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Electronically Filed
Jun 29 2020 12:23 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

IN THE SUPREME COURT OF THE STATE OF NEVADA

WASTE MANAGEMENT OF NEVADA, INC., Appellant, v. WEST TAYLOR STREET, LLCA, a limited liability company, Respondent.	**Supreme Court No.: 80841** (District Court Case No. CV12-02995)

JOINT APPENDIX

VOLUME 4

APPELLANTS' COUNSEL:

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RESPONDENT'S COUNSEL:

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Docket 80841 Document 2020-23994

JOINT APPENDIX

DOCUMENT	DATE	VOL.	BATES
Affidavit of Teri Morrison	09/13/2017	4	JA_0739-741
Affidavit of Teri Morrison in Support of Opposition to Motion for Summary Judgment	10/18/2016	3	JA_0556-559
Appellant's Opening Brief (Case No. 74876)	07/20/2018	4	JA_0877-946
Complaint	12/03/2012	1	JA_0001-5
Declaration of C. Nicholas Pereos in Support of Opposition to Motion for Attorney Fees	01/03/2020	5	JA_1099-1101
Defendant's Answer to Plaintiff's Complaint	09/16/2013	1	JA_0009-13
Defendants' Answer to Plaintiff's Second Amended Complaint	07/14/2014	1	JA_0125-129
Defendants' Motion for Summary Judgment on Plaintiffs' Slander of Title Claim	09/06/2016	2-3	JA_0305-555
Defendant's Trial Statement	10/30/2017	4	JA_0796-863
Docket Sheet for Entire Case	05/20/2020	6	JA_1236-1255
First Amended Complaint	02/14/2014	1	JA_0020-25
First Amended Scheduling Order	04/19/2017	4	JA_0732-738
Memorandum of Costs	12/23/2019	5	JA_1008-1034

DOCUMENT	DATE	VOL.	BATES
Motion for Award of Attorneys Fees and Costs	12/26/2019	5	JA_1045-1098
Motion for Leave to File Second Amended Complaint	04/10/2014	1	JA_0048-60
Motion for Partial Summary Judgment	03/11/2014	1	JA_0026-47
Motion for Partial Summary Judgment	09/03/2014	1	JA_0150-159
Motion to Retax Costs	12/24/2019	5	JA_1035-1044
Notice of Appeal	12/02/2015	2	JA_0245-303
Notice of Appeal	01/08/2018	4	JA_0874-876
Notice of Appeal	03/19/2020	6	JA_1233-1235
Notice of Entry of Order	03/11/2020	6	JA_1222-1232
Opposition to Defendant's Motion in Limine	09/13/2017	4	JA_0742-757
Opposition to Motion for Attorneys Fees	01/03/2020	5	JA_1102-1175
Opposition to Motion for Summary Judgment on Claims for Slander of Title	10/18/2016	3	JA_0560-731
Order	07/28/2014	1	JA_0130-149
Order Denying Waste Management of Nevada, Inc.'s Motion for Award of Attorneys' Fees	03/10/2020	5	JA_1215-1221
Order Dismissing Action	12/18/2019	5	JA_1006-1007

DOCUMENT	DATE	VOL.	BATES
Order Dismissing Appeal	03/07/2016	2	JA_0304
Order Granting in Part and Denying in Part West Taylor Street, LLC's Motion to Retax Costs	03/09/2020	6	JA_1209-1214
Order Granting Motion (Supreme Court)	09/13/2018	5	JA_0979-980
Order Granting Motion in Limine to Exclude Evidence of Other Property Holdings	11/03/2017	4	JA_0870-873
Order Granting Waste Management of Nevada, Inc.'s Motion in Limine #1 re: Exclusion of C. Nicholas Pereos as Trial Advocate	11/03/2017	4	JA_0864-869
Reply Argument in Support of Motion for Partial Summary Judgment	04/11/2014	1	JA_0061-75
Reply in Support of Motion for Award of Attorneys Fees and Costs	01/06/2020	5	JA_1176-1208
Respondent's Answering Brief	08/17/2018	4	JA_0947-978
Response to Motion to Vacate Orders, Opposition to Motion for Judgment in Favor of Waste Management, Cross Motion to Summary Judgment on Liens	07/26/2019	5	JA_0981-1005
Scheduling Order	01/07/2014	1	JA_0014-19

DOCUMENT	DATE	VOL.	BATES
Second Amended Complaint	06/27/2014	1	JA_0118-124
Second Amended Scheduling Order	09/22/2017	4	JA_0790-795
Summons	01/31/2013	1	JA_0006
Summons (Alias)	06/04/2013	1	JA_0007-8
Transcript of Proceedings – Status Conference	05/07/2014	1	JA_0076-117
Waste Management of Nevada, Inc.'s Motion for Partial Reconsideration of the Court's July 28, 2014 Order	09/26/2014	1	JA_0175-244
Waste Management of Nevada, Inc's Opposition to Plaintiff's Second Motion for Partial Summary Judgment	09/25/2014	1	JA_0160-174
Waste Management of Nevada, Inc.'s Reply in Support of Motion in Limine #1 re: Exclusion of C. Nicholas Pereos as Trial Advocate	09/19/2017	4	JA_0758-789

CERTIFICATE OF SERVICE

Pursuant to NRAP 25, I certify that I am an employee of SIMONS HALL JOHNSTON PC, and that on this date I caused to be served a true copy of the **JOINT APPENDIX VOLUME 4** on all parties to this action by the method(s) indicated below:

X by using the Supreme Court Electronic Filing System:

C. Nicholas Pereos
Attorney for West Taylor Street, LLC

DATED: This 29 day of June, 2020.

JODI ALHASAN

FILED
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CV12-02995
2017-04-19 11:38:34 AM
Jacqueline Bryant
Clerk of the Court
Transaction # 6059380

3915

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

WEST TAYLOR STREET, LLC, Plaintiff, vs. WASTE MANAGEMENT OF NEVADA, INC., KAREN GONZALEZ, and DOES 1 through 10, Defendants.	CASE NO.: CV12-02995 DEPT. NO.: 4

FIRST AMENDED SCHEDULING ORDER

Nature of Action: SLANDER OF TITLE

Date of Filing Joint Case Conference Report(s): NOVEMBER 8, 2013

Time Required for Trial: 3 DAYS

Date of Trial: OCTOBER 16, 2017

Jury Demand Filed: SEPTEMBER 27, 2013–PLAINTIFF

Counsel for Plaintiff: C. NICHOLAS PEREOS, ESQ.

Counsel for Defendant: MARK SIMONS, ESQ.

Counsel representing all parties have been heard and after consideration by the Court, IT IS HEREBY ORDERED:

1. Complete all discovery by **JULY 18, 2017 (90 days before Trial).**

2. File motions to amend pleadings or add parties on or before **APRIL 19, 2017 (180 days before Trial).**

3. Make initial expert disclosures pursuant to N.R.C.P. 16.1(a)(2) on or before **APRIL 19, 2017 (180 days before Trial).**

4. Make rebuttal expert disclosures pursuant to N.R.C.P. 16.1(a)2) on or before **MAY 19, 2017 (150 days before Trial**).

5. File all dispositive motions, including motions for summary judgment and motions in limine to exclude all or part of an expert's testimony, on or before **AUGUST 16, 2017 (61 days before Trial).**

6. File all other motions in limine on or before **AUGUST 30, 2017 (47 days before Trial).**

7. Formally **submit** all dispositive motions, including motions for summary judgment and motions in limine to exclude an expert's testimony, on or before **SEPTEMBER 15, 2017 (31 days before Trial).**

8. Formally **submit** all other motions in limine on or before **SEPTEMBER 29, 2017 (17 days before Trial).**

9. Unless otherwise directed by the Court, all pretrial disclosures pursuant to N.R.C.P. 16.1(a)(3) must be made at least thirty (30) days before trial.

A. Unless the Court orders otherwise, legal memoranda submitted in support of any motion shall not exceed twenty (20) pages in length; opposition memoranda shall not exceed twenty (20) pages in length; reply memoranda shall not exceed ten (10) pages in length. These limitations are exclusive of exhibits. A party may file a pleading that exceeds these limits by five pages, so long as it is filed with a certification of counsel that good cause existed to exceed the standard page limits and the reasons therefore. Briefs in excess of five pages over these limits may only be filed with prior leave of the Court, upon a showing of good cause.

B. Except upon a showing of unforeseen extraordinary circumstances, the Court will not entertain any pretrial motions filed or orally presented after the above deadlines have passed.

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DISCOVERY

10. Unless otherwise ordered, all discovery disputes (except disputes presented at a pretrial conference or at trial) must be first heard by the Discovery Commissioner, after the following has occurred:

A. Prior to filing any discovery motion, the attorney for the moving party must consult with opposing counsel about the disputed issues. Counsel for each side must present to each other the merits of their respective positions with the same candor, specificity, and support as during the briefing of discovery motions.

B. If both sides desire a discovery dispute resolution conference pursuant to NRCP 16.1(d), counsel must contact the Discovery Commissioner's office, at (775) 328- 3293, to obtain a date and time for the conference that is convenient to all parties and the Discovery Commissioner. Upon stipulation of counsel on the record, a motion may be orally presented at the conference. If the parties cannot agree upon the need for a conference, the party seeking the conference must file and submit a motion in that regard.

C. A party objecting to a written discovery request must, in the original objection, specifically detail the reasons that support the objection, and include affidavits or other evidence for any factual assertions upon which an objection is based.

11. Motions for extensions of discovery shall be made to the Discovery Commissioner prior to the expiration of the discovery deadline above.

12. A continuance of trial does not extend the deadline for completing discovery. A request for an extension of the discovery deadline, if needed, must be included as part of any motion for continuance.

13. A trial statement on behalf of each party shall be delivered to opposing counsel, filed herein and a copy delivered to chambers no later than **OCTOBER 2, 2017 (10 judicial days before Trial).**

A. In addition to the requirements of WDCR 5, the trial statement shall contain:

(1) a concise statement of the claimed facts organized by specifically listing each essential element of the party's claims or defenses and separately stating the facts in support of each such element;

(2) any practical matters which may be resolved before trial (e.g., suggestions as to the order of witnesses, view of the premises, availability of audio or visual equipment);

(3) a list of proposed general voir dire questions for the Court or counsel to ask of the jury;

(4) a statement of any unusual evidentiary issues, with appropriate citations to legal authorities on each issue; and

(5) certification by trial counsel that, prior to the filing of the trial statement, they have personally met and conferred in a good faith effort to resolve the case by settlement.

14. All jury instructions and verdict forms, whether agreed upon by both parties or proposed by a party individually, shall be delivered to chambers no later than the deadline to submit their Trial Statements **OCTOBER 2, 2017** (10 judicial days before Trial) unless specifically modified by the Court.

A. Unless otherwise ordered, the parties shall exchange all proposed jury Instructions and verdict forms two weeks prior to trial. The parties should then meet, confer, and submit to the Court one complete set of agreed-upon set of jury instructions and verdict forms at the same time they submit their trial statements.

B. If the parties do not agree to all proposed instructions, they shall jointly submit a set containing only those instructions that are mutually agreeable. Each party must submit individually any additional proposed jury instructions that have not been agreed upon and/or verdict forms at the same time they submit their trial statements.

C. All instructions should be short, concise, understandable, and neutral statements of law and gender. Argumentative or formula instructions are improper, will not be given, and should not be submitted.

D. The parties are required to submit the jury instructions in the below described format.

1. All proposed jury instructions shall be in clear, legible type on clean, white, heavy paper, 8 ½ by 11 inches in size, and not lighter than 16-lb. Weight with a black border line and no less than 24 numbered lines.
2. The last instruction **only** shall bear the signature line with the words "District Judge" typed thereunder placed on the right half of the page, a few lines below the last line of text.
3. The designation "Instruction No. "shall be at the last line, lower left hand corner of the last page of each instruction.
4. The original instructions shall not bear any markings identifying the attorney submitting the same, and shall not contain any citations of authority.
5. The authorities for instructions must be attached to the original instructions by a separate copy of the instruction including the citation.
6. The parties should also note on the separate copy of the instruction any modifications made on the instructions from statutory authority, Nevada Pattern Jury Instructions, Devitt and Blackmar, CALCRIM or other form instructions, specifically stating the modification made to the original form instructions and the authority supporting the modification. All original instructions shall be accompanied by a separate copy of the instruction containing a citation to the form instruction, statutory or case authority supporting that instruction. All modifications made to instructions taken from statutory authority, Nevada Pattern Jury Instructions, Devitt and Blackmar,

CACI or other form instructions shall be specifically noted on the citation page. For any form instruction submitted from any source other than Nevada Pattern Jury Instructions, counsel shall include copies of the original instruction form.

7. For any form instruction submitted from any source other than Nevada Pattern Jury Instructions, counsel shall include copies of the original instruction form.

15. Jurors will be permitted to take notes during the trial. Jurors may be permitted to ask questions in writing during trial, screened by the Court and counsel. Any party objecting to this procedure should state this objection in the trial statement.

16. All applications for attorney's fees shall state services rendered and fees incurred for such services with sufficient specificity to enable an opposing party and the court to review such application. Any memorandum of costs and disbursements must comply with Bergmann v. Boyce, 109 Nev. 670, 856 P.2d 560 (1993) and Bobby Beresini v. PETA, 114 Nev. 1348, 971 P.2d 383 (1998).

17. Trial counsel for all parties shall contact the Courtroom Clerk (Marci Stone 775/328-3139) **no later than Monday, one week prior to trial,** to arrange a date and time to mark trial exhibits. All exhibits will be marked in one numbered series (Exhibit 1, 2, 3, etc.), no matter which side is offering the particular exhibit. Once trial exhibits are marked by the Clerk, they shall remain in the custody of the Clerk. When marking the exhibits with the Clerk, counsel must advise the Clerk of all exhibits which may be admitted without objection. In any case which involves fifteen or more document exhibit pages, the exhibits shall be placed in a loose-leaf binder behind a tab noting the number of each exhibit. The binder shall be clearly marked on the front and side with the case caption and number, but no identification as to the party producing the binder. All document exhibits shall be in **one** binder no matter which party is offering the exhibits. At the time set for marking the trial exhibits, counsel for the Plaintiff shall provide the Courtroom Clerk with the binder containing the number tabs. Counsel for all parties shall provide all exhibits, no matter when marked, even if marked during the course of trial, in a condition appropriate for inclusion in the evidence binder.

18. The Court expects that both sides will cooperate to try the case within the time set, and confer regarding the order of witnesses, stipulated exhibits, and any other matters which will expedite trial of the case.

19. All parties and counsel are bound by the terms of this Scheduling Order, the Nevada Rules of Civil Procedure ("NRCP"), the District Court Rules ("DCR"), the Washoe District Court Rules ("WDCR"), and the Nevada Revised Statutes ("NRS"), and failure to comply could result in the imposition of sanctions.

DATED this 19 day of April, 2017.

Connie J. Steinheimer
DISTRICT JUDGE

CERTIFICATE OF SERVICE

CASE NO. CV12-02995

I certify that I am an employee of the SECOND JUDICIAL DISTRICT COURT of the STATE OF NEVADA, COUNTY OF WASHOE; that on the 19 day of April, 2017, I filed the **FIRST AMENDED SCHEDULING ORDER** with the Clerk of the Court.

I further certify that I transmitted a true and correct copy of the foregoing document by the method(s) noted below:

_____ **Personal delivery to the following: [NONE]**

__X__ **I electronically filed with the Clerk of the Court, using the ECF which sends an immediate notice of the electronic filing to the following registered e-filers for their review of the document in the ECF system:**

MARK SIMONS, ESQ. for WASTE MANAGEMENT OF NEVADA INC
C. PEREOS, ESQ. for WEST TAYLOR STREET LLC
THERESE SHANKS, ESQ. for WASTE MANAGEMENT OF NEVADA INC et al

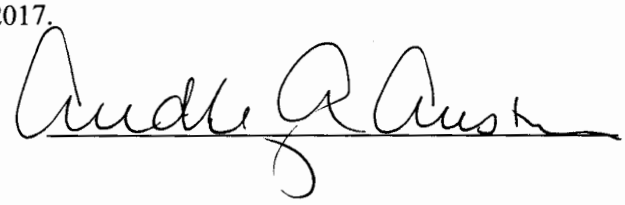
_____ **Deposited in the Washoe County mailing system in a sealed envelope for postage and mailing with the United States Postal Service in Reno, Nevada: [NONE]**

_____ **Placing a true copy thereof in a sealed envelope for service via:**

_____ Reno/Carson Messenger Service – **[NONE]**

_____ Federal Express or other overnight delivery service **[NONE]**

DATED this 19 day of April, 2017.



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Jacqueline Bryant
Clerk of the Court
Transaction # 6297499 : pmsewell

CODE: 1030
C. NICHOLAS PEREOS, ESQ.
Nevada Bar #0000013
1610 MEADOW WOOD LANE, STE. 202
RENO, NV 89502
(775) 329-0678

IN THE SECOND JUDICIAL DISTRICT COURT OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

* * * * *

WEST TAYLOR STREET, LLC,
a limited liability company,

Plaintiff,

vs.

WASTE MANAGEMENT OF NEVADA, INC., KAREN GONZALEZ, and DOES 1 THROUGH 10,

Defendants.
_____/

Case No. CV12 02995
Dept. No. 4

AFFIDAVIT OF TERI MORRISON

STATE OF NEVADA)
) ss.
COUNTY OF WASHOE)

Teri Morrison, does hereby swear under penalty of perjury that the assertions of this Affidavit are true.

1. Affiant prepared rent rolls for the various properties of the Trusts to include the property is the subject of this lawsuit. It identifies the tenant, the amount of rent, the lease date and the rent collection. It identifies if the property is vacant. The rent roll is prepared on a monthly basis.

2. Affiant is the one that verbally interacted with Waste Management in connection with this dispute.

3. Affiant prepared letters for the signature of C. Nicholas Pereos.

4. Affiant has reviewed the vacancy schedule to confirm its accuracy in connection with the rent rolls. The vacancy schedules is a yearly summarization of the monthly rent rolls.

5. Affiant prepares the check register from the checkbook.

6. Affiant files the bills.

7. Affiant has knowledge concerning the vacancy and occupancy of the subject property and is the one who notifies Waste Management of the same.

8. Affiant created the accounts with Waste Management.

9. Affiant services the account with Waste Management when property is vacant or occupied.

10. Affiant notifies Waste Management in disputes with bills.

11. Affiant worked on this account at times relevant.

AFFIRMATION

The undersigned does hereby affirm that the preceding document does not contain the social security number of any person.

DATED this 13 day of September, 2017.

TERI MORRISON

SUBSCRIBED & SWORN to before me this 13 day of September, 2017.

Notary Public

C. NICHOLAS PEREOS
Notary Public, State of Nevada
Appointment No. 92-1077-2
My Appt. Expires May 13, 2019

C. NICHOLAS PEREOS, ESQ.
1610 MEADOW WOOD LANE
RENO, NV 89502

CERTIFICATE OF SERVICE

PURSUANT TO NEVADA RULES OF CIVIL PROCEDURE 5 (b), I certify that I am an employee of C. NICHOLAS PEREOS, LTD., and that on the date listed below, I caused to be served a true copy of the foregoing pleading on all parties to this action by the methods indicated below:

I deposited for mailing at Reno, Nevada, a true copy of the foregoing document addressed to:

Douglas K. Fermoile, Esq.
427 Ridge Street, Suite B
Reno, NV 89501
Attorney for West Taylor Street, LLC

I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which served the following parties electronically:

ROBISON, SIMONS, SHARP & BRUST
Mark G. Simons, Esq.
Attorneys for Waste Management and Karen Gonzalez

DATED this 13th day of September, 2017

Iris M. Norton

Iris M. Norton

FILED
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Jacqueline Bryant
Clerk of the Court
Transaction # 6297499 : pmsewell

CODE: 2645
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ATTORNEYS FOR PLAINTIFF

IN THE SECOND JUDICIAL DISTRICT COURT OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

* * * * *

WEST TAYLOR STREET, LLC,
a limited liability company,

Plaintiff,

vs.

WASTE MANAGEMENT OF NEVADA, INC., KAREN GONZALEZ, and DOES 1 THROUGH 10,

Defendants.
_____/

Case No. CV12 02995

Dept. No. 4

Trial Date: October 16, 2017

OPPOSITION TO DEFENDANT'S MOTION IN LIMINE

A. STATEMENT OF FACTS

This case arises by reason of the recording of three liens against the property owned by the Plaintiff. Two liens were recorded against the property at 345 W. Taylor and one lien was recorded against the property at 347 W. Taylor. The first lien was recorded on February 23, 2012 as document #4086834 and affected 347 W. Taylor for unpaid garbage fee in the amount of $489.47. The second lien was recorded on November 21, 2012 as document #474177148 and affected 345 W. Taylor in the amount of $859.78 for unpaid garbage fee. The third lien was recorded on March 14, 2014 as document #43343635 in the amount of $404.88. After Defendant refused to release the liens, this lawsuit was commenced seeking relief from the Court in connection with the recording of

these liens. One of the claims in this lawsuit was that the liens were improperly filed and that Plaintiff through its counsel requested the removal of the liens which did not happen. Another claim was that Defendant had abused its authority given the monopoly that it had in connection with collection of garbage and the right to record liens with no remedy afforded to the Plaintiff or any other property owner.

The property is a rental duplex. There are times the property is vacant and Waste Management was notified of the same without a need for disposal services. Despite acknowledging these notices, Waste Management continued to bill and send invoices to the Plaintiff as if it was still occupied and then demands collection of the monies. The request for correction fell on deaf ears. Meanwhile, Waste Management does nothing in connection with addressing this issues necessitating the filing of the lawsuit.

After the filing of this lawsuit, the Plaintiff filed it's first motion for Partial Summary Judgement on March 11, 2014. After extensive briefing, oral arguments and a Motion to Reconsider, the court entered its order for Partial Summary Judgement on July 28, 2014 and proceeded to deny the Motion to Reconsider. Defendant acknowledges that there were three liens recorded against the subject property and then proceeded to release those liens against the property several years after filing the lawsuit.

By the time the Defendant elected to remove the two liens the Plaintiff had already invested approximately $65,000 in attorneys fees and costs. The claim now remaining is Slander of Title and the damages beings sought in the Slander of Title claim are attorney fees and costs. There has been no meaningful discussion in connection with this claim. The claim has now swelled with costs and attorney fees to the approximate amount of $100,000. The billing rate of Plaintiff's counsel in this claim has been at $400 per hour which is substantially below market value given the degree of experience and the years of practice by counsel. A review of the file will provide an explanation and justification of that claim which does not include the petition before the Supreme Court pursued by Defendant, and discovery.

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RENO, NV 89502

B. **ARGUMENT**

The facts will demonstrate that Pereos had no direct verbal communications with Waste Management. The extent of its communications with Waste Management in these proceedings were letters acting in a representative capacity for the Plaintiff. At no time did Pereos have any verbal communications with Waste Management. The evidence will reflect that Teri Morrison, named witness working for the Plaintiff for Pereos for 15+ years, communicated with Waste Management. Teri Morrison notified Waste Management of vacancies and occupancies. She created the accounts with Waste Management in connection with this property and other properties held by the two Trusts. Pereos is the Grantor of the 1980 Pereos Trust and the 2004 Pereos Trust which Trusts are property holding trusts. The 2004 Pereos Trust own the Plaintiff. Teri Morrison exclusively deals with Waste Management when there are issues regarding servicing the accounts of this property and any other property. She prepares the rent rolls which identifies when a property is occupied and vacant. She files and posts the paid bills on the property to include Waste Management. She prepares a check register for the checks showing payment of the bills. Albeit, Pereos writes the checks for the payment of the bills and confirms payment but they are then processed by Teri Morrison. She notifies Waste Management of any disputes on payment of the bill and resolves the issues regarding those disputes. Pereos does not perform any of these functions. Furthermore, Pereos has no financial interest in the Plaintiff. Pereos is not a party to this litigation. Pereos has no verbal communication with Waste Management on this property or any other properties. In other words, Pereos does not open or close accounts with Waste Management. Pereos does not notify Waste Management of vacancies or occupancies. Pereos is not a property manager. Pereos has no verbal interactive experiences with Waste Management. Pereos never created accounts with Waste Management. Pereos has never resolve a dispute with Waste Management other than letter writing. The one with the experience with Waste Management is Teri Morrison.

C. NICHOLAS PEREOS, ESQ.
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RENO, NV 89502

This case involves the justification, if any, in connection with the recording of the liens. It is not a comparative negligence case. It has nothing to do with the personal actions of Pereos in connection with representing his client or performing any functions with other properties. Any attempt to go into that territory by Defense counsel would to be to create a smoke screen to confuse the jury regarding the issues to be decided in this case.

Pereos has lived with this case from its beginning. He knows the theories of the lawsuit. He has pursued discovery and depositions. He has the same wealth of knowledge regarding this case as does the Trial Judge who has also been living with this case from its inception. That factor coupled with the extensive commercial litigation experience of Plaintiff's attorney (admitted to the bars of Colorado, Nevada and California starting in 1970 and practicing as a real estate and commercial litigation lawyer since 1975 after departure from the District Attorney's office and personal injury defense firms) coupled with his knowledge of the case can not be duplicated by attorney Douglas Fermoile who will be assisting in the presentation of the case once Plaintiff's attorney testifies as to attorney fees and costs.

Although Plaintiff's counsel recognizes that there are many abuses by trial lawyers in our legal system, the mature trial lawyers recognize that the law has a therapeutic effect and this case is typical exemplification of that application! Some of us older lawyers remember the Pinto car manufactured by Ford and the Corvair car manufactured by Chevrolet. Both of those cars are no longer on the market as they were deemed to be "death traps" by their design and handling. They were removed from the market by the concerted activities of trial lawyers and a consumer advocate known as Ralph Nader. Pinto cars were exploding upon rear impact by reason of the placement of the gas tank in the back of the car and the Corvairs were highly unstable on the road at high speed. Another recent exemplification of the therapeutic effect of lawsuits is the metal shrapnel upon exploding air bags manufactured by Takata after accidents resulting in the massive

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recall that has now occurred by reason of the same. In this case, this matter was pursued by reason of the willingness of Plaintiff's attorney to "call out" Waste Management in its practices. As a result, Waste Management has changed their franchise agreement with the City of Reno and does not pursue liens. Now the time has come to determine if Waste Management is to be held accountable for its actions and it now seeks through this motion to excuse its wrongful activity which has been demonstrated by the voluntary removable of the lien two years later.

The one dealing with Waste Management is Teri Morrison. She is the one that prepares the rent rolls for the month for rent being collected. She is the one who has knowledge the accuracy of the vacancy schedule. She is the one that contacts Waste Management regarding garbage services when the property is occupied or rented. She is the one that posts checks for payments to Waste Management. She is the one who speaks to the representative of Waste Management. In fact, there is no evidence that Plaintiff's counsel spoke to anyone from Waste Management.

Teri Morrison will testify regarding the letters that were prepared and mailed to Waste Management after signed by Plaintiff's counsel. Plaintiff acknowledges that he must testify if the jury is to decide damages, to wit, the attorneys fees incurred in the Slander of Title action as opposed to the Judge deciding the quantitative amount of those attorneys fees although Plaintiff is prepared to submit the matter to the Trial Judge.

The trial will proceed in the following manner: Voire Dire, Opening Statements, Plaintiff's direct case, Defendant's direct case, Closing Arguments, Deliberation. The testimony of the Plaintiff's attorney will be in their direct case. Thereinafter, Douglas Fermoile will act as lead counsel and argue the case in closing. By then, he would have been educated to the same degree as the Trial Judge on the case. Should Plaintiff's counsel be removed to all aspects and all stages of this case, the legal fees will swell tremendously given the need to educate attorney Douglas Fermoile as to the theme of the case coupled with the deposition testimony of the witnesses and its legal theories. The

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only justification for the removal of Plaintiff's counsel is to create another roadblock to Plaintiff in the pursuit of this case and to punish Plaintiff. In other words, this case will flow smoothly without the removal of Plaintiff's counsel given the role of attorney Fermoile. In connection with the claim of attorneys fees this Court can oversee the quantitative amount of the attorneys fees as being reasonable even with the jury to determine the right to recover attorneys fees. In fact, Plaintiff's counsel is prepared to waive the jury to avoid any issues of confusion and/or submit the issue of attorney fees to the Court for a quantified determination.

The vacancy schedule delivered to Defense counsel is a calendar summation of the rent rolls which is its source material. Similarly, Teri Morrison will testify concerning the payments to Waste Management. Once again, foundation comes from Teri Morrison and a Bank Representative in connection with the payments. It is not unusual for attorneys to prepare summations and compilations to ease understanding of information for the jury as long as a foundation is made by a witness. In connection with the Court procedures, Voire Dire is not advocacy it is designed to secure an impartial jury. The Opening Statement is not advocacy it is designed to alert the jury of the evidence to be introduced. The testimony of the witnesses in Plaintiff's Case in Chief presents the facts to the jury. Thereinafter, Douglas Fermoile will act as lead counsel advancing the case in Closing Arguments. Merely because Defendant alleges that Pereos is a "prime witness" does not create a basis to exclude Pereos as the attorney for the Plaintiff. As referenced in the case of *Dimartino v Eight Judicial District Court,* 119 Nev. 119, 66 P.3d 945 (2003), Defendant should not be allowed to disqualify Plaintiff's counsel simply by stating that they will examine him as a witness. In *Warrilow v Norrell,* 791 S.W.2d 515 (Tex. App. 1989) the Court observed that the disqualification of attorney sought to be called as a witness by the opposing party is subject to a more stringent standard because a litigant may call his or her opponent attorney as a trial tactic seeking to disqualify the attorney from the case. *Id.* at Page 521.

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Rule 3.7 of RPC derives from SCR 178. The rule provides that an attorney can act as a trial advocate in connection with testimony relating to the nature and value of legal services rendered in the case or should the disqualification of the lawyer render substantial hardship on the client. In other words, testimony regarding legal services does not prevent the attorney from acting as an advocate. Furthermore, if the disqualification of the lawyer results as substantial hardship to the client, it too does not act as a basis to disqualify the lawyer. Notwithstanding these two exceptions to Rule 3.7, Pereos engaged Douglas Fermoile so as to assist. In *Dimartino v Eighth Judicial District Court*, 119 Nev. 119, 66 P.3d 945 (2003) our Supreme Court observed that the potential for abuse is obvious. Interpreting SCR 178 to permit total disqualification would invite the rules misuse as a tactical ploy. *Id.* at Page 121. Pereos has no financial interest in Plaintiff's corporation. In discovery, Pereos has acknowledged that the only claim for damages arises from this lawsuit is the attorney fees. In other words, there is no claim for damages by the Plaintiff other than to reimburse attorney fees which clearly falls within the purpose of Rule 3.7 exception.

In *Estate of Bowlds v. American Cancer Society*, 102 P.3d 593 (2004), the court noted that an attorney may continue to act as an advocate in a lawsuit even though he is going to testify regarding his or her fees.

Other Nevada cases, while not addressing conflicts under RPC 3.7 or former SCR 178, provide guidance concerning the disqualification of counsel as trial advocates for their clients. In *Brown v. Eighth Judicial Dist. Court ex. rel. Cty. Of Clark*, 116 Nev. 1200, 14 P.3d 1266 1269-70 (2000), a case discussing the disqualification of counsel under former SCR 160, the court stated:

> District courts are responsible for controlling the conduct of attorneys practicing before them, and have broad discretion in determining whether disqualification is required in a particular case. *See Robbins v. Gillock,* 109 Nev. 1015 1018, 862 P.2d 1195, 1197 (1993); *Cronin v. District Court,* 105 Nev. 635, 640, 781 P.2d 1150, 1153 (1989). Courts deciding attorney disqualification motions are faced with the delicate and sometimes difficult task of balancing competing interests: the individual right to be represented by counsel of one's choice, ... parties

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> should not be allowed to misuse motions for disqualification as instruments of harassment or delay. *See Flo-Con Systems, Inc. v. Servsteel, Inc.*, 759 F.Supp. 456, 458 (N.D.Ind.1990).
>
> When considering whether to disqualify counsel, the district court must balance the prejudices that will inure to the parties as a result of its decision. *Cronin*, 105 Nev. at 640, 781 P.2d at 1153. To prevail on a motion to disqualify opposing counsel, the moving party must first establish "at least a reasonable possibility that some specifically identifiable impropriety did in fact occur," and then must also establish that "the likelihood of public suspicion or obloquy outweighs the social interests which will be served by a lawyer's continued participation in a particular case." *Id.* at 641, 781 P.2d at 1153 (quoting *Shelton v. Hess*, 599 F.Supp. 905, 909 (S.D.Tex.1984)).

It is interesting to observe the balancing test suggested hereinabove. Defense counsel must show a reasonable possibility that some specifically identifiable impropriety has occurred! This concept was reinforced in the case of *Hernandez v Guigliemo*, 796 F.Supp.2d 1285 (D. Nev. 2011) wherein the Court observed that Defense counsel bears the burden of establishing an ethical violation or other factual predicate upon which the motion depends. Disqualification is a drastic measure which Court should hesitate when posed except when absolutely necessary!

Similarly, in *Robbins v. Gillock*, 109 Nev. 1015, 1018, 862 P.2d 1195, 1197 (1993), addressing SCR 159, the court held:

> The burden of proving whether [the rule applies] falls on the party moving for disqualification and that party must have evidence to buttress the claim that a conflict exists. Commonwealth Ins. Co. v. Graphix Hot Line, Inc., 808 F.Supp. 1200, 1204 (E.D.Pa.1992); Satellite Fin. Planning v. 1st Nat. Bk. Wilmington, 652 F.Supp. 1281, 1283 [109 Nev. 1018] (D.Del.1987).

