IN THE SUPREME COURT OF THE STATE OF NEVADA

DIRECT GRADING & PAVING, L.L.C., a Nevada limited liability company, Petitioner, v. THE EIGHTH JUDIICAL DISTRICT COURT, in and for the County of Clark, State of Nevada, and THE HONORABLE ROB BARE, District Judge Respondent, and CENTURY COMMUNITIES OF NEVADA, L.L.C, a Nevada limited liability company, Real Party in Interest	Case No. Electronically Filed Oct 14 2020 08:27 a.m. Elizabeth A. Brown Clerk of Supreme Court Dist. Court Case No. A-18-773139-C Dept. No. XXXII

PETITION
From the Eighth Judicial District Court
The Honorable Rob Bare, District Judge

PETITION FOR WRIT OF MANDAMUS

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record for Petitioners certifies that the following are persons and entities as described by NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Direct Grading & Paving, L.L.C., Petitioner, has no parent corporations. Further, no publicly-held company owns 10% or more of Petitioner's stock.

Matthew L. Johnson of Johnson & Gubler, P.C., attorney for Petitioners, Direct Grading & Paving, L.L.C.

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I. ROUTING STATEMENT

This is presumably assigned to the Court of Appeals under NRAP 17(b)(8), (11), and (13).

II. RELIEF SOUGHT

Petitioner, Direct Grading & Paving, L.L.C. ("Petitioner" or "Direct") seeks a reversal of the Eighth Judicial District Court's decision to grant Century's Motion for Provisional Relief and to remove the matter from Binding Arbitration. For the reasons herein, all parties agreed to binding arbitration, and gave the Arbitrator consent to rule. The parties should be permitted to litigate this matter before the Arbitrator, as agreed, and not the District Court. Alternatively, Petitioner should be afforded Due Process to conduct discovery by the District Court to at least rebut the allegations Century submits in its briefing to the District Court.

III. WHY THE WRIT SHOULD ISSUE

NRS 34.170 governs Writs of Mandamus and states:

> This writ shall be issued in all cases where there is not a plain, speedy and adequate remedy in the ordinary course of law. It shall be issued upon affidavit, on the application of the party beneficially interested.

NRS 34.170.

This Court may issue a Writ of Mandamus "to compel the performance of an act that the law requires or to control an arbitrary or capricious exercise of

discretion." *Nev. Yellow Cab Corp. v. Eighth Judicial Dist. Court*, 123 Nev. 44, 49, 152 P.3d 737 (2007); *see also* NRS 34.160. A Writ of Mandamus is available to compel the district court to undertake an action it is legally required to take. *Panko v. Eighth Judicial Dist. Ct*., 111 Nev. 1522, 1525, 908 P.2d 706 (1995).

IV. ISSUES PRESENTED

A. Whether the District Court erred when it removed this case from binding arbitration and held that it has inherent jurisdiction and authority over this matter pursuant to NRCP 37 where the parties contractually agreed to submit all issues in dispute to binding arbitration and submitted the case to an arbitrator agreed to by all parties?

B. Did the District Court err, when it held that it has the authority under NRS 38.222 to provide provisional relief to Century where the parties contractually agreed to binding arbitration and submitted the case to an arbitrator agreed to by all parties?

C. Alternatively, did the District Court err, when it did not grant discovery that would allow Direct to rebut allegations by Century?

V. STATEMENT OF FACTS

A. Mechanic's Liens.

This matter arises from the District Court's decision to remove this case from Binding Arbitration after all parties agreed to submit to Binding Arbitration.

See PA, Vol. I, DIRECT000112-115. This case was commenced after Direct recorded a series of mechanic's liens against properties owned by Century after Century failed to pay Direct for construction work that Direct performed on those properties. *See Petitioner's Appendix ("PA"), Vol. I, DIRECT000001-39.* On June 29, 2010, Direct and Century's predecessor, Dunhill, entered into a Master Subcontract Agreement ("MSA")[1] and subsequent Project Work Authorizations ("PWAs") for four (4) construction projects ("Projects") to be performed on Century's Inspirada, Lakes Las Vegas, Freeway 50/Parkview, and Rhodes Ranch Phase 5 properties ("Properties"). *See Petitioner's Appendix ("PA"), Vol. I-II, DIRECT000231-260.* For each of these Projects, Direct fully performed in good faith all of the work to which the parties had agreed under the MSA and the PWAs. *See PA, Vol. I, DIRECT000001-39.* Yet, despite Direct completing all work on each project, Century failed to pay for Direct's work in full. *Id.*

Because Century failed to pay Direct for the various work performed and for materials and equipment, as is required under the parties' agreements, Direct recorded mechanic's liens on each of the Projects. *Id.* Specifically, Direct recorded the following 4 mechanic's liens with the Clark County Recorder's Office: 1) a

[1] Dunhill never assigned or sold the MSA to Century; however, because the subsequent PWAs between Direct and Century mentioned the MSA between Direct and Dunhill, the Arbitrator found that Direct and Century were subject to the MSA in this proceeding. *See, e.g., PA, Vol. III, DIRECT00654.*

lien in the amount of $290,018.55 for work performed on the Inspirada Property ("Inspirada Lien"); 2) a lien in the amount of $301,043.48 for work performed on the Lakes Las Vegas Property ("Lakes Las Vegas Lien"); 3) a lien in the amount of $735,863.15 for work performed on the Freeway 50/Parkview Property ("Freeway 50 Lien"), and; 4) a lien in the amount of $344,988.46 for work performed on the Rhodes Ranch Phase 5 Property ("Rhodes Lien"). *Id.*

