IN THE SUPREME COURT

STATE OF ARIZONA

THE WEITZ COMPANY, LLC, an Iowa limited liability company, Plaintiff/Appellee, vs. NICHOLAS HETH, a single man, *et al.*, Defendants/Appellants.	No. CV-13-0378-PR No. 1 CA-CV-11-0788 Maricopa County Superior Court No. CV 2008-028378

APPELLEE'S SUPPLEMENTAL BRIEF

Michael J. Holden (State Bar No. 006361)
mholden@holdenwillits.com
Barry A. Willits (State Bar No. 016091)
bwillits@holdenwillits.com
Holden Willits PLC (Bar No. 00593200)
Two North Central Avenue, Suite 1220
Phoenix, Arizona 85004
Telephone (602) 508-6210
Facsimile (602) 508-6211

Jonathan Sternberg
(Missouri Bar No. 59533)
jonathan@sternberg-law.com
Jonathan Sternberg, Attorney, P.C.
911 Main Street, Suite 2300
Kansas City, Missouri 64105
Telephone (816) 292-7000
Facsimile (816) 292-7050

Attorneys for Plaintiff/Appellee

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Argument

Arizona's mechanic's and materialmen's lien statute expressly prefers mechanic's liens over all later-attaching interests. A.R.S. § 33-992(A). Its legislative purpose is to ensure contractors are paid for the costs of improving property. Appellants seek to circumvent this statutory right, arguing it somehow would allow an *unpaid contractor who created the very asset in which they claim an interest* to "receiv[e] an unearned windfall." RESTATEMENT (THIRD) OF PROPERTY: MORTGAGES § 7.6 cmt. a (1997).

Equity, however, is unavailable to alter the contractor's clearly-defined statutory right to first priority. In any event, equitable subrogation would be improper here because: (1) the Restatement does not allow partial subrogation; (2) granting equitable subrogation to Appellants under the circumstances of this case would prejudice Weitz; and (3) disallowing equitable subrogation would not give Weitz an "unearned windfall."[1]

I. By statute, mechanic's liens are entitled to preferential treatment over "*all*" later-attaching instruments.

Contractors are unlike the judgment lienors, *see Sourcecorp, Inc. v. Norcutt*, 229 Ariz. 272, 274 P.3d 1206 (2012), or the holders of trust deeds, *see Herberman v. Bergstrom*, 168 Ariz. 587, 816 P.2d 244 (App. 1991), at issue in other equitable

[1] Appellee The Weitz Company LLC ("Weitz") will not repeat the factual and legal issues it raised in both its brief before the Court of Appeals and its Response to Appellants' Petition for Review, which are incorporated herein.

subrogation cases. Rather, contractors are lenders of first resort who use their labor and materials to enhance the value of an improvement upon a promise to be paid *after* their work is performed. By definition, the more credit a contractor supplies to a project as the work is completed, the more value the improvement has to the owner and its lender. Stated succinctly, contractors "are generally in a vulnerable position because they extend large blocks of credit; invest significant time, labor, and materials into a project; and have any number of workers vitally depend upon them for eventual payment." *In re Fontainebleu Las Vegas Holdings, LLC*, 289 P.3d 1199, 1210 (Nev. 2012) (citation omitted).

A. Arizona's lien statute jealously protects contractors.

Because contractors "contribute their labor and means to enhance the value of the property of another," our legislature has decided they "should be jealously protected." *Wylie v. Douglas Lumber Co.*, 39 Ariz. 511, 515, 8 P.2d 258, 260 (1932). The mechanic's lien statute achieves this by: (1) guaranteeing that contractors "shall have a lien on such building, structure or improvement for the work or labor done," A.R.S. § 33-981(A); and (2) mandating that those liens be given priority over "***all*** liens, mortgages or other encumbrances upon the property attaching subsequent to the time the labor was commenced" on the project. A.R.S. § 33-992(A) (emphasis added). The only statutory exception is for a construction

lender's mortgage or deed of trust "recorded within ten days after labor was commenced or the materials were commenced to be furnished." *Id.*

Our legislature could have, but did not, create an additional exception for equitably subrogated interests. The Internal Revenue Code, for example, creates an express exception for subrogation rights with respect to the priority of federal tax liens. *See* 26 U.S.C. § 6323(i)(2). Moreover, our legislature also has favored mechanic's liens over other recognized special rights, such as the homestead exemption. § 33-1103(A)(2). This statutory feature alone distinguishes Weitz's mechanic's lien rights from the judgment lien at issue in *Sourcecorp*, 229 Ariz. at 272, 274 P.3d at 1206, which enjoyed no such statutory preference.