Other jurisdictions also set strong limitations on the disqualification of counsel. In *Nuri v. PRC*, Inc., 5 F.Supp. 2d 1299, 1303-4 (D. Ala. 1998) the court examined case law from multiple jurisdictions:

> Disqualification is always a drastic measure, which courts should hesitate to impose except when absolutely necessary. *See, e.g., Owen v. Wangerin*, 985 F.2d 312, 317 (7th Cir.1993); *Metrahealth Ins. Co. v. Anclote Psychiatric Hosp.*, 961 F. Supp. 1580, 1582 (M.D.Fla.1997) ("The disqualification of one's chosen counsel is an extraordinary measure that

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should be resorted to sparingly."). Because of the impact a motion to disqualify has on the party losing her counsel, the moving party is held to a high standard of establishing the basis of the motion, and the need for disqualification. *See, e.g., Plant Genetic Sys.,* 933 F. Supp. at 517 ("Disqualification is a serious matter which cannot be based on imagined scenarios of conflict, and the moving party has a high standard of proof to meet in order to prove that counsel should be disqualified."); *English Feedlot, Inc. v. Norden Laboratories, Inc.,* 833 F. Supp. 1498, 1506 (D.Colo.1993) ("The moving party has the burden of showing sufficient grounds for disqualification.... Specific facts must be alleged and `counsel cannot be disqualified on the basis of speculation or conjecture....'"); *Tessier,* 731 F. Supp. at 729 (E.D.Va.1990) ("The Court is also aware that the disqualification of a party's chosen counsel is a serious matter which cannot be based on imagined scenarios of conflict."). Other means of addressing a violation short of disqualification are available to the court like exclusion of ill-gotten evidence and should be used when appropriate. *See, e.g., University Patents, Inc. v. Kligman,* 737 F. Supp. 325, 329 (E.D.Pa.1990) ("the court is satisfied that the circumstances warrant precluding the defendants from introducing any information obtained through Mr. Morrison's *ex parte* contacts with persons whose statements could bind the University.").

Finally, because a motion for disqualification is such a "potent weapon" and "can be misused as a technique of harassment," the court must exercise extreme caution in considering it to be sure it is not being used to harass the attorney sought to be disqualified, or the party he represents. *See, e.g., Kitchen v. Aristech Chem.,* 769 F. Supp. 254, 256-57 (S.D.Ohio 1991); *see also Developments in the Law: Conflict of Interest in the Legal Profession,* 94 Harv.L.Rev. 1244, 1285 (1981) ("Lawyers have discovered that disqualifying counsel is a successful trial strategy, capable of creating delay, harassment, additional expense, and perhaps even resulting in the withdrawal of a dangerously competent counsel.").

In *Zurich Ins. Co. v. Knotts*, 52 S.W.3d. 555,559-60 (S.Ct. Kentucky 2001), a case addressing the disqualification of counsel under of RPC 3.7, the court ruled:

> Disqualification is a drastic measure which courts should be hesitant to impose except when absolutely necessary. *See University of Louisville v. Shake,* Ky., 5 S.W.3d 107 (1999). Disqualification separates a party from the counsel of its choice with immediate and measurable effect. Here, attorney Franklin has lived through the previous litigation from its inception and has in his memory, or at his fingertips, knowledge of the case no one else could duplicate. Moreover, regardless of the level of competency of a successor attorney, the degree of confidence and trust that has developed between the Knottses and Franklin cannot be replaced.

In *Warrilow v Norrell,* 791 S.W.2d 515 (Tex. App. 1989), the Court addressed the issue of disqualification of counsel and observed that a skilled cross-examining attorney

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could sufficiently test the credibility of any lawyer who is a witness observing that a lawyer that is a witness is readily impeachable because of his interest in the outcome of the litigation. As stated above, Pereos has no financial interest in Plaintiff's corporation. The Warrilow Court noted that disqualification of an attorney sought to be called as a witness for the opposing party is subject to a more stringent standard because "a litigant may call his or her opponent's attorney as a trial tactic, seeking to disqualify the attorney from the case." *Id.* at 521, n.7[3] (citing *Jones v. City of Chicago,* supra); see also *General Mill Supply Co. v. SCA Services, Inc.,* 697 F.2d 704 (6th Cir.1982). Similarly, in *Gilbert McClure Enterprises v. Burnett,*735 S.W.2d 309 (Tex.App.1987), the Texas Court of Appeals again held that the mere announcement by an adversary of his intention to call opposing counsel as a witness is insufficient to warrant counsel's disqualification. "There must be a genuine need for the attorney's testimony, which should be material to the movant's case as well as prejudicial to the interests of the attorney's client . . . ." *Id.* at 311. (internal citations omitted); see also *Sargent County Bank v. Wentworth,* 500 N.W.2d 862 (N.D.1993); *Cottonwood Estates, Inc. v. Paradise Builders, Inc.,* 128 Ariz. 99, 624 P.2d 296 (1981)

Notwithstanding, disqualification is a drastic measure which courts should be hesitant to impose except when absolutely necessary. See *University of Louisville v. Shake,* Ky., 5 S.W.3d 107 (1999). Disqualification separates a party from the counsel of its choice with immediate and measurable effect. Here, attorney Franklin has lived through the previous litigation from its inception and has in his memory, or at his fingertips, knowledge of the case no one else could duplicate. Moreover, regardless of the level of competency of a successor attorney, the degree of confidence and trust that has developed between the Knottses and Franklin cannot be replaced. Warrilow (*Id.*)

However, the showing of prejudice needed to disqualify opposing counsel must be more stringent than when the attorney is testifying on behalf of his own client, because adverse parties may attempt to call opposing lawyers as witnesses simply to

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disqualify them. Consequently, Zurich has failed to demonstrate that: (a) Franklin's testimony is important to its proof at trial; (b) there is any probability that Franklin's testimony will conflict with that of other witnesses; and (c) the information contained in Franklin's affidavit is unattainable from other sources. It is Zurich who seeks to call him as a witness. While such is permissible, it does not, and should not, result in Franklin's disqualification. Warrilow (*Id.*)

This analysis clearly applies to the present case. Pereos has dealt with this case "from its inception and has in his memory, or at his fingertips, knowledge of the case no one else could duplicate." Further, Defendant is unquestionably attempting to use RPC 3.7 "as a tactical weapon for expense, delay [and] inconvenience. . ." by trying to bar Pereos from acting as trial advocate this close to trial. Defendant's Motion is based solely on its claim that "Pereos is the Plaintiff's primary witness in this action." (Defendant's Motion in Limine p.3, line 2.) This claim is false. Plaintiff's main witness will be its employee, Teri Morrison, who was the person who communicated with Defendant, will testify concerning her contacts with Defendant, the rent rolls and vacancy schedule for the property in question, and the cancelled checks showing all payments made to Defendant during the dates cited by Defendant as the lien periods. Pereos, who never spoke to any employee or representative of Defendant.

In truth, Pereos is going out of his way to avoid confusing a jury or causing prejudice to Defendant's case by having attorney Fermoile advocate the case in the Closing Arguments after Pereos's testimony. RPC 3.7 does not require either disqualification or substitution of counsel after counsel has testified concerning his or her fees in a case. To require Pereos to entirely withdraw as counsel at this point in the case would clearly work a substantial hardship on Plaintiff by requiring the expenditure of even more attorney's fees and costs going into trial. In its Motion, Defendant does not even attempt to show a balance of interests between the parties or identify any "confusion and prejudice" that would result from Pereos acting as trial advocate in this

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case. DiMartino, supra. Accordingly, Defendant has failed to meet the burden of proof required to disqualify Pereos from acting as trial advocate under RPC 3.7.

AFFIRMATION

The undersigned affirms that the foregoing pleading does not contain a social security number.

DATED this 13 day of September, 2017 C. NICHOLAS PEREOS, LTD.

By: _____
C. NICHOLAS PEREOS, ESQ.
1610 MEADOW WOOD LANE,STE.202
RENO, NV 89502
ATTORNEY FOR PLAINTIFF

CERTIFICATE OF SERVICE

PURSUANT TO NEVADA RULES OF CIVIL PROCEDURE 5 (b), I certify that I am an employee of C. NICHOLAS PEREOS, LTD., and that on the date listed below, I caused to be served a true copy of the foregoing pleading on all parties to this action by the methods indicated below:

I deposited for mailing at Reno, Nevada, a true copy of the foregoing document addressed to:

Douglas K. Fermoile, Esq.
427 Ridge Street, Suite B
Reno, NV 89501
Attorney for West Taylor Street, LLC

I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which served the following parties electronically:

ROBISON, SIMONS, SHARP & BRUST
Mark G. Simons, Esq.
Attorneys for Waste Management and Karen Gonzalez

DATED: 9/13/17

Iris M. Norton

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SCHEDULE OF EXHIBITS

C. NICHOLAS PEREOS, ESQ.
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Exhibit 1

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Jacqueline Bryant
Clerk of the Court
Transaction # 6297499 : pmsewell

Exhibit 1

BROWNSTONE RENT COLLECTION ROLL FOR JANUARY 2007

345 W. Taylor	VACANT	2 BR					
347 W. Taylor	Jeremy Hampton Cell 813-4323	2BR	Current Lease 9-15-06	$650.00 $650.00			Currently pays rent on the 15th of the month.

BROWNSTONE RENT COLLECTION ROLL FOR FEBRUARY 2007

345 W. Taylor	VACANT	2 BR					
347 W. Taylor	Jeremy Hampton Cell 813-4323	2BR	Current Lease 9-15-06	$650.00 $650.00			Currently pays rent on the 15th of the month.

BROWNSTONE RENT COLLECTION ROLL FOR MARCH 2007

345 W. Taylor	VACANT	2 BR					
347 W. Taylor	Jeremy Hampton Cell 813-4323	2BR	Current Lease 9-15-06	$650.00 $650.00	$650.00 3-15-07	CK # 216	Currently pays rent on the 15th of the month.

WTS0279

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Clerk of the Court
Transaction # 6307290 : swilliam

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Attorneys for Waste Management of Nevada, Inc.

IN THE SECOND JUDICIAL DISTRICT FOR THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

WEST TAYLOR STREET, LLC, a limited liability company,

Plaintiff,

v.

WASTE MANAGEMENT OF NEVADA, INC., KAREN GONZALEZ, and DOES 1 THROUGH 10,

Defendants.

_____/

CASE NO.: CV12-02995

DEPT. NO.: 4

WASTE MANAGEMENT OF NEVADA, INC.'S REPLY IN SUPPORT OF MOTION IN LIMINE #1 RE: EXCLUSION OF C. NICHOLAS PEREOS AS TRIAL ADVOCATE

Waste Management of Nevada, Inc. ("WM"), by and through its attorney Mark G. Simons of Robison, Simons, Sharp & Brust replies in support of its motion in limine seeking to exclude Plaintiffs' counsel C. Nicholas Pereos ("Pereos") from acting as trial advocate in this action as follows.

I. PEREOS IS A NECESSARY WITNESS.

Plaintiff West Taylor Street, LLC ("WTS") confuses the relevant test as to whether an attorney should be removed as trial advocate under NRPC 3.7(a). The test is not whether the attorney is the "prime" or "main" witness, but whether the attorney is a "necessary witness." *See* NRPC 3.7(a) ("A lawyer shall not act as advocate at a trial in

which the lawyer is likely to be a ***necessary witness*** . . . .”). A “necessary witness” is a witness “whose testimony must be admissible and unobtainable through other trial witnesses.” Gonzalez-Estrada v. Glancy, ____ N.E.3d ___, ___, 2017 WL 632892 (Ohio Ct. App., Feb. 16, 2017); *see also* State v. O’Neil, 393 P.3d 1238, 1243 (Wash. App. 2017) (defining “necessary witness” as an attorney whose “testimony is material [and] unobtainable elsewhere”).

WTS admits that Pereos will be called by WTS to testify during WTS’ direct case. *See* Opposition to Defendant’s Motion in Limine (“Opp.”) at p. 5. WTS further admits that Pereos is the only witness with personal knowledge sufficient to authenticate key trial exhibits, including, but not limited to, the letters WTS sent to WM and the checks for payment of WM’s bills. *See* id. at p. 3. Pereos is the only person who can testify on behalf of WTS, as WTS admits that Teri Morrison has no ownership in that entity. Id. WTS also admits that Pereos must testify regarding the damages that WTS has sustained. Id. at p. 5. Thus, Pereos is clearly a “necessary witness” who should be excluded from acting as an advocate during the trial of this case under NRPC 3.7(a).

In addition, while Pereos contends that Teri Morrison will also testify at trial, Ms. Morrison testified that she was prohibited from many business activities because Mr. Pereos was solely responsible for such actions as follow:

1. Pereos determines who and when to enter into leases with tenants. **Exhibit 1**, deposition excerpts of Teri Morrison, p. 12:5-20.[1]
2. Pereos has to sign the lease before any tenant can enter the premises. Exh. 1, p. 16:12-15.
3. Mr. Morrison is only Pereos’ assistant. Id. 24:10-11.
4. Use of WM waste recepticals existed before she ever became Pereos’s assistant. Id. 24:25-25:5.
5. Pereos makes all decisions about what waste collection services are obtained from WM. Id. 28:21-29:1. Ms. Morrison does not make such decision. Id. 30:3-5.

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[1] See also Exhibit 2, Affidavit of Mark G. Simons at ¶4.

6. Pereos dictates all the letters that go to WM. Id. 30:14-18 ("I do what Mr. Pereos dictates . . . .").

7. Pereos created the "vacancy schedule" exhibits that WTS intends to use at trial as exhibits. Id. 32:4 ("Mr. Pereos told me he prepared these."). See WTS's Pretrial Statement Schedule of Exhibits, Exhibit 7. Obviously, the creation of exhibits that WTS intends on relying upon at trial makes Mr. Pereos not only a necessary witness but a critical witness.

8. Pereos opens all the mail, which would include all WM invoices and notices of delinquency. Id. at 49:12-14; 72:4 ("I don't open the mail.").

9. Pereos pays all the bills. Id. at 57:1 ("I don't pay the bills. I don't.").

10. Pereos had all mail communication with WM. Id. at 72:5-16.

11. Any communication Ms. Morrision had with WM had to be relayed to Pereos and Pereos would make the decision how to respond to WM. Id. at 86:2-20.

In addition, Mr. Willis Powell, the Trustee of the underlying properties that Nina Properties II LLC ("Nina Properties"), testified that he is just a figure head and Pereos runs the trusts and makes all ownership decisions and runs every aspect of the trust properties as follows:

Q Your understanding of being a trustee for the 1980 Pereos Trust is that Mr. Pereos runs the trust and you step in in the event he becomes incapacitated?

A Yes. . . .

Q So isn't it fair to say that you defer all aspects of the operation of the 1980 trust to Mr. Pereos?

A Yes.

Q Does he run the trust from your perspective?

A I would say he oversees it, yes.

Q Okay. Who makes the day-to-day decisions regarding the affairs of the Trust assets?

A Mr. Pereos.

Q Okay. Do you defer to Mr. Pereos to do that?

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A Yes.

Exhibit 3, deposition excerpt of Willis Powell, pp. 16:14-17:4.[2]

Accordingly, the testimony of the relevant witnesses dictate that Pereos is obviously a necessary witness. As a critical and necessary witness, Pereos is prohibited from representing WTS as at trial as counsel.

II. PEREOS IS ONLY ALLOWED TO PARTICIPATE IN PRE-TRIAL PROCEEDINGS.

WTS also confuses what "advocacy" means. According to WTS, the only "advocacy" that occurs during trial is in the closing argument. Opp., p. 6. As this Court is well aware, advocacy begins with voir dire. WTS also ignores the Nevada Supreme Court's ruling in DiMartino v. Eighth Jud. Dist. Ct., 119 Nev. 119, 122, 66 P.3d 945, 947 (2003) wherein the Court held that an attorney subject to trial advocacy preclusion begins at the end of pre-trial proceedings. Accordingly, the Nevada Supreme Court has marked the **conclusion of pre-trial proceedings** as the bright-line rule that triggers an attorneys' prohibition to act as trial counsel. Id. Upon conclusion of pre-trial proceedings, Mr. Pereos is prohibited from attending trial in an advocacy capacity. As the Court is aware, voir dire, opening statements, presentation of evidence, and closing arguments all occur at trial and are not pre-trial proceedings.

WTS also ignores controlling law stated in DiMartino. In DiMartino, the Court explained that the rule is in place to avoid confusing a jury and creating prejudice if an attorney "appears before a jury as an advocate" as well "as a witness." Id. ("**the rule is meant to eliminate any confusion and prejudice that could result if an attorney appears before a jury as an advocate and as a witness.**"). Accordingly, the rule is clear that appearing in front of a jury as an advocate, such as the commencement of voir dire, is trial advocacy and is prohibited by an attorney who is a necessary witness.

NRPC 3.7(a) is to ensure that a "lawyer may not appear in any situation requiring the lawyer to argue his own veracity to a court or other body." DiMartino v. Eighth Jud.

[2] Exh. 2, at ¶5.

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Dist. Ct., 119 Nev. 119, 122, 66 P.3d 945, 947 (2003). As the ABA Model Rules explain:

> The opposing party has proper objection where the combination of roles may prejudice that party's right in the litigation. A witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on evidence given by others. It may not be clear whether a statement by an advocate-witness should be taken as proof or as an analysis of proof.

Model Rule 3.7(a), Comment 2. Because Pereos must testify regarding key elements of WTS's case, he is directly in a position which will require him to "argue his own veracity." Accordingly, he is properly excluded from advocating at trial under NRPC 3.7(a).[3]

III. PLAINTIFF WILL NOT SUFFER ANY SUBSTANTIAL HARDSHIP.

WTS has not identified any substantial hardship sufficient to prevent the exclusion of Pereos from testifying at trial. WTS admits that it has already hired separate counsel, Douglas Fermoile, Esq., for trial. Opp., p. 4. According to WTS, Mr. Fermoile will only provide the closing argument; thus, WTS will be allegedly prejudiced by paying attorney fees to bring its trial counsel up to speed on WTS's case if Pereos is excluded from acting as an advocate. Id. at p.5. Basically, WTS is arguing that it should not be required to pay for trial counsel to become competent, because Mr. Fermoile will learn the case as the trial progresses. Id. However, all other litigants must pay for their counsel to prepare for trial. Mr. Pereos has elected to allegedly represent his own company. WM should not be prejudiced because Mr. Pereos has elected to represent his own company.

Instead, WTS appears to argue that it should not be required to actually ***pay*** for an attorney since Pereos is representing WTS in a pseudo-pro-se capacity. Mr. Pereos's pseudo-pro-se is also directly relevant to the issues in this case because WTS is purporting to seek recovery of attorney fees which it has not paid to Pereos for his representation of it. Opp., p. 5.

---

[3] While WTS spends a considerable amount of time arguing the standards for disqualification of Pereos, WM is not trying to disqualify Pereos. He may remain as counsel however he is precluded from acting as trial advocate during trial under NRPC 3.7(a).

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The bottom line is this Court must exclude Pereos from acting as advocate at the trial of this matter. He is not exempt from the application of NRPC 3.7(a) and the Nevada Supreme Court's ruling in DiMartino v. Eighth Jud. Dist. Ct.. Such prohibition is mandatory and constitutes plain error if Mr. Pereos is allowed to act as trial advocate at trial. Matter of Estate of Waters, 647 A.2d 1091, 1098 (Del. 1994) ("It was plain error to permit Murphy to undermine the integrity of the adversary process by participating as a trial attorney in a proceeding in which he was a central witness on the contested issues being adjudicated.").

IV. CONCLUSION.

For the foregoing reasons, WM respectfully requests that this Court grant its motion in limine No. 1 to exclude Pereos from acting as an advocate for WTS at trial.

AFFIRMATION: The undersigned does hereby affirm that this document does not contain the Social Security Number of any person.

DATED this 19th day of September, 2017.

ROBISON, SIMONS, SHARP & BRUST
A Professional Corporation
71 Washington Street
Reno, Nevada 89503

By: _____
MARK G. SIMONS, ESQ.
THERESE M. SHANKS, ESQ.
Attorneys for Waste Management of Nevada, Inc.

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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of ROBISON, SIMONS, SHARP & BRUST, and that on this date I caused to be served a true copy of the **WASTE MANAGEMENT OF NEVADA, INC.'S REPLY IN SUPPORT OF MOTION IN LIMINE #1 RE: EXCLUSION OF C. NICHOLAS PEREOS AS TRIAL ADVOCATE** on all parties to this action by the method(s) indicated below:

☐ by placing an original or true copy thereof in a sealed envelope, with sufficient postage affixed thereto, in the United States mail at Reno, Nevada, addressed to:

C. Nicholas Pereos, Esq.
1610 Meadow Wood Lane, Ste. 202
Reno, NV 89502
Attorney for West Taylor Street, LLC

☒ I hereby certify that on the date below, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which served the following parties electronically:

C. Nicholas Pereos, Esq.

☐ by personal delivery/hand delivery addressed to:

☐ by facsimile (fax) and/or electronic mail addressed to:

☐ by Federal Express/UPS or other overnight delivery addressed to:

DATED: This 19th day of September, 2017.

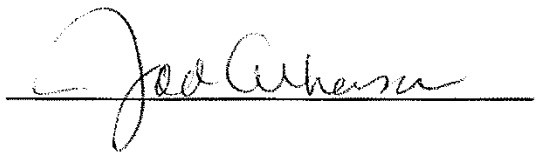

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EXHIBIT LIST

NO.	DESCRIPTION	PAGES
1	T. Morrison Deposition Excerpts	15
2	Affidavit of Mark G. Simons	1
3	W. Powell Deposition Excerpts	5

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Jacqueline Bryant
Clerk of the Court
Transaction # 6307290 : swilliam

EXHIBIT 1

EXHIBIT 1

Case No. CV12-02995

Dept. No. 4

SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

--o0o--

WEST TAYLOR STREET, LLC, a limited liability company,

Plaintiff,

vs.

WASTE MANAGEMENT OF NEVADA, INC., KAREN GONZALEZ, and DOES 1 through 10,

Defendants.

==========

DEPOSITION OF TERI MORRISON

Thursday, July 27, 2017

Reno, Nevada

Reported by: LORI URMSTON, CCR #51, RPR, RMR
CALIF. CCR #3217

Q Once you obtain the application, you call and you verify employment, you speak to a prior landlord, then you go in to Mr. Pereos and say, "I think this is -- we should rent to this tenant"?

A No. Then I do a memo of what I was told as far as verifying the employment and the previous landlord and I forward it to Mr. Pereos and he makes the final decision.

Q Okay. So can we call that like the memo of tenant information?

A For the application.

Q Memo of tenant information from application.

A Yes.

Q Okay. Then you go in with the memo, "Here it is," he reads it, you talk about it, and then he says yes or no?

A Not always. If there's multiple applications, I get them to him as I can and then he makes a decision. We don't discuss his decision of who he's going to choose.

Q All right. Then say the -- we're jumping to the signature of the lease.

A Okay.

Q The lease is signed by Nick Pereos. Then what do you do?

Q What I'm trying to get at is from your perspective and business practice, signing of the lease is the triggering event for allowing the tenant access to use the rental property?

A Yes.

Q Do you call them leases or rental agreements or what is the name that you guys use for --

A I refer to them as the lease.

Q So let's just use the term "lease" so we're using the same terminology today.

A Okay.

Q All right. So the lease has to be signed by the tenant and by Nick Pereos before the tenant can access the property?

A Yes.

Q And until a lease is signed is it fair to say the tenant has no right to start ordering utility services for the property?

A I tell them ahead of time that they -- I suggest to them that they should get the power put in their name.

Q Okay. And is that at or about the time the lease is signed?

A Yes.

Q So I just want to walk this process through,

A It would be 300 West Pueblo.
Q What is 300 West Pueblo?
A Brownstone Apartments.
Q Okay. And how many units does Brownstone Apartments have?
A Twenty.
Q Do you do the property management for the Brownstone Apartments?
A Yes, assistant.
Q Who are you the assistant of?
A Mr. Pereos.
Q Okay. So we've got Brownstone Apartments with 20 units, we've got Carville Drive Apartments with 42 units. And you're the assistant property manager for both of those apartment complexes?
A Yes.
Q And as part of your function we went through what you do for the leasing of the units and getting Mr. Pereos to okay each tenant. Is that for both apartments?
A Yes.
Q Okay. Now, 300 West Pueblo, does that pay for service from Waste Management?
A With a big yard dumpster, yes.
Q Okay. Did you get approval from Waste

Management that 1425 Watt Street could dump into the dumpster to satisfy its obligations under the City's franchise agreement?

A I didn't, no. It just has always been like that since I started.

Q So it's always been you just -- when you lease 1425 Watt Street, you just tell them to throw their trash away in the dumpster for the West Pueblo Brownstone Apartments?

A Yes, because they're next door.

Q Is 1425 Watt Street a duplex or a single-family residence or what, do you know?

A Duplex.

Q And so you tell both of those units to dump over in that other dumpster?

A Yes. I tell them where the big dumpster is, yes.

Q 1445 Watt Street, what kind of unit is that?

A It's a single small home.

Q Where does Watt Street -- does 1445 Watt Street have Waste Management service?

A Through the same dumpster.

Q Okay. So this one goes to the dumpster too?

A Yes.

Q Has it always been that way?

Q You don't have anything to do with 3775 Jagged Rock Road?

A No.

Q So is it fair to say because it's not an income-generating property it doesn't fall into your property management responsibilities?

A Yes.

Q Okay. Any other properties that you manage that we haven't covered yet?

A No.

Q Okay. Do the Carville Drive Apartments have Waste Management service for that location?

A They have a big yard dumpster, yes.

Q Do you know what size of dumpster?

A I believe there's two. One is a 4-yard and one is a 6-yard.

Q Have they always had that since -- those two dumpsters since you've been there?

A No. They've gone bigger or smaller depending on tenant occupancy.

Q So have you been responsible for increasing or decreasing the size of dumpsters that you need at that location?

A No. If we get more tenants in there, Mr. Pereos lets me know to order a bigger one or a

smaller one.

Q Well, that's what I'm getting at. You're the one who makes the call to place an order for either an increase in service or a decrease in service?

A Yes.

Q And currently it's a 4-yard plus a 6-yard?

A Yes.

Q Going back to the Brownstone Apartments, you said that there's a yard dumpster. Do you know the size?

A At which property?

Q The Brownstone Apartments.

A I'm not sure if it's a 4- or 6-yard.

Q So currently it's either a 4 or a 6 to your knowledge?

A To my knowledge.

Q The same process, if the tenancy increases, you ask for a bigger dumpster, if the tenancy decreases, you say, "Can we have a smaller dumpster"?

A Yes.

Q And you've been handling both Brownstone Apartments and Carville Drive Apartments since 2002 when you started?

A Yes.

Q So is it fair to say since 2002 you've known

how to contact Waste Management to discuss service level requirements?

A I don't make the decision whether we increase or decrease. I just make the call to either increase or decrease.

Q But you knew how to do it since 2002, you pick up the phone, you dial a specific number and you talk to a customer representative to discuss your service needs?

A Yes.

Q Do you also -- for any of these properties have you prepared correspondence for them?

A I've done letters.

Q Why do you send letters? What would be included in the letter?

A I do what Mr. Pereos dictates usually or if I make a phone call now I am following it up with a letter.

Q Would you contact Waste Management by letter and sending it to the local office?

A Yes.

Q And you've been doing that since 2002 whenever the need arose?

A No. I just recently started following up with letters.

through, I'm going to have you look at Exhibit 21 and 22.

A Okay.

Q Mr. Pereos told me he prepared these. And I'm just -- did you do this work or did he do the work? I mean the manual inputting of the information.

A He did the work.

Q Let's go back to Exhibit 2. I'm going to take that one and give you Exhibit 2.

Do you also do any work for his law practice, Nick Pereos's law practice?

A No. Very little, copying maybe.

Q As I have an understanding, he's cut back on the practice of law over the years. Have you experienced that?

A Maybe fewer clients coming in.

Q Because you're paid from his law practice. Do you do any paralegal-type work?

A No.

Q Do you do any secretarial-type work?

A Answer phones.

Q Do you prepare letters for any of his cases?

A No.

Q Do you dictate? Is he a dictator?

A He dictates, yes.

check for 347 West Taylor, you write that into the rent roll manually, date of the check, the amount of the check, and then you give that check to Mr. Pereos?

A I don't open mail.

Q Well, then how --

A When they come in and pay, I accept their payment and put it into the rent roll and then forward it.

Q Do you receive any checks by mail?

A I don't open the mail. I'm sure there's some that come in, but I don't open them.

Q Then how do you get the check? Mr. Pereos opens the mail?

A Yes.

Q And if there's checks in the mail, then he gives them to you and says, "Put these in the rent roll"?

A He'll let me know one came in for a property, but I don't do anything with the checks, just that the property had paid.

Q Okay. But your job is to make sure on the rent rolls you write in every payment for every unit?

A No. I write in what I received and then forward.

Q Okay. So if checks come in that are mailed or,

A I don't pay the bills. I don't.
Q Well, look at your first letter. You write this letter, don't you?
A Um-hum.
Q That's a "yes"?
A Yes.
Q Now, you produced it, but there's no signature on this. Is it because you did not keep a copy of the original?
A Years ago I would just take copies once it was printed. I didn't wait until after it was signed.
Q Okay. And is it your practice to -- do you see the left bottom corner, the small initial "tm"?
A Um-hum.
Q And when you put the small initial "tm," that means you wrote the letter?
A Um-hum.
Q That's a "yes"?
A Yes.
Q So then you write up above -- and you're sending the letter to Waste Management - Reno Disposal, 100 Vassar Street. Do you know that?
A Yes.
Q How did you know to send a letter to that address?

you need to pay these amounts?

A I don't recall.

Q Do you ever recall ever seeing one of those?

A I don't open the mail.

Q Oh, okay. So all that communication would go directly to Nick Pereos, wouldn't it?

A The mail.

Q Yeah. And if it was sent by mail, your job is not to open the mail but to give it to Nick Pereos to open it and his job was to open it from your understanding?

A I don't open the mail.

Q Well, you know who does open the mail when it comes to the properties. You already said it. Your supervisor, Nick Pereos; right?

A The mail gets forwarded to him, yes.

Q Okay. Then we have on October 2nd, 2007, it says, "Collection notice returned by customer with a note stating that they had paid months ago." Do you see that?

A Yes.

Q Okay. Did you make that contact? Did you send in the collection notice return to Waste Management?

A No.

Q That would have been a Nick Pereos function?

to the file.

Q Okay. So do you know -- well, let's look down. You've got in caps, "PER CNP NO CONTAINER IS THERE THAT HAS BEEN PROVIDED BY THEM." Do you see that?

A Yes.

Q So at least we know you talked with Nick Pereos after you had a conversation with Liz in customer service, didn't you?

A And this date may have been after several conversations I put them all on the date all together on that date.

Q Okay. Answer the question, please. The question was you make a notation that you had a communication with Nick Pereos right after your call with Liz at Waste Management; right?

A I make a notation that Mr. Pereos said there's no container there provided by them.

Q So the only way you would have got that information is by talking to Nick Pereos; right?

A He would have told me, yes.

Q So then you again call Waste Management and talk to a guy named Paul about various rates, and you notate that; correct?

A Yes.

Q Then you call again and speak to an individual

CERTIFICATE OF WITNESS

I hereby certify under penalty of perjury that I have read the foregoing deposition, made the changes and corrections that I deem necessary, and approve the same as now true and correct.

Dated this _____ day of _____,

20_____.

_____

TERI MORRISON

STATE OF NEVADA)
) ss.
COUNTY OF WASHOE)

I, LORI URMSTON, a Certified Court Reporter in and for the State of Nevada, do hereby certify that on Thursday, the 27th day of July, 2017, at the hour of 2:01 p.m. of said day, at Robison, Belaustegui, Sharp & Low, 71 Washington Street, Reno, Nevada, I reported the deposition of TERI MORRISON in the matter entitled herein; that said witness was duly sworn by me; that before the proceedings' completion, the reading and signing of the deposition was requested by counsel for the respective parties; that the foregoing transcript, consisting of pages 1 through 114, is a true and correct transcript of the stenographic notes of testimony taken by me in the above-captioned matter to the best of my knowledge, skill and ability.

I further certify that I am not an attorney or counsel for any of the parties, nor a relative or employee of any attorney or any of the parties, nor financially interested in the action.

DATED: At Reno, Nevada, this 14th day of August, 2017.

Lori Urmston

LORI URMSTON, CCR #51

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Jacqueline Bryant
Clerk of the Court
Transaction # 6307290 : swilliam

EXHIBIT 2

EXHIBIT 2

AFFIDAVIT OF MARK G. SIMONS, ESQ. IN SUPPORT OF WASTE MANAGEMENT OF NEVADA, INC.'S REPLY IN SUPPORT OF MOTION IN LIMINE #1 RE: EXCLUSION OF C. NICHOLAS PEREOS AS TRIAL ADVOCATE

COUNTY OF WASHOE)
)ss.
STATE OF NEVADA)

I, MARK G. SIMONS, under penalty of perjury, hereby state:

1. I am a licensed attorney in state of Nevada, and am a shareholder at Robison, Simons, Sharp & Low.

2. I am counsel for defendants in this matter.

3. I submit this affidavit in support of Waste Management of Nevada, Inc.'s Reply in Support of Motion in Limine #1 re: Exclusion of C. Nicholas Pereos as Trial Advocate ("Reply"), to which this affidavit is attached as Exhibit 2.

