

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

Respondent,

and

CENTURY COMMUNITIES OF
NEVADA, L.L.C, a Nevada limited
liability company,
Real Party in Interest

) Case No. 81933

)
)
) Electronically Filed
) Dec 28 2020 05:11 p.m.
) Elizabeth A. Brown
) Clerk of Supreme Court

)
) Dist. Court Case No.
) A-18-773139-C

)
) Dept. No. XXXII

APPELLANT'S REPLY BRIEF
From the Eighth Judicial District Court
The Honorable Rob Bare, District Judge

Matthew L. Johnson (6004)
Russell G. Gubler (10889)
JOHNSON & GUBLER, P.C.
8831 West Sahara
Las Vegas, Nevada 89117
Phone: (702) 471-0065
Facsimile: (702) 471-0075
e-mail: mjohnson@mjohnsonlaw.com;
rgubler@mjohnsonlaw.com
Attorneys for Petitioner

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.

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

JOHNSON & GUBLER, P.C.

/s/ Russell G. Gubler
Matthew L. Johnson (6004)
Russell G. Gubler (10889)
Lakes Business Park
8831 West Sahara
Las Vegas, Nevada 89117

Attorneys for Petitioner

TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	v
I. INTRODUCTION	1
II. RESPONSE TO RESPONDENT’S STATEMENT OF FACTS	4
A. Mechanic’s Liens	4
B. Linda Middleton’s alteration of the BLM Documents and the resulting staying of General Discovery imposed in Arbitration	4
C. Contrary to Century’s allegations, Direct has complied with Arbitrator’s discovery orders, including allowing inspection of Ms. Middleton’s computer	8
D. Century cannot show that Direct intended to alter the BLM documents	10
E. There exists no conflict of interest with respect to Scott Prokopchuk	12
F. Century has already admitted before the District Court that the Arbitrator did issue a decision on the alleged discovery issues	16
III. ARGUMENT	17
A. Direct is not untimely in raising this Appeal	17
B. To permit this matter to continue before the District Court would interfere with the parties’ Arbitration Agreement	19
C. Direct has already been sanctioned in Arbitration for the BLM documents	20
IV. CONCLUSION	24
CERTIFICATE OF COMPLIANCE	25
CERTIFICATE OF SERVICE	26

TABLE OF AUTHORITIES

Cases

<i>Aoude v. Mobil Oil Corp.</i> , 892 F.2d 1115, 1118 (1st Cir. 1989).....	22, 23
<i>Principal Invs., Inc. v. Harrison</i> , 366 P.3d 688, 692-93 (Nev. 2016)	19, 21

Statutes

NRS 38.221	19
NRS38.222	16
NRS 108.2275	1, 2

Other Authorities

NRAP 28(e)(1).....	25
NRAP 32(a)	25

I. INTRODUCTION

It is important to note that Respondent's assertions raised its Introduction are assertions that have been addressed verbatim countless time before the Arbitrator and again before the District Court. Every allegation pertaining to the alleged extent and nature of Direct's discovery offenses presented in Century's Answering Brief had been thoroughly briefed and argued by both parties in the parties' Arbitration *at least three (3) times*. Century overlooks the fact that the Arbitrator actually found in Century's favor relating to the alteration of the BLM documents and entered significant monetary sanctions against Direct (over \$125,000.00). *See* PA, Vol. IV, DIRECT000862-865. Yet, Century still repeatedly and falsely attempts to maintain that the Arbitrator, Donald Williams, failed to act.

The Arbitrator has heard all of Century's allegations numerous times. In its Brief, Century claims that it is entitled to a dismissal of Direct's liens on the basis of NRS 108.2275. *See Answering Brief, p. 37*. Indeed, Century requested this relief on the basis of NRS 108.2275 before the Arbitrator. However, the arguments that Century presented to the Arbitrator for such relief were those pertaining to the BLM documents, discovery abuses, and Scott Prokopchuk's alleged conflicts – the very same arguments that it subsequently raised before the District Court. *See PA, Vol. I, DIRECT000084-108*. Century could not actually

demonstrate that Direct's liens, including the lien at pertaining to the Inspirada project, were unsupported or baseless.