B. Sales after a mechanic's lien has attached are subject to the lien.

Because the statute expressly provides a contractor's lien is superior to ***all*** other later-attaching interests, contractors in Arizona naturally expect that any conveyance of an improvement after construction begins will be junior to that lien. The statute's express language informs the contractor that it can be confident of being paid for enhancing a property, which cannot be conveyed free and clear of the contractor's lien.

Making conveyances subject to mechanic's liens has been a vital principle common to the various lien systems throughout America for well over a century. *See* Samuel L. Phillips, A TREATISE ON THE LAW OF MECHANICS' LIENS § 225

(1883) (mechanic's lien's "true function is to prevent subsequent alienations and encumbrances, except in subordination to itself. It does not, however, prevent the sale or mortgage of the property, but only subordinates the latter to the former") (Appx. p. 6); Louis Boisot, TREATISE ON MECHANICS' LIENS § 313 at 306 (1897) ("the rule is a general one that a purchaser of land to which a mechanic's lien has attached takes title subject to such lien") (Appx. p. 17); *Scottsdale Mem'l Health Sys. v. Clark*, 157 Ariz. 461, 468, 759 P.2d 607, 614 (1988) (non-judicial foreclosure sale property purchaser took subject to preexisting mechanic's lien).

Because the mechanic's lien has priority over all later-attaching interests, the "property in its improved condition…is a fund set aside for the payment of such lien creditors." *Wylie*, 39 Ariz. at 521, 8 P.2d at 260. As one court explained the year after Arizona enacted its first mechanic's lien statute:

> [The owner] could not sell, nor could [the buyer] purchase, any better title than [the owner] held. [The buyer] therefore purchased the property subject to the same lien that existed against it while it was held by [the owner], nor has he done any act to free it or the money in his hands from the lien. *The [purchase] money thus received became, in equity, a trust fund liable to discharge the lien.*

Ellet v. Tyler, 41 Ill. 449 at *1 (1866) (emphasis added); *see also* Boisot, *supra*, § 4 at 4 ("The doctrine upon which the [mechanic's] lien is founded is the consideration of natural justice that the party who has enhanced the value of property by incorporating therein his labor or materials shall have a preferred claim on such property for the value of his labor or materials").

Arizona's statutory mechanisms favoring contractors are why Weitz was willing to rely on the promises of the owner and its construction lender that Weitz would be paid from sale proceeds if Weitz continued construction. *Infra* at § IV.B. Even if the owner and lender reneged, Weitz knew it still would have priority over the later-attaching interests of any purchasers and their lenders. *Id.*

II. The legislature balanced the statutory preference for mechanic's liens against the interest of owners and lenders.

The preference the statute affords to contractors comes with a price. Balanced against their right to priority over all later-attaching interests are:

- Stringent lien perfection and notice requirements, the failure to follow any one of which could prove fatal to the contractor's lien.
- Statutory mechanisms by which an owner and its lender can protect themselves against a contractor's lien – or even unilaterally discharge it; and
- Onerous statutory penalties against a contractor for recording an improper lien, as well as a right of owners and lenders to file a special action with expedited proceedings to have the lien removed altogether.

Weitz addressed these specific statutory tradeoffs at length in its Response to the Petition for Review (pp. 5-9) and will not repeat them here. Suffice it to say, the legislature enacted a comprehensive system to balance the rights of all stakeholders, including subsequent purchasers and their lenders.