4. Exhibit 1 to the Reply are true and correct excerpts of Terri Morrison's deposition transcript.

5. Exhibit 3 to the Reply are true and correct excerpts of Willis Powell's deposition transcript.

FURTHER AFFIANT SAYETH NAUGHT.

DATED this 19th day of September, 2017.

MARK G. SIMONS

Subscribed and sworn to before me
by Mark G. Simons this 19th day
of September 2017 at Reno, Nevada.

NOTARY PUBLIC

JODI ALHASAN
Notary Public - State of Nevada
Appointment Recorded in Washoe County
No: 14-13483-2 - Expires January 3, 2018

Robison, Simons,
Sharp & Brust
71 Washington St.
Reno, NV 89503
(775) 329-3151

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Clerk of the Court
Transaction # 6307290 : swilliam

EXHIBIT 3

EXHIBIT 3

Case No. CV12-02995

Dept. No. 4

SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

--o0o--

WEST TAYLOR STREET, LLC, a limited liability company,

Plaintiff,

vs.

WASTE MANAGEMENT OF NEVADA, INC., KAREN GONZALEZ, and DOES 1 through 10,

Defendants.

==========

DEPOSITION OF WILLIS EDGAR POWELL

Thursday, July 27, 2017

Reno, Nevada

Reported by: LORI URMSTON, CCR #51, RPR, RMR
CALIF. CCR #3217

A I'm a trustee on a trust.
Q Right.
A The property was purchased by the Pereos trust. As a trustee I signed off on the purchase of the property.
Q That's your job is to run the assets of the trust, isn't it?
MR. PEREOS: Objection to the form of the question.
BY MR. SIMONS:
Q What do you understand your job is as the co-trustee of a trust?
A I am in an advisory capacity in the event that Mr. Pereos becomes incapacitated as a trustee.
Q Your understanding of being a trustee for the 1980 Pereos Trust is that Mr. Pereos runs the trust and you step in in the event he becomes incapacitated?
A Yes. And I'm kept in the loop from time to time on these types of issues.
Q So isn't it fair to say that you defer all aspects of the operation of the 1980 trust to Mr. Pereos?
A Yes.
Q Does he run the trust from your perspective?
A I would say he oversees it, yes.
Q Okay. Who makes the day-to-day decisions

regarding the affairs of the trust assets?

A Mr. Pereos.

Q Okay. Do you defer to Mr. Pereos to do that?

A Yes.

Q Stepping back, you and Mr. Pereos, I understand, have been good friends for a long period of time.

A Yes.

Q Thirty years or so?

A Absolutely.

Q How long -- so have you been the trustee of this trust since 1980 since that's the name of the trust?

A I do not believe so. I think that I probably got involved in the '90s. I would -- I'm pretty sure it was some time in the '90s.

Q And so in the 1990s from my perspective, because you're good friends, he said -- does he call you Bill or is it Willis?

A Bill.

Q Bill. "Bill, would you mind being a co-trustee with my daughter of my 1980 trust?"

A Reasonable.

Q And what was your understanding of your responsibilities when you accepted that request?

CERTIFICATE OF WITNESS

I hereby certify under penalty of perjury that I have read the foregoing deposition, made the changes and corrections that I deem necessary, and approve the same as now true and correct.

Dated this _____ day of _____, 20_____.

_____

WILLIS EDGAR POWELL

STATE OF NEVADA)
) ss.
COUNTY OF WASHOE)

I, LORI URMSTON, a Certified Court Reporter in and for the State of Nevada, do hereby certify that on Thursday, the 27th day of July, 2017, at the hour of 9:51 a.m. of said day, at Robison, Belaustegui, Sharp & Low, 71 Washington Street, Reno, Nevada, I reported the deposition of WILLIS EDGAR POWELL in the matter entitled herein; that said witness was duly sworn by me; that before the proceedings' completion, the reading and signing of the deposition was requested by counsel for the respective parties; that the foregoing transcript, consisting of pages 1 through 67, is a true and correct transcript of the stenographic notes of testimony taken by me in the above-captioned matter to the best of my knowledge, skill and ability.

I further certify that I am not an attorney or counsel for any of the parties, nor a relative or employee of any attorney or any of the parties, nor financially interested in the action.

DATED: At Reno, Nevada, this 14th day of August, 2017.

Lori Urmston

LORI URMSTON, CCR #51

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Clerk of the Court
Transaction # 6312602

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IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

WEST TAYLOR STREET, LLC, Plaintiff, vs. WASTE MANAGEMENT OF NEVADA, INC., KAREN GONZALEZ, and DOES 1 through 10, Defendants.	CASE NO.: CV12-02995 DEPT. NO.: 4

SECOND AMENDED SCHEDULING ORDER

Nature of Action: SLANDER OF TITLE

Date of Filing Joint Case Conference Report(s): NOVEMBER 8, 2013

Time Required for Trial: 3 DAYS

Date of Trial: NOVEMBER 13, 2017

Jury Demand Filed: SEPTEMBER 27, 2013–PLAINTIFF

Counsel for Plaintiff: C. NICHOLAS PEREOS, ESQ.

Counsel for Defendant: MARK SIMONS, ESQ.

On August 30, 2017, C. Nicholas Pereos, Esq. appeared on behalf of Plaintiff WEST TAYLOR STREET, LLC, and Mark Simons, Esq., appeared on behalf of WASTE MANAGEMENT OF NEVADA, INC. After discussion concerning the Court's trial scheduled,

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///

the above-entitled matter was set for jury trial on November 13, 2017. Additionally, the Court stated a new scheduling order would enter concerning the remaining relative pre-trial deadlines.

Based upon the foregoing, IT IS HEREBY ORDERED:

1. Formally **submit** all dispositive motions, including motions for summary judgment and motions in limine to exclude an expert's testimony, on or before **SEPTEMBER 15, 2017 (59 days before Trial).**

2. Formally **submit** all other motions in limine on or before **SEPTEMBER 29, 2017 (45 days before Trial).**

3. Unless otherwise directed by the Court, all pretrial disclosures pursuant to N.R.C.P. 16.1(a)(3) must be made at least thirty (30) days before trial.

A. Unless the Court orders otherwise, legal memoranda submitted in support of any motion shall not exceed twenty (20) pages in length; opposition memoranda shall not exceed twenty (20) pages in length; reply memoranda shall not exceed ten (10) pages in length. These limitations are exclusive of exhibits. A party may file a pleading that exceeds these limits by five pages, so long as it is filed with a certification of counsel that good cause existed to exceed the standard page limits and the reasons therefore. Briefs in excess of five pages over these limits may only be filed with prior leave of the Court, upon a showing of good cause.

B. Except upon a showing of unforeseen extraordinary circumstances, the Court will not entertain any pretrial motions filed or orally presented after the above deadlines have passed.

4. A trial statement on behalf of each party shall be delivered to opposing counsel, filed herein and a copy delivered to chambers no later than **OCTOBER 30, 2017 (10 judicial days before Trial).**

A. In accordance with and in addition to the requirements of WDCR 5, the trial statement shall contain:

(1) a concise statement of the claimed facts organized by specifically listing each essential element of the party's claims or defenses and separately stating the facts in support of each such element;
(2) A statement of admitted or undisputed facts
(3) A statement of issues of law supported by a memorandum of authorities;
(4) The names and addresses of all witnesses, except impeaching witnesses.
(5) Any other appropriate comment, suggestion, or information for the assistance of the court in the trial of the case.

(a) any practical matter which may be resolved before trial (e.g., suggestions as to the order of witnesses, view of the premises, availability of audio or visual equipment);

(b) a statement of any unusual evidentiary issues, with appropriate citations to legal authorities on each issue;

(6) A list of special questions requested to be propounded to prospective jurors.

(a) a list of proposed general voir dire questions for counsel to ask of the jury.

(7) Certification by counsel that discovery has been completed, unless late discovery has been allowed by order of the court.

(8) Certification by counsel that, prior to the filing of the trial statement, they have personally met and conferred in good faith to resolve the case by settlement.

5. All jury instructions and verdict forms, whether agreed upon by both parties or proposed by a party individually, shall be delivered to chambers no later than the deadline to submit their Trial Statements **OCTOBER 30, 2017** (10 judicial days before Trial) unless specifically modified by the Court.

A. Unless otherwise ordered, the parties shall exchange all proposed jury Instructions and verdict forms two weeks prior to trial. The parties should then meet, confer, and submit to the Court one complete set of agreed-upon set of jury instructions and verdict forms at the same time they submit their trial statements.

B. If the parties do not agree to all proposed instructions, they shall jointly submit a set containing only those instructions that are mutually agreeable. Each party must submit individually any additional proposed jury instructions that have not been agreed upon and/or verdict forms at the same time they submit their trial statements.

C. All instructions should be short, concise, understandable, and neutral statements of law and gender. Argumentative or formula instructions are improper, will not be given, and should not be submitted.

D. The parties are required to submit the jury instructions in the below described format.

1. All proposed jury instructions shall be in clear, legible type on clean, white, heavy paper, 8 ½ by 11 inches in size, and not lighter than 16-lb. Weight with a black border line and no less than 24 numbered lines.
2. The last instruction **only** shall bear the signature line with the words "District Judge" typed thereunder placed on the right half of the page, a few lines below the last line of text.
3. The designation "Instruction No. "shall be at the last line, lower left hand corner of the last page of each instruction.
4. The original instructions shall not bear any markings identifying the attorney submitting the same, and shall not contain any citations of authority.
5. The authorities for instructions must be attached to the original instructions by a separate copy of the instruction including the citation.
6. The parties should also note on the separate copy of the instruction any modifications made on the instructions from statutory authority,

Nevada Pattern Jury Instructions, Devitt and Blackmar, CALCRIM or other form instructions, specifically stating the modification made to the original form instructions and the authority supporting the modification. All original instructions shall be accompanied by a separate copy of the instruction containing a citation to the form instruction, statutory or case authority supporting that instruction. All modifications made to instructions taken from statutory authority, Nevada Pattern Jury Instructions, Devitt and Blackmar, CACI or other form instructions shall be specifically noted on the citation page. For any form instruction submitted from any source other than Nevada Pattern Jury Instructions, counsel shall include copies of the original instruction form.

7. For any form instruction submitted from any source other than Nevada Pattern Jury Instructions, counsel shall include copies of the original instruction form.

6. Jurors will be permitted to take notes during the trial. Jurors may be permitted to ask questions in writing during trial, screened by the Court and counsel. Any party objecting to this procedure should state this objection in the trial statement.

7. All applications for attorney's fees shall state services rendered and fees incurred for such services with sufficient specificity to enable an opposing party and the court to review such application. Any memorandum of costs and disbursements must comply with Bergmann v. Boyce, 109 Nev. 670, 856 P.2d 560 (1993) and Bobby Beresini v. PETA, 114 Nev. 1348, 971 P.2d 383 (1998).

8. Trial counsel for all parties shall contact the Courtroom Clerk (Marci Stone 775/328-3139) **no later than Monday, one week prior to trial,** to arrange a date and time to mark trial exhibits. All exhibits will be marked in one numbered series (Exhibit 1, 2, 3, etc.), no matter which side is offering the particular exhibit. Once trial exhibits are marked by the Clerk, they shall remain in the custody of the Clerk. When marking the exhibits with the Clerk, counsel must advise the Clerk of all exhibits which may be admitted without objection. In any case which involves fifteen or more document exhibit pages, the exhibits shall be placed in a loose-leaf binder behind a tab noting the number of each exhibit. The binder shall be clearly marked on the front and side with the case caption and number, but no identification as to the party producing the binder. All document exhibits shall be in **one** binder no matter which party is offering the exhibits. At the time set for marking the trial exhibits, counsel for the Plaintiff shall provide the Courtroom Clerk

with the binder containing the number tabs. Counsel for all parties shall provide all exhibits, no matter when marked, even if marked during the course of trial, in a condition appropriate for inclusion in the evidence binder.

9. The Court expects that both sides will cooperate to try the case within the time set, and confer regarding the order of witnesses, stipulated exhibits, and any other matters which will expedite trial of the case.

10. All parties and counsel are bound by the terms of this Scheduling Order, the Nevada Rules of Civil Procedure ("NRCP"), the District Court Rules ("DCR"), the Washoe District Court Rules ("WDCR"), and the Nevada Revised Statutes ("NRS"), and failure to comply could result in the imposition of sanctions.

DATED this 22 day of September, 2017.
NUNC PRO TUNC TO AUGUST 30, 2017.

Connie J. Steinheimer
DISTRICT JUDGE

CERTIFICATE OF SERVICE

CASE NO. CV12-02995

I certify that I am an employee of the SECOND JUDICIAL DISTRICT COURT of the STATE OF NEVADA, COUNTY OF WASHOE; that on the 22 day of September, 2017, I filed the **SECOND AMENDED SCHEDULING ORDER** with the Clerk of the Court.

I further certify that I transmitted a true and correct copy of the foregoing document by the method(s) noted below:

_____ **Personal delivery to the following: [NONE]**

__e__ **I electronically filed with the Clerk of the Court, using the ECF which sends an immediate notice of the electronic filing to the following registered e-filers for their review of the document in the ECF system:**

MARK SIMONS, ESQ. for WASTE MANAGEMENT OF NEVADA INC
C. PEREOS, ESQ. for WEST TAYLOR STREET LLC
THERESE SHANKS, ESQ. for WASTE MANAGEMENT OF NEVADA INC et al

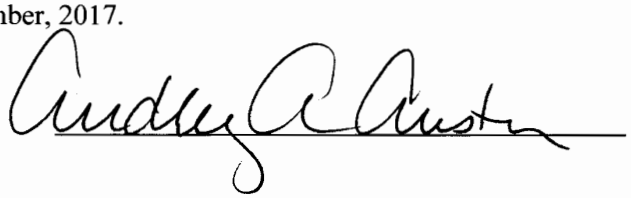
_____ **Deposited in the Washoe County mailing system in a sealed envelope for postage and mailing with the United States Postal Service in Reno, Nevada: [NONE]**

_____ **Placing a true copy thereof in a sealed envelope for service via:**

_____ Reno/Carson Messenger Service – **[NONE]**

_____ Federal Express or other overnight delivery service **[NONE]**

DATED this 22 day of September, 2017.



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Jacqueline Bryant
Clerk of the Court
Transaction # 6370385 : yviloria

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Mark G. Simons, Esq., NSB No. 5132
Therese M. Shanks, Esq. (SBN 12890)
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Telephone: (775) 329-3151
Facsimile: (775) 329-7169
E: msimons@rssblaw.com
and tshanks@rssblaw.com

Attorneys for Waste Management of Nevada, Inc.

IN THE SECOND JUDICIAL DISTRICT FOR THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

WEST TAYLOR STREET, LLC, a limited liability company,

Plaintiff,

v.

WASTE MANAGEMENT OF NEVADA, INC., KAREN GONZALEZ, and DOES 1 THROUGH 10,

Defendants.

_____/

CASE NO.: CV12-02995

DEPT. NO.: 4

DEFENDANT'S TRIAL STATEMENT

DEFENDANT'S TRIAL STATEMENT

Defendant WASTE MANAGEMENT OF NEVADA, INC. ("Waste Management"), by and through its counsel of Robison, Simons, Sharp & Brust, submits its Trial Statement, in accordance with WDCR 5 and this Court's scheduling order:

I. PROCEDURAL BACKGROUND.

Plaintiff West Taylor Street, LLC ("WTS") filed its complaint against Waste Management and its former employee, Karen Gonzalez, on December 3, 2012. The original complaint asserted claims for (1) declaratory relief, and (2) slander of title relating to a garbage lien recorded by Waste Management in February 2012 on property owned by WTS located at 345 West Taylor Street. In February 2014, WTS amended its

complaint to include another garbage lien recorded by Waste Management on property owned by WTS which was located at 347 West Taylor Street. In June 2014, WTS filed its Second Amended Complaint, to include a second garbage lien recorded against 345 West Taylor Street in March 2014.

WTS moved for partial summary judgment on its first claim for declaratory relief in March 2014. On July 28, 2014, this Court granted in part and denied in part WTS's motion for partial summary judgment. The motion was granted on the ground that this Court found that Waste Management was required to notice delinquent bills within 90 days, but was denied with regard to properly noticed claims.

In September 2014, WTS filed a second motion for summary judgment which sought, essentially, an order from this Court fully adjudicating its first claim for declaratory relief. Waste Management then filed a motion for reconsideration of this Court's July 2014 order. The parties agreed to stay resolution and further briefing on the motion for summary judgment pending this Court's decision on the motion for reconsideration. This Court denied the motion for reconsideration on February 6, 2015. WTS then renewed its motion for summary judgment, and this Court granted that motion on October 1, 2015.

The parties proceeded forward on WTS's second claim for slander of title. In September 2016, Waste Management filed a motion for summary judgment on WTS's remaining claim for slander of title. This Court granted the motion in part and denied the motion in part. This Court found that there were material issues of fact regarding whether the liens properly reflected the amounts owed by WTS to Waste Management, and whether Waste Management acted with actual malice. Thus, this Court denied the motion for summary judgment as to Waste Management. However, this Court granted the motion for summary judgment as to Karen Gonzalez because there was no evidence that Ms. Gonzalez acted independently from her role as an employee of Waste Management.

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II. STATEMENT OF CLAIMS AND DEFENSES:

A. WTS' CLAIMS: The only claim remaining before this Court is WTS's claim for slander of title relating to the filing of three garbage liens: (1) one which encumbered 345 West Taylor Street for $859.78; (2) a second lien which encumbered 345 West Taylor Street for $404.88; and (3) a garbage lien which encumbered 347 West Taylor Street for $489.47.

B. WASTE MANAGEMENT'S DEFENSES: Waste Management's primary defenses against liability are that (1) Waste Management did not act with actual malice, and (2) Waste Management did not make false statements regarding the money that WTS owed when it recorded the liens. Waste Management additionally defends against WTS's claim for special damages on the ground that (1) these damages are not actually incurred, and (2) purported attorney fees incurred after the liens were removed are not recoverable as special damages.

III. STATEMENT OF CLAIMED FACTS:

The essential elements of a slander of title claim are (1) a false statement, (2) actual malice, and (3) special damages sustained as a result of the false statement. Rowland v. Lepire, 99 Nev. 308, 313, 662 P.2d 1332, 1335 (1983). Waste Management intends to establish the following facts at trial:

A. NO FALSE STATEMENT.

1. WTS failed to comply with Waste Management's vacancy policy;

2. WTS owed past due amounts, fees and interest to Waste Management;

3. WTS failed to pay these amounts; and

4. The liened amounts were substantially, if not entirely, accurate.

B. NO ACTUAL MALICE.

1. WTS failed to comply with Waste Management's vacancy policy;

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2. WTS owed past due amounts, fees and interest to Waste Management;

3. WTS failed to pay these amounts;

4. The liened amounts were substantially, if not entirely, accurate;

5. It was reasonable for Waste Management to believe it was not required to comply with the 90-day notice requirement in the mechanic lien statutes, because that requirement was interpreted into NRS 444.520 as a matter of first impression by this Court ***after*** Waste Management filed the liens and ***after*** this Court found that NRS 444.520 was ambiguous as to which mechanic lien requirements applied to garbage liens; and

6. Waste Management promptly removed the liens after entry of this Court's order in July 2014.

C. NO SPECIAL DAMAGES.

1. WTS did not formally retain Pereos as its attorney;

2. WTS has never paid Pereos for his services;

3. WTS has not actually incurred attorney fees; and

4. The liens, and any cloud upon title, were removed in August 2014, thereby terminating WTS's special damages as of August 8, 2014.

IV. <u>UNDISPUTED AND ESTABLISHED FACTS</u>:

1. WTS owns real property located at 345 West Taylor Street and 347 West Taylor Street, both within Reno city limits. These addresses are part of a single parcel.

2. C. Nicholas Pereos, Esq. ("Pereos") is the manager of WTS.

3. WTS is owned by the Restated 1980 Pereos Trust.

4. Pereos makes all decisions for the Restated 1980 Pereos Trust.

5. The properties at issue are managed by Nina Properties, Inc. ("Nina").

6. Pereos is an officer of Nina. Pereos' trust is also an owner of Nina, and again Pereos makes all decisions for the Trust.

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7. Waste Management is the parent company of Reno Disposal, Inc., which operates under the name of "Waste Management." Reno Disposal collects and hauls garbage from properties within Reno city limits.

8. Waste Management is a party to the First Amended City of Reno Garbage Franchise 8/9/94, which requires Waste Management to service all properties within certain areas of Reno city limits, including 345 and 347 West Taylor Street, at least once a week.

9. Under the First Amended City of Reno Garbage Franchise 8/9/94, Waste Management is permitted to charge fees for the collection of waste.

10. Pursuant to Reno City Ordinance, and the First Amended City of Reno Garbage Franchise 8/9/94, all owners of property which generates solid waste must subscribe to Waste Management's services.

11. Under the First Amended City of Reno Garbage Franchise 8/9/94, all properties are presumed to generate waste unless the owner obtains an exemption from Waste Management.

12. On November 7, 2012, the City of Reno entered into a new Exclusive Area Franchise Agreement with Waste Management (Reno Disposal).

13. Under the new Franchise Agreement, Waste Management was also obligated to service all property within Reno city limits.

14. Under the new Franchise Agreement, Waste Management is permitted to charge fees for the collection of waste.

15. Under the new Franchise Agreement, all owners of properties which generate solid waste must subscribe to Waste Management's services.

16. Under the new Franchise Agreement, all properties are presumed to generate waste unless the owner obtains an exemption from Waste Management.

17. At all times relevant to this lawsuit, Waste Management has an established vacancy policy, which requires owners to inform Waste Management when

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a property will be vacant so that the owner does not incur fees for Waste Management's service of that vacant property. The burden is on the owner to inform Waste Management of the vacancy.

18. NRS 444.520 allows Waste Management to file a garbage lien against any property for unpaid fees and charges.

19. WTS was sent monthly invoices for the amounts due and owing on its properties to Waste Management.

20. WTS was sent collection notices for the past due amounts owing on its properties to Waste Management.

21. WTS was sent pre-lien notices for the past due amounts owing on its properties to Waste Management.

22. On occasion, Pereos, Nina and/or WTS would communicate with Waste Management through Pereos' office, by telephone and by sending letters to the local Waste Management office.

23. In February 2012, Waste Management recorded a garbage lien against 345 West Taylor Street, for $859.78.

24. In November 2012, Waste Management recorded a garbage lien against 347 West Taylor Street, for $489.47.

25. In March 2014, Waste Management recorded a second garbage lien against 345 West Taylor Street, for $404.88.

26. In July 2014, this Court interpreted NRS 444.520 as a matter of first impression. This Court determined that NRS 444.520 must comply with certain notice requirements contained within Chapter 108, governing mechanic liens.

27. After this Court's July 2014 order, Waste Management removed all three liens from WTS' property on August 8, 2014.

28. There is no fee agreement between Pereos and WTS.

29. Pereos allegedly agreed to hire himself to represent WTS.

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30. Pereos made all decisions relating to the property and this litigation.

31. WTS has not paid any money for any legal services purportedly rendered on its behalf by Pereos.

V. STATEMENT OF ISSUES OF LAW AND SUPPORTING MEMORANDUM:

The essential elements of a slander of title claim are (1) a false statement, (2) actual malice, and (3) special damages sustained as a result of the false statement. Rowland v. Lepire, 99 Nev. 308, 313, 662 P.2d 1332, 1335 (1983).

A. THE LIEN AMOUNTS WERE NOT "FALSE."

The evidence will establish that WTS owed money to Waste Management for unpaid invoices, late fees and interest. Although WTS contends that there are discrepancies in the amounts invoiced to WTS versus the amounts actually liened, any such discrepancy is not sufficient to render the statements in the liens "false."

A statement which is substantially true is not a "false" statement that supports a claim for slander of title. Exec. Excellence, LLC v. Martin Bros. Investments, LLC, 710 S.E.2d 169, 170 (2011). Because slander of title is a subset of defamation, the same defenses and privileges which apply to defamation claims, apply to slander of title claims. *See* Stewart v. Fahey, 481 P.2d 519, 520 (Ariz. App. Ct. 1971) ("While it is clear that 'slander of title' is not a **true** defamation action, being historically an action on the case for special damages arising from a falsehood, it is equally clear that the privilege defenses available in an action for personal defamation are also available in an action for 'slander of title.'" (Internal citations omitted)); Albertson v. Raboff, 295 P.2d 405, 508 (Cal. 1956) ("Although the gravamen of an action for disparagement of title is different from that of an action for personal defamation, substantially the same privileges are recognized in relation to both torts . . . ."). Under Nevada law, a statement is not slanderous "if it is absolutely true, or substantially true." Pegasus v. Reno Newspapers, Inc., 118 Nev. 706, 715, 57 P.3d 82, 88 (2002).

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Because WTS indisputably owed Waste Management money, Waste Management's liens did not contain a "false" statement merely because there may have been minor discrepancies in what amount was liened versus what amount was actually owed. The evidence will also establish that Waste Management's records were, in fact, substantially accurate.

B. WASTE MANAGEMENT ACTED REASONABLY.

"In order to prove malice it must be shown that the defendant knew the statement was false or acted in reckless disregard of its falsity." Rowland, 99 Nev. at 313, 662 P.2d at 1335. "Where a defendant has reasonable grounds for belief in his claim, he has not acted with malice." Id.

It is undisputed that WTS owed Waste Management money. Therefore, WTS cannot prove that Waste Management knew its liens were "false."

WTS also cannot prove that Waste Management acted with reckless disregard to the truthfulness of its lien amounts. Although WTS contends that the properties were vacant at certain time periods during which it was charged fees for service of these properties, the evidence will establish: (1) WTS's "vacancy" dates in its own records upon which it relies are inaccurate; (2) WTS did not comply with Waste Management's vacancy policy, which, in turn required Waste Management to continue to service the allegedly vacant parcels and correctly charge WTS fees for such service; and (3) Waste Management made adjustments to the amounts owing to it for actual, properly noticed vacancies on the properties at issue.

Furthermore, WTS cannot prove that Waste Management acted with malice by including amounts in the lien that did not comply with the 90-day notice requirement imposed by this Court after the liens were filed. The 90-day notice requirement period is not found in the statutory text of NRS 444.520, but in the text of the mechanic liens statutes in NRS Chapter 108. *See* NRS 444.520. That requirement was interpreted into NRS 444.520 by this Court in its July 2014 order. This Court specifically noted that

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"[t]he extent to which the mechanic's lien statutes are incorporated into NRS 444.520 is a matter of first impression." Order, p. 9. This Court further found that NRS 444.520 was ambiguous "as to which portions of the mechanic's lien statutes may be applied since the specific sections are not listed in the language of the statute." Id. at p. 11. This Court then interpreted NRS 444.520, as a matter of first impression, and held that the 90-day notice requirement should be imposed.

Prior to this Court's ruling, there was no law or other authority decisively requiring Waste Management to provide notice within 90 days. Waste Management removed the liens on August 8, 2014, one week after receiving this Court's July 28, 2014 order. Therefore, WTS cannot prove that Waste Management acted with actual malice.

C. WTS HAS NO SPECIAL DAMAGES.

In Nevada, attorney fees are "available as special damages in slander of title actions." Horgan v. Felton, 123 Nev. 577, 586, 170 P.3d 982, 988 (2007). However, such fees are only recoverable as special damages where those fees are necessarily incurred to remove a cloud upon title. *See* Sumner Hill Homeowners' Ass'n, Inc. v. Rio Mesa Holdings, LLC, 141 Cal. Rptr. 3d 109 (Ct. App. 2012) ("Accordingly, it is well established that attorney fees and litigation costs are recoverable as pecuniary damages in slander of title causes of action when . . . litigation is necessary to remove the doubt cast upon the vendibility or value of plaintiff's property."); Computerized Thermal Imaging, Inc. v. Bloomberg, L.P., 312 F.3d 1292, 1300 (10th Cir. 2002) ("Attorney's fees, however, are permitted as special damages in a slander of title action if incurred to clear title . . . ." (Internal quotations omitted)). Furthermore, these fees and costs are only recoverable "up to the point in the lawsuit when title is cleared[.]" Rehn v. Christensen, 392 P.3d 872, 885 (Utah Ct. App. 2017).

Title was cleared on August 8, 2014, after Waste Management removed the liens on the property. Thus, to the extent that WTS can recover attorney fees as special damages, WTS can only recover those fees expended up until that point. Based upon

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Pereos' alleged billing records, the fees allegedly incurred as of August 8, 2014, are $48,150.22.

However, WTS cannot recover special damages because no attorney fees were actually incurred. "'Special damages' are limited to actual pecuniary loss, which must be specifically pleaded and proved." F.A.A. v. Cooper, 566 U.S. 284, 295 (2012); *see also* Veatch v. Aurora Loan Servs., LLC, 771 S.E.2d 241, 244 (Ga. Ct. App. 2015) ("A plaintiff asserting a slander of title claim is entitled to only such special damages as he actually sustained as a consequence of the wrongful acts, which damages must be pled and proven with particularity." (Internal quotations omitted)).

The evidence will establish that Pereos never entered into a fee agreement with WTS, that WTS has never been charged for services performed by Pereos, and that WTS has not paid any actual attorney fees. As an owner of WTS, Pereos is essentially attempting to represent WTS "pro per." But a limited liability company cannot appear "pro per." *See* WDCR 23(5) ("A corporation may not appear in proper person."). Accordingly, WTS cannot recover attorney fees it never actually incurred and never actually paid as special damages.

VI. NAMES AND ADDRESSES OF ALL WITNESSES (EXCEPT IMPEACHING WITNESSES)

1. C. Nicholas Pereos, Esq.
   1610 Meadow Wood Lane, St. 202
   Reno, Nevada 89502

2. Maria Elizabeth Davis
   c/o Robison, Simons, Sharp & Brust
   71 Washington Street
   Reno, Nevada 89503

3. Teri Morrison
   c/o C. Nicholas Pereos
   1610 Meadow Wood Lane, St. 202
   Reno, Nevada 89502

4. Willis Edgar Powell
   1300 Freeport Blvd.
   Sparks, Nevada 89431

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5. David Stratton
c/o Robison, Simons, Sharp & Brust
71 Washington Street
Reno, Nevada 89503

VII. ANY OTHER APPROPRIATE COMMENT, SUGGESTION, OR INFORMATION FOR THE ASSISTANCE OF THE COURT:

None.

VIII. SPECIAL QUESTIONS TO BE PROPOUNDED TO THE JURORS:

1. Whether any potential juror is a landlord or property manager within this community;

2. Whether any potential juror has had a garbage lien placed upon their property;

3. Whether any potential juror has sued Waste Management.

IX. MOTIONS IN LIMINE:

1. Waste Management of Nevada, Inc.'s Motion in Limine #1 Re: Exclusion of Nicholas Pereos as Trial Advocate, attached hereto, with all oppositions and replies, as **Exhibit 1**.

X. CERTIFICATION THAT DISCOVERY HAS BEEN COMPLETED:

The undersigned counsel certifies that discovery has been completed.

XI. CERTIFICATION OF GOOD FAITH ATTEMPT TO RESOLVE CASE:

The undersigned counsel certifies that they have attempted in good faith to resolve the case with opposing counsel without success.

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AFFIRMATION (Pursuant to NRS 239B.030). The undersigned does hereby affirm that this document does not contain the social security number of any person.

DATED this 30th day of October, 2017.

ROBISON, SIMONS, SHARP & BRUST
A Professional Corporation
71 Washington Street
Reno, Nevada 89503

By: _____
MARK G. SIMONS, ESQ.
THERESE M. SHANKS, ESQ.
Attorneys for Waste Management of Nevada, Inc.

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of ROBISON, SIMONS, SHARP & BRUST, and that on this date I caused to be served a true copy of the **DEFENDANT'S TRIAL STATEMENT** on all parties to this action by the method(s) indicated below:

☐ by placing an original or true copy thereof in a sealed envelope, with sufficient postage affixed thereto, in the United States mail at Reno, Nevada, addressed to:

☒ I hereby certify that on the date below, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which served the following parties electronically:

C. Nicholas Pereos, Esq.

Douglas Keith Fermoile, Esq.

☐ by personal delivery/hand delivery addressed to:

☐ by facsimile (fax) and/or electronic mail addressed to:

☐ by Federal Express/UPS or other overnight delivery addressed to:

DATED: This 30th day of October, 2017.

An employee of Robison, Simons, Sharp & Brust

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EXHIBIT LIST

NO.	DESCRIPTION	PAGES
1	MIL Briefing	53

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EXHIBIT 1

EXHIBIT 1

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Mark G. Simons, Esq. (SBN 5132)
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Attorneys for Waste Management of Nevada, Inc.

IN THE SECOND JUDICIAL DISTRICT FOR THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

WEST TAYLOR STREET, LLC, a limited liability company,

Plaintiff,

v.

WASTE MANAGEMENT OF NEVADA, INC., KAREN GONZALEZ, and DOES 1 THROUGH 10,

Defendants.
_____/

CASE NO.: CV12-02995

DEPT. NO.: 4

WASTE MANAGEMENT OF NEVADA, INC.'S MOTION IN LIMINE #1 RE: EXCLUSION OF C. NICHOLAS PEREOS AS TRIAL ADVOCATE

Waste Management of Nevada, Inc. ("WM"), by and through its attorney Mark G. Simons of Robison, Belaustegui, Sharp & Low submits the following motion in limine seeking to exclude Plaintiffs' counsel C. Nicholas Pereos ("Pereos") from acting as trial advocate in this action. This motion is supported by Nevada Rules of Professional Conduct ("RPC") 3.7 and the following memorandum of points and authorities.