While the Arbitrator did enter monetary sanctions after considering the same allegations that Century raises in its Answering Brief, the Arbitrator also stated that he was "not thoroughly convinced at [that] time that Direct ha[d] engaged in a spoliation of evidence" that would warrant complete dismissal of Direct's claims. *Id.*, DIRECT000865, lines 11-13. Instead, the Arbitrator stated that he would address Century's requests for dismissal and the merits of Direct's underlying claims at a final Arbitration hearing by July 1, 2020. *Id.*, DIRECT000894, lines 4-8. The Arbitrator had set a definitive deadline to hear claims and grant any potential relief to the parties. *Id.* Yet, while claiming that it was denied expeditious relief, Century instead made the decision to prolong this matter by seeking to remove the matter from Arbitration and re-litigate these very same issues over again before the District Court. Century was the party that consistently requested continuances in Arbitration for one reason or another. *See Answering Brief*, p. 37. Further, despite having been successful in its request for sanctions against Direct in Arbitration, Century is dissatisfied with anything short of complete dismissal of Direct's claims without having them heard on the merits and without affording Direct Due Process.

Instead, Century brought the issue of the alleged abuses before the District Court to raise the very same allegations on which it prevailed in Arbitration to obtain monetary sanctions from Direct. Century accuses Direct of refusing to comply with discovery orders, which is untrue. *See Answering Brief*, p. 3. The District Court has never issued any discovery orders. Rather, the Arbitrator has issued all existing discovery orders in this matter, and the Arbitrator has stated that he was not convinced of Century's allegations that would warrant further sanctions against Direct in the form of complete dismissal of its claims.¹ *See* PA, Vol. IV, DIRECT000865, lines 11-13.

Century claims that Direct has prevented it from having a fair hearing, and that this Petition is merely an attempt to evade any consequences for alleged "egregious misconduct". *See Answering Brief*, pp. 3-4. This is not true. Century has raised the same allegations time and time again before the Arbitrator, and actually prevailed in its request for monetary sanctions against Direct. Instead of continuing in Arbitration, as it was required to do per the parties' Arbitration Agreement, drafted by Century's attorneys, Century has sought the District Court's

¹ Century made repeated arguments before the Arbitrator that Direct had failed to produce discovery or refused to comply with discovery orders. But again, the Arbitrator knew of the details of the discovery issues, including that Direct had voluntarily turned over information it was not ordered to turn over, and was not convinced of Century's arguments concerning further discovery misconduct. *See* PA, Vol. IV, DIRECT000865, lines 11-13.

intervention to completely dismiss Direct's claims, without Direct having the opportunity to fully conduct discovery on its claims, and despite evidence existing that Direct completed the projects to warrant payment of its underlying liens. In light of these issues, this Petition is appropriate.

II. RESPONSE TO RESPONDENT'S STATEMENT OF FACTS

A. Mechanic's Liens.

Century claims that it is intent on expeditiously addressing the issue of Direct's liens for its unpaid work, but cannot do so because the Arbitrator has refused to make a ruling on Direct's alleged discovery abuses. *See Answering Brief*, p. 6. This is false. The Arbitrator has already heard and addressed Century's allegations and has issued monetary sanctions against Direct. Further, the Arbitrator clearly stated in his Order that he intended to hold a final Arbitration hearing by July 1, 2020 to fully resolve this matter. PA, Vol. IV DIRECT000894, lines 4-8. However, Century sought the District Court's intervention before a final Arbitration hearing took place.

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

Century raises grievances about Direct's employee, Ms. Linda Middleton's, alteration of BLM documents, an issue that Century has raised to the Arbitrator

numerous times and has already partly prevailed in raising this issue. *See Answering Brief*, p. 6.

It is important to note that the BLM documents at issue only pertained to the Inspirada Project and do not concern any other mechanic's liens for any of the other Projects. *See* PA, Vol. II, DIRECT000355 at ¶7. The BLM documents at issue were related to Direct's obtaining gravel, sand, and mineral material from the BLM for its construction work on the Inspirada Project. *Id.* The Inspirada Project was only one of several projects that Direct worked on for Century. *Id.*, Vol. I-II, DIRECT000231-260. To date, Century has not alleged and has not produced any evidence of any alterations and/or spoliation of evidence pertaining to these other projects.