Courts should be especially careful not to use equity to upset the balance the legislature achieved for two additional reasons. First, it is well-established that contractors may not invoke equity to shield them against errors in perfecting their liens: "[I]t is beyond the remedial scope of equity…to protect the lien claimant against" its failure to comply with statutory requirements. *Lewis v. Midway Lumber, Inc.*, 114 Ariz. 426, 432, 561 P.2d 750, 756 (App. 1977). As a result, even seemingly minor procedural mistakes often are fatal to mechanic's lien claimants. *See, e.g.*, *MLM Constr. Co. v. Pace Corp.*, 172 Ariz. 226, 232, 836 P.2d 439, 445 (App. 1992) (failure to attach proof of service of 20-day notice was fatal to lien even though there was actual receipt of the notice). If equity cannot repair a technically deficient lien because it would upset the statutory balance, then allowing equity to alter a properly-perfected lien's statutory priority rights would upset that same balance.

Second, the priority § 33-992(A) affords is itself the result of a legislative compromise. In some states, mechanic's liens have absolute priority over all other interests, even prior-recorded loans. *See, e.g.*, *Ex parte Lawson*, 6 So.3d 7, 11 (Ala. 2008). From its very beginning in 1865, however, Arizona's lien statute only has afforded lien claimants priority over later-attaching interests, vesting Arizona contractors with lesser rights than those in some other states. *Weitz Co. v. Heth*, 233 Ariz. 442, 445 ¶ 8, 314 P.3d 569, 572 (App. 2013).

In short, grafting equity onto the lien statute's priority regimen to disfavor Arizona's "jealously protected" contractors would alter the delicate balance achieved by the legislature.

III. The lien statute, not equity, governs priority of mechanic's liens.

Although courts uniformly have held equity may not be used to shield a contractor from its failure to meet the statute's requirements, Appellants nonetheless seek to use it as a sword to alter Weitz's clearly-defined statutory priority rights. The Court of Appeals correctly held it was improper to judicially modify Weitz's statutory rights.

A. Weitz has priority under the lien statute.

The mechanic's lien statute plainly and unambiguously states what Weitz's rights are.

Under the first sentence of § 33-992(A), contractor liens "are preferred to ***all*** liens, mortgages or other encumbrances upon the property attaching subsequent to the time the labor was commenced," with only one express exception that is not at issue here. (Emphasis added). Weitz's lien attached for priority purposes when it commenced work in November 2005. All of Appellants' interests, by contrast, did not even exist when Weitz began work. Rather, their interests attached years later when the trust deeds were recorded. *See, e.g., Wooldridge Constr. Co. v. First Nat'l Bank of Arizona*, 130 Ariz. 86, 634 P.2d 13 (App. 1981) (deed of trust

attached for purposes of determining priority under mechanic's lien statute when it was recorded). The express language of the statute thus vests priority in Weitz's lien over these later-attaching interests.

In addition, the second sentence of § 33-992(A) provides an independent basis for preferring Weitz's lien over Appellants' interests. It requires that mechanics' liens be "preferred to ***all*** liens, mortgages and other encumbrances of which the lienholder had no actual or constructive notice at the time the lienholder commenced labor or commenced to furnish materials...." (Emphasis added). At the time Weitz began construction in 2005, it could not have had knowledge, constructive or actual, about Appellants' interests because those interests did not even exist until 2007 and 2008. As discussed below, Appellants did not publicly assert their claimed equitable rights except as a defense in this lawsuit.

Under the statute, Weitz has priority both because its interest attached prior and because it had no knowledge of Appellants' alleged interests.

B. Equitable subrogation would alter Weitz's unambiguous lien rights.

Appellants seek to nullify the express statutory outcome. Under the statute, Weitz has the clearly-defined right to priority because (i) its lien attached prior to Appellants' later-created interests; and (ii) Weitz had no knowledge, constructive or actual, of those later-created interests when it began work. Appellants want equity to take away these rights. But "[e]quity has no power to assail or unsettle a

perfect and independent legal right clearly defined and established by the statute." *Valley Drive-In Theatre Corp. v. Superior Court*, 79 Ariz. 396, 399, 291 P.2d 213, 215 (1955). Because Weitz's rights are clearly defined by the statute, equity must stay its hand.

