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: BK-S-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): Bond Safeguard/Lexon Insurance Co.

RECEIVED
JUN 30 2011
BMC GROUP

Name and address where notices should be sent:
c/o Christine A. Roberts, Esq.
228 South 4th Street, 1st Floor
Las Vegas, NV 89101

Telephone number: (702) 382-6440

☐ Check this box to indicate that this claim amends a previously filed claim.

Court Claim Number:_____ (*If known*)

Filed on:_____

Name and address where payment should be sent (if different from above):

Telephone number:

☐ 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.

☐ Check this box if you are the debtor or trustee in this case.

1. Amount of Claim as of Date Case Filed: $ 3,061,458.26

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.

If all or part of your claim is entitled to priority, complete item 5.

☐ 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.

2. Basis for Claim: Bond # 5030223
(See instruction #2 on reverse side.)

3. Last four digits of any number by which creditor identifies debtor: _____

3a. Debtor may have scheduled account as: C & S Company
(See instruction #3a on reverse side.)

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.

Nature of property or right of setoff: ☐ Real Estate ☐ Motor Vehicle ☐ Other
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: _____

Amount of Secured Claim: $_____ Amount Unsecured: $_____

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.

Specify the priority of the claim.

☐ Domestic support obligations under 11 U.S.C. §507(a)(1)(A) or (a)(1)(B).

☐ 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).

☐ Contributions to an employee benefit plan – 11 U.S.C. §507 (a)(5).

☐ 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).

☐ Taxes or penalties owed to governmental units – 11 U.S.C. §507 (a)(8).

☐ Other – Specify applicable paragraph of 11 U.S.C. §507 (a)(__).

Amount entitled to priority:

$_____

**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.*

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: 6/28/11

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.

Stephen Ross STEPHEN A. ROSS, AUP OF SURETY CLAIMS LEXON/BOND SAFEGUARD INSURANCE CO.

FOR COURT USE ONLY

South Edge
00034

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.

C & S COMPANY

BOND #5030223

$40,578.20	This amount claimed for expenses is the non-contingent liquidated portion of the claim.
$3,020,880.06	This is the bond amount which is the unliquidated contingent portion of the claim.

COPY

Lexon Insurance Company
Bond Safeguard Insurance Company

Lombard, Illinois

GENERAL AGREEMENT OF INDEMNITY

This Agreement entered into by and between the undersigned South Edge, LLC, a Nevada limited liability company (hereinafter called "South Edge"), as well as the other indemnifying entities signing below herein called the Indemnitors, on the one hand and Bond Safeguard Insurance Company, Illinois, and/or Lexon Insurance Company, Texas, with Executive Offices in Lombard, Illinois herein called the Company on the other hand, witnessed:

WHEREAS, in the transaction of business, certain bonds, undertakings and other writings obligatory in the nature of a bond have heretofore been, and may hereafter be, required by, for, or on behalf of South Edge , and application has been made and will hereafter be made to the Company to execute such bonds, and as a prerequisite to the execution of such bond or bonds, the Company requires complete indemnification.

NOW, THEREFORE, in consideration of the premises, and the payment by the Company of the sum of One ($1.00) Dollar to South Edge and each of the Indemnitors, receipt whereof is hereby acknowledged, and for other good and valuable considerations, the Indemnitors do, for themselves, their heirs, executors, administrators and assigns, severally, agree with the Company as follows:

1. South Edge will pay to the Company, at its Executive Offices in Lombard, Illinois, premiums and charges at the rates, and at the times specified in respect to each such bond in the Company's schedule of rates, which, with any additions, or amendments thereto, is by reference made a part hereof, and will continue to pay the same where such premium or charge is annual, until the Company shall be discharged and released from any and all liability and responsibility upon and from each such bond or matters arising therefrom, and until South Edge or the Indemnitors shall deliver to the Company at its Executive Offices in Lombard, Illinois, competent written evidence satisfactory to the Company of its discharge from all liability on such bond or bonds. No amendment or modification shall be made to the rate schedule without providing South Edge with sixty (60) days prior written notice, and in any event the rate scheduled will not be amended or modified as to bonds which have been issued prior to the effective date of any increase in the rate schedule.