In reference to the BLM documents at issue during the discovery in the arbitration, and before he left on a job site, Mel Westwood, as Direct's managing member, told Ms. Middleton to just make sure everything "balanced" before producing the paperwork. *See* PA, Vol. II, DIRECT000346, lines 8-11. There is nothing wrong with checking the numbers. Nevertheless, Direct did not authorize or even know that Ms. Middleton altered the BLM documents until after it was discovered and produced by Century. *Id.*, lines 20-21. Mr. Westwood testified that he did not know about Ms. Middleton's alteration of the BLM documents until it was brought to his attention by his counsel. *Id.*, lines 20-21. During one of the

requests for production, Century requested information showing trucking tickets and contracts with the BLM. *Id.*, Vol. II, DIRECT000451. Mr. Westwood regularly works on the job sites, but instructed his office staff to pull the files that Direct had for production and to simply verify that all of the numbers corresponded. *Id.* Although Mr. Westwood did not intend for Direct's office staff to modify documents, unfortunately, Ms. Middleton did just that. *Id.* Direct agrees that the modification of the BLM documents was wrong, but Direct maintains that Ms. Middleton took it upon herself to alter the BLM documents. *Id.* Mr. Westwood never told Ms. Middleton to alter the documents, to which she admitted. *Id.* This was done without Direct's or Direct Management's knowledge or consent. *Id.*

The actual contract with the BLM was changed from 50,000 cubic yards to 100,000 cubic yards, with corresponding dollar amounts, without Mr. Westwood's or Direct's knowledge or consent. *Id.* When Century first confronted Direct about the change, Direct conducted an investigation into the matter and learned that Linda Middleton had modified the BLM documents without Mr. Westwood's or Direct's knowledge or consent. *Id.* This was the first time that Mr. Westwood or anyone in Direct's management was aware that the BLM documents had been modified. *Id.*

Upon learning of the modification, counsel for Direct went to the BLM office to review the BLM documents as well. *Id.* 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. *Id.*, *DIRECT000452*. This was done before the issue was brought before the Arbitrator. *Id.* Century did not and still does not believe Direct's story of what happened, despite having prevailed in requesting the Arbitrator to impose sanctions on Direct regarding this issue. *Id.* However, Mel Westwood, the managing member of Direct, never told or intended for anyone at Direct to modify documents. *Id.* Mel Westwood never knew about the changes with the BLM documents. *Id.*, *DIRECT000346*, lines 20-21. Nevertheless, Century brought the issue before the Arbitrator, who stayed discovery on the underlying case and allowed Century to conduct discovery on the issues involving the BLM documents and Mr. Prokopchuk. Thereafter, the Arbitrator heard all of the evidenced presented by Century. The Arbitrator sanctioned Direct over \$125,000.00 for Direct's employee altering the BLM documents but held any decision on other alleged matters until other discovery could be had because the Arbitrator was not fully convinced that Direct had any culpable wrongdoing based on what Century was presented. *Id.*, Vol. IV, *DIRECT000865*, lines 11-13. This was not enough for Century. Century filed a motion with the District Court for further sanctions and told the District Court (and this Court) that the Arbitrator had failed to act. *Id.*, Vol. I, *DIRECT000084-108*. Now, after two years of stayed discovery, the parties know exactly what they knew

then about the BLM documents – that Ms. Middleton admittedly altered the BLM documents. Regardless, nothing changes the fact that Century received all of the dirt, materials, and services that it had contracted to receive, but has still refused to pay for it.

Ultimately, the modification of the BLM documents does not affect or harm Century. The BLM materials were for the Inspirada project. Century's own plans for the Inspirada project calls for at least 122,744 cubic yards of fill. *See PA, Vol. II, DIRECT000477-480*. All of the required materials, as provided in Century's own plans, were provided to the Inspirada project, plus more. Century received all of the material required under the contract. *Id.* Century never says that Direct did not provide the dirt. It can't. The appropriate governing bodies approved Direct's work, and there are, right now, houses on that very property. Century is not damaged. The hole at the Inspirada project was filled; Century received the dirt to the Projects at the expense of Direct, without Century paying for it. Thus, whether or not Direct reported correctly or incorrectly to the BLM does not harm Century in any way. Direct maintains that it performed the work and provided the materials on the Projects, and therefore, properly filed any complaint, whether with the Arbitrator or with the District Court to preserve the statute of limitations.

C. Contrary to Century's allegations, Direct has complied with the Arbitrator's discovery orders, including allowing inspection of Ms. Middleton's computer.

