

# **ADDENDUM**

# **D**

## MECHANICS' AND MATERIALMEN'S LIENS

**NRS 108.221 Definitions.** As used in [NRS 108.221](#) to [108.246](#), inclusive, unless the context otherwise requires, the words and terms defined in [NRS 108.22104](#) to [108.22188](#), inclusive, have the meanings ascribed to them in those sections.  
(Added to NRS by 1965, 1159; A 1993, 2055; 1995, 1506; [2003, 2595](#); [2005, 1897](#))

**NRS 108.22104 “Agent of the owner” defined.** “Agent of the owner” means every architect, builder, contractor, engineer, geologist, land surveyor, lessee, miner, subcontractor or other person having charge or control of the property, improvement or work of improvement of the owner, or any part thereof.  
(Added to NRS by [2003, 2587](#))

**NRS 108.22108 “Building” defined.** “Building” means a primary building or other superstructure, together with all garages, outbuildings and other structures appurtenant thereto.  
(Added to NRS by [2003, 2587](#))

**NRS 108.22112 “Commencement of construction” defined.** “Commencement of construction” means the date on which:

1. Work performed; or
2. Materials or equipment furnished in connection with a work of improvement,

is visible from a reasonable inspection of the site.  
(Added to NRS by [2003, 2587](#))

**NRS 108.22116 “Completion of the work of improvement” defined.** “Completion of the work of improvement” means:

1. The occupation or use by the owner, an agent of the owner or a representative of the owner of the work of improvement, accompanied by the cessation of all work on the work of improvement;
2. The acceptance by the owner, an agent of the owner or a representative of the owner of the work of improvement, accompanied by the cessation of all work on the work of improvement; or
3. The cessation of all work on a work of improvement for 30 consecutive days, provided a notice of completion is timely recorded and served and the work is not resumed under the same contract.

(Added to NRS by [2003, 2587](#))

**NRS 108.22118 “Construction control” defined.** “Construction control” has the meaning ascribed to it in [NRS 627.050](#).  
(Added to NRS by [2005, 1893](#))

**NRS 108.2212 “Contract” defined.** “Contract” means a written or oral agreement, including all attachments and amendments thereto, for the provision of work, materials or equipment for a work of improvement.  
(Added to NRS by [2003, 2588](#))

**NRS 108.22124 “Equipment” defined.** “Equipment” means tools, machinery and vehicles, furnished or rented, which are used or to be used in the construction, alteration or repair of a work of improvement at the request of the owner or an agent of the owner.  
(Added to NRS by [2003, 2588](#))

**NRS 108.22128 “Improvement” defined.** “Improvement” means the development, enhancement or addition to property, by the provision of work, materials or equipment. The term includes, without limitation:

1. A building, railway, tramway, toll road, canal, water ditch, flume, aqueduct, reservoir, bridge, fence, street, sidewalk, fixtures or other structure or superstructure;
2. A mine or a shaft, tunnel, adit or other excavation, designed or used to prospect, drain or work a mine;
3. A system for irrigation, plants, sod or other landscaping;
4. The demolition or removal of existing improvements, trees or other vegetation;
5. The drilling of test holes;
6. Grading, grubbing, filling or excavating;
7. Constructing or installing sewers or other public utilities; and
8. Constructing a vault, cellar or room under sidewalks or making improvements to the sidewalks in front of or adjoining the property.

(Added to NRS by [2003, 2588](#))

**NRS 108.22132 “Lien” defined.** “Lien” means the statutory rights and security interest in a construction disbursement account established pursuant to [NRS 108.2403](#), or property or any improvements thereon provided to a lien claimant by [NRS 108.221](#) to [108.246](#), inclusive.  
(Added to NRS by [2003, 2588](#); A [2005, 1897](#))

**NRS 108.22136 “Lienable amount” defined.** “Lienable amount” means the principal amount of a lien to which a lien claimant is entitled pursuant to subsection 1 of [NRS 108.222](#).  
(Added to NRS by [2003, 2588](#))

**NRS 108.2214 “Lien claimant” defined.**

1. “Lien claimant” means any person who provides work, material or equipment with a value of \$500 or more to be used in

or for the construction, alteration or repair of any improvement, property or work of improvement. The term includes, without limitation, every artisan, builder, contractor, laborer, lessor or renter of equipment, materialman, miner, subcontractor or other person who provides work, material or equipment, and any person who performs services as an architect, engineer, land surveyor or geologist, in relation to the improvement, property or work of improvement.

2. As used in this section, "laborer" includes, without limitation, an express trust fund to which any portion of the total compensation of a laborer, including, without limitation, any fringe benefit, must be paid pursuant to an agreement with that laborer or the collective bargaining agent of that laborer.

(Added to NRS by [2003, 2588](#); A [2007, 660](#))

**NRS 108.22144 "Material" defined.** "Material" means appliances, equipment, machinery and substances affixed, used or to be used, consumed or incorporated in the improvement of property or the construction, alteration or repair of any improvement, property or work of improvement.

(Added to NRS by [2003, 2588](#); A [2005, 1897](#))

**NRS 108.22146 "Notice of lien" defined.** "Notice of lien" means a notice recorded pursuant to [NRS 108.226](#) to perfect a lien.

(Added to NRS by [2003, 2589](#))—(Substituted in revision for NRS 108.22152)

**NRS 108.22148 "Owner" defined.**

1. "Owner" includes:

(a) The record owner or owners of the property or an improvement to the property as evidenced by a conveyance or other instrument which transfers that interest to the record owner or owners and is recorded in the office of the county recorder in which the improvement or the property is located;

(b) The reputed owner or owners of the property or an improvement to the property;

(c) The owner or owners of the property or an improvement to the property, as shown on the records of the county assessor for the county where the property or improvement is located;

(d) The person or persons whose name appears as owner of the property or an improvement to the property on the building permit;

(e) A person who claims an interest in or possesses less than a fee simple estate in the property;

(f) This State or a political subdivision of this State, including, without limitation, an incorporated city or town, that owns the property or an improvement to the property if the property or improvement is used for a private or nongovernmental use or purpose; or

(g) A person described in paragraph (a), (b), (c), (d) or (e) who leases the property or an improvement to the property to this State or a political subdivision of this State, including, without limitation, an incorporated city or town, if the property or improvement is privately owned.

2. The term does not include:

(a) A mortgagee;

(b) A trustee or beneficiary of a deed of trust;

(c) The owner or holder of a lien encumbering the property or an improvement to the property; or

(d) Except as otherwise provided in paragraph (f) of subsection 1, this State or a political subdivision of this State, including, without limitation, an incorporated city or town.

(Added to NRS by [2003, 2588](#); A [2005, 1897](#))

**NRS 108.22152 "Notice of lien" defined.** [Replaced in revision by [NRS 108.22146](#).]

**NRS 108.22156 "Prevailing lien claimant" defined.** "Prevailing lien claimant" means a lien claimant to whom an amount is found due by a trier of fact on a notice of lien or a claim against a surety bond.

(Added to NRS by [2003, 2589](#))

**NRS 108.2216 "Prime contract" defined.** "Prime contract" means a contract between a prime contractor and the owner or lessee of property about which the contract relates.

(Added to NRS by [2003, 2589](#); A [2005, 1897](#))

**NRS 108.22164 "Prime contractor" defined.** "Prime contractor" means:

1. A person who contracts with an owner or a lessee of property to provide work, materials or equipment to be used for the improvement of the property or in the construction, alteration or repair of a work of improvement; or

2. A person who is an owner of the property, is licensed as a general contractor pursuant to [chapter 624](#) of NRS and provides work, materials or equipment to be used for the improvement of the property or in the construction, alteration or repair of a work of improvement.

(Added to NRS by [2003, 2589](#); A [2005, 1898](#))

**NRS 108.22168 "Principal" defined.** "Principal," as pertaining to a surety bond, means the debtor of the lien claimant or a party in interest in the property subject to the lien whose name and signature appear as principal on a surety bond.

(Added to NRS by [2003, 2589](#))

**NRS 108.22172 "Property" defined.** "Property" means the land, real property or mining claim of an owner for which a work of improvement was provided, including all buildings, improvements and fixtures thereon, and a convenient space on, around and about the same, or so much as may be required for the convenient use and occupation thereof.

(Added to NRS by [2003, 2589](#))

**NRS 108.22176 “Surety” defined.** “Surety” means a corporation authorized to transact surety business in this state pursuant to [NRS 679A.030](#) that:

1. Is included in the United States Department of the Treasury’s Listing of Approved Sureties; and
  2. Issues a surety bond pursuant to [NRS 108.2413](#) to [108.2425](#), inclusive, that does not exceed the underwriting limitations established for that surety by the United States Department of the Treasury.
- (Added to NRS by [2003, 2589](#))

**NRS 108.2218 “Surety bond” defined.** “Surety bond” means a bond issued by a surety for the release of a prospective or existing lien pursuant to [NRS 108.2413](#) to [108.2425](#), inclusive.

(Added to NRS by [2003, 2589](#); A [2005, 1898](#))

**NRS 108.22184 “Work” defined.** “Work” means the planning, design, geotechnical and environmental investigations, surveying, labor and services provided by a lien claimant for the construction, alteration or repair of any improvement, property or work of improvement whether the work is completed or partially completed.

(Added to NRS by [2003, 2589](#))

**NRS 108.22188 “Work of improvement” defined.** “Work of improvement” means the entire structure or scheme of improvement as a whole, including, without limitation, all work, materials and equipment to be used in or for the construction, alteration or repair of the property or any improvement thereon, whether under multiple prime contracts or a single prime contract except as follows:

1. If a scheme of improvement consists of the construction of two or more separate buildings and each building is constructed upon a separate legal parcel of land and pursuant to a separate prime contract for only that building, then each building shall be deemed a separate work of improvement; and
2. If the improvement of the site is provided for in a prime contract that is separate from all prime contracts for the construction of one or more buildings on the property, and if the improvement of the site was contemplated by the contracts to be a separate work of improvement to be completed before the commencement of construction of the buildings, the improvement of the site shall be deemed a separate work of improvement from the construction of the buildings and the commencement of construction of the improvement of the site does not constitute the commencement of construction of the buildings. As used in this subsection, “improvement of the site” means the development or enhancement of the property, preparatory to the commencement of construction of a building, and includes:
  - (a) The demolition or removal of improvements, trees or other vegetation;
  - (b) The drilling of test holes;
  - (c) Grading, grubbing, filling or excavating;
  - (d) Constructing or installing sewers or other public utilities; or
  - (e) Constructing a vault, cellar or room under sidewalks or making improvements to the sidewalks in front of or adjoining the property.

(Added to NRS by [2003, 2590](#))

**NRS 108.222 Lien on property, improvements and construction disbursement account; amount of lien; lien not available to unlicensed contractor or professional who must be licensed to perform work.**

1. Except as otherwise provided in subsection 2, a lien claimant has a lien upon the property, any improvements for which the work, materials and equipment were furnished or to be furnished, and any construction disbursement account established pursuant to [NRS 108.2403](#), for:

(a) If the parties agreed, by contract or otherwise, upon a specific price or method for determining a specific price for some or all of the work, material and equipment furnished or to be furnished by or through the lien claimant, the unpaid balance of the price agreed upon for such work, material or equipment, as the case may be, whether performed, furnished or to be performed or furnished at the instance of the owner or the owner’s agent; and

(b) If the parties did not agree, by contract or otherwise, upon a specific price or method for determining a specific price for some or all of the work, material and equipment furnished or to be furnished by or through the lien claimant, including, without limitation, any additional or changed work, material or equipment, an amount equal to the fair market value of such work, material or equipment, as the case may be, including a reasonable allowance for overhead and a profit, whether performed, furnished or to be performed or furnished at the instance of the owner or at the instance of the owner’s agent.

2. If a contractor or professional is required to be licensed pursuant to the provisions of NRS to perform the work, the contractor or professional will only have a lien pursuant to subsection 1 if the contractor or professional is licensed to perform the work.

(Added to NRS by 1965, 1159; A 1987, 98; 1993, 2055; [1997, 2691](#); [2003, 2595](#); [2005, 1898](#))

**NRS 108.225 Priority of liens.**

1. The liens provided for in [NRS 108.221](#) to [108.246](#), inclusive, are preferred to:

(a) Any lien, mortgage or other encumbrance which may have attached to the property after the commencement of construction of a work of improvement.

(b) Any lien, mortgage or other encumbrance of which the lien claimant had no notice and which was unrecorded against the property at the commencement of construction of a work of improvement.

2. Every mortgage or encumbrance imposed upon, or conveyance made of, property affected by the liens provided for in [NRS 108.221](#) to [108.246](#), inclusive, after the commencement of construction of a work of improvement are subordinate and subject to the liens provided for in [NRS 108.221](#) to [108.246](#), inclusive, regardless of the date of recording the notices of liens.

(Added to NRS by 1965, 1160; A 1993, 2056; 1995, 1506; [2003, 2596](#))

**NRS 108.226 Perfection of lien: Time for recording notice of lien; contents of notice of lien; verification; penalty for**

**certain false statements; form for notice of lien; notice of intent to lien required under certain circumstances.**

1. To perfect a lien, a lien claimant must record a notice of lien in the office of the county recorder of the county where the property or some part thereof is located in the form provided in subsection 5:

(a) Within 90 days after the date on which the latest of the following occurs:

(1) The completion of the work of improvement;

(2) The last delivery of material or furnishing of equipment by the lien claimant for the work of improvement; or

(3) The last performance of work by the lien claimant for the work of improvement; or

(b) Within 40 days after the recording of a valid notice of completion, if the notice of completion is recorded and served in the manner required pursuant to [NRS 108.228](#).

2. The notice of lien must contain:

(a) A statement of the lienable amount after deducting all just credits and offsets.

(b) The name of the owner if known.

(c) The name of the person by whom the lien claimant was employed or to whom the lien claimant furnished the material or equipment.

(d) A brief statement of the terms of payment of the contract.

(e) A description of the property to be charged with the notice of lien sufficient for identification.

3. The notice of lien must be verified by the oath of the lien claimant or some other person. The notice of lien need not be acknowledged to be recorded.

4. It is unlawful for a person knowingly to make a false statement in or relating to the recording of a notice of lien pursuant to the provisions of this section. A person who violates this subsection is guilty of a gross misdemeanor and shall be punished by a fine of not less than \$5,000 nor more than \$10,000.

5. A notice of lien must be substantially in the following form:

Assessor's Parcel Numbers

### NOTICE OF LIEN

The undersigned claims a lien upon the property described in this notice for work, materials or equipment furnished or to be furnished for the improvement of the property:

1. The amount of the original contract is: \$.....

2. The total amount of all additional or changed work, materials and equipment, if any, is: \$

3. The total amount of all payments received to date is: \$.....

4. The amount of the lien, after deducting all just credits and offsets, is: \$.....

5. The name of the owner, if known, of the property is: .....

6. The name of the person by whom the lien claimant was employed or to whom the lien claimant furnished or agreed to furnish work, materials or equipment is: .....

7. A brief statement of the terms of payment of the lien claimant's contract is: .

.....

8. A description of the property to be charged with the lien is: .....

(Print Name of Lien Claimant)

By:.....

(Authorized Signature)

State of Nevada )

) ss.

County of ..... )

..... (print name), being first duly sworn on oath according to law, deposes and says:

I have read the foregoing Notice of Lien, know the contents thereof and state that the same is true of my own personal knowledge, except those matters stated upon information and belief, and, as to those matters, I believe them to be true.

.....  
(Authorized Signature of Lien Claimant)

Subscribed and sworn to before me

this ..... day of the month of ..... of the year .....

.....  
Notary Public in and for  
the County and State

6. Except as otherwise provided in subsection 7, if a work of improvement involves the construction, alteration or repair of multifamily or single-family residences, including, without limitation, apartment houses, a lien claimant, except laborers, must serve a 15-day notice of intent to lien incorporating substantially the same information required in a notice of lien upon both the owner and the reputed prime contractor before recording a notice of lien. Service of the notice of intent to lien must be by personal delivery or certified mail and will extend the time for recording the notice of lien described in subsection 1 by 15



days. A notice of lien for materials or equipment furnished or to be furnished for work or services performed or to be performed, except labor, for a work of improvement involving the construction, alteration or repair of multifamily or single-family residences may not be perfected or enforced pursuant to [NRS 108.221](#) to [108.246](#), inclusive, unless the 15-day notice of intent to lien has been given to the owner.

7. The provisions of subsection 6 do not apply to the construction of any nonresidential construction project.  
(Added to NRS by 1965, 1160; A 1971, 367; 1995, 1507; [1997, 2692](#); [2003, 2597](#); [2005, 1898](#))

#### **NRS 108.227 Service of copy of notice of lien.**

1. In addition to the requirements of [NRS 108.226](#), a copy of the notice of lien must be served upon the owner of the property within 30 days after recording the notice of lien, in one of the following ways:

- (a) By personally delivering a copy of the notice of lien to the owner or registered agent of the owner;
- (b) By mailing a copy of the notice of lien by certified mail, return receipt requested, to the owner at the owner's place of residence or the owner's usual place of business or to the registered agent of the owner at the address of the registered agent; or
- (c) If the place of residence or business of the owner and the address of the registered agent of the owner, if applicable, cannot be determined, by:
  - (1) Fixing a copy of the notice of lien in a conspicuous place on the property;
  - (2) Delivering a copy of the notice of lien to a person there residing, if such a person can be found; and
  - (3) Mailing a copy of the notice of lien addressed to the owner at:
    - (I) The place where the property is located;
    - (II) The address of the owner as identified in the deed;
    - (III) The address identified in the records of the office of the county assessor; or
    - (IV) The address identified in the records of the county recorder of the county in which the property is located.

2. If there is more than one owner, failure to serve a copy of the notice of lien upon a particular owner does not invalidate a notice of lien if properly served upon another owner.

3. Each subcontractor who participates in the construction, improvement, alteration or repair of a work of improvement shall deliver a copy of each notice of lien required by [NRS 108.226](#) to the prime contractor. The failure of a subcontractor to deliver the notice to the prime contractor is a ground for disciplinary proceedings pursuant to [chapter 624](#) of NRS.

(Added to NRS by 1965, 1161; A 1969, 1099; 1987, 99; [2003, 2599](#); [2007, 2716](#))

#### **NRS 108.2275 Frivolous or excessive notice of lien: Motion; hearing; consequences of failure to appear; effect on action to foreclose; order; appeal; recording of certified copy of order releasing or reducing notice of lien.**

1. The debtor of the lien claimant or a party in interest in the property subject to the notice of lien who believes the notice of lien is frivolous and was made without reasonable cause, or that the amount of the notice of lien is excessive, may apply by motion to the district court for the county where the property or some part thereof is located for an order directing the lien claimant to appear before the court to show cause why the relief requested should not be granted.

2. The motion must:

- (a) Set forth in detail the legal and factual grounds upon which relief is requested; and
- (b) Be supported by:
  - (1) A notarized affidavit signed by the applicant setting forth a concise statement of the facts upon which the motion is based; and
  - (2) Documentary evidence in support of the affidavit, if any.

3. If the court issues an order for a hearing, the applicant shall serve notice of the application and order of the court on the lien claimant within 3 days after the court issues the order. The court shall conduct the hearing within not less than 15 days or more than 30 days after the court issues the order for a hearing.

4. The order for a hearing must include a statement that if the lien claimant fails to appear at the time and place noted, the notice of lien will be released with prejudice and the lien claimant will be ordered to pay the reasonable costs the applicant incurs in bringing the motion, including reasonable attorney's fees.

5. If, at the time the application is filed, an action to foreclose the notice of lien has not been filed, the clerk of the court shall assign a number to the application and obtain from the applicant a filing fee of \$85. If an action has been filed to foreclose the notice of lien before the application was filed pursuant to this section, the application must be made a part of the action to foreclose the notice of lien.

6. If, after a hearing on the matter, the court determines that:

- (a) The notice of lien is frivolous and was made without reasonable cause, the court shall make an order releasing the lien and awarding costs and reasonable attorney's fees to the applicant for bringing the motion.
- (b) The amount of the notice of lien is excessive, the court may make an order reducing the notice of lien to an amount deemed appropriate by the court and awarding costs and reasonable attorney's fees to the applicant for bringing the motion.
- (c) The notice of lien is not frivolous and was made with reasonable cause or that the amount of the notice of lien is not excessive, the court shall make an order awarding costs and reasonable attorney's fees to the lien claimant for defending the motion.

7. Proceedings conducted pursuant to this section do not affect any other rights and remedies otherwise available to the parties.

8. An appeal may be taken from an order made pursuant to subsection 6. A stay may not be granted if the district court does not release the lien pursuant to subsection 6.

9. If an order releasing or reducing a notice of lien is entered by the court, and the order is not stayed, the applicant may, within 5 days after the order is entered, record a certified copy of the order in the office of the county recorder of the county where the property or some part thereof is located. The recording of a certified copy of the order releasing or reducing a notice of lien is notice to any interested party that the notice of lien has been released or reduced.

(Added to NRS by 1995, 1505; A [1997, 2693](#); [2003, 2600](#); [2005, 1900](#))

**NRS 108.228 Notice of completion: Recording; contents; verification; delivery of copy to each prime contractor and potential lien claimant; effect of failure to deliver copy to prime contractor or lien claimant.**

1. The owner may record a notice of completion after the completion of the work of improvement.
  2. The notice of completion must be recorded in the office of the county recorder of the county where the property is located and must set forth:
    - (a) The date of completion of the work of improvement.
    - (b) The owner's name or owners' names, as the case may be, the address of the owner or addresses of the owners, as the case may be, and the nature of the title, if any, of the person signing the notice.
    - (c) A description of the property sufficient for identification.
    - (d) The name of the prime contractor or names of the prime contractors, if any.
  3. The notice must be verified by the owner or by some other person on the owner's behalf. The notice need not be acknowledged to be recorded.
  4. Upon recording the notice pursuant to this section, the owner shall, within 10 days after the notice is recorded, deliver a copy of the notice by certified mail, to:
    - (a) Each prime contractor with whom the owner contracted for all or part of the work of improvement.
    - (b) Each potential lien claimant who, before the notice was recorded pursuant to this section, either submitted a request to the owner to receive the notice or delivered a preliminary notice of right to lien pursuant to [NRS 108.245](#).
  5. The failure of the owner to deliver a copy of the notice of completion in the time and manner provided in this section renders the notice of completion ineffective with respect to each prime contractor and lien claimant to whom a copy was required to be delivered pursuant to subsection 4.
- (Added to NRS by 1965, 1161; A 1989, 900; 1993, 853; 1995, 1508; [2003, 2601](#))

**NRS 108.229 Recording and service of amended notice of lien; variances; errors or mistakes do not defeat lien; exceptions; amendments; substitution of defendants; sufficiency of notice of lien.**

1. At any time before or during the trial of any action to foreclose a lien, a lien claimant may record an amended notice of lien to correct or clarify the lien claimant's notice of lien. The lien claimant shall serve the owner of the property with an amended notice of lien in the same manner as required for serving a notice of lien pursuant to [NRS 108.227](#) and within 30 days after recording the amended notice of lien. A variance between a notice of lien and an amended notice of lien does not defeat the lien and shall not be deemed material unless the variance:
    - (a) Results from fraud or is made intentionally; or
    - (b) Misleads an adverse party to the party's prejudice, but then only with respect to the adverse party who was prejudiced.
  2. Upon the trial of any action or suit to foreclose a lien, a variance between the lien and the proof does not defeat the lien and shall not be deemed material unless the variance:
    - (a) Results from fraud or is made intentionally; or
    - (b) Misleads the adverse party to the party's prejudice, but then only with respect to the adverse party who was prejudiced.
- Á In all cases of immaterial variance the notice of lien may be amended, by amendment duly recorded, to conform to the proof.
3. An error or mistake in the name of the owner contained in any notice of lien does not defeat the lien, unless a correction of the notice of lien in a particular instance would prejudice the rights of an innocent bona fide purchaser or encumbrancer for value, but then only with respect to the bona fide purchaser or encumbrancer for value who was prejudiced.
  4. Upon the trial, if it appears that an error or mistake has been made in the name of the owner or that the wrong person has been named as owner in any notice of lien, the court shall order an amended notice of lien to be recorded with the county recorder where the original notice of lien was recorded and shall issue to the person who is so made to appear to be the original owner a notice directing the person or persons to be and appear before the court within the same time as is provided by Nevada Rules of Civil Procedure for the appearance in other actions after the service of summons, which notice must be served in all respects as a summons is required to be served, and to show cause why:
    - (a) That person or persons should not be substituted as the correct owner in the notice of lien and in the suit, in lieu of the person so made defendant and alleged to be owner by mistake.
    - (b) That person or persons should not be bound by the judgment or decree of the court. Such proceedings must be had therein as though the party so cited to appear had been an original party defendant in the action or suit, and originally named in the notice of lien as owner, and the rights of all parties must thereupon be fully adjudicated.
  5. A notice of lien which contains therein the description of the property supplied by and set forth in the notice of completion recorded pursuant to [NRS 108.228](#) must, for all purposes, be sufficient as a description of the actual property upon which the work was performed or materials or equipment were supplied, and amendment of the notice of lien or amendment of the pleading filed by the lien claimant in a foreclosure action, or both, may be made to state the correct description, and the corrected description relates back to the time of recording the notice of lien, unless a correction of the notice of lien in a particular instance would prejudice the rights of an innocent bona fide purchaser or encumbrancer for value, but then only with respect to the bona fide purchaser or encumbrancer for value who was prejudiced.
- (Added to NRS by 1965, 1162; A [2003, 2602](#))

**NRS 108.231 Notice of lien against two or more separate buildings or mining claims: Designation of amount due on each; effect of failure to designate amount due on each.**

1. In every case in which a notice of lien is recorded against two or more separate buildings or mining claims that are owned by the same person and that are located on separate legal parcels that existed at the commencement of construction, the lien claimant must, at the time of recording the notice of lien, designate the lienable amount due on each building or mining claim.
2. The lien of a lien claimant only applies to the lienable amount designated in the notice of lien, plus all amounts that may be awarded by the court pursuant to [NRS 108.237](#), as against other creditors having liens by judgment or otherwise, upon the buildings or mining claims. However, the lienable amount chargeable to the interest of the owner in each building must be the

total amount of the lien claimant's notice of lien, without regard to the proportionate amount designated to each separate building in the lien claimant's notice of lien, plus all amounts that may be awarded by the court pursuant to [NRS 108.237](#), but upon the trial thereof, the court may, where it deems it equitable to do so, distribute the lien equitably as among the several buildings involved.