2. In the event that South Edge fails to pay any amounts owed to Company (including but not limited to deposits under Section 3) when due after thirty (30) days written notice to South Edge and copied to Indemnitors, the Indemnitors will, in direct proportion to their respective ownership interests in South Edge (that is 48.5% as to KB Home, 15.5% as to Focus South Group, 10.5% as to Toll Brothers, 8.1% as to Woodside, 6.3% as to Kimball Hill, 4.9% as to Pardee Homes, 3.6% as to Meritage, 2.6% as to Beazer), and on a pro-rata basis, indemnify and save the Company harmless from and against every claim, demand, liability, cost, charge, suit, judgment and expense which the Company may pay or incur in consequence of having executed, or procured the execution of, such bonds, or any renewals or continuations thereof or substitutes therefore, including fees of attorneys, whether on salary, retainer or otherwise, and the expense of procuring, or attempting to procure, release from liability, or in bringing suit to enforce the obligation of South Edge or such Indemnitor under this Agreement. In the event of payment by the Company, the Indemnitors agree to accept the voucher or other evidence of such payment as prima facie evidence of the propriety thereof, and of the Indemnitor's severally limited liability therefore to the Company.

3. If the Company, in its reasonable discretion and with written notice to South Edge detailing the rationale shall set up a reserve to cover any claim, suit or judgment under any such bond, South Edge will, immediately upon demand, deposit with the Company a sum of money equal to such reserve, such sum to be held by the Company as collateral security on such bond, and such sum and any other money or property which shall have been, or shall hereafter be, pledged as collateral security on any such bond shall, unless otherwise agreed in writing by the Company, be available, in the discretion of the Company, as collateral security on any other or all bonds coming within the scope of this Agreement.

4. South Edge immediately upon becoming aware of any demand, notice, or proceeding preliminary to determining or fixing any liability with which the Company may be subsequently charged under any such bond, shall notify the Company thereof in writing at its Executive Offices in Lombard, Illinois.

5. The Company, after written notice to (copied to the Indemnitors) and consultation with South Edge, shall have the exclusive right in its reasonable discretion to determine for itself, South Edge and the Indemnitors whether any claim or suit brought against the Company or South Edge upon any such bond shall be settled or defended and its decision shall be binding and conclusive upon South Edge and the Indemnitors.

6. If such bond be given in connection with a contract, the Company is hereby authorized with written notice to South Edge, but not required, to consent to any change in the contract or in the plans or specifications relating thereto; to make or guarantee advances or loans for the purposes of the contract without the necessity of seeing to the application thereof, it being understood that the amount of all such advances or loans, unless repaid with legal interest by the Contractor to the Company when due, shall be conclusively presumed to be a loss hereunder; in the event of the abandonment, forfeiture or breach of the contract, or the breach of any bond given in connection therewith, or the failure, neglect or refusal to pay for labor or materials used in the prosecution of the contract, to take possession of the work under the contract and, at the expense of South Edge , to complete the contract, or cause, or consent, to the completion thereof. South Edge and the Indemnitors hereby assign, transfer, and set over to the Company (to be effective as of the date of any such bond, but only in the event of a default as aforesaid), all of their rights under the contract, including their right, title and interest in and to all subcontracts let in connection therewith; all of their rights in and to all machinery, plant, equipment, tools and materials which shall be upon the site of the work or elsewhere for the purposes of the contract, including all materials ordered for the contract, and any and all sums due under the contract at the time of such abandonment, forfeiture, breach, failure, neglect or refusal, or which may thereafter become due, and the Indemnitors hereby authorize the Company to endorse in the name of the payee, and to collect any check, draft, warrant or other instrument made or issued in payment of any such sum, and to disburse the proceeds thereof.