Century claims that an independent third-party inspected Ms. Middleton's computer and concluded that Direct allegedly upgraded the computer right before the Arbitrator's March 2018 Order. *See Answering Brief, pp. 11-12.* Century attempts to pass this off as conclusive. However, it is important to note that Mr. Holpuck *is not an independent third-party*, but rather serves as Century's hired expert to provide alleged testimony in Century's favor. Presumably, Mr. Holpuch's opinion is, at least partially, based on the fact that Adobe was not installed on Ms. Middleton's computer and that Windows 10 had been installed on the computer. *Id., p. 7, p 12.* However, this presumption is not true. Direct has maintained, and Ms. Middleton testified, that the Adobe program she utilized was online. *See PA, Vol. III, DIRECT000618-623.* Thus, it seems that Mr. Holpuch's opinion is based on incorrect presumptions. *Id.*

Century further mentions the Windows 10 upgrade to Ms. Middleton's computer. *See Answering Brief, p. 12.* This has already been addressed numerous times before the Arbitrator. In essence, Mr. Joey Morgan, who previously worked for Direct, but still maintains Direct's computer system, testified that when he set up Direct's computers, Direct did not like the Windows 10 program. *See PA, Vol. III, DIRECT000629.* As a result, Direct had Mr. Morgan program all of the

computers to Windows 7. *Id.* Thereafter, Mr. Morgan stated that the computers would receive a pop-up screen, asking the users if they wanted to upgrade to Windows 10. *Id.* Mr. Morgan said that any upgrade to Windows 10 could have easily been done by mistake. *Id.*

D. Century cannot show that Direct intended to alter the BLM documents.

Century argues that Ms. Middleton's Declaration is entirely false and has argued this before the Arbitrator numerous times. Direct has acknowledged some statements in the Declaration to be inaccurate. *See PA, Vol. II, DIRECT000452-453.* Paragraph 4 of the Declaration is not accurate as to which numbers did not match. *Id.* This was a simple mistake. *Id.* Paragraph 4 states, in part, "I gathered the documents related to the BLM contract and compared them with payments that Direct had made to the BLM. The numbers did not match [.]" *Id.* Paragraph 4 should have said that Ms. Middleton gathered the payments that Century made to Direct and compared them with payments that Direct had made to the BLM, and that the numbers did not match. *Id.* Mr. Westwood seemed to confirm this in his deposition, when he stated, "I believe that Linda [Ms. Middleton] was referring to [...] the moneys paid to the BLM did not match the invoice billing to Century Communities. I believe that's where the different was at." *See PA, Vol. II, DIRECT000346, lines 8-11.* Further, Mr. Westwood unequivocally stated that he

had no knowledge that Ms. Middleton had altered the BLM documents until it was brought to his counsels' attention by Century. *Id.*, lines 20-25.

Additionally, Century uses Direct's counsel's email correspondence regarding criminal implications stemming from Ms. Middleton's actions to insinuate that Direct is somehow culpable for or admitting to altering the BLM documents. *See Answering Brief*, p. 13. This is disingenuous. Prior to that email cited by Century, in a conference between Direct's counsel, Century's counsel, and the Arbitrator, Century expressed concerns that Ms. Middleton was not advised properly before signing her sworn statement because there were possible criminal implications. *See* PA, Vol. II, DIRECT000350. After Century expressed these concerns, it was discussed that there may be criminal issues concerning Ms. Middleton and that Ms. Middleton should seek legal advice before signing a sworn statement describing her actions toward the BLM documents. *See id.* In the email cited by Century, Direct's counsel was simply repeating the concerns expressed by Century and discussed between the parties in their meeting. *See id.*

Further, Direct submits that the contents of Ms. Middleton's declaration and what she compared to alter the BLM documents is irrelevant. It is clear that Century received the dirt and materials for the project. Century's own plans calls for the amount of dirt that was needed. *See* PA, Vol. II, DIRECT000477-480. This is the amount that Century was billed for. The dirt was hauled into the site, and

inspections were made, with approval. *Id.* Today there are houses on the property. Despite its attempts to redirect the Court's attention to Ms. Middleton, Century cannot argue that it did not receive the dirt. The project required the dirt. *See id.* Further, while Century repeatedly claims that Direct is engaging in concealing evidence, Direct openly acknowledged that Ms. Middleton had altered the BLM documents. *See PA, Vol. II, DIRECT000450.* Direct has never attempted to evade this issue.