3. If a lien claimant fails to designate in the notice of lien the amount due on each separate building as provided in subsection 1, the lien claimant's notice of lien must be postponed to the notices of lien of other lien claimants and other encumbrancers for value who have designated the amount due on each building or mining claim but must not be inferior to any rights or interests of the owner. For purposes of this subsection, a lien claimant's lien must not be postponed to other liens or encumbrances if the lien claimant's designation among the parcels was estimated by the lien claimant in good faith or was based upon a pro rata division of the total lienable amount.

(Added to NRS by 1965, 1163; A [2003, 2603](#))

**NRS 108.232 Notice of lien to be recorded; fees of recorder.** The county recorder of the county in which property that is subject to a lien is located must record the notice of lien in a book kept by the county recorder for that purpose, which record must be indexed as deeds and other conveyances are required by law to be indexed, and for which the county recorder may receive the same fees as are allowed by law for recording deeds and other instruments.

(Added to NRS by 1965, 1163; A [2003, 2604](#))

**NRS 108.233 Duration of lien.**

1. A lien provided for in [NRS 108.221](#) to [108.246](#), inclusive, must not bind the property subject to the lien for a period longer than 6 months after the date on which the notice of lien was recorded, unless:

(a) Proceedings are commenced in a proper court within that time to enforce the same; or

(b) The time to commence the action is extended by a written instrument signed by the lien claimant and by a person or persons in interest in the property subject to the lien, in which event, and as to only that person or those persons in interest signing the agreement, the time is extended, but no extension is valid unless in writing and recorded in the county recorder's office in which the notice of lien is recorded and unless the extension agreement is recorded within the 6-month period. The extension agreement, to be recorded, must be acknowledged as required by law for the acknowledgment of deeds. An action may be commenced within the extended time only against the persons signing the extension agreement and only as to their interests in the property are affected, and upon the lapse of the time specified in the extension agreement, an action may not thereafter be commenced, nor may a second extension be given.

2. For all purposes, a notice of lien shall be deemed to have expired as a lien against the property after the lapse of the 6-month period provided in subsection 1, and the recording of a notice of lien does not provide actual or constructive notice after the lapse of the 6-month period and as a lien on the property referred to in the notice of lien, unless, before the lapse of the 6-month period an extension agreement has been recorded, in which event, the lien will only continue as a lien on the interests of those persons signing the extension for the period specified in the extension. An extension must not be given for a period in excess of 1 year beyond the date on which the notice of lien is recorded.

3. If there are other notices of lien outstanding against the property, an extension must not be given upon a notice of lien which will tend to delay or postpone the collection of other liens evidenced by a notice of lien or encumbrances against the property.

(Added to NRS by 1965, 1163; A [2003, 2604](#))

**NRS 108.234 Recording of notice of nonresponsibility by disinterested owner; contents and validity of notice of nonresponsibility; service of notice of nonresponsibility upon lessee and prime contractor; prime contractor's obligations upon receipt of notice of nonresponsibility; effect of owner's failure to comply with provisions of this section.**

1. Except as otherwise provided in subsection 2, every improvement constructed, altered or repaired upon property shall be deemed to have been constructed, altered or repaired at the instance of each owner having or claiming any interest therein, and the interest owned or claimed must be subject to each notice of lien recorded in accordance with the provisions of [NRS 108.221](#) to [108.246](#), inclusive.

2. The interest of a disinterested owner in any improvement and the property upon which an improvement is constructed, altered or repaired is not subject to a notice of lien if the disinterested owner, within 3 days after he or she first obtains knowledge of the construction, alteration or repair, or the intended construction, alteration or repair, gives notice that he or she will not be responsible for the improvement by recording a notice in writing to that effect with the county recorder of the county where the property is located and, in the instance of a disinterested owner who is:

(a) A lessor, the notice of nonresponsibility shall be deemed timely recorded if the notice is recorded within 3 days immediately following the effective date of the lease or by the time of the execution of the lease by all parties, whichever occurs first; or

(b) An optionor, the notice of nonresponsibility shall be deemed timely recorded if the notice is recorded within 3 days immediately following the date on which the option is exercised in writing.

3. To be effective and valid, each notice of nonresponsibility recorded pursuant to this section must identify:

(a) The names and addresses of the disinterested owner and the person who is causing the work of improvement to be constructed, altered or repaired;

(b) The location of the improvement and the address and legal description of the property upon which the improvement is or will be constructed, altered or repaired;

(c) The nature and extent of the disinterested owner's interest in the improvement and the property upon which the improvement is or will be constructed, altered or repaired;

(d) The date on which the disinterested owner first learned of the construction, alteration or repair of the improvement that is the subject of the notice of nonresponsibility; and

(e) Whether the disinterested owner has notified the lessee in writing that the lessee must comply with the requirements of



[NRS 108.2403.](#)

4. To be effective and valid, each notice of nonresponsibility that is recorded by a lessor pursuant to this section must be served by personal delivery or by certified mail, return receipt requested:

(a) Upon the lessee within 10 days after the date on which the notice of nonresponsibility is recorded pursuant to subsection 2; and

(b) Upon the prime contractor for the work of improvement within 10 days after the date on which the lessee contracts with the prime contractor for the construction, alteration or repair of the work of improvement.

5. If the prime contractor for the work of improvement receives a notice of nonresponsibility pursuant to paragraph (b) of subsection 4, the prime contractor shall:

(a) Post a copy of the notice of nonresponsibility in an open and conspicuous place on the property within 3 days after receipt of the notice of nonresponsibility; and

(b) Serve a copy of the notice of nonresponsibility by personal delivery, facsimile or by certified mail, return receipt requested, upon each lien claimant from whom a notice of right to lien was received, within 10 days after receipt of the notice of nonresponsibility or a notice of right to lien, whichever occurs later.

6. An owner who does not comply with the provisions of this section may not assert any claim that the owner's interest in any improvement and the property upon which an improvement is constructed, altered or repaired is not subject to or is immune from the attachment of a lien pursuant to [NRS 108.221](#) to [108.246](#), inclusive.

7. As used in this section, "disinterested owner" means an owner who:

(a) Does not record a notice of waiver as provided in [NRS 108.2405](#); and

(b) Does not personally or through an agent or representative, directly or indirectly, contract for or cause a work of improvement, or any portion thereof, to be constructed, altered or repaired upon the property or an improvement of the owner.

Ä The term does not include an owner who is a lessor if the lessee fails to satisfy the requirements set forth in [NRS 108.2403](#) and [108.2407](#).

(Added to NRS by 1965, 1163; A [2001.1752](#); [2003.2605](#); [2005.1901](#))

**NRS 108.235 Amount recoverable by prime contractor; payment of all liens by prime contractor; defense of action on notice of lien; withholding or deduction of money by owner.**

1. A prime contractor:

(a) Upon a notice of lien, may recover the lienable amount as may be due, plus all amounts that may be awarded by the court pursuant to [NRS 108.237](#); and

(b) Upon receipt of the amount described in paragraph (a), shall pay all liens for the work, equipment or materials which were furnished or to be furnished as provided in [NRS 108.221](#) to [108.246](#), inclusive.

2. In all cases where a prime contractor has been paid for the work, materials or equipment which are the subject of a notice of lien recorded under [NRS 108.221](#) to [108.246](#), inclusive, the prime contractor shall defend the owner in any action brought thereupon at the prime contractor's own expense.

3. Except as otherwise provided in this subsection, if a lien claimant records a notice of lien for the work, equipment or materials furnished or to be furnished to the prime contractor, the owner may withhold from the prime contractor the amount of money for which the lien claimant's notice of lien is recorded. If the lien claimant's notice of lien resulted from the owner's failure to pay the prime contractor for the lien claimant's work, materials or equipment, the owner shall not withhold the amount set forth in the notice of lien from the prime contractor if the prime contractor or lien claimant tenders a release of the lien claimant's lien to the owner. In case of judgment against the owner or the owner's property which is the subject of the lien, the owner may deduct, from any amount due or to become due to the prime contractor, the amount paid by the owner to the lien claimant for which the prime contractor was liable and recover back from the prime contractor any amount so paid by the owner in excess of the amount the court has found that the owner owes to the prime contractor.

(Added to NRS by 1965, 1164; A [2003.2606](#); [2005.1903](#))

**NRS 108.236 Court must declare rank of lien claimants or class of lien claimants; application of proceeds.**

1. In every case in which different liens are asserted against any property, the court, in the judgment, must declare the rank of each lien claimant or class of lien claimants in the following order:

(a) First: All labor whether performed at the instance or direction of the owner, the subcontractor or the prime contractor.

(b) Second: Material suppliers and lessors of equipment.

(c) Third: All other lien claimants who have performed their work, in whole or in part, under contract with the prime contractor or any subcontractor.

(d) Fourth: All other lien claimants.

2. The proceeds of the sale of the property must be applied to each lien claimant or class of lien claimants in the order of its rank.

(Added to NRS by 1965, 1164; A 1993, 2056; [2003.2607](#))

**NRS 108.237 Award of lienable amount, cost of preparing and recording notice of lien, costs of proceedings and representation and other amounts to prevailing lien claimant; calculation of interest; award of costs and attorney's fees when lien claim not upheld.**

1. The court shall award to a prevailing lien claimant, whether on its lien or on a surety bond, the lienable amount found due to the lien claimant by the court and the cost of preparing and recording the notice of lien, including, without limitation, attorney's fees, if any, and interest. The court shall also award to the prevailing lien claimant, whether on its lien or on a surety bond, the costs of the proceedings, including, without limitation, reasonable attorney's fees, the costs for representation of the lien claimant in the proceedings, and any other amounts as the court may find to be justly due and owing to the lien claimant.

2. The court shall calculate interest for purposes of subsection 1 based upon:

(a) The rate of interest agreed upon in the lien claimant's contract; or

(b) If a rate of interest is not provided in the lien claimant's contract, interest at a rate equal to the prime rate at the largest

bank in Nevada, as ascertained by the Commissioner of Financial Institutions, on January 1 or July 1, as the case may be, immediately preceding the date of judgment, plus 4 percent, on the amount of the lien found payable. The rate of interest must be adjusted accordingly on each January 1 and July 1 thereafter until the amount of the lien is paid.

Interest is payable from the date on which the payment is found to have been due, as determined by the court.

3. If the lien claim is not upheld, the court may award costs and reasonable attorney's fees to the owner or other person defending against the lien claim if the court finds that the notice of lien was pursued by the lien claimant without a reasonable basis in law or fact.

(Added to NRS by 1965, 1165; A 1981, 1859; 1987, 941; [2003, 2607](#); [2005, 1904](#))

**NRS 108.238 Right to maintain civil action or submit controversy to arbitration not impaired.** The provisions of [NRS 108.221](#) to [108.246](#), inclusive, must not be construed to impair or affect the right of a lien claimant to whom any debt may be due for work, materials or equipment furnished to maintain a civil action to recover that debt against the person liable therefor or to submit any controversy arising under a contract to arbitration to recover that amount.

(Added to NRS by 1965, 1165; A [2003, 2608](#))

**NRS 108.239 Action to enforce notice of lien: Complaint; required notices; joinder of persons holding or claiming notice of lien; consolidation of actions; hearing and judgment; preferential trial setting; binding arbitration; sale of property.**

1. A notice of lien may be enforced by an action in any court of competent jurisdiction that is located within the county where the property upon which the work of improvement is located, on setting out in the complaint the particulars of the demand, with a description of the property to be charged with the lien.

2. At the time of filing the complaint and issuing the summons, the lien claimant shall:

(a) File a notice of pendency of the action in the manner provided in [NRS 14.010](#); and

(b) Cause a notice of foreclosure to be published at least once a week for 3 successive weeks, in one newspaper published in the county, and if there is no newspaper published in the county, then in such mode as the court may determine, notifying all persons holding or claiming a notice of lien pursuant to the provisions of [NRS 108.221](#) to [108.246](#), inclusive, on the property to file with the clerk and serve on the lien claimant and also on the defendant, if the defendant is within the State or is represented by counsel, written statements of the facts constituting their liens, together with the dates and amounts thereof.

3. All persons holding or claiming a notice of lien may join a lien claimant's action by filing a statement of facts within a reasonable time after publication of the notice of foreclosure or receiving notice of the foreclosure, whichever occurs later. Any number of persons claiming liens may join in the same action if they timely file a statement of facts in the lien claimant's action. The lien claimant and other parties adversely interested must be allowed 20 days to answer the statements.

4. If it appears from the records of the county recorder that there are other notices of lien recorded against the same property at the time of the commencement of the action, the lien claimant shall, in addition to and after the initial publication of the notice of foreclosure as provided in paragraph (b) of subsection 2, mail to those other lien claimants, by registered or certified mail, or deliver in person a copy of the notice of foreclosure as published.

5. At the time of any change in the venue of the action, the lien claimant shall file a notice of pendency of the action, in the manner provided in [NRS 14.010](#), and include in the notice the court and county to which the action is changed.

6. When separate actions are commenced by lien claimants to foreclose on their respective notices of lien, the court may consolidate all the actions. The consolidation does not affect or change the priority of lien claims.

7. The court shall enter judgment according to the right of the parties, and shall, by decree, proceed to hear and determine the claims in a summary way, or may, if it be the district court, refer the claims to a special master to ascertain and report upon the liens and the amount justly due thereon. No consequential damages may be recovered in an action pursuant to this section. All liens not so exhibited shall be deemed to be waived in favor of those which are so exhibited.

8. Upon petition by a lien claimant for a preferential trial setting:

(a) The court shall give preference in setting a date for the trial of an action brought pursuant to this section; and

(b) If a lien action is designated as complex by the court, the court may take into account the rights and claims of all lien claimants in setting a date for the preferential trial.

9. If the lienable amount of a lien claimant's lien is the subject of binding arbitration:

(a) The court may, at the request of a party to the arbitration, stay the lien claimant's action to foreclose the lien pending the outcome of the binding arbitration. If the foreclosure on the lien involves the rights of other lien claimants or persons whose claims are not the subject of the binding arbitration, the court may stay the lien claimant's foreclosure proceeding only upon terms which are just and which afford the lien claimant a fair opportunity to protect his or her lien rights and priorities with respect to other lien claimants and persons.

(b) Upon the granting of an award by the arbitrator, any party to the arbitration may seek an order from the court in the action to foreclose on the lien confirming or adopting the award and determining the lienable amount of the lien claimant's lien in accordance with the order, if any. Upon determining the lienable amount, the court shall enter a judgment or decree for the lienable amount, plus all amounts that may be awarded by the court to the lien claimant pursuant to [NRS 108.237](#), and the court may include as part of the lien all costs and attorney's fees awarded to the lien claimant by the arbitrator and all costs and attorney's fees incurred by the lien claimant pertaining to any application or motion to confirm, adopt, modify or correct the award of the arbitrator. A judgment or decree entered by the court pursuant to this subsection may be enforced against the property as provided in subsections 10, 11 and 12.

10. On ascertaining the whole amount of the liens with which the property is justly chargeable, as provided in [NRS 108.221](#) to [108.246](#), inclusive, the court shall cause the property to be sold in satisfaction of all liens and the costs of sale, including all amounts awarded to all lien claimants pursuant to [NRS 108.237](#), and any party in whose favor judgment may be rendered may cause the property to be sold within the time and in the manner provided for sales on execution, issued out of any district court, for the sale of real property.

11. If the proceeds of sale, after payment of the costs of sale, are not sufficient to satisfy all liens to be included in the decree of sale, including all amounts awarded to all lien claimants pursuant to [NRS 108.237](#), the proceeds must be apportioned

according to the right of the various lien claimants. If the proceeds of the sale amount to more than the sum of all liens and the cost of sale, the remainder must be paid over to the owner of the property.

12. Each party whose claim is not satisfied in the manner provided in this section is entitled to personal judgment for the residue against the party legally liable for it if that person has been personally summoned or has appeared in the action.

(Added to NRS by 1965, 1165; A 1969, 728; 1981, 175; 1983, 1848; 1989, 628; [1997, 2694](#); [2003, 2608](#); [2005, 1904](#))

**NRS 108.2403 Lessee to record notice of posted security and either establish construction disbursement account or record surety bond before beginning work of improvement; contents of notice of posted security and service thereof; effect of failure to comply with requirements; rights and remedies additional.**

1. Except as otherwise provided in [NRS 108.2405](#), before a lessee may cause a work of improvement to be constructed, altered or repaired upon property that the lessee is leasing, the lessee shall:

(a) Record a notice of posted security with the county recorder of the county where the property is located upon which the improvement is or will be constructed, altered or repaired; and

(b) Either:

(1) Establish a construction disbursement account and:

(I) Fund the account in an amount equal to the total cost of the work of improvement, but in no event less than the total amount of the prime contract;

(II) Obtain the services of a construction control to administer the construction disbursement account; and

(III) Notify each person who gives the lessee a notice of right to lien of the establishment of the construction disbursement account as provided in paragraph (f) of subsection 2; or

(2) Record a surety bond for the prime contract that meets the requirements of subsection 2 of [NRS 108.2415](#) and notify each person who gives the lessee a notice of right to lien of the recording of the surety bond as provided in paragraph (f) of subsection 2.

2. The notice of posted security required pursuant to subsection 1 must:

(a) Identify the name and address of the lessee;

(b) Identify the location of the improvement and the address, legal description and assessor's parcel number of the property upon which the improvement is or will be constructed, altered or repaired;

(c) Describe the nature of the lessee's interest in:

(1) The property upon which the improvement is or will be constructed, altered or repaired; and

(2) The improvement on such property;

(d) If the lessee establishes a construction disbursement account pursuant to subsection 1, include:

(1) The name and address of the construction control;

(2) The date that the lessee obtained the services of the construction control and the total amount of funds in the construction disbursement account; and

(3) The number of the construction disbursement account, if any;

(e) If the lessee records a surety bond pursuant to subsection 1, include:

(1) The name and address of the surety;

(2) The surety bond number;

(3) The date that the surety bond was recorded in the office of the county recorder of the county where the property is located upon which the improvement is or will be constructed, altered or repaired;

(4) The book and the instrument or document number of the recorded surety bond; and

(5) A copy of the recorded surety bond with the notice of posted security; and

(f) Be served upon each person who gives a notice of right to lien within 10 days after receipt of the notice of right to lien, in one of the following ways:

(1) By personally delivering a copy of the notice of posted security to the person who gives a notice of right to lien at the address identified in the notice of right to lien; or

(2) By mailing a copy of the notice of posted security by certified mail, return receipt requested, to the person who gives a notice of right to lien at the address identified in the notice of right to lien.

3. If a lessee fails to satisfy the requirements of subsection 1 of this section or subsection 2 of [NRS 108.2407](#), the prime contractor who has furnished or will furnish materials or equipment for the work of improvement may stop work. If the lessee:

(a) Satisfies the requirements of subsection 1 of this section or subsection 2 of [NRS 108.2407](#) within 25 days after any work stoppage, the prime contractor who stopped work shall resume work and the prime contractor and the prime contractor's lower-tiered subcontractors and suppliers are entitled to compensation for any reasonable costs and expenses that any of them have incurred because of the delay and remobilization; or

(b) Does not satisfy the requirements of subsection 1 of this section or subsection 2 of [NRS 108.2407](#) within 25 days after the work stoppage, the prime contractor who stopped work may terminate the contract relating to the work of improvement and the prime contractor and the prime contractor's lower-tiered subcontractors and suppliers are entitled to recover:

(1) The cost of all work, materials and equipment, including any overhead the prime contractor and the lower-tiered subcontractors and suppliers incurred and profit the prime contractor and the lower-tiered subcontractors and suppliers earned through the date of termination;

(2) The balance of the profit the prime contractor and the lower-tiered subcontractors and suppliers would have earned if the contract had not been terminated;

(3) Any interest, costs and attorney's fees that the prime contractor and the lower-tiered subcontractors and suppliers are entitled to pursuant to [NRS 108.237](#); and

(4) Any other amount awarded by a court or other trier of fact.

4. The rights and remedies provided pursuant to this section are in addition to any other rights and remedies that may exist at law or in equity, including, without limitation, the rights and remedies provided pursuant to [NRS 624.606](#) to [624.630](#), inclusive.

(Added to NRS by [2005, 1893](#))

**NRS 108.2405 Inapplicability of [NRS 108.2403](#) and [108.2407](#) under certain circumstances; service of notice of waiver of owners' rights upon prime contractor and lien claimants.**

1. The provisions of [NRS 108.2403](#) and [108.2407](#) do not apply:
  - (a) In a county with a population of 700,000 or more with respect to a ground lessee who enters into a ground lease for real property which is designated for use or development by the county for commercial purposes which are compatible with the operation of the international airport for the county.
  - (b) If all owners of the property, individually or collectively, record a written notice of waiver of the owners' rights set forth in [NRS 108.234](#) with the county recorder of the county where the property is located before the commencement of construction of the work of improvement.
2. Each owner who records a notice of waiver pursuant to paragraph (b) of subsection 1 must serve such notice by certified mail, return receipt requested, upon the prime contractor of the work of improvement and all other lien claimants who may give the owner a notice of right to lien pursuant to [NRS 108.245](#), within 10 days after the owner's receipt of a notice of right to lien or 10 days after the date on which the notice of waiver is recorded pursuant to this subsection.
3. As used in this section:
  - (a) "Ground lease" means a written agreement:
    - (1) To lease real property which, on the date on which the agreement is signed, does not include any existing buildings or improvements that may be occupied on the land; and
    - (2) That is entered into for a period of not less than 10 years, excluding any options to renew that may be included in any such lease.
  - (b) "Ground lessee" means a person who enters into a ground lease as a lessee with the county as record owner of the real property as the lessor.
 (Added to NRS by [2005, 1895](#); A [2011, 1141](#))

**NRS 108.2407 Lien claimant has lien upon funds in construction disbursement account; disbursement of funds from construction disbursement account; lien claimant may notify construction control of claim of lien; construction control to pay legitimate claim of lien; interpleader; liability of construction control.**

1. If a construction disbursement account is established and funded pursuant to subsection 2 of this section or subsection 1 of [NRS 108.2403](#), each lien claimant has a lien upon the funds in the account for an amount equal to the lienable amount owed.
2. Upon the disbursement of any funds from the construction disbursement account for a given pay period:
  - (a) The lessee shall deposit into the account such additional funds as may be necessary to pay for the completion of the work of improvement, including, without limitation, the costs attributable to additional and changed work, material or equipment;
  - (b) The construction control described in subsection 1 of [NRS 108.2403](#) shall certify in writing the amount necessary to pay for the completion of the work of improvement; and
  - (c) If the amount necessary to pay for the completion of the work of improvement exceeds the amount remaining in the construction disbursement account:
    - (1) The construction control shall give written notice of the deficiency by certified mail, return receipt requested, to the prime contractor and each person who has given the construction control a notice of right to lien; and
    - (2) The provisions of subsection 3 of [NRS 108.2403](#) shall be deemed to apply.
3. The construction control shall disburse money to lien claimants from the construction disbursement account for the lienable amount owed such lien claimants.
4. A lien claimant may notify the construction control of a claim of lien by:
  - (a) Recording a notice of lien pursuant to [NRS 108.226](#); or
  - (b) Personally delivering or mailing by certified mail, return receipt requested, a written notice of a claim of lien to the construction control within 90 days after the completion of the work of improvement.
5. Except as otherwise provided in subsection 6, the construction control shall pay a legitimate claim of lien upon receipt of the written notice described in subsection 4 from the funds available in the construction disbursement account.
6. The construction control may bring an action for interpleader in the district court for the county where the property or some part thereof is located if:
  - (a) The construction control reasonably believes that all or a portion of a claim of lien is not legitimate; or
  - (b) The construction disbursement account does not have sufficient funds to pay all claims of liens for which the construction control has received notice.
7. If the construction control brings an action for interpleader pursuant to paragraph (a) of subsection 6, the construction control shall pay to the lien claimant any portion of the claim of lien that the construction control reasonably believes is legitimate.
8. If an action for interpleader is brought pursuant to subsection 6, the construction control shall:
  - (a) Deposit with the court an amount equal to 1.5 times the amount of the lien claims to the extent that there are funds available in the construction disbursement account;
  - (b) Provide notice of the action for interpleader by certified mail, return receipt requested, to each person:
    - (1) Who gives the construction control a notice of right to lien;
    - (2) Who serves the construction control with a claim of lien;
    - (3) Who has performed work or furnished materials or equipment for the work of improvement; or
    - (4) Of whom the construction control is aware may perform work or furnish materials or equipment for the work of improvement; and
  - (c) Publish a notice of the action for interpleader once each week, for 3 successive weeks, in a newspaper of general circulation in the county in which the work of improvement is located.
9. A construction control who brings an action for interpleader pursuant to subsection 6 is entitled to be reimbursed from the construction disbursement account for the reasonable costs that the construction control incurred in bringing such action.



(Added to NRS by 2005, 1895)

(Added to NRS by 1965, 1166; A 1975, 1206; 1981, 31; [2003, 2610](#))

1. To obtain the release of a lien for which notice of lien has been recorded against the property, the principal and a surety must execute a surety bond in an amount equal to 1.5 times the lienable amount in the notice of lien, which must be in the following form:

(Title of court and cause, if action has been commenced)

(Legal Description)

IN TESTIMONY WHEREOF, the principal and surety have executed this bond at \_\_\_\_\_, Nevada, on the \_\_\_\_\_ day of the month of \_\_\_\_\_ of the year \_\_\_\_\_.

By.....  
(Its Attorney in Fact)

State of Nevada }  
County of..... } ss.

(Notary Public in and for  
the County and State)

(Title of court and cause, if action has been commenced)

<http://www.leg.state.nv.us/nrs/NRS-108.html>



(Parties to the Prime Contract)  
 (Amount of the Prime Contract)  
 (Date of the Prime Contract)  
 (Summary of Terms of the Prime Contract)

WHEREAS, the property that is the subject of the surety bond is described as follows:

(Legal Description)

NOW, THEREFORE, the undersigned principal and surety do hereby obligate themselves in the sum of \$..... (1 1/2 x amount of prime contract) to all prospective and existing lien claimants who have provided or hereafter provide materials, equipment or work under the prime contract, from which sum the principal and surety will pay the lien claimants the lienable amount that a court of competent jurisdiction may determine is owed to each lien claimant, and such additional amounts as may be awarded pursuant to [NRS 108.237](#), but the liability of the surety may not exceed the penal sum of the surety bond. IN TESTIMONY WHEREOF, the principal and surety have executed this bond at ....., Nevada, on the ..... day of the month of ..... of the year .....