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DATED this 30th day of August, 2017.

ROBISON, BELAUSTEGUI, SHARP & LOW
A Professional Corporation
71 Washington Street
Reno, Nevada 89503

By: _____
MARK G. SIMONS, ESQ.
Attorneys for Waste Management of Nevada, Inc.

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION

I. STANDARD OF REVIEW.

Motions in limine are designed to seek the Court's ruling on the admissibility of arguments, assertions and evidence in advance of trial. A motion in limine is an increasingly common vehicle through which litigants bring requests to exclude potentially prejudicial evidence from a jury trial. *Kelly v. New West Fed. Sav.*, 56 Cal.Rptr.2d 803, 808 (1996). The Nevada Supreme Court has approved the use of motions in limine recognizing the legitimacy of such pre-trial motion practice and the courts' authority to rule on these motions. *See, e.g., Bull v. McCuskey*, 615 P.2d 957, 961 (Nev. 1976). Additionally, NRCP 16(c)(3) recognizes the legitimacy of such pre-trial motion practice and the court's authority to rule on these motions by allowing for "advance rulings . . . on the admissibility of evidence." Motions in limine "permit more careful consideration of evidentiary issues than would take place in the heat of battle during trial," and they promote judicial economy by minimizing "side-bar conferences and disruptions during trial" and by resolving "potentially critical issues at the onset, they enhance the efficiency of trials and promote settlements." *Kelly*, 56 Cal.Rptr.2d at 808.

II. PLAINTIFF'S COUNSEL IS PRECLUDED FROM ACTING AS A TRIAL ADVOCATE.

Given that the presentation of evidence at trial is at issue with this motion, it is believed the proper procedure of addressing the prohibition of Pereos as trial advocate is the proper subject of a motion in limine. Pereos is precluded by Rules of Professional

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Conduct 3.7, formerly Supreme Court Rule 178, from acting as a trial advocate in this action since Pereos is the Plaintiff's primary witness in this action. RPC 3.7 precludes an attorney who "is likely to be a necessary witness" from acting as a trial advocate and states in relevant part:

> (a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:
>
> (1) The testimony relates to an uncontested issue;
>
> (2) The testimony relates to the nature and value of legal services rendered in the case; or
>
> (3) Disqualification of the lawyer would work substantial hardship on the client.

In *DiMartino v. Eighth Judicial Dist. Court ex rel. Cty. of Clark*, 119 Nev. 119, 121–22, 66 P.3d 945, 946–47 (2003), the Nevada Supreme Court analyzed the scope of Lawyer as Witness rule and held that an attorney is precluded from acting as a trial advocate "[b]ecause the rule is meant to eliminate any confusion and prejudice that could result if an attorney appears before a jury as an advocate and as a witness . . . ."

Pereos has previously informed Defendants' counsel that he will not be acting as a trial advocate in this action and that . . . will be Plaintiff's sole trial counsel. Notwithstanding this representation, Defendants are still entitled to an order precluding Pereos from acting as a trial advocate in this action including but not limited to the following: precluded from all aspects of jury selection, precluded from presenting any witnesses or evidence at trial and precluded from any oral argument, objection or other speaking role at trial and that his role is limited exclusively to acting as a witness at trial.

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(775) 329-3151

AFFIRMATION: The undersigned does hereby affirm that this document does not contain the Social Security Number of any person.

DATED this 30th day of August, 2017.

ROBISON, BELAUSTEGUI, SHARP & LOW
A Professional Corporation
71 Washington Street
Reno, Nevada 89503

By: _____
MARK G. SIMONS, ESQ.
Attorneys for Waste Management of Nevada, Inc.

Robison, Belaustegui, Sharp & Low
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Reno, NV 89503
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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of ROBISON, BELAUSTEGUI, SHARP & LOW, and that on this date I caused to be served a true copy of the **WASTE MANAGEMENT OF NEVADA, INC.'S MOTION IN LIMINE #1 RE: EXCLUSION OF C. NICHOLAS PEREOS AS TRIAL ADVOCATE** on all parties to this action by the method(s) indicated below:

☐ by placing an original or true copy thereof in a sealed envelope, with sufficient postage affixed thereto, in the United States mail at Reno, Nevada, addressed to:

C. Nicholas Pereos, Esq.
1610 Meadow Wood Lane, Ste. 202
Reno, NV 89502
Attorney for West Taylor Street, LLC

☒ I hereby certify that on the date below, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which served the following parties electronically:

C. Nicholas Pereos, Esq.

☐ by personal delivery/hand delivery addressed to:

☐ by facsimile (fax) and/or electronic mail addressed to:

☐ by Federal Express/UPS or other overnight delivery addressed to:

DATED: This 30th day of August, 2017.

Jodi Anderson

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ATTORNEYS FOR PLAINTIFF

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IN THE SECOND JUDICIAL DISTRICT COURT OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

*****

WEST TAYLOR STREET, LLC,
a limited liability company,

Plaintiff,

vs.

WASTE MANAGEMENT OF NEVADA, INC., KAREN GONZALEZ, and DOES 1 THROUGH 10,

Defendants.
_____/

Case No. CV12 02995

Dept. No. 4

Trial Date: October 16, 2017

OPPOSITION TO DEFENDANT'S MOTION IN LIMINE

A. STATEMENT OF FACTS

This case arises by reason of the recording of three liens against the property owned by the Plaintiff. Two liens were recorded against the property at 345 W. Taylor and one lien was recorded against the property at 347 W. Taylor. The first lien was recorded on February 23, 2012 as document #4086834 and affected 347 W. Taylor for unpaid garbage fee in the amount of $489.47. The second lien was recorded on November 21, 2012 as document #474177148 and affected 345 W. Taylor in the amount of $859.78 for unpaid garbage fee. The third lien was recorded on March 14, 2014 as document #43343635 in the amount of $404.88. After Defendant refused to release the liens, this lawsuit was commenced seeking relief from the Court in connection with the recording of

these liens. One of the claims in this lawsuit was that the liens were improperly filed and that Plaintiff through its counsel requested the removal of the liens which did not happen. Another claim was that Defendant had abused its authority given the monopoly that it had in connection with collection of garbage and the right to record liens with no remedy afforded to the Plaintiff or any other property owner.

The property is a rental duplex. There are times the property is vacant and Waste Management was notified of the same without a need for disposal services. Despite acknowledging these notices, Waste Management continued to bill and send invoices to the Plaintiff as if it was still occupied and then demands collection of the monies. The request for correction fell on deaf ears. Meanwhile, Waste Management does nothing in connection with addressing this issues necessitating the filing of the lawsuit.

After the filing of this lawsuit, the Plaintiff filed it's first motion for Partial Summary Judgement on March 11, 2014. After extensive briefing, oral arguments and a Motion to Reconsider, the court entered its order for Partial Summary Judgement on July 28, 2014 and proceeded to deny the Motion to Reconsider. Defendant acknowledges that there were three liens recorded against the subject property and then proceeded to release those liens against the property several years after filing the lawsuit.

By the time the Defendant elected to remove the two liens the Plaintiff had already invested approximately $65,000 in attorneys fees and costs. The claim now remaining is Slander of Title and the damages beings sought in the Slander of Title claim are attorney fees and costs. There has been no meaningful discussion in connection with this claim. The claim has now swelled with costs and attorney fees to the approximate amount of $100,000. The billing rate of Plaintiff's counsel in this claim has been at $400 per hour which is substantially below market value given the degree of experience and the years of practice by counsel. A review of the file will provide an explanation and justification of that claim which does not include the petition before the Supreme Court pursued by Defendant, and discovery.

C. NICHOLAS PEREOS, ESQ.
1610 MEADOW WOOD LANE
RENO, NV 89502

B. **ARGUMENT**

The facts will demonstrate that Pereos had no direct verbal communications with Waste Management. The extent of its communications with Waste Management in these proceedings were letters acting in a representative capacity for the Plaintiff. At no time did Pereos have any verbal communications with Waste Management. The evidence will reflect that Teri Morrison, named witness working for the Plaintiff for Pereos for 15+ years, communicated with Waste Management. Teri Morrison notified Waste Management of vacancies and occupancies. She created the accounts with Waste Management in connection with this property and other properties held by the two Trusts. Pereos is the Grantor of the 1980 Pereos Trust and the 2004 Pereos Trust which Trusts are property holding trusts. The 2004 Pereos Trust own the Plaintiff. Teri Morrison exclusively deals with Waste Management when there are issues regarding servicing the accounts of this property and any other property. She prepares the rent rolls which identifies when a property is occupied and vacant. She files and posts the paid bills on the property to include Waste Management. She prepares a check register for the checks showing payment of the bills. Albeit, Pereos writes the checks for the payment of the bills and confirms payment but they are then processed by Teri Morrison. She notifies Waste Management of any disputes on payment of the bill and resolves the issues regarding those disputes. Pereos does not perform any of these functions. Furthermore, Pereos has no financial interest in the Plaintiff. Pereos is not a party to this litigation. Pereos has no verbal communication with Waste Management on this property or any other properties. In other words, Pereos does not open or close accounts with Waste Management. Pereos does not notify Waste Management of vacancies or occupancies. Pereos is not a property manager. Pereos has no verbal interactive experiences with Waste Management. Pereos never created accounts with Waste Management. Pereos has never resolve a dispute with Waste Management other than letter writing. The one with the experience with Waste Management is Teri Morrison.

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This case involves the justification, if any, in connection with the recording of the liens. It is not a comparative negligence case. It has nothing to do with the personal actions of Pereos in connection with representing his client or performing any functions with other properties. Any attempt to go into that territory by Defense counsel would to be to create a smoke screen to confuse the jury regarding the issues to be decided in this case.

Pereos has lived with this case from its beginning. He knows the theories of the lawsuit. He has pursued discovery and depositions. He has the same wealth of knowledge regarding this case as does the Trial Judge who has also been living with this case from its inception. That factor coupled with the extensive commercial litigation experience of Plaintiff's attorney (admitted to the bars of Colorado, Nevada and California starting in 1970 and practicing as a real estate and commercial litigation lawyer since 1975 after departure from the District Attorney's office and personal injury defense firms) coupled with his knowledge of the case can not be duplicated by attorney Douglas Fermoile who will be assisting in the presentation of the case once Plaintiff's attorney testifies as to attorney fees and costs.

Although Plaintiff's counsel recognizes that there are many abuses by trial lawyers in our legal system, the mature trial lawyers recognize that the law has a therapeutic effect and this case is typical exemplification of that application! Some of us older lawyers remember the Pinto car manufactured by Ford and the Corvair car manufactured by Chevrolet. Both of those cars are no longer on the market as they were deemed to be "death traps" by their design and handling. They were removed from the market by the concerted activities of trial lawyers and a consumer advocate known as Ralph Nader. Pinto cars were exploding upon rear impact by reason of the placement of the gas tank in the back of the car and the Corvairs were highly unstable on the road at high speed. Another recent exemplification of the therapeutic effect of lawsuits is the metal shrapnel upon exploding air bags manufactured by Takata after accidents resulting in the massive

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recall that has now occurred by reason of the same. In this case, this matter was pursued by reason of the willingness of Plaintiff's attorney to "call out" Waste Management in its practices. As a result, Waste Management has changed their franchise agreement with the City of Reno and does not pursue liens. Now the time has come to determine if Waste Management is to be held accountable for its actions and it now seeks through this motion to excuse its wrongful activity which has been demonstrated by the voluntary removable of the lien two years later.

The one dealing with Waste Management is Teri Morrison. She is the one that prepares the rent rolls for the month for rent being collected. She is the one who has knowledge the accuracy of the vacancy schedule. She is the one that contacts Waste Management regarding garbage services when the property is occupied or rented. She is the one that posts checks for payments to Waste Management. She is the one who speaks to the representative of Waste Management. In fact, there is no evidence that Plaintiff's counsel spoke to anyone from Waste Management.

Teri Morrison will testify regarding the letters that were prepared and mailed to Waste Management after signed by Plaintiff's counsel. Plaintiff acknowledges that he must testify if the jury is to decide damages, to wit, the attorneys fees incurred in the Slander of Title action as opposed to the Judge deciding the quantitative amount of those attorneys fees although Plaintiff is prepared to submit the matter to the Trial Judge.

The trial will proceed in the following manner: Voire Dire, Opening Statements, Plaintiff's direct case, Defendant's direct case, Closing Arguments, Deliberation. The testimony of the Plaintiff's attorney will be in their direct case. Thereinafter, Douglas Fermoile will act as lead counsel and argue the case in closing. By then, he would have been educated to the same degree as the Trial Judge on the case. Should Plaintiff's counsel be removed to all aspects and all stages of this case, the legal fees will swell tremendously given the need to educate attorney Douglas Fermoile as to the theme of the case coupled with the deposition testimony of the witnesses and its legal theories. The

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only justification for the removal of Plaintiff's counsel is to create another roadblock to Plaintiff in the pursuit of this case and to punish Plaintiff. In other words, this case will flow smoothly without the removal of Plaintiff's counsel given the role of attorney Fermoile. In connection with the claim of attorneys fees this Court can oversee the quantitative amount of the attorneys fees as being reasonable even with the jury to determine the right to recover attorneys fees. In fact, Plaintiff's counsel is prepared to waive the jury to avoid any issues of confusion and/or submit the issue of attorney fees to the Court for a quantified determination.

The vacancy schedule delivered to Defense counsel is a calendar summation of the rent rolls which is its source material. Similarly, Teri Morrison will testify concerning the payments to Waste Management. Once again, foundation comes from Teri Morrison and a Bank Representative in connection with the payments. It is not unusual for attorneys to prepare summations and compilations to ease understanding of information for the jury as long as a foundation is made by a witness. In connection with the Court procedures, Voire Dire is not advocacy it is designed to secure an impartial jury. The Opening Statement is not advocacy it is designed to alert the jury of the evidence to be introduced. The testimony of the witnesses in Plaintiff's Case in Chief presents the facts to the jury. Thereinafter, Douglas Fermoile will act as lead counsel advancing the case in Closing Arguments. Merely because Defendant alleges that Pereos is a "prime witness" does not create a basis to exclude Pereos as the attorney for the Plaintiff. As referenced in the case of *Dimartino v Eight Judicial District Court,* 119 Nev. 119, 66 P.3d 945 (2003), Defendant should not be allowed to disqualify Plaintiff's counsel simply by stating that they will examine him as a witness. In *Warrilow v Norrell,* 791 S.W.2d 515 (Tex. App. 1989) the Court observed that the disqualification of attorney sought to be called as a witness by the opposing party is subject to a more stringent standard because a litigant may call his or her opponent attorney as a trial tactic seeking to disqualify the attorney from the case. *Id.* at Page 521.

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Rule 3.7 of RPC derives from SCR 178. The rule provides that an attorney can act as a trial advocate in connection with testimony relating to the nature and value of legal services rendered in the case or should the disqualification of the lawyer render substantial hardship on the client. In other words, testimony regarding legal services does not prevent the attorney from acting as an advocate. Furthermore, if the disqualification of the lawyer results as substantial hardship to the client, it too does not act as a basis to disqualify the lawyer. Notwithstanding these two exceptions to Rule 3.7, Pereos engaged Douglas Fermoile so as to assist. In *Dimartino v Eighth Judicial District Court*, 119 Nev. 119, 66 P.3d 945 (2003) our Supreme Court observed that the potential for abuse is obvious. Interpreting SCR 178 to permit total disqualification would invite the rules misuse as a tactical ploy. *Id.* at Page 121. Pereos has no financial interest in Plaintiff's corporation. In discovery, Pereos has acknowledged that the only claim for damages arises from this lawsuit is the attorney fees. In other words, there is no claim for damages by the Plaintiff other than to reimburse attorney fees which clearly falls within the purpose of Rule 3.7 exception.

In *Estate of Bowlds v. American Cancer Society*, 102 P.3d 593 (2004), the court noted that an attorney may continue to act as an advocate in a lawsuit even though he is going to testify regarding his or her fees.

Other Nevada cases, while not addressing conflicts under RPC 3.7 or former SCR 178, provide guidance concerning the disqualification of counsel as trial advocates for their clients. In *Brown v. Eighth Judicial Dist. Court ex. rel. Cty. Of Clark*, 116 Nev. 1200, 14 P.3d 1266 1269-70 (2000), a case discussing the disqualification of counsel under former SCR 160, the court stated:

> District courts are responsible for controlling the conduct of attorneys practicing before them, and have broad discretion in determining whether disqualification is required in a particular case. *See Robbins v. Gillock*, 109 Nev. 1015 1018, 862 P.2d 1195, 1197 (1993); *Cronin v. District Court*, 105 Nev. 635, 640, 781 P.2d 1150, 1153 (1989). Courts deciding attorney disqualification motions are faced with the delicate and sometimes difficult task of balancing competing interests: the individual right to be represented by counsel of one's choice, ... parties

> should not be allowed to misuse motions for disqualification as instruments of harassment or delay. *See Flo-Con Systems, Inc. v. Servsteel, Inc.*, 759 F.Supp. 456, 458 (N.D.Ind.1990).
>
> When considering whether to disqualify counsel, the district court must balance the prejudices that will inure to the parties as a result of its decision. *Cronin*, 105 Nev. at 640, 781 P.2d at 1153. To prevail on a motion to disqualify opposing counsel, the moving party must first establish "at least a reasonable possibility that some specifically identifiable impropriety did in fact occur," and then must also establish that "the likelihood of public suspicion or obloquy outweighs the social interests which will be served by a lawyer's continued participation in a particular case." *Id.* at 641, 781 P.2d at 1153 (quoting *Shelton v. Hess*, 599 F.Supp. 905, 909 (S.D.Tex.1984)).

It is interesting to observe the balancing test suggested hereinabove. Defense counsel must show a reasonable possibility that some specifically identifiable impropriety has occurred! This concept was reinforced in the case of *Hernandez v Guigliemo*, 796 F.Supp.2d 1285 (D. Nev. 2011) wherein the Court observed that Defense counsel bears the burden of establishing an ethical violation or other factual predicate upon which the motion depends. Disqualification is a drastic measure which Court should hesitate when posed except when absolutely necessary!

Similarly, in *Robbins v. Gillock*, 109 Nev. 1015, 1018, 862 P.2d 1195, 1197 (1993), addressing SCR 159, the court held:

> The burden of proving whether [the rule applies] falls on the party moving for disqualification and that party must have evidence to buttress the claim that a conflict exists. Commonwealth Ins. Co. v. Graphix Hot Line, Inc., 808 F.Supp. 1200, 1204 (E.D.Pa.1992); Satellite Fin. Planning v. 1st Nat. Bk. Wilmington, 652 F.Supp. 1281, 1283 [109 Nev. 1018] (D.Del.1987).

Other jurisdictions also set strong limitations on the disqualification of counsel. In *Nuri v. PRC*, Inc., 5 F.Supp. 2d 1299, 1303-4 (D. Ala. 1998) the court examined case law from multiple jurisdictions:

> Disqualification is always a drastic measure, which courts should hesitate to impose except when absolutely necessary. *See, e.g., Owen v. Wangerin*, 985 F.2d 312, 317 (7th Cir.1993); *Metrahealth Ins. Co. v. Anclote Psychiatric Hosp.*, 961 F. Supp. 1580, 1582 (M.D.Fla.1997) ("The disqualification of one's chosen counsel is an extraordinary measure that

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should be resorted to sparingly."). Because of the impact a motion to disqualify has on the party losing her counsel, the moving party is held to a high standard of establishing the basis of the motion, and the need for disqualification. *See, e.g., Plant Genetic Sys.*, 933 F. Supp. at 517 ("Disqualification is a serious matter which cannot be based on imagined scenarios of conflict, and the moving party has a high standard of proof to meet in order to prove that counsel should be disqualified."); *English Feedlot, Inc. v. Norden Laboratories, Inc.*, 833 F. Supp. 1498, 1506 (D.Colo.1993) ("The moving party has the burden of showing sufficient grounds for disqualification.... Specific facts must be alleged and `counsel cannot be disqualified on the basis of speculation or conjecture....'"); *Tessier*, 731 F. Supp. at 729 (E.D.Va.1990) ("The Court is also aware that the disqualification of a party's chosen counsel is a serious matter which cannot be based on imagined scenarios of conflict."). Other means of addressing a violation short of disqualification are available to the court like exclusion of ill-gotten evidence and should be used when appropriate. *See, e.g., University Patents, Inc. v. Kligman*, 737 F. Supp. 325, 329 (E.D.Pa.1990) ("the court is satisfied that the circumstances warrant precluding the defendants from introducing any information obtained through Mr. Morrison's *ex parte* contacts with persons whose statements could bind the University.").

Finally, because a motion for disqualification is such a "potent weapon" and "can be misused as a technique of harassment," the court must exercise extreme caution in considering it to be sure it is not being used to harass the attorney sought to be disqualified, or the party he represents. *See, e.g., Kitchen v. Aristech Chem.*, 769 F. Supp. 254, 256-57 (S.D.Ohio 1991); *see also Developments in the Law: Conflict of Interest in the Legal Profession*, 94 Harv.L.Rev. 1244, 1285 (1981) ("Lawyers have discovered that disqualifying counsel is a successful trial strategy, capable of creating delay, harassment, additional expense, and perhaps even resulting in the withdrawal of a dangerously competent counsel.").

In *Zurich Ins. Co. v. Knotts*, 52 S.W.3d. 555,559-60 (S.Ct. Kentucky 2001), a case addressing the disqualification of counsel under of RPC 3.7, the court ruled:

> Disqualification is a drastic measure which courts should be hesitant to impose except when absolutely necessary. *See University of Louisville v. Shake*, Ky., 5 S.W.3d 107 (1999). Disqualification separates a party from the counsel of its choice with immediate and measurable effect. Here, attorney Franklin has lived through the previous litigation from its inception and has in his memory, or at his fingertips, knowledge of the case no one else could duplicate. Moreover, regardless of the level of competency of a successor attorney, the degree of confidence and trust that has developed between the Knottses and Franklin cannot be replaced.

In *Warrilow v Norrell*, 791 S.W.2d 515 (Tex. App. 1989), the Court addressed the issue of disqualification of counsel and observed that a skilled cross-examining attorney

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could sufficiently test the credibility of any lawyer who is a witness observing that a lawyer that is a witness is readily impeachable because of his interest in the outcome of the litigation. As stated above, Pereos has no financial interest in Plaintiff's corporation. The Warrilow Court noted that disqualification of an attorney sought to be called as a witness for the opposing party is subject to a more stringent standard because "a litigant may call his or her opponent's attorney as a trial tactic, seeking to disqualify the attorney from the case." *Id.* at 521, n.7[3] (citing *Jones v. City of Chicago*, supra); see also *General Mill Supply Co. v. SCA Services, Inc.*, 697 F.2d 704 (6th Cir.1982). Similarly, in *Gilbert McClure Enterprises v. Burnett*,735 S.W.2d 309 (Tex.App.1987), the Texas Court of Appeals again held that the mere announcement by an adversary of his intention to call opposing counsel as a witness is insufficient to warrant counsel's disqualification. "There must be a genuine need for the attorney's testimony, which should be material to the movant's case as well as prejudicial to the interests of the attorney's client . . . ." *Id.* at 311. (internal citations omitted); see also *Sargent County Bank v. Wentworth*, 500 N.W.2d 862 (N.D.1993); *Cottonwood Estates, Inc. v. Paradise Builders, Inc.*, 128 Ariz. 99, 624 P.2d 296 (1981)

Notwithstanding, disqualification is a drastic measure which courts should be hesitant to impose except when absolutely necessary. See *University of Louisville v. Shake*, Ky., 5 S.W.3d 107 (1999). Disqualification separates a party from the counsel of its choice with immediate and measurable effect. Here, attorney Franklin has lived through the previous litigation from its inception and has in his memory, or at his fingertips, knowledge of the case no one else could duplicate. Moreover, regardless of the level of competency of a successor attorney, the degree of confidence and trust that has developed between the Knottses and Franklin cannot be replaced. Warrilow (*Id.*)

However, the showing of prejudice needed to disqualify opposing counsel must be more stringent than when the attorney is testifying on behalf of his own client, because adverse parties may attempt to call opposing lawyers as witnesses simply to

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disqualify them. Consequently, Zurich has failed to demonstrate that: (a) Franklin's testimony is important to its proof at trial; (b) there is any probability that Franklin's testimony will conflict with that of other witnesses; and (c) the information contained in Franklin's affidavit is unattainable from other sources. It is Zurich who seeks to call him as a witness. While such is permissible, it does not, and should not, result in Franklin's disqualification. Warrilow (*Id.*)

This analysis clearly applies to the present case. Pereos has dealt with this case "from its inception and has in his memory, or at his fingertips, knowledge of the case no one else could duplicate." Further, Defendant is unquestionably attempting to use RPC 3.7 "as a tactical weapon for expense, delay [and] inconvenience. . ." by trying to bar Pereos from acting as trial advocate this close to trial. Defendant's Motion is based solely on its claim that "Pereos is the Plaintiff's primary witness in this action." (Defendant's Motion in Limine p.3, line 2.) This claim is false. Plaintiff's main witness will be its employee, Teri Morrison, who was the person who communicated with Defendant, will testify concerning her contacts with Defendant, the rent rolls and vacancy schedule for the property in question, and the cancelled checks showing all payments made to Defendant during the dates cited by Defendant as the lien periods. Pereos, who never spoke to any employee or representative of Defendant.

In truth, Pereos is going out of his way to avoid confusing a jury or causing prejudice to Defendant's case by having attorney Fermoile advocate the case in the Closing Arguments after Pereos's testimony. RPC 3.7 does not require either disqualification or substitution of counsel after counsel has testified concerning his or her fees in a case. To require Pereos to entirely withdraw as counsel at this point in the case would clearly work a substantial hardship on Plaintiff by requiring the expenditure of even more attorney's fees and costs going into trial. In its Motion, Defendant does not even attempt to show a balance of interests between the parties or identify any "confusion and prejudice" that would result from Pereos acting as trial advocate in this

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case. DiMartino, supra. Accordingly, Defendant has failed to meet the burden of proof required to disqualify Pereos from acting as trial advocate under RPC 3.7.

AFFIRMATION

The undersigned affirms that the foregoing pleading does not contain a social security number.

DATED this 13 day of September, 2017 C. NICHOLAS PEREOS, LTD.

By: _____
C. NICHOLAS PEREOS, ESQ.
1610 MEADOW WOOD LANE,STE.202
RENO, NV 89502
ATTORNEY FOR PLAINTIFF

CERTIFICATE OF SERVICE

PURSUANT TO NEVADA RULES OF CIVIL PROCEDURE 5 (b), I certify that I am an employee of C. NICHOLAS PEREOS, LTD., and that on the date listed below, I caused to be served a true copy of the foregoing pleading on all parties to this action by the methods indicated below:

I deposited for mailing at Reno, Nevada, a true copy of the foregoing document addressed to:

Douglas K. Fermoile, Esq.
427 Ridge Street, Suite B
Reno, NV 89501
Attorney for West Taylor Street, LLC

I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which served the following parties electronically:

ROBISON, SIMONS, SHARP & BRUST
Mark G. Simons, Esq.
Attorneys for Waste Management and Karen Gonzalez

DATED: 9/13/17

Iris M. Norton

SCHEDULE OF EXHIBITS

Exhibit "1" ..... Sample Rent Roll

C. NICHOLAS PEREOS, ESQ.
1610 MEADOW WOOD LANE
RENO, NV 89502

Exhibit 1

FILED
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2017-09-13 01:43:33 PM
Jacqueline Bryant
Clerk of the Court
Transaction # 6297499 : pmsewell

Exhibit 1

BROWNSTONE RENT COLLECTION ROLL FOR JANUARY 2007

345 W. Taylor	VACANT	2 BR					
347 W. Taylor	Jeremy Hampton Cell 813-4323	2BR	Current Lease 9-15-06	$650.00 $650.00			Currently pays rent on the 15th of the month.

BROWNSTONE RENT COLLECTION ROLL FOR FEBRUARY 2007

345 W. Taylor	VACANT	2 BR					
347 W. Taylor	Jeremy Hampton Cell 813-4323	2BR	Current Lease 9-15-06	$650.00 $650.00			Currently pays rent on the 15th of the month.

BROWNSTONE RENT COLLECTION ROLL FOR MARCH 2007

345 W. Taylor	VACANT	2 BR					
347 W. Taylor	Jeremy Hampton Cell 813-4323	2BR	Current Lease 9-15-06	$650.00 $650.00	$1150.00 3-15-07	CK# 2112	Currently pays rent on the 15th of the month.

WTS0279

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Jacqueline Bryant
Clerk of the Court
Transaction # 6297499 : pmsewell

CODE: 1030
C. NICHOLAS PEREOS, ESQ.
Nevada Bar #0000013
1610 MEADOW WOOD LANE, STE. 202
RENO, NV 89502
(775) 329-0678

IN THE SECOND JUDICIAL DISTRICT COURT OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

* * * * *

WEST TAYLOR STREET, LLC,
a limited liability company,

Plaintiff,

vs.

WASTE MANAGEMENT OF NEVADA, INC., KAREN GONZALEZ, and DOES 1 THROUGH 10,

Defendants.
_____/

Case No. CV12 02995
Dept. No. 4

AFFIDAVIT OF TERI MORRISON

STATE OF NEVADA)
) ss.
COUNTY OF WASHOE)

Teri Morrison, does hereby swear under penalty of perjury that the assertions of this Affidavit are true.

1. Affiant prepared rent rolls for the various properties of the Trusts to include the property is the subject of this lawsuit. It identifies the tenant, the amount of rent, the lease date and the rent collection. It identifies if the property is vacant. The rent roll is prepared on a monthly basis.

2. Affiant is the one that verbally interacted with Waste Management in connection with this dispute.

3. Affiant prepared letters for the signature of C. Nicholas Pereos.

4. Affiant has reviewed the vacancy schedule to confirm its accuracy in connection with the rent rolls. The vacancy schedules is a yearly summarization of the monthly rent rolls.

5. Affiant prepares the check register from the checkbook.

6. Affiant files the bills.

7. Affiant has knowledge concerning the vacancy and occupancy of the subject property and is the one who notifies Waste Management of the same.

8. Affiant created the accounts with Waste Management.

9. Affiant services the account with Waste Management when property is vacant or occupied.

10. Affiant notifies Waste Management in disputes with bills.

11. Affiant worked on this account at times relevant.

AFFIRMATION

The undersigned does hereby affirm that the preceding document does not contain the social security number of any person.

DATED this 13 day of September, 2017.

TERI MORRISON

SUBSCRIBED & SWORN to before me this 13 day of September, 2017.

Notary Public

C. NICHOLAS PEREOS
Notary Public, State of Nevada
Appointment No. 92-1077-2
My Appt. Expires May 13, 2018

C. NICHOLAS PEREOS, ESQ.
1610 MEADOW WOOD LANE
RENO, NV 89502

CERTIFICATE OF SERVICE

PURSUANT TO NEVADA RULES OF CIVIL PROCEDURE 5 (b), I certify that I am an employee of C. NICHOLAS PEREOS, LTD., and that on the date listed below, I caused to be served a true copy of the foregoing pleading on all parties to this action by the methods indicated below:

I deposited for mailing at Reno, Nevada, a true copy of the foregoing document addressed to:

Douglas K. Fermoile, Esq.
427 Ridge Street, Suite B
Reno, NV 89501
Attorney for West Taylor Street, LLC

I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which served the following parties electronically:

ROBISON, SIMONS, SHARP & BRUST
Mark G. Simons, Esq.
Attorneys for Waste Management and Karen Gonzalez

DATED this 13th day of September, 2017

Iris M. Norton

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Mark G. Simons, Esq. (SBN 5132)
Therese M. Shanks, Esq. (SBN 12890)
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and tshanks@rssblaw.com

Attorneys for Waste Management of Nevada, Inc.

IN THE SECOND JUDICIAL DISTRICT FOR THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

WEST TAYLOR STREET, LLC, a limited liability company,

Plaintiff,

v.

WASTE MANAGEMENT OF NEVADA, INC., KAREN GONZALEZ, and DOES 1 THROUGH 10,

Defendants.

/

CASE NO.: CV12-02995

DEPT. NO.: 4

WASTE MANAGEMENT OF NEVADA, INC.'S REPLY IN SUPPORT OF MOTION IN LIMINE #1 RE: EXCLUSION OF C. NICHOLAS PEREOS AS TRIAL ADVOCATE

Waste Management of Nevada, Inc. ("WM"), by and through its attorney Mark G. Simons of Robison, Simons, Sharp & Brust replies in support of its motion in limine seeking to exclude Plaintiffs' counsel C. Nicholas Pereos ("Pereos") from acting as trial advocate in this action as follows.

I. PEREOS IS A NECESSARY WITNESS.

Plaintiff West Taylor Street, LLC ("WTS") confuses the relevant test as to whether an attorney should be removed as trial advocate under NRPC 3.7(a). The test is not whether the attorney is the "prime" or "main" witness, but whether the attorney is a "necessary witness." *See* NRPC 3.7(a) ("A lawyer shall not act as advocate at a trial in

A Yes.