E. There exists no conflict of interest with respect to Scott Prokopchuk.

Century attempts to argue that a conflict exists between Century, Direct, and Mr. Prokopchuk. Century cites the MSA which states that "Subcontractor shall exercise all reasonable care and diligence to prevent any actions or conditions that could result in conflict with Contractor's best interests." *See Answering Brief, pp. 18-19.* However, this goes to the underlying Century claim of whether anyone breached a contract or if Century was damaged.

Further, no conflict exists. Mr. Prokopchuk did not perform any work for Direct. In 2016, Mr. Prokopchuk performed some consulting work, including an industrial property in Apex, for a company called DGP Holdings, LLC. *See PA, Vol. III, DIRECT000633, ¶ 13.* DGP Holdings, LLC is a completely separate and distinct entity from Direct. DGP Holdings is an asset holding company, which held an interest in industrial land that was prospectively going to be used for an element

industrial park. *Id.*, *DIRECT000610*. Mr. Prokopchuk helped in the design and layout of the element industrial park held by DGP Holdings.

Nevertheless, to avoid tax liabilities, Mr. Prokopchuk wanted to be paid through a payroll, where taxes were withheld. *Id.*, *DIRECT000633*, ¶ 13. However, DGP Holdings did not have a payroll service. *Id.*, *Vol. II*, *DIRECT000456*. As a result, Direct invoiced DGP Holdings for Mr. Prokopchuk's time, and then paid Mr. Prokopchuk. *Id.* No business relationship exists between Direct and DGP Holdings, other than they have the same owner. *Id.* Direct already gave Century information about Mr. Prokopchuk and his relationship to DGP Holdings through formal and informal discovery. *Id.*

Further, most of the other contracts in dispute that were signed by Mr. Prokopchuk were also signed by another person at Century. *See PA*, *Vol. I-II*, *DIRECT000001-39*. Four of the contracts alone were signed by Rick Barron in 2016 — the person that ultimately wrote the letter of default — during the very time that Century (and Mr. Barron) claim that they had well given up on Direct because of its tardiness and did not trust Direct anymore. *Id.*

Additionally, Century uses the alleged conflict of interest between Direct, Century, and Mr. Prokopchuk as one of the basis for its request to expunge Direct's mechanic's liens. However, Century's upper management approved and executed every PWA entered into between Direct and Century. *PA*, *Vol. I-II*,

DIRECT000001-39. Mr. Prokopchuk testified that Century never gave him sole authorization to execute subcontractor contracts and that Century always had its upper management review, approve, and execute all contracts with Direct. *See PA, Vol. III, DIRECT000631*, ¶ 5. In other words, despite Century's assertions in its Motion, Century was well aware of the content of all agreements entered into with Direct and approved those agreements. Thus, Century was not harmed.

Further, while Century claims in its Motion that two former Direct employees stated that Mr. Prokopchuk was employed by Direct, both Mr. Prokopchuk and Mr. Westwood expressly contest the former employees' accounts. *See, e.g., PA, Vol. III, DIRECT000633*, ¶ 12. Therefore, to expunge all of Direct's mechanic's liens and dismiss all its claims on this basis, where there clearly exists differing and contradicting evidence, would be wholly inappropriate.

Interestingly, despite Century's claims of Mr. Prokopchuk's conflict with Direct, Century has taken steps to recruit Mr. Prokopchuk to its organization, while Century attempts to make these very arguments before this Court. *See Petitioner's Reply Appendix, Vol. I, DIRECT001382*. If Century was really concerned about Mr. Prokopchuk and any alleged conflict he may have posed with Direct, then why is Century simultaneously so intent on hiring Mr. Prokopchuk?

Further, Direct has abided by all discovery orders (which have all been issued by the Arbitrator), including those pertaining to Mr. Prokopchuk. During

the second motion to compel with the Arbitrator, Century mentioned an email address: pd@directgrading.com. Mr. Westwood had to inquire about this email address for Direct to be able to respond to the second Motion to Compel. In its response to the second Motion to Compel, Direct stated that this account was initially set up to allow foremen on a jobsite to communicate regarding payroll each week. In fact, Mr. Morgan confirmed this in his deposition. "PD" was to represent "Pay Day". *See PA, Vol. III, DIRECT000625-629*. However, the system did not work, and Direct stopped using the account.

