
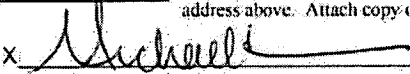


B 10 (Official Form 10) (04/10)

UNITED STATES BANKRUPTCY COURT		District of Nevada	PROOF OF CLAIM
Name of Debtor: South Edge, LLC		Case Number: 10-32968-BAM	
NOTE: This form should not be used to make a claim for an administrative expense arising after the commencement of the case. A request for payment of an administrative expense may be filed pursuant to 11 U.S.C. § 503.			
Name of Creditor (the person or other entity to whom the debtor owes money or property): C & S Company, Inc. (Chapter 11 Bankruptcy Estate - District of Nevada 08-22706-mkn)		<input type="checkbox"/> Check this box to indicate that this claim amends a previously filed claim.	
Name and address where notices should be sent: c/o Shumway, Van & Hansen, Chld. 8985 South Eastern Avenue, Suite 100 Las Vegas, NV 89123		Court Claim Number: _____ (If known)	
Telephone number: (702) 478-7770		Filed on: _____	
Name and address where payment should be sent (if different from above): <div style="text-align: center; font-weight: bold; font-size: 1.2em;">RECEIVED JUN 30 2011 BMC GROUP</div>		<input checked="" type="checkbox"/> Check this box if you are aware that anyone else has filed a proof of claim relating to your claim. Attach copy of statement giving particulars.	
Telephone number: _____		<input type="checkbox"/> Check this box if you are the debtor or trustee in this case.	
1. Amount of Claim as of Date Case Filed: \$ <u>4,310,503.34</u>		5. Amount of Claim Entitled to Priority under 11 U.S.C. § 507(a). If any portion of your claim falls in one of the following categories, check the box and state the amount.	
If all or part of your claim is secured, complete item 4 below; however, if all of your claim is unsecured, do not complete item 4.		<input type="checkbox"/> Domestic support obligations under 11 U.S.C. § 507(a)(1)(A) or (a)(1)(B).	
If all or part of your claim is entitled to priority, complete item 5.		<input type="checkbox"/> Wages, salaries, or commissions (up to \$11,725*) earned within 180 days before filing of the bankruptcy petition or cessation of the debtor's business, whichever is earlier - 11 U.S.C. § 507 (a)(4).	
<input checked="" type="checkbox"/> Check this box if claim includes interest or other charges in addition to the principal amount of claim. Attach itemized statement of interest or charges.		<input type="checkbox"/> Contributions to an employee benefit plan - 11 U.S.C. § 507 (a)(5).	
2. Basis for Claim: <u>See Exhibit "A" attached.</u> (See instruction #2 on reverse side.)		<input type="checkbox"/> Up to \$2,600* of deposits toward purchase, lease, or rental of property or services for personal, family, or household use - 11 U.S.C. § 507 (a)(7).	
3. Last four digits of any number by which creditor identifies debtor: _____		<input type="checkbox"/> Taxes or penalties owed to governmental units - 11 U.S.C. § 507 (a)(8).	
3a. Debtor may have scheduled account as: _____ (See instruction #3a on reverse side.)		<input type="checkbox"/> Other - Specify applicable paragraph of 11 U.S.C. § 507 (a)():	
4. Secured Claim (See instruction #4 on reverse side.) Check the appropriate box if your claim is secured by a lien on property or a right of setoff and provide the requested information.		Amount entitled to priority: \$ _____	
Nature of property or right of setoff: <input checked="" type="checkbox"/> Real Estate <input type="checkbox"/> Motor Vehicle <input checked="" type="checkbox"/> Other		*Amounts are subject to adjustment on 4/1/13 and every 3 years thereafter with respect to cases commenced on or after the date of adjustment.	
Describe:			
Value of Property: \$ _____ Annual Interest Rate _____ %			
Amount of arrearage and other charges as of time case filed included in secured claim, if any: \$ _____ Basis for perfection: <u>Bond</u>			
Amount of Secured Claim: \$ <u>4,310,503.34</u> Amount Unsecured: \$ _____			
6. Credits: The amount of all payments on this claim has been credited for the purpose of making this proof of claim.			
7. Documents: Attach redacted copies of any documents that support the claim, such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, judgments, mortgages, and security agreements. You may also attach a summary. Attach redacted copies of documents providing evidence of perfection of a security interest. You may also attach a summary. (See instruction 7 and definition of "redacted" on reverse side.)			
DO NOT SEND ORIGINAL DOCUMENTS. ATTACHED DOCUMENTS MAY BE DESTROYED AFTER SCANNING.			
If the documents are not available, please explain: _____			
Date: <u>06/28/2011</u>		FOR COURT USE ONLY	
Signature: The person filing this claim must sign it. Sign and print name and title, if any, of the creditor or other person authorized to file this claim and state address and telephone number if different from the notice address above. Attach copy of power of attorney, if any.		South Edge  00010	
x  Michael C. Van, Esq. - Attorney for C&S Company, Inc.			

Penalty for presenting fraudulent claim: Fine of up to \$500,000 or imprisonment for up to 5 years, or both: 18 U.S.C. §§ 152 and 3571.

EXHIBIT "A"

On June 7, 8, 9, 10, 14, 15 and 16, an arbitration was held between C&S Company, Inc. ("C&S") and South Edge, LLC. ("South Edge") regarding a dispute over a construction project located in Henderson, Nevada before a three judge panel. C&S was represented by counsel as was South Edge.

C&S was awarded a contract for the work and was not paid for much of the work performed. On May 13, 2011 the Arbitration Panel issued its Award.¹

The total award amount was \$4,187,292.27 with interest calculated through December 30, 2010. Additional interest at a rate of six percent (6%) has been included through the date of the filing of this "proof of claim".

C&S filed a Mechanics Lien against the properties subject to the terms of the Contract. Bond Safeguard issued a Mechanics Lien release bond in the penal sum of \$3,020,822.06.

Claim has been made against Bond Safeguard for payment of the penal sum of the Bond. However, after payment there remains an amount in excess of one million dollars, exclusive of interest, yet to be paid.

Nevada Revised Statute allows a claimant to seek additional security in the event it is determined that the amount of the bond is insufficient to pay the amounts due. Therefore, C&S may have rights against the property of the Debtor, which amounts may be determined to be secured by the same property previously subject to the Mechanics Liens, which is now property of the estate.