.....  
 (Signature of Principal)

(Surety Corporation)  
 By.....  
 (Its Attorney in Fact)

State of Nevada }  
 } ss.  
 County of..... }

On ..... (month) ..... (day), ..... (year), before me, the undersigned, a notary public of this County and State, personally appeared ..... who acknowledged that he or she executed the foregoing instrument as principal for the purposes therein mentioned and also personally appeared ..... known (or satisfactorily proved) to me to be the attorney in fact of the surety that executed the foregoing instrument, known to me to be the person who executed that instrument on behalf of the surety therein named, and he or she acknowledged to me that the surety executed the foregoing instrument.

.....  
 (Notary Public in and for  
 the County and State)

3. The principal must record the surety bond in the office of the county recorder in the county in which the property upon which the improvement is located, either before or after the commencement of an action to enforce the lien. A certified copy of the recorded surety bond shall be deemed an original for purposes of this section.

4. Upon the recording of the surety bond, the principal must serve a file-stamped copy of the recorded surety bond in the following manner:

(a) If a lien claimant has appeared in an action that is pending to enforce the notice of lien, service must be made by certified or registered mail, return receipt requested, upon the lien claimant at the address set forth in the lien and the lien claimant's counsel of record at his or her place of business;

(b) If a notice of lien is recorded at the time the surety bond is recorded and no action is pending to enforce the notice of lien, personal service must be made upon each lien claimant pursuant to [Rule 4](#) of the Nevada Rules of Civil Procedure; or

(c) If no notice of lien is recorded at the time the surety bond is recorded, service must be made by personal service or certified mail, return receipt requested, upon each lien claimant and prospective lien claimant that has provided or thereafter provides the owner or lessee with a notice of a right to lien. Such service must be within 10 days after the recording of the surety bond, or the service of notice of the right to lien upon the owner by a lien claimant, whichever is later.

5. Failure to serve the surety bond as provided in subsection 4 does not affect the validity of the surety bond, but the statute of limitations on any action on the surety bond, including a motion excepting to the sufficiency of the surety pursuant to [NRS 108.2425](#), is tolled until notice is given.

6. Subject to the provisions of [NRS 108.2425](#), the recording and service of the surety bond pursuant to:

(a) Subsection 1 releases the property described in the surety bond from the lien and the surety bond shall be deemed to replace the property as security for the lien.

(b) Subsection 2 releases the property described in the surety bond from any liens and prospective liens for work, materials or equipment related to the prime contract and the surety bond shall be deemed to replace the property as security for the lien.

(Added to NRS by 1981, 28; A [2001, 29](#); [2003, 2610](#); [2005, 1906](#))

**NRS 108.2421 Action against principal and surety on surety bond and debtor: Action before or after surety bond is recorded; time within which to commence action; preferential trial setting; expert witnesses; amount of award to prevailing lien claimant.**

1. The lien claimant is entitled to bring an action against the principal and surety on the surety bond and the lien claimant's debtor in any court of competent jurisdiction that is located within the county where the property upon which the work of

improvement is located.

2. If an action by a lien claimant to foreclose upon a lien has been brought:

(a) Before the surety bond is recorded:

(1) The lien claimant may amend the complaint to state a claim against the principal and the surety on the surety bond;

or

(2) The liability of the principal and surety on the surety bond may be enforced pursuant to [NRS 108.2423](#); or

(b) After the surety bond is recorded:

(1) If the surety bond is recorded pursuant to subsection 1 of [NRS 108.2415](#), the lien claimant may bring an action against the principal and the surety not later than 9 months after the date that the lien claimant was served with notice of the recording of the surety bond.

(2) If the surety bond is recorded pursuant to subsection 2 of [NRS 108.2415](#), the lien claimant may bring an action against the principal and the surety within the later of:

(I) Nine months after the date that the lien claimant was served with notice of the recording of the surety bond; or

(II) Nine months after the date of the completion of the work of improvement.

3. At any time after the filing of a joint case conference report pursuant to [Rule 16.1](#) of the Nevada Rules of Civil Procedure or, if the case is designated by the court as complex litigation, after the approval of the initial case management order by the court, each lien claimant in the action may serve upon the adverse party a "demand for preferential trial setting" and file the demand with the clerk of the court. Upon filing, the clerk of the court shall, before the Friday after the demand is filed, vacate a case or cases in a department of the court and set the lien claimant's case for hearing, on a day or days certain, to be heard within 60 days after the filing of the "demand for preferential trial setting." Only one such preferential trial setting need be given by the court, unless the hearing date is vacated without stipulation of counsel for the lien claimant in writing. If the hearing date is vacated without that stipulation, upon service and filing, a new preferential trial setting must be given.

4. A lien claimant shall, at the time of making a demand for a preferential trial setting, and each other party to the preferential trial shall, within 20 days after the lien claimant's service of the demand, serve upon all parties to the preferential trial the following documents and information:

(a) A copy of all documents that the party intends to rely upon at the time of the trial;

(b) A list of witnesses whom the party intends to call at the time of the trial, which must include for each witness:

(1) The name of the witness;

(2) The company for whom the witness works and title of the witness; and

(3) A brief summary of the expected testimony of the witness;

(c) Any supplemental discovery responses as required by the Nevada Rules of Civil Procedure;

(d) The identity of each person whom the party expects to call as an expert witness at the trial, together with a statement of the substance of the facts and opinions to which the expert witness is expected to testify and a summary of the grounds for each opinion;

(e) Any expert reports not previously disclosed; and

(f) A detailed summary of all claims, offsets and defenses that the party intends to rely upon at the trial.

5. Within 20 days after receipt of an opposing party's identification of an expert witness, a party who desires to call a rebuttal expert witness at the trial must identify each person whom the party expects to call as a rebuttal expert witness, and must provide a statement of the substance of the facts and opinions to which the rebuttal expert witness is expected to testify and a summary of the grounds for each opinion.

6. A prevailing lien claimant on a claim against a surety bond must be awarded the lienable amount plus the total amount that may be awarded by the court pursuant to [NRS 108.237](#), so long as the liability of the surety is limited to the penal sum of the surety bond. Such a judgment is immediately enforceable and may be appealed regardless of whether any other claims asserted or consolidated actions or suits have been resolved by a final judgment.

(Added to NRS by 1981, 30; A 1995, 1508; [2003, 2612](#); [2005, 1909](#))

#### **NRS 108.2423 Enforcement of liability of principal and surety.**

1. By entering into a surety bond given pursuant to [NRS 108.2415](#), the principal and surety submit themselves to the jurisdiction of the court in which an action or suit is pending on a notice of lien on the property described in the surety bond, and the principal and surety irrevocably appoint the clerk of that court as their agent upon whom any papers affecting the liability on the surety bond may be served. The liability of the principal may be established by the court in the pending action. The liability of the surety may be enforced on motion without necessity of an independent action. The motion and such notice of motion as the court prescribes may be served on the clerk of the court, who shall forthwith mail copies to the principal and surety if their addresses are known.

2. The motion described in subsection 1 must not be instituted until 30 days after:

(a) If a notice of appeal from the judgment is not filed, the giving of notice of entry of judgment in the action against the lien claimant's debtor or the giving of notice of entry of judgment in an action against the principal or the lien claimant's debtor, as the case may be; or

(b) If an appeal has been taken from the judgment, the filing of the remittitur from the Supreme Court.

(Added to NRS by 1981, 31; A [2003, 2613](#))

**NRS 108.2425 Exception to sufficiency of surety or surety bond; order to require additional security or change, substitute or add securities or for other relief; court may order principal to obtain additional security or to change or substitute securities if amount of surety bond insufficient; surety to remain liable on surety bond regardless of payment of premium.**

1. The lien claimant may, within 15 days after the service of a copy of the surety bond pursuant to subsection 4 of [NRS 108.2415](#), file a motion with the clerk of the court in a pending action, or if no action has been commenced, file a petition with the court, excepting to the sufficiency of the surety or the surety bond, and shall, at the same time and together with that motion or petition, file an affidavit setting forth the grounds and basis of the exceptions to the surety or the surety bond, and

shall serve a copy of the motion or petition and a copy of the affidavit upon the principal at the address set forth in the surety bond within 5 business days after the date of filing. A hearing must be had upon the justification of the surety or the surety bond not less than 10 days and not more than 20 days after the filing of the motion or petition. If the court determines that the surety or surety bond is insufficient, the lien claimant's lien will remain against the property or the court may allow the substitution of a sufficient surety and surety bond.

2. If, at any time after the recording of a surety bond pursuant to [NRS 108.2415](#), the surety becomes unauthorized to transact surety business in this State pursuant to [NRS 679A.030](#) or is dropped from the United States Department of the Treasury's Listing of Approved Sureties or there exists any other good cause, a lien claimant or other person having an interest in the surety bond may apply to the district court in a pending action, or commence an action if none is pending, for an order to require the principal to provide additional security or to change, substitute or add securities, or to enforce or change any other matter affecting the security provided by the surety bond.

3. If a court finds that the amount of a surety bond recorded pursuant to [NRS 108.2415](#) is insufficient to pay the total amount that may be awarded by the court pursuant to [NRS 108.237](#), the court shall order the principal to obtain additional security or to change or substitute securities so that the amount of the security provided is 1.5 times the total amount that may be awarded.

4. Any surety that records or consents to the recording of a surety bond pursuant to [NRS 108.2415](#) will remain fully liable to any lien claimant for up to the penal sum of the surety bond regardless of the payment or nonpayment of any surety bond premium.

(Added to NRS by 1981, 31; A [2003, 2614](#); [2005, 1911](#))

#### **NRS 108.243 Assignment of lien.**

1. Any lien may be assigned in the same manner as any other chose in action after it has been perfected by recording.

2. An assignment of a lien before recording will not be effective until written notice of the assignment has been given to the owner by the assignee. The notice will be sufficient if delivered in person or mailed by certified mail to the owner. After such notice, the assignee may perfect the lien in the assignee's own name.

3. One or more lien claimants of any class may assign their notices of lien by written assignment, signed by each assignor, to any other person or lien claimant of any class, and the assignee may commence and prosecute the action upon all of the notices of lien in the assignee's own name or in the name of the original lien claimant.

4. In the event that a claim for which a lien may be filed is assigned before it is perfected, such assignment does not discharge or defeat the right to perfect the lien, if the lien is reassigned to the lien claimant, and thereafter the lien is timely perfected.

(Added to NRS by 1965, 1168; A 1969, 729; [2003, 2614](#); [2005, 1912](#))

#### **NRS 108.2433 Discharge of notice of lien: Marginal entries; discharge or release must be recorded if notice of lien recorded by photographic process; presentation by lien claimant or lien claimant's personal representative or assignee.**

1. Except as otherwise provided in subsection 2, a notice of lien upon the property provided for in [NRS 108.221](#) to [108.246](#), inclusive, may be discharged by an entry on the margin of the record thereof, signed by the lien claimant or the lien claimant's personal representative or assignee in the presence of the recorder or the recorder's deputy, acknowledging the satisfaction of or value received for the notice of lien and the debt secured thereby. The recorder or the deputy shall subscribe the entry as witness. The entry has the same effect as a discharge or release of the notice of lien acknowledged and recorded as provided by law. The recorder shall properly index each marginal discharge.

2. If the notice of lien has been recorded by a microfilm or other photographic process, a marginal release may not be used and an acknowledged discharge or release of the notice of lien must be recorded.

3. If the recorder or the recorder's deputy is presented with a certificate executed by the lien claimant or the lien claimant's personal representative or assignee, specifying that the notice of lien has been paid or otherwise satisfied or discharged, the recorder or the deputy shall discharge the notice of lien upon the record.

(Added to NRS by 1991, 1104; A [2003, 2615](#))

#### **NRS 108.2437 Discharge of notice of lien: Recording by lien claimant; form; liability for failure to record.**

1. As soon as practicable, but not later than 10 days after a notice of lien upon the property pursuant to [NRS 108.221](#) to [108.246](#), inclusive, is fully satisfied or discharged, the lien claimant shall cause to be recorded a discharge or release of the notice of lien in substantially the following form:

Assessor's Parcel Numbers

#### **DISCHARGE OR RELEASE OF NOTICE OF LIEN**

##### **NOTICE IS HEREBY GIVEN THAT:**

The undersigned did, on the ..... day of the month of ..... of the year ....., record in Book ....., as Document No. ...., in the office of the county recorder of ..... County, Nevada, its Notice of Lien, or has otherwise given notice of his or her intention to hold a lien upon the following described property or improvements, owned or purportedly owned by ....., located in the County of ....., State of Nevada, to wit:

(Legal Description or Address of the Property or Improvements)

NOW, THEREFORE, for valuable consideration the undersigned does release, satisfy and discharge this notice of lien on the property or improvements described above by reason of this Notice of Lien.

(Signature of Lien Claimant)

2. If the lien claimant fails to comply with the provisions of subsection 1, the lien claimant is liable in a civil action to the owner of the property, his or her heirs or assigns for any actual damages caused by the lien claimant's failure to comply with those provisions or \$100, whichever is greater, and for a reasonable attorney's fee and the costs of bringing the action.

(Added to NRS by 1991, 1104; A 1995, 1509; [2001, 30](#); [2003, 2615](#))

**NRS 108.244 Limitation on filing complaint for foreclosure of notice of lien.** A lien claimant or assignee of a lien claimant or claimants may not file a complaint for foreclosure of a notice of lien or the assigned notice of lien or notices of lien until 30 days have expired immediately following the recording of a notice of lien or following the recording of the assigned notice of lien or the last of the assigned notices of liens. This provision does not apply to or prohibit the filing of any statement of fact constituting a lien or statements of fact constituting a lien:

1. In an action already filed for foreclosure of a notice of lien; or
2. In order to comply with the provisions of [NRS 108.239](#).

(Added to NRS by 1965, 1169; A [2003, 2616](#); [2005, 1912](#))

**NRS 108.245 Notice of right to lien: Form; service; effect.**

1. Except as otherwise provided in subsection 5, every lien claimant, other than one who performs only labor, who claims the benefit of [NRS 108.221](#) to [108.246](#), inclusive, shall, at any time after the first delivery of material or performance of work or services under a contract, deliver in person or by certified mail to the owner of the property a notice of right to lien in substantially the following form:

**NOTICE OF RIGHT TO LIEN**

To: .....  
(Owner's name and address)

The undersigned notifies you that he or she has supplied materials or equipment or performed work or services as follows:

(General description of materials, equipment, work or services)

for improvement of property identified as (property description or street address) under contract with (general contractor or subcontractor). This is not a notice that the undersigned has not been or does not expect to be paid, but a notice required by law that the undersigned may, at a future date, record a notice of lien as provided by law against the property if the undersigned is not paid.

(Claimant)

A subcontractor or equipment or material supplier who gives such a notice must also deliver in person or send by certified mail a copy of the notice to the prime contractor for information only. The failure by a subcontractor to deliver the notice to the prime contractor is a ground for disciplinary proceedings against the subcontractor under [chapter 624](#) of NRS but does not invalidate the notice to the owner.

2. Such a notice does not constitute a lien or give actual or constructive notice of a lien for any purpose.
3. No lien for materials or equipment furnished or for work or services performed, except labor, may be perfected or enforced pursuant to [NRS 108.221](#) to [108.246](#), inclusive, unless the notice has been given.
4. The notice need not be verified, sworn to or acknowledged.
5. A prime contractor or other person who contracts directly with an owner or sells materials directly to an owner is not required to give notice pursuant to this section.
6. A lien claimant who is required by this section to give a notice of right to lien to an owner and who gives such a notice has a right to lien for materials or equipment furnished or for work or services performed in the 31 days before the date the notice of right to lien is given and for the materials or equipment furnished or for work or services performed anytime thereafter until the completion of the work of improvement.

(Added to NRS by 1965, 1169; A 1967, 1104; 1969, 730; 1979, 1091; [1997, 2695](#); [2003, 2616](#); [2005, 1912](#))

**NRS 108.2453 Waiver or modification of right, obligation or liability set forth in [NRS 108.221](#) to [108.246](#), inclusive, prohibited; certain conditions, stipulations or provisions of contract for improvement of property or construction, alteration or repair of work of improvement void and unenforceable.**

1. Except as otherwise provided in [NRS 108.221](#) to [108.246](#), inclusive, a person may not waive or modify a right, obligation or liability set forth in the provisions of [NRS 108.221](#) to [108.246](#), inclusive.
2. A condition, stipulation or provision in a contract or other agreement for the improvement of property or for the construction, alteration or repair of a work of improvement in this State that attempts to do any of the following is contrary to public policy and is void and unenforceable:
  - (a) Require a lien claimant to waive rights provided by law to lien claimants or to limit the rights provided to lien claimants, other than as expressly provided in [NRS 108.221](#) to [108.246](#), inclusive;
  - (b) Relieve a person of an obligation or liability imposed by the provisions of [NRS 108.221](#) to [108.246](#), inclusive;
  - (c) Make the contract or other agreement subject to the laws of a state other than this State;
  - (d) Require any litigation, arbitration or other process for dispute resolution on disputes arising out of the contract or other agreement to occur in a state other than this State; or



(e) Require a prime contractor or subcontractor to waive, release or extinguish a claim or right that the prime contractor or subcontractor may otherwise possess or acquire for delay, acceleration, disruption or impact damages or an extension of time for delays incurred, for any delay, acceleration, disruption or impact event which was unreasonable under the circumstances, not within the contemplation of the parties at the time the contract was entered into, or for which the prime contractor or subcontractor is not responsible.

(Added to NRS by [2003, 2590](#); A [2005, 1913](#))

**NRS 108.2457 Term of contract that attempts to waive or impair lien rights of contractor, subcontractor or supplier void; requirements for enforceability of waiver or release of rights of lien claimant; effect of payment in form of two-party joint check; forms.**

1. Any term of a contract that attempts to waive or impair the lien rights of a contractor, subcontractor or supplier is void. An owner, contractor or subcontractor by any term of a contract, or otherwise, may not obtain the waiver of, or impair the lien rights of, a contractor, subcontractor or supplier, except as provided in this section. Any written consent given by a lien claimant that waives or limits any lien rights is unenforceable unless the lien claimant:

(a) Executes and delivers a waiver and release that is signed by the lien claimant or the lien claimant's authorized agent in the form set forth in this section; and

(b) In the case of a conditional waiver and release, receives payment of the amount identified in the conditional waiver and release.

2. An oral or written statement purporting to waive, release or otherwise adversely affect the rights of a lien claimant is not enforceable and does not create any estoppel or impairment of a lien unless:

(a) There is a written waiver and release in the form set forth in this section; and

(b) The lien claimant received payment for the lien and then only to the extent of the payment received.

3. Payment in the form of a two-party joint check made payable to a lien claimant and another joint payee who are in privity with each other shall, upon endorsement by the lien claimant and the joint check clearing the bank upon which it is drawn, be deemed to be payment to the lien claimant for only:

(a) The amount of the joint check;

(b) The amount the payor intended to pay the lien claimant out of the joint check; or

(c) The balance owed to the lien claimant for the work, materials or equipment covered by the joint check, whichever is less.

4. This section does not affect the enforceability of either an accord and satisfaction regarding a bona fide dispute or any agreement made in settlement of an action pending in any court or arbitration, provided the accord and satisfaction or settlement makes specific reference to the lien rights waived or impaired and is in a writing signed by the lien claimant.

5. The waiver and release given by any lien claimant is unenforceable unless it is in the following forms in the following circumstances:

(a) Where the lien claimant is required to execute a waiver and release in exchange for or to induce the payment of a progress billing and the lien claimant is not in fact paid in exchange for the waiver and release or a single payee check or joint payee check is given in exchange for the waiver and release, the waiver and release must be in the following form:

**CONDITIONAL WAIVER AND RELEASE  
UPON PROGRESS PAYMENT**

Property Name:.....  
Property Location:.....  
Undersigned's Customer:.....  
Invoice/Payment Application Number:.....  
Payment Amount:.....

Upon receipt by the undersigned of a check in the above-referenced Payment Amount payable to the undersigned, and when the check has been properly endorsed and has been paid by the bank on which it is drawn, this document becomes effective to release and the undersigned shall be deemed to waive any notice of lien, any private bond right, any claim for payment and any rights under any similar ordinance, rule or statute related to payment rights that the undersigned has on the above-described Property to the following extent:

This release covers a progress payment for the work, materials or equipment furnished by the undersigned to the Property or to the Undersigned's Customer which are the subject of the Invoice or Payment Application, but only to the extent of the Payment Amount or such portion of the Payment Amount as the undersigned is actually paid, and does not cover any retention withheld, any items, modifications or changes pending approval, disputed items and claims, or items furnished that are not paid. Before any recipient of this document relies on it, the recipient should verify evidence of payment to the undersigned. The undersigned warrants that he or she either has already paid or will use the money received from this progress payment promptly to pay in full all laborers, subcontractors, materialmen and suppliers for all work, materials or equipment that are the subject of this waiver and release.

Dated:.....

.....  
(Company Name)

By:.....

Its:.....



(b) Where the lien claimant has been paid in full or a part of the amount provided for in the progress billing, the waiver and release of the amount paid must be in the following form:

**UNCONDITIONAL WAIVER AND RELEASE  
UPON PROGRESS PAYMENT**

Property Name:.....  
 Property Location:.....  
 Undersigned's Customer:.....  
 Invoice/Payment Application Number:.....  
 Payment Amount:.....

The undersigned has been paid and has received a progress payment in the above-referenced Payment Amount for all work, materials and equipment the undersigned furnished to the Customer for the above-described Property and does hereby waive and release any notice of lien, any private bond right, any claim for payment and any rights under any similar ordinance, rule or statute related to payment rights that the undersigned has on the above-described Property to the following extent:

This release covers a progress payment for the work, materials and equipment furnished by the undersigned to the Property or to the Undersigned's Customer which are the subject of the Invoice or Payment Application, but only to the extent of the Payment Amount or such portion of the Payment Amount as the undersigned is actually paid, and does not cover any retention withheld, any items, modifications or changes pending approval, disputed items and claims, or items furnished that are not paid. The undersigned warrants that he or she either has already paid or will use the money received from this progress payment promptly to pay in full all laborers, subcontractors, materialmen and suppliers for all work, materials or equipment that are the subject of this waiver and release.

Dated:.....

.....  
 (Company Name)

By:.....

Its:.....

(Each unconditional waiver and release must contain the following language, in type at least as large as the largest type otherwise on the document:)

*Notice: This document waives rights unconditionally and states that you have been paid for giving up those rights. This document is enforceable against you if you sign it to the extent of the Payment Amount or the amount received. If you have not been paid, use a conditional release form.*

(c) Where the lien claimant is required to execute a waiver and release in exchange for or to induce payment of a final billing and the lien claimant is not paid in exchange for the waiver and release or a single payee check or joint payee check is given in exchange for the waiver and release, the waiver and release must be in the following form:

**CONDITIONAL WAIVER AND RELEASE  
UPON FINAL PAYMENT**

Property Name:.....  
 Property Location:.....  
 Undersigned's Customer:.....  
 Invoice/Payment Application Number:.....  
 Payment Amount:.....  
 Payment Period:.....  
 Amount of Disputed Claims:.....

Upon receipt by the undersigned of a check in the above-referenced Payment Amount payable to the undersigned, and when the check has been properly endorsed and has been paid by the bank on which it is drawn, this document becomes effective to release and the undersigned shall be deemed to waive any notice of lien, any private bond right, any claim for payment and any rights under any similar ordinance, rule or statute related to payment rights that the undersigned has on the above-described Property to the following extent:

This release covers the final payment to the undersigned for all work, materials or equipment furnished by the undersigned to the Property or to the Undersigned's Customer and does not cover payment for Disputed Claims, if any. Before any recipient of this document relies on it, the recipient should verify evidence of payment to the undersigned. The undersigned warrants that he or she either has already paid or will use the money received from the final payment promptly to pay in full all laborers, subcontractors, materialmen and suppliers for all work, materials or equipment that are the subject of this waiver and release.

Dated:.....

.....  
 (Company Name)

By:.....

Its:.....

(d) Where the lien claimant has been paid the final billing, the waiver and release must be in the following form:

**UNCONDITIONAL WAIVER AND RELEASE  
UPON FINAL PAYMENT**

Property Name:.....

Property Location:.....

Undersigned's Customer:.....

Invoice/Payment Application Number:.....

Payment Amount:.....

Amount of Disputed Claims:.....

The undersigned has been paid in full for all work, materials and equipment furnished to the Customer for the above-described Property and does hereby waive and release any notice of lien, any private bond right, any claim for payment and any rights under any similar ordinance, rule or statute related to payment rights that the undersigned has on the above-described Property, except for the payment of Disputed Claims, if any, noted above. The undersigned warrants that he or she either has already paid or will use the money received from this final payment promptly to pay in full all laborers, subcontractors, materialmen and suppliers for all work, materials and equipment that are the subject of this waiver and release.

Dated:.....

.....  
(Company Name)

By:.....

Its:.....

(Each unconditional waiver and release must contain the following language, in type at least as large as the largest type otherwise on the document:)

*Notice: This document waives rights unconditionally and states that you have been paid for giving up those rights. This document is enforceable against you if you sign it, even if you have not been paid. If you have not been paid, use a conditional release form.*

(e) Notwithstanding any language in any waiver and release form set forth in this section, if the payment given in exchange for any waiver and release of lien is made by check, draft or other such negotiable instrument, and the same fails to clear the bank on which it is drawn for any reason, then the waiver and release shall be deemed null, void and of no legal effect whatsoever and all liens, lien rights, bond rights, contract rights or any other right to recover payment afforded to the lien claimant in law or equity will not be affected by the lien claimant's execution of the waiver and release.

(Added to NRS by [2003, 2591](#); A [2005, 1914](#))

**NRS 108.246 Prime contractor to advise owner of content of [NRS 108.245](#); copy to be provided to each subcontractor; failure to comply with requirements constitutes ground for disciplinary action against prime contractor.**

1. Each prime contractor shall, before execution of a contract for construction, inform the owner with whom the prime contractor intends to contract of the provisions of [NRS 108.245](#) in substantially the following form:

To:.....  
(Owner's name and address)

The provisions of [NRS 108.245](#), a part of the mechanics' and materialmen's lien law of the State of Nevada, require, for your information and protection from hidden liens, that each person or other legal entity who supplies materials to or performs work on a construction project, other than one who performs only labor, deliver to the owner a notice of the materials and equipment supplied or the work performed. You may receive these notices in connection with the construction project which you propose to undertake.

2. Each prime contractor shall deliver a copy of the information required by subsection 1 to each subcontractor who participates in the construction project.

3. The failure of a prime contractor to inform pursuant to this section owners and subcontractors with whom the prime contractor contracts is a ground for disciplinary proceedings under [chapter 624](#) of NRS.