Thereafter, Mr. Prokopchuk believed that he could use the account, if necessary. *See PA, Vol. II, DIRECT000458*. However, Direct had made a search and could not find where this account was used and did not remember this account being used by Mr. Prokopchuk. *Id.* Indeed, despite Direct's efforts to locate any emails to or from Mr. Prokocho from this particular email address, no such email communications were found. *Id.* Indeed, Mr. Prokopchuk had testified that he does not recall ever using this particular email address. *Id., Vol. II, DIRECT000633, ¶ 14.*

Century claims that Direct is attempting to use Mr. Prokopchuk as its star witness. *See Answering Brief, p. 20*. However, Century conveniently omits the fact that it has consistently objected to Direct's efforts to present additional evidence and witnesses to testify to the fact that Century received all the materials

it required for their projects and that Mr. Prokopchuk was monitored and double-checked throughout the duration of the projects. *See PA, Vol. VI, DIRECT001372-1373.*

F. Century has already admitted before the District Court that the Arbitrator did issue a decision on the alleged discovery issues.

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.*

Despite admitting this, Century now argues that the Arbitrator "refused to impose any terminating sanctions against Direct and failed to even address the removal of the liens and the bonds." *See Answering Brief, p. 22.* This is untrue.

In fact, the Arbitrator had addressed and heard these same allegations numerous times since 2018. Further, he *did* rule on these issues by imposing severe monetary sanctions against Direct. *See PA, Vol. IV, DIRECT000865*. However, when the question became whether complete termination of Direct's liens was appropriate, the Arbitrator clearly stated was "not thoroughly convinced at this time that Direct has engaged in a spoliation of evidence" that would warrant complete dismissal of Direct's claims." *Se PA, Vol. IV, DIRECT000865*, lines 11-13. Instead, the Arbitrator was intent on issuing a final ruling on the merits by July 1, 2020, after granting Direct the opportunity to conduct general discovery on its underlying claims and liens. *Id.*, *DIRECT000894*, lines 4-8. In light of this, the Arbitrator did act on these issues, just not to the extent that Century had hoped.

III. ARGUMENT

A. Direct is not untimely in raising this Appeal.

On February 20, 2020, the District Court had ruled that it would assume jurisdiction over the Arbitration matter and hear Century's claims for additional sanctions against Direct, including a possible dismissal of Direct's claims. *See PA, Vol. V, DIRECT001152-1160*. During one of the hearings concerning the issue of staying Arbitration, Direct's counsel raised the concern that Direct had never had the opportunity to conduct general discovery on its claims. *See PA, Vol. VI,*

DIRECT001348. In response to that concern, the District Court stated that it would be open to permitting Direct to conduct full discovery into its claims. *Id.*

After Century's request to stay the Arbitration was granted and Century had filed its separate Motion for Sanctions on identical grounds raised in Arbitration, Direct filed its Motion for Reconsideration. *See PA, Vol. V, DIRECT001173-1184.* The District Court continued the hearing on Century's Motion for Sanctions in order to hear the parties' Motions together. *See PA, Vol. V, DIRECT001208.* In the midst of this, the COVID-19 pandemic began to cause procedural and scheduling issues in Nevada courts. The Eighth Judicial District Court's Administrative Orders in response to the pandemic stayed discovery for 30 days. *See Administrative Order 20-09 of Eighth Judicial District Court.*

When discovery was finally allowed to proceed, Direct's counsel contacted Century's counsel about discovery Direct intended to conduct. Century's counsel claimed that the District Court did not rule on the discovery issue, and that therefore, Century would not agree to respond to any discovery. The District Court counseled the parties to communicate with one another about this issue and required the parties to brief and participate in hearings regarding this issue. While Century claims in its Brief that it was open to responding to Direct's discovery requests, Century's Briefing to the District Court regarding this issue shows

otherwise. *See PA, Vol. VI, DIRECT001365-1376.* Century was opposed to almost all of Direct's requests. *Id.*

Finally, the District Court stated that Direct would only be permitted very limited discovery and issued a minute order stating the same. *See PA, Vol. VI, DIRECT001378-1381.* The District Court also denied contemporaneously denied Direct's Motion for Reconsideration. *Id.* In less than 3 weeks' time, Direct filed this present Petition.

Apart from procedural delays and delays posed by the pandemic, Direct's counsel has also been facing an ongoing family emergency—his wife had been diagnosed with Stage IV lung cancer shortly before Century filed its Motion for Provisional Relief. *See* NRAP 27(e) Certificate to Emergency Motion Under NRAP 27(e).

