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A. Glass Bagging's notice does not contain an adequate and ascertainable description.

Under West Virginia law, the notice of lien filed for recordation must describe the improvement with sufficient definiteness that the same may be readily identified. See *Scott Lumber Co. v. Wheeling Cemetery Ass'n*, 117 W.Va. 534, 536, 186 S.E. 117, 118 (1936). An "adequate and ascertainable" description of the land upon which a lien is claimed is essential in order to comply with Code 38-2-11. See *Duncan Box & Lumber Co. v. Stewart*, 126 W.Va. 871, 872, 30 S.E.2d 391, 392 (1944).

In *Duncan Box*, this Court held that "the occupation of a lot by a building sufficiently described to be identified if located, without more, is certainly not a description of a land upon which it rests. The statute requires that the buildings be listed and land described." *Id.* Thus, the lien claimant is required to not only describe the improvement but to also describe the land on which it rests. Moreover, the description must be such that a mere inspection of the records should disclose all the information necessary to enable those interested in the property to determine the existence of the liens on the property. See *Niswander and Co. v. Black*, 50 W.Va. 188, 196, 40 S.E. 431, 435

(1901)(quoting *Loan Co. v. Furbush*, 80 F. 631 (4th Cir. 1897)).

The description in Glass Bagging's lien is as follows:

1501 Wheeling Avenue, Glendale, Marshall County, West Virginia, including pipeline installed by L.A. Pipeline Construction Co. for Caiman Energy, LLC from December 17, 2010 to April 20, 2011 in Marshall County, West Virginia.

The most specific portion of Glass Bagging's description is 1501 Wheeling Avenue, Glendale. Yet, as pointed out in the affidavit of Richard West (J.A., 340), the materials Glass Bagging delivered were not incorporated into any improvements on the land located at this address.

Glass Bagging does not even claim to have a lien on the property located at 1501 Wheeling Avenue, Glendale. Instead, Glass Bagging pleads that this erroneous address "should not be detrimental to Glass Bagging's claim." Brief, p.12. Yet, the problem posed by this misleading inaccuracy is highlighted in the cases that Glass Bagging has presented. See *Treasure Valley Plumbing & Heating v. Earth Resources Co.*, 106 Idaho 920, 923, 684 P.2d 322, 325 (Id. 1984)("There is no contention here that the property owner or anyone else interested in the property was misled by the description"); *Great Plains Equip. v. Northwest Pipeline Corp.*, 132 Idaho 754, 704, 979 P.2d 627, 637 (1999) ("unless the description was such as to mislead the owner, any mere lack of accuracy therein is not available as a defense.")(quoting *Turnbro v. Keele*, 86 Idaho 101,

106, 383 P.2d 591, 594 (1963)); *Drexel v. Richards*, 50 Neb. 509, 512, 70 N.W. 23, 24 (1897)(“The owners of premises could not have been misled by the description, much less does the evidence show that they were in any manner deceived thereby.”).

In this case, the most specific portion of Glass Bagging’s description is completely wrong.¹ This mistake would mislead anyone reviewing the description into believing that it affected the property at that location. It is just like the situation in *Duncan Box*, 126 W.Va. at 873, where the lien claimant’s description covered “with exact accuracy, the wrong lot.”

Glass Bagging asserts that a prudent entity or individual would not be misled to believe that the pipeline was situated at 1501 Wheeling Avenue. Brief, p.12. Glass Bagging even implausibly insists that a person or entity reviewing the incorrect address “would have been put on inquiry as to the correct location of the lien.” Brief, p.12. So, according to Glass Bagging, the inclusion of an incorrect address actually makes the description more accurate and ascertainable than if there had been no address at all.