(Added to NRS by 1971, 881; A [1997, 2696](#); [2003, 2617](#))

# **ADDENDUM**

## ADDENDUM TABLE OF CONTENTS

- A.**    *Mezzanine Deeds of Trust Subordination Agreement*, dated January 22, 2008. (3 App. 641-648)
- B.**    *Findings of Fact, Conclusions of Law and Order Granting APCO Construction's Motion for Summary Judgment on Priority; and Denying Scott Financial Corporation's Motion for Priority*, entered November 22, 2011. (4 App. 840-851)
- C.**    *Decision, Order, and Judgment on Defendant SFC's Motion for Summary Judgment as to Priority of Liens*, entered May 7, 2012. (5 App. 1131-1142)
- D.**    NRS Chapter 108.221 to 108.246 (Mechanics' and Materialmen's Liens)

# **ADDENDUM**

## **A**



20080207-0001486

Assessor's Parcel Number: 163-32-101-019

Recording Requested by and  
When Recorded Mail to:

Scott Financial Corporation  
15010 Sundown Drive  
Bismarck, ND 58503

Fee: \$21.00  
N/C Fee: \$0.00

02/07/2008 10:00:58

T2008021465

Requestor:

COMMONWEALTH TITLE

Debbie Conway ADF  
Clark County Recorder Pgs: 8

④

2

### MEZZANINE DEEDS OF TRUST SUBORDINATION AGREEMENT

THIS AGREEMENT is made effective January 22, 2008, by **SCOTT FINANCIAL CORPORATION**, a North Dakota corporation ("SFC").

#### RECITALS

A. Gemstone Apache, LLC ("Apache") is the "Trustor" and SFC is the "Beneficiary" under the following described deeds of trust (separately and collectively, together with amendments now existing or hereafter arising, the "Mezzanine Deeds of Trust") covering the real property described on Exhibit A hereto (the "Trust Property"), each of which was recorded in the Official Records of Clark County, Nevada ("Office"):

(i) Senior Deed of Trust dated June 26, 2006, and recorded July 5, 2006, at Book 20060705, Instrument No. 0004264, securing \$15,000,000 evidenced by a promissory note of equal amount payable by Apache to SFC, affecting a portion of the Trust Property (the "Mezzanine Senior Deed of Trust");

(ii) Junior Deed of Trust dated June 26, 2006, and recorded July 5, 2006, at Book 20060705, Instrument No. 0004265, securing \$10,000,000 evidenced by a promissory note of equal amount payable by Apache to SFC, as amended by a First Amendment recorded May 22, 2007, at Book 20070522, Instrument No. 0004011, securing an additional \$8,000,000 evidenced by a promissory note of equal amount payable by Apache to SFC (the "Mezzanine Junior Deed of Trust"); and

(iii) Third Deed of Trust dated June 26, 2006, and recorded July 5, 2006, at Book 20060705, Instrument No. 004266, securing \$13,000,000 evidenced by a promissory note of equal amount payable by Alexander Edelstein to SFC ("Edelstein Note"), as amended by a First Amendment to Third Deed of Trust recorded October 24, 2007 at Book 20071024, Instrument No. 004182, securing an additional \$10,000,000 evidenced by a promissory note of equal amount payable by Apache to SFC (the "Mezzanine Third Deed of Trust"). (The foregoing promissory notes payable by Apache to SFC are herein referred to separately and collectively as the "Mezzanine Notes.")

B. Gemstone Development West, Inc. ("GDW") has purchased the Trust Property from Apache and has assumed the obligations under the Mezzanine Deeds of Trust and the Mezzanine Notes and the Edelstein Note pursuant to an Assumption Agreement to be recorded contemporaneously herewith. The Mezzanine Notes have been restructured and consolidated into a \$46,000,000 Promissory Note ("Restructured Mezzanine Note") payable by GDW to SFC, and the Mezzanine Deeds of Trust have

been amended to secure payment of the Restructured Mezzanine Note, pursuant to the Fourth Amendment to Mezzanine Loan Agreement of even date herewith.

C. SFC has agreed to loan \$110,000,000 to GDW pursuant to a Senior Debt Loan Agreement ("Senior Debt Loan Agreement") of even date herewith between GDW, as Borrower, and SFC, as SFC, as further evidenced by a \$100,000,000 Senior Debt Construction Note and a \$10,000,000 Senior Debt Contingency Notes (the "Senior Debt Notes") payable by GDW to SFC, payment of which is secured by a Senior Debt Deed of Trust of even date recorded in the Office at Book ~~10~~, Instrument No. ~~100~~ wherein GDW is the Trustor and SFC is the Beneficiary of a Senior Deed of Trust (the "\$110,000,000 Senior Debt Deed of Trust"). \* Book 2008207 \* Instrument No. 01482

C. SFC has agreed and hereby intends to evidence that the Mezzanine Deeds of Trust and the indebtedness secured thereby shall be subordinate to the \$110,000,000 Senior Debt Deed of Trust and the indebtedness secured thereby.

#### AGREEMENT

NOW, THEREFORE, in consideration of the premises and of the terms and conditions hereafter set forth, and as inducement for any participant to acquire any interest in the Senior Debt Loan Agreement, the Senior Debt Notes and all related loan documents, SFC hereby agrees as follows:

1. Lien Priority. The lien of the \$110,000,000 Senior Debt Deed of Trust and the indebtedness secured thereby shall in all respects be deemed prior to and superior to the lien of the Mezzanine Deeds of Trust and the indebtedness secured thereby, as though the Mezzanine Deeds of Trust had been recorded subsequent to the recordation of the \$110,000,000 Senior Debt Deed of Trust.

1. Subordination. The payment of all of the Restructured Mezzanine Note is hereby expressly subordinated to the extent and in the manner hereinafter set forth to the payment in full of the Senior Debt Notes; and regardless of any priority otherwise available to SFC (as lender of the Restructured Mezzanine Note) by law or by agreement, SFC shall hold a first security interest in all collateral securing payment of the Senior Debt Notes (the "Collateral"), and any security interest claimed therein (including any proceeds thereof) by SFC (as lender of the Restructured Mezzanine Note) shall be and remain fully subordinate for all purposes to the security interest of SFC therein for all purposes whatsoever.

2. No Payments. Until all of the Senior Debt Notes has been paid in full, SFC (as lender of the Restructured Mezzanine Note) shall not demand, receive or accept any payment (whether of principal, interest or otherwise) from the Borrower in respect of the Restructured Mezzanine Note, or exercise any right of or permit any setoff in respect of the Restructured Mezzanine Note, provided that notwithstanding the foregoing, so long as no event of default has occurred with respect to the Senior Debt Notes or the \$110,000,000 Senior Debt Deed of Trust, SFC may receive and Borrower may pay scheduled interest and fees and may pay such interest and fees from advances on the Mezzanine Note.

3. Receipt of Prohibited Payments. If SFC (as lender of the Restructured Mezzanine Note) receives any payment on the Restructured Mezzanine Note that SFC (as lender of the Restructured Mezzanine Note) is not entitled to receive under the provisions of this Agreement, SFC (as lender of the Restructured Mezzanine Note) will hold the amount so received in trust for SFC and will forthwith turn over such payment to SFC in the form received (except for the endorsement of SFC (as lender of the Restructured Mezzanine Note) where necessary) for application to then-existing Senior Debt Notes

(whether or not due), in such manner of application as SFC may deem appropriate. In the event that SFC (as lender of the Restructured Mezzanine Note) shall exercise any right of setoff that SFC (as lender of the Restructured Mezzanine Note) is not permitted to exercise under the provisions of this Agreement, SFC (as lender of the Restructured Mezzanine Note) will promptly pay over to SFC, in immediately available funds, an amount equal to the amount of the claims or obligations offset. If SFC (as lender of the Restructured Mezzanine Note) fails to make any endorsement required under this Agreement, SFC, or any of its officers or employees or agents on behalf of SFC, is hereby irrevocably appointed as the attorney-in-fact (which appointment is coupled with an interest) for SFC (as lender of the Restructured Mezzanine Note) to make such endorsement in SFC (as lender of the Restructured Mezzanine Note)'s name.

4. Action on Restructured Mezzanine Note. SFC (as lender of the Restructured Mezzanine Note) will not commence any action or proceeding against the Borrower to recover all or any part of the Restructured Mezzanine Note, or join with any SFC (as lender of the Restructured Mezzanine Note) (unless SFC shall so join) in bringing any proceeding against the Borrower under any bankruptcy, reorganization, readjustment of debt, arrangement of debt receivership, liquidation or insolvency law or statute of the federal or any state government, or take possession of, sell, or dispose of any Collateral, or exercise or enforce any right or remedy available to SFC (as lender of the Restructured Mezzanine Note) with respect to any such Collateral, unless and until the Senior Debt Notes has been paid in full.

5. Foreclosure of Collateral. Notwithstanding any security interest now held or hereafter acquired by SFC (as lender of the Restructured Mezzanine Note), SFC may take possession of, sell, dispose of, and otherwise deal with all or any part of the Collateral, and may enforce any right or remedy available to it with respect to the Collateral, all without notice to or consent of SFC (as lender of the Restructured Mezzanine Note) except as specifically required by applicable law. All proceeds received by SFC with respect to any Collateral may be applied, first, to pay or reimburse SFC for all costs and expenses (including reasonable attorneys' fees) incurred by SFC in connection with the collection of such proceeds, and, second, to any indebtedness secured by the Bank's security interest in that Collateral in any order that it may choose.

6. Bankruptcy and Insolvency. In the event of any receivership, insolvency, bankruptcy, assignment for the benefit of SFC (as lender of the Restructured Mezzanine Note)s, reorganization or arrangement with SFC (as lender of the Restructured Mezzanine Note)s, whether or not pursuant to bankruptcy law, the sale of all or substantially all of the assets of the Borrower, dissolution, liquidation or any other marshaling of the assets or liabilities of the Borrower, SFC (as lender of the Restructured Mezzanine Note) will file all claims, proofs of claim or other instruments of similar character necessary to enforce the obligations of the Borrower in respect of the Restructured Mezzanine Note and will hold in trust for SFC and promptly pay over to SFC in the form received (except for the endorsement of SFC (as lender of the Restructured Mezzanine Note) where necessary) for application to the then-existing Senior Debt Notes, any and all moneys, dividends or other assets received in any such proceedings on account of the Restructured Mezzanine Note unless and until the Senior Debt Notes has been paid in full. If SFC (as lender of the Restructured Mezzanine Note) shall fail to take any such action, SFC, as attorney-in-fact for SFC (as lender of the Restructured Mezzanine Note), may take such action on SFC (as lender of the Restructured Mezzanine Note)'s behalf. SFC (as lender of the Restructured Mezzanine Note) hereby irrevocably appoints SFC, or any of its officers or employees on behalf of SFC, as the attorney-in-fact for SFC (as lender of the Restructured Mezzanine Note) (which appointment is coupled with an interest) with the power but not the duty to demand, sue for, collect and receive any and all such moneys, dividends or other assets and give acquittance therefor and to file any claim, proof of claim or other instrument of similar character, to vote claims on the Restructured Mezzanine Note to accept or reject any plan of partial or complete liquidation, reorganization, arrangement, composition or extension and to take such other action in SFC's own name or in the name of SFC (as lender of the Restructured Mezzanine Note) as SFC may deem necessary or advisable for the enforcement of the agreements contained herein; and SFC (as lender of the Restructured Mezzanine Note) will execute and deliver to SFC such other and further powers-of-attorney or instruments as SFC may request in order to accomplish the foregoing.

7. Restrictive Legend; Transfer of Restructured Mezzanine Note. SFC (as lender of the Restructured Mezzanine Note) will cause all notes, bonds, debentures or other instruments evidencing the Restructured Mezzanine Note or any part thereof to contain a specific statement thereon to the effect that the indebtedness thereby evidenced is subject to the provisions of this Agreement, and SFC (as lender of the Restructured Mezzanine Note) will mark its books conspicuously to evidence the subordination effected hereby. SFC (as lender of the Restructured Mezzanine Note) will not assign, transfer or pledge to any other person any of the Restructured Mezzanine Note unless the subordination provisions hereof are accepted and agreed by such other person.

8. Continuing Effect. This Agreement shall constitute a continuing agreement of subordination, and SFC may modify any term of the Senior Debt Notes in reliance upon this Agreement. Without limiting the generality of the foregoing, SFC may, at any time and from time to time:

- (a) change the interest rate or change the amount of payment or extend the time for payment or renew or otherwise alter the terms of any Senior Debt Notes or any instrument evidencing the same in any manner;

(b) sell, exchange, release or otherwise deal with any property at any time securing payment of the Senior Debt Notes or any part thereof;

(c) release anyone liable in any manner for the payment or collection of the Senior Debt Notes or any part thereof;

(d) exercise or refrain from exercising any right against the Borrower or any other person (including SFC (as lender of the Restructured Mezzanine Note)); and

(e) apply any sums received by SFC, by whomsoever paid and however realized, to the Senior Debt Notes in such manner as SFC shall deem appropriate.

10. This Agreement shall not be construed as affecting the priority of any other liens or encumbrances in favor of SFC on the Trust Property.

11. This Agreement shall be construed according to the laws of the State of Nevada and shall be binding upon and inure to the benefit of SFC, its participants, and their successors and assigns.

*The rest of this page is intentionally left blank.*



SCOTT FINANCIAL CORPORATION

By: \_\_\_\_\_

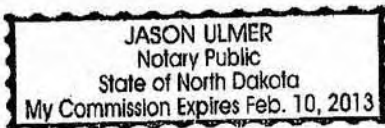
Brad J. Scott  
President

STATE OF NORTH DAKOTA }

ss

COUNTY OF BURLEIGH }

This instrument was acknowledged before me on January 29, 2008, by Brad J. Scott, President of Scott Financial Corporation, a North Dakota corporation, on behalf of the corporation.

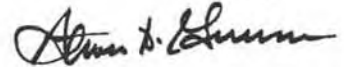


\_\_\_\_\_  
NOTARY PUBLIC

THIS INSTRUMENT WAS DRAFTED BY:  
Maslon Edelman Borman & Brand, LLP (PRH)  
3300 Wells Fargo Center  
90 South Seventh Street  
Minneapolis, Minnesota 55402  
(612) 672-8200

**ADDENDUM**

**B**



CLERK OF THE COURT

**FFCO**  
GWEN RUTAR MULLINS, ESQ.  
Nevada Bar No. 3146  
WADE B. GOCHNOUR, ESQ.  
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*Attorneys for Defendant APCO Construction*

**DISTRICT COURT  
CLARK COUNTY, NEVADA**

APCO CONSTRUCTION, a Nevada  
corporation,

Plaintiff,

vs.

GEMSTONE DEVELOPMENT WEST, INC.,  
a Nevada corporation; NEVADA  
CONSTRUCTION SERVICES, a Nevada  
corporation; SCOTT FINANCIAL  
CORPORATION, a North Dakota corporation;  
COMMONWEALTH LAND TITLE  
INSURANCE COMPANY; FIRST  
AMERICAN TITLE INSURANCE  
COMPANY; and DOES I through X,

Defendants.

CASE NO.: A571228

DEPT. NO.: XXIX

Consolidated with: 08A574391,  
08A574792, 08A577623, 09A580889,  
09A583289, 09A584730, 09A587168, A-  
09-589195-C, A-09-589677-C, A-09-  
590319-C, A-09-592826-C, A-09-596924-C,  
and A-09-597089-C

**FINDINGS OF FACT, CONCLUSIONS  
OF LAW AND ORDER GRANTING  
APCO CONSTRUCTION'S MOTION  
FOR SUMMARY JUDGMENT ON  
PRIORITY; and DENYING SCOTT  
FINANCIAL CORPORATION'S  
MOTION FOR PRIORITY**

**AND ALL RELATED CASES AND  
MATTERS**

This matter having come before this Court for a hearing on July 27, 2010 on APCO Construction's Motion for Summary Judgment on Priority ("APCO's Motion") and Scott Financial Corporation's Motion for Summary Judgment on Priority ("SFC's Motion"), Plaintiff, APCO CONSTRUCTION ("APCO"), appearing by and through Wade B. Gochnour, Esq. of

1 the law firm of HOWARD & HOWARD ATTORNEYS PLLC, Defendant SCOTT  
2 FINANCIAL CORPORATION ("SFC"), appearing by and through Glenn F. Meier, Esq. of the  
3 law firm of MEIER & FINE and other counsel for various lien claimants appearing, and the  
4 Court having heard the arguments of counsel and further considered all the papers, oppositions,  
5 joinders and other pleadings filed in this action, and the Court having taken the matter under  
6 submission and having made an oral pronouncement of its decision on the competing motions  
7 for summary judgment on priority as reflected by the Court's Minute Order dated December 9,  
8 ~~2011~~<sup>2010</sup> and other good cause appearing therefor,

9 **THE COURT HEREBY MAKES THE FOLLOWING FINDINGS OF FACT:**

10 1. Gemstone Development West, Inc. ("Gemstone") is the current owner of the  
11 ManhattanWest mixed use development project ("Project"), commonly referred to as 9205 W.  
12 Russell Road, Clark County, Nevada, described in the contract with APCO and Gemstone as  
13 being located on Assessor's Parcel Numbers: 163-32-101-003, 163-32-101-004, 163-32-101-  
14 005, 163-32-101-010 and 163-32-101-014 but listed by the Clark County Assessors Office as  
15 APN #163-32-101-019, and then, well after commencement of construction, was subdivided  
16 into 163-32-101-019; 163-32-101-020; 163-32-101-022; 163-32-101-023 and 163-32-112-001  
17 through 163-32-112-246, inclusive, together with an undivided allocated fractional interest in  
18 and to any common elements on said property, further described as PT NE4 NW4 SEC 32 21  
19 60, SEC 32 TWP 21 RNG 60 by the Clark County Assessor's Office and more fully described  
20 in that certain Grant Bargain Sale Deed recorded on February 7, 2008 in Book 20080207 as  
21 Instrument No. 01481 of the Official Records of Clark County Recorder (the "Property").

22 2. SFC and Gemstone Apache, LLC entered into a Loan Agreement (Gemstone  
23 Apache), dated June 26, 2006, in which SFC would loan Gemstone Apache the total sum of  
24 \$25,000,000.00 (the "2006 Loan Agreement").

25 3. The loan was divided into two loans, the "Senior Loans" for up to \$15,000,000  
26 and the "Junior Loans" for up to \$10,000,000.

27 ///

28 ///

1           4.     In order to effectuate the loans, SFC and Gemstone Apache entered into two  
2 separate notes, the Senior Deed of Trust Note for \$15,000,000 ("Senior Note") and the Junior  
3 Deed of Trust Note for \$10,000,000 ("Junior Note"), both dated June 26, 2006.

4           5.     In order to secure the obligations of the Senior Note, a Senior Deed of Trust and  
5 Security Agreement with Assignment of Rents and Fixture Filing (Line of Credit)  
6 (\$15,000,000) was recorded on July 5, 2006 as Book No. 20060705, Instrument No. 0004264  
7 (the "Senior DOT").

8           6.     In order to secure the obligations of the Junior Note, a Junior Deed of Trust and  
9 Security Agreement with Assignment of Rents and Fixture Filing (Line of Credit)  
10 (\$10,000,000) was recorded on July 5, 2006 as Book No. 20060705, Instrument No. 0004265  
11 (the "Junior DOT").

12           7.     In conjunction with the Senior Note and Junior Note, SFC also entered into a  
13 Loan Agreement (Edelstein), dated June 26, 2006 (the "Edelstein Loan"), with Alexander  
14 Edelstein, for a loan in the maximum amount of \$13,000,000.

15           8.     In order to secure the Edelstein Note, SFC obtained a Third Deed of Trust and  
16 Security Agreement with Assignment of Rents and Fixtures Filing (Line of Credit)  
17 (\$13,000,000) (the "Third DOT"), which was recorded on July 5, 2006, at Book No. 20060705,  
18 Instrument No. 0004266.

19           9.     The Loan Agreement also provided for the Senior Note, Junior Note and  
20 Edelstein Note to be secured by a Junior Third Deed of Trust and Security Agreement with  
21 Assignment of Rents and Fixtures Filing in the amount of \$38,000,000.00 (the "Gemstone LVS  
22 Deed of Trust"), secured by property owned by Gemstone LVS, the owner of a prior project  
23 known at the Manhattan project.

24           10.    On or about May 22, 2007, SFC recorded the First Amended Junior Deed of  
25 Trust and Security Agreement with Assignment of Rents and Fixture Filing (Line of Credit) at  
26 Book No. 20070522, Instrument No. 0004011 (the "First Amended Junior DOT").

27           11.    The First Amended Junior DOT was recorded to secure a new Additional Line of  
28 Credit Note in the maximum amount of \$8,000,000.

12. The Additional Line of Credit Note provided for SFC to loan Gemstone Apache an additional \$8,000,000 over and above the \$10,000,000 provided for in the Junior Note.

13. On or about October 19, 2007, SFC and Mr. Edelstein entered in a Senior Debt Construction Line Of Credit Note, dated October 19, 2007 (the "Construction LOC Note").

14. Pursuant to the Construction LOC Note, SFC agreed to loan an additional \$10,000,000 to Mr. Edelstein.

15. Despite using the term "Senior Debt," the Construction LOC Note was secured by the First Amendment to Third Deed of Trust and Security Agreement with Assignment of Rents and Fixtures Filing (Line Of Credit), recorded on October 24, 2007 at Book No. 20071024, Instrument No. 0004182 (the "Amended Third DOT").

16. The Senior DOT, the Junior DOT, the Third DOT, the First Amended Junior DOT, and the Amended Third DOT are collectively hereafter the "Prior Deeds of Trust."

17. On or around January 22, 2008, SFC agreed to make a construction loan to fully fund construction of the Project.

18. Some of the basic items of the financing were set forth in an e-mail from Brad Scott of SFC to Gary Tharaldson, and copied to Alex Edelstein on October 5, 2007, where Mr. Scott states as of October 5, 2007 as:

These notes all covert (sic) to one single note of \$33 MM to the Company and the existing \$13 MM to Alex (until [the existing Manhattan] Sales pay this in full) upon closing of the Senior Construction Loan to the Company for a total of \$46 MM.

19. SFC entered into a Senior Debt Loan Agreement with Gemstone Development West, Inc. dated January 22, 2008 (the "Construction Loan Agreement").

20. The construction loan transaction resulted in the recording of several deeds of trust:

a) The Senior Debt Deed of Trust and Security Agreement with Assignment of Rents and Fixtures Filing (Construction) dated January 22, 2008, recorded on February 7, 2008, at Book 20080207, Instrument No. 001482 (the "Construction Deed of Trust").

b) The First Amendment to Senior Deed of Trust and Security Agreement with Assignment of Rents and Fixtures Filing (Line of Credit) (Mezzanine), dated January 22, 2008, recorded on February 7, 2008, at Book 20080207, Instrument No. 001484 (the "Senior Mezzanine DOT").

c) The Second Amendment to Junior Deed of Trust and Security Agreement with Assignment of Rents and Fixtures Filing (Line of Credit) (Mezzanine), dated January 22, 2008, recorded on February 7, 2008, at Book 20080207, Instrument No. 001485 (the "Junior Mezzanine DOT").

21. The Senior Mezzanine DOT and the Junior Mezzanine DOT are collectively hereafter the "Mezzanine Deeds of Trust."

22. Pursuant to the Construction Loan Agreement, SFC agreed to loan to Gemstone the maximum amount of \$110,000,000, which would be made up of two separate loans: a \$100,000,000 Senior Debt Construction Note and a \$10,000,000 Senior Debt Contingency Note.

23. The Construction Loan Agreement also stated:

2.2 The initial advance under the Senior Debt Construction Note will be used to pay the Mezzanine Financing except for the following: (a) land costs, (b) loan fees or interest expense paid the Mezzanine Financing participant or (c) required equity as set forth in Section 3.1.10 below.

24. In addition to the Construction Loan Agreement, SFC and Gemstone Development West, Inc. entered into a new Mezzanine Note, dated January 22, 2008, for the principal sum of \$46,000,000.

25. The Mezzanine Note refinanced the Prior Deeds of Trust as the Senior Mezzanine DOT and the Junior Mezzanine DOT.

26. In conjunction with the Mezzanine Note, SFC entered into a Nonrecourse Participation Agreement (the "Participation Agreement") with Club Vista Financial Services, LLC, dated January 21, 2008.



1           27. Pursuant to the terms of the Participation Agreement, Club Vista Financial  
2 Services was providing SFC with \$46,000,000 to fund the loan to Gemstone West  
3 Development, Inc.

4           28. The Participation Agreement was further evidenced by the Loan Participation  
5 Certificate, setting forth that Club Vista Financial Services, LLC was providing 100% of the  
6 \$46,000,000 to be loaned under the Mezzanine Note.

7           29. As part of the title insurance process for the Construction Deed of Trust, a  
8 Construction Loan Loss of Priority Questionnaire (the "Questionnaire") was obtained from  
9 Gemstone, noting that as of January 11, 2008, work on the "Foundation, Framing" was ongoing.

10           30. Also, the Questionnaire noted that there were deeds of trust to be subordinated to  
11 the Construction Deed of Trust.

12           31. As of the time of the Questionnaire, SFC knew that there was a construction loan  
13 loss of priority.

14           32. On February 7, 2008, SFC Recorded the Mezzanine Deeds of Trust  
15 Subordination Agreement (the "Subordination Agreement") at Book 20080207, Instrument No.  
16 001486.

17           33. The Subordination Agreement provides, in pertinent part:

18           ... The Mezzanine Notes have been restructured and consolidated  
19 into a \$46,000,000 Promissory Note ("Restructured Mezzanine  
20 Note") payable by GDW to SFC, and the Mezzanine Deeds of  
21 Trust have been amended to secure payment of the Restructured  
22 Mezzanine Note, pursuant to the Fourth Amendment to  
23 Mezzanine Loan Agreement of even date herewith.

24           C. SFC has agreed and hereby intends to evidence that  
25 the Mezzanine Deeds of Trust and the indebtedness secured  
26 thereby shall be subordinate to the \$110,000,000 Senior Debt  
27 Deed of Trust and the indebtedness secured thereby.

28           1. Lien Priority. The lien of the \$110,000,000 Senior  
Debt Deed of Trust and the indebtedness secured thereby shall in  
all respects be deemed prior to and superior to the lien of the  
Mezzanine Deeds of Trust and the indebtedness secured thereby,  
as though the Mezzanine Deeds of Trust had been

recorded subsequent to the recordation of the \$110,000,000 Senior Debt Deed of Trust.