Tellingly, Appellants ignore both the mechanic's lien statute's express language and its legislative intent to ensure contractors are paid. They avoid grappling with the legislature's delicate balance of competing interests.

The reason for this is plain – equitable subrogation is inconsistent with the statute's plain language and framework. For example, the statute expressly provides that later-attaching interests are junior to Weitz's lien. The timing of the attachment drives the statutory consequences. Under Appellants' scheme, by contrast, the units Weitz created at its own cost can be bought and sold again and again, with these later-recorded interests retroactively – and contrary to the statute – having priority over Weitz's lien in perpetuity, regardless of their actual dates of attachment. Appellants' desired outcome cannot coexist within a statutory rubric whose very purpose is to ensure payment by bestowing priority to contractors over "all" later-recorded interests.

Appellants' argument also would upset the statutory balance in other ways. Under A.R.S. § 33-992.01, contractors must provide a specific notice to lenders within 20 days of commencing work, and failure to provide this notice is fatal to

the contractor's lien rights. *KAZ Constr., Inc. v. Newport Equity Partners*, 229 Ariz. 303, 307 ¶16, 275 P.3d 602, 606 (App. 2012). If a purchaser's lender were always subrogated into a prior lender's senior priority, as Appellants imagine, the statutory notice requirement would be of no effect, and contractors could lose important lien rights for failing to perform an unnecessary act. Similarly, the statute allows owners and lenders to file a special action in court to have a wrongful lien removed. A.R.S. § 33-420. Under Appellants' reasoning, however, rather than having to prove any defect in court, the collateral could be bought and sold *forever* without regard to a properly-recorded lien, rendering that remedy superfluous.

This is not the statutory framework established by the legislature.

C. Appellants have the burden to show equity would not alter Weitz's clearly-defined statutory rights.

Rather than explaining how applying equitable subrogation here would be consistent with the statutory system, Appellants argue Weitz must prove the mechanic's lien statutes intend to preclude "common law"[2] equitable subrogation (Petition at 10). But the fulcrum in this case is not what the statute says about equitable subrogation, but rather what it says about the priority of Weitz's lien.

[2] Equitable subrogation "was adopted from the Roman and not from the common law," *Mosher v. Conway*, 45 Ariz. 463, 468, 46 P.2d 110, 112 (1935).

The Court must, of course, give effect to the plain meaning of the statute's express terms. *Hall v. Read Dev., Inc.*, 229 Ariz. 277, 279 ¶ 6, 274 P.3d 1211, 1213 (App. 2012). Here, the statute states, and has stated since 1865, Weitz's lien has priority over "***all***" later-attaching interests. *Weitz*, 233 Ariz. at 445 ¶ 8, 314 P.3d at 572. The only logical conclusion to draw from this 150 years of consistent legislative expression is that the statute means what it says. The plain meaning of "all" is "all," not "less than all."

There is no ambiguity as to the priority of Weitz's lien under the statute. The Court of Appeals correctly gave effect to the statute's plain language.

IV. Appellants cannot satisfy the requirements for equitable subrogation.

Under the circumstances of this case, equitable subrogation cannot apply in any event. The Restatement includes at least three requirements Appellants must satisfy: (1) they must discharge in full the interest into whose shoes they seek to jump; (2) granting subrogation cannot prejudice Weitz; and (3) subrogation must be necessary to avoid Weitz receiving an unearned windfall.

Appellants fail to satisfy any of these requirements, let alone all three.

A. Appellants, both individually and collectively, only partially discharged the prior-attaching construction loan.

Section 7.6(a) of the Restatement creates a black-letter rule against partial subrogation. As explained in its comments:

> Where subrogation to a mortgage is sought, *the entire obligation secured by the mortgage must be discharged*. ***Partial subrogation to a mortgage is not permitted***. The reason is that partial subrogation would have the effect of dividing the security between the original obligee and the subrogee, imposing unexpected burdens and potential complexities of division of the security and marshalling upon the original mortgagee.