¹ The Award was executed by the respective Panel members on May 13, 2011 but issued on June 10, 2011. The Award is attached to this Proof of Claim.

1 Chief Justice Robert E. Rose (Ret.)
2 JAMS

3 2300 W. Sahara Ave., Suite 900
4 Las Vegas, NV 89102
5 Phone: (702) 457-5267
6 Fax: (702) 437-5267

7 Hon. Robert E. May (Ret.)
8 JAMS
9 401 "B" Street, Suite 2100
10 San Diego, CA 92101
11 Telephone: (619) 236-1848
12 Fax: (619) 236-9032

13 Hon. Luis Cardenas (Ret.)
14 JAMS
15 500 N. State College Blvd.
16 Suite 1400
17 Orange, CA 92868
18 Telephone: (714) 939-1300
19 Fax: (714) 939-8710

20 Arbitrators

21 IN THE MATTER OF THE ARBITRATION
22 BETWEEN

23 C & S COMPANY, INC.,
24 Claimant/Counterdefendant,
25 MERCHANTS BONDING COMPANY,
26 Claimant-In-Intervention,
27 vs.

28 SOUTH EDGE, LLC, a Nevada Limited
Liability Company, and BOND SAFE-
GUARD INSURANCE COMPANY,
Respondents/Counterclaimants.

JAMS Ref. No.: 1260001162

AWARD¹

¹ The issues regarding attorney fees, costs and interest were heard on December 10, 2010 and are addressed beginning at page 17 of this Award.

1 I. INTRODUCTION

2 The arbitration involved claims by C&S Company (C&S) and its
3 bonding company, Merchants Bonding Company (Merchants)², against
4 South Edge, LLC (S/E) and its bonding company, Bond Safeguard
5 Company (Bond). S/E and Bond counterclaimed against Claimants. The
6 claims arose from excavation work performed by C&S for S/E.³

7 The arbitration was conducted on June 7, 8, 9, 10, 14, 15 and 16,
8 2010, before a three-judge panel consisting of Panel Chair Robert Rose,
9 retired Chief Justice of the Nevada Supreme Court, and Panelists Luis
10 Cardenas and Robert May, retired Superior Court Judges from California.
11 Representing Merchants were Jay Mann and Robert Berens. Representing
12 C&S was Michael Van. Representing S/E and Bond were Stephen Peek
13 and Sean Thuson. After completion of the evidentiary hearing, the
14 Claimants and Respondents submitted written closing arguments on or
15 about August 11, 2010. The parties have stipulated that the Interim Award
16 may be served no later than September 24, 2010.

17 C&S is an excavation company which, after a competitive bidding
18 process, was awarded the contract for the Executive Airport
19 Road/Volunteer Boulevard Sanitary Sewer Project (Volunteer Project) (Exh.
20 13 - Master Contract; Exh. 14 - General Conditions, and Exh. 34 -
21 Addendum 4). S/E was the owner of the project and Landtek, LLC
22 (Landtek) was the construction manager (CM) for S/E. Merchants issued
23 both performance and payment bonds⁴ on behalf of C&S for the Volunteer
24 Project. Bond became involved when it issued a mechanic's lien release

25
26 ² Merchants was a Claimant-in-Intervention.

27 ³ The work was the "Executive Airport Road/Volunteer Boulevard Sanitary Sewer Project" located in
Henderson, Nevada.

28 ⁴ C&S and Mr. & Mrs. Lindberg executed a General Indemnity Agreement in favor of Merchants.

1 bond to cover C&S's project mechanic liens.

2 C&S and Merchants brought the instant action against S/E and
3 Bond alleging that C&S encountered unexpected subsurface cementious
4 material that substantially exceeded that which was within the contractual
5 scope of work. C&S seeks recovery of the extra costs incurred, the balance
6 of contractual fees owed, payments based upon the Nevada Prompt Pay Act
7 as well as interest, fees and costs. C&S also seeks punitive damages.
8 Merchants seeks recovery of damages claimed by C&S, which Merchants is
9 equitably subrogated, and losses incurred by Merchants in relation to the
10 bonds, interest, fees and costs.

11 S/E alleges that the subsurface conditions were part of C&S's
12 contractual scope of work, that C&S did not complete its work timely, and
13 that C&S permitted subcontractors and suppliers to lien the job. S/E
14 seeks damages for these breaches as well as fees and costs.

15 The following witnesses testified during the course of the arbitration:

- 16 1. Brad Lindberg
- 17 2. Stacey Lindberg
- 18 3. Brooks Cox
- 19 4. Stavros Chrysovergas
- 20 5. Thomas Tomeo
- 21 6. Sean Harron
- 22 7. Barbara Carlos
- 23 8. Larry Bross
- 24 9. Keith Mattecheck
- 25 10. Jack Bassett
- 26 11. Steven Viani

27 In addition, certain deposition transcripts were submitted by counsel
28 and were read by the Panel. These excerpts included testimony from Jack

1 Bassett, Sean Harron, Stacey Lindberg, Brooks Cox, Nathan Wasden,
2 Robert Taxelius, Arne Wagley, John Holden, Chris Morris, Tom Tomeo,
3 Larry Bross, Stavros Chrysovergas and Steve Viani.

4 **II. FACTUAL SUMMARY**

5 The following discussion is a summary of those facts found by the
6 Arbitration Panel to be true and relevant to the issuance of this Interim
7 Award. Any differences between the recitation and any party's position or
8 contention is the result of the Panel's determination as to witness
9 credibility, relevance, burden of proof considerations and the weighing of
10 evidence, both oral and written.

11 **A. Bid Process.**

12 In April 2006, S/E solicited excavation bids for the Volunteer
13 Project. C&S did not bid. No contract was awarded at that time. In
14 August 2006, a second round of bids was solicited. C&S submitted a bid in
15 the amount of \$2,785,018.74 (Exh. 28).⁵ This amount was subsequently
16 revised to \$2,558,526.24 (Exh. 34) and C&S received the work.