1. (sic) Subordination. The payment of all of the Restructured Mezzanine Note is hereby expressly subordinated to the extent and in the manner hereinafter set forth to the payment in full of the Senior Debt Notes; and regardless of any priority otherwise available to SFC (as lender of the Restructured Mezzanine Note) by law or by agreement, SFC shall hold a first security interest in all collateral securing payment of the Senior Debt Notes (the "Collateral"), and any security interest claimed therein (including any proceeds thereof) by SFC (as lender of the Restructured Mezzanine Note) shall be and remain fully subordinate for all purposes to the security interest of SFC therein for all purposes whatsoever.

2. No Payments. Until all of the Senior Debt Notes has (sic) been paid in full, SFC (as lender of the Restructured Mezzanine Note) shall not demand, receive or accept any payment (whether of principal, interest or otherwise) from the Borrower in respect of the Restructured Mezzanine Note, or exercise any right of or permit any setoff in respect of the Restructured Mezzanine Note, provided that notwithstanding the foregoing, so long as no event of default has occurred with respect to the Senior Debt Notes or the fees and may pay such interest and fees from advances on the Mezzanine Note.

4. Action on Restructured Mezzanine Note. SFC (as lender of the Restructured Mezzanine Note) will not commence any action or proceeding against the Borrower to recover all or any part of the Restructured Mezzanine Note, or join with any SFC (as lender of the Restructured Mezzanine Note) (unless SFC shall so join) in bringing any proceeding against the Borrower under any bankruptcy, reorganization, readjustment of debt, arrangement of debt receivership, liquidation or insolvency law or statute of the federal or any state government, or take possession of, sell, or dispose of any Collateral, or exercise or enforce any right or remedy available to SFC (as lender of the Restructured Mezzanine Note) with respect to any such Collateral, unless and until the Senior Debt Notes has (sic) been paid in full.  
(Page 3, emphasis added).

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1           34. As part of the Construction Deed of Trust, SFC obtained a title policy from  
2 LandAmerica Commonwealth, with a specific endorsement for mechanic's liens that have  
3 priority over the Construction Deed of Trust, which provides:

ENDORSEMENT  
ATTACHED TO POLICY NO. 05111973  
ISSUED BY  
Commonwealth Land Title Insurance Company

The Company hereby insures against loss or damage sustained by reason of the establishment of priority over the lien of the Insured Mortgage upon Title of any statutory lien for services, labor or material arising out of any work of improvement under construction or completed at Date of Policy.

35. On January 23, 2008, before the Construction Deed of Trust was recorded, SFC approved a SFC Draw Summary, which included a Site Inspection Report showing work APCO performed in November 2007, and pictures of visible work of construction.

36. APCO began work prior to the execution or recording of the Construction Deed of Trust.

37. In response to Requests For Admission Nos. 11, 12 and 13, relating to the relative priority between the Mezzanine Deeds of Trust and the Construction Deed of Trust, SFC stated:

Without waiving the objection, it is Scott Financial Corporation's contention that the Construction Deed of Trust is senior in priority.

38. In its Answer To Interrogatory No. 20, SFC stated:

SFC does not contend that any other deed of trust or lien, held by SFC, has priority over the Senior Deed of Trust and Security Agreement with Assignment of Rents and Fixtures Filing (Construction), recorded on February 7, 2008, as Book No. 20080207, Instrument No. 1482.

39. APCO and all of the other lien claimants have filed mechanic's liens asserting claims for unpaid work on the Project.

///

1. NRS 108.22112 provides:

1. Work performed; or
2. Materials or equipment furnished in connection with a work of improvement,

is visible from a reasonable inspection of the site.

3. NRS 108.225 provides:

(b) Any lien, mortgage or other encumbrance of which the lien claimant had no notice and which was unrecorded against the property at the commencement of construction of a work of improvement.

4. NRS 108.225 and NRS 108.22112 do not require the specific lien claimant requesting priority to perform work prior to the recordation of the deed of trust in order for its mechanic's lien to have priority. Instead, all mechanic's liens relate back to the date overall construction commenced. *J.E. Dunn Northwest, Inc. v. Corus Construction Venture, LLC*, 127 Nev. Adv. Opn. 5 (March 3, 2011).

6. The argument made by SFC is for equitable remedies.

1           7.       Equity arguments cannot be enforced when the Legislature has enacted a statute  
2 addressing the issue. *See e.g. Beazer Homes Nevada, Inc. v. District Court*, 120 Nev. 575, 578,  
3 97 P.3d 1132, FN4 (2004) (“When a statute is clear, unambiguous, not in conflict with other  
4 statutes and is constitutional, the judicial branch may not refuse to enforce the statute on public  
5 policy grounds. That decision is within the sole purview of the legislative branch.”); *Pellegrini*  
6 *v. State*, 117 Nev. 860, 877-78, 34 P.3d 519, 531 (2001) (“equitable principles will not justify a  
7 court’s disregard of statutory requirements”); *Mello v. Woodhouse*, 110 Nev. 366, 373, 872 P.2d  
8 337, 341 (1994) (“Moreover, it is well established that courts of equity can no more disregard  
9 statutory and constitutional requirements than can courts of law.”).

10           8.       The Nevada Legislature has provided a specific statute that provides that the  
11 mechanic’s lien claimants have priority over the Construction Deed of Trust.

12           9.       NRS 108.225 clearly and specifically addresses the priority question before the  
13 Court, and provides that the lien claimants have priority over any interest of SFC herein.

14           10.      Priority is also determined between the lien claimants and SFC on the relative  
15 priority between the lien claimants and the Construction Deed of Trust due to the explicit terms  
16 of the Subordination Agreement.

17           11.      As provided in the express terms of the Subordination Agreement, SFC fully and  
18 completely subordinated the Mezzanine Deeds of Trust to a position behind the Construction  
19 Deed of Trust, “for all purposes.”

20           12.      The terms and language of the Subordination Agreement are clear and  
21 unambiguous.

22           13.      By subordinating its debt to a later lien, SFC knowingly placed the Mezzanine  
23 Deeds of Trust behind the Construction Deed of Trust for priority purposes. *AmSouth Bank v. J*  
24 *& D Financial Corp.*, 679 So.2d 695, 698 (Ala. 1996).

25           14.      The definition of subordination agreement states that “the subordinating party  
26 agrees that its interest in real property should have a lower priority than the interest to which it is  
27 being subordinated.” *Id.* (citing *Black’s Law Dictionary* (6<sup>th</sup> ed.1990)).  
28

1 15. Nothing in the definition of subordination contemplates raising a lower priority  
2 lien holder up to the position of the subordinating party." *Id.* See e.g. *J.C. McConnell v.*  
3 *Mortgage Investment Co. of El Paso*, 292 S.W.2d 636 (Tex.Ct.Civ.App. 1955), and *Ladner v.*  
4 *Hogue Lumber & Supply Co.*, 91 So.2d 545 (Miss. 1956).

5 16. Further, the Court does not find that *Bratcher v. Buckner*, 90 Cal.App.4<sup>th</sup> 1177  
6 (2001) is persuasive.

7 Based upon the above Findings of Fact and Conclusions of Law,

8 **IT IS HEREBY ORDERED, ADJUDGED AND DECREED** that APCO's Motion is  
9 hereby granted in its entirety.

10 **IT IS FURTHER ORDERED, ADJUDGED AND DECREED** that SFC's Motion is  
11 hereby denied in its entirety.

12 **IT IS FURTHER ORDERED, ADJUDGED AND DECREED** that SFC has standing  
13 to dispute the mechanic's lien claimants' motions, amount and priorities, as its interests are  
14 adverse to the lien claimants' interests.

15 **IT IS FURTHER ORDERED, ADJUDGED AND DECREED** that all mechanic's  
16 lien claimants, including APCO, are in first priority position over any and all deeds of trusts on  
17 the Property, including without limitation, the Prior Deeds of Trust, the Mezzanine Deeds of  
18 Trust and the Construction Deed of Trust on the Property.

19 ///

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HOWARD & HOWARD ATTORNEYS PLLC  
3800 Howard Hughes Parkway  
Wells Fargo Tower, Suite 1400  
Las Vegas, Nevada 89169  
(702) 257-1483


1 IT IS FURTHER ORDERED, ADJUDGED AND DECREED that to the extent any  
2 finding of fact should be considered a conclusion of law, or any conclusion of law should be  
3 considered a finding of fact, then any such provision shall be treated as such.

4 DATED this 15<sup>th</sup> day of November 2011. *Presumed to EDCR 7-10 (b), SIGNED THIS DAY BY:*

5  
6  
7   
DISTRICT COURT JUDGE

8  
9 Respectfully Submitted By:

10 HOWARD & HOWARD ATTORNEYS PLLC

11  
12   
13 Gwon Rutar Mullins, Esq.  
14 Nevada Bar No. 3146  
15 Wade B. Gochnour, Esq.  
16 Nevada Bar No. 6314  
17 3800 Howard Hughes Pkwy., Suite 1400  
18 Las Vegas, NV 89169  
19 Attorneys for APCO Construction  
20  
21  
22  
23  
24  
25  
26  
27  
28

**ADDENDUM**

**C**

ORIGINAL

*Alman P. Quinn*

CLERK OF THE COURT

JMNT  
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SCOTT FINANCIAL CORPORATION

DISTRICT COURT

CLARK COUNTY, NEVADA

In Re Manhattan West Mechanic's Lien  
Litigation,

Case No. 08-A571228-B

Dept. No. XXIX

APCO CONSTRUCTION, INC., a Nevada  
corporation,

*Consolidated With*

|            |               |
|------------|---------------|
| 08-A574391 | A-09-589195-C |
| 08-A574792 | A-09-589677-C |
| 08-A577623 | A-09-590319-C |
| 09-A579963 | A-09-592826-C |
| 09-A580889 | A-09-596924-C |
| 09-A583289 | A-09-597089-C |
| 09-A584730 | A-09-606730-C |
| 09-A587168 | A-10-608717-C |
|            | A-10-608718-C |

Plaintiff,  
vs.

GEMSTONE DEVELOPMENT WEST, INC., a  
Nevada corporation; NEVADA  
CONSTRUCTION SERVICES, a Nevada  
corporation; SCOTT FINANCIAL  
CORPORATION, a North Dakota corporation;  
COMMONWEALTH LAND TITLE  
INSURANCE COMPANY; FIRST  
AMERICAN TITLE INSURANCE  
COMPANY; and DOES I through X,

**DECISION, ORDER AND JUDGMENT  
ON DEFENDANT SCOTT FINANCIAL  
CORPORATION'S MOTION FOR  
SUMMARY JUDGMENT AS TO  
PRIORITY OF LIENS**

Defendants.

Date: April 4, 2012

Time: 11:00 a.m.

And all Related and Consolidated Claims.

Defendant SCOTT FINANCIAL CORPORATION'S ("SFC") re-hearing of its Motion  
for Summary Judgment as to Priority of Liens having come on for hearing on March 21, 2012,  
and after reviewing all of the moving papers, oppositions, joinders and replies filed as a result of  
both the original and the re-hearing; and having entertained arguments of counsel;

///

///

04-32-12 PMS-03 18

MEIER & FINE  
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Las Vegas, Nevada 89102  
Tel: (702) 673-1000  
Fax: (702) 673-1001

1 The following is the Court's DECISION:

2 As threshold finding, the Court finds that this issue is ripe for summary judgment as there  
3 are no genuine issues of material fact. The following are the undisputed facts material to the  
4 resolution of the issue of lien priority:

5 **UNDISPUTED FACTS**

6 1. At issue in this motion is the relative priority of competing liens encumbering  
7 certain real property in Clark County, Nevada commonly referred to as 9205 W. Russell Road,  
8 Clark County, Nevada. The property at issue was initially identified by Assessor Parcel  
9 Numbers: 163-32-101-003; 163-32-101-004; 163-32-101-005; 163-32-101-010; and 163-32-101-  
10 014, but were later identified by the Clark County Assessor's Office as Assessor Parcel Number:  
11 163-32-101-019. The parcel was subsequently sub-divided into parcels numbered 163-32-101-  
12 019; 163-32-101-020; 163-32-101-022; and 163-32-101-023 and those are the parcel numbers as  
13 assigned by the Clark County Assessor's office as of the date of this order. ("Subject Property").

14 2. The priority issues decided in this motion deal with the relative priority of two  
15 groups of liens. The first group of liens are represented by numerous deeds of trust securing  
16 purchase money and construction loans while the second are mechanics' liens asserted by  
17 various contractors who have claimed to furnish labor and materials in support of improving  
18 the Subject Property and assert liens pursuant to Chapter 108 of the Nevada Revised Statutes.

19 3. The Subject Property was acquired by Gemstone Apache, LLC in July 5, 2006,  
20 and this acquisition was financed by two Purchase Money Deeds of Trust in favor of SFC in  
21 the amount of \$15 million and \$10 million, respectively, and a third line of Credit Deed of  
22 Trust in the amount of \$13 million.

23 4. The loans referenced above were secured by three separate Deeds of Trust. A  
24 First Deed of Trust for \$15,000,000.00, was recorded in Book Number 20060705 as Instrument  
25 Number 0004264 on July 5, 2006. A Junior Deed of Trust for \$10,000,000.00 was recorded in  
26 Book Number 200607045 as Instrument Number 0004265 on July 5, 2006, and a Third Deed of  
27 Trust for \$13,000,000.00 recorded as Book Number 20060705 as Instrument Number 0004266  
28 on July 5, 2006 in the Official Records of the Clark County Recorder for Clark County, Nevada

1 (collectively, the "Original Mezzanine Deeds of Trust").

2 5. No work commenced until April 2007, well after Original Mezzanine Deeds of  
3 Trust were properly recorded.

4 6. On or about May 22, 2007 SFC extended additional financing in the amount of  
5 \$8,000,000.00 to Gemstone and such financing was secured by way of an Amendment to the  
6 above-referenced Junior Deed of Trust. The Junior Deed of Trust Amendment was recorded in  
7 Book Number 20070522 as Instrument Number 0004011 in the Official Records of the Clark  
8 County Recorder for Clark County, Nevada, on May 22, 2007. This was not a refinance of the  
9 existing debt, nor was the original loan paid off. The additional financing of \$8,000,000.00 was  
10 new money for the Manhattan West project.

11 7. On or about October 24, 2007 SFC extended additional financing in the amount of  
12 \$10,000,000.00 secured by way of an Amendment to the Third Deed of Trust which was  
13 recorded in Book Number 20071024 as Instrument Number 0004182 in the Official Records of  
14 the Clark County Recorder for Clark County, Nevada. This was not a refinance of the existing  
15 debt, nor was the original loan paid off. The additional financing of \$10,000,000.00 was new  
16 money for the Manhattan West project.

17 8. On January 22, 2008 an Assumption Agreement was executed and entered with  
18 SFC as Lender, Gemstone Apache, LLC and Gemstone Development West, LLC in which  
19 Gemstone Apache conveyed its interest in the Subject Property to Gemstone Development West,  
20 LLC and Gemstone Development West, LLC assumed the Senior Deed of Trust, Junior Deed of  
21 Trust and Third Deed of Trust with the amendments thereto. The Assumption Agreement was  
22 recorded on February 7, 2008 on Book Number 20080207 as Instrument Number 0001483 in the  
23 Official Records of the Clark County Recorder for Clark County, Nevada.

24 9. On January 22, 2008 a First Amendment to the Senior Deed of Trust and Security  
25 Agreement with Assignment of Rents and Fixtures Filing (Line of Credit) (Mezzanine) was  
26 executed ("Senior Deed of Trust Amendment"). The Senior Deed of Trust Amendment was  
27 recorded on February 7, 2008 in Book Number 20080207 as Document Number 0001484.

28 10. On January 22, 2008 a Second Amendment to the Junior Deed of Trust and

1 Security Agreement with the Assignment of Rents and Fixture Filing was executed and recorded  
2 on February 7, 2008 in Book Number 20080207 as Document Number 0001485. The Senior  
3 Deed of Trust Amendment and the Junior Deed of Trust Second Amendment were renamed the  
4 Mezzanine Trust Deeds. This additional funding provided by SFC simply introduced new  
5 money to the project and did not constitute a new loan or a refinance of any existing debt.

6 11. On January 28, 2008 the Senior Deed of Trust and Security Agreement with  
7 Assignment of Rents and Fixture Filings for \$110,000,000.00 was executed ("Construction Deed  
8 of Trust"). SFC was the beneficiary of the Construction Deed of Trust which was recorded on  
9 February 7, 2008 in Book Number 20080207 as Document Number 00014882. This was not a  
10 refinance of the existing debt, nor was the original loan paid off. This additional funding  
11 provided by SFC simply introduced new money to the project and did not constitute a new loan  
12 or a refinance of any existing debt.

13 12. In addition to the execution of the above-referenced Deeds of Trust, on January  
14 22, 2008 a Mezzanine Deed of Trust Subordination Agreement was executed ("Subordination  
15 Agreement") solely by Gemstone and SFC and provided that the Construction Deed of Trust was  
16 to be deemed superior and hold a first security interest as between these two entities. The  
17 Subordination Agreement was recorded on February 7, 2008 in Book Number 20080207 as  
18 Document Number 0001486.

19 13. In July of 2006, prior to the commencement of construction for any work of  
20 improvement on the Subject Property, the Original Mezzanine Deeds of Trusts secured  
21 obligations totaling \$38,000,000.00. In May of 2007 the total amount secured by all Mezzanine  
22 Deeds of Trust (including post-April 2007 amendments) was \$46,000,000.00, and in October of  
23 2007 the total amount again increased to \$56,000,000.00. In February of 2008 the Construction  
24 Deed of Trust added an additional \$110,000,000.00 of financing for the Subject Project to the  
25 \$56,000,000.00 which was already in existence. At that time, all the Mezzanine Deeds of Trust  
26 were subordinated to the Construction Deed of Trust pursuant to the Subordination Agreement.

27 14. The Original Mezzanine Deeds of Trust were never released or reconveyed.

28 15. In all amendments to the Original Mezzanine Deeds of Trust, all Mezzanine



1 Deeds of Trust were affirmed, and all Notes and Trust Deeds were amended and not replaced.

2 16. The express purpose of the Subordination Agreement is to place the  
3 \$110,000,000.00 Construction Deed in a senior priority position to the Mezzanine Trust Deeds.

4 17. The clear language of the Subordination Agreement when read in its entirety  
5 demonstrates that the language in paragraph 1 page 2 of the Subordination Agreement modifies  
6 and references the \$110,000,000.00 Construction Deed in reference to the Mezzanine Trust  
7 Deeds and does not subordinate the Mezzanine Trust Deeds to any other interest in the Subject  
8 Property. No language in the Subordination Agreement evidences a clear intent for the parties to  
9 the Subordination Agreement to benefit any non-party to the Subordination Agreement.

10 CONCLUSIONS OF LAW

11 20. Pursuant to NRS § 108.225, encumbrances that are of record prior to the date that  
12 construction commences on any work of improvement (as that term is used in NRS Chapter 108)  
13 are entitled to priority over any mechanic lien claims asserted pursuant to NRS Chapter 108.  
14 The Original Mezzanine Deeds of Trust with principal amounts totaling \$38,000,000.00 were  
15 recorded before the commencement of construction for the project at issue and are therefore  
16 entitled to a senior priority lien position over any mechanics lien claims at issue in this case.

17 21. The fact that SFC obtained title insurance as part of the loan transactions is  
18 irrelevant and is common procedure. SFC's purchase of title insurance does not operate in any  
19 way to waive any claim it would have to priority under any of the Deeds of Trust at issue in this  
20 case.

21 22. This case presents an issue of first impression in Nevada, specifically, whether the  
22 Subordination Agreement operates to alter the priority positions of any non-parties to that  
23 Agreement, in this case, specifically the mechanics lien claimants.

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1           23.     The mechanics lien claimants in this case have argued that as the initial Senior,  
2 Junior and Third Deeds of Trusts, as amended by the Mezzanine Deeds of Trust, were  
3 subordinated to the Construction Loan Deed of Trust that was recorded after the commencement  
4 of construction for the work of improvement at issue, that the effect of the Subordination  
5 Agreement is to subordinate the initial Senior, Junior and Third Deeds of Trusts, as amended by  
6 the Mezzanine Deeds of Trust to both the Construction Loan Deed of Trust and the mechanics  
7 lien claims.

8           24.     The clear intent of the Subordination Agreement when read in its entirety reveals  
9 no intent to do anything other than ensure that the \$110,000,000.00 Construction Deed of Trust  
10 would be paid prior to the Mezzanine Deeds of Trust.

11           25.     The clear intent of the Subordination Agreement would be contradicted by  
12 placing mechanic's liens in higher priority than the Construction Deed of Trust.

13           26.     The Subordination Agreement does not evidence any expressed or implied intent  
14 to benefit any third-party and specifically evidences no intent to benefit the mechanics lien  
15 claimants.

16           27.     It is undisputed that lien claimants had actual and/or constructive knowledge that  
17 they were commencing construction on a project already subject to a \$38,000,000.00 lien.

18           28.     This Court adopts the reasoning of Bratcher v. Buckner, 90 Cal. App. 4<sup>th</sup> 1177  
19 (2001) and as such the Subordination Agreement does not change the lien claimants' priority.

20           29.     The lien claimants commenced work subject to a \$38,000,000.00 lien when they  
21 started work on the Manhattan West project. To place them in a more advantageous position due  
22 to a subordination agreement they were not a party to would be to grant them a windfall.

23           28.     The lien claimants received benefit from the construction funding including the  
24 funds advanced and secured by the Construction Deed of Trust.

25           29.     The reasoning provided in the AmSouth Bank v. J&D Financing Corp., 679 So.  
26 2d 695 (Ala. 1996) is not persuasive and the Bratcher case more correctly and fairly describes  
27 the issue of circuitry of liens in line with the policies and laws of the state of Nevada.

28     ///

1           30. Specifically under Bratcher assuming that there are three liens respectively in  
2 priority (referred to for convenience herein as liens A, B, and C), subordinating A to C does not  
3 result in the subordinating of A to B. The legal effect of the Subordination Agreement in this  
4 context is that A and C have switched places in priority but only to the amount of A's lien  
5 against the property. B's interest in the property is neither benefited nor burdened by this result  
6 since B's interest in the property is still subordinate to a lien of the same amount as it was when  
7 its lien attached to the property.

8           31. This reasoning was likewise adapted by Nevada's neighbor Arizona in 2002 in In  
9 re Price Waterhouse, Ltd, 202 Ariz. 379 (2002) and appears to be the majority view nationally.

10           IT IS THEREFORE ORDERED ADJUDGED AND DECREED SFC's Motion for  
11 Partial Summary Judgment as to Priority of Liens is GRANTED as reconsidered and/or reheard  
12 by this Court;

13           IT IS FURTHER ORDERED ADJUDGED AND DECREED that SFC's loan of  
14 \$110,000,000.00 is in first position priority regarding the other claimants in the principal amount  
15 of \$38,000,000.00. Thereafter, the mechanic lien claimants are in second position and the  
16 remainder of SFC's \$110,000,000.00 principal amount loan, namely \$72,000,000.00 in principal  
17 is in third position, and the Original Mezzanine Deeds of Trust along with the post-April 2007  
18 Mezzanine Deeds of Trust are in junior priority position to the aforementioned encumbrances;

19           IT IS FURTHER ORDERED ADJUDGED AND DECREED a further stay of this  
20 litigation is granted pending a petition to the Nevada Supreme Court provided such is timely  
21 filed and for which no bond is required; and

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1 IT IS FURTHER ORDERED ADJUDGED AND DECREED this matter is set for a  
2 status check on May 9, 2012 at 10:00 a.m.

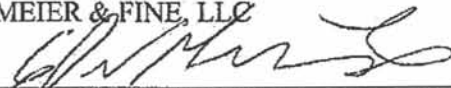
3 Dated: ~~April~~ 4, 2012.

4 May

5   
6 DISTRICT COURT JUDGE

7 Submitted by:

8 MEIER & FINE, LLC

9 

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Nevada Bar No. 006059

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Attorneys for Defendant

14 SCOTT FINANCIAL CORPORATION

IN THE SUPREME COURT OF THE STATE OF NEVADA

**In Re Manhattan West Mechanic's Lien  
Litigation**

APCO CONSTRUCTION, INC., a Nevada  
corporation, *et al.*,

Petitioners,

vs.

The Honorable Susan W. Scann, Judge,  
Eighth Judicial District Court, Clark County,  
Nevada,

Respondent,

*and*

SCOTT FINANCIAL CORPORATION, a  
North Dakota Corporation, *et al.*,

Real Parties in Interest.

**[Full Caption On Next Page]**

No. \_\_\_\_\_

Electronically Filed  
Jun 25 2012 11:14 a.m.  
Tracie K. Lindeman  
Clerk of Supreme Court

**District Court No. 08A571228**

*Consolidated with:*

|           |               |
|-----------|---------------|
| 08A574391 | A-09-589195-C |
| 08A574792 | A-09-589677-C |
| 08A577623 | A-09-590319-C |
| 09A579963 | A-09-592826-C |
| 09A580889 | A-09-596924-C |
| 09A583289 | A-09-597089-C |
| 09A584730 | A-09-606730-C |
| 09A587168 | A-10-608717-C |
|           | A-10-608718-C |

***Original Petition***

**JOINT PETITION FOR WRIT OF MANDAMUS  
OR, IN THE ALTERNATIVE, PROHIBITION**

**GWEN RUTAR MULLINS**

Nevada Bar No. 3146

**WADE B. GOCHNOUR**

Nevada Bar No. 6314

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*Attorneys for All Other Lien Claimant Petitioners*

IN THE SUPREME COURT OF THE STATE OF NEVADA

**In Re Manhattan West Mechanic's Lien  
Litigation**

No. \_\_\_\_\_

APCO CONSTRUCTION, INC., a Nevada corporation; ACCURACY GLASS & MIRROR COMPANY INC; BUCHELE INC.; BRUIN PAINTING CORPORATION; CACTUS ROSE CONSTRUCTION; FAST GLASS INC.; HD SUPPLY WATERWORKS LP; HEINAMAN CONTRACT GLAZING; HELIX ELECTRIC OF NEVADA LLC; INTERSTATE PLUMBING & AIR CONDITIONING; SWPPP COMPLIANCE SOLUTIONS LLC; WRG DESIGN INC.,

Petitioners,

vs.

