IN THE SUPREME COURT OF THE STATE OF NEVADA

DIRECT GRADING & PAVING, L.L.C., a Nevada limited liability company, Petitioner, v. THE EIGHTH JUDICIAL DISTRICT COURT, in and for the County of Clark, State of Nevada; and THE HONORABLE ROB BARE, District Judge, Respondents, and CENTURY COMMUNITIES OF NEVADA, L.L.C, a Nevada limited liability company, Real Party in Interest.	Case No. 81933 District Court Case No.: A-18-773139-C Dept. No.: XXXII

ANSWER TO PETITION FOR WRIT OF MANDAMUS

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RULE 26.1 DISCLOSURE

The undersigned counsel of record certifies, pursuant to NRAP 26.1, 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 judges of this court may evaluate possible disqualification or recusal.

Real Party in Interest Century Communities of Nevada, LLC is a Nevada limited liability company. Real Party in Interest Argonaut Insurance Company is a surety licensed to provide bonds and is owned by Argo Group International Holdings, Ltd., a Bermuda-based international underwriter of specialty insurance and reinsurance products in the property and casualty market. Real Party in Interest Arch Insurance Company provides specialty property/casualty insurance in the United States and Canada and is owned by Arch Capital Group (U.S.), a Bermuda-based insurer of specialty property/casualty insurance, reinsurance, as well as traditional property/casualty lines to businesses in various industries, such as health care, construction, real estate, and energy.

Undersigned counsel further certifies that the law firm of Santoro Whitmire and Attorneys Nicholas J. Santoro and Oliver J. Pancheri are the attorneys who have appeared for Real Party in Interest in this action. The law firm of Santoro Whitmire and Attorneys Nicholas J. Santoro and Oliver J. Pancheri are the only attorneys and firm expected to appear for Real Party in Interest in this Court.

Dated this 11th day of December, 2020.

/s/ Oliver J. Pancheri

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Defendants CENTURY COMMUNITIES OF NEVADA, LLC ("***Century***") and ARGONAUT INSURANCE COMPANY ("***Argonaut***") (collectively referred to as "***Century***"), submit the following Answer to the Petition filed by Direct Grading & Paving LLC ("***Direct***").

I. INTRODUCTION

It would be an understatement to say that this matter presents unique issues. This matter is replete with Direct's extreme and flagrant misconduct including the alteration and manipulation of evidence (altered to conceal fraudulent billing practices), the filing of fraudulent liens with the District Court, refusal to obey discovery orders, and the spoliation of evidence in an effort to conceal that a key Century employee was secretly acting as a dual agent for Direct (and on Direct's payroll). Direct's pervasive misconduct in the proceedings was deliberate and undertaken in an effort to conceal its fraudulent activities.

Despite its egregious misconduct, Direct brazenly and unapologetically brings this matter before this Court seeking extraordinary relief. However, Direct fails to provide an accurate picture of its misconduct or the extent to which that misconduct infected and irreparably undermined **both** the arbitration proceedings and the District Court proceedings – proceedings Direct commenced to foreclose on its fraudulent mechanic's liens (the "***Foreclosure Action***"). Direct further fails to accurately portray the action taken by the District Court, which was both appropriate

and justified. The District Court correctly recognized the unique and extreme nature of this matter, which involves multiple instances of the most severe misconduct that wholly undermined the integrity of the proceedings.

It bears repeating that Direct's misconduct in this matter is not limited to a singular act. Rather, Direct engaged in a pattern and practice of deceit effectively rendering the prospect of a fair hearing for Century an utter impossibility. As detailed herein, Direct altered and manipulated federal documents (contracts and correspondence involving the Bureau of Land Management) in order to conceal hundreds of thousands of dollars in fraudulent bills submitted to Century. Direct further engaged in discovery misconduct to prevent Century from discovering the depth of its falsification of evidence. When ordered to produce the computer utilized to make the alterations, Direct simply failed to so. Thus, Century was never able to determine **who was involved in altering the BLM documents and what other documents Direct produced in this matter that may have been altered**. To make matters worse, Direct also concealed and spoliated evidence – in direct violation of discovery orders - in order to prevent Century from knowing the depth of the betrayal of one of Century's trusted employees. Century uncovered that Direct had secretly placed Century's Land Development Manager on its payroll in order to compromise him in a blatant conflict of interest, which was expressly prohibited under the parties' agreement. Direct failed to comply with orders to produce documents that would

likely impeach Direct's attempts to downplay the conflict of interest. Thus, Direct's misconduct implicated **all** of its claims and liens in this matter.

As Direct's misconduct was not limited to one act, its misconduct was also not limited to one proceeding. Even when Century brought the fabricated evidence to Direct's attention, Direct failed to withdraw it. To the contrary, Direct doubled-down by ***initiating*** the Foreclosure Action with the District Court while knowing full well that the liens were incorrect. The mechanic's liens are based on claims that are entirely the product of Direct's fraudulent conduct and breaches. In other words, Direct sought to utilize the District Court as an instrument to further advance its fraud. When Century was left with no other option but to bring Direct's misconduct to the District Court's attention, the District Court correctly refused to allow Direct to continue with its misconduct unchecked. Having invoked the jurisdiction of the District Court, Direct cannot validly claim that the District Court had no authority to address Direct's fraudulent conduct.

The District Court's ruling correctly recognized the gravity of Direct's misdeeds and their impact on the integrity of the proceedings. By altering, concealing and spoliating evidence of critical importance in this matter (in addition to flatly refusing to comply with discovery orders), Direct made it impossible for Century to have a fair hearing. "When a party falsifies evidence of central importance to a case, this shows bad faith, willfulness, or fault, and thus supports the

Court's exercise of its inherent power to dismiss a case…Indeed, '[**t]here is no point to a lawsuit, if it merely applies law to lies. True facts must be the foundation for any just result.**'" *Vogel v. Tulaphorn, Inc*., No. CV 13-464 PSG (PLAX), 2013 WL 12166212, at *4-5 (C.D. Cal. Nov. 5, 2013), ("…courts in the Ninth Circuit routinely impose terminating sanctions when a party falsifies evidence of central importance to a case") *aff'd*, 637 F. App'x 344 (9th Cir. 2016) (emphasis added). Direct hopes to do one thing with its current Petition – avoid finally answering for its egregious misconduct and to continue to "apply law to lies." This should never be permitted.

Truly, it defies logic that Direct, after its misconduct has finally come to light (through the expenditure of significant forensic and other investigative expense by Century), would have the temerity to ask for this Court to intervene with emergency writ relief. This Court should see through Direct's improper Petition and not permit Direct to use this Court to further advance its bad faith claims. Direct comes before this Court with unclean hands and is undeserving of any relief whatsoever from this Court. It was entirely appropriate and necessary for the District Court to address the fraud and misconduct perpetrated by Direct since Direct sought to foreclose on the knowingly fraudulent and improper liens and to recover on its frivolous claims in the District Court. *See, e.g., Wyle v. R.J. Reynolds Indus., Inc.*, 709 F.2d 585, 589 (9th Cir. 1983) ("…[C]ourts have inherent power to dismiss an action when a party

has willfully deceived the court and engaged in conduct utterly inconsistent with the orderly administration of justice). The Petition should be dismissed in its entirety.

II. FACTS NECESSARY TO UNDERSTAND THE PETITION

A. Direct's Mechanic's Liens

Century's contractual relationship with Direct is governed by a Master Subcontract Agreement (the "***MSA***") and several Project Work Authorizations (each, a "***PWA***"). (1-2 App. 232-260). Direct defaulted under the MSA and the PWAs due to, among other things, failing to timely perform the scope of work required under the PWAs for various projects.[1] (1 App. 22). The dispute largely arose from Direct's recordation of approximately $1.7 million in fraudulent and meritless mechanic's liens (the "***Liens***") in 2017 against the Projects after Century terminated Direct.[2] (1 App. 24-39).