Restatement § 7.6 cmt. a (emphasis added). Appellants' attempt to invoke equitable subrogation here runs afoul of this bright-line rule.

The "obligation secured by the mortgage" that Appellants must "fully discharge" is the prior recorded trust deed for the construction loan. As the closing statements from the new unit purchasers' lenders show, neither individually nor in the aggregate did they paid off this encumbrance in full (I.R. 502, Exs. 12a, 12b). Rather, a portion of each of the more than 90 transactions only paid a small percentage of the $60 million loan amount and, even when combined, the total of the 90 transactions did not "fully discharge" it (I.R. 502, Exs. 12a, 12b; 512, p. 3).

Appellants contend they fully discharged the construction lender's interest *in each individual unit* because they paid "releases prices" set forth in the construction loan for each unit (Petition at 4-5). This is simply untrue. There never were any "release price" or "step down" provisions allocating the overall loan among the individual units in any construction loan document (I.R. 550, Ex. 2, ¶

13(a); Appendix 18).[3] Instead, the purchasers merely paid a price the sellers would accept. Thus, the original construction loan *was not* hundreds of mini-loans individually dischargeable.

Rather, the construction lender held a single deed of trust in the entire property, and that single encumbrance included (without differentiation) 165 residential units, all the common areas, the commercial storefronts on the first floor, and much of the land surrounding the property. Appellants – representing approximately 90 of the 165 total units – neither individually nor collectively "fully discharged" that trust deed when the 90 units were purchased.

These circumstances perfectly illustrate the complexities and burdens motivating the Restatement's rule against dividing the security and allowing partial subrogation to it. Rather than one party seeking to step into the shoes of another, over 100 different parties seek to step into a portion of one pair of shoes. As a result, to effect Appellants' desired subrogation, the circumstances of over 100 claimed equitable rights would have to be examined, including:

- Accounting for all the monthly mortgage payments made (or not made, which would result in penalty fees and foreclosures) in the approximately six years since the units were originally purchased; and

[3] The project owner testified he failed to negotiate a "step down" of the release prices for each unit with the construction lender (I.R. 816, Ex. B; Appx. 20). Nothing in the record controverts this testimony.

- Adjusting "the debt balance that would have existed if the interest rate had been unchanged" from the interest of the construction loan for each of the sold units. Restatement § 7.6 cmt. e;

In this case, these complexities only have amplified over time. In the six years since Weitz first filed its foreclosure action, thousands of monthly mortgage payments have been made, thus paying down (or even extinguishing) the amount of the putative equitable interest. Many of the units have been purchased and sold several times over. Others have been foreclosed upon.

Determining the amount equitably subrogated for each unit over time would be a Herculean task, requiring complicated title and accounting analysis for each unit, the cost of which may well exceed the amount of Weitz's lien allocated to each unit. *See Richards v. Sec. Pac. Nat'l Bank*, 849 P.2d 606, 612 n.6 (Utah 1993) ("illustrat[ing] the wasteful nature of litigation over the doctrine of equitable subrogation" by observing that the plaintiff's "five thousand dollar lien" was "the subject of a judgment, including costs and fees, of nearly ten thousand dollars").

Partial subrogation in this case also would beg additional important questions. May subrogation be perpetuated for an unlimited number of sales and resales, as Appellants seem to argue, or only once? Would it apply to purchasers of units from all-cash owners (the second-tier purchaser is not discharging the "obligation" of another because the seller has no mortgage)? Are purchasers at

foreclosure sales entitled to subrogation?[4] Can Weitz still foreclose the owner's interest and take the property subject to the equitable lien?

These complications show why the Restatement disallows partial subrogation. The Court should not disregard this bright-line rule here.

B. Subrogation in this case would be *inequitable* because it would prejudice Weitz, who was induced to continue work by promises of payment from sale proceeds.

Under the Restatement, and as this Court held in *Sourcecorp*, 229 Ariz. at 275 ¶ 25, 274 P.3d at 1209, subrogation is unavailable if it would materially prejudice Weitz. Under the undisputed circumstances here, subrogation plainly would be inequitable.