The Honorable Susan W. Scann, Judge,  
Eighth Judicial District Court, Clark County,  
Nevada,

Respondent,

*and*

SCOTT FINANCIAL CORPORATION, a North Dakota Corporation; AHERN RENTALS, INC.; ARCH ALUMINUM AND GLASS CO.; ATLAS CONSTRUCTION SUPPLY, INC.; BRADLEY J. SCOTT; CABINETEC, INC.; CELLCRETE FIREPROOFING OF NEVADA, INC.; CAMCO PACIFIC CONSTRUCTION CO., INC.; CLUB VISTA FINANCIAL SERVICES, LLC;

**District Court No. 08A571228**

*Consolidated with:*

08A574391  
08A574792  
08A577623  
09A579963  
09A580889  
09A583289  
09A584730  
09A587168  
A-09-589195-C  
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A-09-592826-C  
A-09-596924-C  
A-09-597089-C  
A-09-606730-C  
A-10-608717-C  
A-10-608718-C

**[Continued on Next Page]**



CONCRETE VISIONS, INC.; CREATIVE  
HOME THEATRE, LLC; CUSTOM  
SELECT BILLING INC.; DAVE  
PETERSON FRAMING, INC.; E&E FIRE  
PROTECTION, LLC; EZA, P.C.;  
FERGUSON FIRE AND FABRICATION,  
INC.; GEMSTONE DEVELOPMENT  
WEST, INC; GRANITE CONSTRUCTION  
COMPANY; HARSCO CORPORATION;  
HD SUPPLY WATERWORKS, LP;  
HYDROPRESSURE CLEANING;  
INQUIPCO; INSULPRO PROJECTS, INC.;  
JEFF HEIT PLUMBING, CO., LLC; JOHN  
DEERE LANDSCAPE, INC.; LAS VEGAS  
PIPELINE, LLC; NEVADA PREFAB  
ENGINEERS; NOORDA SHEET METAL  
COMPANY; NORTHSTAR CONCRETE,  
INC; PAPE MATERIALS HANDLING;  
PATENT CONSTRUCTION SYSTEM;  
PROFESSIONAL DOOR AND MILL  
WORKS, LLC; READY MIX, INC.;  
RENAISSANCE POOLS & SPA, INC.;  
REPUBLIC CRANE SERVICE, LLC;  
STEEL ENGINEERS, INC.; SUPPLY  
NETWORK, INC.; SUNSTATE  
COMPANIES, INC.; THARALDSON  
MOTELS II, INC.; THE PRESSURE  
GROUT COMPANY; TRI CITY  
DRYWALL, INC.; UINTAH  
INVESTMENTS, LLC; ZITTING  
BROTHERS CONSTRUCTON, INC.,

Real Parties in Interest.

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## **Representation Statement**

This is a joint petition. Set forth below are the two groups of petitioners and their respective counsel.

Party: APCO CONSTRUCTION, INC., a Nevada corporation

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Party: ACCURACY GLASS & MIRROR COMPANY INC; BUCHELE INC.; BRUIN PAINTING CORPORATION; CACTUS ROSE CONSTRUCTION; FAST GLASS INC.; HD SUPPLY WATERWORKS LP; HEINAMAN CONTRACT GLAZING; HELIX ELECTRIC OF NEVADA LLC; INTERSTATE PLUMBING & AIR CONDITIONING; SWPPP COMPLIANCE SOLUTIONS LLC; WRG DESIGN INC.

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## Petition for Writ of Mandamus or Prohibition

### RELIEF SOUGHT

Petitioners APCO Construction, Inc., *et al.*<sup>1</sup> (“APCO” or “Lien Claimants”), through their respective counsel, jointly petition this Court for a writ of mandamus or prohibition,

1. compelling the respondent court to vacate its May 7, 2012 Decision, Order, and Judgment on Defendant SFC’s Motion for Summary Judgment as to Priority of Liens, in which it determined that \$38 million of a \$110 million construction loan deed of trust was in first position, ahead of Petitioners’ mechanic’s liens, as a result of a subordination agreement – even though the subordination agreement subordinated all prior deeds of trust to the construction loan deed of trust “in all respects”; and

2. compelling the respondent court to recognize the first priority position of all mechanic’s liens perfected on the project, after the commencement of the work of improvement in April 2007, as a consequence of the subordination agreement and by operation of NRS § 108.225.

The effect that a subordination agreement has on the relative priority between construction lenders and mechanic’s lien claimants presents a question of first impression for this Court. Intervention by this Court is warranted at this time both because of the importance of the issue as a matter of public policy and because of the crucial effect that this determination has on the underlying litigation. A definitive resolution of this issue by this Court, at this time, will most

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<sup>1</sup> Please refer to the foregoing *Representation Statement* included with this petition for a full listing of petitioners and their respective counsel.

likely streamline the remainder of the underlying case, reducing the expense of litigation for all parties involved as well as conserving scarce judicial resources. And, in fact, the respondent court has recognized the importance of resolving this issue now and has stayed the district court proceedings for the express purpose of bringing this issue before this Court by way of a petition for extraordinary relief.

### REQUEST FOR STAY

Petitioners further request that this Court, in order to preserve the status quo, and to avoid further harm to petitioners, stay all proceeding in the district court pending resolution of this petition. NRAP 8(a); NRAP 27(e). A separate motion for stay, and *ex parte* emergency motion for immediate temporary stay, is being filed concurrently with this petition.

Although the district court has ordered the district court proceedings stayed while this petition is pending, a stay from this Court is required because real parties in interest Scott Financial Corporation (“SFC”) and Bradley J. Scott (“Scott”) have moved the district court to have the stay lifted, and for permission to sell the property that is the subject of the disputed liens without bonding around the liens (and for other relief).<sup>2</sup> 5 App. 1158. The district court has set the matter for hearing on July 2, 2012 at 9:30 a.m. 7 App. 1626. If SFC and Scott’s motion is

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<sup>2</sup> *Motion to Lift Stay, Allow Sale to Proceed with Deposit of Funds Pending Further Court Order, and for Posting of Bond on Order Shortening Time*, filed May 29, 2012.

granted by the district court, there may not be time to seek further intervention from this Court before the subject property is sold and the relief requested herein potentially rendered moot.

### STATEMENT REGARDING REALIGNMENT OF PARTIES

Among the parties to the underlying action listed as real parties in interest herein are various other mechanic's lien claimants. Petitioner's recognize that some or all of these other lien claimants may wish to join with petitioners in seeking the relief requested herein. Petitioners consent to any such realignment of the parties as may be deemed necessary by this Court to effectuate such joinders.

### STATEMENT OF ISSUES PRESENTED

- 1. Determination of whether a subordination agreement that specifically states that prior loans shall be treated "in all respects" as if they were recorded at a later time, nevertheless eliminates the priority afforded mechanic's liens by Nevada law.**
- 2. Whether the Respondent Court, after having this case administratively transferred from Department 25 to Department 29, exceeded its authority by failing to follow this Court's repeated pronouncements on the proper basis for motions for reconsideration, and instead proceeded to re-hear motions for summary judgment under NRCP 54(b), after Department 25 had heard and issued written findings of facts and conclusions of law.**

### STATEMENT OF RELEVANT FACTS

*Procedural Note: For the purpose of this petition only, and to better focus on the issues before this Court, certain factual assertions underlying the district court's*

*rulings may be set forth below as if they are not disputed by petitioners, when in fact they are. Petitioners reserve their right to challenge such factual matters if and when this case is again before the district court or otherwise as appropriate. The factual statements below taken from the district court record and are in no way to be taken as an admission of any kind.*

## **A. The Transaction History**

### **1. The Property Acquisition Financing**

In June 2006, SFC loaned Gemstone Apache, LLC a total amount of \$25,000,000.00, to acquire the land for the Project. 2 App. 316-349. The loan was divided into two portions: (1) the “Senior Loans” for up to \$15,000,000; and (2) the “Junior Loans” for up to \$10,000,000. Id. at 323. The loans were secured by a Senior Deed of Trust and Security Agreement with Assignment of Rents and Fixture Filing (Line of Credit) (\$15,000,000), recorded on July 5, 2006 (the “Senior DOT”), and a Junior Deed of Trust and Security Agreement with Assignment of Rents and Fixture Filing (Line of Credit) ((\$10,000,000), recorded on July 5, 2006 (the “Junior DOT”). 2 App. 359-378 (Senior DOT); and 2 App. 380-398 (Junior DOT).

SFC also entered into a Loan Agreement (Edelstein), dated June 26, 2006 (the “Edelstein Loan”), with Alexander Edelstein, for a loan of \$13,000,000. 2 App. 400-427. The Edelstein Loan was secured by a Third Deed of Trust and

Security Agreement with Assignment of Rents and Fixtures Filing (Line of Credit) (\$13,000,000) (hereafter the “Third DOT”), recorded on July 5, 2006. 2 App. 433-453 (Third DOT).

The Senior Note, Junior Note and Edelstein Note were also secured by a Junior Third Deed of Trust and Security Agreement with Assignment of Rents and Fixtures Filing in the amount of \$38,000,000.00 (the “Gemstone LVS Deed of Trust”), secured by property owned by Gemstone LVS, the owner of a prior project known at the Manhattan project. 2 App. 318 (Articles 1.1.10 and 1.1.11). The Gemstone LVS Deed of Trust was recorded on July 5, 2006. 2 App. 455-484.2.2

2. Post-Acquisition Developments and Additional Financing  
Before the Construction Loan Transactions

In the District Court, it was undisputed that construction of the work of improvement commenced no later than April 2007. 1 App. 166.

After construction of the work of improvement commenced, SFC recorded the First Amended Junior Deed of Trust and Security Agreement with Assignment of Rents and Fixture Filing (Line of Credit) (the “First Amended Junior DOT”), on May 22, 2007. 3 App. 486-498. The First Amended Junior DOT was recorded to secure a new Additional Line of Credit Note in the maximum amount of \$8,000,000. *Id.* at 487. The Additional Line of Credit Note brought the total pre-construction loan financing to \$46,000,000.

SFC and Alexander Edelstein entered into a further loan on October 19, 2007 for an additional \$10,000,000 to Mr. Edelstein, secured by the First Amendment to Third Deed of Trust and Security Agreement with Assignment of Rents and Fixtures Filing (Line Of Credit), recorded on October 24, 2007. 3 App. 508-513.

### 3. The Construction Loan Transaction

The construction financing came together in late January 2008. SFC, as lender on behalf of the Construction Lenders, entered into a Senior Debt Loan Agreement with Gemstone dated January 22, 2008 (the “Construction Loan Agreement”). 3 App. 519-541. Pursuant to the Construction Loan Agreement, SFC would loan to Gemstone the maximum amount of \$110,000,000, which would be made up of two separate loans: a \$100,000,000 Senior Debt Construction Note; and a \$10,000,000 Senior Debt Contingency Note. *Id.* at 524.

In addition to the Construction Loan Agreement, SFC and Gemstone entered into a new Mezzanine Note, dated January 22, 2008, for the principal sum of \$46,000,000. 3 App. 543-545. The Mezzanine Note refinanced the prior land acquisition loans and provided a new interest rate, a new date for the commencement of interest payments and a new maturity date. *Id.* SFC entered into a Nonrecourse Participation Agreement (the “Participation Agreement”) with Club Vista Financial Services, LLC (“Club Vista”), dated January 21, 2008, whereby Club Vista would provide SFC with \$46,000,000 to fund the Mezzanine



loan to Gemstone. 3 App. 547-555. Club Vista was providing 100% of the \$46,000,000 to be loaned under the Mezzanine Note. 3 App. 557.

Both the Senior Mezzanine DOT and the Junior Mezzanine DOT contained the same language noting “The Trustor has requested, and the Beneficiary has agreed, *to refinance the obligations secured* by the [Senior/Junior Deed of Trust].” 3 App. 628, and 3 App. 634 (emphasis added). The Senior Mezzanine DOT refinanced the \$15 Million Note, and secured \$28,000,000 of the Mezzanine Note. 3 App. 628. The Junior Mezzanine DOT refinanced the \$10 Million Note and the \$8 Million Note, and secured \$18,000,000 of the Mezzanine Note. 3 App. 634.

The construction loan transaction resulted in the recording of several deeds of trust, in the following order, all of which were recorded after the commencement of construction of the work of improvement:

1. The Senior Debt Deed of Trust and Security Agreement with Assignment of Rents and Fixtures Filing (Construction) dated January 22, 2008, recorded on February 7, 2008 (the “Construction DOT”). 3 App. 604-625.
2. The First Amendment to Senior Deed of Trust and Security Agreement with Assignment of Rents and Fixtures Filing (Line of Credit)(Mezzanine), dated January 22, 2008, recorded on February 7, 2008. 3 App. 627-632.
3. The Second Amendment to Junior Deed of Trust and Security Agreement with Assignment of Rents and Fixtures Filing (Line of Credit)(Mezzanine), dated January 22, 2008, recorded on February 7, 2008 (the “Junior Mezzanine DOT”). 3 App. 634-639.

4. Knowledge Of Broken Priority

At the time of the construction financing SFC knew about the broken priority from the subordination of the Mezzanine Deeds of Trust to the Construction DOT. Prior to the construction financing, SFC sought to obtain a Title Insurance Policy from Commonwealth Land Title Insurance Company, including an endorsement insuring against loss of priority due to intervening mechanic's liens. 3 App. 565-593. Title insurance was not part of the routine transaction for this Project.

Contrary to the assertions made by SFC, SFC's counsel in a related matter, Club Vista Financial Services, LLC, et al., v. Scott Financial Corp., et al., Case No. A579963, argued that the title insurance was to address the broken priority. As part of counsel's opening statement, SFC's counsel took the position that SFC obtained the mechanic's lien endorsement, known as a 101.3, to deal with broken priority. 7 App. 1618:8-19, and 7 App. 161620:2-10. Furthermore, during that trial, a representative of the largest participant, Bank of Oklahoma, testified that the bank understood that if liens were recorded, those liens could "prime" the Construction DOT, and that was why the 101.3 was obtained. 7 App. 1635:5-1637:22 (Bench Trial, Partial Transcript – Partial Testimony of Phillip Timothy James Only). SFC knew that priority would be broken if liens were recorded against the Project, and title insurance was obtained to cover broken priority.

In addition, SFC's knowledge of broken priority was confirmed when Commonwealth Land Title Insurance Company required a "Construction Loan Loss of Priority Questionnaire." 3 App. 595. The "Construction Loan Loss of Priority Questionnaire" stated that as of January 11, 2008, work on the "Foundation, Framing" was ongoing. Id. Also, the Questionnaire noted that the Mezzanine Deeds of Trust were to be subordinated to the construction loan. Id. Commonwealth Land Title Insurance Company also obtained an Indemnity Agreement (Mechanic's Liens). 3 App. 597-602.

#### 5. The Subordination Agreement

As part of the construction loan transaction, SFC also recorded the Mezzanine Deeds of Trust Subordination Agreement (the "Subordination Agreement") on February 7, 2008.<sup>3</sup> 3 App. 641-648. The express stated purpose of the Subordination Agreement was to place the Mezzanine Deeds of Trust behind the Construction DOT, as if the Mezzanine Deeds of Trust had been recorded after the Construction DOT. Id. at 642. The applicable provisions of the Subordination Agreement stated in full:

1. The lien of the \$110,000,000 Senior Debt Deed of Trust and the indebtedness secured thereby ***shall in all respects*** be deemed prior to and superior to the lien of the Mezzanine Deeds of Trust and the indebtedness secured thereby, ***as though the Mezzanine Deeds of Trust had been recorded subsequent to the***

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<sup>3</sup> For the convenience of the Court, a copy of the Subordination Agreement is attached hereto as Addendum A.

***recording*** of the \$110,000,000 Senior Deed of Trust.

*Id.* (see paragraph 1) (emphasis added).

There is no language indicating that the Subordination Agreement applies only to the liens between the Mezzanine Deeds of Trust and the Construction DOT. 3 App. 641-648. The Subordination Agreement recorded by SFC also does not contain any language prohibiting third party reliance or beneficiaries. *Id.* There is also no language to suggest that the Construction DOT expected to step into the shoes of the priority of the Mezzanine Deeds of Trust. *Id.*

The Subordination Agreement was not simply to allow the Construction DOT to have priority over the Mezzanine Deeds of Trust. Gary Tharaldson, the principal of Club Vista, who in turn was the sole participant in the Mezzanine Deeds of Trust, was to receive a payment for the subordination, as well as a guaranty of the construction loan. In exchange for Club Vista's agreement to allow subordination, SFC and the construction lenders agreed to pay Mr. Tharaldson a fee of 5% of the Construction Loan, representing a portion of the percentage rate charged to Gemstone. 1 App. 107-108. Therefore, in exchange for a payment of over \$5,000,000, Club Vista agreed that its priority position would be subordinated, "in all respects" as if it was recorded after the Construction DOT.

*Figure 1*

| BEFORE SUBORDINATION                               |  |
|--|--|
| <b>First position:</b><br>Recorded on July 5, 2006 | Senior Deed of Trust<br>\$15 Mil.        |
|  | Junior Deed of Trust<br>\$10 Mil.        |
|  | Third Deed of Trust<br>\$13 Mil.         |
| <b>Second position:</b><br>April 2007              | Construction Work Begins                 |
| <b>Third position:</b><br>Recorded May 22, 2007    | Amended Junior Deed of Trust<br>\$8 Mil. |

| AFTER SUBORDINATION<br>(Petitioners' Argument)   |  |
|--|--|
| <b>First position:</b><br>April 2007   | Construction Work Begins                           |
| <b>Second position:</b><br>Recorded February 7, 2008   | Construction DOT<br>\$110 Mil                      |
| <b>Third position:</b><br>Deemed as if recorded subsequent to the<br>Construction DOT  | Restructured Mezzanine Deeds of Trust<br>\$46 Mil. |
| <b>NOTE:</b> The Restructured Mezzanine Deeds of Trust replaced and refinanced the Senior Deed of Trust, the Junior Deed of Trust, the Third Deed of Trust and the Amended Junior Deed of Trust. |  |

## 6. The Project Fails and the Litigation Begins

In the fall of 2008, issues began to develop between APCO and Gemstone regarding the construction and payment. 1 App. 15-19. In August 2008 APCO stopped work for non-payment, while at the same time, Gemstone attempted to terminate APCO from the Project. Id. After APCO left the Project, Gemstone retained another general contractor, CAMCO Pacific Construction Company, Inc. (“CAMCO”) to continue with the work on the Project. After CAMCO began working on the Project, other disputes arose between SFC and Gary Tharaldson, the Guarantor of the Construction Loan. Mr. Tharaldson withdrew his guaranty, which resulted in SFC stopping any further funding for the Project.

### **B Procedural History**

This action started on September 9, 2008 when APCO filed its Complaint seeking, among other relief, to foreclose APCO’s notice of lien recorded against the Project. 1 App. 1-13. Eventually, all of the contractor and subcontractor claims were consolidated into the main case, Case No. A571228.

Pursuant to a Case Management Order, the parties filed briefing on the issue of priority between the lien claimants and the lenders<sup>4</sup>. The following primary briefs were filed:

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<sup>4</sup> By the time of the deadline for the priority motions, the owner of the Project, Gemstone, had essentially disappeared from the case.

1. SFC's Motion for Partial Summary Judgment as to Priority of Liens; and Errata to SFC's Motion for Summary Judgment as to Priority of Liens (1 App. 157-171);
2. APCO's Motion for Summary Judgment on Priority (1 App. 172 – 2 App. 285);
3. APCO's Opposition to SFC's Motion for Partial Summary Judgment as to Priority of Liens (2 App. 293 – 3 App. 674);
4. SFC's Reply Brief in Support of the Motion for Partial Summary Judgment as to Priority of Liens (3 App. 685-698); and
5. Reply in Support of APCO's Motion for Summary Judgment on Priority (3 App. 699-713).

SFC did not file an opposition to APCO's Motion for Summary Judgment.

Approximately 38 joinders were filed to APCO's Motion for Summary Judgment by other lien claimants relative the issue of priority.

On July 27, 2010, Department 25 heard the competing motions for summary judgment regarding priority. 3 App. 714-734 (Reporter's Transcript of Proceedings). The priority motions were argued at length, and each side gave a full presentation. After the hearing, Judge Delaney took the matter under advisement. *Id.*

At a status hearing held on December 9, 2010, Department 25 orally announced that it was finding that the lien claimants had priority over SFC's deeds of trust. The Court issued Minutes confirming the oral pronouncement of its decision on priority. 4 App. 782.



After the status hearing, but before a written order on priority was issued, Department 25 was tasked with taking over another department's calendar due to the retirement of Judge Glass. As a result, this case was administratively reassigned and/or transferred from Department 25 to Department 29.

While waiting for a written decision from Department 25, SFC attempted to have the lien priority determination made in a related case that had nothing to do with lien priority, namely *Club Vista Financial Services, LLC. et. al v. Scott Financial Corporation, et. al*, Case No. A579963, before Department 13. 4 App. 777. As a result of SFC's attempt to forum shop the priority decision, APCO filed a Motion for Issuance of an Order on Priority on Order Shortening Time (the "Motion For Order") with Department 29, the District Court assigned to the case. 4 App. 775-812. As part of the Motion For Order, APCO submitted a proposed form of Findings of Fact, Conclusions of Law and Order Granting APCO Construction's Motion for Summary Judgment on Priority; and Denying Scott Financial Corporation's Motion for Priority ("Proposed Order"). 4 App. 799-810. The Proposed Order incorporated the Minutes issued by Department 25 and the arguments made by APCO in the briefing and argument on the motions for priority. SFC filed an Opposition to the Motion For Order, but did not provide any opposition to or comments relating to the form or content of the Proposed Order. 4 App. 811-837.

Department 29 worked with Department 25 to have a written order issued on priority. Department 25 made some changes and adopted the Proposed Order. 4 App. 838-851. The *Findings of Fact, Conclusions of Law and Order Granting APCO Construction's Motion for Summary Judgment on Priority; and Denying Scott Financial Corporation's Motion for Priority* (the "Initial Order") was entered on November 22, 2011.<sup>5</sup> *Id.*

On December 12, 2011, SFC filed its Motion for Reconsideration of Findings of Fact, Conclusions of Law and Order Granting APCO Construction's Motion for Summary Judgment on Priority; and Denying Scott Financial Corporation's Motion for Priority or in the Alternative, Motion for a Re-Hearing (the "Motion for Rehearing"). 4 App. 852-877. The Motion for Rehearing simply asked Department 29 to start over as if Department 25 had never made the Initial Order. *Id.* APCO opposed the Motion for Rehearing, as did the other lien claimants. 4 App. 881-897 (APCO's Opposition), and 4 App. 898-908 (other oppositions).

The hearing on the Motion for Rehearing was held on January 25, 2012. 4 App. 930-969. At the hearing, Department 29 correctly noted that it did not perceive any change in the facts or law that would warrant reconsideration of the Initial Order. *Id.* at 934:8-936:3. SFC, however, argued that the Court could re-

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<sup>5</sup> For the convenience of the Court, the Initial Order is attached as Addendum B hereto.

hear the entire matter based upon *Bower v. Harrah's Laughlin, Inc.*, 125 Nev. 470, 215 P.3d 709 (2009), and NRCP 54(b). *Id.* at 943:5-20. The District Court then took the matter under advisement. On February 1, 2012, Department 29 granted SFC's Motion for Rehearing pursuant to NRCP 54(b). 4 App. 970.

The rehearing on the summary judgment motions regarding priority was held on March 21, 2012. 5 App. 1079-1130. Again, the same briefs, facts and law were re-argued to Department 29 on the priority issue. *Id.* Department 29 took the motions under advisement until April 4, 2012, at which time Department 29, issued an order directly contrary to Department 25's Initial Order—now finding in favor of SFC. 5 App. 1131-1142.

At the hearing, counsel for APCO and SFC noted that they had agreed prior to learning of the District Court's decision, to seek a determination by the Nevada Supreme Court on the priority issue through a Writ Petition. *Id.* at 1136:23-1139:22. As a result, the parties requested a stay of the proceedings, which was granted, without bond, pending the resolution of the Writ before this Court. *Id.* *The Decision, Order, and Judgment on Defendant SFC's Motion for Summary Judgment as to Priority of Liens* (the "Replacement Order") was entered on May 7, 2012.<sup>6</sup> 5 App. 1143-1155.

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<sup>6</sup> For the convenience of the Court, the Replacement Order is attached as Addendum C hereto.

## SUMMARY OF THE ARGUMENT

This matter resulted from the failed development project known as the Manhattan West Mixed Use Project (the “Project”). Scott Financial Corporation (“SFC”) was a loan syndicator who put together several different loans for different loan participant groups relating to the Project. APCO was the original general contractor for the Project. This dispute arose after the construction lenders, who had put no money into the project until after APCO and its subcontractors had begun work on the Project, stopped funding work on the Project, thereby shutting the Project down. APCO, its subcontractors and suppliers recorded notices of lien for millions of dollars for the unpaid value of work on the Project, while SFC sought to turn the priority provided to the lien claimants by Nevada law on its head.

In particular, SFC is seeking to leapfrog over the lien claimants statutory priority, in spite of language in a recorded subordination agreement to treat all deeds of trust recorded prior to the commencement of the work of improvement as if they had been recorded after the commencement of the work of improvement.

In competing motions for summary judgment before Department 25, the District Court reviewed the papers, heard the arguments and decided that the lien claimants were entitled to priority over the construction lenders. Before the Department 25 issued a written decision on priority, this case was transferred to Department 29 as part of an Eighth Judicial District Court administrative case

reassignment. Despite, the transfer, Department 25 retained jurisdiction and entered an order on the priority motions. Department 25 found that the terms of the Subordination Agreement were clear and unambiguous, and provided that the Mezzanine Deeds of Trust recorded prior to the commencement of the work of improvement on the Project, were to be treated as if they had been recorded after the Construction Deed of Trust, which was recorded after commencement of the work of improvement began on the Project. 4 App. 838-851 (Findings of Fact, Conclusions of Law And Order Granting APCO Construction's Motion For Summary Judgment On Priority; and Denying Scott Financial Corporation's Motion For Priority (the "Initial Order")). *Id.*

After entry of the Initial Order finding priority in favor of the lien claimants, SFC moved for reconsideration of Department 25's findings, conclusions and order, in front of Department 29. 4 App. 852-877. Despite noting that there were *no new* facts or legal decisions, Department 29 determined to re-hear the matter based upon NRCP 54(b), and *Bower v. Harrah's Laughlin, Inc.*, 125 Nev. 470, 215 P.3d 709 (2009).