B. Parties' Appointment of the Arbitrator.

In accordance with the arbitration clause in the MSA, the parties entered into an Arbitration Letter Agreement on July 18, 2017, wherein the parties agreed to binding arbitration and appointed Donald Williams as the Arbitrator. *See PA, Vol. I, DIRECT000112-115.* The Arbitration Letter Agreement expressly states the following:

> The parties now wish to arbitrate the Disputes in accordance herewith ("Arbitration"). The parties further expressly agree that the arbitrator shall have the authority to grant any relief available under NRS Chapter 108 with respect to the Liens and the Bonds, subject to confirmation by the Court in accordance with NRS Chapter 38[.]. . . .
>
> The parties hereby select and appoint Donald Williams, Esq., as the sole Arbitrator of the Disputes. ***The Arbitration shall be private and binding.*** The binding arbitration proceeding shall be governed by Nevada Revised Statute § 38.206, et seq. (the Nevada Uniform Arbitration Act) ***and the arbitration award shall be subject to confirmation by the Eighth Judicial District Court, Clark County, Nevada.*** With respect to the Arbitration, the parties specifically adopt and reaffirm Article 7.5 of the Agreement, which states as follows:

> 7.5 Arbitration. In the event any disputed claim between the Contractor and Subcontractor are not settled through mediation, ***then such dispute shall be by arbitration*** in accordance with the Construction Industry Rules of the AAA. […] ***The Contractor and Subcontractor agree to be bound by the findings of any such boards of arbitration, as final and without recourse to any court of law.*** Venue for the arbitration will be located in the county where the project is located, State of Nevada. ***If both parties agree not to arbitrate***, then either may commence a legal action exclusively in the State or Federal Courts of Nevada as provided in Paragraph 8.5 […].

Id. (emphasis added).

In conjunction with the binding arbitration agreement, the parties also agreed, with the insight from the Arbitrator, that Direct would file the District Court matter to preserve the lien statute under NRS 108 and stipulate to stay the action. *See* PA, Vol. I, DIRECT000046-53.

C. Linda Middleton's alteration of the BLM Documents and the resulting staying of General Discovery imposed in Arbitration.

During discovery in the Arbitration, Century requested information showing trucking tickets and contracts with the BLM. *See PA, Vol. II, DIRECT000355.* Before leaving the office to conduct work on a job site, Mel Westwood, as Direct's managing member, instructed an employee, Linda Middleton, to gather the requested information and to make sure everything matched up before producing the information to Direct's attorneys. *See PA, Vol. II, DIRECT000355,* ¶*3.* Mr. Westwood regularly works on the job sites, but instructed his office staff to pull the files that Direct had for production and to verify that all of the numbers

corresponded to ensure that all of the information was being produced. *See id.* When Linda Middleton began gathering the requested information, she noticed that the amount of dirt being taken from BLM land to one of the Century projects did not properly correspond with the amount of dirt required for that particular project. *See PA, Vol. II, DIRECT000355.* When she was unable to reach Direct's principal to determine why the dirt quantities did not match, she took it upon herself to alter the BLM documents regarding the amount of dirt taken from the BLM lot and delivered to the Inspirada project. *See* PA, Vol. II, DIRECT000355 at ¶7; DIRECT000451. Although Mr. Westwood did not intend in any way for Direct's office staff to modify the BLM documents, Ms. Middleton did so. *Id.* Ms. Middleton changed the BLM agreement from 50,000 cubic yards to 100,000 cubic yards, with corresponding dollar amounts, without Mr. Westwood's or Direct's knowledge or consent. *See PA, Vol. II, DIRECT000289.* When Century first confronted Direct about the change, Direct conducted an investigation into the matter and learned for the first time that Linda Middleton had modified the BLM documents without Mr. Westwood's or Direct's knowledge or consent. *See PA, Vol. II, DIRECT000355.* This was the first time that Mr. Westwood or anyone in Direct's management was aware that the BLM documents had been modified. *See PA, Vol. III, DIRECT000611.*

Upon learning of the modification, counsel for Direct went to the BLM office to review the BLM documents as well. *See* PA, Vol. II, DIRECT000451-452. Thereafter, counsel for Direct called another meeting with counsel for Century and informed Century that, in fact, the BLM contract and letter had been changed. *See Id*. at DIRECT000452. Direct gave a complete statement as to how this happened. *See* PA, Vol. IV, DIRECT000961-962. Regardless, general discovery in the arbitration was stayed by the Arbitrator, and Direct was ordered to allow Century to search their computers and phones. *See* PA, Vol. IV, DIRECT000864, 894.