Exhibit 3, deposition excerpt of Willis Powell, pp. 16:14-17:4.[2]

Accordingly, the testimony of the relevant witnesses dictate that Pereos is obviously a necessary witness. As a critical and necessary witness, Pereos is prohibited from representing WTS as at trial as counsel.

II. PEREOS IS ONLY ALLOWED TO PARTICIPATE IN PRE-TRIAL PROCEEDINGS.

WTS also confuses what "advocacy" means. According to WTS, the only "advocacy" that occurs during trial is in the closing argument. Opp., p. 6. As this Court is well aware, advocacy begins with voir dire. WTS also ignores the Nevada Supreme Court's ruling in DiMartino v. Eighth Jud. Dist. Ct., 119 Nev. 119, 122, 66 P.3d 945, 947 (2003) wherein the Court held that an attorney subject to trial advocacy preclusion begins at the end of pre-trial proceedings. Accordingly, the Nevada Supreme Court has marked the **conclusion of pre-trial proceedings** as the bright-line rule that triggers an attorneys' prohibition to act as trial counsel. Id. Upon conclusion of pre-trial proceedings, Mr. Pereos is prohibited from attending trial in an advocacy capacity. As the Court is aware, voir dire, opening statements, presentation of evidence, and closing arguments all occur at trial and are not pre-trial proceedings.

WTS also ignores controlling law stated in DiMartino. In DiMartino, the Court explained that the rule is in place to avoid confusing a jury and creating prejudice if an attorney "appears before a jury as an advocate" as well "as a witness." Id. ("**the rule is meant to eliminate any confusion and prejudice that could result if an attorney appears before a jury as an advocate and as a witness.**"). Accordingly, the rule is clear that appearing in front of a jury as an advocate, such as the commencement of voir dire, is trial advocacy and is prohibited by an attorney who is a necessary witness.

NRPC 3.7(a) is to ensure that a "lawyer may not appear in any situation requiring the lawyer to argue his own veracity to a court or other body." DiMartino v. Eighth Jud.

[2] Exh. 2, at ¶5.

Robison, Simons, Sharp & Brust
71 Washington St.
Reno, NV 89503
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Dist. Ct., 119 Nev. 119, 122, 66 P.3d 945, 947 (2003). As the ABA Model Rules explain:

> The opposing party has proper objection where the combination of roles may prejudice that party's right in the litigation. A witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on evidence given by others. It may not be clear whether a statement by an advocate-witness should be taken as proof or as an analysis of proof.

Model Rule 3.7(a), Comment 2. Because Pereos must testify regarding key elements of WTS's case, he is directly in a position which will require him to "argue his own veracity." Accordingly, he is properly excluded from advocating at trial under NRPC 3.7(a).[3]

III. PLAINTIFF WILL NOT SUFFER ANY SUBSTANTIAL HARDSHIP.

WTS has not identified any substantial hardship sufficient to prevent the exclusion of Pereos from testifying at trial. WTS admits that it has already hired separate counsel, Douglas Fermoile, Esq., for trial. Opp., p. 4. According to WTS, Mr. Fermoile will only provide the closing argument; thus, WTS will be allegedly prejudiced by paying attorney fees to bring its trial counsel up to speed on WTS's case if Pereos is excluded from acting as an advocate. Id. at p.5. Basically, WTS is arguing that it should not be required to pay for trial counsel to become competent, because Mr. Fermoile will learn the case as the trial progresses. Id. However, all other litigants must pay for their counsel to prepare for trial. Mr. Pereos has elected to allegedly represent his own company. WM should not be prejudiced because Mr. Pereos has elected to represent his own company.

Instead, WTS appears to argue that it should not be required to actually ***pay*** for an attorney since Pereos is representing WTS in a pseudo-pro-se capacity. Mr. Pereos's pseudo-pro-se is also directly relevant to the issues in this case because WTS is purporting to seek recovery of attorney fees which it has not paid to Pereos for his representation of it. Opp., p. 5.

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[3] While WTS spends a considerable amount of time arguing the standards for disqualification of Pereos, WM is not trying to disqualify Pereos. He may remain as counsel however he is precluded from acting as trial advocate during trial under NRPC 3.7(a).

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71 Washington St.
Reno, NV 89503
(775) 329-3151

The bottom line is this Court must exclude Pereos from acting as advocate at the trial of this matter. He is not exempt from the application of NRPC 3.7(a) and the Nevada Supreme Court's ruling in DiMartino v. Eighth Jud. Dist. Ct.. Such prohibition is mandatory and constitutes plain error if Mr. Pereos is allowed to act as trial advocate at trial. Matter of Estate of Waters, 647 A.2d 1091, 1098 (Del. 1994) ("It was plain error to permit Murphy to undermine the integrity of the adversary process by participating as a trial attorney in a proceeding in which he was a central witness on the contested issues being adjudicated.").

IV. CONCLUSION.

For the foregoing reasons, WM respectfully requests that this Court grant its motion in limine No. 1 to exclude Pereos from acting as an advocate for WTS at trial.

AFFIRMATION: The undersigned does hereby affirm that this document does not contain the Social Security Number of any person.

DATED this 19th day of September, 2017.

ROBISON, SIMONS, SHARP & BRUST
A Professional Corporation
71 Washington Street
Reno, Nevada 89503

By: _____
MARK G. SIMONS, ESQ.
THERESE M. SHANKS, ESQ.
Attorneys for Waste Management of Nevada, Inc.

Robison, Simons, Sharp & Brust
71 Washington St.
Reno, NV 89503
(775) 329-3151

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of ROBISON, SIMONS, SHARP & BRUST, and that on this date I caused to be served a true copy of the **WASTE MANAGEMENT OF NEVADA, INC.'S REPLY IN SUPPORT OF MOTION IN LIMINE #1 RE: EXCLUSION OF C. NICHOLAS PEREOS AS TRIAL ADVOCATE** on all parties to this action by the method(s) indicated below:

☐ by placing an original or true copy thereof in a sealed envelope, with sufficient postage affixed thereto, in the United States mail at Reno, Nevada, addressed to:

C. Nicholas Pereos, Esq.
1610 Meadow Wood Lane, Ste. 202
Reno, NV 89502
Attorney for West Taylor Street, LLC

☒ I hereby certify that on the date below, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which served the following parties electronically:

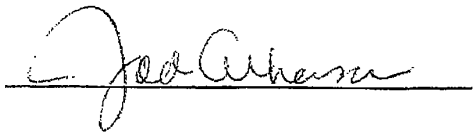
C. Nicholas Pereos, Esq.

☐ by personal delivery/hand delivery addressed to:

☐ by facsimile (fax) and/or electronic mail addressed to:

☐ by Federal Express/UPS or other overnight delivery addressed to:

DATED: This 19th day of September, 2017.



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Clerk of the Court
Transaction # 6307290 : swilliam

EXHIBIT 1

EXHIBIT 1

Case No. CV12-02995

Dept. No. 4

SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

--o0o--

WEST TAYLOR STREET, LLC, a limited liability company,

Plaintiff,

vs.

WASTE MANAGEMENT OF NEVADA, INC., KAREN GONZALEZ, and DOES 1 through 10,

Defendants.

==========

DEPOSITION OF TERI MORRISON

Thursday, July 27, 2017

Reno, Nevada

Reported by: LORI URMSTON, CCR #51, RPR, RMR
CALIF. CCR #3217

Q Once you obtain the application, you call and you verify employment, you speak to a prior landlord, then you go in to Mr. Pereos and say, "I think this is -- we should rent to this tenant"?

A No. Then I do a memo of what I was told as far as verifying the employment and the previous landlord and I forward it to Mr. Pereos and he makes the final decision.

Q Okay. So can we call that like the memo of tenant information?

A For the application.

Q Memo of tenant information from application.

A Yes.

Q Okay. Then you go in with the memo, "Here it is," he reads it, you talk about it, and then he says yes or no?

A Not always. If there's multiple applications, I get them to him as I can and then he makes a decision. We don't discuss his decision of who he's going to choose.

Q All right. Then say the -- we're jumping to the signature of the lease.

A Okay.

Q The lease is signed by Nick Pereos. Then what do you do?

Q What I'm trying to get at is from your perspective and business practice, signing of the lease is the triggering event for allowing the tenant access to use the rental property?

A Yes.

Q Do you call them leases or rental agreements or what is the name that you guys use for --

A I refer to them as the lease.

Q So let's just use the term "lease" so we're using the same terminology today.

A Okay.

Q All right. So the lease has to be signed by the tenant and by Nick Pereos before the tenant can access the property?

A Yes.

Q And until a lease is signed is it fair to say the tenant has no right to start ordering utility services for the property?

A I tell them ahead of time that they -- I suggest to them that they should get the power put in their name.

Q Okay. And is that at or about the time the lease is signed?

A Yes.

Q So I just want to walk this process through,

A It would be 300 West Pueblo.
Q What is 300 West Pueblo?
A Brownstone Apartments.
Q Okay. And how many units does Brownstone Apartments have?
A Twenty.
Q Do you do the property management for the Brownstone Apartments?
A Yes, assistant.
Q Who are you the assistant of?
A Mr. Pereos.
Q Okay. So we've got Brownstone Apartments with 20 units, we've got Carville Drive Apartments with 42 units. And you're the assistant property manager for both of those apartment complexes?
A Yes.
Q And as part of your function we went through what you do for the leasing of the units and getting Mr. Pereos to okay each tenant. Is that for both apartments?
A Yes.
Q Okay. Now, 300 West Pueblo, does that pay for service from Waste Management?
A With a big yard dumpster, yes.
Q Okay. Did you get approval from Waste

Management that 1425 Watt Street could dump into the dumpster to satisfy its obligations under the City's franchise agreement?

A I didn't, no. It just has always been like that since I started.

Q So it's always been you just -- when you lease 1425 Watt Street, you just tell them to throw their trash away in the dumpster for the West Pueblo Brownstone Apartments?

A Yes, because they're next door.

Q Is 1425 Watt Street a duplex or a single-family residence or what, do you know?

A Duplex.

Q And so you tell both of those units to dump over in that other dumpster?

A Yes. I tell them where the big dumpster is, yes.

Q 1445 Watt Street, what kind of unit is that?

A It's a single small home.

Q Where does Watt Street -- does 1445 Watt Street have Waste Management service?

A Through the same dumpster.

Q Okay. So this one goes to the dumpster too?

A Yes.

Q Has it always been that way?

Q You don't have anything to do with 3775 Jagged Rock Road?

A No.

Q So is it fair to say because it's not an income-generating property it doesn't fall into your property management responsibilities?

A Yes.

Q Okay. Any other properties that you manage that we haven't covered yet?

A No.

Q Okay. Do the Carville Drive Apartments have Waste Management service for that location?

A They have a big yard dumpster, yes.

Q Do you know what size of dumpster?

A I believe there's two. One is a 4-yard and one is a 6-yard.

Q Have they always had that since -- those two dumpsters since you've been there?

A No. They've gone bigger or smaller depending on tenant occupancy.

Q So have you been responsible for increasing or decreasing the size of dumpsters that you need at that location?

A No. If we get more tenants in there, Mr. Pereos lets me know to order a bigger one or a

smaller one.

Q Well, that's what I'm getting at. You're the one who makes the call to place an order for either an increase in service or a decrease in service?

A Yes.

Q And currently it's a 4-yard plus a 6-yard?

A Yes.

Q Going back to the Brownstone Apartments, you said that there's a yard dumpster. Do you know the size?

A At which property?

Q The Brownstone Apartments.

A I'm not sure if it's a 4- or 6-yard.

Q So currently it's either a 4 or a 6 to your knowledge?

A To my knowledge.

Q The same process, if the tenancy increases, you ask for a bigger dumpster, if the tenancy decreases, you say, "Can we have a smaller dumpster"?

A Yes.

Q And you've been handling both Brownstone Apartments and Carville Drive Apartments since 2002 when you started?

A Yes.

Q So is it fair to say since 2002 you've known

how to contact Waste Management to discuss service level requirements?

A I don't make the decision whether we increase or decrease. I just make the call to either increase or decrease.

Q But you knew how to do it since 2002, you pick up the phone, you dial a specific number and you talk to a customer representative to discuss your service needs?

A Yes.

Q Do you also -- for any of these properties have you prepared correspondence for them?

A I've done letters.

Q Why do you send letters? What would be included in the letter?

A I do what Mr. Pereos dictates usually or if I make a phone call now I am following it up with a letter.

Q Would you contact Waste Management by letter and sending it to the local office?

A Yes.

Q And you've been doing that since 2002 whenever the need arose?

A No. I just recently started following up with letters.

through, I'm going to have you look at Exhibit 21 and 22.

A Okay.

Q Mr. Pereos told me he prepared these. And I'm just -- did you do this work or did he do the work? I mean the manual inputting of the information.

A He did the work.

Q Let's go back to Exhibit 2. I'm going to take that one and give you Exhibit 2.

Do you also do any work for his law practice, Nick Pereos's law practice?

A No. Very little, copying maybe.

Q As I have an understanding, he's cut back on the practice of law over the years. Have you experienced that?

A Maybe fewer clients coming in.

Q Because you're paid from his law practice. Do you do any paralegal-type work?

A No.

Q Do you do any secretarial-type work?

A Answer phones.

Q Do you prepare letters for any of his cases?

A No.

Q Do you dictate? Is he a dictator?

A He dictates, yes.

check for 347 West Taylor, you write that into the rent roll manually, date of the check, the amount of the check, and then you give that check to Mr. Pereos?

A I don't open mail.

Q Well, then how --

A When they come in and pay, I accept their payment and put it into the rent roll and then forward it.

Q Do you receive any checks by mail?

A I don't open the mail. I'm sure there's some that come in, but I don't open them.

Q Then how do you get the check? Mr. Pereos opens the mail?

A Yes.

Q And if there's checks in the mail, then he gives them to you and says, "Put these in the rent roll"?

A He'll let me know one came in for a property, but I don't do anything with the checks, just that the property had paid.

Q Okay. But your job is to make sure on the rent rolls you write in every payment for every unit?

A No. I write in what I received and then forward.

Q Okay. So if checks come in that are mailed or,

A I don't pay the bills. I don't.
Q Well, look at your first letter. You write this letter, don't you?
A Um-hum.
Q That's a "yes"?
A Yes.
Q Now, you produced it, but there's no signature on this. Is it because you did not keep a copy of the original?
A Years ago I would just take copies once it was printed. I didn't wait until after it was signed.
Q Okay. And is it your practice to -- do you see the left bottom corner, the small initial "tm"?
A Um-hum.
Q And when you put the small initial "tm," that means you wrote the letter?
A Um-hum.
Q That's a "yes"?
A Yes.
Q So then you write up above -- and you're sending the letter to Waste Management - Reno Disposal, 100 Vassar Street? Do you know that?
A Yes.
Q How did you know to send a letter to that address?

you need to pay these amounts?

A I don't recall.

Q Do you ever recall ever seeing one of those?

A I don't open the mail.

Q Oh, okay. So all that communication would go directly to Nick Pereos, wouldn't it?

A The mail.

Q Yeah. And if it was sent by mail, your job is not to open the mail but to give it to Nick Pereos to open it and his job was to open it from your understanding?

A I don't open the mail.

Q Well, you know who does open the mail when it comes to the properties. You already said it. Your supervisor, Nick Pereos, right?

A The mail gets forwarded to him, yes.

Q Okay. Then we have on October 2nd, 2007, it says, "Collection notice returned by customer with a note stating that they had paid months ago." Do you see that?

A Yes.

Q Okay. Did you make that contact? Did you send in the collection notice return to Waste Management?

A No.

Q That would have been a Nick Pereos function?

to the file.

Q Okay. So do you know -- well, let's look down. You've got in caps, "PER CNP NO CONTAINER IS THERE THAT HAS BEEN PROVIDED BY THEM." Do you see that?

A Yes.

Q So at least we know you talked with Nick Pereos after you had a conversation with Liz in customer service, didn't you?

A And this date may have been after several conversations I put them all on the date all together on that date.

Q Okay. Answer the question, please. The question was you make a notation that you had a communication with Nick Pereos right after your call with Liz at Waste Management, right?

A I make a notation that Mr. Pereos said there's no container there provided by them.

Q So the only way you would have got that information is by talking to Nick Pereos, right?

A He would have told me, yes.

Q So then you again call Waste Management and talk to a guy named Paul about various rates, and you notate that, correct?

A Yes.

Q Then you call again and speak to an individual

CERTIFICATE OF WITNESS

I hereby certify under penalty of perjury that I have read the foregoing deposition, made the changes and corrections that I deem necessary, and approve the same as now true and correct.

Dated this _____ day of _____, 20_____.

_____

TERI MORRISON

STATE OF NEVADA)
) ss.
COUNTY OF WASHOE)

I, LORI URMSTON, a Certified Court Reporter in and for the State of Nevada, do hereby certify that on Thursday, the 27th day of July, 2017, at the hour of 2:01 p.m. of said day, at Robison, Belaustegui, Sharp & Low, 71 Washington Street, Reno, Nevada, I reported the deposition of TERI MORRISON in the matter entitled herein; that said witness was duly sworn by me; that before the proceedings' completion, the reading and signing of the deposition was requested by counsel for the respective parties; that the foregoing transcript, consisting of pages 1 through 114, is a true and correct transcript of the stenographic notes of testimony taken by me in the above-captioned matter to the best of my knowledge, skill and ability.

I further certify that I am not an attorney or counsel for any of the parties, nor a relative or employee of any attorney or any of the parties, nor financially interested in the action.

DATED: At Reno, Nevada, this 14th day of August, 2017.

Lori Urmston

LORI URMSTON, CCR #51

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2017-09-19 02:57:06 PM
Jacqueline Bryant
Clerk of the Court
Transaction # 6307290 : swilliam

EXHIBIT 2

EXHIBIT 2

AFFIDAVIT OF MARK G. SIMONS, ESQ. IN SUPPORT OF WASTE MANAGEMENT OF NEVADA, INC.'S REPLY IN SUPPORT OF MOTION IN LIMINE #1 RE: EXCLUSION OF C. NICHOLAS PEREOS AS TRIAL ADVOCATE

COUNTY OF WASHOE)
)ss.
STATE OF NEVADA)

I, MARK G. SIMONS, under penalty of perjury, hereby state:

1. I am a licensed attorney in state of Nevada, and am a shareholder at Robison, Simons, Sharp & Low.

2. I am counsel for defendants in this matter.

3. I submit this affidavit in support of Waste Management of Nevada, Inc.'s Reply in Support of Motion in Limine #1 re: Exclusion of C. Nicholas Pereos as Trial Advocate ("Reply"), to which this affidavit is attached as Exhibit 2.

4. Exhibit 1 to the Reply are true and correct excerpts of Terri Morrison's deposition transcript.

5. Exhibit 3 to the Reply are true and correct excerpts of Willis Powell's deposition transcript.

FURTHER AFFIANT SAYETH NAUGHT.

DATED this 19th day of September, 2017.

MARK G. SIMONS

Subscribed and sworn to before me
by Mark G. Simons this 19th day
of September 2017 at Reno, Nevada.

NOTARY PUBLIC

JODI ALHASAN
Notary Public - State of Nevada
Appointment Recorded in Washoe County
No: 14-13483-2 - Expires January 3, 2018

Robison, Simons,
Sharp & Brust
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Clerk of the Court
Transaction # 6307290 : swilliam

EXHIBIT 3

EXHIBIT 3

Case No. CV12-02995

Dept. No. 4

SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

--o0o--

WEST TAYLOR STREET, LLC, a limited liability company,

Plaintiff,

vs.

WASTE MANAGEMENT OF NEVADA, INC., KAREN GONZALEZ, and DOES 1 through 10,

Defendants.

==========

DEPOSITION OF WILLIS EDGAR POWELL

Thursday, July 27, 2017

Reno, Nevada

Reported by: LORI URMSTON, CCR #51, RPR, RMR
CALIF. CCR #3217

A I'm a trustee on a trust.
Q Right.
A The property was purchased by the Pereos trust. As a trustee I signed off on the purchase of the property.
Q That's your job is to run the assets of the trust, isn't it?
MR. PEREOS: Objection to the form of the question.
BY MR. SIMONS:
Q What do you understand your job is as the co-trustee of a trust?
A I am in an advisory capacity in the event that Mr. Pereos becomes incapacitated as a trustee.
Q Your understanding of being a trustee for the 1980 Pereos Trust is that Mr. Pereos runs the trust and you step in in the event he becomes incapacitated?
A Yes. And I'm kept in the loop from time to time on these types of issues.
Q So isn't it fair to say that you defer all aspects of the operation of the 1980 trust to Mr. Pereos?
A Yes.
Q Does he run the trust from your perspective?
A I would say he oversees it, yes.
Q Okay. Who makes the day-to-day decisions

regarding the affairs of the trust assets?
A Mr. Pereos.
Q Okay. Do you defer to Mr. Pereos to do that?
A Yes.
Q Stepping back, you and Mr. Pereos, I understand, have been good friends for a long period of time.
A Yes.
Q Thirty years or so?
A Absolutely.
Q How long -- so have you been the trustee of this trust since 1980 since that's the name of the trust?
A I do not believe so. I think that I probably got involved in the '90s. I would -- I'm pretty sure it was some time in the '90s.
Q And so in the 1990s from my perspective, because you're good friends, he said -- does he call you Bill or is it Willis?
A Bill.
Q Bill. "Bill, would you mind being a co-trustee with my daughter of my 1980 trust?"
A Reasonable.
Q And what was your understanding of your responsibilities when you accepted that request?

CERTIFICATE OF WITNESS

I hereby certify under penalty of perjury that I have read the foregoing deposition, made the changes and corrections that I deem necessary, and approve the same as now true and correct.

Dated this _____ day of _____, 20_____.

_____

WILLIS EDGAR POWELL

STATE OF NEVADA)
) ss.
COUNTY OF WASHOE)

I, LORI URMSTON, a Certified Court Reporter in and for the State of Nevada, do hereby certify that on Thursday, the 27th day of July, 2017, at the hour of 9:51 a.m. of said day, at Robison, Belaustegui, Sharp & Low, 71 Washington Street, Reno, Nevada, I reported the deposition of WILLIS EDGAR POWELL in the matter entitled herein; that said witness was duly sworn by me; that before the proceedings' completion, the reading and signing of the deposition was requested by counsel for the respective parties; that the foregoing transcript, consisting of pages 1 through 67, is a true and correct transcript of the stenographic notes of testimony taken by me in the above-captioned matter to the best of my knowledge, skill and ability.

I further certify that I am not an attorney or counsel for any of the parties, nor a relative or employee of any attorney or any of the parties, nor financially interested in the action.

DATED: At Reno, Nevada, this 14th day of August, 2017.

Lori Urmston

LORI URMSTON, CCR #51

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Transaction # 6379464

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

WEST TAYLOR STREET, LLC, a limited liability company,

Plaintiff,

vs.

WASTE MANAGEMENT OF NEVADA, INC.,

Defendants.

Case No. CV12-02995

Dept. No. 4

ORDER GRANTING WASTE MANAGEMENT OF NEVADA, INC.'S MOTION IN LIMINE #1 RE: EXCLUSION OF C. NICHOLAS PEREOS AS TRIAL ADVOCATE

On August 30, 2017, Defendant WASTE MANAGEMENT OF NEVADA, INC. (hereinafter "WM") by and through its attorney, Mark G. Simons, Esq., of Robison, Simons, Sharp & Burst, filed *Motion in Limine # 1 Re: Exclusion of C. Nicholas Pereos as Trial Advocate*. WEST TAYLOR STREET, LLC (hereinafter "WTS"), by and through its attorney, C. Nicholas Pereos, Esq. (hereinafter "Pereos"), filed an opposition on September 13, 2017. WM replied on September 19, 2017.

WM seeks to preclude Pereos from acting as a trial advocate pursuant to Nevada Rule of Professional Conduct (hereinafter "RPC") 3.7 because Pereos is a necessary witness in this action. Pereos will be called by WTS to testify during WTS's case-in-chief. Additionally, Pereos is the only witness with personal knowledge sufficient to authenticate key trial exhibits including the

letters WTS sent to WM and the checks for payment of WM's bills. Pereos must also testify regarding damages that WTS has sustained.

WTS opposes the motion arguing WM is attempting to use RPC 3.7 as a tactical weapon for expense, delay, and inconvenience in order to bar Pereos from acting as a trial advocate this close to trial. WTS contends the facts will demonstrate Pereos had no direct verbal communications with WM, there was only communications through letters acting in a representative capacity for WTS. Rather, Teri Morrison (hereinafter "Morrison"), a named witness, was working for WTS for over 15 years and communicated with WM. WTS acknowledges Pereos must testify if the jury is to decide damages (although WTS is prepared to submit the matter to the Court). However, WTS alleges Pereos has no financial interest in WTS. WTS argues removal of counsel will prejudice WTS, as legal fees will swell tremendously given the need to educate associated counsel, Douglas Fermoile (hereinafter "Fermoile") on the case. WTS avers Pereos has been with the case from the beginning and his knowledge of the case coupled with his extensive commercial litigation experience cannot be duplicated by Fermoile. Additionally, WTS alleges it is going out of its way to avoid jury confusion by having Fermoile advocate in closing arguments.

WM responds arguing Morrison has testified she was prohibited from many business activities because Pereos was responsible for such actions. Additionally, Mr. Willis Powell, Trustee of the underlying properties that Nina Properties II LLC (hereinafter "Nina Properties") manages, testified he is just a figurehead and Pereos runs every aspect of the trust. Additionally, Pereos's pseudo-pro-se capacity is directly relevant to the issues in this case because WTS is seeking recovery of attorney fees that it has not paid to Pereos for his representation. WM also argues WTS will not suffer substantial hardship as it has already hired separate counsel for trial.

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RPC 3.7 provides:

> a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:
> (1) The testimony relates to an uncontested issue;
> (2) The testimony relates to the nature and value of legal services rendered in the case; or
> (3) Disqualification of the lawyer would work substantial hardship on the client.
> (b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9

In DiMartino v. Eighth Judicial District Court ex rel. County of Clark, 119 Nev. 119, 121–22, 66 P.3d 945, 946–47 (2003), the Nevada Supreme Court articulated the purpose of RPC 3.7, noting, "the rule is meant to eliminate any confusion and prejudice that could result if an attorney appears before a jury as an advocate and as a witness." RPC 3.7 is the equivalent of ABA Rule 3.7. The comments to ABA Rule 3.7 are also instructive as to the purpose of the rule.

> The tribunal has proper objection when the trier of fact may be confused or misled by a lawyer serving as both advocate and witness. The opposing party has proper objection where the combination of roles may prejudice that party's rights in the litigation. A witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on evidence given by others. It may not be clear whether a statement by an advocate-witness should be taken as proof or as an analysis of the proof.

[ABA Rule 3.7, Comment (2)].

First, in determining whether RPC 3.7 mandates disqualification of a trial advocate, the court must establish whether counsel is likely to be a "necessary witness." Kelly v. CSE Safeguard Ins. Co., 2:08-CV-00088-KJD-RJ, 2010 WL 3613872, at *2 (D. Nev. Sept. 8, 2010). Courts applying the equivalent to RPC 3.7 have found a lawyer to be a necessary witness if the testimony is relevant, material and unobtainable elsewhere.[1]

The only claim remaining in this action is WTS's claim for slander of title. "The requisites to an action for slander of title are that the words spoken be false, that they be maliciously spoken and that the plaintiff sustain some special damage as a direct and natural result of their having been

[1] See World Youth Day, Inc. v. Famous Artists Merch. Exch., Inc., 866 F.Supp. 1297, (D. Colo. 1994); see also Macheca Transp. Co. v. Philadelphia Indem. Co., 463 F.3d 827, 833 (8th Cir. 2006)

spoken." Rowland v. Lepire, 99 Nev. 308, 313, 662 P.2d 1332, 1335 (1983). To prove malice, the plaintiff must prove the "defendant knew that the statement was false or acted in reckless disregard of its truth." Id. Attorney's fees incurred in removing the cloud on title qualify as special damages. See DeCarnelle v. Guimont, 101 Nev. 412, 415, 705 P.2d 650, 651 (1985).

WTS seeks special damages in the form of attorney's fees. Here, WTS will call Pereos in its case-in-chief to testify as to the attorney's fees it incurred to remove the liens on the properties. It is WM's position attorney's fees were not actually incurred as WTS did not formally retain Pereos as its attorney and it has never paid Pereos for his services. Pereos may also be required to authenticate certain documents. Because of the nature of the dispute regarding attorney's fees, as well as the potential need for Pereos to offer testimony regarding certain documents, the Court finds Pereos is likely to be a necessary witness.

Normally an attorney may testify at trial without being disqualified under RPC 3.7 if the testimony relates to the nature and value of legal services rendered in the case. RPC 3.7(a)(2). However, the Court finds this exception is not applicable based on the arguments and defenses asserted by WM and the relationship between Pereos, WTS, and the ownership structure of the properties at issue. It has been alleged in this action that Pereos is the grantor of the trust that owns WTS, and Pereos makes all decisions concerning the trust. It has also been asserted the properties at issue are managed by Nina Properties, Pereos is an officer of Nina Properties, and the trust is an owner of Nina Properties. The issue regarding whether WTS incurred any fees will be central to this action.

Next, the Court considers whether disqualification of Pereos would create a substantial hardship on WTS. The Court finds it would not. Pereos has already associated counsel to assist in trial. While Pereos will have to incur fees to brief Fermoile on this action, the Court finds in order to have counsel give closing arguments, he would have to be appropriately briefed on the case in any event. The Court also finds WM would suffer prejudice if Pereos presented testimony

and advocated on behalf of WTS. The jury may be confused as to whether Pereos was giving sworn testimony or merely advocating for WTS.

Based on the foregoing and good cause appearing,

IT IS HEREBY ORDERED that Waste Management of Nevada, Inc.'s Motion in Limine # 1 Re: Exclusion of C. Nicholas Pereos as Trial Advocate is GRANTED.

Dated this 3 day of November, 2017.

Connie J. Steinheimer
DISTRICT JUDGE

CERTIFICATE OF SERVICE

CASE NO. CV12-02995

I certify that I am an employee of the SECOND JUDICIAL DISTRICT COURT of the STATE OF NEVADA, COUNTY OF WASHOE; that on the 3 day of November, 2017, I filed the **ORDER GRANTING WASTE MANAGEMENT OF NEVADA, INC.'S MOTION IN LIMINE #1 RE: EXCLUSION OF C. NICHOLAS PEREOS AS TRIAL ADVOCATE** with the Clerk of the Court.

I further certify that I transmitted a true and correct copy of the foregoing document by the method(s) noted below:

_____ **Personal delivery to the following: [NONE]**

__X__ **I electronically filed with the Clerk of the Court, using the ECF which sends an immediate notice of the electronic filing to the following registered e-filers for their review of the document in the ECF system:**

MARK SIMONS, ESQ. for WASTE MANAGEMENT OF NEVADA INC
DOUGLAS FERMOILE, ESQ. for WEST TAYLOR STREET LLC
C. PEREOS, ESQ. for WEST TAYLOR STREET LLC
THERESE SHANKS, ESQ. for WASTE MANAGEMENT OF NEVADA INC

_____ **Deposited in the Washoe County mailing system in a sealed envelope for postage and mailing with the United States Postal Service in Reno, Nevada: [NONE]**

_____ **Placing a true copy thereof in a sealed envelope for service via:**

_____ Reno/Carson Messenger Service – **[NONE]**

_____ Federal Express or other overnight delivery service **[NONE]**

DATED this 3 day of November, 2017.

FILED
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Jacqueline Bryant
Clerk of the Court
Transaction # 6379490

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

WEST TAYLOR STREET, LLC, a limited liability company, Plaintiff, vs. WASTE MANAGEMENT OF NEVADA, INC., Defendants.	Case No. CV12-02995 Dept. No. 4

ORDER GRANTING MOTION IN LIMINE TO EXCLUDE EVIDENCE OF OTHER PROEPRTY HOLDINGS

On August 14, 2017, WEST TAYLOR STREET, LLC (hereinafter "WTS"), by and through its attorney, C. Nicholas Pereos, Esq. (hereinafter "Pereos"), filed *Plaintiff's Motion in Limine Number One to Exclude Evidence Regarding Other Property Holdings*. WASTE MANAGEMENT OF NEVADA, INC. (hereinafter "WM") by and through its attorney, Mark G. Simons, Esq., of Robison, Simons, Sharp & Burst, filed an opposition on August 31, 2017. WTS replied on September 12, 2017.

WTS moves for an order in limine in connection with the following evidence: 1) Property holdings of either the Restated 1980 Pereos Trust or the 2004 Pereos Trust after March 14, 2014; 2) Commercial property holdings of either Trust from 2007-2014; 3) Multi-family property holdings of either Trust from 2007-2014; and 4) Single family residences owned by either Trust from 2007-2014. WTS contends evidence of unrelated properties to the property that is at issue in

these proceedings is not relevant. Even if it was relevant, the danger of unfair prejudice, confusion of the issues, and waste of time outweigh the probative value.

WM opposes the motion and argues information of other property holdings is relevant to show the course of conduct between Nina Properties, Pereos, and WM. The business structure created by Pereos to own, operate, and manage his various business holdings does not insulate him from testifying about this information. Additionally, WM contends, Pereos's extensive history of communicating with WM is directly relevant to WTS's actions in this case because WTS failed to communicate with WM regarding vacancies and amounts owed by WTS for WM's services. The evidence is also relevant to allow the jury to weigh the credibility of WTS's claims in this action and to impeach Pereos by challenging his motives, bias, and interests in the litigation.