After re-hearing the same facts and the same law as Department 25, Department 29 issued the Decision, Order and Judgment On Defendant Scott Financial Corporation's Motion For Summary Judgment As To Priority Of Liens (the "Replacement Order"), completely (the judge has no power to "reverse") conflicting with the prior Order by Department 25. 5 App. 1143-1155. The

Replacement Order found that the Construction DOT, even though recorded after the commencement of the work of improvement, had priority over the mechanic's liens. *Id.* Department 29 found that despite recording a Subordination Agreement that provided for the prior Mezzanine Deeds of Trust to be treated "as though the Mezzanine Deeds of Trust had been recorded subsequent to the recording of the [Construction Deed of Trust]," the construction lenders would step into the shoes of the Mezzanine Deeds of Trust's priority up to \$38,000,000, which represented the portion of the Mezzanine Deeds of Trust in place before commencement of the work of improvement. *Id.*

Department 29's position, which is wholly contrary to the reasoning undertaken by Department 25, has resulted in two opposing decisions on the same facts, issued by two different judges of the Eight Judicial District Court. There are two contradictory orders regarding the effect of a subordination agreement on priority. Those contradictory orders differ with respect to whether the express language of the Subordination Agreement in question should be enforced without negating the statutory priority provided to lien claimants under Nevada law. The Initial Order recognized and enforced the effect of the language found in the Subordination Agreement, while the Replacement Order ignored the unambiguous language of the Subordination Agreement. As this is an issue of first impression in Nevada, this Court should exercise its jurisdiction to decide this important issue.

The mechanic's lien claimants simply ask this Court to follow the statutory dictates of NRS 108.225, and find that the mechanic's liens have priority over the Construction DOT. The lien claimants also request that this Court recognize that under Nevada law, parties are bound to the plain meaning of the terms of their agreements. When SFC signed and recorded the Subordination Agreement, it did so with an implied understanding of the definition and meaning of subordination. The Subordination Agreement recorded by SFC recognizes the effect of subordination and provides that SFC was asking the public to treat its Mezzanine Deeds of Trust as if they were recorded at a later time. This is the essence of subordination, waiving and reducing a party's priority position behind other claims.

All of the evidence shows that SFC had the intent, and in fact did, completely and unconditionally waive and subordinate any claim of priority arising from the Mezzanine Deeds of Trust. SFC provided public notice on how the priority of the Mezzanine Deeds of Trust were to be treated where the Subordination Agreement stated that "in all respects," the Mezzanine Deeds of Trust were to be deemed and treated as if they were recorded after the recording of the Construction DOT. By SFC's own document, recorded in the public record, the Mezzanine Deeds of Trust must be treated as if they were recorded after February 7, 2008.



There is no evidence that the construction lenders expected to obtain any priority over the mechanic's lien claims. Just the opposite. The undisputed evidence shows that the lenders knew that there was broken priority. SFC obtained title insurance to protect against a possibility that mechanic's liens would be placed against the Project.

In this original petition, petitioners request that this Court exercise its jurisdiction and decide—as a matter of Nevada law—that the lien claimants have priority over the construction lenders. Further, petitioners ask that this Court clarify the appropriate standards for motions for reconsideration.

## ARGUMENT

### **I.**

#### **EXTRAORDINARY RELIEF IS**

#### **WARRANTED UNDER THE CIRCUMSTANCES**

A writ of mandamus is available to compel the performance of an act which the law requires as a duty resulting from an office, trust, or station, or to control an arbitrary or capricious exercise of discretion. *Borger v. District Court*, 120 Nev. 1021, 1025, 102 P.3d 600, 603 (2004); NRS § 34.160; *see also Lewis v. Smart*, 96 Nev. 846, 619 P.2d 1212 (1980). Mandamus is appropriate where a petition raises

important legal issues that are likely to be the subject of litigation within the Nevada district court system. *Borger*, 120 Nev. at 1025-26.

A writ of prohibition is available when proceedings are without or in excess of the jurisdiction of the tribunal. *State v. District Court (Anzalone)*, 118 Nev. 140, 146-47, 42 P.3d 233, 237 (2002); NRS 34.320.

Extraordinary relief is available where the petitioner has no plain, speedy and adequate remedy in the ordinary course of law. *State v. District Court*, 116 Nev. 953, 957, 11 P.3d 1209 (2000). Further, whether to entertain extraordinary relief is within the Court's sound discretion. *Borger v. District Court*, 120 Nev. 1021, 1025, 102 P.3d 600, 603 (2004).

The Court has provided situations in which it will consider a writ for extraordinary relief. Writ relief is available where (1) no factual dispute exists, and the district court is obligated to take certain action, or (2) an important issue of law needs clarification, and considerations of sound judicial economy and administration militate in favor of granting the petition. *Beazer Homes Nevada, Inc. v. District Court*, 120 Nev. 575, 579, 97 P.3d 1132 (2004). This Court has exercised its discretion to accept review when issues of public policy concerns are raised or when issues of law need clarification. *Id.* This Court has also exercise its discretion to entertain a writ petition where an important issue of law needs to be decided, and where circumstances indicate an urgency or strong necessity. *Civil Service Comm'n v. District Court*, 118 Nev. 186, 188-89, 42 P.3d 268 (2002);

*Mountainview Hospital, Inc. v. District Court*, 128 Nev. Adv. Op. 17, 273 P.3d 861, 864 (2012). Additionally, this Court has entertained writ petitions for issues that warranted clarification to further judicial economy in the case. *Borger v. District Court*, 120 Nev. 1021, 1022, 102 P.3d 600, 601 (2004).

This case involves the type of matters that the Supreme Court has granted review in the past. There have been two separate and opposing orders issued by different departments in the Eighth Judicial District Court on the same facts and law. The primary determination of law in this case is a matter of first impression, the determination of which would clarify the remaining issues for the parties and the district court. Review by the Supreme Court would save judicial resources by determining legal issues that impact which direct discovery in the case will go, and will likely affect whether many of the lien claimants even remain in the action. The facts and law involved in this writ petition will not materially change by further proceedings in the district court, making this matter ripe for adjudication by the Supreme Court through this writ petition. Since there is no right to an immediate appeal from the governing district court order, and there have been two opposite decisions on the operative law and facts, the Writ Petition should be accepted for review by this Court.

## II.

### AS A MATTER OF LAW, THE DISTRICT COURT ERRED IN DETERMINING THE EFFECT OF THE SUBORDINATION AGREEMENT ON THE RELATIVE PRIORITY OF THE LIENS

#### A. Standard of Review

This Court reviews de novo an order granting summary judgment. *ASAP Storage, Inc. v. City of Sparks*, 123 Nev. 639, 656-57, 173 P.3d 734, 738 (2007).

Pursuant to NRCP Rule 56(c), a party's motion for summary judgment should be granted when "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." "When reviewing a motion for summary judgment, the evidence and all reasonable inferences drawn from the evidence, must be viewed in a light most favorable to the non-moving party." *Richards v. Republic Silver State Disposal, Inc.*, 122 Nev. 1213, 148 P.3d 684, 686 (2006). The nonmoving party is entitled to have the evidence and all reasonable inferences accepted as true. *Doud v. Las Vegas Hilton Corp.*, 109 Nev. 1096, 1100, 864 P.2d 796 (1993).

In the present case, the parties do not dispute the material facts of the case. Instead, they dispute the district court's legal conclusions on the issue of priority. This Court reviews district court's legal conclusions, including matters of statutory construction de novo. *In re Application of Shin*, 125 Nev. 100, 102, 206 P.3d 91,

92 (2009). Finally, “[c]ontract interpretation is subject to a de novo standard of review.” *May v. Anderson*, 121 Nev. 668, 672, 119 P.3d 1254, 1257 (2005) (citing *Diaz v. Ferne*, 120 Nev. 70, 73, 84 P.3d 664, 665-66 (2004)).

## **B. This Court Must Enforce the Relative Priority of the Lien**

### **Claimants Statutorily Mandated by the Legislature**

#### **1. The Plain Language of NRS 108.225 and the Subordination Agreement Give Priority to the Lien Claimants**

The essential issue in this case is who has priority to the Project assets, the lien claimants or the construction lenders, who did not record their deed of trust until after construction had commenced.<sup>7</sup>

NRS 108.225 provides that mechanic’s lien holders have priority over any encumbrance recorded or imposed after the commencement of construction on a work of improvement. Specifically, NRS 108.225 provides:

1. The liens provided for in NRS 108.221 to 108.246, inclusive, are preferred to:

(a) Any lien, mortgage or other encumbrance which may have attached to the property after the commencement of construction of a work of improvement.

(b) Any lien, mortgage or other encumbrance of which the lien claimant had no notice and which was unrecorded against

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<sup>7</sup> For the convenience of the Court, the relevant provisions of NRS Chapter 108 are attached hereto as Addendum D.

the property at the commencement of construction of a work of improvement.

2. Every mortgage or encumbrance imposed upon, or conveyance made of, property affected by the liens provided for in NRS 108.221 to 108.246, inclusive, after the commencement of construction of a work of improvement are subordinate and subject to the liens provided for in NRS 108.221 to 108.246, inclusive, regardless of the date of recording the notices of liens.

When interpreting a statute, this Court has repeatedly held that the Court should start by looking at the plain language of the statute. *MGM Mirage v. Nevada Ins. Guar. Ass'n*, 125 Nev. 223, 228-229, 209 P.3d 766 (2009). When the statute's meaning is clear and unambiguous, this Court must not construe the statute otherwise. *Id.* The plain language of NRS 108.225 provides that contractors have the right to recover for the work and materials performed on a construction project before any lien holder whose lien attaches after construction work has begun. *See* NRS § 108.225. It is undisputed that construction work began on the Project before the Construction DOT was funded or recorded.

The construction lenders are seeking to jump over the lien claimants and into a superior position contrary to the express provisions of NRS § 108.225. In order to jump over the lien claimants, the construction lenders must rely upon the Subordination Agreement recorded on February 7, 2008. The express terms of the Subordination Agreement state that all loans and their associated liens made prior to the Construction DOT were to be treated “as though the Mezzanine Deeds of Trust had been *recorded subsequent* to the recordation of the \$110,000,000 Senior

Debt Deed of Trust.” 3 App. 642 (emphasis added). It is clear from the express terms of the Subordination Agreement that SFC fully and completely subordinated the Mezzanine Deeds of Trust to a recorded position *after* the Construction DOT. And, again, Theraldson, the ultimate beneficiary, received over \$5 million dollars in consideration for his agreement to subordinate the Mezzanine Deeds of Trust behind the Construction DOT.

While it is clear what the Subordination Agreement does say, it is also clear what it does not say. There is no language indicating that the Subordination Agreement applies only to the liens between the Mezzanine Deeds of Trust and the Construction DOT. As noted below, in the cases cited by SFC, and relied upon by Department 29, the subordination agreements specifically provided that the agreement only affected priority between the first and third priority creditors. *See e.g. Bratcher v. Buckner*, 90 Cal.App.4th 1177 (Ct. App. 4th Div. 2001); *In Re Price Waterhouse Ltd.*, 46 P.3d 408 (Ariz. 2002); *Duraflex Sales & Service Corp. v. W.H.E. Mechanical Contractors*, 110 F.3d 927 (2nd Cir. 1997). The Subordination Agreement drafted by SFC and recorded in the public record does not have any such limitation. The Subordination Agreement recorded by SFC also does not contain any language that it is not for the benefit of any third party. Most importantly, there is no language to suggest that the Construction DOT expected to only have priority up to the amount of the Mezzanine Deeds of Trust, since SFC



knew that at least a portion of the Mezzanine Deeds of Trust did not have priority over the mechanic's liens in the first place.

Despite the clarity of SFC's language, and despite the fact that SFC recorded that language to provide public notice of the terms, SFC now wants to have the Court grant it priority rights to which it is not entitled and for which it did not contract. This Court should enforce the clear language of SFC's Subordination Agreement, and give the construction lenders exactly what they asked for. SFC's Mezzanine Deeds of Trust should be treated as if they were recorded after the Construction DOT, on February 7, 2008, well after construction began on the Project.

This Court's analysis must start with the meaning of subordination. Subordination is a defined term in the legal context. *Black's Law Dictionary* defines "Subordination" as "The act or process by which a person's rights or claims are ranked below those of others." *Black's Law Dictionary* p. 1426 (6th ed. 1990). A similar definition is found from the on-line legal dictionary at *Law.com*, which defines subordination as "allowing a debt or claim which has priority to take second position behind another debt, particularly a new loan." *Black's* also defines "Subordination agreement" as:

An agreement by which one holding an otherwise senior lien or other real estate interest ***consents to a reduction in priority*** vis-à-vis another person holding an interest in the same real estate.

*Black's Law Dictionary* p. 1426 (6<sup>th</sup> ed. 1990) (emphasis added). All of these definitions talk about a party taking a reduction in priority, not that another party will be elevated in priority. This is particularly true where NRS 108.225 expressly provides the lien claimants with priority to payment over any person who records an interest after the work of improvement commences.

In two cases directly on point, *Old Stone Mortgage And Realty Trust v. New Georgia Plumbing, Inc.*, 231 S.E.2d 785 (Ga. Ct. App. 1977) (“*Old Stone 1*”), and *Old Stone Mortgage And Realty Trust v. New Georgia Plumbing, Inc.*, 236 S.E.2d 592 (Ga. 1977) (“*Old Stone 2*”), the Supreme Court of Georgia found for the lien claimants. In these cases, an initial land acquisition loan was given by the “Seed Lenders.” *Old Stone 1* at 786. A second loan was given for construction prior to construction work beginning. *Id.* Thereafter, New Georgia Plumbing began work on the project. *Id.* Finally, a permanent loan was made with knowledge of the construction, which paid off the construction loan, but left the Seed Lenders loan. *Id.* As part of the permanent financing, the Permanent Lender required the Seed Lenders to subordinate their prior secured deed to the Permanent Lender’s secured deed. *Id.*

The Georgia Appellate Court found that the effect of the subordination agreement placed the first lien of the Seed Lenders behind the lien of the Permanent Lenders. *Id.* at 788. The Court started by noting that under Georgia law, just as it does under Nevada law, “A contractor’s lien attaches from the time

work is commenced or material furnished.” *Id.* at 787. Just like this case, there was prior land loan, an intervening mechanic’s lien, a third position loan given with knowledge of the intervening mechanic’s liens, and a subordination of the first position lien behind the third position lien. The Georgia Appellate Court also went on the hold that “One who subordinates a first lien to a third lien makes his line inferior to both the second and the third liens.” *Id.* at 788.

The Georgia Appellate Court’s ruling was later upheld by the Supreme Court of Georgia in *Old Stone 2*. The Supreme Court of Georgia noted that the holding of *Old Stone 1* was supported by logic and syllogistic reasoning.

Specifically, the Court stated:

if a senior security deed becomes inferior to a junior security deed and the junior security deed is inferior to a materialman’s lien, the senior security deed is inferior to the materialman’s lien.

*Old Stone 2*, 236 S.E.2d at 593. The Court also held that it could not reasonably hold otherwise, as allowing a secured party to jump in front of a known lien holder would “destroy the legal rights of the intervening statutory lien holder and cannot be approved.” *Id.*

The *Old Stone 2* Court also discussed the language of the subordination agreement. The agreement stated “The subordinate party hereby subordinates and makes inferior all of its right, title and interest in and under the subordinated security deed to the first security deed.” *Id.* at 594 (internal comments omitted).

The Court held that the subordination was not conditional. *Id.* The Court also held

that the agreement did not contain any language to permit an interpretation that the parties were switching positions of priority in the form of a subrogation agreement. *Id.*

The facts of this case track those in the *Old Stone* cases. Here, just like *Old Stone*, a third position lender (SFC) is seeking priority over mechanic's lien claimants. The construction lenders (SFC) knew that work had commenced before the construction loan was recorded. The express language of the Subordination Agreement stated that the original loans were to be treated "in all respects" as if they were recorded after the Construction Loan. 3 App. 642. There is no language to indicate that the construction lenders were expecting to take the place of the original loans for priority purposes. Therefore, Nevada law would be well served by adopting the common sense and reasonable position taken by the Supreme Court of Georgia.

Similar results have been found by several other courts. The most recent case comes from Supreme Court of Idaho in *Blickenstaff v. Clegg*, 97 P.3d 439 (Ida. 2004). In *Blickenstaff*, there were two security interests in the property 1) Thomas and 2) M&D Trust. *Id.* at 443. A loan from U.S. Bank for the property was obtained after the Thomas and M&D Trust deeds of trust were recorded. *Id.* As part of the U.S. Bank loan, Thomas signed a subordination agreement, subordinating his interest to the U.S. Bank deed of trust. *Id.* In *Blickenstaff*, the Idaho district court found that as a result of the subordination agreement, U.S.

Bank and Thomas exchanged positions to the extent that the U.S. Bank loan was smaller or equal to Thomas' interest. *Id.* at 446. The Idaho Supreme Court ***reversed***, holding that the Thomas/U.S. Bank subordination agreement was an agreement to place Thomas' position behind that of M&D and U.S. Bank. *Id.* at 447-448.

The Idaho Supreme Court noted that Thomas had provided authority from California and Arizona supporting the district court's ruling, and that the district court had made the same findings as the Order in this case. Despite these, the Idaho Supreme Court rejected the position offered by SFC in this case. The *Blickenstaff* Court started its analysis by noting that there are basic rules of priority and recording that would be violated by allowing a third position party to jump into first position. *Id.* at 447. The Court held that Thomas had the right to move his priority behind that of U.S. Bank, but he did not have the right to elevate U.S. Bank's priority over M&D without M&D's consent. *Id.* The Court summed up its holding:

We agree that when one debt is senior to another debt in priority of payment, the inferior debt may not be paid ahead of any senior debt without the agreement of the senior creditor, regardless of any subordination agreement between another senior creditor and the inferior creditor.

*Id.* at 448.

The *Blickenstaff* analysis is stronger in this case. The lien claimants were not a party to the Subordination Agreement, yet the construction lenders are

attempting to use the agreement to jump over the mechanic's lien claimants. In Nevada, the Legislature and this Court have established and supported a strong public policy in favor of mechanic's liens to "secure payment to those who perform labor or furnish material to improve the property of the owner." *Lehrer McGovern Bovis v. Bullock Insulation, Inc.*, 124 Nev. 1102, 1115-1116, 197 P.3d 1032, 1041 (2008).

NRS 108.225 is the legislative declaration that mechanic's lien claimants shall have priority to payment over any lien that arises after the commencement of construction. NRS § 108.225 (1) and (2) subject mortgages and other encumbrances recorded after the date a work of improvement is commenced to the rights of mechanic's lien claimants, and prohibits the courts from "imposing" such mortgages or encumbrances ahead of such mechanic's liens, regardless of the date of recording such notices of liens. There is no exception for subordination agreements, and there is certainly no exception for subordination agreements that expressly ask for the prior lien to be treated as if it were recorded after the construction loan. Allowing the construction lenders to jump over the statutory preference provided to mechanic's lien claimants would go a long way to gutting the protections afforded to the mechanic's lien holders, and cannot be supported.

When interpreting a statute, the court starts by looking at the plain language of the statute. *MGM Mirage v. Nevada Ins. Guar. Ass'n.*, 125 Nev. 223, 228-229, 209 P.3d 766, 769 (2009). The plain language of NRS 108.225 provides that

contractors have the right to recover for the work and materials performed on a construction project before any lien holder whose lien attaches after construction work has begun. *See* NRS 108.225. It is undisputed that construction work began on the Project before the Construction DOT was recorded. Since the Mezzanine Deeds of Trust are deemed “*in all respects*” to have been recorded after the Construction DOT, the construction lenders cannot rely upon any deeds of trust recorded before the Construction DOT, because they agreed, and provided public notice that those deeds of trust should be treated as if they were recorded after February 7, 2008. *See* 3 App. 642. The Subordination Agreement does not provide any exception to treating the Mezzanine Deeds of Trust as if they were recorded after the Construction DOT. *Id.* In fact, the Subordination Agreement states the opposite, saying that this is the treatment that should be given “in all respects.” *Id.* The mechanic’s lien holders have priority under the plain language of NRS 108.225 and the plain language of the Subordination Agreement.

Other cases have reached the same result as *Old Stone* and *Blickenstaff*. In *AmSouth Bank v. J & D Financial Corp.*, 679 So.2d 695 (Ala. 1996), the Supreme Court of Alabama held that by subordinating its debt to a later lien holder, the original lien holder has put itself behind that lien. *Id.* at 698. The *AmSouth* Court noted the definition of subordination meant that “the subordinating party agrees that its interest in real property should have a lower priority than the interest to which it is being subordinated.” *Id.* (citing *Black’s Law Dictionary* (6th ed.1990)).

The Court went on to note that subordination “contemplates a reduction in priority. Nothing in the definition contemplates raising a lower priority lien holder up to the position of the subordinating party.” *Id.* Similar results were held in *J.C. McConnell v. Mortgage Investment Co. of El Paso*, 292 S.W.2d 636 (Tex. Ct. Civ. App. 1955), and *Ladner v. Hogue Lumber & Supply Co.*, 91 So.2d 545 (Miss. 1956).

2. This Court Should Reject the Partial Subordination Approach,  
As Have the Majority of Other Court’s Considering it

The approach adopted by Department 29 and advocated by SFC is often referred to as partial subrogation. One of the leading cases for partial subrogation is *Bratcher v. Buckner*, 90 Cal.App.4th 1177 (Ct. App. 4<sup>th</sup> Div. 2001). The facts of this case shows why the *Bratcher* approach should not be adopted, and the error in the logic used by California Appeals Court.

*Bratcher* did not involve mechanic’s liens and the legislative priority given to mechanic’s liens. *Id.* In *Bratcher*, Buckner owned a piece of property, and recorded two deeds of trust against the property. *Id.* at 1181-1182. After those deeds of trust were recorded, Bratcher obtained a judgment, and obtained a judgment lien against Buckner and his property. *Id.* at 1182. In order to obtain a SBA loan, the Buckner’s deeds of trust were subordinated, subordinating the both recorded deeds of trust to the SBA loan. *Id.* The subordination language



specifically stated that priority between the first and third liens was being subordinated “but only insofar as would affect the priority between the deeds of trust hereinbefore specifically described, . . . .” *Id.*

In deciding that the SBA loan would give priority up to the amounts of the first two deeds of trust, the California Court of Appeals relied upon the express language of the subordination agreement, finding “[t]he subordination agreements also specified they would only affect the priority of the Grant & Asaro, Buckner and SBA liens.” *Id.* The California Court went to hold:

The subordination agreements explicitly state that they are affecting priority only as between the [prior deeds of trust] and SBA liens.

*Id.* at 1186.

The one point that should be taken from *Bratcher* is “subordination agreements, like contracts in general, are subject to the rule that they ***must be interpreted to enforce the objective intent*** of the parties.” *Id.* at 1186 (emphasis added). The language of the Subordination Agreement recorded in the public record in this case is unambiguous, and shows the objective intent of SFC. The Mezzanine Deeds of Trust shall be treated as though they “had been recorded subsequent to the recordation of the \$110,000,000 Senior Deed of Trust.” 3 App. 641-648. Under Nevada law, when a contract is clear on its face, it “will be construed from the written language and enforced as written.” *Ellison v. C.S.A.A.*, 106 Nev. 601, 603, 797 P.2d 975, 977 (1990). Contractual terms are given their

plain and ordinary meaning. *Traffic Control Servs. v. United Rentals*, 120 Nev.

168, 174, 87 P.3d 1054, 1058 (2004). This Court has also held:

. . . the court should not revise a contract under the guise of construing it. Further, '[n]either a court of law nor a court of equity can interpolate in a contract what the contract does not contain.'

*All Star Bonding v. State of Nevada*, 119 Nev. 47, 49, 62 P.3d 1124, 1125 (2003)

(quoting *Club v. Investment Co.*, 64 Nev. 312, 324, 182 P.2d 1011, 1017 (1947)).

The *Bratcher* Court based its decision in large part on its finding that the subordination agreement explicitly stated it only involved the priority between the parties, and was not meant to affect any other lien rights. *Id.* The Subordination Agreement in this case does not have any such language. The Subordination Agreement is very explicit that the Mezzanine Deeds of Trust “shall ***in all respects*** be deemed. . . as though . . . had ***been recorded subsequent to*** the recordation of the \$110,000,000 Senior Debt Deed of Trust.” 3 App. 642 (emphasis added). The language drafted by SFC, must be given its objective effect. SFC knew that construction on the work of improvement was ongoing prior to recording the Construction loan and that the Construction loan would be behind any lien claims in priority. Despite this knowledge, SFC still decided that the prior deeds of trust would be treated “in all respects” as if they were recorded after the Construction DOT on February 2008.

Other cases cited by the *Bratcher* Court are also inapplicable to the situation before this Court and the Subordination Agreement in this case. For example, *ITT Diversified Credit Corp. v. First City Capital Corp.*, 737 S.W.2d 803 (Tex. 1987) dealt with a subordination of liens of personal property. *Id.* The Texas Supreme Court noted that the prior decision of *J.C. McConnell v. Mortgage Investment Co. of El Paso*, 292 S.W.2d 636 (Tex. Ct. Civ. App. 1955) was the law regarding real estate subordination. *Id.* at 804. As noted above, *McConnell* held that the second lien holder moved to first position based upon the subordination of the first lien holder to the third lien holder. *See J.C. McConnell v. Mortgage Investment Co. of El Paso*, 292 S.W.2d 636 (Tex. Ct. Civ. App. 1955). Not only does the *ITT* case not support the partial subordination approach as to real property, it actually supports the complete subordination approach in this case, involving real property.

In the case of *In Re Cliff's Ridge Skiing Corp.*, 123 B.R. 753 (W.D. Mich. 1991), the Bankruptcy Court for the Western District of Michigan allowed the third lien holder to take up the priority position of the first lien holder when the first lien holder agreed to subordinate a discrete portion of its lien on a specific portion of the collateral. *Id.* The first lien holder held a deed of trust covering real property and any improvements or fixtures attached to ski resort property. *Id.* at 755. The first lien holder then subordinated its loan only as it related to a ski lift to a third lien holder. *Id.* The Court held:

FOA did not subordinate its entire real estate mortgage to First

National; FOA only subordinated its mortgage interest to the extent it covered the chairlift to be attached as a fixture.

*Id.* at 767-768. Again, this is not the situation with the Subordination Agreement at issue, which does not limit the liens being subordinated.