Although Direct agrees that Ms. Middleton's actions were wrong, and does not condone or approve of this conduct in any way, Direct has maintained that the modification of the BLM documents does not affect or harm Century. *See* PA, Vol. II, DIRECT000452. The BLM materials were for the Inspirada project only. *See PA, Vol. II, DIRECT000477-480.* Century's own plans for the Inspirada project calls for at least 122,744 cubic yards of fill. *See PA, Vol. II, DIRECT000477-480.* Century never says that Direct did not provide the dirt. *See PA, Vol. II, DIRECT000452.* It can't. *Id.* Century received the dirt that it required. *Id.* It was not shorted in any way. *Id.* The appropriate governing bodies approved Direct's work, and there are, right now, houses on that very property. *Id.* Whether or not Direct reported correctly or incorrectly the amount of dirt taken from the BLM property is

no concern to Century or the bearing on this case. Century received all of the dirt that it required from Direct, and built houses on that dirt. *Id.*

The BLM contract does not account for compacted material versus embankment materials. *See PA, Vol. II, DIRECT000477-484 (explaining compacted versus embankment materials, as well as the approval of the project).* Direct provided to Century all of the required materials, as provided in Century's own plans, and moved those materials, plus more, to the Inspirada project. *Id.* Century received all of the material required under its contract with Direct. *Id.* Century was not damaged. *Id.* The hole was filled; they received their dirt; Direct moved the dirt and filled the hole, and Century did not pay for it. *Id.*

D. Century filed multiple motions before the Arbitrator.

In early January 2019, after Century discovered the alteration of the BLM documents by Ms. Middleton, of which Direct had no knowledge, Century submitted to the Arbitrator its initial Motion for Discovery Sanctions ("First Motion for Sanctions") on January 18, 2019, which included allegations about the BLM documents and many other issues. *See* PA, Vol. IV, DIRECT000838. The Arbitrator granted that First Motion for Sanctions by imposing severe monetary sanctions on Direct. *See* PA, Vol. IV, DIRECT000862-865. Additionally, the Arbitrator stayed all other general discovery to allow limited discovery on the issue of the BLM documents. *See id.* The Order made clear that the Arbitrator would

revisit the issue of striking Direct's claims "upon completion of discovery." *Id*., p. 2, lines 17-18; *see also* PA, Vol. IV, DIRECT000891-894. (stating: "expunging the entire lien, based upon what has been presented to date would be inappropriate at this juncture.").

Despite the parties' extensive briefing and oral arguments before the Arbitrator relating to Century's initial Motion for Discovery Sanctions, and despite the Arbitrator's entering sanctions against Direct as a result of that Motion, Century submitted to the Arbitrator a Motion for Clarification and Reconsideration of the Arbitrator's May 31, 2019 Amended Order on the Motion for Discovery Sanctions on June 7, 2019. *See* PA, Vol. IV, DIRECT000867-878. Once again, for a second time, on the basis of the same allegations addressed in its initial Motion for Discovery Sanctions without introducing any new allegations or evidence, Century requested the Arbitrator to expunge the liens. *See id.*

While the Arbitrator's decision on Century's Motion for Clarification and Reconsideration was still pending, Century submitted to the Arbitrator a third Motion for Additional Sanctions on June 24, 2019. *See* PA, Vol. IV, DIRECT000879-884. While part of that Motion sought additional sanctions for failure to pay the $130,000.00 sanctions addressed in the Arbitrator's May 31, 2019 Amended Order, the primary purpose of that Motion was to again request, for

a third time, that Direct's claims be stricken based on the same allegations and arguments that Century had raised numerous times in previous motions. *See id*.

In its Opposition to Century's Motion for Additional Sanctions, Direct stated that it had been attempting in good faith to obtain the funds from other parties to pay the sanctions, but had been unable to do so at that point. *See* PA, Vol. IV, DIRECT000886-890. This was as a result, in part, of Century's refusal to pay Direct, which is a small business, over ***$1.67 million*** that Century owed to Direct for work performed on behalf of Century. *See* PA, Vol. I, DIRECT000001-00039.

On September 27, 2019, the Arbitrator issued an Order on Century's Motion for Clarification. *See* PA, Vol. IV, DIRECT000892-894. The Arbitrator ruled that his previous Order on Century's initial Motion for Discovery Sanctions was "clear and unambiguous," that the award of attorney's fees to Century was subject to a right to object, and that "expunging the entire lien, based upon what has been presented to date would be inappropriate at this juncture." *Id*. In this Order, the Arbitrator expressly stated that he intended to issue a final determination of the parties' claims following the discovery deadline set for May 15, 2020 and the final Arbitration date set for July 1, 2020. *Id.*

E. The Jan. 24, 2020 Hearing on Century's Motion for Provisional Relief.

Despite Century's express agreement to resolve this matter by Binding Arbitration, and despite Century's acknowledgment of every instance in which the Arbitrator rightfully exercised his authority to rule in Century's favor numerous times, including imposing significant monetary sanctions against Direct related to the issue of the BLM documents ($130,000.00 sanction), Century moved the District Court to intervene in the parties' Arbitration Letter Agreement on the basis that the Arbitrator did not provide an "adequate remedy" pursuant to NRS 38.222 when the Arbitrator declined to dismiss Direct's action prior to the final Arbitration hearing. *See PA, Vol. I, DIRECT000084-108.*