The parties entered into a letter agreement, dated July 18, 2017, in order to facilitate the arbitration of the parties' dispute and to appoint attorney Donald Williams, Esq. (the "***Arbitrator***"), as the arbitrator. (1 App. 113-115). The Arbitrator was given the authority to grant relief with regard to the liens and bonds

[1] Among others, Century and Direct entered into a PWA for work at Lake Las Vegas, Inspirada, Rhodes Ranch and Parkway a/k/a Freeway 50 (the "***Projects***").

[2] Because the liens on three of the Projects interfered with Century's operations, Century eventually bonded around the mechanic liens on these projects. Century must pay annual fees to renew the bonds until they are released. Further, Century is obligated to pay for the defense of the bonding companies.

pursuant to NRS Chapter 108, including the authority, subject to confirmation by the District Court, to order the liens and any bonds be released. It was important to Century that the Liens and any bonds be expeditiously addressed as they would undoubtedly interfere with Century's residential home building business. However, that has not occurred due to Direct's extensive discovery abuses that have completely undermined the proceedings and the Arbitrator's refusal to make a ruling as required by Nevada law.

B. Direct Alters Evidence to Conceal Its Overbilling

Direct's misconduct is clearly connected to Direct's efforts to conceal its fraudulent conduct and breaches of obligations owed to Century. Direct went so far as to alter federal documents in order to conceal its **fraudulent overbilling**. Direct overcharged Century to the tune of approximately $550,000 just with respect to the import of dirt from the Bureau of Land Management (the "***BLM***") for the Inspirada Project. (2 App. 272, 276-277). This overbilling far exceeds the amount Direct claims is owed for the Inspirada Project. In other words, Direct's mechanic's lien for Inspirada, which it sought to foreclose upon in the Foreclosure Action, is entirely the product of fraudulent billing that Direct hoped to conceal by altering evidence.

Direct took advantage of Century by charging as if **93,200** cubic yards of soil had been purchased from the BLM and transported from the BLM site. However, Direct was only contracted to remove up to 50,000 cubic yards from the BLM site.

(2 App. 272-277, 284). More importantly, Direct reported to the BLM that only **33,395** cubic yards were removed from the BLM site. (2 App. 272-277, 287; 4 App. 922-926). Thus, Direct overcharged Century to the tune of approximately $550,000 just with respect to the BLM dirt. (2 App. 276-277).

Century requested through discovery that Direct provide the underlying BLM documentation (contracts, proof of payments, etc.) in connection with any of the Projects. (2 App. 298, 301). Faced with the dilemma that the production of the BLM documentation would reveal Direct's fraudulent billing practices, Direct altered and manipulated the BLM documents to conceal the overbilling and produced the fabricated documents to Century. (2 App. 272-277, 279-291).

Direct's manipulation of evidence was truly deceptive as the documents were altered electronically using Adobe software that would make the discovery of the alteration nearly impossible to detect on the face of the documents. (4 App. 945-946). Direct likely would have succeeded with its deception if Century did not uncover evidence of Direct's successful efforts to compromise Century's Land Develop Manager by placing him on Direct's payroll (discussed further below). The blatant conflict of interest caused Century to have serious concerns regarding the legitimacy of Direct's billing practices. As such, Century elected to obtain the same documentation it had requested from Direct from the BLM. (2 App. 275). It goes without saying that Century was shocked to discover the significant discrepancies in

the documents provided by the BLM compared to the documents Direct produced.

The BLM file contained numerous documents indicating that Direct had only purchased about a third of the amount of cubic yards that it charged Century (33,395 cubic yards compared to 94,395). (2 App. 275). To illustrate the difference between the documents, a comparison of the documents produced by Direct against those actually contained in the BLM file is included below (with the differences between the documents highlighted).

1. The Shonna Dooman Letter (dated August 22, 2017)

Direct's produced version of the letter (dated August 22, 2017) from Shonna Dooman, Assistant Field Manager for the BLM, to Direct differs from the original letter obtained from the BLM in four key respects as highlighted below.[3]

(a) The BLM Original

On January 14, 2016, the BLM issued you a new contract, serialized as N-93876, for the use of 50,000 cubic yards of mineral material from the Duck Creek Community Pit. A recent review of our records found that 33,395 cubic yards of mineral materials were used under this contract. The value of those mineral materials is $52,430.15. The BLM has received payments for those mineral materials totaling $49,282.30. This leaves a balance owed to the BLM of $3,147.85.

(2 App. 287).

(b) The Direct Modified Version

On January 14, 2016, the BLM issued you a new contract, serialized as N-93876, for the use of 100,000 cubic yards of mineral material from the Duck Creek Community Pit. A recent review of our records found that 94,395 cubic yards of mineral materials were used under this contract. The value of those mineral materials is $148,200.15 The BLM has received payments for those mineral materials totaling $145,052.30. This leaves a balance owed to the BLM of $3,147.85.

[3] The last highlight of "a balance owed to the BLM of $3,147.85" was on the original document contained in the BLM file.

(2 App. 282).

2. The Dooman Letter (dated January 14, 2016)

Similarly, Direct's produced version of the letter dated January 14, 2016 from Ms. Dooman to Direct differs from the original letter as highlighted below.

(a) BLM Original

Enclosed is a signed copy of your non-competitive mineral material sales contract for operations at the Duck Creek Detention Basin Stockpile, T. 22 S., R. 60 E., sec. 26, NE1/4SW1/4, E1/2SE1/4NW1/4. The new contract has been serialized as N-93876. Please use this serial number in future correspondence regarding your new contract. This contract is for the removal of 50,000 cubic yards of sand and gravel over a period of 2 months. This contract became effective on January 14, 2016, and is set to expire on March 14, 2016.

(2 App. 284-285).

(b) DGP Modified Version

Enclosed is a signed copy of your non-competitive mineral material sales contract for operations at the Duck Creek Detention Basin Stockpile, T. 22 S., R. 60 E., sec. 26, NE1/4SW1/4, E1/2SE1/4NW1/4. The new contract has been serialized as N-93876. Please use this serial number in future correspondence regarding your new contract. This contract is for the removal of 100,000 cubic yards of sand and gravel over a period of 2 months. This contract became effective on January 14, 2016, and is set to expire on March 14, 2016.

(2 App. 279).

3. BLM Contract for Sale of Mineral Materials (Form 3600-9)

Direct produced a substantively altered version of the BLM Contract for Sale of Mineral Materials (Form 3600-9). Notably, in addition to the modifications highlighted below, it can been seen in Direct's produced version of the Form 3600-9 that Direct removed a key portion of the contract as indicated in red below (as seen by the period left in place, which Direct missed in making its alteration).

(a) BLM Original

KIND OF MATERIAL *You may list only one material commodity per contract*	QUANTITY *(Unit of Measure must be specified in next column)*	UNIT OF MEASURE ☑ Cubic Yards OR ☐ Tons *(Choose only 1)*	PRICE PER UNIT	TOTAL PRICE
Sand and Gravel, S&G	50,000.00	Cubic Yards	$1.57	$78,500.00
Reclamation Fee, if in a Community Pit:	50,000.00	Cubic Yards	$0.01	$500.00
TOTAL PURCHASE PRICE				$79,000.00
PERFORMANCE BOND				$0.00

BLM's determination of the amount of materials that you have taken under the contract is binding on you. You may appeal this determination as provided in Section 19.

You are liable for the total purchase price, even if the quantity of materials you ultimately extract is less than the amount shown above. You may not mine more than the quantity of materials shown in the contract.