17 As part of the bid package C&S received various soils reports
18 (Exh. 6, 7, 507 and 526). No soils reports were prepared specifically for the
19 Volunteer Project and no soils report had boring data below 15 to 17 feet.
20 As part of its due diligence before bidding, Mr. Lindberg⁶ also met with the
21 supervisor for Western States, which had excavated for a water line
22 approximately thirty (30) feet from the proposed Volunteer sewer line.
23 Additionally, Mr. Lindberg requested, of Landtek, all soils reports within a
24 one mile radius of the Volunteer Project. C&S was never given a June 7,
25 2006, soils report (Exh. 25) prior to executing the contract.

26
27 ⁵ The next lowest bid was \$4,748,994.35 (Exh. 29).

28 ⁶ Mr. Lindberg was a principal at C&S.

1 B. Contract Provisions.

2 Certain provisions of the contract (Exh. 14) will be considered
3 regarding the claims of C&S. The parties all agreed that the scope of work
4 included a "hard dig."⁷ In paragraph 1.1.15, C&S acknowledged it had
5 visited the site to review the existing conditions and had done the necessary
6 investigations to properly estimate the costs of its work. The paragraph
7 goes on to state that "unless otherwise provided in this Contract, no
8 additional monies will be paid to the Contractor by Owner because of site
9 conditions that are apparent or are indicated on the plans or other
10 drawings and site conditions as they actually exist." (Emphasis added.)

11 C&S was to promptly notify Landtek, in writing, if C&S
12 encountered materially changed site conditions (§4.16.4.2). Landtek would
13 then review the conditions to determine whether there was a material
14 difference, whether such condition(s) should have been reasonably expected
15 to be present, and whether C&S would be entitled to a change in contract
16 price (§4.16.5).

17 C. Changed Site Conditions.

18 After commencing its work on the Volunteer Project, C&S
19 encountered rock, which exceeded in scope that described in the S/E
20 provided soils reports. (See testimony of Brad Lindberg, Brooks Cox, Jack
21 Bassett and Stavros Chrysovergas.) Landtek became aware of C&S's
22 position regarding changed conditions no later than November, 2006 (Exh.
23 52, and testimony of Mr. Bassett).

24 The encountered material was described by Mr. Bassett as
25 prehistoric rock, "about the hardest material on the planet." Based upon
26 past experience, Mr. Bassett was aware, prior to bidding, that the

27
28 ⁷ "Hard dig" is not specifically defined; however, it appears in the excavation field, the term refers to the presence of hard cementitious type material and/or boulders.

1 suggested equipment to use, which was in the September 19, 2005 soils
2 report (Exh. 11, p. 8), would not be sufficient to do the project. The soils
3 report indicated a D-10 or equivalent could be used for hard cemented
4 layers less than 24-inches thick and a rock saw or hoe-ram could be used
5 for thicker layers. Mr. Bassett raised his concerns regarding the "D-10 or
6 equivalent" equipment with Mr. Worley. Mr. Bassett testified at his
7 deposition that Mr. Worley said the September 19 report was the soils
8 report, so Mr. Bassett did nothing. Mr. Bassett's experience indicated that
9 an H.L. Chapman would be required. He never told this to C&S even
10 though he was aware that the H.L. Chapman was not listed by C&S as
11 equipment to be used.

12 After utilizing various equipment to excavate the encountered
13 rock layers, C&S eventually leased a H.L. Chapman from Texas in
14 December 2006.⁸ This piece of equipment was sufficient to complete the
15 Volunteer Project.⁹

16 D. Extra Work Orders.

17 As a result of what C&S had claimed to be changed
18 circumstances, it requested to be compensated for additional labor,
19 equipment and material costs as well as other costs and fees. There was a
20 meeting between Mr. Lindberg and Mr. Bassett in November 2006 wherein
21 Mr. Lindberg indicated that the "hard dig" material was substantially
22 different than anticipated and as a result the costs were higher. Mr.
23 Bassett told Mr. Lindberg he would need to submit back-up so Mr. Bassett
24 could write a justification letter to the owner's sub-committee. C&S
25

26 ⁸ Mr. Bassett had eventually recommended this equipment.

27 ⁹ The completion was approximately 4-5 months after the contractual completion date. However, the
28 overall project had experienced a delay of approximately 5-6 months based upon different issues (Exh. 49, ¶6.a).

1 continued its excavation work after this meeting.

2 On or about December 14, 2006, Mr. Lindberg and Mr. Bassett
3 met again. During this meeting, Mr. Lindberg testified that Mr. Bassett
4 stamped and initialed (signed) an Extra Work Order (Exh. 55). Mr. Bassett
5 agreed that the stamp was his, but the signature was not.¹⁰ Exhibit 55
6 states, "Working on add'l hardrock - CO at completion of contract."¹¹

7 In addition to Exhibits 55 and 61, both Mr. Lindberg and Mr.
8 Cox testified that during December 2006 and the beginning of 2007, C&S
9 was told by Mr. Bassett to keep its head down and get the work done and it
10 would be taken care of at the end of job. At field meetings, Mr. Bassett
11 would say to get the costs together and we will work out at end of job.¹²
12 C&S continued to work until the project was substantially completed.

13 There was testimony from Mr. Lindberg and Mr. Bassett that
14 C&S had delivered a letter and spreadsheet to Landtek for extra work in the
15 amount of \$778,337.50. Mr. Bassett testified that he never received
16 complete documentation requested from C&S and, therefore, never
17 presented C&S's request and spreadsheet (Exh. 66) to the owner's sub-
18 committee for consideration.

19 On March 22, 2007, Mr. Worley, Vice President of Development
20 for Landtek, sent a letter to C&S (Exh. 84). In that letter, he indicated, in
21 part, that he had researched the change order request for \$778,337.50 for
22 hard rock excavation and denied the request.¹³ There is no mention in this
23

24 ¹⁰ S/E requested the Panel compare Mr. Bassett's signatures on Exhibits 72, 174-179 and 527.

25 ¹¹ C&S claims that a second Extra Work Order (Exh. 61) with the exact same verbiage was stamped and
26 signed by Mr. Bassett on January 12, 2007. Again, Mr. Bassett agrees the stamp was his, but not the signature.

27 ¹² Mr. Bassett testified he would not have said this.

28 ¹³ This letter from Mr. Worley supports the allegation that a spreadsheet in the amount of \$778,337.50
had actually been given to Landtek at some point, although Mr. Lindberg was inconsistent in his testimony as
to the date it was given.

1 letter that C&S had failed to provide details for Mr. Worley's analysis.

