

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

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Clerk of Supreme Court

District Court Case No.: A-18-773139-C
Dept. No.: XXXII

**MOTION FOR LEAVE TO FILE SURREPLY TO PETITIONER'S REPLY
TO ANSWER TO PETITION FOR WRIT OF MANDAMUS**

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Defendants CENTURY COMMUNITIES OF NEVADA, LLC (“*Century*”) and ARGONAUT INSURANCE COMPANY (“*Argonaut*”) (collectively referred to as “*Century*” or the “*Defendants*”), by and through their undersigned counsel, submit the following Motion to File a Surreply to the Reply Brief recently submitted by Direct Grading & Paving LLC (“*Direct*”). A copy of the proposed Surreply is attached to this Motion as **Exhibit “A.”** The Surreply is limited to addressing two misleading assertions made in Direct’s Reply relating to Scott Prokopchuk.¹

First, Direct included an e-mail sent to Mr. Prokopchuk as part of Century’s general recruiting efforts through its LinkedIn account to make it appear that Century is currently attempting to hire Mr. Prokopchuk. (Direct’s Reply App. 1382). This is false and Direct’s attempt to claim otherwise is simply disingenuous. Direct is well-aware that Century filed a Third Party Complaint against Mr. Prokopchuk asserting, among other things, that Mr. Prokopchuk breached duties he owed to Century by secretly working for Direct while acting as Century’s Land Development Manager. (1 App. 57-81). Further, both Direct and Mr. Prokopchuk should be well-aware that these types of e-mails are simply part of recruiting “e-mail blasts” that are sent to *any* person with potentially matching qualification based upon a LinkedIn

¹ A brief surreply is preferable to a motion to strike given that motions to strike are disfavored. See *Germaine Music v. Universal Song of Polygram*, 275 F. Supp. 2d 1288, 1300 (D. Nev. 2003); *D.E. Shaw Laminar Portfolios, LLC v. Archon Corp.*, 570 F. Supp. 2d 1262, 1271 (D. Nev. 2008).

profile. Contrary to Direct's assertions, Century is not attempting to hire Mr. Prokopchuk. Direct is actually currently suing Mr. Prokopchuk for significant breaches of duty to his former employer.

Second, Direct misleadingly states that Mr. Prokopchuk testified that "he does not recall" ever using the e-mail address pd@directgrading.com. (Reply at p. 15). This statement is misleading because Mr. Prokopchuk later *admitted* in his deposition that he did, in fact, send and receive e-mails using that e-mail address. (7 App. 1553-1554). When Mr. Prokopchuk was shown examples of the handful of pd@directgrading.com e-mails that were recovered, Mr. Prokopchuk was unable to simply contend that he did not "remember" using the e-mail address. Rather, he was forced to acknowledge the e-mails were his as he could not hide behind feigned forgetfulness when confronted with the actual evidence. This only demonstrates the obvious prejudice to Century by Direct's spoliation of evidence. If Direct had actually complied with its discovery obligations, there would have been many more such e-mails that could be utilized to rebut Direct's efforts to minimize the blatant conflict of interest it created by secretly employing Mr. Prokopchuk while he was working for Century overseeing Direct's work on the various projects.

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Century respectfully requests that the Court grant this Motion and provide leave for Century to file the attached Surreply addressing the two narrow issues set forth herein.

DATED this 11th day of January, 2021.

SANTORO WHITMIRE

/s/ Oliver J. Pancheri

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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 January, 2021, I electronically filed the **MOTION FOR LEAVE TO FILE SURREPLY TO PETITIONER'S REPLY TO 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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