☐ **If you pay in full in advance, BLM will check this box, and Subsections 3(a) through 3(c) do not apply to your contract.** ***You must pay in full for all sales of $2,000 or less.***

Sec. 3. ***Payments, title, and reappraisals*** **– You may not extract the materials until you have paid in advance for them in full $_____, or paid the first installment of $4,425.00 (5% of $78,500.00) + $500.00.**

(2 App. 286).

(b) Direct Modified Version

designated by the unit price given below, or as changed through reappraisal.

KIND OF MATERIAL *You may list only one material commodity per contract*	QUANTITY *(Unit of Measure must be specified in next column)*	UNIT OF MEASURE ☑ Cubic Yards OR ☐ Tons *(Choose only 1)*	PRICE PER UNIT	TOTAL PRICE
Sand and Gravel, S&G	100,000.00	Cubic Yards	$1.57	$157,000.00
Reclamation Fee, if in a Community Pit:	100,000.00	Cubic Yards	$0.01	$1000.00
TOTAL PURCHASE PRICE				$158,000.00
PERFORMANCE BOND				$0.00

BLM's determination of the amount of materials that you have taken under the contract is binding on you. You may appeal this determination as provided in Section 19.

You are liable for the total purchase price, even if the quantity of materials you ultimately extract is less than the amount shown above. You may not mine more than the quantity of materials shown in the contract.

☐ **If you pay in full in advance, BLM will check this box, and Subsections 3(a) through 3(c) do not apply to your contract.** ***You must pay in full for all sales of $2,000 or less.***

Sec. 3. ***Payments, title, and reappraisals*** **– You may not extract the materials until you have paid in advance for them in full $_____, or paid the first installment of $4,425.00**

(2 App. 281).

The discovery of the falsified evidence called into question all of the

documents produced by Direct.[4] How could any of Direct's production be trusted given the lengths it undertook to conceal its fraudulent billing?

C. Direct's Efforts of Concealment Continue Undeterred

Upon discovering the altered evidence, Century brought the matter to the attention of Direct's legal counsel in February 2018. (7 App. 1399-1405). However, the altered and fraudulent BLM documents were never formally withdrawn.[5] Century then brought the matter to the Arbitrator's attention given the gravity of the misconduct and Century's legitimate concern that Direct may have submitted other fabricated evidence.

The Arbitrator ordered that all discovery be stayed other than discovery relating to the fabricated evidence and discovery misconduct. The Arbitrator further ordered that an independent third-party information technology specialist perform a

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[4] Direct charged Century as if dirt was being purchased from the BLM and hauled across the valley when it was, in actuality, coming from sites where Direct obtained the dirt at no cost – including other Century projects. (4 App. 904, 928, 934-935; 7 App. 1566-1579). In some instances **Direct was apparently hauling dirt from one Century job site to another Century job site and charging Century as if the dirt had been purchased from the BLM.** *See id.* It is no wonder that Direct wanted to conceal its overbilling scheme, which was perpetrated under the nose of Century's conflicted Land Development Manager. While Century did eventually obtain the dirt necessary to build the homes at the Inspirada project, any notion that Century was not damaged by Direct's overbilling scheme is manifestly false. Century overpaid Direct approximately $550,000 for that dirt, alone.

[5] To the contrary, Direct would ***later*** file the action with the District Court seeking to foreclose on the mechanic's lien upon which the fraudulent charges were based. (1 App. 1-20).

"sweep" of Direct's computer, cell phones, and server (the "***March Order***"). (2 App. 293-296). Century engaged Michael Holpuch of HOLO Discovery to conduct the ordered sweep. On April 5, 2018, Mr. Holpuch sent an email summarizing some of the preliminary issues he had encountered after analyzing the data and computers Direct permitted him to access. (2 App. 312-316). Disturbingly, Mr. Holpuch discovered that Direct had upgraded the computer supposedly used to alter the BLM documents to Windows 10 on March 15, 2018 – less than ***two days after*** the issuance of the March Order calling for the inspection of the computer. (1 App. 122, 141). Even more disturbing was the fact that the computer represented to be the computer used to alter the BLM documents did not appear to have been in use prior to March 15, 2018. (1 App. 148). In fact, Mr. Holpuch explained that **Direct had not provided the devices utilized to alter the BLM documents, which was one of the primary purposes of his examination**. *See id*. In other words, Direct failed to comply with the Arbitrator's Order in an effort to further conceal the truth. (1 App.148-149).

The Arbitrator later, in his July 9, 2018 Order (the "***July Order***"), ordered that, among other things, Mr. Holpuch image two additional Direct computers. (2 App. 336-339). Mr. Holpuch imaged the additional computers, but was nevertheless unable to locate the altered BLM documents. (1 App. 148-149). Moreover, Mr. Holpuch concluded that, contrary to Direct's representations to the Arbitrator, Direct

had not provided access to all of its computers and servers. (1-2 App. 148-149, 440-441). Direct had spoliated or concealed the very computer it utilized to alter the evidence.

D. Direct's Unsuccessful Efforts to Blame its Controller

In an effort to avoid responsibility for the alteration of evidence, Direct's owner, Mel Westwood, blamed the alteration of evidence on Direct's controller, Linda Middleton. Ms. Middleton, despite altering the evidence in this matter, remains employed at Direct.[6] This is noteworthy considering the statement by Direct's counsel in his May 15, 2018 email that "**there may be possible criminal implications related to her actions in changing the BLM documents**." (2 App. 350). Moreover, Direct caused Ms. Middleton to sign a declaration confessing to the alterations of the BLM documents (the "***Declaration***"). (2 App. 355). The Declaration indicates that Mr. Westwood asked Ms. Middleton to compile the BLM documents and that he asked her to "**make sure that all of the numbers matched before sending them to Direct's counsel**." *Id*. Because Direct had reported taking out approximately 33,000 cubic yards of material to the BLM and had billed Century

[6] Mel Westwood of Direct testified that once this litigation with Century is completed, Ms. Middleton will most likely be fired. *See* deposition transcript of Mel Westwood, dated November 19, 2018. (2 App. 347).

as if it had taken out nearly 94,000 cubic yards, the numbers did not "match." Accordingly, Ms. Middleton ensured the numbers would match—per the instruction from Mr. Westwood—by altering the BLM documents in order to conceal the overbilling.[7] Further, Ms. Middleton testified that she showed Mr. Westwood the alterations a few days after they were made. (4 App. 947). However, Direct failed to correct the alteration.[8]

Direct's efforts to blame Ms. Middleton were unavailing as the Arbitrator expressly (and correctly) found that Direct was responsible for the actions of Ms. Middleton under the doctrine of respondeat superior. (1 App. 118-120). Further,

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[7] Ironically, despite the Declaration being drafted by some combination of Ms. Middleton and Mr. Westwood, **both of them testified that the Declaration contained false statements**. (2 App. 345-347, 361-362). Yet, Direct still cites the Declaration in its Petition without noting its falsity. (Petition as p. 6). Further, Direct cites the Declaration for the proposition that Ms. Middleton altered the BLM documents because "she noticed that the amount of dirt being taken from the BLM land to one of the Century projects did not properly correspond with the amount of dirt required for that particular project." *Id.* This is not what the Declaration states. The Declaration states that Ms. Middleton altered the BLM documents because the payments to the BLM from Direct did not match the BLM contract. (2 App. 355). In her deposition, Ms. Middleton admitted that this was not accurate. (2 App. 361-362). Like the altered BLM documents, Direct has taken no action to rectify the false Declaration it submitted. Moreover, Direct cites the Declaration for assertions that are simply not there.

[8] Mr. Westwood testified that Ms. Middleton texted her on the day she altered the documents, but consistent with Direct's conduct in this action, the text message was not preserved. (7 App. 1412-1415). Mr. Westwood disagreed with Ms. Middleton's testimony that she showed him the alterations before Century discovery them. (2 App. 346).