During the hearing on Century's Motion for Provisional Relief, the District Court stated that based on the papers and evidence presented, ***the Arbitrator appeared to have the authority to act, appeared to be acting with that authority, and that he was in a position to provide an adequate remedy*** pursuant to NRS 38.222. *See PA, Vol. V, DIRECT001086-1095, at 9:49, 10:36:38.* When the District Court questioned Century's counsel's as to whether counsel disputed this statement, counsel expressly stated on the record: "***I don't disagree with that. I think that we gave him the authority. He feels he has the authority."*** *Id.* As Century's counsel continued, it is clear that Century's position is not that the

Arbitrator has refused to act (indeed, the Arbitrator has indisputably acted by sanctioning Direct $130,000.00), but that the Arbitrator has not acted in a manner that Century would like. *Id.*

On February 11, 2020, the District Court issued its Order granting Century's Motion for two reasons: 1) the Court found that it had jurisdiction over the lawsuit that was commenced by Direct filing its Complaint to initiate Case No. 18-773139, and; 2) the Court has authority under NRS 38.222 to provide provisional relief to Century because the matter was considered "urgent," that the Arbitrator was not doing what a trial judge would do, that the Arbitrator cannot provide an adequate remedy under the circumstances, and that the Court assuming jurisdiction over the matter would allow for preserving judicial economy. *See PA, Vol. V, DIRECT001152-1160.* The Court specifically held that it did not have any issues with the Arbitrator to provide a timely remedy, but found that the Arbitrator could not provide an adequate remedy and that Century could not obtain fairness. *See id.*

In light of this ruling, the Arbitration is stayed indefinitely and the Arbitrator has lost his authority to preside over this matter. To date, general discovery is still stayed in Arbitration, and Direct never had an opportunity to complete its discovery in that proceeding prior to Century seeking and obtaining the District Court's intervention in this matter. *See PA, Vol. II, DIRECT000461.*

After the decision, Petitioner filed a motion for reconsideration and submitted a brief to allow limited discovery to rebut allegations made by Century. *See PA, Vol. V, DIRECT001173-1184.* Direct listed many of the allegations by Century in its motion for sanctions and why certain discovery was needed to rebut the allegations, even if in briefing only. *See id.* However, both the motion for reconsideration, and the request for limited discovery in preparation for the hearing on the Motion for Sanctions, were denied. *See PA, Vol. V, DIRECT001178-1191.*

VI. SUMMARY OF ARGUMENT

This matter should continue in Arbitration, and not before the District Court, for the following reasons: 1) the District Court permitting Century to remove this matter from Arbitration would permit the District Court to interfere with the parties' agreement to submit this matter to binding arbitration because of the Arbitration Letter Agreement; 2) Century's counsel admitted during the January 24, 2020 hearing on Century's Motion for Provisional Relief that the Arbitrator has the authority to act pursuant to NRS 38.222; 3) the District Court's Order granting Century's Motion for Provisional Relief is inconsistent with Century's admissions made on the record during the January 24, 2020 hearing; 4) the District Court's assumption of jurisdiction in this matter presents *res judicata* and judicial estoppel issues, and; 5) Direct has been prejudiced because it has not had the opportunity to

complete its discovery to at least rebut Century's claims during the sanction hearing, and has been forced to re-litigate the same issues before a different forum.

VII. ARGUMENT

A. Standard of Review

This matter primarily pertains to the language of NRS 38.222 and NRS 38.226(1). Subject matter jurisdiction and statutory interpretation are questions of law subject to *de novo* review. *Ogawa v. Ogawa*, 125 Nev. 660, 667, 221 P.3d 699, 704 (2009); *Westpark Owners' Ass'n v. Eighth Judicial Dist. Court*, 123 Nev. 349, 357, 167 P.3d 421, 426-27 (2007). *See Thomas v. MEI-GSR Holdings, Ltd. Liab. Co.*, 413 P.3d 835 (Nev. 2018)

B. To allow Century to remove this matter from arbitration would permit court interference with the parties' agreement to arbitrate.

The Supreme Court of Nevada has expressly stated the following with respect to arbitration agreements:

> Because arbitration is fundamentally a matter of contract "[w]hether enforcing an agreement to arbitrate or construing an arbitration clause, ***courts and arbitrators must 'give effect to the contractual rights and expectations of the parties.***'" *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 682, 130 S. Ct. 1758, 176 L. Ed. 2d 605 (2010) (quoting *Volt Information Sciences v. Board of Trustees*, 489 U.S. 468, 479, 109 S. Ct. 1248, 103 L. Ed. 2d 488 (1989)).

See Principal Invs., Inc. v. Harrison, 366 P.3d 688, 692-93 (Nev. 2016) (emphasis added). Similarly, NRS 38.221 states the following in pertinent part:

> 1. On motion of a person showing an agreement to arbitrate and alleging another person's refusal to arbitrate pursuant to the agreement:
>
> . . .
>
> (b) If the refusing party opposes the motion, the court shall proceed summarily to decide the issue ***and order the parties to arbitrate unless it finds that there is no enforceable agreement to arbitrate***.

Nev. Rev. Stat. Ann. § 38.221 (emphasis added). NRS 38.221(b) clearly states that a court should always err on the side of allowing arbitrations to proceed in light of an existing arbitration agreement.