7. That it shall not be necessary for the Company to give the Indemnitors, or any one or more of them, notice of the execution of any such bonds, or except as expressly set forth herein, nor of any fact or information coming to the notice or knowledge of the Company affecting its rights or liabilities, or the rights or liabilities of the Indemnitors under any such bond executed by it, notice of all such being hereby expressly waived.

8. In the event of any claim or demand being made by the Company against the Indemnitors, or any one or more of the parties so designated, by reason of the execution of a bond or bonds, the Company is hereby expressly authorized to settle with any one or more of the Indemnitors individually, and without reference to the others, and such settlement or composition shall not affect the pro-rata liability of any of the others, and the Indemnitors hereby expressly waive the right to be discharged and released by reason of the release of one or more of the several debtors, and hereby consent to any settlement or composition that may hereafter be made.

9. The Company at its option may decline to execute or participate in, or procure the execution of, any such bonds without impairing the validity of this General Agreement of Indemnity.

10. If the Company procures the execution of such bonds by other companies, or executes such bonds with co-sureties, or reinsures any portions of such bonds with reinsuring companies, then all the terms and conditions of this Agreement shall apply and operate for the benefit of such other companies, co-sureties and reinsurers as their interests may appear.

11. The several and pro-rata liability of the Indemnitors hereunder shall not be affected by the failure of South Edge to sign any such bond, nor by any claim that other indemnity or security was to have been obtained, nor by the release of any indemnity, or the return or exchange of any collateral that may have been obtained and if any party signing this Agreement is not bound for any reason, this Agreement shall still be binding upon each and every other party.

12. This Agreement may be terminated by South Edge , upon written notice to the Company of not less than ten (10) days, but any such notice of termination shall not operate to modify, bar or discharge the liability of any party hereto, upon or by reason of any and all such obligations that may be then in force.

13. Indemnitors agree that their several and pro-rata liability shall be construed as the corresponding several liability of a compensated Surety, as broadly as the suspected several liability of the Company would be construed toward its obligee.

14. The word Indemnitors, or personal pronouns used to refer to said word, shall apply regardless of number or gender, and to individuals, partnerships or corporations, as the circumstances require.

15. That no change or modification of or in the terms of this agreement shall be effective unless such change or modification is in writing and signed by the President, a Vice-President, a Secretary, or an Assistant Secretary of the Company.

17. At any time, and until such time as the liability of the Surety under any and all said Bonds is terminated, the Surety shall have the right to reasonable access to the books, records, and accounts of South Edge ; and any bank depositary, material man, supply house, or other person, firm, or corporation when requested by the Surety is hereby authorized to furnish the Surety any information requested including, but not limited to, the status of the work under contracts being performed by South Edge , the condition of the performance of such contracts and payments of accounts.

18. In the event of any breach, delay or default asserted by the obligee to any said Bonds, or South Edge has suspended or ceased work on any contract or contracts covered by any said Bonds, or failed to pay obligations incurred in connection therewith, or in the event of South Edge's conviction for a felony, imprisonment, incompetency, insolvency or bankruptcy of South Edge, or the appointment of a receiver or trustee for South Edge, or the property of South Edge, or in the event of an assignment for the benefit of creditors of South Edge, or if any action is taken by or against South Edge under or by virtue of the National Bankruptcy Act, or should reorganization or arrangement proceedings be filed by or against South Edge under said Act, or if any action is taken by or against South Edge under the insolvency laws of any state, possession, or territory of the United States, the Surety shall have the right, after written notice to South Edge, equal to Indemnitors, and thirty (30) days opportunity to cure, at its option and in its sole discretion, and is hereby authorized, with or without exercising any other right or option conferred upon it by law or in the terms of this Agreement, to take possession of any part or all of the work under any contract or contracts covered by any said Bonds, and,at the expense of South Edge and Indemnitors (in proportion to their respective obligations owing under this Agreement) to complete or arrange for the completion of the same, and South Edge and Indemnitors (in proportion to their respective obligations owing under this Agreement) shall promptly upon demand pay to the Surety all losses, and expenses so incurred.