Mr. Westwood's failure to correct the alteration serves as a ratification of the alteration. While Mr. Westwood disputes Ms. Middleton's testimony in this regard, he did not deny that **Ms. Middleton is still employed with Direct**. (2 App. 347). If Ms. Middleton was truly acting on her own to alter the evidence in this matter, Direct certainly would not retain her as controller. The fact that she still works for Direct evidences ratification of Ms. Middleton's conduct. Direct also ratified Ms. Middleton's conduct again by failing to withdraw the fabricated evidence and subsequently filing the Foreclosure Action seeking to recover on the fraudulent lien. More importantly, Direct's effort to blame Ms. Middleton is meaningless when Direct **continues** to seek to recover the fraudulent charges that Ms. Middleton sought to conceal.

The motive for Direct to alter the evidence in this matter is obvious – to cover up Direct's fraudulent overbilling. Ms. Middleton did not stand to personally benefit from the fraudulent billing or the alteration of the evidence. The notion that Ms. Middleton would act on her own to alter evidence in order to conceal overbilling perpetrated by Direct was never credible. Nevertheless, Direct made the prospect of testing Direct's assertion impossible by failing to turn over the computer used to alter the BLM documents (and potentially others). On the heels of altering evidence to conceal its fraudulent billing, Direct disobeyed the Arbitrator's orders by refusing to actually turn over the computer utilized to alter the documents. (1 App. 148-149).

Given Direct's willingness to alter the BLM documents to conceal its fraudulent billing, it is not difficult to conclude that Direct refused to comply with the Arbitrator's order and provide the computer used to alter the evidence for a reason – there was certainly more damning information on that withheld computer. Whether that damning information included evidence that others were involved in altering the documents or if other documents produced by Direct were also altered, no one will ever know because of Direct's failure to obey the Arbitrator's order.

Direct failed to provide Mr. Holpuch the computers and devices as ordered and caused Century to incur significant expenses by having to sift through Direct's deceit. Direct even boasted at one point that after a year of discovery on the issue of Direct's alteration of evidence and discovery abuses, the parties are no closer to knowing precisely what took place with regard to the altered BLM documents. (2 App. 452). However, the parties were no closer to knowing exactly how the BLM documents were altered by Ms. Middleton and who else may have been involved in the alteration, because Direct made every effort to hide its trail. Once the alteration of the BLM was discovered, Direct not only attempted to blame Ms. Middleton for the alteration, but it also sought to conceal the forensic computer evidence demonstrating how the evidence was altered and exactly who was involved in the alteration. This is evident in the expert report provided by Mr. Holpuch.

Mr. Holpuch provided an initial report expressly stating that: (1) **Direct failed**

to comply with the Arbitrator's Order regarding a forensic inspection of the altered BLM documents; (2) **The data Direct provided did *not* include the altered BLM documents**; (3) **Mr. Holpuch was unable to analyze how the documents were altered and by whom**; (4) **Mr. Holpuch was unable to determine who accessed the altered BLM documents**; (5) **Direct did not provide him the computer (or hard drive) utilized by Ms. Middleton in February 2018 (despite the Arbitrator's Orders to do so)**;[9] (6) **Direct changed Ms. Middleton's computer to Windows 10 one day after the Arbitrator ordered it be imaged – Direct claimed this was an automatic update, but that is <u>not</u> consistent with Windows 10 upgrades offered at that time**; and (7) **That there is evidence of another server utilized by Direct that Mr. Holpuch was not allowed to access (also in violation of the Arbitrator's Orders)**. (1, 2 App. 148-149, 440-441). The forensic examination was an expensive process that was made even more expensive

[9] Direct previously argued that Mr. Holpuch is incorrect in his conclusion that Direct failed to produce the computer utilized to alter the BLM documents. (2 App. 454). Direct then, without any evidentiary citation, claimed that Ms. Middleton, Mr. Westwood and Joe Morgan (Direct's computer/IT vendor) all testified that Direct provided Mr. Holpuch Ms. Middleton's computer. However, there is nothing in Ms. Middleton's deposition testimony supporting Direct's assertion that Ms. Middleton testified that Mr. Holpuch copied the computer she utilized to alter the BLM documents. Mr. Morgan likewise did not testify that Mr. Holpuch copied the computer Ms. Middleton used to alter the BLM documents – in fact, he testified that he did not know what computer belonged to Linda. (4 App. 957). Mr. Holpuch's conclusions regarding Direct's failure to comply with the Arbitrator's orders remain uncontradicted.

and time-consuming by Direct's failure to comply with the Arbitrator's Orders. Mr. Holpuch did not find more because Direct took action to ensure that nothing more could be found. Mr. Holpuch's reports make that much clear. *See id*. Direct had successfully spoliated the evidence. Direct should not be rewarded for its bad faith discovery tactics and non-compliance with the Arbitrator's Orders.

E. Direct's Conflict of Interest is Uncovered

Direct would pretend its misconduct was limited to a singular lien for the Inspirada project. This is far from the truth. Early on in the arbitration proceeding, Century was forced to file motions to compel Direct's answers to discovery requests because Direct failed to provide the requested documents and instead provided boilerplate objections. Direct's objections prominently featured references to Scott Prokopchuk, Century's former Land Development Manager, by claiming that "[Direct] has performed many services for Century since 2010. [Direct] never received any complaints concerning its services until Prokopchuk left his employment with Century in 2016." (7 App. 1382, 1387). Direct failed to mention in those repeated objections that ***Prokopchuk was also employed by Direct during most of 2016.*** However, this revelation came to light when Direct was ordered to produce certain payroll records and those records showed that Prokopchuk was actually on Direct's payroll. (7 App. 1580-1603). This was a direct violation of the MSA.

Pursuant to the MSA, Direct expressly agreed to avoid any actions or conditions that would conflict with Century's best interests:

> 8.1 Good Faith. **Subcontractor (Direct) shall exercise all reasonable care and diligence to prevent any actions or conditions that could result in conflict with Contractor's (Century's) best interests.** This obligation shall apply to the activities of the employees and agents of Subcontractor **in their relations with the employees and agents of Contractor and Owner**.

(1 App. 238).

Direct breached the MSA by secretly employing Prokopchuk. This was a material breach considering Prokopchuk's significant position of trust and responsibility with Century. At Century, Prokopchuk was responsible for (among other things) the following: (1) obtaining job costs estimates and bids from contractors; (2) participating in awarding jobs to contractors; (3) overseeing the actual work performed by the contractors; (4) approving any change orders and purchase orders for the contractors; and (5) authorizing payment to the contractors. In performing these duties for Century, Prokopchuk oversaw Direct in each of these regards.

Faced with this evidence of a blatant conflict and breach of the MSA, Direct argued that Prokopchuk merely performed consulting work for a company related to Direct and that he was only paid by Direct to "avoid tax liabilities." (2 App. 456). In other words, Direct claimed that Prokopchuk performed no work for Direct

despite being paid by Direct. (2 App. 455). Century discovered that these statements were likely false. Century uncovered evidence that, contrary to Direct's representations, Prokopchuk: (1) had his own office at Direct while they were employed there; (2) was issued a Direct cell phone; (3) utilized a Direct email address of PD@directgrading.com; (4) attended budgeting meetings for Direct; and (5) regularly attended internal scheduling meetings for Direct ***concerning Century projects*** and the projects of other homebuilders with whom Direct was working. (2 App. 267-270). This evidence contradicts Direct's representations that Prokopchuk never worked for Direct and only worked for an entity related to Direct. However, Direct failed to produce the documents that would actually answer the question of the depth of Prokopchuk's betrayal.