In late summer 2007, the construction lender indicated it no longer would fund the final $4 million of construction costs "due to [its] capital requirements imposed by regulatory agencies" (I.R. 512, Ex. A, ¶ 9). The project owner, the lender, and Weitz began discussing alternative methods of funding the Project to completion (I.R. 816, Ex. B). Ultimately, the parties agreed that, if Weitz continued work, Weitz would be paid from the proceeds obtained in selling off the remaining individual condominium units (I.R. 816, Ex. B). The construction lender agreed to allow Weitz to be paid sale proceeds "so that a lien wouldn't be filed" against the project, which also was its collateral (I.R. 816, Ex. B).

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[4] *Scottsdale Mem'l*, 157 Ariz. at 468, 759 P.2d at 614 (purchaser at non-judicial foreclosure sale took property subject to preexisting mechanic's lien).

Weitz relied on this promise and continued to use its own credit to finish units or they otherwise could not be sold (I.R. 705, Ex. 6). After completion, the construction lender reneged on its promise and Weitz's final ten pay applications went unpaid (I.R. 469, Ex. 1; 816, Ex. B). In short, Weitz incurred additional costs it did not have to in reliance of the lender's promise. Those expenditures benefitted the lender at Weitz's expense. If anyone should be equitably subrogated to the construction lender's lien position, it should be Weitz. *See In re Mortgages Ltd.*, 482 B.R. 298, 309-10 (Bankr. D.Ariz. 2012) (lender who failed to fully fund its loan would be unjustly enriched if equitable subrogation were applied).

Weitz's situation is nearly identical to the mechanic's lien holder in *First Am. Title Ins. Co. v. Liberty Capital Starpoint*, 254 P.3d 835 (Wash. App. 2011). There, a junior construction lender (Liberty) paid off the contractor's mechanic's lien, took an assignment, and then sought to foreclose out the interests of the individual unit owners, just as Weitz has here. *Id.* at 839. There, as here, the lenders for the purchasers argued they should be equitably subrogated into the position of the construction lender and ahead of Liberty's mechanic's lien because they "paid in full the portion of" the construction loan allocated to their units. *Id.* at 846-47. The court held such subrogation would prejudice Liberty's superior lien interests because Liberty was supposed to have final approval over all sales, presumably to ensure it was paid from those sales. *Id.* at 847-49. When the sales

happened without Liberty's approval, Liberty was prejudiced by being deprived of the chance to protect itself, such as by "demanding additional collateral from" the developer. *Id.* at 848.

The same is true here. Had Weitz known the construction lender unilaterally would take all sale proceeds in violation of its agreement with Weitz, Weitz could have acted to protect itself, such as stopping work or "demanding additional collateral." *Id.* Having relied on the lender's broken promise, however, the collateral became more valuable at Weitz's expense.

Weitz also has been prejudiced by Appellants' failure timely to assert their alleged equitable rights. Under the statute, mechanic's liens are "preferred to all liens, mortgages and other encumbrances of which the lienholder had no actual or constructive notice at the time the lienholder commenced labor…." § 33-992(A). Similarly, the Restatement recognizes that prejudice often results from a delay by a payor in "publicly asserting subrogation to the mortgage paid" because "it may not be apparent to the…intervening interest that the priority of the old first mortgage will be preserved by subrogation." Restatement, § 7.6 cmt. f.

Partly for this reason, the court in *Mortgages Ltd.*, 482 B.R. at 309-10, found subrogation was inappropriate where the party seeking subrogation "did absolutely nothing to give any notice to the [mechanic's lien claimants] that it would assert a priority ahead of them…." As a result, "the contractors continued to incur more

debt, and continued to improve [the other party]'s collateral, while the public record led them to believe they had priority…." *Id.* at 310.

Again, the same is true here. Recordings reflecting unit sales began as early as September 25, 2007, and continued through the date Weitz filed its foreclosure complaint (I.R. 532, Ex. B). During that time, none of the 90 purchasers or their lenders recorded anything that would alert the public–or Weitz–that they intended to assert a priority over Weitz's mechanic's lien rights. Weitz blindly continued to work, believing the statute afforded it priority over the later-recorded interests.