Relevant evidence is defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." NRS 48.015. Generally, relevant evidence is admissible. NRS 48.025. However, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. NRS 48.035(1). Additionally, relevant evidence may be excluded if its probative value is substantially outweighed by undue delay, waste of time, or needless presentation of cumulative evidence. NRS 48.035(2).

The only claim that remains in this action is WTS's claim for slander of title relating to the filing of three garbage liens. "The requisites to an action for slander of title are that the words spoken be false, that they be maliciously spoken and that the plaintiff sustain some special damage as a direct and natural result of their having been spoken." Rowland v. Lepire, 99 Nev. 308, 313, 662 P.2d 1332, 1335 (1983). To prove malice, the plaintiff must prove the "defendant knew that the statement was false or acted in reckless disregard of its truth." Id. Attorney's fees incurred in removing the cloud on title qualify as special damages. See DeCarnelle v. Guimont, 101 Nev. 412, 415, 705 P.2d 650, 651 (1985).

At this time, the Court does not find evidence concerning properties unrelated to the properties at issue in this proceedings is relevant. The Court does not find evidence of WM's accounts for these unrelated properties or Pereos's knowledge of the unrelated properties is relevant to the slander of title claim or WM's defenses thereto. However, if it appears evidence of the properties WTS seeks to exclude becomes relevant, either party may request a hearing outside the presence of the jury.

Based on the foregoing and good cause appearing,

IT IS HEREBY ORDERED that West Taylor Street, LLC's Motion in Limine Number One to Exclude Evidence Regarding Other Property Holdings is GRANTED, with leave to renew the objection outside the presence of the jury if some basis to inquire into the area presents itself at trial.

Dated this 3 day of November, 2017.

Connie J. Steinheimer
DISTRICT JUDGE

CERTIFICATE OF SERVICE

CASE NO. CV12-02995

I certify that I am an employee of the SECOND JUDICIAL DISTRICT COURT of the STATE OF NEVADA, COUNTY OF WASHOE; that on the 3 day of November, 2017, I filed the **ORDER GRANTING MOTION IN LIMINE TO EXCLUDE EVIDENCE OF OTHER PROPERTY HOLDINGS** with the Clerk of the Court.

I further certify that I transmitted a true and correct copy of the foregoing document by the method(s) noted below:

_____ **Personal delivery to the following: [NONE]**

__X__ **I electronically filed with the Clerk of the Court, using the ECF which sends an immediate notice of the electronic filing to the following registered e-filers for their review of the document in the ECF system:**

MARK SIMONS, ESQ. for WASTE MANAGEMENT OF NEVADA INC
DOUGLAS FERMOILE, ESQ. for WEST TAYLOR STREET LLC
C. PEREOS, ESQ. for WEST TAYLOR STREET LLC
THERESE SHANKS, ESQ. for WASTE MANAGEMENT OF NEVADA INC

_____ **Deposited in the Washoe County mailing system in a sealed envelope for postage and mailing with the United States Postal Service in Reno, Nevada: [NONE]**

_____ **Placing a true copy thereof in a sealed envelope for service via:**

_____ Reno/Carson Messenger Service – **[NONE]**

_____ Federal Express or other overnight delivery service **[NONE]**

DATED this 3 day of November, 2017.

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Jacqueline Bryant
Clerk of the Court
Transaction # 6470977 : yviloria

$2515
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Attorneys for Waste Management of Nevada , Inc.

IN THE SECOND JUDICIAL DISTRICT FOR THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

WEST TAYLOR STREET, LLC, a limited liability company,

Plaintiff,

v.

WASTE MANAGEMENT OF NEVADA, INC., KAREN GONZALEZ, and DOES 1 THROUGH 10,

Defendants.

_____/

CASE NO.: CV12-02995

DEPT. NO.: 4

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that Waste Management of Nevada, Inc. ("Waste Management"), by and through its attorney Mark G. Simons of Robison, Belaustegui, Sharp & Low, appeals to the Nevada Supreme Court from the: (1) ORDER, entered on July 28, 2014; (2) ORDER DENYING DEFENDANTS' MOTION FOR PARTIAL RECONSIDERATION, entered on February 6, 2015; (3) PARTIAL SUMMARY JUDGMENT, entered on October 1, 2015; and (4) JUDGMENT, entered January 8, 2018.

...

...

AFFIRMATION: The undersigned does hereby affirm that this document does not contain the Social Security Number of any person.

DATED this 17th day of January, 2018.

ROBISON, BELAUSTEGUI, SHARP & LOW
A Professional Corporation
71 Washington Street
Reno, Nevada 89503

By: _____
MARK G. SIMONS, ESQ.
THERESE M. SHANKS, ESQ.
Attorneys for Waste Management of Nevada, Inc.

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Robison, Belaustegui, Sharp & Low
71 Washington St.
Reno, NV 89503
(775) 329-3151

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of ROBISON, BELAUSTEGUI, SHARP & LOW, and that on this date I caused to be served a true copy of the **NOTICE OF APPEAL** on all parties to this action by the method(s) indicated below:

☒ by placing an original or true copy thereof in a sealed envelope, with sufficient postage affixed thereto, in the United States mail at Reno, Nevada, addressed to:

C. Nicholas Pereos, Esq.
1610 Meadow Wood Lane, Ste. 202
Reno, NV 89502
Attorney for West Taylor Street, LLC

☐ I hereby certify that on the date below, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which served the following parties electronically:

☐ by personal delivery/hand delivery addressed to:

☐ by facsimile (fax) and/or electronic mail addressed to:

☐ by Federal Express/UPS or other overnight delivery addressed to:

DATED: This 8th day of January, 2018.

Employee of Robison, Belaustegui, Sharp & Low

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IN THE SUPREME COURT OF THE STATE OF NEVADA

Electronically Filed
Jul 20 2018 03:03 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

WASTE MANAGEMENT OF NEVADA, INC.

Appellant,

vs.

WEST TAYLOR STREET, LLC,

Respondent.

_____/

Supreme Court
Case No.: 74876

Second Judicial District Court
Case No. CV12-02995

APPELLANT'S OPENING BRIEF

MARK G. SIMONS, ESQ.
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Docket 74876 Document 2018-27836

NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities described in NRAP 26.1(a) and must be disclosed. These representations are made in order that the justices of this Court may evaluate possible disqualifications or recusal.

Appellant Waste Management of Nevada, Inc. is a corporation. It is wholly owned by Waste Management Holdings, Inc., a Delaware corporation.

The undersigned counsel at SIMONS LAW, PC appears in these proceeding on behalf of Waste Management of Nevada, Inc. The undersigned counsel was previously a partner in Robison, Simons, Sharp & Brust and its predecessor entity Robison, Belaustegui, Sharp & Low. Holland & Hart represented Waste Management of Nevada, Inc. in certain proceedings before the District Court until such time as the undersigned substituted in as counsel of record.

DATED this 20th day of July, 2018.

SIMONS LAW, PC
6490 S. McCarran Blvd. C-20
Reno, Nevada 89509

BY: _____
Mark G. Simons, Esq.
Nevada Bar No. 5132
Attorney for Appellant

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NRAP 17 ROUTING STATEMENT

Pursuant to NRAP 28(a)(5), Appellant provides the following routing statement. This case is properly before this Court because this appeal raises "as a principal issue a question of statewide public importance," namely, whether NRS 444.520(3) is to be interpreted to require garbage companies in Nevada to comply with **all** of the requirements set forth in Nevada's mechanic's lien statutes in order to perfect and foreclose upon a garbage lien or only the single "foreclosure" statute specifically referenced in 444.520(3).[1] In addition, this appeal presents an issue of first impression as NRS 444.520 has not yet been interpreted by this Court, and a published opinion on this issue would set forth controlling precedent applicable to a multitude of statutes.[2]

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[1] NRS 444.520(3) states:

> Until paid, any fee or charge levied pursuant to subsection 1 [collection of waste] constitutes a perpetual lien against the property served, superior to all liens, claims and titles other than liens for general taxes and special assessments. The lien is not extinguished by the sale of any property on account of nonpayment of any other lien, claim or title, except liens for general taxes and special assessments. **The lien may be foreclosed in the same manner as provided for the foreclosure of mechanics' liens**. (Emphasis added).

[2] The district court also acknowledged that its interpretation and application

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In addition, the language at issue in this case contained in NRS 444.520(3) is the adoption of almost identical language contained in two other statutes: (1) NRS 318.197(2)--which applies to perpetual liens for services provided by general improvement districts,[3] and (2) NRS 244A.549(2)--which applies to, among other things, services provided by counties or the State for sewage and wastewater.[4] Therefore, this Court's decision will necessarily impact the interpretation and application of NRS 318.197 and NRS 244A.549 since these statutes also contain essentially identical language at issue in this appeal.

Moreover, this Court's decision could have even greater repercussions than the interpretation of a single statute. This is because, in addition to NRS 318.197 and 244A.549, the Nevada Legislature has

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of NRS 444.520's provisions were an issue of first impression. 2 JA 407:15-16 ("The extent to which the mechanic's lien statutes are incorporated into NRS 444.520 is a matter of first impression.").

[3] NRS 318.197(2)(a), applicable for services provided in a general improvement districts, provides: "**A perpetual lien must be foreclosed in the same manner as provided by the laws of the State of Nevada for the foreclosure of mechanics' liens.**" (Emphasis added).

[4] NRS 244A.549(2), applicable to perpetual liens for, among other things, sewage and wastewater service: "**A lien for unpaid services charges may be foreclosed in the same manner as provided for the foreclosure of mechanics' liens.**" (Emphasis added).

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repeatedly provided in a multitude of other statutory schemes identifying that these other statutory liens "may be foreclosed in the same manner as provided for the foreclosure" of other liens.[5] Because there are a significant number of other statutes in Nevada that adopt similar language as used in NRS 444.520(3) referencing the manner for foreclosure of mechanic's liens, this Court's analysis and decision will likely have far reaching and significant ramifications should this Court adopt the District Court's reasoning. Each of these other statutory schemes will then be required to fully comply with all the additional notice, perfection, duration and enforcement obligations relating to a mechanic's lien statute in addition to any statutory framework giving rise to the non-mechanic's lien.

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[5] *See e.g.*, NRS 108.870 ("foreclosure upon a lien for money owed to the Department of Health and Human Services as a result of the payment of benefits for Medicaid by action in the district court in the same manner as for foreclosure of any other lien."); NRS 244.335(7) ("Any license tax levied . . . constitutes a lien upon the real and personal property of the business upon which the tax was levied until the tax is paid. . . . The lien must be enforced . . . [b]y an action for foreclosure against the property in the same manner as an action for foreclosure of any other lien."); NRS 268.095(7) ("Any license tax levied under . . . this section constitutes a lien upon the real and personal property of the business upon which the tax was levied until the tax is paid. . . . The lien must be enforced . . . [b]y an action for foreclosure against the property in the same manner as an action for foreclosure of any other lien"); NRS 612.680(4) ("The lien hereby created may be foreclosed by a suit in the district court in the manner provided by law for the foreclosure of other liens on real or personal property.").

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STATEMENT OF THE ISSUES

1. Whether the District Court erred holding NRS 444.520(3) requires the incorporation of the "entire mechanic's lien statutory scheme" and not just the single "foreclosure" statute specifically referenced in NRS 444.520(3)?[6]

2. Whether the District Court erred by imposing a two-year statute of limitations period to initiate foreclosure proceedings brought under NRS 444.520(3) even though no such limitation is called out for and a garbage lien it is a "perpetual lien"?

STATEMENT OF THE CASE

This appeal arises from a District Court order granting summary judgment in favor of respondent West Taylor Street, LLC ("WTS") on WTS's claim for declaratory relief that petitioner Waste Management of Nevada, Inc. ("Waste Management") failed to comply with the proper procedural requirements in noticing, perfecting, recording and moving forward to enforce a garbage lien under NRS 444.520. The District Court also arbitrarily imposed a 2-year statute of limitations to pursue any foreclosure proceedings under NRS 444.520 even though the garbage lien

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6 NRS 108.239 is the statute specifically detailing the "foreclosure" process of a mechanic's lien.

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is a perpetual lien and the legislature did not impose any such limitation period. The District Court's interpretation of NRS 444.520(3) has state-wide importance regarding a matter of serious public concern and raises an issue of first impression.

PROCEDURAL BACKGROUND

WTS owns a duplex with the addresses of 345 and 347 West Taylor Street, Reno, Nevada. 2 JA 420. The property is comprised of a single parcel with a single assessor parcel number. 2 JA 426-428. Each address has its own waste service account with Waste Management. Id.

On February 23, 2012, Waste Management recorded a Notice of Lien for unpaid garbage fees for unpaid service provided at 347 West Taylor Street in the amount of $489.47 (the "1st Lien"). 2 JA 426. On November 26, 2012, Waste Management recorded a Notice of Lien for unpaid garbage fees for unpaid service provided at 345 West Taylor Street in the amount of $859.78 (the "2nd Lien"). 2 JA 427.

WTS filed its declaratory relief Complaint on December 3, 2012. 1 JA 1-5. However, WTS's Complaint only addressed the 1st Lien as WTS was apparently unaware of the recordation of the 2nd Lien at that time. 1 JA 2, ¶IV. On February 14, 2014, WTS filed its First Amended Complaint correcting the misidentification of the service address for the 1st Lien from

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345 to 347 West Taylor. 1 JA 20-25. In all other respects the allegations were identical as contained in the original Complaint.

On March 11, 2014, WTS filed its Motion for Partial Summary Judgment which only addressed the recordation of the 1st Lien. 1 JA 26:28-27:2.

On March 14, 2014, Waste Management recorded a Notice of Lien for unpaid garbage fees for additional unpaid service provided at 345 West Taylor Street that had accrued since the recordation of the 2nd Lien, with this lien identifying the additional amounts owed of $404.88 (the "3rd Lien"). 2 JA 428.

On May 7, 2014, the District Court conducted oral argument on WTS's partial motion for summary judgment. 2 JA 399. On June 27, 2014, while the District Court was still considering its ruling on the motion for partial summary judgment, WTS filed its Second Amended Complaint to include claims relating to the 2nd Lien and the 3rd Lien. 2 JA 387-393.

On July 28, 2014, the District Court entered its Order granting partial summary judgment on the 1st Lien in WTS's favor regarding the interpretation and application of NRS 444.520 (the "Order"), which Order forms the basis of this appeal. 2 JA 399-418.

After the Order was entered, WTS then moved for summary

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judgment on the same grounds to address the 2nd and 3rd Liens referenced in WTS's Second Amended Complaint. 2 JA 419-428. Waste Management opposed this second motion as being procedurally unnecessary since Waste Management had voluntarily released all three of its garbage liens based upon the District Court's Order ruling that Waste Management's 1st Lien was invalidly recorded. 2 JA 429-443. To reiterate, all liens were released by Waste Management based upon the District Court's ruling. 2 JA 438-443. Concurrent with its opposition, Waste Management filed a Motion for Reconsideration of the District Court's Order granting summary judgment identifying a number of defects in the District Court's analysis. 2 JA 453-522. The District Court denied Waste Management's Motion for Reconsideration. 3 JA 551-554.

Following denial of the Motion for Reconsideration, WTS renewed its second motion for partial summary judgment on its declaratory relief claims in its Second Amended Complaint. 3 JA 523-525. The District Court granted the motion and entered partial summary judgment on the claims relating to the 2nd and 3rd Liens based upon the identical analysis supporting the District Court's original Order. 3 JA 568-570.

The claims against Karen Gonzales were dismissed and WTS's claim for slander of title claim was withdrawn by WTS. 5 JA 1091.

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FACTUAL BACKGROUND

WTS owns a duplex with the addresses of 345 and 347 West Taylor Street, Reno, Nevada. 1 JA 59:20-26. On February 23, 2012, Waste Management recorded its 1st Lien for unpaid garbage fees provided at 347 West Taylor Street. 1 JA 59:27-60:1; 2 JA 426. On November 26, 2012, Waste Management recorded its 2nd Lien for unpaid garbage fees for service provided at 345 West Taylor Street. 1 JA 60:4-8; 2 JA 427. On March 14, 2014, Waste Management recorded its 3rd Lien for additional unpaid fees for garbage service at 345 West Taylor Street that had accrued since the recordation of the 2nd Lien. 2 JA 428.

Waste Management is mandatorily obligated to provide garbage collection services for WTS's property and may not refuse service for non-payment. 2 JA 404:14-15; 1 JA 65, fn. 4. WTS owed the money for unpaid garbage collection services provided to it by Waste Management as reflected in the liens. 2 JA 426-428.

WTS moved for partial summary judgment on its first claim for declaratory relief and the District Court framed WTS's arguments as follows:

> 2) the statutory formalities required for mechanic's liens apply to garbage liens **because NRS 444.520 incorporates the entire mechanic's lien statutory scheme**;

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3) **statutes of limitations apply to this case**; [and]

4) that the lien **should not exist in perpetuity** after it has been recorded.

2 JA 400:14-18 (emphasis added).[7] The District Court also concluded that the issues presented were questions of law since the basic facts were undisputed. 2 JA 401:5-6 ("the Court will decide the pending questions as a matter of law.").

Addressing the issues as presented, Waste Management argued, among other things, that NRS 444.520(3)'s reference to the "manner" of the foreclosure of a mechanic's lien only could logically reference NRS 108.239 since that is the only statute that details the "manner" of foreclosing on a mechanic's lien. The District Court recognized the validity of Waste Management's argument because it stated the issue the court was considering:

> is whether only NRS 108.239, relating to mechanic's lien foreclosures, may be applied to the garbage lien or whether the garbage lien can be governed by the entire statutory structure of the mechanic's lien.

[7] WTS's first argument was that Waste Management lacked standing to file a lien, however, that issue was disposed of by the District Court in Waste Management's favor. 2 JA 400, fn. 1.

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2 JA 409:11-13. The District Court clearly recognized that NRS 108.239 was the only mechanic's lien statute addressing the foreclosure process. Disturbingly, however, the District Court then expanded its analysis of NRS 444.520(3) to see if the garbage lien statute "can" be governed by other unrelated statutory provisions of the mechanic's lien statutes that were not specifically called out for in NRS 444.520(3).[8]

In granting WTS's motion for summary judgment, the District Court held that all sixty-two (62) "individual statutes" contained in Chapter 108 were adopted and incorporated into NRS 444.520(3).[9] 2 JA 416. Accordingly, the District Court ruled that NRS 444.520's language that the **"lien may be foreclosed in the same manner as provided for the foreclosure of mechanics' liens"** was intended to accomplish a wholesale

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[8] The district court's analysis focused on the "can" approach and whether 444.520 "permits the incorporation of just one or all of the mechanic's lien statutes." 2 JA 410. It is suggested the district court's analysis was fundamentally flawed because the analysis is not "can" the court incorporate the entirety of Chapter 108 into NRS 444.520 but rather what did the Legislature specifically intend and say 444.520(3) provided.

[9] In its Order, the district court noted that Chapter 108 contains an additional sixty-two (62) "individual statutes". 2 JA 405:17-18.

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adoption of the entirety of Chapter 108's sixty-two distinct and separate individual statutes.[10]

The practical effect of the District Court's ruling was to convert a unique garbage lien (created under an entirely different statutory framework and enacted for an entirely different purpose) into a general mechanic's lien.[11] The effect of this ruling, if allowed to stand, is that all other liens created by the Nevada Legislature that are allowed to be "foreclosed" upon in the same manner as a mechanic's lien will also have

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[10] If this was really the intent of the Legislature, then the Legislature would have simply amended Chapter 108 to include garbage liens. There would not have been a need to create an entirely new garbage lien structure. Logic dictates that because the Legislature did not simply include garbage liens as a Chapter 108 lien, the Legislature never intended garbage liens to be treated exactly like mechanic's liens or governed by all the extraneous requirements for such liens. Nevada Power Co. v. Haggerty, 115 Nev. 353, 364, 989 P.2d 870, 877 (1999) ("When the legislature enacts a statute, this court presumes that it does so 'with full knowledge of existing statutes relating to the same subject.'").

[11] It is suggested that if the Nevada Legislature intended to treat a unique garbage lien as a general mechanic's lien, then the Legislature would simply have defined a mechanic's lien to include "garbage liens" and the Legislature would not have gone through all the extensive steps of enacting an entirely new statutory framework to create the statutory garbage lien and to make it a perpetual lien. The district court's interpretation, therefore, is inconsistent with reason and the public policy underlying the grave public safety concerns relating to the collection and disposal of garbage. Great Basin Water Network v. State Eng'r, 234 P.3d 912, 918 (Nev. 2010) ("We next consider legislative intent by construing the statute in a manner consistent with reason and public policy.")

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to be treated exactly as a mechanic's lien regardless of the purpose and intent of those other statutory liens, regardless of the entity providing such service, regardless of the service provided and regardless of what objective the Legislature was attempting to accomplish when it enacted the non-mechanic's lien statutes.

In rendering its decision, the District Court concluded that NRS 444.520(3) was ambiguous because even though the statute specifically states that garbage liens can be *foreclosed* in the same manner as mechanics' liens, the statute does not identify which specific mechanic's lien statutes are incorporated into NRS 444.520 because the specific sections are not listed. 2 JA 409:23. The District Court then confusingly and improperly considered the legislative history of the mechanic's lien statutes, because the legislative history of NRS 444.520 was silent on which "foreclosure" statute was referenced. Id. at 405-407. The District Court engaged in its analysis of the purpose underlying the mechanic's liens even though the District Court recognized the entire purpose of NRS 444.520 was "to create a method of recourse for the garbage company once a customer became delinquent on a bill by allowing the garbage company to place a lien on the property." 2 JA 403:13-15.

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Even though the clear purpose of NRS 444.520 was to provide "recourse for the garbage company", the District Court ignored this Legislative intent and focused the purpose and intent underlying the enactment of the mechanic's lien statutes—which relate to an entirely different industry, *i.e.*, the construction industry. The District Court ignored that the waste collection industry is profoundly different from the construction industry in that the garbage collectors are providing publicly mandated services and can't just walk off a job for non-payment like a contractor. The garbage collector must continue to perform its public duty and must continue to service each property regardless of whether or not payment was made.

After review of these two completely separate legislative histories (enacted for entirely distinct reasons), the District Court then hypothecated that the Legislature was "trying to create a real incentive for homeowners to address outstanding charges when they are notified by the garbage company that they are delinquent on the garbage bill, but also implement a process that allows an opportunity for the deficiency to be cured before foreclosure occurs." Id. at 411. The District Court's analysis shifted entirely away from the Legislature's intent to protect garbage companies to why the garbage lien should be limited so as to protect homeowners. The

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District Court then concluded that incorporating the entirety of the mechanic's lien statutes into NRS 444.520 "would enhance the legislative intent to create a fair system" that favored the homeowner. Id.

The District Court's primary argument for incorporation of the entirety of the mechanic's lien statutory framework was due to the District Court's concern that there was no method articulated in NRS 444.520(3) to challenge a garbage lien, whereas the mechanic's lien statutes provided a separate mechanism to challenge a mechanic's lien. 2 JA 413. The District Court failed to consider that NRS 108.239 detailed the judicial foreclosure process and that the process was designed to provide notice and the ability to contest a lien. Further, the District Court ignored NRS 30.040 which specifically provides the avenue for a property owner to contest liens against their property by proceeding with a declaratory relief action.[12] Ironically, the District Court failed to consider that WTS pursued this very avenue to challenge the garbage lien by filing its own declaratory relief

[12] It is suggested that it is unnecessary for the Legislature to specifically reference NRS 30.040 since that would be merely redundant language and the Legislature already knew that the declaratory relief statutes provided homeowners with a method to challenge a garbage lien. Nevada Power Co. v. Haggerty, 115 Nev. 353, 364, 989 P.2d 870, 877 (1999) ("When the legislature enacts a statute, this court presumes that it does so 'with full knowledge of existing statutes relating to the same subject'" (citation omitted)).

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complaint to contest the validity of the liens. Despite WTS's declaratory relief action proceeding before the District Court to contest the validity of the garbage liens, the District Court held that NRS 444.520(3) had to incorporate the entirety of Chapter 108 so that a property owner had "an opportunity to be heard if the property owner disputes the lien" even though WTS was already challenging the lien via a declaratory relief action. 2 JA 413.

The District Court then proceeded to expressly adopt almost every requirement for notice, perfection, duration and foreclosure of mechanics' liens into NRS 444.520(3) despite the fact that the plain language of NRS 444.520(3) only incorporated the **foreclosure** process contained in the mechanic's lien statutes. Id. at 411-414. Again, the foreclosure process is only found in one statute in NRS Chapter 108—108.239.

Expanding on the burdens and obligations set forth in NRS 444.520, the District Court found that notices of liens must be recorded within ninety days of the first "delinquency" in order to be valid--even though this requirement is not contained anywhere in NRS Chapter 108 and is not in NRS 444.520 either. Id. at 413-414. The District Court then found that even though NRS 444.520(1) creates a "perpetual" lien, such a lien must be foreclosed upon within two years of recording the lien even though neither

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NRS Chapter 108 nor NRS 444.520 contain such a statute of limitations. Id. at 414-415. Of further note, WTS never argued that a two-year statute of limitations applied—which the District Court even noted in its Order. 2 JA 414:23-24 ("[WTS] argues that Waste management failed to commence an action within six months to foreclose the lien after notice of the lien is sent . . . .").

Despite the foregoing, the District Court reasoned that while the garbage lien could remain on the property in perpetuity, Waste Management would lose its right to foreclose on the lien after two years and the District Court decided it would apply NRS 11.190(4)(b) as the statute of limitations applicable to garbage lien foreclosure actions—even though application and/or inapplicability of this statute was never argued or briefed. Id. at 415-16. NRS 11.190(4)(b) is the statute of limitations applicable to "an action upon a statute for a penalty or forfeiture." In unilaterally creating a 2-year statute of limitation, the District Court analogized the garbage lien as a penalty or forfeiture and refused to consider the lien as analogous to an assessment for taxes.

Seeking to address the deficiencies in the District Court's analysis, Waste Management filed its Motion for Reconsideration arguing that NRS 444.520(3) cannot be ambiguous when there is only one statute in NRS

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Chapter 108 that deals with the "manner" of foreclosure of a lien. 2 JA 453–3 JA 522. Further, Waste Management noted that there was no statutory language from which the District Court could have based its requirement that liens be recorded within ninety days of the last "delinquency," since "delinquency" did not appear anywhere in NRS Chapter 444 **or** NRS Chapter 108. Id. at 468-69. Further, Waste Management then noted that WTS never argued that a two-year statute of limitations period applied to the garbage lien statutes and that NRS 11.190(4)(b) had no application to a garbage lien. Id. at 469-472. Finally, Waste Management argued that even **if** a limitations period could be applied to NRS 444.520, the District Court applied the wrong limitations period, because if a limitations period was to apply the closest analogous statute is for statutory liability and not forfeiture. Id. Waste Management's Motion for Reconsideration was denied. 3 JA 551-554.

SUMMARY OF THE ARGUMENT

The general premise of this appeal is the District Court erred in incorporating multiple statutory requirements from NRS Chapter 108 into NRS 444.520(3) and not just the manner of the foreclosure statute called out for in NRS 108.239. Given the perceived deficiencies in the District

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Court's decision and analysis, there are an extensive number of grounds requiring reversal.

First, the District Court erred in concluding NRS 444.520(3) was ambiguous merely because it incorporates by reference the foreclosure process identified for foreclosing upon a mechanic's lien as contained in NRS Chapter 108. *See* Arg. II.A. The District Court ignored the fact that there is only **one** statute in Chapter 108 addressing the "foreclosure" of a mechanic's lien, which statute is NRS 108.239. Therefore, applying the plain language of NRS 444.520, there is no ambiguity in 444.520 and the plain language of the statute must be enforced and must include only those provisions in NRS 108.239 addressing the foreclosure process.

Second, even if NRS 444.520 is somehow ambiguous, the District Court's decision is still in error because the rules of statutory interpretation clearly hold that the District Court cannot expand upon the statutory text of NRS 444.520(3) to include additional lien notice and perfection requirements. *See* Arg. II.B. When the District Court expanded upon the obligations referenced in NRS 444.520(4), the court impermissibly created statutory obligations that did not exist and/or were expressly rejected by the Legislature.

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Third, the District Court's imposition of additional lien notice and perfection requirements for a garbage lien is contrary to the legislative history of NRS 318.197—which contains the identical language adopted by the Legislature into NRS 444.520(3). *See* Arg. II.C. The Nevada Legislature previously rejected the very requirements that the District Court imposed in interpreting the identical language contained in NRS 318.197.

Fourth, the District Court's holding is contrary to the rules of statutory construction. *See* Arg. II.D. Specifically, because a specific statute controls a general statute, the District Court erred in imposing to NRS Chapter 108's general mechanic's lien requirements for notice and perfection into NRS 444.520(3), a statute specifically governing garbage liens. The Legislature is deemed to have been aware of the requirements for lien notice and perfection contained in Chapter 108 yet explicitly chose not to adopt those additional procedural hurdles for the creation, duration, perfection and enforcement of a garbage lien.

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Fifth, other courts interpreting identical statutes have overwhelmingly rejected the District Court's interpretation.[13] *See* Arg. II.E.

Sixth, NRS 444.520 does not need the additional notice requirements provided in NRS Chapter 108 inserted into it because it is constitutional as enacted. *See* Arg. II.F. NRS 444.520(4) provides for notice of the garbage lien recordation. The foreclosure process incorporated into NRS 444.520(3) is a judicial foreclosure process which by its very nature provides notice to the landowner and provides an opportunity to be heard. Finally, to the extent that the recordation of a garbage lien is sought to be contested by a landowner, there is the affirmative remedy of a declaratory relief action under NRS 30.030 and/or NRS 30.040.[14]

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[13] These other jurisdictions include the very authority cited to and relied upon by the District Court in its' opinion, however, these other jurisdictions reached the exact opposite conclusion. The District Court did not explain why it cited as support extra-jurisdictional authority as support then rendered an opposite conclusion.

[14] NRS 30.030 provides in part: "Courts of record within their respective jurisdictions shall have power to declare rights, status and other legal relations whether or not further relief is or could be claimed." NRS 30.040(1) states: "Any person interested under a deed, written contract or other writings constituting a contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity

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Seventh, the District Court's interpretation conflicts with the use of the term "may" in NRS 444.520. *See* Arg. II.G. NRS 444.520 provides that a "lien may be foreclosed in the same manner as provided for the foreclosure of mechanics' liens". "May" defines a permissive act. The District Court's interpretation converts may into a mandatory act or the garbage lienholder loses its foreclosure rights. If such a dire consequence was intended, it is clear that the Legislature would have articulated and addressed such a draconian result.

Eighth, the District Court erred in holding that a garbage lien foreclosure action is subject to a two-year statute of limitations because no statute of limitations applies to a perpetual lien. *See* Arg. II.H.

Ninth, even if there is a statute of limitation applicable to Waste Management's perpetual lien, the two-year limitation period applied by the District Court is the incorrect period to apply and the appropriate statute of limitation should be three-years under NRS 11.190(3)(a) ("[a]n action upon a liability created by statute . . . ."). *See* Arg. II.I. This is because the 2-year period in NRS 11.190(4)(b) applies to **forfeitures**, whereas NRS

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arising under the instrument, statute, ordinance, contract or franchise and obtain a declaration of rights, status or other legal relations thereunder."

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444.520(3) is not a forfeiture but is instead a lien allowing for a **foreclosure** and NRS 11.190(3)(a) applies.

Tenth, even if the Court were to adopt some type of statute of limitations period on a perpetual lien, the time period to file the lien should trigger 90 days after the last garbage collection services were provided and not within 90 days of any delinquency date. *See* Arg. II.J.

ARGUMENT

I. STANDARD OF REVIEW.

All issues presented herein are reviewed under a de novo standard of review since this Court reviews the District Court's statutory interpretation under a de novo standard. Tam v. Eighth Jud. Dist. Ct., 383 P.3d 234, 240 (Nev. 2015). ("We review de novo questions of statutory construction.").

II. THE DISTRICT COURT ERRED IN INCORPORATING THE ENTIRETY OF CHAPTER 108 INTO NRS 444.520(3).

NRS 444.520(1) permits garbage companies to levy fees for the collection of solid waste materials. If these fees are not paid, the fees become "a perpetual lien against the property[.]" NRS 444.520(3). This statute unambiguously then states: "**The lien may be foreclosed in the same manner as provided for the foreclosure of mechanics' liens.**" Id. (emphasis added).

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The lien becomes "effective" when it is mailed to the owner of record, delivered to and recorded by the county recorder, and indexed by the county recorder. Id. at 444.520(4). Accordingly, NRS 444.520(4) provides that the landowner be provided with actual notice by mail as well as receiving constructive notice by the recordation of the lien.[15]

Should an owner wish to contest the garbage lien, it may do so when the garbage company proceeds with the judicial foreclosure process embodied in NRS 108.239 (by conceding, defending and/or challenging the lien). Alternatively, an owner may affirmatively initiate a declaratory relief action pursuant to NRS 30.040 (exactly like WTS did in the proceedings in the district court). Under either scenario, any due process concerns are addressed as no foreclosure proceedings may be completed until the homeowner has the opportunity to be heard.

The central issue in this appeal is whether the phrase "[t]he lien may be foreclosed in the same manner as provided for the foreclosure of mechanics' liens" means what it says and only incorporates the mechanic's lien statute identifying the "manner" of the actual "foreclosure" process for

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[15] Adaven Mgmt., Inc. v. Mountain Falls Acquisition Corp., 124 Nev. 770, 781, 191 P.3d 1189, 1196 (2008) ("Because CFB complied with the recordation requirements, Adaven had constructive notice . . . .").