Direct failed to produce e-mails and preserve evidence that would bear directly on the blatant conflict of interest caused by Direct hiring Prokopchuk. It is obvious that Direct plans to call Prokopchuk as its star witness. However, due to Direct's spoliation of evidence and failure to comply with discovery orders, Century will not have the e-mails needed to properly cross-examine witnesses in this matter and to refute the anticipated testimony from Westwood and Prokopchuk. Direct was ordered to produce all communications it had with Prokopchuk no matter what e-mail address Prokopchuk utilized. (2 App. 265). Direct provided Prokopchuk an e-mail address, but Direct failed to produce the Prokopchuk e-mails as ordered by the

Arbitrator. Direct claimed that it searched for the emails, but could not find any. (2 App. 457).

The forensic review demonstrated that Direct had willfully failed to comply with discovery orders and obligations. Mr. Holpuch concluded that Direct failed to provide access to a server that was in use during the relevant timeframe. (1 App. 148-149). If Direct had actually preserved documents in this matter – as it was obligated to do – there would likely be numerous emails involving Prokopchuk and evidencing his communications with Direct while was acting as Direct's dual agent. This evidence is of critical importance in this matter as Direct's breach of the MSA by secretly employing Prokopchuk is a complete defense for Century to each of Direct's claims. Direct is keenly aware of this, which is why it failed to comply with orders to produce the Prokopchuk e-mails and failed to actually provide Mr. Holpuch with complete access to its devices.

F. The Motion for Sanctions and to Remove the Liens

Given the discovery abuses and fraud upon the tribunals, Century submitted a Motion for Discovery Sanctions against Direct Regarding: (1) Falsification of Evidence; (2) Spoliation of Evidence; and (3) Failure to Comply with the Arbitrator's Orders and Motion to Expunge Liens Recorded against Century's Properties Pursuant to NRS 108.2275 and 108.2421 (the "***Motion for Sanction and to Remove the Liens***") on January 18, 2019 with the Arbitrator. NRS 108.2275(3)

requires a Court (or the Arbitrator) to conduct a hearing within the timeframe established by statute (not less than 15 days but no more than 30 days after the court issues the order for a hearing). This Court has instructed that while a "district court does not have to resolve the matter within the time frame…the matter **should be addressed expeditiously**." *J.D. Constr., Inc. v. IBEX Int'l Grp., Ltd. Liab. Co.*, 126 Nev. 366, 378, 240 P.3d 1033, 1042 (2010) (emphasis added). The Arbitrator conducted a lengthy hearing on Century's Motion for Sanctions and to Remove the Liens on April 5, 2019. However, the Arbitrator issued an Order on May 15, 2019 (the "***May Order***"), in which he refused to impose any terminating sanctions against Direct and failed to even address the removal of the liens and the bonds. (1 App. 117-120). Instead, the Arbitrator ordered Direct pay Century's attorney's fees and costs dating back to the discovery of the alteration of the BLM documents. *See id.* This limited sanction, however, failed to actually rectify Direct's misconduct in any way at all.

It took a significant amount of time and expense to uncover Direct's discovery abuses and fraudulent conduct. Century submitted its fees totaling $186,270 and costs in the amount of $84,177 (these costs included the forensic computer expert, the forensic fraud examiner and Century's construction expert). However, the Arbitrator then amended his May Order on May 31, 2019 (the "***Amended May Order***") and reduced the monetary sanction to $130,000 (approximately one-half of

the total amount pursuant to the previous Order) and ordered that it be paid within thirty (30) days or the Arbitrator "would consider other appropriate sanctions." (7 App. 1416-1418). Direct—similar to the Arbitrator's prior orders—ignored the Amended May Order and failed to pay the sanction. This should have been strike three for Direct, but it was not.

On June 6, 2019, Century submitted a Motion for Clarification and Reconsideration of the Arbitrator's May 15, 2019 Order (the "***Motion for Clarification***") requesting that the Arbitrator make a ruling on Century's NRS Chapter 108 request to address the liens and the bonds as required by statute. On July 24, 2019, Century also filed a Motion for Additional Sanctions in Light of Direct's Failure to Comply with the Amended Order (the "***Motion for Additional Sanctions***"). On September 27, 2019, the Arbitrator issued an order refusing to make a ruling on the liens and the bonds and simply deferred the issue for the ultimate hearing on the merits, which the Arbitrator indicated should take place by July 1, 2020. (7 App. 1419-1421). The Arbitrator further refused Century's request for an evidentiary hearing on the discovery sanctions and refused to impose any additional sanctions on Direct as a result of its failure to pay the ordered sanction. Instead, the Arbitrator ordered that the $130,000 would be deducted from one of Direct's liens, which were already frivolous to begin with and should have been entirely expunged. *See id.*

The Arbitrator's deferral of a ruling on Century's Motion for Sanctions and to Remove the Liens constitutes a failure to act and does not comply with Nevada law. Century should not be forced to wait even longer to have the liens and bonds released when it has already been established that any award in favor of Direct would be the product of fraud and misconduct. More importantly, Direct's discovery abuses prevent Century from having a fair opportunity to defend the claims asserted by Direct. Direct has already been caught altering evidence in this matter to conceal its fraudulent billing and has spoliated other evidence to conceal the breadth of Prokopchuk's betrayal to Century (in addition to Direct's breaches and blatant misconduct). The Arbitrator failed to rectify Direct's discovery misconduct. The unfortunate and unfair consequence of the Arbitrator's failure to act is that Century will be deprived of its right to a fair hearing based upon all of the evidence.

G. The District Court's Order

Given the Arbitrator's failure to act and the Direct's action to file its knowingly fraudulent lien with the District Court in the Foreclosure Action, Century sought relief with the District Court. Century requested that the District Court take action pursuant to NRS 38.222 to remove the liens and the bonds as the Arbitrator is not able or willing to act in a timely fashion in accordance with the provisions of NRS 108. Further, given the fraud upon the tribunals, Century argued that the District Court had the inherent power to dismiss Direct's claims pending with the

District Court. It would be manifestly unjust to allow Direct to proceed to a hearing on the merits given the discovery abuses and fraudulent evidence uncovered. An award procured by fraud—which would necessarily be the case if there was any award in favor of Direct—would ultimately be vacated under NRS 38.241(1)(a). Alternatively, Century requested that the Court appoint a new arbitrator to hear this matter pursuant to NRS 38.226.

The District Court, after conducting two hearings and considering supplemental briefs from the parties, entered its order on February 20, 2020, which is the subject of Direct's Petition. (5 App. 1155-1160). In the Order, the Court found it had jurisdiction to address the issues raised by Century because: (1) it had jurisdiction over the Foreclosure Action commenced by Direct, including inherent jurisdiction to address Direct's misconduct; and (2) it had the authority under NRS 38.222 to provide provisional relief. (5 App. 1157-1159). The District Court set forth an additional briefing schedule and set an evidentiary hearing, which was most recently scheduled to take place on December 9, 2020 (after being continued initially due to COVID-19 and later at the request of Direct's counsel). The District Court permitted limited discovery relating to the issues relevant to Direct's misconduct. The District Court did not remove this proceeding from Arbitration as Direct contends. (5 App. 1152-1160). Rather, the District Court's Order was intended to address Direct's fraud upon the tribunals and the discovery misconduct only. The

Arbitration would proceed after the Court's ultimate decision.[10]

III. REASONS WHY THE WRIT SHOULD NOT ISSUE

With its Petition, Direct seeks either a reversal of the District Court's Order or the ability to conduct additional discovery before the District Court. (Pet. at p. 1). The petitioner bears the burden of demonstrating that such extraordinary relief is warranted. *Pan v. Eighth Judicial Dist. Court*, 120 Nev. 222, 228, 88 P.3d 840, 844 (2004). This court exercises its discretion to intervene under circumstances of urgency or strong necessity, or when an important issue of law needs clarification and sound judicial economy and administration favor the granting of the petition. *See D.R. Horton, Inc. v. Eighth, Judicial Dist. Court*, 131 Nev. 865, 869-70, 358 P.3d 925, 928 (2015). The District Court did not abuse its discretion in entering the Order and its decision should not be overturned. Direct failed to establish that the District Court "manifestly abused that discretion or acted arbitrarily or capriciously." *John S. Walker v. Second Judicial District Court*, No. 80358, 136 Nev. Advance Opinion 80, * 2 (2020).[11]

A. Direct Is Not Entitled to Emergency Writ Relief

Direct waited approximately **eight months** from the entry of the Order (and

[10] Century has counterclaims for damages pending in the Arbitration.