Aside from the erroneous street address, the only other information contained in Glass Bagging’s description

¹In fact, it is quite possible that Glass Bagging’s lien has slandered the title of the property located at 1501 Wheeling Avenue, Glendale.

is 1) that the improvement was a pipeline, 2) that the pipeline was installed by L.A. Pipeline, 3) that the pipeline was installed for Caiman Energy, 4) the period of time in which the pipeline was constructed, and 5) the county and state where the pipeline is located. The purpose of the description, however, is not to identify who, when, or for whom the pipeline was constructed; rather, it is to show where is the pipeline located. None of the information in Glass Bagging's lien identifies the location of the pipeline within Marshall County.

Glass Bagging says that metes and bounds are not required. Brief, p. 8. That may be true, but in the absence of metes and bounds, the location must be described in some other way. As suggested in L.A. Pipeline's Opening Brief, this could include a description of "the property that the pipeline would be running through, or even the line under construction between two locations." L.A. Pipeline Opening Brief, p. 11. Glass Bagging's description does not include any of this information.

Glass Bagging asks this Court to compare its description to the descriptions set forth in a number of other cases, including an Idaho case where a property known as the "Salem Bar" was described as being "situated on the Idaho side of the main channel of the Snake River, one-half

mile north or down the river from the mouth of the Grand Ronde in Nez Perce county, Idaho." See *Treasure Valley*, 106 Idaho at 923 (citing *Phillips v. Salmon River Mining & Development Co.*, 9 Idaho 149, 72 P. 886 (1903)). Yet that description is far more specific (and accurate) than the description set forth in Glass Bagging's lien, since it provides the distance of the property from and describes the proximity of the property to at least two well-known geographic locations. This is completely lacking in Glass Bagging's description.

Glass Bagging also refers this Court to *H.C. Houston Lumber Co. v. Wetzel & Tyler Ry*, 69 W.Va. 682, 689, 72 S.E. 786, 789 (1911), where the property was described as a "railway of said corporation situate in the Counties of Wetzel and Tyler and extending from the City of Sistersville in Tyler County to the Town of Brooklyn in Wetzel County." Again, that description provides more detail than the description at issue here, which completely fails to describe in what direction the pipeline runs or whether the pipeline runs from one identifiable geographic location to another. Moreover, this Court specifically noted in *H.C. Houston Lumber* that the description was sufficient "[b]ecause of the character of a railway traversing as it does in this case the streets and roads of a town and county [and] the notoriety which is

necessarily given such a work of internal improvement." *Id.* at 689. An underground pipeline is not of the same character and does not have similar notoriety.

Glass Bagging cites to another Idaho case, *Great Plains Equip.* 132 Idaho 754. In that case, the description identified a "pipeline," but the plaintiffs had also demonstrated, by affidavit, through the use of the "property descriptions contained in the liens" and "the maps and diagrams provided and referenced in the plaintiff's lien," that two different people familiar with the locality had been able to identify the property with reasonable certainty. *Id.* at 764-65 (emphasis added). Here, Glass Bagging's lien does not contain any property descriptions, maps, or diagrams. Glass Bagging certainly has not presented any testimony by affidavit or otherwise indicating that it would be possible for someone familiar with the locality to identify the location of the pipeline with reasonable certainty.

Glass Bagging cites to a Nebraska case *Drexel*, 50 Neb. 509. That case is also distinguishable because the property known as the "Bartlett & Downing Block" in Kearney, Buffalo County, Nebraska, was an establishment that was well-known to those who were acquainted with the locality.

The property had been "repeatedly designated in the testimony by the witnesses as the 'Bartlett & Downing Block.'" *Id.* at 512. There is no evidence that the location of the underground pipeline in this case was well-known to anyone. It is not a public establishment; it does not have a street address and its location cannot be ascertained by looking it up in the phone book. In fact, Glass Bagging complains in its own Brief that it was "impossible to know which pipeline the materials were being utilized in."² Brief, p. 10. If that were true, then how can Glass Bagging expect anyone to locate the pipeline based on its description?