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a lien contained in NRS 108.239. Alternatively, the Court must determine if the District Court's interpretation of NRS 444.520(3) is correct and the language employed by the Legislature was intended to include the wholesale adoption of the mechanic's lien statutory framework contained in Chapter 108.

A. NRS 444.520(3) IS NOT AMBIGUOUS.

The District Court implemented the wholesale adoption of all 62 of Nevada's mechanic's lien statutes contained in Chapter 108 into NRS 444.520(3). To do so, the District Court concluded that NRS 444.520 was ambiguous and that **all** of the procedural requirements related to notice, perfection, duration and foreclosure of a mechanic's lien had to be adopted into the garbage lien statute. However, the District Court's analysis was in error because (1) NRS 444.520 is not ambiguous using the plain language rule of construction, (2) the District Court cannot expand upon or insert "new" requirements into statutes that the Legislature has not included even if the statute is silent on an issue, and (3) NRS 444.520 is constitutional as enacted and does not need additional notice requirements.

NRS 444.520 is not ambiguous using the plain language rule of statutory construction. However, the District Court found that NRS 444.520(3) was ambiguous because it does not name the specific

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mechanic's lien statute whose provisions are incorporated into NRS 444.520(3).[16] This finding was in error because NRS 444.520(3) only incorporates the mechanic's lien statute that "provide[s] for foreclosure of mechanics' liens" and there is only **one** statute that provides for foreclosure of mechanics' liens. *See* NRS 108.239.

The early words of this Court in Brown v. Davis, 1 Nev. 409 (1865) are still applicable and controlling in this case:

> **"The rule is cardinal and universal that if the law is plain and unambiguous, there is no room for construction or interpretation." . . . "Where a law is plain and unambiguous, whether it be expressed in general or limited terms, the legislature should be intended to mean what they have plainly expressed, and consequently, no room is left for construction."**

Id. at 413-14 (emphasis added) (citation omitted). Here, NRS 444.520 is not ambiguous merely because it does not specifically call out NRS 108.239, instead it specifically references this statute as this is the only statute that defines "the manner of foreclosing" on a lien. This result is clearly what the Legislature intended even though it generally referenced

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[16] The District Court's interpretation also means that NRS 318.197 (improvement distinct liens) and NRS 244A.549 (waste water liens) are also ambiguous.

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the statute and did not provide the specific statute number.[17]

This is the plain reading of the statute. A court interprets clear and unambiguous statutes by giving effect to plain and ordinary meaning of the statute's words. Williams v. United Parcel Servs., 129 Nev. 386, 391, 302 P.3d 1144, 1147 (2013). When a statute is unambiguous, this Court "do[es] not resort to other sources, such as legislative history, in ascertaining that statute's meaning." Id. "[T]here is no room for construction" of an unambiguous statute; thus, this Court is "not permitted to search for its meaning beyond the statute itself." Sandpointe Apts., 129 Nev. 813, 827, 313 P.3d 849, 858 (2013) (internal quotations omitted). Accordingly, the District Court erred by concluding NRS 444.520(3) was ambiguous.

NRS 444.520(3) also limits its reference to the mechanic's lien statute that deals solely with **foreclosure**. "Foreclosure" has a plain and ordinary meaning. *See* In re Resort at Summerlin Litig., 122 Nev. 177,

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[17] There is a common sense reason that the Legislature generally referenced the mechanic's lien foreclosure statute. The Legislature is very familiar that statutes are often repealed, amended, or modified thereby necessitating numerical changes to statute numbers. By generally referencing the mechanic's lien foreclosure statute, the Legislature avoided the need to amend NRS 444.520(3) in the event the mechanic's lien statutes were altered.

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182, 127 P.3d 1076, 1079 (2006) ("If a statutory phrase is left undefined, this court will construe the phrase according to its plain and ordinary meaning."). "Foreclosure" is defined as "[a] legal proceeding to terminate a mortgagor's interest in property, instituted by the lender . . . either to gain title or force a sale in order to satisfy the unpaid debt secured by the property." *Foreclosure*, Black's Law Dictionary (10th ed. 2014). This definition clearly limits "foreclosure" to actual **foreclosure proceedings.** The term "foreclosure" does not include notice, perfection, duration or any statute of limitations.

In addition, the term "manner" has a plain and unambiguous meaning and means the procedure or way of acting. *"Manner"*, Merriam-Webster.com, https://www.merriam-webster.com/dictionary/manner (July 12, 2018), ¶2 ("a mode of procedure or way of acting."). NRS 108.239 again specifically defines the exact procedure for a foreclosure process as follows. First, a mechanic's lien may be foreclosed by filing a complaint for judicial foreclosure. NRS 108.239(1). Then, once the complaint is filed, the garbage company must also file a lis pendens, publish the notice of foreclosure once a week for three weeks, and personally serve any other lien claimants and the landowner with a copy of the notice and a written statement of the facts constituting the lien and the amounts and dates

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thereof. NRS 108.239(2). Once service of the lien foreclosure action has been made on all lien claimants of record and the landowner, the court can proceed to determine the validity and amount of the lien and order that the property be "sold in satisfaction of all liens." NRS 108.239(7), (10). This is the exact process that the Nevada Legislature envisioned when it said that garbage liens may be "foreclosed" upon in the "same manner" as called out for the foreclosure of a mechanic's liens.[18]

Accordingly, the District Court's decision must be reversed because 444.520 is not ambiguous. NRS 108.239 is the only statute in NRS Chapter 108 that contains the "manner" of proceeding for a "foreclosure" of a mechanic's lien. Therefore, NRS 444.520(3) clearly and unambiguously incorporates NRS 108.239 when it states that garbage liens "may be foreclosed in the same manner as provided for the foreclosure of mechanics' liens."

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[18] Obviously the need for a garbage company to file a complaint for judicial foreclosure, file and record a lis pendens, publish notice of the foreclosure proceedings and personally serve all interested parties satisfies any due process concerns. The District Court ignored the due process protections built into NRS 108.239—which due process protections are incorporated into 444.520(3) by reference.

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B. EVEN IF AMBIGUOUS, THE DISTRICT COURT CANNOT IMPOSE ADDITIONAL REQUIREMENTS INTO THE STATUTORY TEXT OF NRS 444.520.

Reversal is also warranted because (1) the District Court erred by expanding upon NRS 444.520's statutory language to include additional notice and perfection requirements, and (2) the District Court's imposition of additional requirements is contrary to 444.520's legislative history.

1. The District Court Erred In Expanding Upon NRS 444.520's Statutory Language to Include Additional Notice and Perfection Requirements.

The District Court found that NRS 444.520 should be interpreted "to state that the garbage lien may apply the mechanic's liens statutes that address procedural requirements not already governed by NRS 444.520." 2 JA 411. The District Court then expressly incorporated NRS 108.226, which requires garbage companies to send out a notice of the lien within 90 days of the delinquency, and NRS 108.2275, which permits a homeowner to request a hearing to contest the lien. Id. at 412-413. Neither of these two mechanic's lien statutes are referenced in NRS 444.450 and neither of these two statutes has anything to do with the manner of a foreclosure.

Because NRS 444.450 does not include a 90-day notice obligation or a hearing contained in the mechanic's lien statutes, the District Court then said this silence allowed the Court to incorporate these obligations from the

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mechanic's lien statutes.[19] 2 JA 411. However, the District Court ignored that when a statute is silent on an issue the District Court is not vested with the authority to make up an entirely new statutory framework.

Instead, as this Court has stated: "**it is not the business of th[e] court to fill in alleged legislative omissions based on conjecture as to what the legislature would or should have done.**" McKay v. Bd. of Cnty. Comm'rs, 103 Nev. 490, 492, 746 P.2d 124, 125 (1987) (emphasis added). The District Court's duty in interpreting NRS 444.520 "**does not include expanding upon or modifying the statutory language because such acts are the Legislature's function.**" Williams, 129 Nev. at 391-392, 302 P.3d at 1147 (2013) (emphasis added). Therefore, "**a court should not add to or alter the language to accomplish a purpose not on the face of the statute or apparent from permissible extrinsic aids such as legislative history or committee reports.**" State Indus. Ins. Sys. v. Bokelman, 113 Nev. 1116, 1122, 946 P.2d 179, 183 (1997) (internal quotations and alterations omitted) (emphasis added). By interpreting NRS

[19] Using this logic, every statute is silent on something so every statute is therefore susceptible to judicial expansion well beyond the plain meaning and legislative purpose and intent.

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444.520 to include all statutes related to mechanics' liens, the District Court impermissibly expanded upon the language of NRS 444.520 statute.[20] Accordingly, the District Court's decision must be reversed.

2. The District Court's Imposition of Additional Requirements Is Contrary to the Legislative History of 444.520.

The Legislature specifically declined to adopt any additional requirements from NRS Chapter 108 into NRS 444.520. The language at issue in this petition was added to NRS 444.520(3) in 2005, by Senate Bill 354. With regard to this enactment, the discussion of mechanics' liens only arose in the context of an actual foreclosure as follows:

> Assemblyman Horne: These are the types of liens where you can effectuate a sale of property. It's a type of lien where, once the property is conveyed, there is notice saying that people, in a certain order, will get paid out of the proceeds of the sale; is that correct?
>
> Jennifer Lazovich: It **operates in the same way as a mechanic's lien**. The ultimate step could take place; **foreclosure proceedings** could be brought forward . . . .

Hearing on S.B. 354 before Assem. Comm. on Health and Human Servs.,

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[20] Furthermore, the District Court ignored that 444.520(4) provides the statutory framework for the "effectiveness" of the garbage lien. Nothing contained in this statute allows the District Court to incorporate mechanic's lien law regarding notice, perfection and dispute of a recordation of a lien since the Legislature already defined what is legally required for the garbage lien to be effective. *See* NRS 444.520(4).

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73rd Reg. Session (May 20, 2005) (Emphasis added). Nowhere in the legislative history is there any discussion of incorporating all of the requirements of the mechanic's lien statutes into NRS 444.520(3) only the "foreclosure" proceeding are referenced.

The District Court recognized that the Legislature's concern was that homeowners be given notice of a garbage lien prior to foreclosure when these liens may arise from a **renter's** failure to pay garbage fees. 2 JA 405-406. Strangely, the District Court even noted the Legislature addressed this issue and the "Senate Committee discussed that if renters live in a home, the homeowner must take precautionary steps to have the garbage bill sent to the homeowner's residence instead of the rental." 2 JA 405:10-12.

The District Court's myopic view failed to recognize that the "fairness" that drove the amendments to NRS 444.520 was not the "fairness" to homeowners, but the fairness to the garbage companies who are the recipients of the lien rights. As the proponents of 444.520 explained, the purpose of the garbage lien is to protect garbage collectors who are "required to pick up your garbage whether the bills are getting paid by whoever lives there or not." Hearing on S.B. 354 before Senate Comm. on Gov. Affairs, 73rd Reg. Session (April 6, 2005). The garbage

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collectors wanted "to pursue the unpaid bills, since the garbage companies are required to pick up the garbage no matter what happens." Id. The Legislature specifically **agreed** with the garbage companies and stated that "[t]he only way this is going to work is the owner of the property will have to ultimately address the lien, even if he had a tenant in violation." Id.

The fairness consideration—that was ignored by the District Court—is that it is unfair to require garbage collectors to continue picking up garbage when they are not getting paid. That is why the Legislature gave them a perpetual lien to protect them from harm. Garbage collectors are providing a service of utmost public concern and policy. *See* NRS 444.440 ("It is hereby declared to be the policy of this State to regulate the collection and disposal of solid waste . . . ."). Therefore, the Legislature provided garbage collectors with a lien that is perpetual and that can foreclose upon should they elect to do so.

Because a failure to abide by these "new" and additional statutory requirements imposed by the District Court can and do result in the forfeiture of the garbage lien rights, the District Court's holding does not further the purpose and intent of NRS 444.520--which is to assist garbage companies to get their liens paid. In fact, this new interpretation by the District Court requires that all prior unpaid garbage fees incurred by Waste

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Management and/or any other garbage company, that are over 90 days old with no lien filed are forever lost. The District Court just caused serious financial harm to Waste Management and all garbage collection companies when the whole purpose and intent of NRS 444.520 was to protect garbage collectors who are forced to collect garbage even when not getting paid. The District Court's ruling achieves the exact opposite result and imposes new barriers and new time restrictions upon garbage collection companies that the Nevada Legislature did not impose, did not contemplate and did not desire to impose.

In addition, requiring garbage companies to follow these "new" additional steps created by the District Court imposes additional costs and burdens on garbage collection companies and substantially increases the financial harm to property owners—all of which the Legislature was attempting to avoid.[21] For example, in the case of WTS, in 2012, if Waste Management was required to go forward with recording a lien every 90 days following non-payment as the District Court has concluded, Waste

[21] Again, the District Court's interpretation imposes the same burdens upon general improvement districts, counties and the State. See NRS 318.197(2) (perpetual liens for services in a general improvement district) and 244A.549(2) (perpetual lien for service charges for sewage and wastewater).

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Management would have had to assess service charges to WTS's account in the amount of $64.00 to process the 1st Lien and record it. 1 JA 150. Thus, if WTS missed a single $36.06 quarterly charge (the rate applicable to WTS account for 347 West Taylor at the time of the February 2012 lien) and Waste Management was required to race to the County Recorder's office every 90 days, in the span of a 12-month period of time in 2012, the service charges would be $144.24 and the lien and recording fees would be $256.00. This outcome was not what the Legislature envisioned or intended.

To the contrary, the Legislature was specifically informed that before it enacted NRS 444.520 "[c]ustomers receive about six requests for payment before they receive an intent to lien notice." 2 JA 411:4-5 (quoting Senate Committee on Government Affairs, Committee Analysis of A.B. 354, at 11 (April 6, 2005)). Requests for payment do not cost the homeowner any additional charges. These requests give the homeowner multiple chances to avoid liens and recording fees. However, requiring the garbage lien to be recorded within 90 days of the first delinquency in payment would all but eviscerate any opportunity for a customer to avoid these additional costs. Neither the express language of NRS 444.520 nor the legislative history of NRS 444.520(3) call for the imposition of such an

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inflexible, unworkable and punitive system to the garbage collection companies and to the homeowners.

The District Court knew its ruling would have a substantial impact on the garbage collection industry because it advised that Waste Management would be required to send out a notice of lien, which would force the garbage company to "impose a shorter billing cycle" than the billing cycles already in place and to actively and vigorously pursue liens or forever lose their lien rights. 2 JA 416. It is suggested that, in this instance, the decision on how an industry should conduct its business in Nevada is clearly best left to Nevada's Legislature, and not to the district courts of this State.

C. THE LEGISLATURE REJECTED THE DISTRICT COURT'S INTERPRETATION WHEN ENACTING THE IDENTICAL PROVISION IN 318.197(2).

The District Court failed to address that the language contained in 444.520(3) was adopted from the identical language that existed and was employed in NRS 318.197(2).[22] NRS Chapter 318 addresses the

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[22] When a statute is ambiguous, this Court may consider analogous statutory provisions. Nev. State Democratic Party v. Nev. Republican Party, 127 Nev. ___, ___, 256 P.3d 1, 5 (2011). NRS 318.197 is an analogous statute because its language is identical and because NRS Chapter 318 governs public health and safety by promoting the

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obligations and duties of general improvement districts. NRS 318.197(1) provides that general improvement districts may charge and impose liens on real property for electrical energy, cemetery services, swimming pool services, other recreational facility services, television and radio services, sewer service, water service, storm drainage service, flood control service, snow removal service, lighting service, **garbage service**, tolls and all other charges that are not deemed special assessments. Under NRS 318.197, the general improvement districts have liens rights associated with providing the foregoing services.

If the District Court was considering analogous statutes in its endeavor to interpret what the Legislature intended by enacting the provisions of 444.520(3), the District Court should have considered the legislative intent of the identical language contained in NRS 318.197(2), which also provided lien rights for garbage collection services by general improvement districts, and which states, in relevant part:

> [U]ntil paid, all rates, tolls or charges constitute a perpetual lien on and against the property served . . . . **A perpetual lien must be**

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organization of districts to regulate sanitation, water, and public health. *See* NRS 318.015 ("It is hereby declared as a matter of legislative determination that the organization of districts . . . will serve a public use and will promote the health, safety, prosperity, security and general welfare of the inhabitants thereof . . . .").

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foreclosed in the same manner as provided by the laws of the State of Nevada for the foreclosure of mechanics' liens . . . .

(Emphasis added). An analysis of the legislative history of NRS 318.197 conclusively establishes that the District Court's reasoning was incorrect.

Specifically, in 1977 the Legislature considered whether NRS 318.197 should be amended to include language addressing notice and recordation actions that must be given to the homeowners like a mechanic's lien before the general improvement district lien could become valid. *See* Hearing on A.B. 165 before Assem. Comm. on Gov. Affairs, 59th Reg Session (February 14, 1977), Exhibit 2.[23] The proponents of this amendment argued as support that "chapter 108, the general statutory lien law also requires for notice and recording before a lien is enforceable." Id. **The Legislature sided with the opponents of the proposed amendment and it was never adopted**. Stated another way, the Legislature was already presented with and already rejected the District Court's interpretation of NRS 444.520 when considering the almost identical language contained in NRS 318.197. Conclusively demonstrating the Legislature's rejection of the imposition of mechanic's lien notice and

[23] Notably, in 1977, NRS 318.197 was also being amended to add a subpart that is virtually identical to the notice and efficacy requirements set forth in NRS 444.520(4). *Compare* NRS 318.197(9).

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perfection requirements, this proposed amendment seeking to require such obligations is literally crossed out on the Bill Guide. Id.

To sum up this history, the 1977 Legislature in amending NRS 318.197(2) (allowing for, among other things, general improvement district garbage liens), which contains the exact language contained in NRS 444.520(2). The Legislature expressly refused to adopt the exact requirements from NRS Chapter 108 that the District Court has now imposed by judicial fiat into NRS 444.520(3). Therefore, the District Court's decision has already been rejected by relevant and applicable analogous legislative history.

Further, the District Court failed to address that its interpretation of 444.520(3) would impose the same notice obligations, 90-day delinquency triggering event to file a lien or lose it, and the imposition of a 2-year statute of limitations to enforce general improvement district liens embodied in 318.197(2). Similarly, the District Court failed to address that its interpretation would impact the counties' and the State's ability to pursue their lien rights for providing a wide variety of services to county and State residents as embodied in 244A.549(2).

The District Court's creation of an entirely new set of extensive obligations on garbage collection companies, general improvement

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districts, counties and the State will obviously have significant impacts on these additional industries and services. It will also necessitate much more aggressive collection activities and costly lien recordation activities—all with the effect of increasing costs and charges to property owners. It is also anticipated that the District Court's decision, if left unchanged, will likely bar general improvement districts, counties and the State from collecting hundreds of thousands of dollars in unpaid service fees for which a lien was not recorded within 90 days of a delinquency. If such broad and sweeping changes are to occur to a multitude of Nevada statutory lien frameworks, this should be the prerogative of the Nevada Legislature, not the District Court.

D. THE DISTRICT COURT'S HOLDING IS CONTRARY TO THE RULES OF STATUTORY CONSTRUCTION.

The District Court's incorporation of all procedural mechanic's lien statutes is directly contrary to the rules of statutory interpretation. Specifically, the District Court erred in holding that garbage companies are required, under NRS 108.226, to record a lien within 90 days of a "delinquency". 2 JA 414. This condition is not contained in NRS 444.520(4) which sets forth the requirements for a garbage lien to become

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"effective".[24]

Contrary to the District Court's analysis, NRS 444.520(4) sets forth specific requirements for notice and perfection of a garbage lien. This statute requires that notice be: (1) "[m]ailed to the last known owner at the owner's last known address", (2) "[d]elivered to the county recorder", (3) [r]ecorded by the county recorder", and (4) "[i]ndexed in the real estate index." NRS 444.520(4). Nowhere in the statute is there a time limitation for when this notice of lien must be provided.

Nevada law is clear "that a provision which specifically applies to a given situation will take precedence over one that applies only generally." Nev. Power Co. v. Haggerty, 115 Nev. 353, 364, 989 P.2d 870, 877 (1999) (internal quotations omitted). Because NRS 444.520 specifically governs garbage liens, the District Court erred in interposing requirements from the **general** mechanic's lien statutes into the **specific** garbage lien statute.

Finally, when NRS 444.520(4) was enacted, NRS 108.226 was already in existence. "[T]his [C]ourt assumes that when enacting a statute, the Legislature is aware of related, statutes." Double Diamond v. Second Jud. Dist. Ct., 131 Nev. Adv. Op. 573, 54 P.3d 641, 644 (2015). Therefore,

[24] The requirements contained in NRS 444.529(4) are identical to the requirements contained in NRS 318.197(9)

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the Legislature could have chosen to include the 90-day notice requirement found in mechanic's lien statutes but it did not do so. The fact that the Legislature did not impose this obligation is clear evidence that the Legislature **did not** intend to require garbage companies to submit notice of the lien within 90 days of any delinquency. Further, NRS 318.197(9), which is identical to NRS 444.520(4) also does not impose any such 90-day time obligation.

Similarly, the District Court erred in concluding that NRS 108.2275's provisions allowing for a motion to be brought before the district court to contest a mechanic's lien, also applies to garbage liens. 2 JA 412. Again, NRS 108.2275 was also in effect at the time that NRS 444.520 was amended, and the Legislature could have chosen to include a similar dispute process, however, it did not. This is because the lien foreclosure statute already included a dispute resolution methodology and/or NRS 30.040 allowed for an affirmative action to contest any lien. In practicality, there is no distinction between a motion to contest a mechanic's lien under NRS 108.2275 and a complaint for declaratory relief challenging the lien and/or its amount. Both have to be filed with a district court and served on opposing parties and both require filing fees to be paid to proceed. Therefore, the District Court's interpretation that NRS 444.520

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needed yet another dispute resolution methodology over and above what was included in NRS 108.239 and/or in NRS 30.040 was excessive, duplicative and unnecessary and such interpretation requires reversal as requested.

E. OTHER COURTS REJECT THE DISTRICT COURT'S INTERPRETATION.

Other courts addressing the identical language have rejected the District Court's interpretation. Colorado has rejected the District Court's interpretation in interpreting an identical statute. In North Washington Water & Sanitation District v. Majestic Savings & Loan Association, 594 P.2d 599, 600 (Colo. Ct. App. 1979), the court interpreted a Colorado statute providing that sewage fees "shall constitute a perpetual lien against the property served, and any such lien may be foreclosed in the same manner as provided for by the laws of the State of Colorado for the foreclosure of mechanics' liens." The Colorado Court of Appeals rejected the argument that the water district was required to comply with the procedural mechanic's lien statutes regarding perfection of a lien in order to properly foreclose on a sewage lien. Id. at 600.[25]

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[25] Strangely, the District Court relied upon North Washington in its Order (2 JA 415 fn. 10) and even cited to the foregoing language that a perpetual

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In addition to North Washington, in Skyland Metropolitan District v. Mountain West Enterprises, 184 P.3d 106, 116 (Colo. Ct. App. 2007), the Colorado Court of Appeals again rejected the argument that the phrase "foreclosure of mechanics' liens" in Colorado's statute required the water district to comply with the mechanic's lien law's statutory notice procedures. The court reasoned that "[t]he purpose of the statutory notice of intent is to perfect a valid lien," but that the sewage lien was "in the nature of taxes," and, therefore, **already perfected**. Id. Accordingly, the court held that "because the districts' liens were perpetual and perfected, service of the notice of intent was unnecessary to preserve the lien." Id.

Like the courts in Colorado, the Nevada Attorney General also believes that garbage fees may be considered taxes and treated as such. *See* 99-24, Op. Atty. Gen. 125, 1-2 (1999). Specifically, the Nevada Attorney General has opined that counties may, pursuant to NRS 318.201, "impose landfill user fees" charged pursuant to NRS 444.520 "on the tax roll." Id.

NRS 444.520(4) imposes its own notice requirements for garbage companies or others seeking to place a lien for unpaid garbage fees on

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lien does not have a statute of limitations, and even "adopted" Colorado's definition of "perpetual" yet ignored the legal analysis of the case it was "adopting" and rendered the complete opposite holding. 2 JA 415.

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property. Under the reasoning set forth above, because fees levied under NRS 444.520(1) are treated like taxes, the perpetual lien under NRS 444.520(3) should be considered perfected and no additional steps should be taken once the notice requirements of NRS 444.520(4) are met. Accordingly, the District Court's decision must be reversed as there should not be any further notice or perfection obligations imposed in order to establish a valid garbage lien.

F. NRS 444.520 IS CONSTITUTIONAL AS ENACTED.

Nevada's Constitution at Article 1, Section 8 states: "No person shall be deprived of life, liberty, or property, without due process of law." However, due process is satisfied where a party is given notice and the opportunity to be heard. Browning v. Dixon, 114 Nev. 213, 217, 954 P.2d 741, 743 (1998). NRS 444.520(3) provides notice and the opportunity to be heard via the foreclosure proceedings incorporated into NRS 108.239.

WTS generally argued that there were "constitutional issues" with NRS 444.520 because NRS 444.520 did not contain a "mechanism" to contest the lien.[26] 1 JA 30:8. The District Court noted that WTS did not

[26] Although not briefed at the trial court level, arguably Waste Management is acting under the color of the law pursuant to NRS 268.083(2) which authorizes the City of Reno to hire Waste Management to perform the

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"completely brief" its constitutional argument. Id. at JA 415 fn.9. Even though the issue was only superficially referenced by WTS, the District Court nonetheless concluded that NRS 444.520 "does not provide an opportunity to be heard if the property owner disputes the lien . . . ." 2 JA 413:2-3. Again, the District Court's analysis was entirely silent on the fact that NRS 444.520(3) provides notice and the opportunity to be heard via the foreclosure proceedings incorporated into NRS 108.239.

In State v. Glusman, 98 Nev. 412, 420, 651 P.2d 639, 644 (1982), this Court stated:

> In the face of attack, every favorable presumption and intendment will be brought to bear in support of constitutionality. As previously held, "[a]n act of the legislature is presumed to be constitutional and should be so declared unless it appears to be clearly in contravention of constitutional principles."

Id. (citation omitted). Here, the District Court should have initiated its analysis with the constitutionality of NRS 444.520(3)'s provisions by considering the inclusion of NRS 108.239's judicial foreclosure process and/or NRS 30.040's declaratory relief process as satisfying due process requirements.

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waste collection activities in the City. "The Fourteenth Amendment protects individuals against the deprivation of liberty or property by the government without due process." State v. Eighth Judicial Dist. Ct., 118 Nev. 140, 153-54, 42 P.3d 233, 242 (2002).

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Under NRS 108.239, a mechanic's lien may be foreclosed by filing a complaint for judicial foreclosure. NRS 108.239(1). The garbage company must also file a lis pendens, publish the notice of foreclosure once a week for three weeks, and personally serve any other lien claimants and the landowner with a copy of the notice and a written statement of the facts constituting the lien and the amounts and dates thereof. NRS 108.239(2). The court can then determine whether the property should be judicially foreclosed, and order that the property "be sold in satisfaction of all liens." NRS 108.239(7), (10). Accordingly, homeowners are afforded both notice of the garbage lien and the opportunity to be heard under the provisions of NRS 444.520(3), incorporating 108.239's requirements. Therefore, there are no constitutional barriers to the validity and enforcement of NRS 444.452(3) and it is constitutional as enacted.[27]

G. THE DISTRICT COURT ERRED IN DISREGARDING THE LEGAL EFFECT OF THE TERM "MAY".

The District Court's interpretation conflicts with the use of the term "may" in NRS 444.520. NRS 444.520 provides that a "lien **may** be

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[27] This Court has considered due process implications arising from another lien statute in the State and has determined that "Nevada's superpriority lien statutes do not implicate due process." Saticoy Bay LLC Series 350 Durango 104 v. Wells Fargo Home Mortg., 388 P.3d 970, 973 (Nev. 2017).

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foreclosed in the same manner as provided for the foreclosure of mechanics' liens". (Emphasis added). "May" defines a permissive act.[28] The District Court's interpretation converts "may" from a permissive act into a mandatory act under the dire consequence that the garbage servicer loses its garbage lien and its foreclosure rights if the action is not taken. If such a dire consequence was intended, it is clear that the Legislature would have articulated such a result and used the language "shall" requiring mandatory compliance.

If the statute says "may" foreclose and provides for a perpetual lien, then there is no mandate to initiate a foreclosure proceeding within any defined time period. The foreclosure process is therefore a permissive act that has no termination date associated with it. However, the District Court's interpretation now requires that such language mean that the foreclosure action shall occur within a date certain or the ability to foreclose on the lien terminates. The District Court's interpretation contradicts the permissive nature of the foreclosure process and instead

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[28] Nevada Comm'n on Ethics v. JMA/Jucchesi, 110 Nev. 1, 886 P.2d 297, 302 (1994) ("It is a well-settled principal of statutory construction that statutes using the word 'may' are generally directory and permissive in nature, while those that employ the term 'shall' are presumptively mandatory.").

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mandates a date certain by which the foreclosure process must happen or be forever lost. The District Court's interpretation creates a harsh, draconian and punitive result which is not proper and must be reversed. Las Vegas Sun v. District Court, 104 Nev. 508, 511, 761 P.2d 849, 851 (1988) ("statutes should be interpreted so as to effect the intent of the legislature in enacting them; the interpretation should be reasonable and avoid absurd results.").

H. THE DISTRICT COURT ERRED BECAUSE A PERPETUAL LIEN IS NOT SUBJECT TO A STATUTE OF LIMITATION.

The District Court erred in holding that foreclosure of a garbage lien must be brought within two years from the date that the lien was recorded. 2 JA 414-416. This is because perpetual liens are, by their very nature, "perpetual" and are not subject to any statute of limitations. Swingley v. Riechoff, 112 P.2d 1075, 1079 (Mt. 1941) ("a perpetual lien . . . [has] no statute of limitations . . . ."); Gibson v. Peterson, 224 N.W. 272, 273 (Neb. 1929) ("the holder of a . . . perpetual lien . . . may . . . enforce it at any time, without regard to any statute of limitations."); Wells Cty. v. McHenry, 74 N.W. 241, 248 (N.D. 1898) ("A perpetual tax lien presupposes the continuance of the obligation of the citizen to pay the tax without reference to the lapse of time."); *see also* James v. Strange, 407

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U.S. 128, 132, 92 S. Ct. 2027, 2030, 32 L. Ed. 2d 600 (1972) (recognizing Florida's recoupment law creates a perpetual lien and has no statute of limitation); Wilford v. City of Ottawa, 186 N.E.2d 785, 786 (Ill. Ct. App. 1962) (no statute of limitations apply to special assessment liens because they are perpetual like a tax lien).

Further, imposing a statute of limitations on the garbage lien is antithetical to a "perpetual" lien that can be foreclosed upon and creates an absurd interpretation. Washoe Med. Ctr. v. Second Jud. Dist. Ct., 122 Nev. 1298, 1302, 148 P.3d 790, 793 (2006) ("we consider 'the policy and spirit of the law and will seek to avoid an interpretation that leads to an absurd result.'"). If the Legislature wanted a statute of limitation to apply to the perpetual garbage lien, it would have said so and/or limited such "perpetual" lien to something less than "perpetual". Alternatively, if the Legislature wanted to limit the right to foreclose upon a tax lien to a finite duration of time, the Legislature would have imposed a statute of limitations in NRS 444.520.

Similarly, the District Court's interpretation conflicts with the perpetual lien rights for taxes and special assessments under 318.197(2) and 244A.549(2). Clearly an action to foreclose upon liens for delinquent payment taxes and special assessments have no statute of limitation. NRS

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11.255. At the time of enactment of NRS 444.520(3), the Legislature was fully aware that there was no statute of limitations applicable to perpetual liens for taxes and/or special assessments and adopted the identical language relating to those perpetual liens into NRS 444.520(3). Accordingly, the District Court's interpretation creates an absurd result by creating a statute of limitations on a "perpetual" lien, contradicting NRS 11.255's provisions and contradicting 318.197(2)'s and 244A.549(2)'s identical provisions.

Then, the District Court freely acknowledged that NRS 444.520's perpetual lien "directly conflicts" with NRS 108.233's 6-month time period to move forward with a foreclosure of a mechanic's lien. 2 JA 415. Ignoring this "direct conflict" the District Court made up the imposition a 2-year statute of limitations for any action to foreclose on the perpetual garbage lien analogizing the lien to a penalty or forfeiture. 2 JA 416.

To support this analysis, the District Court relied upon this Court's 1872 decision of State v. Yellow Jacket Silver Min. Co., 14 Nev. 220 (1872), to hypothesize that statutory limitations **do apply** to tax liens. 2 JA 414-415. An understanding of the District Court's analysis of Yellow Jacket is in order to examine the flawed reasoning of the District Court. In

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Yellow Jacket, the statute of limitations at that time—existing almost 150 years ago–C.L. 1034–stated:

> The limitations prescribed in this act shall apply to actions brought in the name of the state, or for the benefit of the state, in the same manner as to actions by private parties.

Id. at 229. In Yellow Jacket, the Nevada Supreme Court held that a complaint for back taxes was thus subject to the four-year statute of limitation found in C.L. 1034. Id. at 228-29.