[11] The inherent authority to issue sanctions and to address litigation abuses is within the discretion of the District Court. *See Young v. Johnny Ribeiro Bldg.*, 106 Nev. 88, 92, 787 P.2d 777, 779 (1990).

nearly nine months from the oral pronouncement of the District Court's ruling on January 24, 2020) to file the Petition on the eve of the evidentiary hearing. Direct has known since January 24, 2020 that the District Court decided it had jurisdiction over Century's request for sanctions. Since that time, the parties have briefed several issues in the District Court and also participated in a number of hearings before the District Court regarding the evidentiary hearing (which the District Court scheduled back on May 14, 2020).

The parties have also participated in discovery relative to the evidentiary hearing during that time. (7 App. 1527-1565, 1511-1526). Yet, Direct sat back for nearly nine months before filing its Petition and ultimately seeking a stay on the eve of the evidentiary hearing. If Direct was going to seek relief by way of extraordinary writ, it should have done so long ago and has offered no legitimate justification for its failure to do so. Direct simply hopes to avoid answering for its misconduct, which includes altering federal documents and spoliating evidence.

"As an extraordinary remedy, a writ of mandamus is subject to the doctrine of laches." *Bldg. & Constr. Trades Council of N. Nev. v. State*, 108 Nev. 605, 611, 836 P.2d 633, 637 (1992); *accord Cheney v. United States District Court for District of Columbia*, 542 U.S. 367, 379 (2004) ("Laches might bar a petition for a writ of mandamus if the petitioner 'slept on his rights . . . ., and especially if the delay has been prejudicial to the [other party] . . . .") (quoting *Chapman v. County of Douglas*,

107 U.S. 348, 355 (1883)). "In deciding whether the doctrine of laches should be applied to preclude consideration of a petition for a writ of mandamus, a court must determine: (1) whether there was an inexcusable delay in seeking the petition, (2) whether an implied waiver arose from the petitioner's knowing acquiescence in existing conditions, and (3) whether there were circumstances causing prejudice to the respondent." *Bldg. & Constr. Trades Council of N. Nev.*, 108 Nev. at 611, 836 P.2d at 637.

If Direct believed writ review was appropriate, it should have promptly acted on the District Court's Order. "Extraordinary relief should be extraordinary." *Walker*, 136 Adv. Op. 80, at *5. Yet, Direct waited approximately nine months to file the Petition. Direct engaged in numerous hearings with the District Court and participated in discovery in anticipation of the evidentiary hearing. This Court should apply its precedents and dismiss the Petition out of hand due to Direct's delay. *See State v. Eighth Judicial Dist. Court*, 116 Nev. 127, 134-135, 994 P.2d 692, 697 (2000) (eleventh-month delay alone precluded consideration of a petition); *Bldg. & Constr. Trades Council of N. Nev.*, 108 Nev. at 611, 836 P.2d at 637 (one month delay is too long).[12]

[12] *See Henry v. Gill Indus., Inc.*, 983 F.2d 943, 948 (9th Cir. 1993) ("[A] defendant suffers prejudice if the plaintiff's actions impair the defendant's ability to go to trial

B. The District Court Has Inherent Jurisdiction to Address Direct's Misconduct

On April 19, 2018, Direct filed the District Court Foreclosure Action. The parties entered into stipulation to stay the Foreclosure Action on July 12, 2018, which expired on February 7, 2019. (1 App. 48-49). The parties entered into a second stipulation to stay proceedings in the Foreclosure Action on February 27, 2019, which expired on June 5, 2019. (1 App. 52-53). After the expiration of the stay, Direct, on or around February 10, 2020, recorded Notices of Lis Pendens and Foreclosure (the "***Notices***") against the Inspirada, Parkview, and Lake Las Vegas parcels. The Notices were filed despite the fact that Century had bonded around the Liens. (7 App. 1422-1460). Century had to threaten motion practice to remove the Notices before Direct removed them. (7 App. 1461-1469). Finally, on April 3, 2020, Direct filed an Amended Complaint (the "***Amended Complaint***") in the District Court adding Arch Insurance as a defendant (Arch Insurance provided a bond in connection with the Direct's lien against a Rhodes Ranch project). (7 App. 1470-1510). Direct's original Complaint, the Notices and the Amended Complaint all seek recovery in connection with the Inspirada Project, despite the fact that Century

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or threaten to interfere with the rightful decision of the case." (citation omitted)); *see also In re Phenylpropanolamine (PPA) Products*, 460 F.3d 1217, 1236 (9th Cir. 2006) (holding that, with respect to discovery abuses, "[p]rejudice from unreasonable delay is presumed" and failure to comply with court orders mandating discovery "is sufficient prejudice").

uncovered and advised Direct and the Arbitrator of the fraudulent nature of this claim – including the altered evidence to conceal the fraud. (7 App. 1398-1405). Despite being put clearly on notice by Century of the fraudulent Inspirada lien which was based upon fabricated evidence, Direct nevertheless proceeded to file its Amended Complaint in the District Court seeking to recover on the knowingly-fraudulent lien. In so doing, Direct perpetrated its fraud on the District Court and invoked its jurisdiction to rectify the fraud.

Importantly, the Amended Complaint seeks recovery on the other Liens and claims, which also completely lack merit given Century's breach of the MSA by secretly employing Prokopchuk and spoliating evidence regarding this critical issue. Nevertheless, Direct repeatedly (three times after the fraud was uncovered) availed itself of the District Court to pursue its fraudulent and meritless claims, which cannot now be fairly litigated given Century's misconduct. Direct argues that none of this should matter because the parties agreed to arbitrate. *So what* that it altered evidence in this matter in order to conceal its fraudulent billing? *So what* that it presented a false Declaration from its controller? *So what* that it failed to comply with discovery orders to produce documents and cooperate with the ordered forensic computer examination? *So what* that it failed to pay the sanction imposed by the Arbitrator? *So what* if it sought to foreclose on the fraudulent and improper liens with the District Court – knowing they were fraudulent? Direct acts as if adherence to the rules is

discretionary and that its litigation abuses – no matter how egregious – simply do not matter. Unfortunately, the Arbitrator's failure to act and to enforce his own orders has only emboldened Direct to believe there will be no meaningful consequences for falsifying evidence, spoliating evidence, and ignoring orders.

The failure to meaningfully address Direct's misconduct will leave Century severely prejudiced. Century simply cannot have a fair hearing and adequately defend itself against Direct's claims given Direct's misconduct, alteration of evidence, and discovery abuses. There have to be meaningful consequences for altering evidence to hide fraudulent billing, spoliating evidence and refusing to comply with orders.

While Century does not dispute that the parties agreed to arbitrate or that the Arbitrator had authority to address Direct's misconduct and to grant relief pursuant to NRS 108.2275, Century does dispute that the District Court abused its discretion. Given Direct's misconduct and fraudulent claims, which have been repeatedly asserted and are pending in the Foreclosure Action, that the District Court cannot exercise its inherent authority to address Direct's misconduct. Further, Century disputes that the District Court cannot provide provisional relief under NRS 38.222.