The parties' Arbitration Letter Agreement explicitly stated:

> 7.5 Arbitration. In the event any disputed claim between the Contractor and Subcontractor are not settled through mediation, ***then such dispute shall be by arbitration*** in accordance with the Construction Industry Rules of the AAA. […] ***The Contractor and Subcontractor agree to be bound by the findings of any such boards of arbitration, as final and without recourse to any court of law.*** Venue for the arbitration will be located in the county where the project is located, State of Nevada. ***If both parties agree not to arbitrate***, then either may commence a legal action exclusively in the State or Federal Courts of Nevada as provided in Paragraph 8.5 […]."

See PA, Vol. I, DIRECT000112-115 (emphasis added).

By preparing and executing this Agreement, Century expressly acknowledged that it would participate in a ***binding*** arbitration until the Arbitrator

issued a final decision and that the only point during which a court may assume any jurisdiction would be when approving a final arbitration ruling. As cited above, Nevada law favors these agreements to be enforced by the District Court. For the District Court to assume jurisdiction over these proceedings would disrupt and interfere with the parties' unequivocal contract to arbitrate until the Arbitrator issues a final ruling. For this Court to hold otherwise would destroy the sanctity of binding arbitration in Nevada, as any party that did not like the way an arbitrator ruled could simply go to the District Court and ask it to intervene.

To the extent that Century argues that the District Court has inherent authority to assume jurisdiction over this matter by virtue of Direct filing its Complaint to initiate Case No. 18-773139, as stated in the Court's Feb. 11, 2020 Order, the District Court is still required under Nevada law to only assume jurisdiction in those particular instances described in the parties' agreement. In this case, the Arbitration Letter Agreement's express language clearly states that the District Court may assume jurisdiction over the parties' dispute *only when reviewing the Arbitrator's final findings*, which would have been issued in few months' time given that the final arbitration hearing was already scheduled for early July 2020. *Id.* By failing to uphold the agreement for binding arbitration, it has cost all parties additional tens of thousands of dollars, and the matter is still not resolved as it would have been had the Arbitrator been allowed to proceed.

Alternatively, if Century's position is that the District Court has inherent jurisdiction in this matter because Direct initiated Case No. 18-773139, then the District Court should only review whatever pleadings have been brought before it, *which is solely the Complaint*. All other issues that have been raised in Century's Motion for Provisional Relief concerning discovery issues should remain within the purview of the Arbitrator pursuant to the Arbitration Letter Agreement, where those issues have already been litigated and ruled upon by the Arbitrator.

In light of this, instead of assuming full jurisdiction of this matter and removing this case from arbitration, the District Court should have remanded this issue to the Arbitrator for an immediate evidentiary hearing to address these issues because the Arbitrator, as the trier of fact, had already issued multiple rulings and presided over an extensive proceeding over the course of several years. *See Towbin Dodge, L.L.C. v. Eighth Judicial Dist.*, 121 Nev. 251, 254, 112 P.3d 1063, 1066 (2005) (stating that a writ of mandamus to disqualify as judge is an "extraordinary measure" and should not be granted if that judge has already ruled on contested pretrial matters).

C. The District Court erred by removing the matter from arbitration under NRS 38.222.

NRS 38.222(2)(b) provides:

> 2. After an arbitrator is appointed and is authorized and able to act:

> (a) The arbitrator may issue such orders for provisional remedies, including interim awards, as the arbitrator finds necessary to protect the effectiveness of the arbitral proceeding and to promote the fair and expeditious resolution of the controversy, to the same extent and under the same conditions as if the controversy were the subject of a civil action; and
>
> (b) A party to an arbitral proceeding may move the court for a provisional remedy only if the matter is urgent and the arbitrator is not able to act timely or the arbitrator cannot provide an adequate remedy.

The Arbitrator in this matter granted provisional remedies requested by Century. Obviously, Century believed that the Arbitrator could provide an adequate remedy and so requested it in at least three motions brought before the Arbitrator. However, when Century did not get what it wanted (the complete striking of Direct's complaint), Century moved the District Court for the relief that the Arbitrator had *temporarily* denied. After motion practice, the District Court stayed the arbitration and found, among other things, that the Court had jurisdiction under NRCP 37 (as discussed below) because a complaint had been filed (although to preserve the statute) and under NRS 38.222 because it was a more appropriate tribunal; that the Arbitrator was not doing what a trial judge would do; and that the Arbitrator was not providing an adequate remedy.[2] The

[2] Further, NRS 38.231(1) provides that "An arbitrator may conduct an arbitration in such manner as the arbitrator considers appropriate for a fair and expeditious disposition of the proceeding." Because this statutory language granted the arbitrator broad authority and discretion to conduct the arbitration proceeding, it

Court specifically held that it did not have any issues with the Arbitrator to provide a timely remedy, but found that the Arbitrator could not provide an adequate remedy and that Century could not obtain fairness. However, during the hearing on Century's Motion for Provisional Relief, the District Court found just the opposite -- that based on the papers and evidence presented, the Arbitrator appeared to have the authority to act, appeared to be acting with that authority, and that he was in a position to provide an adequate remedy pursuant to NRS 38.222. *See* PA, Vol. V, DIRECT001086-1095, at 9:49, 10:36:38.

Moreover, Century's attorney admitted to this finding. NRS 51.035 defines a party admission as the following:

> ***3. The statement is offered against a party and is:***
>
> ***(a) The party's own statement, in either the party's individual or a representative capacity***;
>
> (b) A statement of which the party has manifested adoption or belief in its truth[.] . . .