Glass Bagging says the description was sufficient because it states that the pipeline was constructed by L.A. Pipeline for Caiman Energy. Brief, p. 10. This information would not assist someone in identifying the pipeline, let alone the land upon which the pipeline was located. Glass Bagging therefore urges this Court to consider facts not in the record by asserting that, "upon information and belief," there were not a multitude of pipelines being constructed at the relevant time period in Marshall County. Brief, p. 10. Glass Bagging suggests that its deficient description can be

² Although Glass Bagging suggests that knowledge of the pipeline's location was "unique" to L.A. Pipeline (Brief, p. 13), it was not impossible for Pipeline Supply & Services, LLC, the other lien claimant in Case No. 11-C-124, to properly describe the location of the pipeline.

cured by resorting to other extraneous documents. Brief, p. 11. This is contrary to *Niswander v. Black*, 50 W.Va. at 196, where this Court held that "[t]he record should be sufficient to give in itself the information intended by the recordation and should not be made to depend upon verbal explanations of its meaning, and the record cannot be supplemented by parol evidence after suit brought to enforce the lien."

Despite this Court's holding in *Niswander*, Glass Bagging goes on at great length, in a footnote, regarding the duty to inquire. Brief, pp. 11-12. Glass Bagging says it is unfair that it should be expected to know the location of the property affected by its lien. It even suggests that contractors may scheme to "have their materials delivered to an off-site location to prevent a materialman from knowing the location where the materials are to be used so no mechanic's lien could ever be enforced."³ Brief, p. 12.

Allowing Glass Bagging to perfect a lien without providing an accurate, ascertainable description would have far worse consequences than any of the scenarios put forth by Glass Bagging. Glass Bagging would impose a duty to inquire on the general public while completely disavowing responsibility to make any kind of inquiry on its own.

³Glass Bagging could have protected itself from any such scheme by simply asking L.A. Pipeline to identify the location of the pipeline prior to delivering the materials.

Under Glass Bagging's proposed framework, all the burdens to inquire would fall on those persons who are in a far worse position to ascertain the meaning of its lien. Essentially, Glass Bagging asks this Court to send anyone reviewing its extremely vague and partially erroneous description on a treasure hunt to determine the location of the property.

Glass Bagging also warns that "[f]inding the lien invalid would be to allow L.A. Pipeline to benefit from the materials provided by Glass Bagging without just compensation. This outcome would perpetrate the evil the statute was designed to prevent." Brief, p.15. In fact, Glass Bagging has a legal remedy to recover compensation for the materials that it provided. Glass Bagging can obtain judgment against L.A. Pipeline for the amount of its claim, just as it has already done in this case. As Glass Bagging points out, L.A. Pipeline "does not dispute the amount owing to Glass Bagging" (Brief, p.1), "does not dispute that Glass Bagging is entitled to judgment" (Brief, p.22), and "has not appealed the judgment entered against it."⁴ Brief, p.3.

The law also permits Glass Bagging to secure its right to receive payment with a lien on the improved property. In order to obtain such a lien, however, Glass

⁴In fact, L.A. Pipeline offered Glass Bagging judgment by consent. J.A. 492.

Bagging must comply with the requirements of the mechanic's lien statute, including the requirement that it identify the improvement and accurately and ascertainably describe the land on which the improvement is located. This, it has utterly failed to do. The supposed evil that Glass Bagging claims will be perpetrated in this case could have been avoided with only a minimal amount of due diligence.

B. Glass Bagging has not timely asserted a claim to enforce its lien.

Even if the description was adequate and ascertainable, Glass Bagging's lien has been discharged for lack of timely enforcement. Glass Bagging says that it "does not need to institute its own suit to enforce its lien within six months of filing the required notice."⁵ Brief, p.

16. L.A. Pipeline agrees that Glass Bagging is not required to "institute its own suit;" if Glass Bagging had asserted a claim to enforce its purported mechanic's lien in Case No. 11-C-124, or if L.A. Pipeline's claim to enforce its lien had been maintained, then the filing of Case No. 11-C-124 by L.A. Pipeline would have inured to Glass Bagging's benefit under W.Va. Code § 38-2-34.