As noted by the District Court, it "has inherent jurisdiction over the lawsuit and authority under NRCP 37 and applicable Nevada jurisprudence." (5 App. 1157-1158). Direct knew that Century had uncovered the altered evidence when it

asserted, reasserted and then again asserted claims with the District Court alleging that the full amount of the liens were due and owing—despite the fact that the liens were based upon fraudulent invoices and invalid claims. Thus, it is entirely appropriate and necessary for the District Court to address the fraud and misconduct perpetrated by Direct as Direct has brought that same conduct to the District Court by seeking to foreclose on the fraudulent and improper liens.[13]

This Court recognized a party's conduct in a judicial setting can impact that party's right to arbitrate certain claims – particularly when fraud upon the Court is at issue. *See Principal Invs., Inc. v. Harrison*, 132 Nev. 9, 19, 366 P.3d 688, 695 (2016) ("A party to an arbitration agreement likely would expect a court to determine whether the opposing party's conduct in a judicial setting amounted to waiver of the right to arbitrate."). In *Principal*, this Court upheld a lower court's decision that a pay day lender had waived its right to arbitrate when it previously obtained default judgments by falsely attesting that service of process had been effectuated. *See id.* This Court further explained that the pay day lender's reliance on a "no waiver" provision in the parties' arbitration agreement "**should not be applied to sanctify a**

[13] While the parties originally agreed Direct could commence this action to preserve certain lien and rights against the bonds, Direct's continued incorporation of the fraudulent and improper claims in filings and it recording of the improper Notices serves as a litigation conduct waiver – particularly when viewed in conjunction with the fabrication of evidence and discovery misconduct Direct has perpetrated in the proceedings.

fraud upon the court allegedly committed by the party who itself elected a litigation forum for its claim." *Principal*, 132 Nev. at 22, 366 P.3d at 698 (emphasis added).

Here, Direct similarly hopes to avoid answering for its fraudulent conduct, which extended to the Foreclosure Action, by contesting the jurisdiction of the District Court due to the parties' Arbitration Agreement. The District Court – similar to the lower court in *Principal* – refused to permit Direct to use Nevada's jurisprudence favoring the enforcement of arbitration agreements to effectively "sanctify a fraud upon the court." Further, the District Court recognized, as did the lower court in *Principal*, that Direct's election to initiate litigation should not be overlooked. By initiating the Foreclosure Action (and repeatedly asserting the fraudulent claims), Direct made itself subject to the inherent jurisdiction of the District Court. *See, e.g.*, *Wyle*, 709 F.2d at 589 (stating that when a party has perpetrated a fraud upon the court, the court possesses inherent authority to dismiss the party's action).[14]

[14] *See, e.g.*, *Stonecreek-AAA, LLC v. Wells Fargo Bank N.A.*, No. 1:12-CV-23850, 2014 WL 12514900, at *3 (S.D. Fla. May 13, 2014) ("It would send a dangerous message to attorneys and parties if I were to allow a party to use fabricated evidence as the basis of its complaint, strike the fabricated evidence and then allow the case to proceed. Such an abuse of the judicial process, and defilement of the judicial temple that is the court, will not be tolerated. Therefore, the appropriate and only sanction –

Aoude v. Mobil Oil Corp., 892 F.2d 1115, 1118-19 (1st Cir. 1989) is particularly instructive to these proceedings. In *Aoude*, a plaintiff initiated a lawsuit seeking to enforce a knowingly fraudulent purchase agreement. The court outlined the fraudulent scheme perpetrated by the plaintiff, which strongly resembles the instant action -

> Because corrupt intent knows no stylistic boundaries, fraud on the court can take many forms. In our estimation, however, the present case is a near-classic example of the genre. Appellant's bad faith is manifest. By Aoude's own admission, he fabricated the purchase agreement; gave it to his lawyer; read the complaint before it was filed; realized that counsel, acting on his behalf, proposed to annex the bogus agreement to the complaint (thus representing it to be authentic); and nevertheless authorized the filing. Thereafter, Aoude and his counsel continued to act out the charade until, in the course of pretrial discovery undertaken by Mobil, Monahan revealed a glimmer of the truth. Even then, Aoude hedged his bets, forcing Mobil to piece together the sordid story bit by bit. Following Monahan's deposition testimony, more than three months elapsed before plaintiff asked to amend his complaint to substitute the real agreement for

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one that will deter similar conduct in the future – is outright dismissal with prejudice of this case."); *see also Hutchinson v. Hensley Flying Serv., Inc.*, 210 F.3d 383 (Table), 2000 WL 11432, at *1 (9th Cir. 2000) ("Given the district judge's finding, supported by the evidence, that appellants had knowledge that the attorney was submitting a falsified document, this court cannot say that the trial judge abused his discretion in ordering the dismissal sanction."); *Prof'l Seminar Consultants, Inc. v. Sino Am. Tech. Exch. Council, Inc.*, 727 F.2d 1470, 1474 (9th Cir. 1984) ("The entry of a default judgment was appropriate in view of the order to produce documents or risk having facts established, and in view of SATEC's production of falsified documents. …The magistrate found that the defendants willfully, deliberately, and intentionally submitted false documents to support apparently untenable claims and defenses. Dismissal was not an abuse of discretion.").

> the invented one. The only conceivable reason for Aoude's elaborate duplicity was to gain unfair advantage, first in the dispute, thereafter in the litigation. **The tactic plainly hindered defendant's ability to prepare and present its case, while simultaneously throwing a large monkey wrench into the judicial machinery. In our view, this gross misbehavior constituted fraud on the court.** *See Cleveland Demolition Co. v. Azcon Scrap Corp.*, 827 F.2d 984, 986 (4th Cir. 1987) (fraud on court may exist where witness and attorney conspire to present perjured testimony); *Rozier v. Ford Motor Co.*, 573 F.2d 1332, 1338 (5th Cir. 1978) (same, where party, with counsel's collusion, fabricates evidence).

See id. (emphasis added). Having determined that a fraud had been committed on the court, the court was left to determine its options under its inherent authority -

> There is an irrefragable linkage between the courts' inherent powers and the rarely-encountered problem of fraud on the court. **Courts cannot lack the power to defend their integrity against unscrupulous marauders; if that were so, it would place at risk the very fundament of the judicial system**.

Id. at 119 (internal citations omitted) (emphasis added). The *Aoude* court quoted Justice Hugo Black, who addressed a similar fraud upon the court in another not-dissimilar matter:

> Tampering with the administration of justice in the manner indisputably shown here involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society. . . . The public welfare demands that the agencies of public justice be not so impotent that they must always be mute and helpless victims of deception and fraud. *Hazel-Atlas Glass Co. v.*

> *Hartford-Empire Co.*, 322 U.S. 238, 246, 88 L. Ed. 1250, 64 S. Ct. 997 (1944).

Id. The court in *Aoude* affirmed the dismissal of the case. The court explained that **it would be "difficult to conceive of a more appropriate use of a court's inherent power than to protect the sanctity of the judicial process – to combat those who would dare to practice unmitigated fraud upon the court itself. To deny the existence of such power would, we think, foster the very impotency against which the *Hazel-Atlas* Court specifically warned."** *Id*. (emphasis added). The same considerations are even more applicable to this matter given Direct's brazen and repeated misconduct. The District Court properly exercised its inherent authority to consider Century's Motion.

C. The District Court's Authority to Provide Provisional Relief

The District Court likewise correctly found it had authority under NRS 38.222 to provide provisional relief. The District Court found that, "after considering two lengthy hearings comprised of the arguments of counsel…the elements of NRS 38.222 have been met by Century." (5 App. 1158). Additionally, only the District Court has the jurisdiction to ultimately confirm, modify or adopt any award from the arbitration proceedings. *See* NRS 38.234 and NRS 38.241-242. Direct would ultimately need to come before the District Court to confirm or adopt the award and determine the lienable amount of any mechanic's liens, if any, in accordance with

the award. *See* NRS 108.239(9).[15] Thus, the District Court's Order was correct as was its finding of jurisdiction and setting the evidentiary hearing.