C. Awarding Weitz priority would not give it an unearned windfall.

The Restatement only allows subrogation if required "to avoid a person's receiving an unearned windfall at the expense of another." § 7.6 cmt. a. Here, there is nothing remotely "unearned" about Weitz being paid as promised for finishing the project. As the Supreme Court of Alabama concluded in *Lawson:*

> **If we held against [the contractor], [the owner] would receive the windfall. [The owner] would have the value of [the contractor's] work without having paid anything for it.** The legislature created a specific statutory scheme in which a materialman's lien is given priority over a subsequently created mortgage. The lenders who loaned the money to the purchasers…are sophisticated mortgage companies that could have easily protected their interests.

6 So. 3d at 15 (emphasis added).

Weitz having priority over later-recorded interests for creating the very collateral at issue would be neither a "windfall" nor "unearned." Conversely, each

of Appellants has a readily available contractual remedy: title insurance that insures against mechanic's liens. Granting equitable subrogation in this case would result in a windfall to the title insurers.

V. Following the statute would not hobble lending or title insurance.

Appellants and their *amici* warn that any limits on equitable subrogation could cause lenders to withdraw from the market and expose title insurers to risk. As other courts have observed, however, "commercially sophisticated lenders should protect themselves in contract. Commercial lenders can easily examine the property, ask specific questions regarding the existence of intervening lienholders, acquire subordination agreements with any lienholders that exist, or, in many cases, assume the rights of the earlier lender by assignment." *Richards*, 849 P.2d at 612. Indeed, inquiring into potential lien claims actually is contemplated by our lien statute, which requires that all parties furnishing labor or materials to a project send a 20-day preliminary lien notice to the project lender. § 33-992.01.

Other protection methods are illustrated by what the title insurer did in this case for all original unit sales on this project. It required the project owner to indemnify it specifically against mechanic's lien claims. That agreement provided:

- The owner was commencing work on real property "which may thereafter result in Mechanics' Liens" (§ 2);
- The owner "has an interest in…insuring against loss which may be sustained by reason of Mechanics' Liens, or without exception to Mechanics' Liens, arising out of such work of improvement" (§ 3);

- To "induce" the title insurer to issue "such policies of title insurance …[Owner] promises and agrees to hold harmless, protect and indemnify [the title insurer] from and against any and all liabilities … resulting directly or indirectly from any Mechanics' Liens" (§ 5).

(I.R. 816, Ex. 5). After Weitz recorded its lien¸ the title insurer even held back $50,000 from at least one unit's sale proceeds to be held in escrow to pay off the fraction of Weitz's lien attached to that unit (I.R. 562, Ex. 2; I.R. 641, Ex. 2).

It "is the duty of those purchasing…property to ascertain whether it is encumbered by mechanics' liens." Phillips, *supra* at § 227 (Appx. p. 8). Having undertaken that investigation, purchasing parties can protect themselves through contract (assignments, indemnity, or subordination), insurance, statutory or private bonds, or by refusing to close without a proper statutory lien release from the contractor. Following the mechanic's lien statute would have no negative effects. Using a judicial fiction to carry out a coup d'état on the legislature's intent would.

Conclusion

The Court should affirm the Court of Appeals' opinion, which affirmed the superior court's judgment.

Respectfully submitted this 12th day of May, 2014.

HOLDEN WILLITS PLC

By /s/Michael J. Holden
Michael J. Holden
Barry A. Willits

JONATHAN STERNBERG, P.C.

By /s/Jonathan Sternberg
Jonathan Sternberg

Attorneys for Appellee/The Weitz Company, LLC

CERTIFICATE OF COMPLIANCE

Pursuant to ARCAP 23(c), I certify that this response uses proportionally spaced typeface of 14 points, is double-spaced using a Times New Roman font, and contains 4,725 words. The word count was determined by the word processing system used to prepare this response.

Dated: May 12, 2014.

HOLDEN WILLITS PLC

By /s/Michael J. Holden
Michael J. Holden
Barry A. Willits
Attorneys for Appellee
The Weitz Company, L.L.C.