2 The contract contains various provisions relating to change
3 orders (Exh. 14, ¶9.2 and 9.3). However, there is no specific provision that
4 states Landtek, the construction manager, cannot authorize change
5 orders.¹⁴ Under paragraph 9.2.5, even if no agreement has been made
6 regarding contract price or time, C&S was required to proceed with the
7 changed work if so ordered in writing by Landtek. There was a separate
8 CM Agreement (Exh. 5) between S/E and Landtek, which indicated that
9 Landtek did not have the authority to approve change orders. This CM
10 Agreement was not given to C&S, nor incorporated by reference in C&S's
11 contract. C&S had prior projects where Landtek operated as the CM. In
12 those projects, Landtek did have authority to sign off on change orders.
13 (See uncontradicted testimony of Sean Harron.)

14 The parties presented testimony and documentation from
15 percipient as well as expert witnesses regarding the existence or non-
16 existence of changed subsurface soil conditions. As part of the expert
17 investigations, various soils reports, site photographs and discussions with
18 percipients were considered by the experts before rendering their opinions.

19 Claimant expert Stavros Chrysovergas opined regarding the
20 significance of the boring log results in various soil reports (Exh. 6, 7, 10,
21 11 and 25) when compared to site photographs and industry standards.
22 He also performed calculations to arrive at an opinion regarding the volume
23 of overexcavation of soil required to be done as a result of the changed
24 conditions encountered.

25 Respondent expert Steven Viani opined regarding the boring
26

27 ¹⁴ In fact, Tom Worley of Landtek approved a C&S change order on January 9, 2007, in the amount of
28 \$16,164.70 (Exh. 60).

1 logs as to whether they sufficiently informed the nature and extent of the
2 "hard dig." He also opined that overexcavation would be required, even
3 without any changed conditions, based upon the soils reports and
4 photographs he reviewed and certain OSHA requirements.

5 E. Findings Regarding Changed Conditions.

6 Based upon all evidence received, the Panel makes the
7 following findings:

8 a) C&S's contractual scope of work included a "hard dig."

9 b) C&S's due diligence, before contracting, was reasonable.

10 C&S considered the soils reports provided by S/E, visited the site,
11 discussed the general site area with another excavation contractor,
12 requested other reports, if any, from Landtek and relied upon its own
13 experience in other local excavation projects.

14 c) Landtek, the CM for S/E, did not provide the June 7,
15 2006 report (Exh. 25) that reflected more hard cemented materials than the
16 provided reports.

17 d) Mr. Bassett, Landtek's supervisor, knew that the
18 equipment referenced in the September 19, 2005, soils report would not be
19 sufficient for the Volunteer Project. He did not notify C&S of this
20 knowledge, even though C&S submitted an equipment list as part of its bid.
21 It was not until December 2006 that Mr. Bassett referenced the H.L.
22 Chapman. Once this equipment was brought to the site, it was able to cut
23 the harder encountered cementitious material.

24 e) Mr. Bassett identified the encountered rock as "about the
25 hardest material on the planet." He personally agreed that a change order
26 was warranted, as he believed this was the "hardest job any contractor
27 would have to do." He also based this opinion upon the soils reports he
28 compared to that which was actually encountered and his twenty-eight

1 years of experience.

2 f) The totality of testimony and documentation convinces
3 the Panel that C&S encountered a substantially changed subsurface
4 condition than what was reasonably believed to be present. This
5 encountered condition was not included within the "hard dig" scope of work
6 in the Volunteer contract.

7 g) Although not technically compliant with the notice
8 provision of the contract (§9.2.3), C&S gave sufficient written and oral
9 notice to Landtek on several occasions during November 2006 through
10 January 2007 that C&S had encountered changed conditions, which
11 necessitated increased costs. Landtek was aware of this issue and acted on
12 this issue.

13 h) The evidence supports that C&S was being told to
14 continue working and the compensation would be resolved at a later time.
15 This conclusion is reasonable in that S/E, through Landtek, was interested
16 in pushing the project along and that it would be difficult to quantify the
17 time and cost for the future unknown conditions. The quantity could be
18 less or more based upon these encountered conditions.

19 i) The evidence supports Mr. Lindberg's testimony that Mr.
20 Bassett stamped and signed Exhibits 55 and 61. Even Mr. Bassett testified
21 that the stamp was his and was kept in his desk drawer. A comparison of
22 Mr. Bassett's signature on these two exhibits and Exhibits 72, 174-179 and
23 527 do not necessarily assist the Panel. There are noted differences even
24 with the S/E proffered exemplars.

25 j) It was reasonable for C&S to understand that Landtek
26 had the authority to discuss and to approve extra work requests as well as
27 directing C&S to continue work. This is based upon past experiences
28 between the entities, the absence of contrary language in the Volunteer

1 contract, not having the CM Agreement to review, the signing by Landtek's
2 Tom Worley of Exhibit 60 and the stamping and signing by Landtek's Jack
3 Bassett of Exhibits 55 and 61.

4 k) Landtek was S/E's agent in the field and based upon
5 C&S's contract it was reasonable for C&S to deal directly with Landtek's
6 personnel and rely upon direction given by Landtek. Even though C&S was
7 aware that the owner was S/E and that there was a consortium involved,
8 this knowledge does not negate Landtek's authority, in the eyes of C&S, to
9 act for the owner.

10 F. Compensation For Changed Conditions and Retention
11 Amounts.¹⁵

12 Having found that C&S encountered material changed
13 conditions during the excavation, the Panel will address whether C&S
14 should be compensated for any increased time and costs to complete the
15 Volunteer Project.

16 As previously discussed, C&S submitted a spreadsheet to
17 Landtek, dated January 26, 2007, requesting \$778,337.50. This
18 spreadsheet was purportedly for a portion of the increased scope of work.
19 Several emails were exchanged between C&S and Landtek regarding the
20 increased costs (Exh. 78, 81 and 82). On March 22, 2007, Landtek denied
21 the extra change order (Exh. 84). C&S followed with a letter dated March
22 28, 2007, to Landtek, attention Larry Bross (Exh. 85). However, the issue
23 of increased compensation was not resolved between the parties. On April
24 25, 2007, C&S sent a notice of intent to lien in the amount of
25 \$1,404,803.60 (Exh. 87).¹⁶

26
27 ¹⁵ C&S also has claims for violations of the Prompt Payment Act.