See Nev. Rev. Stat. Ann. § 51.035 (emphasis added).

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was error for the Court to remove the matter from arbitration. Similarly, the Arbitration Letter Agreement unequivocally states that the Arbitrator shall have full authority to grant any requested relief pertaining to the liens and bonds that are the subject of this matter. Under the Agreement, the Court's authority and jurisdiction only pertains to confirmation of the Arbitrator's final determination of the parties' claims raised in Arbitration.

When the District Court questioned Century's counsel's as to whether counsel disputed this statement, i.e., that Arbitrator appeared to have the authority to act, appeared to be acting with that authority, and that he was in a position to provide an adequate remedy pursuant to NRS 38.222, Century's attorney expressly stated on the record: "***I don't disagree with that. I think that we gave him the authority. He feels he has the authority."*** *Id.*[3] Thus, it is clear that Century's position is not that the Arbitrator cannot provide an adequate remedy or has refused to act (indeed, the Arbitrator has indisputably acted by sanctioning Direct), but that the Arbitrator has acted in a manner that Century merely finds unsatisfactory despite having succeeded in its request for significant sanctions against Direct. Regardless, based on the Court's statement and the admission by Century, the finding later by the Court under NRS 38.222 was error.

Similarly, the District Court's Order is inconsistent with its own statement and Century's admissions made on the record at the time of hearing. In its Order, the District Court states one of the reasons why it has assumed jurisdiction over this matter is because "the Arbitration cannot provide an adequate remedy for the issues raised in the Motion and presented to this Court." *See PA, Vol. V,*

[3] Despite Century's counsel making this admission, Century simultaneously claimed in its Motion for Provisional Relief that "The Arbitrator failed to act to address the discovery abuses […]." *See PA, Vol. I, DIRECT000106.* Century cannot simultaneously assume those contradictory positions.

DIRECT001158, lines 15-16. This ruling is inconsistent not only because it is indisputable that the Arbitrator ***did*** timely act and imposed *substantial* sanctions against Direct, but also because Century itself has admitted on the record that the parties granted the Arbitrator authority to act, that the Arbitrator did act to address the discovery issues, and that the Arbitrator was in a position to provide an adequate remedy in this matter. On this basis, Direct requests that the District Court's Order be overturned so that the parties may proceed in Arbitration.

D. The District Court erred when it held that it has inherent jurisdiction and authority over this matter pursuant to NRCP 37.

In *Young v. Johnny Ribeiro Bldg*. 106 Nev. 88 (1990), the Supreme Court of Nevada held:

> "Nev. R. Civ. P. 37(b)(2) authorizes as discovery sanctions dismissal of a complaint, entry of default judgment, and awards of fees and costs. Generally, Rule 37 authorizes discovery sanctions only if there has been willful noncompliance ***with a discovery order of the court.***"

Young v. Johnny Ribeiro Bldg.,106 Nev. 88 (1990) (Emphasis Added)

Direct initially filed the complaint in with the District Court to preserve the statute. This was done upon a meeting and conference with the Arbitrator and Century's counsel. In fact, Century, initially, stipulated to stay the matter. However, the District Court improperly found that this gave the District Court jurisdiction to hear the case. No discovery order was ever entered by the District Court. The District Court does not have jurisdiction to determine Direct's

compliance with the Arbitrator's discovery orders, under *Young*. Therefore, the District Court's order should be reversed, and the matter should be heard by the Arbitrator.

E. The District Court's assumption of jurisdiction in this matter presents res judicata and judicial estoppel issues with respect to the Arbitrator's rulings.

The Supreme Court of Nevada has defined the doctrine of *res judicata* as the following:

> Res judicata applies when (1) the issue decided in the prior litigation is identical to the issue presented in the current action; (2) the initial ruling is on the merits and has become final; and (3) the party against whom the judgment is asserted is a party or in privity with a party to the prior litigation.

See Dermody v. City of Reno, 113 Nev. 207, 209, 931 P.2d 1354, 1356 (1997).

At the moment that the District Court assumed jurisdiction of this matter and stayed the Arbitration to allow the District Court to make its own findings related to the discovery issues, the doctrine of *res judicata* has become applicable in this case. Specifically, for the first element of this doctrine, the issue regarding the alleged discovery allegations that Century has raised in its Motion for Provisional before the District Court are ***identical,*** almost word-for-word, to the various motions it has brought before the Arbitrator. In reference to the second element, the Arbitrator, by finding that the discovery allegations warranted monetary sanctions, but not the striking of Direct's claims, had already ruled on those same

issues that Century presently raises before the District Court. By the District Court assuming jurisdiction and effectively bringing the arbitration hearing to an end, the Arbitrator's rulings on this issue has become final. There is nothing left for the Arbitrator to do, as the District Court has assumed jurisdiction to preside over this matter. In reference to the third element, the same parties are involved in both the Arbitration and in the proceedings before the District Court. Hence, Century should be barred from raising these discovery issues in this case and the District Court should not be permitted to assume jurisdiction over this matter.

Further, Century should be judicially estopped from seeking relief from the District Court. The Supreme Court of Nevada has described the doctrine of judicial estoppel as the following:

> Judicial estoppel is a principle designed to "guard the judiciary's integrity," and "a court may invoke the doctrine at its own discretion." It is a doctrine that applies "when a party's inconsistent position [arises] from intentional wrongdoing or an attempt to obtain an unfair advantage." "Whether judicial estoppel applies is a question of law that we review de novo."