B. To permit this matter to continue before the District Court would interfere with the parties' Arbitration Agreement.

The Supreme Court of Nevada has stated that parties' contractual rights specifically pertaining to arbitration clauses should be given effect. *See Principal Invs., Inc. v. Harrison*, 366 P.3d 688, 692-93 (Nev. 2016) (emphasis added); *see also* Rev. Stat. Ann. § 38.221 (emphasis added). The parties do not dispute that there exists a valid Arbitration Agreement in this matter.

C. Direct has already been sanctioned in Arbitration for the BLM documents.

Century argues that because Direct filed a complaint in the District Court, that Direct was attempting to commit fraud on the Court. Century advantageously uses Direct's employee's wrongful and foolish actions in altering the BLM documents to argue that Direct did not produce the material and direct required under Century's own plans. However, this is not true. For the reasons provided herein and, in the Petition, Direct asserts that Century's plans called for a certain amount of materials and dirt, and those materials and dirt were provided on the Century Projects, and there are houses on the property today. Direct maintains that it provided all work and materials to collect on the liens. This is not fraud on the court.

Further, the pleadings filed in the District Court were to alleviate any concerns about the statute of limitations. The parties had agreed to arbitrate, and Direct was concerned that the statute of limitations would run while the parties were in arbitration. *See PA, Vol. I, DIRECT000114*. Further, in a conference call with the Arbitrator and Century, Direct also expressed a similar concern. In that conference, it was agreed that Direct would file the complaint, and that the parties would stay the case. In fact, Century stipulated to stay the proceedings twice, even after the actions of Direct employee became known. *See Answering Brief, p. 29*.

Thus, Direct did not file the Complaint to commit fraud on the Court. Nevertheless, after the Arbitrator did not dismiss all actions like Century wanted (even though Direct was severely sanctioned), Century then sought relief from the District Court.

Century relies on *Principal Invs., Inc. v. Harrison*, 132 Nev. 9, 366 P.3d 688, (2016) to argue that Direct is not entitled to continuing in Arbitration based on alleged “fraud upon the court.” *See Answering Brief*, pp. 32-33. In that case, the Supreme Court of Nevada found that a payday loan provider had waived its right to arbitrate because it had obtained default judgments by lying to the lower court. Century attempts to use this case as a basis to argue that Direct is not entitled to continuing in Arbitration. This misconstrues the procedural and factual history of this matter. The Arbitrator had already addressed the Century’s claims pertaining to the alleged discovery issues several times and found in Century’s favor, sanctioning Direct over \$125,000.

Further, Century cannot convincingly show that the BLM documents were altered at Direct’s direction or with its knowledge.² There is no fraud, and this matter should continue in Arbitration. Clearly, Direct’s claims for payment for its work on Century’s projects are warranted and have basis because the work was

² Regardless, Direct was still sanctioned by the Arbitrator for Ms. Middleton’s conduct.

completed. There are houses already built on those properties, which could not have been completed had Direct not performed the work it was contracted to do – according to Century’s own plans.

Century also cites to *Aoude v. Mobil Oil Corp.* to argue that Direct has committed fraud upon the court that would allow the District Court to assume jurisdiction. That Court states the following:

“A ‘fraud on the court’ occurs where it can be demonstrated, clearly and convincingly, that a party has sentiently set in motion some unconscionable scheme calculated to interfere with the judicial system’s ability impartially to adjudicate a matter by improperly influencing the trier or unfairly hampering the presentation of the opposing party’s claim or defense.”

Aoude v. Mobil Oil Corp., 892 F.2d 1115, 1118 (1st Cir. 1989) (emphasis added).

Century has never shown by a clear and convincing standard that Direct has engaged in any fraud that would warrant a removal of this matter from Arbitration. It hinges its entire argument for complete dismissal of Direct’s case on Ms. Middleton’s alterations to the BLM documents that notably only pertains to one of several projects. Mr. Westwood has consistently testified that he neither instructed nor had knowledge of Ms. Middleton’s alteration of the documents. Further, there exists other evidence that Direct’s claims for payment are appropriate—there are homes that have already been built on those properties, according to Century’s own plans. Century cannot dispute this fact.

Further, Direct has not done anything to affect the Arbitrator's ability to be impartial. Rather, the Arbitrator has heard Century's arguments time and time again and *actually granted* Century substantial relief by entering significant monetary sanctions against Direct. This is not "clear and convincing evidence" of fraud that *Aoude* requires to be demonstrated.