Not every kind of action will preserve the lien; instead there must be an action to "enforce" a lien. Thus,

⁵Nevertheless, Glass Bagging attempted to file such an action anyway, late, when it initiated Case No. 12-C-47.

the action Glass Bagging filed for breach of contract and unjust enrichment, Case No. 11-C-47, does not satisfy W.Va. Code § 38-2-34(a). Glass Bagging's counterclaim in Case No. 11-C-124 is substantially the same as the complaint it filed in Case No. 11-C-47. None of Glass Bagging's claims attempt to enforce its purported lien.

The cases that Glass Bagging has presented are distinguishable in material ways. In *Amato v. Hall*, 115 W.Va. 79, 174 S.E. 686, 687 (1934), the lienholder was not merely named as a defendant in the action; the trial court in that case had entered a decree "ascertaining and declaring the liens and their priorities." *Id.* at 80. No such order, declaration, or decree was ever made in this case, and there are currently no claims requesting any such relief.

In *Hough v. Watson*, 91 W.Va. 161, 163, 112 S.E. 303, 304 (1922), the lienholder (a bankruptcy trustee) intervened and was substituted in order to prosecute the lien claim. The claimant filed proof of the lien and a cross-bill to enforce it. *Id.* Unlike Glass Bagging in this case, the claimant clearly sought to enforce its lien.

Although L.A. Pipeline attempted to enforce its lien and to establish priority among all lienholders, including Glass Bagging, its claim was dismissed by the

trial court on March 5, 2012. J.A.312. Upon entry of the dismissal, the only claims that remained pending were Glass Bagging's counterclaim against L.A. Pipeline for breach of contract and unjust enrichment; there were no mechanic's lien claims and there were no other claims against the owner of the pipeline, Caiman Energy, or the land on which the pipeline was located. West Virginia Code § 38-2-34 clearly implies that if a lien claimant is joined in a lien enforcement action, the action will inure to such claimant's benefit only if he asserts his lien claim or if the original lien enforcement action is maintained. In this case, neither occurred.

If Glass Bagging had asserted a crossclaim against Caiman Energy to enforce its lien in Case No. 11-C-124 such claim would have continued under W.Va. Code § 38-2-34(a), even after the March 5, 2012 dismissal. Glass Bagging's failure to assert its claim prior to the entry of dismissal means that the lien was never marshalled within the statutory timeframe and that the action initiated by L.A. Pipeline does not inure to its benefit.

The establishment of the escrow fund did not absolve Glass Bagging of its obligation to timely enforce its lien. The owner of the pipeline (Caiman Energy), or any person against whom the lien is claimed, has the right to

bond off the lien "at any time" under W.Va. Code § 38-2-36(b)(1). But, if the lienholder does not assert a claim within the six month limitation period, then the bond is released to the depositor under W.Va. Code § 38-2-36(b)(4).

An action to enforce or to determine the validity of the lien, as described under W.Va. Code § 38-2-36(b)(4), is clearly a separate proceeding from the application to deposit the funds in escrow under W.Va. Code § 38-2-36(b)(1). The creation of the fund does not automatically give rise to a claim to enforce or to determine the lien's validity. Only the lienholder may assert his claim; the court cannot presume that he intends to do so when absolutely no action has ever been taken for that purpose within the relevant time period.

C. L.A. Pipeline has standing to challenge the validity of Glass Bagging's purported lien .

The cases that Glass Bagging presented do not support the trial court's conclusions regarding standing. In *Aluma Systems, Inc. v. Frederick Quinn Corp.*, 206 Ill. App.3d 828, 564 N.E.2d 1280 (Ill. Ct. App. 1990), the court held that it "need not resolve the issue of standing" for the general contractor to challenge the sufficiency or validity of the lien notices. *Id.* at 838. It went on to explain that, as a defendant in the case, the general contractor certainly "can assert as grounds for

dismissal the plaintiff's failure to perfect the purported lien upon which its claim rests." *Id.* That is exactly what L.A. Pipeline is attempting to do in this action. Thus, *Aluma Systems* directly undermines the trial court's holding.