28 ¹⁶ This amount includes an unpaid amount of \$621,614.48 owed on the original contract and the approved change orders. The balance of \$783,189.12 is relatively close to the January 26, 2007, requested amount of \$778,337.50.

1 In regards to the unpaid contractual retention amount of
2 \$621,614.48, S/E, in May 2007, paid pay application 6 (Exh. 637, BS SE
3 000151 and 000161) and in September and October 2007 paid C&S and its
4 subcontractors and suppliers (Exh. 709 and 710) for all but \$50,300 of the
5 retained amount.¹⁷

6 In addition to the claim for \$778,337.50 for increased costs
7 and the \$50,300 retained contractual amount, C&S also claims a violation
8 under the Nevada Prompt Pay Act and under the contract for pay
9 applications 5-11. Pay application 10 (Exh. 688) is for \$1,430,522.84 and
10 pay application 11 (Exh. 689) is for \$515,809.08.

11 S/E purportedly terminated C&S from the project by a letter
12 dated June 7, 2007 (Exh. 679). By this date C&S had substantially
13 completed the Volunteer Project. Only after this termination notice did
14 C&S submit pay applications 10 and 11 on June 30, 2007. This was the
15 first occasion that a request for extra pay exceeded the amount of
16 \$778,337.50.

17 While examining the notice requirements of the Prompt Pay
18 Act, the Panel requested additional briefing from the parties. These
19 supplemental briefs were received on September 20, 2010, and have been
20 read. Having considered the respective positions of Claimants and
21 Respondents, the Panel makes the following findings:

22 1. NRS 624.609 is applicable to situations where (a) the
23 owner intends to withhold payment application funds; (b) the contractor
24 responds to an owner withholding funds; and (c) the contractor notices its
25 intent to abandon the project when funds are withheld. There is no notice
26

27 ¹⁷ S/E had received pay application 5 (Exh. 626) dated 1/31/07; pay application 6 (Exh. 636) dated
28 2/22/07; pay application 7 (Exh. 659) dated 3/31/07; pay application 8 (Exh. 668) dated 4/30/07; and pay
application 9 (Exh. 675) dated 5/31/07. These five (5) pay applications totaled \$621,614.48.

1 requirement, in this statute, placed on the contractor when submitting pay
2 applications or change orders. The burden is placed on the owner to
3 comply with NRS 624.609, if the owner withholds payment from the
4 contractor.

5 2. NRS 624.610 is applicable to situations where (a) the
6 owner fails to comply with NRS 624.609.1, .3 or .4; (b) the owner fails to
7 issue a change order within 30 days after the date a written request for a
8 change order was submitted; (c) the owner fails to give written notice to the
9 contractor of the reasons why the change order is unreasonable; or (d) the
10 owner fails to explain additional information and time are necessary to
11 make a determination. If such failure occurs by the owner, NRS 624.610.3
12 sets forth the consequences to owner. There is no notice requirement
13 placed on the contractor when submitting pay applications or change
14 orders.

15 3. NRS 624.622 sets forth certain notice requirements
16 under NRS 624.609 to 624.622. None of these requirements appear
17 applicable to a contractor that submits pay applications and/or change
18 orders.¹⁸

19 4. S/E has failed to comply with the Prompt Pay Act in that
20 it withheld contractual funds (pay applications 5-9) without giving written
21 notice of any amount that will be withheld (NRS 624.609.1 and .3). The
22 fact that the bulk of these amounts were paid several months after
23 submission by C&S does not cure the statutory time obligation under NRS
24 624.609.1(a) or (b). (Exh. C of Exh. 13 allows 30 days.)

25 5. In regards to pay applications 10 and 11, these were
26

27 ¹⁸ C&S did comply substantially with the contractual notice requirements in the scope and delivery of
28 pay applications 5-11. (See uncontradicted testimony of Stacey Lindberg.) There is no evidence that S/E did
not receive pay applications 5-11 and/or that these applications were not in conformity with the contract.

1 submitted for extra work and retention, in addition to the \$778,337.50 that
2 had been requested in January 2007. The Panel finds no violation of the
3 Prompt Pay Act as to S/E, as there was no contractual relationship as of
4 June 30, 2007.

5 6. In regards to the extra work order for \$778,337.50, the
6 Panel finds that Landtek timely requested additional backup information
7 from C&S in February 2007 (see testimony of Mr. Bassett). C&S never
8 provided this additional information (see testimony of Mr. Bassett and Mr.
9 Lindberg). The extra work order was denied in March, 2007 (Exh. 84).
10 There was no violation by S/E of the Prompt Pay Act for this amount.

11 7. Fees, costs and interest will be the subject of a
12 subsequent hearing.

13 Having made the findings regarding the Prompt Pay Act claims,
14 the Panel then analyzed the evidence to determine whether C&S has
15 satisfied its burden to prove it has incurred the costs sought in those
16 applications. Mr. Tomeo has testified that his investigation led him to the
17 opinion that C&S incurred \$3,699,175.17¹⁹ in extra costs for the work on
18 the Volunteer Project (Exh. 134 and 135). This total is higher than that
19 sought by C&S in its pay applications and change orders. Those figures
20 were \$778,337.50, \$1,430,552.84, \$515,809.08 and \$50,300 for a total of
21 \$2,774,999.42.

22 Having considered the testimony of percipient and expert
23 witnesses as well as relevant exhibits on the issue of damages, the Panel
24 concludes there is insufficient evidence to support Mr. Tomeo's total of
25 \$3,699,175.17.²⁰ However, when his opinions are considered with the
26

27 ¹⁹ C&S had withdrawn a claim of \$189,827.94 for the Losee and Galleria Projects.

28 ²⁰ The Panel considered and accepted many of S/E's concerns set forth by Mr. Viani in his testimony
and discussed by counsel in their closing brief and attached Exhibit A.

1 balance of the evidence, the Panel concludes the following extra costs were
2 incurred by C&S and remain unpaid:

- 3 1. \$ 778,337.50
- 4 2. 1,430,552.84
- 5 3. 486,846.16²¹
- 6 4. 50,300.00

7 Total: \$2,746,036.50

8 G. Lien Claims.

9 C&S filed three liens (Exh. 702, 711 and 716). The amounts of
10 the liens changed, with the final lien (Exh. 716) alleging \$2,743,789.11
11 owed to C&S by S/E. The Panel has found that S/E owed C&S
12 \$2,746,036.50. C&S is the prevailing lien claimant. Fees, costs and
13 interest are addressed starting at page 17 of the Award. (See NRS 108.237,
14 108.238 and 108.239.)