Additionally, while Century claims that Direct has waived its right to proceed in arbitration by virtue of filing the Complaint on April 19, 2018, Century does not explain why it has waited almost two (2) years to request the Court to assume jurisdiction over this matter since the Complaint's filing. *See Answering Brief*, pp. 29-30. In truth, up until this point, Century has always maintained that the Arbitration is the proper forum to litigate this matter. It has only sought to litigate this matter before the District Court after having unsuccessfully attempted to have this entire case dismissed in arbitration at least three (3) times, despite prevailing on its request for sanctions against Direct. Century seeks absolutely no resolution that falls short of having Direct's case dismissed in its entirety without Direct having the opportunity to complete its discovery, to which Direct has a right, and to show that Direct performed the work and provided the materials.

////

////

IV. 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 as agreed in writing by all parties.

DATED this 28th day of December, 2020.

JOHNSON & GUBLER, P.C.

/s/ Russell G. Gubler

Matthew L. Johnson (6004)

Russell G. Gubler (10889)

8831 West Sahara Avenue

Las Vegas, Nevada 89117

Attorneys for Petitioner

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 5,360 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 28th day of December, 2020.

/s/ Russell G. Gubler

RUSSELL G. GUBLER
Nevada Bar Identification No. 10889
Johnson & Gubler, P.C.
8831 W. Sahara Ave.
Las Vegas, NV 89117
702-471-0065

CERTIFICATE OF SERVICE

I certify that on the ____ day of December, 2020, I caused to be served a copy of the APPELLANT’S REPLY BRIEF and PETITIONER’S REPLY APPENDIX VOLUME 1 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 :

Nicholas J. Santoro
Oliver J. Pancheri
Santoro Whitmire
10100 W. Charleston Blvd, Ste. 250
Las Vegas, NV 89135

The Honorable Rob Bare
Department XXXII
Regional Justice Center, Ct 3c
200 Lewis Ave.
Las Vegas, NV 89155

/s/ Annabelle M. Nudo.
An Employee of JOHNSON
& GUBLER, P.C.

**DIRECT GRADING & PAVING,
L.L.C., a Nevada limited liability
company,**

Petitioner,

VS.

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

Dist. Court Case No.
A-18-773139-C

Dept. No. XXXII

PETITION

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

PETITIONER'S REPLY APPENDIX VOLUME I

Matthew L. Johnson (6004)
Russell G. Gubler (10889)
JOHNSON & GUBLER, P.C.
8831 West Sahara
Las Vegas, Nevada 89117
Phone: (702) 471-0065
Facsimile: (702) 471-0075
e-mail: mjohnson@mjohnsonlaw.com;
rgubler@mjohnsonlaw.com
Attorneys for Petitioners

INDEX to PETITIONER'S REPLY APPENDIX

DIRECT GRADING & PAVING, L.L.C. vs. CENTURY COMMUNITIES OF
NEVADA, L.L.C.

Document	Date	Vol	Bates No.
Email from Andrea Linneman to Scott Prokopchuk	11/18/2020	I	DIRECT001382

Subject: FW: VP of Land Development, Century Communities, Colorado

Importance: High

From: Andrea Linneman <inmail-hit-reply@linkedin.com>
Sent: Wednesday, November 18, 2020 2:18 PM
To: Scott Prokopchuk <scottpro53@hotmail.com>
Subject: VP of Land Development, Century Communities, Colorado

Hello Scott,

I am a recruiter with Century Communities, a the corporate headquarters in Greenwood Village, CO. I am engaged in a search for a VP of Land Development, and we are looking outside of the Denver Metro area. I am wondering if you have any interest in a new role and of course, in relocation. I would be happy to share a job description and/or hop on a quick initial call with you to discuss.

Please let me know your thoughts. Either way, I appreciate your time and consideration.

Thank you!

Andrea

Andrea Linneman
Talent Acquisition Business Partner at Century Communities, Inc. (NYSE:CCS)

Yes, interested...

No thanks...

View message

[View Andrea's LinkedIn profile](#)

TIP You can respond to Andrea by replying to this email

You are receiving InMail notification emails. [Unsubscribe](#)
This email was intended for Scott Prokopchuk (Director, Land Development at K. Hovnanian® Homes). [Learn why we included this.](#)

If you need assistance or have questions, please contact [LinkedIn Customer Service](#).

© 2020, LinkedIn Corporation. 1000 West Maude Avenue, Sunnyvale, CA 94085, USA