19. SOUTH EDGE AND THE INDEMNITORS HEREBY ACKNOWLEDGE THAT THIS AGREEMENT IS INTENDED TO COVER ANY BONDS (WHETHER OR NOT COVERED BY ANY APPLICATION SIGNED BY SOUTH EDGE -- SUCH APPLICATION TO BE CONSIDERED BETWEEN THE PARTIES HERETO AS MERELY SUPPLEMENTARY TO THIS GENERAL AGREEMENT OF INDEMNITY) HERETOFORE OR HEREAFTER EXECUTED BY THE COMPANY ON BEHALF OF SOUTH EDGE (WHETHER CONTRACTING ALONE OR AS A JOINT OR CO-ADVENTURER), FROM TIME TO TIME, AND OVER AN INDEFINITE PERIOD OF YEARS, UNTIL THIS AGREEMENT SHALL BE CANCELED IN ACCORDANCE WITH THE TERMS HEREOF.

20. LIMITED MONETARY OBLIGATION OF INDEMNITORS – Notwithstanding any provision to the contrary, the monetary obligation of Indemnitors is apportioned as follows:

A. KB Home – 18.5%
B. Focus South Group – 15.5%
C. Toll Brothers – 10.5%
D. Woodside 8.1%
E. Kimball Hill - 6.3%
F. Pardee Homes 4.9%
G. Meritage – 3.6%
H Beazer – 2.9%

The obligations of Indemnitors shall be several and pro-rata as to all provisions hereof, including but not limited to, the obligation to procure the discharge and exoneration of Surety with respect to any Bond issued hereunder, and the payment of premiums due for any Bond issued for Principal

WE HAVE READ THIS GENERAL AGREEMENT OF INDEMNITY CAREFULLY. THERE ARE NO SEPARATE AGREEMENTS OR UNDERSTANDINGS WHICH IN ANY WAY LESSEN OUR OBLIGATIONS AS ABOVE SET FORTH.

IN TESTIMONY WHEREOF, the Indemnitors have hereunto set their hands and affixed their seals this. This Agreement may be executed in any number of counterparts with the same effect as if all of the Members had signed the same document. All counterparts shall be construed together and shall constitute one agreement.

_____ day of _____, 2006.

SIGNATURE PAGES FOLLOW

Principal
Addresses:

South Edge, LLC
By Holdings Manager, LLC, its General Manager

By: John A. Ritter, its Manager

Indemnitors
Addresses:

Focus South Group, LLC

By: John A. Ritter, its Manager

Meritage Homes Corporation., a Maryland corporation

By: Larry W. Seay, its Chief Financial Officer

Woodside Group, Inc., a Nevada corporation

By: Scott "Chip" Nelson, President

Kimball Hills, Inc., an Illinois corporation

By: David K. Hill, CEO & Chairman of the Board

Weyerhaeuser Real Estate Company, a Washington corporation

By:

Toll Brothers, Inc., a Delaware corporation

Joel H. Rassman, Chief Financial Officer, Executive Vice President & Treasurer

By:

Beazer Homes USA, Inc., a Delaware corporation

Cory J. Boydston, Senior Vice President & Treasurer

By:

Principal
Addresses:

South Edge, LLC
By Building Manager, LLC, its General Manager

By: John A Miller, its Manager

Indemnitors
Addresses:

Focus South Group, LLC

By: John A Miller, its Manager

Meritage Homes Corporation, a Maryland corporation

By: Larry W. Seay, its Chief Financial Officer

Woodside Group, Inc., a Nevada corporation

By: Scott "Chip" Beaton, President

KinderHills, Inc., an Illinois corporation

By: David R. Hill, Jr., its Chairman of the Board

Weyerhaeuser Real Estate Company, a Washington corporation

By:

Toll Brothers, Inc., a Delaware corporation

Joel H. Rassman, Chief Financial Officer, Executive Vice President & Treasurer

By:

Beazer Homes USA, Inc., a Delaware corporation

Mary T. Boyington, Senior Vice President & Treasurer

By:

Principal
Addresses:

South Edge, LLC
By Holdings Manager, LLC, its General Manager

By: John A. Miller, its Manager

Indemnitors
Addresses:

Focus South Group, LLC

By: John A. Miller, its Manager

Meritage Homes Corporation., a Maryland corporation

By: Larry W. Seay, its Chief Financial Officer

Woodside Group, Inc., a Nevada corporation

By: Scott "Chip" Nelson, President

Kimball Hills, Inc., an Illinois corporation

By: David K. Hill, CEO & Chairman of the Board

Weyerhaeuser Real Estate Company, a Washington corporation

By:

Toll Brothers, Inc., a Delaware corporation

Joel H. Rassman, Chief Financial Officer, Executive Vice President & Treasurer

By:

Beazer Homes USA, Inc., a Delaware corporation

Cory J. Boydston, Senior Vice President & Treasurer

By:

Principal
Addresses:

South Edge, LLC
By Holdings Manager, LLC, its General Manager

By: John A. Miller, its Manager

Indemnitors
Addresses:

Focus South Group, LLC

By: John A. Miller, its Manager

Meritage Homes Corporation, a Maryland corporation

By: Larry W. Seay, its Chief Financial Officer

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By: Larry W. Seay, its Chief Financial Officer

Woodside Group, Inc., a Nevada corporation

By: Scott "Chip" Nelson, President

Kimball Hills, Inc., an Illinois corporation

By: David K. Hill, CEO & Chairman of the Board

Weyerhaeuser Real Estate Company, a Washington corporation

By: MYRON J. BANWART, VP-CONTROLLER

Toll Brothers, Inc., a Delaware corporation

Joel H. Rassman, Chief Financial Officer, Executive Vice President & Treasurer

By:

Beazer Homes USA, Inc., a Delaware corporation

Cary J. Boydston, Senior Vice President & Treasurer

By:

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By: John A. Ritter, its Manager

Indemnitors
Addresses:

Focus South Group, LLC

By: John A. Ritter, its Manager

Meritage Homes Corporation., a Maryland corporation

By: Larry W. Seay, its Chief Financial Officer

Woodside Group, Inc., a Nevada corporation

By: Scott "Chip" Nelson, President

Kimball Hills, Inc., an Illinois corporation

By: David K. Hill, CEO & Chairman of the Board

Weyerhaeuser Real Estate Company, a Washington corporation

By:

Toll Brothers, Inc., a Delaware corporation

By: Cary N. Mayo, Group President

By:

Beazer Homes USA, Inc., a Delaware corporation

Cory J. Boydston, Senior Vice President & Treasurer

By:

Principal
Addresses:

South Edge, LLC
By Holdings Manager, LLC, its General Manager

By: John A. Miller, its Manager

Indemnitors
Addresses:

Peous South Group, LLC

By: John A. Miller, its Manager

Meritage Homes Corporation., a Maryland corporation

By: Larry W. Seay, its Chief Financial Officer

Woodside Group, Inc., a Nevada corporation

By: Scott "Chip" Nelson, President

Kimball Hills, Inc., an Illinois corporation

By: David K. Hill, CEO & Chairman of the Board

Weyerhaeuser Real Estate Company, a Washington corporation

By:

Toll Brothers, Inc., a Delaware corporation

Joel H. Rassman, Chief Financial Officer, Executive Vice President & Treasurer

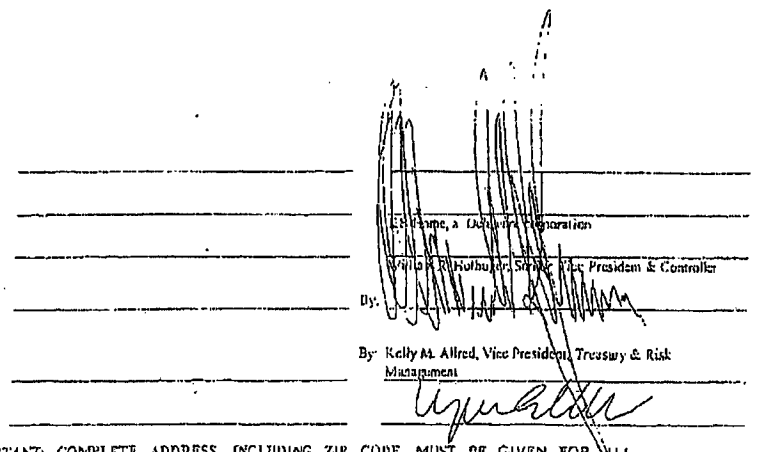
By:

Beazer Homes USA, Inc., a Delaware corporation

1000 Abernathy Rd., Suite 1200
Atlanta, GA 30328

Cory J. Boydston, Senior Vice President & Treasurer

By:



[illegible], a Delaware Corporation

[illegible] Vice President & Controller

By:

By: Kelly M. Allred, Vice President, Treasury & Risk Management

IMPORTANT: COMPLETE ADDRESS, INCLUDING ZIP CODE, MUST BE GIVEN FOR ALL INDEMNITORS. INDIVIDUAL INDEMNITORS MUST FURNISH ADDRESS OF PERMANENT RESIDENCE. (ATTACH SEPARATE SHEET FOR ADDRESSES, IF NECESSARY.)

Chief Justice Robert E. Rose (Ret.)
JAMS
2300 W. Sahara Ave., Suite 900
Las Vegas, NV 89102
Phone: (702) 457-5267
Fax: (702) 437-5267

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

Hon. Luis Cardenas (Ret.)
JAMS
500 N. State College Blvd.
Suite 1400
Orange, CA 92868
Telephone: (714) 939-1300
Fax: (714) 939-8710

Arbitrators

IN THE MATTER OF THE ARBITRATION

BETWEEN

C & S COMPANY, INC.,

Claimant/Counterdefendant,

MERCHANTS BONDING COMPANY,

Claimant-In-Intervention,

vs.

SOUTH EDGE, LLC, a Nevada Limited Liability Company, and BOND SAFEGUARD INSURANCE COMPANY,

Respondents/Counterclaimants.

JAMS Ref. No.: 1260001162

AWARD[1]

[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.

I. INTRODUCTION

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

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

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

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[2] Merchants was a Claimant-in-Intervention.

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

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

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

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

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

The following witnesses testified during the course of the arbitration:

1. Brad Lindberg
2. Stacey Lindberg
3. Brooks Cox
4. Stavros Chrysovergas
5. Thomas Tomeo
6. Sean Harron
7. Barbara Carlos
8. Larry Bross
9. Keith Mattecheck
10. Jack Bassett
11. Steven Viani

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

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

II. FACTUAL SUMMARY

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

A. Bid Process.

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

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

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[5] The next lowest bid was $4,748,994.35 (Exh. 29).

[6] Mr. Lindberg was a principal at C&S.

B. Contract Provisions.

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

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

C. Changed Site Conditions.

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

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

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

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

After utilizing various equipment to excavate the encountered rock layers, C&S eventually leased a H.L. Chapman from Texas in December 2006.[8] This piece of equipment was sufficient to complete the Volunteer Project.[9]

D. Extra Work Orders.

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

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[8] Mr. Basset had eventually recommended this equipment.

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

continued its excavation work after this meeting.

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

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

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

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

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

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

[12] Mr. Bassett testified he would not have said this.

[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.

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

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

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

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

Respondent expert Steven Viani opined regarding the boring

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

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

E. Findings Regarding Changed Conditions.

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

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

b) C&S's due diligence, before contracting, was reasonable. C&S considered the soils reports provided by S/E, visited the site, discussed the general site area with another excavation contractor, requested other reports, if any, from Landtek and relied upon its own experience in other local excavation projects.