In *Welbans & Works, Inc. v. Springfield Corp.*, 76 Mich. App. 541, 548, 257 N.W. 2d 160, 162 (Mich. Ct. App. 1977), the court held that a mortgagee lacked standing to challenge the constitutionality of the mechanic's lien statute on behalf of the property owner. This action, by contrast, has nothing to do with the constitutionality of West Virginia's mechanic's lien statute.

In *Newman v. Valmar Elec. Co.*, 9 Misc. 3d 450, 454 (N.Y. 2005) the court held that certain shareholders did not have standing to challenge a mechanic's lien on behalf of the corporation. The lien was not on their shares and they had no ownership interest in the underlying property. The case had nothing to do with the rights of a general contractor.

Glass Bagging concedes that L.A. Pipeline "bonded off" the lien with its settlement proceeds from Caiman Energy. Brief, p. 21. The use of these settlement proceeds clearly establishes that L.A. Pipeline will suffer an injury in fact. Under W.Va. Code § 38-2-36(b)(4), if a lien enforcement action is not timely commenced the escrowed funds are paid

out to "the depositor." If an action is timely commenced, the funds are paid out "as the court may order or decree." It is absurd to suggest that "the depositor" (L.A. Pipeline) does not have standing in a dispute over how the funds will be disbursed and that, as Glass Bagging suggests, only Caiman Energy will suffer potential injury based on the outcome of this case. Brief, p.19. In fact, Caiman Energy will suffer no injury since, under its agreement with L.A. Pipeline, it is not entitled to the funds if they are disbursed. That is why Caiman Energy is no longer a party to this action.

Moreover, and regardless of the source of the escrowed funds, L.A. Pipeline's contractual relationship with Caiman Energy is sufficient to create standing. Prior to its settlement, L.A. Pipeline had potential liability to Caiman Energy because of the existence of Glass Bagging's purported lien. In the Pennsylvania case that Glass Bagging's cites, *Keim v. McRoberts*, 18 Pa. Super 167, 171-72 (1901), it says that the owner has a right to "demand that the valid liens of subcontractors shall be discharged" and that the owner has a "remedy against the contractor for the amount received by the contractor in excess of the contract price." That is why the escrow fund was created in this case. L.A. Pipeline wished to ensure that, regardless of the validity

of Glass Bagging's lien, it would have no further liability to Caiman Energy.

As explained in *Keim*, "valid liens of subcontractors shall be discharged before the contractor shall compel payment of his claim." *Id.* This is consistent with W.Va. Code §38-2-18, which says that furnishers of materials and subcontractors get paid before the general contractor. The key point, however, is that this applies only when the subcontractor/material furnisher has a valid lien. Glass Bagging's lien has been fully protected, but only to the extent that Glass Bagging can establish that its lien is valid. Without a valid lien, a contractor has no obligation to "protect" the lien and the only available recourse is a the material furnisher or subcontractor (Glass Bagging) to assert a claim against the contractor (L.A. Pipeline).

Glass Bagging criticizes the escrow arrangement as a manufactured attempt to "create an injury." Brief, p.21. In fact, Glass Bagging benefitted from the creation of the escrow fund because the full value of Glass Bagging's purported lien was set aside, in cash, to protect whatever interest it might have. If Glass Bagging could establish that it has a valid lien, it can be paid in full without having to undertake a costly and time-consuming judicial

sale of the pipeline.