C.L. 1034 no longer exists. It has been replaced by NRS 11.255 which states there is **no statute of limitations applicable to unpaid tax liens** and specifically exempts tax lien actions from any limitation period. Specifically, NRS 11.255(2) provides:

> Except as provided in NRS 11.030 and NRS 11.040,[29] **there shall be no limitation of actions brought in the name of the State, or for the benefit of the State, for the recovery of real property**.

Id. (Emphasis added). NRS 11.255(2) now clearly exempts any action to foreclose real property brought for the benefit of the State. Thus, the District Court erred in relying upon outdated case law and ignored NRS 11.255's provisions stating there is no statute of limitations for a tax lien, in order to artificially create a 2-year statute of limitations for a garbage lien.

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[29] These statutes concern property disputes dealing with letters patent granted by the state and are not relevant to this legal proceeding.

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Garbage collection services are in the nature of a public service allowing for the creation and enforcement of tax-like liens. This is because it is clear public policy of this State to regulate the collection and disposal of solid waste embodied in NRS 444.440, stating:

> It is hereby declared to be the policy of this State to regulate the collection and disposal of solid waste in a manner that will:
>
> 1. Protect public health and welfare.
> 2. Prevent water or air pollution.
> 3. Prevent the spread of disease and the creation of nuisances.
> 4. Conserve natural resources.
> 5. Enhance the beauty and quality of the environment.

Id. The Nevada Attorney General has stated that garbage fees are the equivalent of taxes as special assessment and treated as such. *See* 99-24, Op. Atty. Gen. 125, 1-2 (1999). Thus, the fees assessed in NRS 444.520 are in the nature of a tax as a special assessment. *See also* Wasson v. Hogenson, 583 P.2d 914, 917 (Colo. 1978) (fees assessed under Colorado's identical sewage statute "are not taxes in the strict sense of the term," but are, "like special assessments, in the nature of taxes.").

Therefore, the District Court erred in relying upon Yellow Jacket because NRS 11.255(2) has abrogated Yellow Jacket.[30] Garbage collection

[30] Stated another way, the District Court erred in relying upon an

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fees and liens are clearly done to collect services provided on behalf of the State and are in the nature of special assessments and/or taxes, and as such are exempt from any statute of limitations period. Accordingly, no statute of limitations applies to foreclosure proceedings initiated under NRS 444.520(3).

I. SHOULD THIS COURT DISAGREE, THEN GARBAGE LIENS ARE GOVERNED BY A THREE-YEAR STATUTE OF LIMITATIONS.

Alternatively, should this Court disagree with Waste Management's position, the only applicable statute of limitations is the three-year period set forth in NRS 11.190(3)(a). The District Court opined that the appropriate limitations period was the two-year period set forth in NRS 11.190(4)(b) for "forfeitures." 2 JA 415. The District Court's reasoning is in error because a foreclosure is not a forfeiture.

"Forfeiture" is defined as "[t]he divestiture of property without compensation," in which "[t]itle is instantaneously transferred to another." Black's Law Dictionary (10th Ed. 2014). In contrast, title is not instantly transferred via a garbage lien because that legal remedy requires the

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interpretation of a long-since repealed statute for analytical support when the current version of the statute does not contain any statute of limitation on collection of taxes by foreclosure upon real property.

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judicial foreclosure action and a sale to be consummated. For this reason, courts overwhelmingly recognize that "[f]orfeiture and foreclosure are two very different and distinct remedies." Heisel v. Cunningham, 491 P.2d 178, 180 (Idaho 1971); *see also* Frazier v. Jackson, 641 P.2d 64, 66 (Or. Ct. App. 1982) ("Oregon courts have traditionally distinguished between forfeiture and strict foreclosure[.]").

Instead, Waste Management's right to foreclose upon WTS's property would be founded on WTS's statutory liability for payment of garbage fees arising under NRS 444.520(1). Thus, it is governed by the three-year limitation period governing claims based upon statutory liabilities (assuming that the lien is not perpetual and not governed by any statute of limitation). This period is computed from the date of the "**last transaction or the last item charged** or last credit given." NRS 11.200 (emphasis added). Thus, the limitations period to commence a foreclosure begins to run from the date of the ***last date of service*** since that would be the last date credit was provided for the collection of garbage.

J. SHOULD THIS COURT DISAGREE, THEN GARBAGE LIENS SHOULD BE TRIGGERED BASED UPON THE DATE OF THE LAST SERVICE PROVIDED.

In the event the Court concludes that a garbage lien under NRS 444.520 must be perfected within a 90-day period provided under NRS

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108.226, Waste Management respectfully requests this Court to reconsider the District Court's determination as to the triggering event for such deadline. Specifically, the District Court held that "[t]he clear language of NRS 108.226 provides Waste Management with the opportunity to supply notice to its customers within 90 days after each billing cycle **becomes delinquent**." 2 JA 414:7-8 (emphasis added). However, the "clear language" of NRS 108.226 doesn't contain a "delinquency" trigger.

The exact language of NRS 108.226(1)(a), which contains the 90-day deadline, and to which the District Court cited to in its Order, specifically provides however that a mechanic's lien claimant must record the notice of lien:

> Within 90 days after the date on which the latest of the following occurs: (1) The completion of the work of improvement; (2) The last delivery of material or furnishing of equipment by the lien claimant for the work of improvement; or (3) The last performance of work by the lien claimant for the work of improvement.

NRS 108.226(1)(a). The word "delinquency" does not appear anywhere in NRS 108.226(1)(a). Further, the word "delinquent" is not used in NRS 444.520 as a triggering event for recordation of a lien. Thus, utilization of the date of the "delinquency" as a triggering date for filing of a lien is

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neither supported by the language of NRS 108.226(1)(a), NRS 444.520 nor any reasonable inferences drawn therefrom.

Accordingly, if this Court is going to proceed with a wholesale adoption of Chapter 108's provisions into NRS 444.520(3), then this Court must also adopt the triggering language contained in NRS 108.226(a) establishing the date for recordation of a lien as being within 90 days of when the last "performance of work" occurred by the garbage collector. If the District Court and/or this Court is going to adopt provisions of Chapter 108 into 444.520 other than the limited foreclosure statute referenced as 108.239, then the defined lien triggering event must also be used and not some undefined "delinquency" date that is not contained in NRS Chapter 108.

CONCLUSION

For the foregoing reasons, this Court should reverse the District Court's Order and vacate the District Court's Order and Judgment. NRS 444.520(3) is not ambiguous because it clearly and unequivocally **only** incorporates the provisions of NRS 108.239. Any additional notice or perfection requirements created by the District Court are not properly imposed into NRS 444.520. Furthermore, NRS 444.520 is constitutional as enacted because the notice and foreclosure processes already included in

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that statute (via NRS 108.239) provides a homeowner with sufficient notice and an opportunity to be heard as does NRS 30.040's statutory remedy. Finally, because these garbage liens are essentially taxes, no statutory limitation period applies to the foreclosure of garbage liens.

DATED this 20th day of July, 2018.

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CERTIFICATE OF COMPLIANCE PURSUANT TO RULE 28.2

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

This brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14 font and Times New Roman type.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and contains 11,704 words.

3. Finally, I hereby certify that I have read this 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

///

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

DATED this 20th day of July, 2018.

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CERTIFICATE OF SERVICE

Pursuant to NRAP 25, I certify that I am an employee of SIMONS LAW, PC, and that on this date I caused to be served a true copy of the **OPENING BRIEF** on all parties to this action by the method(s) indicated below:

X by using the Supreme Court Electronic Filing System:

C. Nicholas Pereos, Esq.
Attorneys for Respondent

DATED: This 20th day of July, 2018.

JODI ALHASAN

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IN THE SUPREME COURT OF THE STATE OF NEVADA

Electronically Filed
Aug 17 2018 03:37 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

WASTE MANAGEMENT OF NEVADA, INC.

Appellant,

vs.

WEST TAYLOR STREET, LLC

Respondent.

_____/

Supreme Court
Case No.: 74876

Second Judicial District Court
Case No. CV12-02995

RESPONDENT'S ANSWERING BRIEF

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Docket 74876 Document 2018-32014

I. NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities described in NRAP 26.1(a) and must be disclosed. These representations are made in order that the justices of this Court may evaluate possible disqualifications or recusal.

Respondent West Taylor Street, LLC is a Limited Liability Company.

The undersigned counsel C. NICHOLAS PEREOS, LTD. Appears in these proceeding on behalf of West Taylor Street, LLC.

DATED this 17th day of August, 2018

BY: _____

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II. TABLE OF CONTENTS

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III. TABLE OF AUTHORITIES

CASES

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NEVADA REVISED STATUTES

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SECONDARY SOURCE

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IV. STATEMENT OF ISSUES

1. Whether the District Court erred in holding that NRS 444.520(3) requires there be affirmative action by the lien claimant in connection with the foreclosure of a lien?

2. Whether the statue of limitations in connection with debts apply to garbage lien debt created by statute?

3. Where is the District Court opinion faulty in its decision when applying Chapter 108 to NRS 444.520 (3)? Did the District Court apply too many requirements of Chapter 108?

V. BACKGROUND

In resolving the issues before the Court, Respondent submits the following rhetorical issues:

Does the statute creating a garbage lien provide an opportunity to resolve dispute?

Does the statute creating garbage liens provide for a time period for which these disputes are to be resolved?

Who is in a better position to file lawsuits to resolve these disputes? Should the property owner have the burden in resolving disputes with

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regard to the garbage lien?

Is a lawsuit intended to be the only means or vehicle for a property owner when a property owner disputes the legitimacy of the lien?

Does the Franchise Agreement with Waste Management permit Waste Management to stop service for non-payment? (See Volume 1, Joint Appendix 0184)

VI. PROCEDURAL BACKGROUND

Appellant misreads the District Court's Order for Partial Summary Judgment and places a "spin" on that reading. Nowhere did the District Court rule that the garbage lien is covered by all 62 individual statutes incorporated in the mechanic lien statutes. Nowhere did the District Court Order umbrella its ruling to include all other liens created by the Nevada Legislature. The effect of the Court's ruling is to breathe constitutionality into a statute by providing a procedural methodology that addresses recourse to property owners for the unchecked authority given to Waste Management. In other words, the District Court created a method of recourse to a property owner which was clearly missing from the statutory language with the exception of the language stating that the mechanic lien

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statutes are to be applied in connection with the foreclosure of a lien, especially after considering the language of the second Franchise Agreement that permits Appellant to stop service at their discretion.

Given the blatant ambiguity contained in the statute, Appellant seeks to place the burden on the property owner to pursue an action to remove the lien. How many property owners have the resources to engage an attorney to file a lawsuit to remove a garbage lien for residential garbage service that average fifty dollars a quarter? In fact, Appellant is hoping that the recorded garbage lien will mandate a payment without ever having to show accountability to the property owner. The incorporation of the language in NRS 444.520(3) that the lien may be foreclosed in the same manner as provided by the foreclosure of mechanic liens permits a mechanism on constitutionality that would not otherwise exist. There is no statutory lien in the statute books that give an unchecked authority for placing a lien on real property similar to that which has occurred in NRS 444.520. Accordingly, Appellant complains of the findings of the District Court and asks that this Court reject that finding but offers no viable alternatives.

The language of the Franchise Agreements specifically provides that

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the garbage bill becomes delinquent the quarter when it is not paid by the 1st of the month of the next quarter. The Franchise Agreement creates the debt and the debt starts to accrue on the quarter following the delinquency. Meanwhile, the evidence demonstrated that Appellant uses an alleged late payment for a garbage bill to first address late charges, interest, delinquencies and the last quarterly payment. In other words, if the homeowner does not pay the first quarter of the year for whatever reason (such as cancellation of service, property is vacant, etc.) and then pays the second quarter, Appellant then takes that second quarter payment and applies it to delinquency, late fees, interest and then garbage fees. The homeowner will never catch up on his payments! (See Plaintiff's Motion for Partial Summary Judgment of March 2014 which discusses these issues of payment - Volume 2, Joint Appendix 419-428)

VII. SUMMARY OF ARGUMENTS

Appellant is seeking unchecked authority in connection with the recording of a garbage lien without any accountability. There is nothing contained in NRS 444.520 that demands that Appellant's pursue a foreclosure process absent the decision of the District Court and Waste

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Management can sit on its lien in perpetuity. In fact, the second Franchise Agreement permits Appellant to stop service!

VIII. STATEMENT OF FACTS

A. Background

The Second Amended Complaint filed on June 27, 2014 places at issue the legitimacy of garbage liens that were recorded as to Respondent's property. During discovery, Respondent secured the accounting records of Appellant as to the account on the property and discerned discrepancies in those accounting records in connection with the quantitative amount of the debt versus liens. A discussion of these issues was had in the briefing in the Motion for Partial Summary Judgment. (See Volume 1, Joint Appendix 0026-47) (Volume 2 Joint Appendix 338-344) (Volume 3, Joint Appendix 656-658) and (Volume 4, Joint Appendix 865-872) Respondent disputes contention that money was owed in connection with the garbage liens which was evidenced by the trial Court's decision denying Appellant's Motion for Summary Judgment on the slander of title claims. (See Volume 5, Joint Appendix 1050-1059) Meanwhile, this issue became moot as Respondents dismissed the slander of title claims and is not pertinent to the issues before

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this Court.

After the filing of the Complaint and the recording of the first garbage lien, the Franchise Agreement that enabled Appellant to pursue its garbage liens and collect fees charged. The first Franchise Agreement was dated August 9, 1994. (See Volume 3, Joint Appendix 628-652) There was no vehicle for dispute resolution. A new Franchise Agreement was dated November 7, 2012. (See Volume 1, Joint Appendix 168-223) There was a vehicle for dispute resolution but only at the discretion of the Appellant. The second two liens were recorded after the new Franchise Agreement.

After the Summary Judgment was granted but before codified to judgment form and after the denial of the Motion to Reconsider, Appellant voluntarily released its liens. (See Appellant's Opening Brief Page 4, Line 6). Notwithstanding, we are dealing with two Franchise Agreements which is obviously different from each other.

IX. ARGUMENT

A. The Appeal is Moot

With Appellant having voluntarily realeased the liens, there is no

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longer a case or controversy for resolution by this Court. The Appeal is moot! An appeal becomes moot when it is no longer a live issue as the case no longer presents a real or justiciable controversy because the issue involves becomes academic or nonexistent. *Roark v Roark*, 551 N.E.2d 865, (Ind. 1990), *Jenkins v Branstad*, 421 N.W.2d 130 (1988). A moot question is an issue that has been deprived of practical significance or made abstract. *St. Charles Paris School Board v GAF Corp.*, 512 So.2d 1165 (1987). Cases are moot when issues are presented that are no longer "live" where parties lack legally cognizable interes in the outcome. *City of Eerie v Paps A.M*, 120 S.Ct. 1382, 146 L. Ed. 2d 265 (2000). In *Ivey v District Court*, 129 Nev. Adv. Op.16 (2013), the Supreme Court observed that a case may become moot by the occurrence of subsequent events that eliminate any actual controversy. Id at Page 3. In *Bisch v Las Vegas Metro Police Departmen*t, 129 Nev. Adv. Op. 36 (2013), our Court went on to observe that cases presenting real controversies at the time of commencement may become moot by the happening of subsequent events. In the case of *Holt v Regional Trustee Service Corp.*, 127 Nev. 80, 886, 266 P.3d 602 (2011) the Court observed that a notice of a rescission of a foreclosure renders moot

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disputes concerning the foreclosure or its timing as the notice of the rescission cancels the foreclosure sale. When the parties reached the settlement agreement, the issues before the Supreme Court became moot. *Kahn v Morse & Mowbray*, 121 Nev. 464, 117 P.3d 227 (2005). There is no longer an issue between these parties regarding the legitimacy of the lien. *The Matter of Guardianship of LS & HS*, 120 Nev. 157, 87 P.3d 521 (2004). A compromised payment of a judgment renders the appeal moot. *Wheeler Springs Plaza LLC v Beemon*, 119 Nev. 260, 71 P.3d 1258 (2003).

B. The Decision of the District Court Does Not Incorporate the Entirety of Chapter 108.

The issue may be one of semantics. Appellant argues that the decision of the District Court incorporates all of Chapter 108 but the decision of the District Court is not consistent with that position. The decision states on page 18:

> "Text, context and history support the constitutionally sound reading of NRS 444.520 that permits the incorporation of Chapter 108 mechanic liens statutes to the extent that they govern lien foreclosure procedures not addressed by the language in NRS 444.520." (Volume 2, Joint Appendix 399-418)

This language is inconsistent with Appellant's argument. Maybe Appellant

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is suggesting that only NRS 108.239 should have been adopted and read into NRS 444.520. However, NRS 108.239 can not stand independently of the earlier statutes in Chapter 108 as is exemplified in detail when the District Court discusses the legislative history in its decision as to the incorporation of Chapter 108.

The District Court in its opinion did not include additional notice requirements. In order to make NRS 108.239 meaningful, the District Court applied the perfection requirements that also paralleled that which was required in NRS 444.520. In fact, the hearing minutes in connection with the passage of the statutes supports the District Courts decision that the intent was to incorporate foreclosure proceedings as dictated by mechanic lien statutes (Volume 1, Joint Appendix 236 - Volume 2, Joint Appendix 328). The suggestion that it would impose additional burdens on Appellant mandating a shorter billing cycle is absurd. The perfection requirement is to require this corporate conglomerate to let a homeowner know that if it has not paid a bill it is facing lien foreclosure as required by the mechanic lien statutes.

C. Distinction with General Improvement Districts (NRS 318.197)

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Appellant seeks to equate itself with General Improvement Districts under Chapter 318 of Nevada Revised Statutes. There is substantial differences between Appellant and a General Improvement District. First, legislature dictated the obligations of the Board of Directors of the General Improvement District. In those obligations, the County Commissioners provided certain guidelines to the Board of Directors to include the creation of a budget which clearly was a basis for the assessments. NRS 318.080. After the County Commissioners perform that function, they can then appoint five persons on the Board of Directors for the District. Members of the Board are under an obligation imposed by oath. NRS 318.085. Members of the Board are required to keep transcripts of records of their meetings and are to be made available to the public. There is a maximum compensation to be paid to the Board of Directors. NRS 318.085. District members are to be elected, NRS 318.095, by a plurality of vote, NRS 318.0951. Persons within the district are eligible to vote. NRS 318.09525. They are subject to recall. NRS 318.0955. There is to be no conflict of interest. NRS 318.0956, NRS 318.0957. On the other hand Waste Management is a profit making corporation that is not subject to any of the

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restrictions defined herein and is accountable to no one! To suggest that Appellant stands in the same position as the Board of Director of an Improvement District is contrary to enabling statutes for the Board of Directors for the Improvement District.

D. Rules of Statutory Construction

1. Statutory Interpretation

Judicial construction and intervention in interpreting statutes arise from the intrinsic difficulties of language and the emergents situations after enactment of the statutes not anticipated by the most gifted legislatures. These situations demonstrate ambiguities in a statute that compel judicial intervention.

The purpose of construction is to ascertain meaning of every consideration brought to bear with regard to the statute for the solutions of the problem at hand. (Some Reflections on the Reading of Statutes, by Justice Felix Frankfurter, presented at the Benjamin Cardozo Lecture before The Association of the Bar of the City of New York (1947) (See Exhibit "1", Page 215.)

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> "Statutes within a scheme and provisions within a statute must be interpreted harmoniously with one another in accordance with the general purpose of those statutes and should not be read to produce unreasonable or absurd results." *Washington v. State*, 117 Nev. 735, 739, 30 P.3d 1134, 1136 (2001).

In other words, the judicial branch of the government interprets the statute in the context of the events before the Court and if the statute does not address those events, the statute is to be interpreted harmoniously with other statutes that are a part thereof. When Defendant advances a proposition that the lien exists in perpetuity without any limitations, is this harmonious with the statutes of Nevada? When the Defendant advances the proposition that the debt of the garbage lien lasts in perpetuity, is this harmonious with Nevada common law?

The issue before the Court is not the public policy supporting the collection of refuge (garbage) in residential districts. The issue before the Court is a methodology for resolution of disputes created by the filing of a garbage lien. Waste Management wants unchecked authority to record a garbage lien against property and not be held accountable for the amount set forth in the garbage lien. Waste Management wants this Court to accept the proposition that the statute enabling it to record a garbage lien gives it

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unchecked authority without accountability. Even a county government in regard to collection of real property taxes does not have such authority as is discussed hereinafter.

In fact, the legislative hearing on the passage of NRS 444.520 demonstrate that there was concerns about the placement of liens on the owners property. The comment of Assemblywoman Gerhardt, made on Page 15 of the Minutes (Volume 1, Joint Appendix, 278, 293) is informative:

> "I'm always concerned about liens on a person's home; that's pretty sacred. I have a problem with putting someone's home in jeopardy for a bill that they are not really responsible for."

2. Statutory Language in NRS 444.520:

There is no dispute that NRS 444.520 enables Defendant to record a garbage lien. Now the issue is what happens with the lien after it's recorded? The statute tells us that the lien may be foreclosed consistent with the foreclosure mechanic's liens. However, a mechanic's lien cannot be foreclosed until there are certain events that occur prior to the foreclosure. If this "garbage lien" is to be foreclosed in the same manner as provided for the foreclosure of mechanic's liens, there are certain

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prerequisites that have to be followed by lien holder.

The Nevada Supreme Court has repeatedly held that there must be strict compliance by the moving party with statutes creating a remedy particularly the foreclosure of mechanic's lien. In the case of *Schofield v. Copeland Lumber*, 101 Nev. 83, 692 P.2d 519 (1985), the Nevada Supreme Court reversed the decision for summary judgment in an action filed by a contractor to foreclose the mechanic's lien. In discussing the complaint of foreclosure, the Supreme Court observed:

> "The mechanic's lien is a creature of statute, unknown at common law. Strict compliance with the statute creating the remedy is therefore required before a party is entitled to any benefits occasion by its existence.... If one pursues his statutory remedy by filing a complaint to perfect a mechanic's lien, he necessarily implies full compliance with the statutory prerequisite giving rise to the cause of action." Id. at Page 84.

Although the Nevada Supreme Court has recognized that strict compliance with the language of the mechanic's lien is not required in connection with the content of the lien, the same does not hold true in connection with compliance with the statute to perfect and foreclose the lien. In *Fisher Bros., Inc. v. Harrah Realty Co.*, 92 Nev. 65, 545 P.2d 203 (1976). Harrah contracted with Stolte, Inc. Stolte engaged Terry Construction.

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Terry Construction engaged Fisher Brothers. Harrah paid Terry Construction. Terry Construction did not pay Fisher Brothers. In an action to foreclose the lien, the Court observed:

> "Strict compliance with the statutes creating the remedy is therefore required before a party is entitled to any benefits occasioned by its existence [citation omitted]. If one pursues his statutory remedy by filing a complaint to perfect a mechanic's lien, he necessarily implies full compliance with the statutory prerequisites giving rise to the cause of action." Id. at Page 67.

In *Hardy Companies, Inc. v. SNMARK, Inc.*, 126 Nev.Adv.Op. 49, 240 P.3d 1149 (2010), the court noted:

> "Failure to either fully or substantially comply with the mechanic's lien statute will render a mechanic's lien invalid as a matter of law." Id. at Page 155.

There is additional case law from other jurisdictions that indicate that failure to comply with a mechanic's lien statute's procedural provisions will preclude the lien's validity and enforcement. In *Rollar Construction and Demolition, Inc. v. Granite Rock Assoc's, LLC*, 891 A.2d 133, 135-36, (Conn. Ct. App. 2006), the Court stated:

> "Although the mechanic's lien statute creates a statutory right in derogation of the common law . . . its provisions should be liberally construed in order to implement its remedial purpose of furnishing security for one who provides services or materials. . . . Our interpretation, however, may not depart from reasonable compliance with the specific terms of the statute under the guise of a liberal construction."

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(Citations omitted.) The Court further noted:

> "General Statutes Sec. 49-34 includes five requirements to filing a valid mechanic's lien. If any of those requirements fail, the lien is invalid. Id. at FN 7. "

Similarly, in *Westcon/Dillingham Microtunnelling v. Walsh Constr. Co. of Illinois*, 747 N.E.2d 410 (Ill.Ct.App. 2001), the court stated:

> "The purpose of the Act is to protect those who, in good faith, have furnished materials and labor for the construction of buildings or public improvements. Section 39 of this Act states that "[t]his act is and shall be liberally construed as a remedial act." 770 ILCS 60/39 (West 1998). Nevertheless, because the rights created are statutory and in derogation of common law, the technical and procedural requirements necessary for a party to invoke the protection of the Act must be strictly construed. . . . Once a plaintiff has complied with the procedural requirements upon which a right to a lien is based, the Act should be liberally construed to accomplish its remedial purpose.

Id. at 416 (citations omitted). Further,

> It is well established that the creation of a mechanic's lien is entirely governed by the Act, and the rules of equity jurisprudence are irrelevant at this stage.

Id. See also *Crawford Supply Co. v. Schwartz*, 919 N.E.2d 5, 12 (2009):

> Because the rights under the Act are in derogation of the common law, the steps necessary to invoke those rights must be strictly construed.

(Citing *Westcon/Dillingham, supra.*)

> In *National Lumber Co. v. Inman*, 933 N.E.2d 675 (Mass.Ct.App. 2010), the court noted that the purposes of the mechanic's lien statute "include the protection of the owners' real estate," and that

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> "the statute contains filing and notice requirements to protect the owner and others with an interest in the property."

In *In Re Trilogy Development Co.*, 468 B.R. 854 (W.D. Mo. 2011), the court noted that while "mechanic's liens in Missouri are remedial in nature and should be liberally construed for the benefit of the lien claimants," it further stated that "this liberal policy is not open-ended and does not relieve a lien claimant of reasonable and substantial compliance with statutory requirements." Id. at 862 (citations omitted). Finally, in *Southern Management Co. v. Kevin Willes Constr. Co., Inc.*, 856 A.2d 626, 637, (Md.Ct.App. 2004), the court held:

> Mechanic's liens, as they exist in this State, are creatures of statute, and, thus, to be entitled to a mechanic's lien against property in Maryland, a claimant must satisfy the procedural criteria set forth in the statute.

See also *Freeform Pools, Inc. v. Strawbridge Home for Boys, Inc.*, 179 A.2d. 683, 685 (Md.S.Ct. 1962) (stating that "a mechanic's lien is a claim created by statute and is obtainable only if the requirements of the statute are complied with.")

Appellant disputes the necessity to perfect the garbage lien as required by the mechanic's lien law statutes. Instead, Appellant argues that

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NRS 444.520 provides its own methodology for perfecting the lien by mailing and recording which would inherently include delivering and indexing. Let us assume that this Court accepts that proposition, to wit, NRS 444.520 provides its own methodology for perfection. It still does not address the issue of dispute resolution after the lien has been perfected? It does not address the issue as to the time periods of placement of a garbage lien? At least the Appellant acknowledges that it has a requirement to perfect the lien!

As indicated previously, NRS 444.520 is sufficiently vague in connection with its dictate that the lien is to be foreclosed consistent with the mechanic lien statutes. The mechanic lien statutes paint a sequential order in which lien claimant is to follow in connection with foreclosing a lien. The District Court's decision incorporates those aspects of the sequential orders of the things to be performed before going forward with lien and its foreclosure in order that makes sense of the mechanic lien foreclosures. Contrary to the claim of Appellant, there is no built in mechanism for dispute resolution. (Appellant's Brief page 39, line 18)

In the case of *Skyline Metropolitan District v Mountain West*

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Enterprises, 184 P.3d 106, 116, Colorado Court of Appeals (2007) the issue involved density of the property in connection with the amount of assessment that was due. In order to resolve that issue, the District filed a lawsuit for judicial intervention. The landowner counterclaimed and the trial court dismissed a good portion of the counterclaim based upon procedural deficiencies. Not only is that case informative as demonstrating the District filed a lawsuit as to the issue of the quantitative amount of the debt owed to the District as a Special Assessment District created by the Colorado legislature! Waste Management is not a Special Assessment District created by the legislature. It also went on to discuss that the mere failure to file a "Notice of Intent to File a Lien Statement" was not decisive as there had been clients with other aspects of other statutory notices. Nowhere in the opinion does the Colorado Court distance itself from the mechanic lien statutes.

E. Constitutionality of NRS 444.520

The Nevada Supreme Court has consistently ruled that a lien against the property is a monetary encumbrance. *Nevada Association Services v Eighth Judicial District Court*, 130 Nev. Adv. Op. 94 (2014) and

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Hamm v Arrowcreek Homeowners Association, 124 Nev. 290 (2008) The Nevada Supreme Court observed that a lien is an encumbrance against property for the payment of a debt. In the case of *Gonzales - Alpizar v Griffith*, 130 Nev. Adv. Op. 2 (2014), our Supreme Court citing *Browning v Dixon* observed:

> "The Court has stated that an elementary and fundamental requirement of due process...is notice reasonably calculated, under all circumstances, to aprise interested parties of the pendency of the action and afford them the opportunity to present their objections" Id at Page 8
> Where is the opportunity to be heard under NRS 444.520? On

the contrary Waste Management wants to keep the lien on the property in perpetuity so that it can force payment on the property if sold/finance. The argument that NRS 108.239 protects the property owner ignored the language in the statute that says "At the time of filing a complaint and issuing a summons, the lien claimant shall". Clearly, NRS 108.239 places the burden on Appellant to file a complaint to foreclose its lien. Appellant is complaining because they don't want time limitations based upon obligation to file a complaint. Meanwhile, how would this Court resolve a situation where Waste Management records a lien against a parcel of property and does nothing to demonstrate the legitimacy of the lien and

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permits the lien to swell with assessments of late fees, late charges, interest, etc. Clear impact of the decision of the District Court is to place the burden on Waste Management to demonstrate accountability of the lien/encumbrance which constitutes the taking of the property to pay a debt.

The decision of the District Court does not diffuse the perpetual nature of the lien but took away its enforcement by foreclosure of property. Its still a debt in favor of Appellant but they can not foreclose against real estate until compliance with rulings of the District Court. To use as an analogy that the decisions relating to Special Assessment District ignores that Appellant is a profit oriented corporation with no accountability to the voters or anyone else! In connection with reference Nevada Attorney General Opinion, the author was able to find Nevada Attorney General Opinion 1999-24 pertaining for landfill fees wherein the Attorney General observed the methodology that is to be followed by landfill fees in connection with assessing garbage fees before it becomes a tax lien and then there is a lien requirement before they foreclose a tax lien which is mandated by the tax lien foreclosure statutes and the commencement of a lawsuit. This too places a burden on Waste Management to do more than

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just record and mail a lien. More importantly, the ruling does not discuss a "garbage lien" but discusses "garbage fees" and their application as tax liens. (See NRS 318.201) None of these protections are available to the public from Waste Management!

F. Application of Two Year Statute

The two year statute has been applied because the recording of the lien constitute a debt and encumbrance against the property which is the same as a forfeiture. A foreclosure is a procedural mechanism to collect a debt. The debt is a garbage lien. The garbage lien is the taking of a debt or the forfeiting of a debt by the landowner against its property. Furthermore, the limitation period runs from the date that the debt becomes delinquent which is the first month of the following quarter in which is the last quarter was not paid (ignoring the methodology used by Appellant to apply payments to interest, late fees and charges before service fees).

G. Effective Date of Garbage Liens

The District Court decision triggers the commencement of the garbage lien to start on the first month of the next quarter following the delinquent quarter consistent with the Franchise Agreements. The decision

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is based upon the Franchise Agreements. Appellant wants the Court to ignore the terms of the Franchise Agreements. The District Court is seeking to reconcile the Franchise Agreements with the statutes!

X. CONCLUSION

Appellant wants this Court to permit the filing of the lien in perpetuity without the necessity of providing remedial measure if there is a dispute between the owner of the property and Waste Management. There is nothing contained in Chapter 444 providing remedial measure should such a dispute exist. The Court is now faced with the necessity of deciding what was meant in NRS 444.520 that states that the lien is to be foreclosed in the same manner as provided for the foreclosure mechanic liens. Does the statute for foreclosure of mechanic liens provide an opportunity to resolve disputes? Does the statue for foreclosure of mechanic liens provide a time period for which these disputes are to be resolved? Does the mechanic lien foreclosure statutes provide guidance on these issues?

XI. CERTIFICATE OF COMPLIANCE PURSUANT TO RULE 28.2

1. I hereby certify that this brief complies with the formatting

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requirement of NRAP 32 (a)(4), the typeface requirements of NRAP 32 (a)(5) and the type style requirements of NRAP 32 (a)(6) because:

This brief has been prepared ina proportionally spaced typeface using WordPerfect in 14 font and Times New Roman type.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32 (a)(7) because, excluding the parts of the brief exempted by NRAP 32 (a)(7)(c), it does not exceed 30 pages.

3. Finally, I certify that I have read this appellate brief, and 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 asppendix where the matter relied on is to be found, I understand that I may be subject to sanctions in the event that the accompanying brief is not in fconformity with the requirements of the Nevada Rules of Appellate Procedure.

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DATED this 17th day of August, 2018

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XII. CERTIFICATE OF SERVICE

PURSUANT TO NEVADA RULES OF APPELLATE PROCEDURE, I certify that I am an employee of C. NICHOLAS PEREOS, LTD., and that on the date listed below, I caused to be served a true copy of the RESPONDENT'S ANSWERING BRIEF on all parties to this action by electronically filing the foregoing with the Clerk of the Court by using the Supreme Court Electron Filing System which served the following parties electronically:

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