Brock v. Premier Tr., Inc. (In re Frei Irrevocable Tr.), 133 Nev. 8, 390 P.3d 646, 651-52 (2017) (citations omitted).

Further, the Supreme Court of Nevada has outlined five (5) elements that are required to demonstrate judicial estoppel: (1) the same party has taken two positions; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3) the party was successful in asserting the first position (i.e., the

tribunal adopted the position or accepted it as true); (4) the two positions are totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud, or mistake. *Id*.

Century is barred by judicial estoppel from requesting identical relief from this Court that it has previously requested numerous times from the Arbitrator. All 5 elements of judicial estoppel are present here. Century has previously claimed that the Arbitrator has proper jurisdiction and authority to make findings relating to alleged discovery abuses and the expunging of liens.

Specifically, Century has previously argued that the Arbitrator has broad authority to grant any requested relief raised in Arbitration and has consistently relied on that authority when making numerous requests to the Arbitrator for leave to amend its claims, for sanctions against Direct, and for expunging Direct's liens. See Exhibit 1, Exhibit 2. Indeed, Century has been successful in alleging discovery abuses against Direct, resulting in the Arbitrator's decisions to sanction Direct for those alleged abuses, to allow Century in name Mr. Westwood and Ms. Middleton as individual counter-defendants based on those alleged abuses, and to decrease Direct's lien amounts to offset the value of outstanding monetary sanctions. Century's request for relief in Arbitration was not taken as a result of ignorance, fraud, or mistake. Rather, both Parties had conducted extensive discovery and Century relied on some of that obtained discovery to make its

requests to the Arbitrator. Now, in bringing the present Motion, Century assumes the position that only the Court, and not the Arbitrator, has the jurisdiction and the authority to grant its requested relief, which mirrors the relief it has requested from the Arbitrator on numerous occasions. This present position is completely inconsistent with Century's previous position that the Arbitrator had proper jurisdiction and authority to grant that same relief.

Therefore, Century is judicially estopped from requesting the same relief from this Court that it has requested from the Arbitrator, and on many occasions, has prevailed. This court should not allow Century to forum shop.

F. Alternatively, Direct has been prejudiced because it has not had the opportunity to complete its discovery in arbitration and forcing Direct to re-litigate the same issues before a different forum.

In reviewing the appropriateness of dismissal with prejudice as a form of discovery sanctions, the Supreme Court of Nevada has stated the following:

> "Every order of dismissal with prejudice must be supported by a careful and preferably written explanation of a court's analysis of the pertinent factors. ***Factors can include the degree of willfulness, the extent to which the non-offending party would be prejudiced by a lesser sanction, the severity of the sanction relative to the severity of the abuse, whether any evidence has been irreparably lost, the fairness of alternative sanctions, the policy favoring adjudication on the merits, whether sanctions unfairly operate to penalize a party for the misconduct of his attorney***."

See Young v. Johnny Ribeiro Bldg. 106 Nev. 88 (1990) (emphasis added).

i. Degree of willfulness

In reference to this first factor, the *Young* Court states the following:

> "Nev. R. Civ. P. 37(b)(2) authorizes as discovery sanctions dismissal of a complaint, entry of default judgment, and awards of fees and costs. Generally, Rule 37 authorizes discovery sanctions only if there has been willful noncompliance with a ***discovery order of the court."***

Young v. Johnny Ribeiro Bldg. 106 Nev. 88 (1990) (emphasis added).

Direct has never engaged in willful noncompliance with any discovery order because no such order has ever been issued by the District Court. The District Court does not have jurisdiction to determine Direct's compliance with the Arbitrator's discovery orders. In any case, Direct has complied with every discovery order that the Arbitrator had issued. In reference to Ms. Middleton's alteration of the BLM documents, which triggered the Arbitrator's decision to stay all general discovery until that particular issue was addressed, Century has presented no evidence to show that the alteration was the result of Direct's knowledge and instruction. Indeed, Mr. Westwood has repeatedly denied that he provided Ms. Middleton with any such instruction and only realized that the documents had been altered when Century brought it to Direct's counsel's attention. Direct did not willfully engage in discovery misconduct, and Century has not provided any evidence to demonstrate this.

ii. Extent to which non-offending party would be prejudiced by a lesser sanction.

Century has been granted almost every form of sanctions it had requested in Arbitration just short of a complete dismissal of the case and expunging of Direct's liens. In light of the fact that Ms. Middleton's alteration of the BLM documents only affected ***one*** of Direct's liens, a complete dismissal of this case, without permitted Direct to complete its own discovery as to the central issue of the monetary value it is owed for its work, would be extremely prejudicial to Direct—not Century. Additionally, the alteration of the documents was a single isolated event. Direct has acknowledged that Ms. Middleton's actions were wrong. Direct has been sanctioned. Apart from that unfortunate incident, Direct has gone above and beyond to comply with the Arbitrator's discovery orders and has granted Century access to its computers to search through itself. Now that the District Court has assumed jurisdiction over this matter, Century has been granted a ***fifth*** opportunity to litigate issues and facts that have remained unchanged for years, despite having prevailed in Arbitration on these identical issues. Century would not be prejudiced if this case is addressed on the merits.

iii. Severity of the sanction relative to the severity of the abuse and the need for adjudication on the merits.