15 H. Claimants' Additional Claims.

16 C&S has alleged that the Respondent breached the implied
17 covenant of good faith and fair dealing implied in the contract and allege
18 C&S is entitled to punitive damages. The Panel finds there is insufficient
19 evidence to establish S/E's liability for such a breach and for punitives. In
20 addition, the General Conditions of the contract (Exh. 14) disallows
21 punitives.

22 Merchants' Complaint-In-Intervention seeks to recover, based
23 upon subrogation rights, those payments made in its Performance Bond to
24 subcontractors and material suppliers utilized by C&S on the Project. The
25 payments (excluding attorney fees and cost) were established by the
26 testimony of Barbara Carlos and Exhibit 110. The Panel finds that

27
28 ²¹ This represents 10% of the total contract and extra work which totaled \$4,868,461.65. This is in place of \$515,809.08 submitted in pay application 11.

1 Merchants suffered these losses as a result of S/E's failure to pay C&S
 2 money under their contract. As a result of this failure, Merchants provided
 3 payments to subcontractors and suppliers when C&S was financially
 4 unable to do so. The award in the arbitration will be in favor of both C&S
 5 and Merchants based upon their contractual relationship.

6 I. S/E Counterclaim.

7 In a counterclaim, S/E alleged a breach of contract and breach
 8 of the implied covenant of good faith and fair dealing against C&S.
 9 Specifically the counterclaim alleged C&S did not complete its work timely
 10 and it failed to pay its subcontractors and suppliers, which permitted liens
 11 to be filed against the property.

12 The Panel finds that S/E first breached the contract with C&S,
 13 by S/E's failure to timely pay C&S pursuant to the terms of the contract.²²
 14 This resulted in C&S not having sufficient funds to pay its creditors and
 15 this failure to pay resulted in liens being filed. It is a general rule of
 16 contract law that a material breach by one party to a contract excuses
 17 further performance by the other party. (See, e.g., Martin Bloom Assoc.,
 18 Inc. v. Manzie, 389 F.Supp. 848, 853 (D.Nev. 1975); Young v. Elec. Sign Co.
 19 v. Fohrman (1970) 86 Nev. 185, 188; Bradley v. Nevada-Cal-Or.Ry (1919)
 20 42 Nev. 411, 421.)

21 Additionally, there was insufficient evidence presented that
 22 C&S's delay, in completing its work, caused damage to S/E.²³ Evidence
 23 was presented that the project suffered delays based upon issues not
 24 involving C&S (Exh. 48 and 49). The Panel concludes that S/E does not
 25 prevail on its counterclaims.

26
 27 ²² Pay applications 5-9.

28 ²³ The parties had removed the liquidated damages provision from the contract (Exh. 84).

1 III. ATTORNEY FEES, COSTS AND INTEREST

2 A. Attorney Fees.

3 Claimants are the parties whose positions were substantially
4 upheld. C&S is the prevailing lien claimant. A prevailing lien claimant is
5 entitled to costs and fees under NRS 108.237. A prevailing party under
6 NRS 18.010 is one who has been successful on any significant issue which
7 achieves some benefit sought in bringing the suit. (Hornwood v. Smith's
8 Food King, 105 Nev. 188, 192, 856 P.2d 1284, 1287 (1989.)

9 We conclude that the same reasoning would hold true for costs
10 awarded under NRS 108.237. The Panel is given broad discretion to award
11 "without limitation, reasonable attorney fees and any other amounts justly
12 due and owing as costs of the proceedings." (Barney v. Mt. Rose Heating &
13 Air Conditioning, 124 Nev. 821, 192 P.3d 734 (2008).) Lien statutes should
14 be liberally construed in order to effect their purpose. (Schofield v.
15 Copeland Lumber, 101 Nev. 83, 84-85, 692 P.2d 519 (1985).)

16 The prevailing Claimants seek attorneys fees of \$183,340.33
17 expended by C&S and \$491,474.84 incurred by Merchants in asserting
18 C&S's right to additional compensation as well as Merchants' right of
19 subrogation. The Respondents object to any attorneys fees being awarded
20 to Merchants because it is not the lien claimant and thus should not get
21 the benefit of attorney fees under NRS 108.237.

22 The Panel disagrees with the Respondents' position for several
23 reasons. Merchants intervened primarily to assure that the claims of C&S
24 were competently and successfully asserted. The order permitting
25 Merchants' intervention stated that it could not assert any new claims, but
26 was to align its claims with those made by C&S. The work in proving
27 Merchants' right to subrogation was minimal compared to the major effort
28 put forth in proving C&S's lien claim.

1 The efforts of the attorneys for C&S and Merchants were
2 directed by a Common Participation Agreement, where these two Claimants
3 agreed "to jointly prosecute these claims in one coordinated effort." (§J,
4 Common Participation Agreement, attached to Claimant's Application as
5 Exhibit B.) The Panel finds that the fact that Merchants was participating
6 in the arbitration to recover for expenses and claims it paid on behalf of
7 C&S does not diminish the fact that the efforts of the attorneys for both
8 C&S and Merchants were successfully coordinated to assert the claims of
9 C&S.

10 NRS 108.237 provides for an award of attorneys fees and costs
11 "for representation of the lien claimant in these proceedings." Following the
12 clear language of the statute, the attorney fees incurred by Merchants were
13 paid in the assertion of the claims of the lien claimant. The attorneys fees
14 were incurred by both law firms as the arbitration progressed and were
15 direct expenses incurred in asserting C&S's lien claim. Therefore, the
16 attorney fees were direct expenses and not consequential damages as the
17 Respondents contend. Further, Merchants had the right to be subrogated
18 into the claims of C&S under the Indemnity Agreement between C&S and
19 Merchants (Exh. 4), and also had the generally recognized right of equitable
20 subrogation. (See, Pearlman v. Reliance Insurance Company, 371 U.S.
21 132, 136-137 (1962).) Given the facts of this case and the legal authority
22 stated, we conclude that the attorneys fees and costs paid by Merchants for
23 the assertion of C&S's lien claims are recoverable under NRS 108.237.