Glass Bagging claims that the creation of the escrow fund somehow waived L.A. Pipeline's standing to challenge the lien. Brief, pp.20-21. No such waiver ever took place. L.A. Pipeline expressly stated in the motion to establish escrow fund that, "[a]ll claims of all parties have been resolved in this litigation, except the validity of the Glass Bagging Enterprises, Inc. Mechanic's lien and its money claim against Plaintiff." J.A.302. It further stated that "Plaintiff believes that Glass Bagging Enterprises, Inc., does not have a valid Mechanic's lien, but it refuses to release or discharge its lien of record and has refused to cooperate and has rejected all proposals to bond or adequately secure the Mechanic's lien." J.A.302-303. Indeed, the trial court's order expressly states that:

nothing in this Order shall constitute a declaration of the rights to such escrow fund as between L.A. Pipeline Construction Company, Inc., its secured lien creditor, United National Bank, and Glass Bagging Enterprises, Inc. The Court specifically reserves jurisdiction to determine the validity of the Glass Bagging Enterprises, Inc. Mechanic's Lien and claims against L.A. Pipeline Construction Company, Inc.

J.A.317. L.A. Pipeline's position regarding the validity of Glass Bagging's purported lien was in no way affected by its motion or by the trial court's order establishing the escrow fund.

D. The trial court cannot reform Glass Bagging's lien in equity or impose a lien on the property based solely on equitable considerations .

Glass Bagging urges this court to impose an equitable lien. Brief, p.21. Glass Bagging ignores the holding in *Tygart Valley Brewing Co. v. Vilter Mfg. Co.*, 184 F. 845 (4th Cir. 1910), which completely rejects this possibility. Glass Bagging also ignores W.Va. Code § 38-2-14, which says that the failure to substantially comply with all the requirements of the mechanic's lien statute completely discharges the owner and the property from "all liens" for materials furnished in connection with the work on the property.

The Washington case on which Glass Bagging relies states that equity may only create a lien "where there is no valid lien at law." *Gormley v. Robertson*, 120 Wash. App. 31, 39, 83 P.3d 1042, 1047 (2004)(emphasis added). Here, the law already provides Glass Bagging with a lien remedy. That is why the mechanic's lien statute was enacted. Thus, there is no basis for the creation of a new lien in equity.

Glass Bagging asserts that its failure to receive payment for the materials that it delivered is so outrageous that this Court should intervene. There is no allegation that L.A. Pipeline or Caiman Energy committed a fraud or any

other tortious conduct.⁶ Any of L.A. Pipeline's other creditors could just as easily argue that it is unjust for them not to receive payment in full. Although Glass Bagging complains that it will be left "to wait in the long line of Petitioner's creditors," (Brief,p.23), it is not this Court's responsibility to protect Glass Bagging from a risk (nonpayment) against which it could have protected itself.

Glass Bagging says that L.A. Pipeline made similar equitable arguments in its Motion to Secure Profits and Rental Proceeds. Brief,p.22. But it is undisputed that L.A. Pipeline had a valid lien; its equitable arguments, based on this Court's prior authority, related only to the scope of the lien (i.e., whether the lien extended to the rents and profits derived from the use of the pipeline). Glass Bagging does not have any lien rights because its description of the property does not comply with statutory requirements. As an unsecured creditor, Glass Bagging is entitled to no better treatment than anyone else.⁷

The West Virginia legislature has enacted a comprehensive statutory scheme to deal with payments to

⁶Even if L.A. Pipeline's breach of contract was "outrageous," why should that give Glass Bagging an equitable lien upon the assets of Caiman Energy?

⁷It is worth noting that under W.Va. Code § 38-2-18, the lien of a materialman and laborer are of "equal dignity without priority among themselves." Why should Glass Bagging receive payment in equity when the laborers will not?

subcontractors and materialmen on construction projects. If Glass Bagging believes that it should be entitled to a more generous remedy, or that the requirements for perfecting a lien should be relaxed, it requires legislative rather than judicial action.

CONCLUSION

For all the foregoing reasons, this Court should vacate the circuit court's August 26, 2015 Order granting Glass Bagging's motion for summary judgment and should further enter judgment as a matter of law in favor of L.A. Pipeline.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies a copy of the foregoing **Petitioner's Reply Brief** was served upon the following parties by sending a copy of same by ordinary U.S. mail, postage pre-paid, on this 1st day of March, 2016:

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