Further, Century was entitled to an Order removing the Mechanic's Liens and releasing the Bonds from the Arbitrator.[16] Pursuant to NRS 108.2275, Direct was under an obligation to establish the validity of the Mechanic's Liens, which it failed to do in response to the Motion for Discovery Sanctions and to Remove the Liens (and cannot do considering the discovery abuses and the evidence before the Arbitrator). The Arbitrator had three options with respect to the Mechanic's Liens under NRS 108.2275. The first was to expunge the Mechanic's Liens because they were frivolous. *See* NRS 108.2275(6)(a). The second was to reduce the Mechanic's Liens to the extent they were excessive. *See* NRS 108.2275(6)(b). Finally, the third option was to do neither *if* the lien claimant (Direct) established that the Mechanic's Liens were not frivolous (made with reasonable cause) and were not excessive. *See* NRS 108.2275(6)(c). However, the Arbitrator failed to rule upon the request to remove the liens and the bonds, despite Direct's failure to establish either in this

[15] *See* NRS 108.239(9)(b).

[16] By obtaining bonds to remove the Liens, Century did not waive its right to relief under NRS 108.2275. *See Ascent Constr., Inc. v. Sonoma Springs Ltd. P'ship*, 2020 Nev. App. Unpub. LEXIS 236, *6-7, 460 P.3d 481 (2020) (holding that "because the surety bond amount is determined by the lien amount, a property owner obligated to pay the bond fees is not barred from further challenging the lien amount simply because it sought to bond the property first.").

matter. Moreover, any award in favor of Direct would have been the result of fraud upon the tribunal and discovery misconduct. Accordingly, the law required the Mechanic's liens to be expunged and for the bonds to be released.

Chapter 38.222(2) of the Nevada Revised Statute permits a court to issue provisional remedies during the course of an arbitration. The Arbitrator had the authority to order the liens and bonds be removed pursuant to the parties' agreement. (1 App. 114). The Arbitrator was obligated to follow the mandates of NRS 38 and 108 and provide a "fair and expeditious resolution to the controversy." The Arbitrator has failed to do so. The Arbitrator failed to initially make any ruling on the liens and the bonds and then, when ruling on the Motion for Reconsideration, further deferred the ruling. The District Court properly determined that –given the unique circumstances of this case – it was better suited to provide provisional relief under NRS 38.222. (5 App. 1157-1158).

D. There Is No Res Judicata Based upon the Court's Prior Rulings

Direct contends that the District Court's finding that it has jurisdiction in this matter creates a res judicata effect with regard to the Arbitrator's rulings. This is false. "The general rule of issue preclusion is that if an issue of fact or law was actually litigated and determined by a valid and final judgment, the determination is conclusive in a subsequent action between the parties." *Exec. Mgmt. v. Ticor Title Ins. Co.*, 114 Nev. 823, 835, 963 P.2d 465, 473 (1998). In this matter, the Arbitrator

failed to act and deferred any final ruling on the alteration of evidence and the discovery abuses. Thus, his rulings could not be considered "final." Moreover, the Arbitrator has no ability to issue a final judgment. Any award from the arbitrator would be subject to confirmation, modification or being vacated under NRS Chapter 38 before the District Court. Accordingly, Direct's argument only further confirms the legitimacy of the District Court's Order.

E. Century Has No Objection to Discovery Relevant to the Issue of Misconduct

Direct argues that it has been prejudiced because it was not allowed to complete discovery. (Pet. at p. 25-30). This is not correct. The District Court was willing to permit Direct to conduct discovery on issues relating to the issue of misconduct. For instance, Direct could have deposed Mr. Holpuch or the witnesses who signed declarations in support of Century's briefs. However, Direct was simply not permitted to conduct discovery on the entire construction case prior to the scheduled evidentiary hearing, which Direct sought to do simply as a delay tactic. If the Petition is denied, Direct will still have the ability to complete the discovery relevant to the evidentiary hearing.

F. Alternatively, the District Court Should Be Directed to Grant Century's Request for a New Arbitrator under NRS 38.226

To the extent this Court is not willing to uphold District Court's Order, this Court should direct the District Court to grant Century's alternative request to appoint a new arbitrator. NRS 38.226 provides the Court with authority to appoint

a new arbitrator when an arbitrator "fails or is unable to act." *See* NRS 38.226(1). Here, this matter has gone on for years and Century has been forced to expend significant time and money to unravel the web of deceit Direct wove to cover-up its fraudulent billing practices and misconduct. The uncovered conduct and discovery abuses on the part of Direct have undermined the entire arbitration process. The Arbitrator failed to act to address the discovery abuses and follow the mandates of Nevada law with regard to the removal of the liens and the bonds. Accordingly, Century requests, in the alternative, the appointment of a new arbitrator and instruct the Arbitrator to reconsider the Motion for Sanctions and to Remove the Liens previously submitted by Century.

IV. CONCLUSION

The law should never countenance a party's attempt to utilize fabricated evidence by allowing that party to proceed once the fabricated evidence has been uncovered. The Arbitrator has been unable or unwilling to act in order to rectify Direct's extensive and pervasive misconduct. The District Court recognized that the unfortunate and unfair consequence of the Arbitrator's failure to act is that Century will be deprived of its right to a fair hearing based upon all of the evidence. It is difficult to conceive of a circumstance where a party has committed multiple acts of such egregious misconduct. Yet, undeterred, Direct now seeks to improperly benefit by the intervention of this Honorable Court through this extraordinary writ

proceeding. Such bad faith and misconduct should not be rewarded.

Direct's discovery abuses are not inconsequential. Rather, the discovery abuses were Direct's calculated efforts to avoid Century from discovering that Direct engaged in fraudulent billing and had secretly employed Prokopchuk in violation of the parties' agreement. These two issues are entirely dispositive of Direct's claims. Direct's bad faith conduct in this matter has contaminated this ***entire*** proceeding. Century cannot have a fair hearing and fully defend itself unless and until Direct's misconduct and discovery abuses are first adequately addressed. In fact, Direct's alteration of evidence renders Century's ability to obtain a fair hearing where the evidence presented can be trusted an absolute impossibility. Given the impact of Direct's conduct on both the arbitration and the Foreclosure Action and the Arbitrator's inability to act, the District Court rightfully concluded that an evidentiary hearing before the District Court is mandated.

Direct is desperately seeking to avoid the District Court shining light on its alteration of evidence and discovery abuses and issuing an appropriate remedy. Yet Direct invoked the jurisdiction of the District Court by filing pleadings to foreclose on liens which it knew were improper. Due process, equity and justice dictate that the District Court remedy the significant prejudice caused directly by Direct's alteration of evidence and discovery abuses ***prior*** to the parties proceeding with any

ultimate hearing on the merits of the construction case. Direct's Petition should be rejected.

Dated this 11th day of December, 2020.

/s/ Oliver J. Pancheri

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RULE 28.2 ATTORNEY'S CERTIFICATE

1. I 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 it has been prepared in a proportionally spaced typeface using Word 2013 in 14-point Times New Roman font.

2. I further certify that this brief complies with the 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-point and contains 9,957 words.

3. Finally, I 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 11th day of December, 2020.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I am an employee of Santoro Whitmire, and pursuant to NRAP 25(b) and NEFR 9(d), that on this 11th day of December, 2020, I electronically filed the foregoing **ANSWER TO PETITION FOR WRIT OF MANDAMUS** in the following manner:

X (ELECTRONIC SERVICE) The above-referenced document was electronically filed on the date hereof and served through the Notice of Electronic Filing automatically generated by that Court's facilities.

X (UNITED STATES MAIL) By depositing a copy of the above-referenced document for mailing in the United States Mail, first class postage prepaid, at Las Vegas, Nevada, to:

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