In early January 2019, after Century discovered the alleged alteration of the BLM documents by Ms. Middleton and submitted its initial Motion for Discovery

Sanctions on January 18, 2019, which the Arbitrator granted by imposing "severe" sanctions on Direct, the Arbitrator stayed all other general discovery to allow limited discovery on the issue of the BLM documents. *See PA, Vol. IV, DIRECT000862-865.* The Order made clear that the Arbitrator would revisit the issue of striking Direct's claims "upon completion of discovery." *Id., DIRECT000864, lines 17-18; see also PA, Vol. IV, DIRECT000891-894* (stating: ***"expunging the entire lien, based upon what has been presented to date would be inappropriate at this juncture."***).

To date, general discovery is still stayed in the arbitration, and Direct never had an opportunity to complete its discovery in that proceeding prior to Century seeking and obtaining the District Court's intervention in this matter, wherein Century, ***for the fifth time,*** has requested a trier of fact to strike Direct's claims on identical arguments and factual allegations that it has raised since January 2019 without any change in circumstances in approximately two (2) years. It is especially disconcerting that while Century has relentlessly demanded that ***all*** of Direct's claims concerning all the Liens should be stricken on the basis of the BLM documents, while also acknowledging that those BLM documents only pertain to ***one*** of the Liens, Direct has not had the ability to complete its discovery concerning any of its claims.

Direct has been deprived of its ability to take particular depositions or receive vital documents from Century to substantiate its claims. To permit Century to once again argue for striking Direct's claims would deprive Direct of its Due Process. Similarly, to permit an evidentiary hearing before the District Court concerning specifics on Direct's Liens, without Direct being able to take depositions or to promulgate other discovery concerning issues that are certain to arise during the upcoming evidentiary hearing would also violate Due Process of the United States and Nevada Constitutions.

Additionally, the District Court's assumption of jurisdiction of this matter also forces Direct to incur substantial fees and costs to re-litigate the same issues that have been addressed multiple times in Arbitration. After years gathering evidence and arguing before the Arbitrator, and with the Arbitration well on its way towards a nearing resolution in a few months' time, Direct essentially must start this case over again before the District Court without having had a full opportunity to continue its discovery.

iv. Whether any evidence has been irreparably lost.

Again, the BLM documents only pertain to ***one*** of the projects and does not speak to the legitimacy of Direct's other liens. Century was never obligated under the BLM documents. *See PA, Vol. II, DIRECT000284-285.* In any case, even in the event that the BLM documents could not be used as evidence in this matter, there

exist other documents that demonstrate the amount of dirt that Century required on the Inspirada project and the amount of dirt that Century eventually received from Direct. Direct's Expert Report specifically addresses this fact. *See PA, Vol. II, DIRECT000477-480.*

VIII. CONCLUSION

Based on the foregoing, Petitioner seeks a reversal of the Eighth Judicial District Court's decision to grant Century's Motion for Provisional Relief and to remove the matter from Arbitration. For the reasons herein, the parties should be permitted to litigate this matter before the Arbitrator and not the District Court.

DATED this 13th day of October, 2020.

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VERIFICATION

On October 12th, 2020, the affiant, Mel Westwood, appeared in person before me, a notary public, who knows the affiant to be the person whose signature appears on this document, who stated:

"I, Mel Westwood, have read the foregoing petition for writ of mandamus and all factual statements in the petition are with the affiant's personal knowledge and true and correct or supported by citations to the appendix accompanying the petition.

"The exhibits in the appendix are true and correct copies of the original documents."

MEL WESTWOOD

GIVEN UNDER MY HAN AND SEAL OF OFFICE on this 12th day of October, 2020.

ANNABELLE M. NUDO
Notary Public, State of Nevada
Appointment No. 12-7560-1
My Appt. Expires Mar 23, 2024

NOTARY PUBLIC

CERTIFICATE OF COMPLIANCE

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

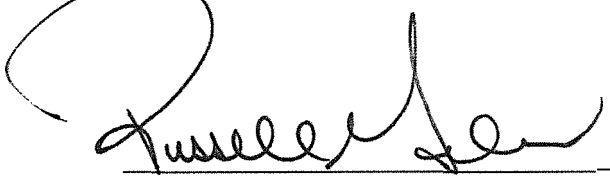
This brief has been prepared in a proportionally spaced typeface using Word 2009 in size 14 font, Times New Roman.

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

Proportionately spaced, has a typeface of 14 points or more, and contains 6,865 words.

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 13th day of October, 2020.



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CERTIFICATE OF SERVICE

I certify that on the 13th day of October, 2020, I caused to be served a copy of the PETITION FOR WRIT OF MANDAMUS and PETITIONER'S APPENDIX VOLUME(S) 1-6 upon all counsel of record:

■ By personally serving it upon him/her; or

□ By mailing it by first-class mail with sufficient postage prepaid to the following address(es), and by submitting them :

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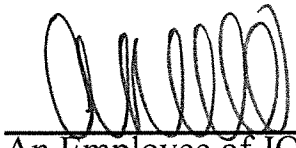

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