24 B. Attorney Fees Were Necessary and Reasonable.

25 Before attorney fees can be awarded to a prevailing lien
26 claimant under NRS 108.237, it must be shown that those fees are
27 necessary and reasonable. (Brunzell v. Golden State Bank, 85 Nv. 345;
28 349, 455 P.2d 32 (1969).) The attorneys fees paid by C&S were charged on

1 an hourly basis, and the attorneys fees incurred by Merchants were
2 calculated on a formula that included a reduced hourly rate and a
3 contingency award agreement for 16-1/2% of the amount recovered. The
4 Panel finds that the hourly rates charged and the blended compensation
5 agreement were reasonable and appropriate for the situation presented.

6 In considering the factors enumerated in Brunzell v. Golden
7 State Bank, *supra*, the Panel makes the following findings of fact:

8 1. This arbitration was complex, presenting issues involving
9 geology, construction excavation, and construction and surety law. The
10 documents involved in the arbitration were voluminous. To further burden
11 the presentation of evidence, C&S had kept incomplete and poor records of
12 the work performed and costs incurred.

13 2. The attorneys for C&S and Merchants were skilled in
14 matters of construction litigation, and the attorneys for Merchants were
15 skilled in surety law and trial advocacy. Mann Berens, which was lead
16 counsel at the arbitration, did an excellent job of presenting the
17 voluminous documents and testimony in a succinct and understandable
18 manner.

19 3. The result achieved was substantial and depended in
20 large measure on the competence of the attorneys for both Claimants. It is
21 questionable whether a positive result would have been achieved by less
22 qualified and talented counsel.

23 4. The arbitration was strongly contested from beginning to
24 end.

25 Based on the factors examined, the Panel finds that the
26 services of the attorneys for C&S and Merchants were necessary and the
27 attorneys fees assessed are reasonable.

28 C. Costs of Proceedings.

1 Claimants assert the right to collect costs incurred in this
2 arbitration under NRS 108.237, as the prevailing lien claimant, and under
3 NRS 18.020, as well as the Prompt Payment Act. We conclude that costs
4 are properly awarded under NRS 108.237, as we stated in the Interim
5 Award. Claimants make a total request for costs in the amount of
6 \$324,200.66.

7 Respondents object to a number of the requested
8 reimbursement items on various grounds. Those objections will be
9 separately considered.

10 1. Respondents claim that the expert witness fees paid to
11 Mr. Thomas Tomeo and Mr. Stavros Chrysovergis were in part duplicative
12 and not necessary or helpful to Claimants because the Panel elected not to
13 adopt all damages projected by Mr. Tomeo. While the Panel did not adopt
14 all of the damages projected by Mr. Tomeo, the Panel did state that his
15 analysis was helpful in assisting the Panel. We also find that the services
16 of a geologist and a damage consultant in this construction case were
17 necessary, indeed essential, and that the fees incurred for these two experts
18 were not duplicative and were reasonable.

19 2. Respondents object to the expert fees paid to
20 Geotechnical Evaluations in the amount of \$5,100. This expert fee was for
21 geotechnical reports and was incurred well before this arbitration began.
22 Neither the report nor the witnesses from Geotechnical Evaluations were
23 presented in the arbitration. The Panel agrees with Respondents and finds
24 that this expense was not incurred during this arbitration and was not
25 necessary to the presentation of the Claimants' case.

26 3. Respondents object to many of the expenses incurred by
27 Ms. Barbara Carlos, the representative of Merchants, as not being allowable
28 under NRS 18.005. However, when analyzed under NRS 108.237, the

1 allowable costs need be only reasonable and necessary to the presentation
2 of the lien claim. Section 108.237 is not as restrictive regarding costs to be
3 allowed. Therefore, we will analyze alleged costs incurred under this
4 standard.

5 The list of expenses incurred included \$2,577.66 for
6 child care expenses by Ms. Carlos. The Panel does not find that this child
7 care expense was necessary to the conducting of this arbitration, but finds
8 that the other costs incurred by Ms. Carlos are appropriate and reasonable
9 under NRS 108.237 as necessary for the presentation of the lien claimants'
10 claim.

11 4. Respondents object to the witness fees claimed by the
12 Claimants in the amount of \$1,105.83, and various expenses paid to Mr.
13 Brooks Cox for travel to Las Vegas to testify. The expenses incurred for
14 Brooks Cox to travel to Las Vegas and testify were necessary to the
15 presentation of the Claimants' case and are allowable under NRS 108.237
16 to the prevailing lien claimant.

17 5. The Respondents object to the expenses incurred by the
18 attorneys for Merchants, Mr. Berens and Mr. Mann, in taking depositions,
19 conducting discovery, and attending the arbitration. These expenses were
20 necessary for the presentation of the Claimants' case, are reasonable and
21 recoverable under NRS 108.237. The Respondents' objection to these
22 expenses is denied.

23 6. The remaining costs and expenses incurred are
24 reasonable and incurred in the asserting of C&S's lien claim.

25 D. Interest.

26 As successful lien claimants, C&S and Merchants are entitled
27 to interest on the money owed pursuant to NRS 108.347(2)(a). This interest
28 begins to accrue when due until paid. The interest is 3-1/2% plus 4%, for

1 a total of 7-1/2% (NRS 108.237(2)(b)). The Award issued, if unpaid, should
2 be reviewed and revised, if necessary, each January 1st and July 1st
3 pursuant to statute.

4 The principal amount awarded is a composite of the following
5 amounts:

- 6 1. \$778,337.50 submitted on January 26, 2007
- 7 2. \$1,430,552.84 submitted on June 30, 2007
- 8 3. \$486,846.16 submitted on June 30, 2007
- 9 4. \$50,300.00 unpaid on original contract

10 The Claimants take the position that the \$788,337.50 became
11 due 30 days after January 26, 2007, or at the very latest 30 days from
12 when the work was completed on June 2, 2007. The Claimants further
13 claim that the remainder of the amounts should bear interest from the
14 same time, July 2, 2007. The Respondents believe that interest should
15 accrue, if at all, on September 28, 2007, when the project was formally
16 lienied.