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

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

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

years of experience.

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

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

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

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

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

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

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

F. Compensation For Changed Conditions and Retention Amounts.[15]

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

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

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[15] C&S also has claims for violations of the Prompt Payment Act.

[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.

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

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

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

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

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

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[17] S/E had received pay application 5 (Exh. 626) dated 1/31/07; pay application 6 (Exh. 636) dated 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.

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

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

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

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

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

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[18] C&S did comply substantially with the contractual notice requirements in the scope and delivery of 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.

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

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

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

Having made the findings regarding the Prompt Pay Act claims, the Panel then analyzed the evidence to determine whether C&S has satisfied its burden to prove it has incurred the costs sought in those applications. Mr. Tomeo has testified that his investigation led him to the opinion that C&S incurred $3,699,175.17[19] in extra costs for the work on the Volunteer Project (Exh. 134 and 135). This total is higher than that sought by C&S in its pay applications and change orders. Those figures were $778,337.50, $1,430,552.84, $515,809.08 and $50,300 for a total of $2,774,999.42.

Having considered the testimony of percipient and expert witnesses as well as relevant exhibits on the issue of damages, the Panel concludes there is insufficient evidence to support Mr. Tomeo's total of $3,699,175.17.[20] However, when his opinions are considered with the

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

[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.

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

1. $ 778,337.50
2. 1,430,552.84
3. 486,846.16[21]
4. 50,300.00

Total: $2,746,036.50

G. Lien Claims.

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

H. Claimants' Additional Claims.

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

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

[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.

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

I. S/E Counterclaim.

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

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

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

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[22] Pay applications 5-9.

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

III. ATTORNEY FEES, COSTS AND INTEREST

A. Attorney Fees.

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

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

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

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

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

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

B. Attorney Fees Were Necessary and Reasonable.

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

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

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

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

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

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

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

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

C. Costs of Proceedings.

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

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

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

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

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

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

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

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

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

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

D. Interest.

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

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

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

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

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

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

E. Prompt Pay Act Interest.

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

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

IV. CONCLUSION

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

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

a) Principal of $2,746,036.50.

b) Attorney fees of $183,340.33 (incurred by C&S).

c) Attorney fees of $491,474.84 (incurred by Merchants).

d) Costs of $73,376.32 (incurred by C&S).

e) Costs of $233,146.68 (incurred by Merchants).

f) Interest on Mechanics Lien of $437,548.40, calculated to 12/30/10.

g) Interest on Prompt Pay Act of $22,369.20, calculated to 12/30/10.

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

Dated: _____

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

Dated: _____

_____
HON. LUIS CARDENAS (Ret.),
Arbitrator

Dated: _____

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

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

Dated: 5/13/2011

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

Dated: 5-13-2011

HON. LUIS CARDENAS (Ret.),
Arbitrator

Dated: _____

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

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

Dated: _____

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

Dated: _____

HON. LUIS CARDENAS (Ret.),
Arbitrator

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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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):**

Creditor: (7127658) Bond Safeguard/Lexon Insurance Co. c/o Christine A. Roberts, Esq. Sullivan Hill Lewin Rez & Engel 228 South 4th Street, 1st Floor Las Vegas, NV 89101	**Claim No: 34** *Original Filed Date*: 06/29/2011 *Original Entered Date*: 06/29/2011	*Status:* *Filed by:* CR *Entered by:* ROBERTS, CHRISTINE *Modified:*

Unsecured claimed: $3061458.26

Total claimed: $3061458.26

History:

Details 34-1 06/29/2011 Claim #34 filed by Bond Safeguard/Lexon Insurance Co., total amount claimed: $3061458.26 (ROBERTS, CHRISTINE)

Description: (34-1) C & S Company - Bond #5030223

Remarks:

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	$3061458.26	
Secured		
Priority		
Unknown		
Administrative		
Total	**$3061458.26**	**$0.00**