17 The Panel finds that \$788,337.50 became due when C&S
18 submitted on January 26, 2007, and interest should begin to accrue on
19 February 25, 2007, 30 days thereafter. We further find that the final
20 amount claimed was stated when C&S formally filed its lien on September
21 28, 2007, and interest should begin to accrue on the remaining amounts
22 30 days after that date, or on October 28, 2007.

23 E. Prompt Pay Act Interest.

24 The Panel finds that Pay Applications 5 (\$248,609.38), 7
25 (\$44,178.75), 8 (\$30,594.12) and 9 (\$272,670.54) were not timely paid and
26 therefore South Edge violated the Prompt Pay Act. The interest is set at 8-
27 1/4% on those amounts from the date accrual starts until the payment was
28 made on October 27, 2007.

1 The Panel finds the interest on these Pay Applications to be as
2 follows: Pay Application 5 (\$13,486.20), 7 (\$1,807.40), 8 (\$1,044.18) and 9
3 (\$6,031.42), for a total interest owed of \$22,369.20.

4
5
6 **IV. CONCLUSION**

7 The parties to this Arbitration are Claimant/Counter-respondent
8 C & S Company, Inc., Claimant-In-Intervention Merchants Bonding
9 Company and Respondents/Counterclaimants South Edge, LLC and Bond
10 Safeguard Insurance Company.

11 The Arbitration Panel finds for C&S Company, Inc. and Merchants
12 Bonding Company and against South Edge, LLC and Bond Safeguard
13 Insurance Company, in the following amounts:

- 14
15 a) Principal of \$2,746,036.50.
16 b) Attorney fees of \$183,340.33 (incurred by C&S).
17 c) Attorney fees of \$491,474.84 (incurred by Merchants).
18 d) Costs of \$73,376.32 (incurred by C&S).
19 e) Costs of \$233,146.68 (incurred by Merchants).
20 f) Interest on Mechanics Lien of \$437,548.40, calculated to
21 12/30/10.
22 g) Interest on Prompt Pay Act of \$22,369.20, calculated to
23 12/30/10.
24
25
26
27
28

1 The Panel further finds that Respondents/Counterclaimants have
2 failed to pay their remaining fees/costs owed to JAMS for the Arbitration. If
3 the balance is paid by Claimant/Claimant-In-Intervention, the above-stated
4 Award against Respondents/Counterclaimants shall be increased by the
5 amount paid.

6
7
8 Dated: _____
9 HON. ROBERT E. ROSE (Ret.),
10 Arbitrator
11

12 Dated: _____
13 HON. LUIS CARDENAS (Ret.),
14 Arbitrator
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16 Dated: _____
17 HON. ROBERT E. MAY (Ret.),
18 Arbitrator
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1 The Panel further finds that Respondents/Counterclaimants have
2 failed to pay their remaining fees/costs owed to JAMS for the Arbitration. If
3 the balance is paid by Claimant/Claimant-In-Intervention, the above-stated
4 Award against Respondents/Counterclaimants shall be increased by the
5 amount paid.

6
7
8 Dated: 5/13/2011


HON. ROBERT E. ROSE (Ret.),
Arbitrator

11
12 Dated: 5-13-2011


HON. LUIS CARDENAS (Ret.),
Arbitrator

15
16 Dated: _____

HON. ROBERT E. MAY (Ret.),
Arbitrator

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- 24 -

AWARD

1 The Panel further finds that Respondents/Counterclaimants have
2 failed to pay their remaining fees/costs owed to JAMS for the Arbitration. If
3 the balance is paid by Claimant/Claimant-In-Intervention, the above-stated
4 Award against Respondents/Counterclaimants shall be increased by the
5 amount paid.

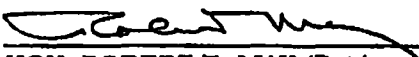
6
7
8 Dated: _____

HON. ROBERT E. ROSE (Ret.),
Arbitrator

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12 Dated: _____

HON. LUIS CARDENAS (Ret.),
Arbitrator

13
14
15
16 Dated: 5/13/11


HON. ROBERT E. MAY (Ret.),
Arbitrator

PROOF OF SERVICE BY EMAIL & U.S. MAIL

Re: C & S Company vs. South Edge, LLC
Reference No. 1260000930

I, Michelle Gonzales, not a party to the within action, hereby declare that on June 10, 2011 I served the attached Award on the parties in the within action by Email and by depositing true copies thereof enclosed in sealed envelopes with postage thereon fully prepaid, in the United States Mail, at Las Vegas, NEVADA, addressed as follows:

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Phone: 702-478-7770
Michael@shumwayvan.com

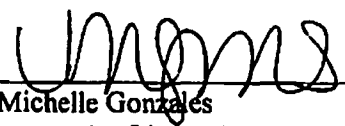
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I declare under penalty of perjury the foregoing to be true and correct. Executed at Las Vegas, NEVADA on June 10, 2011.


Michelle Gonzales
mgonzales@jamsadr.com

District of Nevada Claims Register

10-32968-bam SOUTH EDGE, LLC

Judge: BRUCE A. MARKELL

Chapter: 11

Office: Las Vegas

Last Date to file claims: 06/29/2011

Trustee: CYNTHIA NELSON

Last Date to file (Govt):

<i>Creditor:</i> (7122891) C & S Company, Inc. c/o Michael C. Van, Esq. Shumway Van & Hansen, Chtd. 8985 South Eastern Avenue, Suite 100 Las Vegas, NV 89123	<i>Claim No:</i> 10 <i>Original Filed</i> <i>Date:</i> 06/28/2011 <i>Original Entered</i> <i>Date:</i> 06/28/2011	<i>Status:</i> <i>Filed by:</i> CR <i>Entered by:</i> VAN, MICHAEL <i>Modified:</i>
Secured claimed: \$4310503.34		
Total claimed: \$4310503.34		

History:

Details 10-1 06/28/2011 Claim #10 filed by C & S Company, Inc., total amount claimed: \$4310503.34
(VAN, MICHAEL)

Description: (10-1) Arbitration Award

Remarks: (10-1) Secured Proof of Claim

Claims Register Summary

Case Name: SOUTH EDGE, LLC

Case Number: 10-32968-bam

Chapter: 11

Date Filed: 12/09/2010

Total Number Of Claims: 1

	Total Amount Claimed	Total Amount Allowed
Unsecured		
Secured	\$4310503.34	
Priority		
Unknown		
Administrative		
Total	\$4310503.34	\$0.00