Another case cited in support of the partial subordination approach actually supports the complete subordination approach. In *Duraflex Sales & Service Corp. v. W.H.E. Mechanical Contractors*, 110 F.3d 927 (2nd Cir. 1997), the facts again involved the first lien holder only subordinating a discrete portion of its lien to the third position lien holder. *Id.* at 929-930. The subordination agreement in *Duraflex* specifically stated that but for the portion subordinated, the lien of the first position lender would remain as a first position lien. *Id.* at 930. The Second Circuit Court of Appeals then went on to hold that if there had been a complete subordination of the first mortgage, both the first and third position mortgages would be behind the second position mechanic's lien. Specifically, the Second Circuit held:

Although these cases are of little help in resolving this appeal, we note that the *RJB* scheme employed here is not necessarily inconsistent with them. In *Shaddix* and *McConnell*, the lienholder with first priority subordinated *all* of that lien to the lienholder with third priority. Under the *RJB* analysis, had Charter Federal subordinated the whole of its \$3.95 million mortgage to FNBS, then Charter Federal's lien priority would have been entirely subordinate to the *Duraflex* mechanic's lien. And, in the absence of any stated rationale in *Shaddix* and *McConnell*, we read those cases to say no more than when a first lienholder subordinates its entire lien to the lien of a third lienholder, the original first lien is subordinated to the liens of

both the second and third lienholders. (Citations omitted). In *RJB, Shaddix*, and *McConnell*, the second lienholder was left in a position no worse or better than it would have been in, absent the subordination.

*Id.* at 935.

We have the exact situation in which the Second Circuit Court of Appeals determined that due to the subordination of all of the first lien holder's rights to the third lien, the second lien moves into first position. The Subordination Agreement is clear that SFC was subordinating the entire Mezzanine Deeds of Trust to the Construction DOT. 4 App. 641-648.

As a result, even under the case law supporting SFC's position, when there has been a complete subordination, the majority of courts have held that the second lien holder would have priority. Nevada should join this majority, and in this case, the mechanic's lien claimants should have priority.

### 3. The Facts and Supporting Policy Weigh in Favor of the Mechanic's Lien Claimants

The reasoning presented by the courts applying the partial subordination approach is misplaced. In each case, the same litany of factors is repeated. A careful examination of the facts of this case, and the logic behind the decisions does not support the result SFC is trying to achieve in this case.

SFC is seeking priority for construction lenders who had specific knowledge that construction work was well under way by the time the Construction DOT was

made and recorded. It is undisputed that SFC knew that the construction work was on-going at the time it was negotiating and finalizing the construction loan. The District Court found that APCO had begun construction work in April 2007. 5 App. 1132. SFC funded a portion of the work performed before the Construction DOT through a separate loan for ongoing foundation work. SFC approved the Manhattan West Draw Summary, dated January 23, 2008. 3 App. 658-674. The Draw Summary included APCO's Application for Payment #2, for the period to November 30, 2007, and signed by APCO on December 20, 2007. *Id.* at 667-668. The Draw Request also included a Construction Progress Report, dated January 7, 2008, from SFC's Third Party voucher control company recommending funding of APCO's Application #2. *Id.* at 669. SFC does not, and cannot deny that it knew that construction work had started before the Construction DOT was recorded.

At the time SFC was negotiating, seeking syndicate members for and finalizing the Construction loan, it knew it was behind potential mechanic's liens on priority. Under Nevada's mechanic's lien law, the construction lenders cannot receive payment until the mechanic's liens have been paid. NRS 108.225. However, the construction lenders are relying upon an agreement to treat the Mezzanine Deeds of Trust as if they were recorded after the Construction DOT, to jump over the priority given by statute to the lien claimants.

This is where the partial subordination courts have proclaimed that the second lien claimant expected to be behind a certain amount of liens and is,

therefore, no worse off. However, there is never any discussion of why this same argument does not apply to the third lien holder. Clearly, the construction lenders knew the mechanic's liens would have priority over the Construction DOT as a matter of law. This is what the construction lenders understood they would be behind when they made the loan. Further, that is why the construction lenders obtained protection through title insurance.

By obtaining the subordination, the third lien holder has already improved its initial security by removing the amount of the first lien. It improves its position, and lessens its risk, without prejudice to the rights of the mechanic's lien claimants to receive payment before the construction loan, as provided by Nevada law. As the *Old Stone 2* Court held, any other holding would "destroy the legal rights of the intervening statutory lienholder and cannot be approved." *Old Stone Mortgage And Realty Trust v. New Georgia Plumbing, Inc.*, 236 S.E.2d 592, 593 (Ga. 1977). This is also the basis for the Supreme Court of Idaho's holding in *Blickenstaff* that an inferior party cannot obtain a superior position against a non-party to a subordination agreement. *Blickenstaff v. Clegg*, 97 P.3d 439, 448 (Ida. 2004).

SFC knew that construction on the work of improvement had already commenced before the Construction DOT was recorded, and expected to be behind any mechanic's lien claims filed on the Project. SFC did expect that the Construction loan would be paid before the Mezzanine Loans were paid. Nothing more is indicated from the Subordination Agreement. This makes sense in light of

the fact that the Construction Loan was to be used to fund the construction. The loan funds would be used to pay the contractors thereby avoiding any lien priority over the Construction Loan.

The rationale of this position is even stronger when the lower priority creditor is a construction lender who is trying to jump over mechanic's lien claimants who were doing work expecting to get paid by the construction lender. The construction lender's purpose is to pay for the work being performed by the lien claimants. If the construction lender performs, the potential mechanic's liens are never an issue. However, if the Court were to allow the construction lenders in this case to jump priority over known mechanic's liens, the result would create an incentive for construction lenders to hold off payment while further work is done, thereby increasing their security at the expense of the mechanic's lien claimants who think they will be first in line for payment if the lender stops the project.

In addressing a similar issue, the Supreme Court of Washington noted this very problem in *National Bank of Washington v. Equity Investors*, 518 P.2d 1072 (Wash. 1974). In the *National Bank* case, MacDonald had a first priority deed of trust. *Id.* at 1073. National Bank agreed to provide construction financing. *Id.* MacDonald and National Bank entered into a subordination agreement. *Id.* Columbia was a supplier and lien claimant whose work began after the initial advance of funds from National Bank, but before subsequent advances. *Id.* The Court ruled that National Bank had priority for the initial advance, but because the



later advances were optional, Columbia had priority for any funds after the initial advance. *Id.* at 1074-1075. Further, the subordination agreement allowed Columbia, the lien claimant, to move in front of the first lien holder, MacDonald, as well as National Bank. *Id.*

In its analysis, the *National Bank* Court noted the problem of allowing a construction lender to jump priority over lien claimants. The Supreme Court of Washington held that if the construction lender were allowed priority over the lien claimants due to a subordination agreement, the construction lender would be able to increase its security, and the size of its recovery, based upon the work of contractors that it was to pay. *Id.* at 1075. Specifically, the Court reasoned:

A contrary rule on that point would allow a lender, having power to allocate the loan monies in such a way as to insure that those whose work, materials and efforts serve to enhance the value of the security, to sit idly by and watch his security grow, while at the same time potentially leaving the materialmen, subcontractors and workmen in the position of doing their work and supplying materials for little or nothing. ***The rule here contended for by lender would lead to an inevitable unjust enrichment***, enabling the lender to withhold or apply the loan money as he saw fit, all the while knowing that putative lien claimants were furnishing valuable materials and doing valuable work to the enhancement of his security. The bank here had the option of withholding its advances on the loan from the borrower, and the right to apply the money to the account of Columbia Wood Products in payment of the lumber that company was delivering to the construction project.

*Id.* (emphasis added).

Adopting a rule that allows a later in time construction lender to gain priority over space mechanic's liens would go against the public policy of Nevada to secure payment to contractor's who provide work to improve property, and cannot be followed.

**C. SFC Not Only Knew of The Broken Priority, It Took**

**Specific Steps To Protect Itself**

SFC knew that the work was ongoing, thereby giving priority to the contractors. SFC then did a smart thing. SFC took steps to protect the Construction DOT from any claims that might arise as a result of the loss of priority by obtaining title insurance. As part of the Construction DOT transaction, SFC obtained a policy of title insurance from Commonwealth Title Insurance Company. 3 App. 565-593. SFC obtained a specific endorsement for protection for priority of mechanic's liens. *Id.* The policy provides:

ENDORSEMENT  
ATTACHED TO POLICY NO. 05111973  
ISSUED BY  
Commonwealth Land Title Insurance Company

**The Company hereby insures against loss or damage sustained by reason of the establishment of priority over the lien of the Insured Mortgage upon Title of any statutory lien for services, labor or material arising out of any work of improvement under construction or completed at Date of Policy.**

*Id.* at 584 (emphasis added).

In the District Court, SFC misled both Department 25 and Department 29 by arguing that the title insurance was an ordinary part of any transaction. However, the undisputed facts showed otherwise. In order to obtain the title policy, on January 11, 2008, Commonwealth required a “***Construction Loan Loss Of Priority Questionnaire***.” 3 App. 595. The title of the Questionnaire itself establishes that Commonwealth, SFC and Gemstone each knew that the mechanic’s lien claimants would have priority over the Construction DOT if liens were filed on the Project. An Indemnity Agreement (Mechanic’s Lines) was also given on January 11, 2008, to further protect against the anticipated potential broken priority. 3 App. 597-602. The Recitals reiterate the concerns everyone had in stating, “Company is unwilling to issue the Policy unless Indemnified by Indemnitor,” for losses resulting from “Mechanic’s Liens.” *Id.* at 597. Obtaining title insurance, with the requirement of a Construction Loan Loss of Priority Questionnaire is undisputed proof that SFC knew about, intended to, and did, modify the claimed priority of the Mezzanine Deeds of Trust, moving them behind both the mechanic’s liens and the Construction DOT.

SFC’s ability to protect itself supports the application of the complete subordination approach. The Construction Lenders were in the best position to protect themselves against loss. They moved \$46 million in prior liens behind the Construction DOT through subordination. They also insured against the potential

priority of intervening mechanic's liens. The construction lenders could have also protected their claim by paying the lien claimants, which is what the loan funds were for in the first place.

The ability to protect their claim by other means is not equally available to the mechanic's lien claimants. In fact, the only real method they have is the priority granted to the lien claimants by NRS 108.225. If this Court allows the Construction Lenders to gain priority over the prior interest of the mechanic's lien claimants, lien claimants only protection will be severely limited, which would be contrary to the strong public policy of the State of Nevada to protect mechanic's lien claimants.

**D. There Were Financial Incentives to Proceed With the Deal Despite the Broken Priority**

The Subordination Agreement was given for financial reasons, not just to obtain a loan for construction. Gary D. Tharaldson personally guaranteed the Construction Loan. See Exhibit 19. Mr. Tharaldson played an integral role in the ultimate financing of the Project. Mr. Tharaldson indirectly owns 100% of Club Vista Financial Services ("Club Vista"), the sole participant in the Mezzanine Loans. 1 App. 98 (paragraph 24).

In addition to providing the funds for the Mezzanine Deeds of Trust through Club Vista, Mr. Tharaldson agreed to guaranty the Construction DOT. 3 App.

559-563. Mr. Tharaldson, on behalf of Club Vista also agreed to allow the Mezzanine Deeds of Trust to be subordinated to the Construction DOT. 1 App. 107-108. However, the Subordination was not given for free. In exchange for Club Vista's agreement to allow subordination, and for Mr. Tharaldson's Guaranty, SFC agreed to pay Mr. Tharaldson a fee of 5% of the Construction Loan, representing a portion of the percentage rate charged to Gemstone. Id. In an exchange for a payment of over \$5,000,000, Tharaldson agreed to allow Club Vista's potential priority position to be subordinated and put behind the Construction DOT. Further, as a result of the Guaranty provided, the Construction DOT was fully protected by the Guaranty.

Mr. Tharaldson/Club Vista were paid \$5,000,000 to subordinate the Mezzanine Deeds of Trust, and understood they were moving behind the mechanic's liens and the Construction loan. The Construction Lenders were not concerned about the mechanic's lien because, in addition to the other protections they obtained, the Construction DOT was fully protected by the Guaranty. In other words, the Construction DOT was protected without regard to the position vis-à-vis the mechanic's lien claimants. SFC also benefited from this arrangement by originating and servicing a new loan.

Every party on the lenders' side of the transaction took calculated risks in the loans, guaranty and subordination. However, now that their calculated risk failed, the parties to the Construction DOT are looking for the Court to help them

cover their losses at the expense of the mechanic's lien claimants. The construction lenders are trying to find a method to move in front of the mechanic's liens despite loaning money when they knew construction had already started. Mr. Tharaldson is seeking to lessen his potential guaranty at the expense of the lien claimants. The title insurance is also seeking to avoid any liability under the policy, again, at the expense of the lien claimants.

### **III.**

#### **THE SECOND JUDGE EXCEEDED HER JURISDICTION IN REHEARING THE LIEN PRIORITY ISSUE AFTER ADMINISTRATIVE REASSIGNMENT OF THE CASE**

This Court should also clarify Nevada law on motions for reconsideration/rehearing, and find that Department 29 overstepped its authority in rehearing a matter already decided by its predecessor, Department 25, under the guise of NRCP 54(b). The District Court recognized that there was no appropriate basis for reconsideration of the Initial Order. 4 App. 934:8 – 936:3. There were no new facts that could not have been presented to Department 25. There were no intervening changes in the law previously presented to Department 25. The only change was the administrative reassignment of the case from one department to another department for continued proceedings.

Instead of relying upon clear Nevada precedent on when motions for reconsideration are appropriate, the District Court relied upon *Bower v. Harrah's Laughlin, Inc.*, 125 Nev. 470, 215 P.3d 709 (2009), to find that NRCP 54(b) provided it with authority to completely rehear the motions relating to priority. 4 App. 970 (Court Minutes February 1, 2012).

1. The District Court Recognized Reconsideration Was Not Appropriate

On December 12, 2011, SFC filed its Motion For Reconsideration of Findings of Fact, Conclusions of Law and Order Granting APCO Construction's Motion For Summary Judgment On Priority; And Denying Scott Financial Corporation's Motion For Priority Or In The Alternative, Motion For a Re-Hearing (the "Motion For Reconsideration"). 4 App. 852-877. The Motion For Reconsideration was opposed by APCO and another lien claimant Insulpro Projects, Inc., and joined by several other lien claimants. 4 App. 881-897 (APCO's Opposition); 4 App. 898-905 (Insulpro's Opposition).

At the hearing on the Motion For Reconsideration, the Court, from the inception of the hearing noted her understanding of Nevada law that the appropriate basis for reconsideration was when there was a showing "the discovery of new evidence or an intervening development or taint in the controlling law." 4 App. 934:8 – 936:3. After going through some further discussion of the arguments raised by SFC, the Court stated, "I don't think that this is a case that should be

reconsidered by a trial court judge. I think it needs to be appealed.” *Id.* at936:1-3.

This determination by the District Court follows the clear directing of the Nevada Supreme Court. *See e.g. Moore v. City of Las Vegas*, 92 Nev. 402, 405, 551 P.2d 244 (1976) (finding an abuse of discretion to reconsider a matter where no new law or facts were raised).

2.     The District Court Improperly Relied Upon NRCP 54(b) To  
Reconsider The Matter Under The Guise Of Rehearing.

Despite recognizing that reconsideration of the motions was not appropriate, the District Court relied upon NRCP 54(b) as a basis for rehearing of the priority motions. 4 App. 970 (Court Minutes February 1, 2012). However, the District Court gave no indication of what, if any, difference there was in “reconsideration” and “rehearing,” why Nevada precedent on reconsideration (which is often stated as rehearing) did not apply to rehearing, or why rehearing was appropriate. *Id.* In reality, there is no difference between reconsideration and rehearing by a District Court. *See e.g. Moore v. City of Las Vegas*, 92 Nev. 402, 405, 551 P.2d 244 (1976). As a result, the District Court should have followed Nevada law and required some new facts or new intervening law before throwing out a considered, reasoned and written order. By failing to do so, the District Court committed legal error in disregarding Nevada law. *Id.*



The authority for using NRCP 54(b) as a completely separate basis for reconsidering/rehearing a prior written order appears to have been *Bower v. Harrah's Laughlin, Inc.*, 125 Nev. 470, 215 P.3d 709 (2009). The *Bower* case was one of many cases that arose from a brawl between two rival motorcycle gangs at Harrah's in Laughlin, Nevada. *Id.* at 475-476. Harrah's filed a motion for summary judgment in Mr. Bower's individual case before Judge Denton, which was denied. *Id.* at 477-478. While the case was pending, Mr. Bower's case was consolidated with other cases, and reassigned to another District Court Judge. *Id.* Also while Mr. Bower's case was pending in the District Court, Harrah's successfully prevailed in other related cases, including jury verdicts in the United States District Court For Nevada and a California Superior Court; summary judgments in four (4) cases before the United States District Court For Nevada, and summary judgment in two (2) Nevada District Court Cases. *Id.* As a result, Mr. Bower's counsel suggested that Harrah's orally move the court to reconsider the summary judgment motion previously heard by Judge Denton. *Id.* at 478. Harrah's did so, the Court agreed to rehear the motion, and granted the motion. *Id.*

*Bower* did not establish any new law, it just reiterated existing law regarding when reconsideration/rehearing is appropriate. The *Bower* Court held that reconsideration was appropriate "because additional facts or events had developed since Judge Denton decided the motion." *Id.* This is the same holding from *Moore v. City of Las Vegas*, 92 Nev. 402, 405, 551 P.2d 244 (1976), where this court held:

We note particularly that the second ***motion for rehearing*** raised no new issues of law and made reference to no new or additional facts. Under such circumstances the motion was superfluous and, in our view, ***it was an abuse of discretion for the district court to entertain it.*** Only in very rare instances in which new issues of fact or law are raised supporting a ruling contrary to the ruling already reached should a motion for rehearing be granted.

*Id.* at 405 (emphasis added). The *Moore* Court dealt with rehearing, not as a separate item, but as part of its ongoing case law on reconsideration.

*Bower* is nothing new, and the District Court should have refused to undo the Initial Order under the guise of rehearing under NRCP 54(b). The Court should clarify that 54(b) does not provide a separate basis for reconsidering prior written orders. Otherwise, the rules established by this Court for reconsideration will be meaningless.

### CONCLUSION

For the reasons set forth above, petitioners, appearing jointly through their respective counsel, together with any other parties that may join them, respectfully request that this Court issue the requested writ to the district court affording them the relief set forth in the petition, or such other relief in their favor as this Court deems appropriate.

DATED this 22nd day of June, 2012



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**[Additional Signatures on Next Page]**

DATED this 22nd day of June, 2012



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*Attorneys for Petitioners Accuracy Glass & Mirror Company Inc; Buchele Inc.;*

*Bruin Painting Corporation; Cactus Rose Construction; Fast Glass Inc.; HD*

*Supply Waterworks LP; Heinaman Contract Glazing; Helix Electric of Nevada*

*LLC; Interstate Plumbing & Air Conditioning; SWPPP Compliance Solutions*

*LLC; WRG Design Inc.*

## Verification

STATE OF NEVADA    )  
                                  ) ss.  
COUNTY OF CLARK    )

Wade B. Gochmour, being first duly sworn, deposes and says:

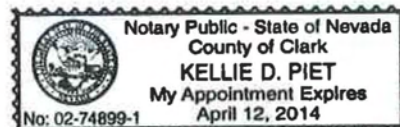
That he is a member of the law firm of HOWARD & HOWARD ATTORNEYS PLLC, attorneys for Petitioner APCO Construction, Inc. in the above-entitled Petition; he has obtained and reviewed copies of district court papers relating to this case, and he is familiar with the facts and circumstances set forth in those papers and in the Petition; that he knows the contents thereof to be true, based on the information he has received, except as to those stated on the information and belief, and as to those he believes them to be true.

This verification is made pursuant to NRS 15.010.

  
\_\_\_\_\_  
WADE B. GOCHMOUR, ESQ.

Subscribed and sworn to before me  
on the 22nd day of June, 2012

  
\_\_\_\_\_  
Notary Public, Clark County, Nevada.



## Certificate of Service

Pursuant to NRAP 25, I certify that I am an employee of Howard & Howard Attorneys PLLC and that on this 22nd day of June 2012, I served the foregoing Petition for Writ of Mandamus or Prohibition by mailing a true and correct copy thereof, postage prepaid, addressed to:

The Honorable Susan W. Scann  
Department 29, Eighth Judicial District Court  
330 S. 3rd Street  
Las Vegas, NV 89155

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Kemp, Jones & Coulthard, LLP  
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*Counsel for Real Parties in Interest Scott Financial Corporation and Bradley J. Scott*

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gmeier@nvbusinesslawyers.com  
*Counsel for Real Parties in Interest Scott Financial Corporation*

I further certify that the underlying case is a mandatory electronic filing case and that, on this same date, I served a copy of the foregoing document on all

parties appearing therein via the Eighth Judicial District Court's E-File&Serve electronic filing system using the service only utility. A true and correct copy of the Party Information from the district court's Register of Actions is attached hereto.

Dated this 22nd day of June, 2012

Kellie P. A.

# REGISTER OF ACTIONS

CASE NO. 08A571228

Apco Construction, Plaintiff(s) vs. Gemstone Development  
West Inc, Defendant(s)

§  
§  
§  
§  
§  
§

Case Type: **Business Court**  
Date Filed: **09/09/2008**  
Location: **Department 29**  
Conversion Case Number: **A571228**

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## RELATED CASE INFORMATION

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### Related Cases

08A574391 (Consolidated)  
08A574792 (Consolidated)  
08A577623 (Consolidated)  
09A580889 (Consolidated)  
09A583289 (Consolidated)  
09A584730 (Consolidated)  
09A587168 (Consolidated)  
A-09-589195-C (Consolidated)  
A-09-589677-C (Consolidated)  
A-09-590319-C (Consolidated)  
A-09-592826-C (Consolidated)  
A-09-596924-C (Consolidated)  
A-09-597089-C (Consolidated)  
A-09-606730-C (Consolidated)  
A-10-608717-C (Consolidated)  
A-10-608718-C (Consolidated)

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## PARTY INFORMATION

---

### Lead Attorneys

Counter Claimant **APCO Construction**

**Gwen Rutar Mullins**  
*Retained*  
702-257-1483(W)

Counter Claimant **Asphalt Products Corporation**

Counter Claimant **Cactus Rose Construction**

Counter Claimant **Camco Pacific Construction Co Inc**

**Steven L. Morris**  
*Retained*  
702-938-2244(W)

Counter Claimant **Camco Pacific Construction Co Inc**

**Steven L. Morris**  
*Retained*  
702-938-2244(W)

Counter Claimant **Camco Pacific Construction Company Inc**

**Steven L. Morris**  
*Retained*  
702-938-2244(W)

Counter Claimant **Camco Pacific Construction Company Inc**

**Zachariah Parry**  
*Retained*  
702-933-0777(W)



|                   |                                     |   |
|-------------------|-------------------------------------|---|
| Counter Claimant  | Club Vista Financial Sevices LLC    | <b>Mark E. Ferrario, ESQ</b><br><i>Retained</i><br>702-792-3773(W)    |
| Counter Claimant  | Gemstone Development West Inc       | <b>Greg S. Gilbert</b><br><i>Retained</i><br>702-669-4600(W)          |
| Counter Claimant  | Insulpro Projects Inc               | <b>Eric Dobberstein</b><br><i>Retained</i><br>7023824002(W)           |
| Counter Claimant  | Tharaldson Motels II Inc            | <b>Martin A. Muckleroy</b><br><i>Retained</i><br>702-949-3100(W)      |
| Counter Claimant  | Tharaldson, Gary D                  | <b>Martin A. Muckleroy</b><br><i>Retained</i><br>702-949-3100(W)      |
| Counter Defendant | Accuracy Glass & Mirror Company Inc | <b>Dallin T. Wayment</b><br><i>Retained</i><br>7029907272(W)          |
| Counter Defendant | Ahern Rentals Inc                   | <b>D. Shane Clifford, ESQ</b><br><i>Retained</i><br>7028211821(W)     |
| Counter Defendant | APCO Construction                   | <b>Gwen Rutar Mullins</b><br><i>Retained</i><br>702-257-1483(W)       |
| Counter Defendant | Arch Aluminum and Glass Co          | <b>Jeffrey Richard Albregts</b><br><i>Retained</i><br>702-791-0308(W) |
| Counter Defendant | Atlas Construction Supply Inc       | <b>David W Dachelet</b><br><i>Retained</i><br>7022574122(W)           |
| Counter Defendant | Bank of Oklahoma NA                 |   |
| Counter Defendant | Bruin Painting Corporation          | <b>Dallin T. Wayment</b><br><i>Retained</i><br>7029907272(W)          |
| Counter Defendant | Buchele Inc                         | <b>Dallin T. Wayment</b><br><i>Retained</i><br>7029907272(W)          |
| Counter Defendant | Cabinetec Inc                       | <b>Justin L. Watkins</b><br><i>Retained</i><br>702-562-6000(W)        |
| Counter Defendant | Camco Pacific Construction Co Inc   | <b>Steven L. Morris</b><br><i>Retained</i><br>702-938-2244(W)         |

|  |  |
|--|--|
| Counter Defendant Camco Pacific Construction Inc       | <b>Steven L. Morris</b><br><i>Retained</i><br>702-938-2244(W)                |
| Counter Defendant Cellcrete Fireproofing of Nevada Inc | <b>Robert C. Reade</b><br><i>Retained</i><br>702-794-4411(W)                 |
| Counter Defendant Concrete Visions Inc                 |  |
| Counter Defendant Creative Home Theatre LLC            |  |
| Counter Defendant Dave Peterson Framing Inc            | <b>Stephen M. Dixon</b><br><i>Retained</i><br>702-256-0156(W)                |
| Counter Defendant E & E Fire Protection LLC            | <b>Stephen M. Dixon</b><br><i>Retained</i><br>702-256-0156(W)                |
| Counter Defendant Executive Plastering Inc             | <b>Matthew Q. Callister</b><br><i>Retained</i><br><del>702-385-3343(W)</del> |
| Counter Defendant EZA P.C.                             | <b>Donald H Williams</b><br><i>Retained</i><br>7023207755(W)                 |
| Counter Defendant Fast Glass Inc                       | <b>Michael T. Gebhart</b><br><i>Retained</i><br>7029907272(W)                |
| Counter Defendant Fast Glass Inc                       | <b>Michael T. Gebhart</b><br><i>Retained</i><br>7029907272(W)                |
| Counter Defendant Ferguson Fire and Fabrication Inc    | <b>Dale B. Rycraft Jr.</b><br><i>Retained</i><br>702-796-5555(W)             |
| Counter Defendant Gemstone Development West Inc        | <b>Greg S. Gilbert</b><br><i>Retained</i><br><del>702-669-4600(W)</del>      |
| Counter Defendant Granite Construction Company         | <b>David R. Johnson</b><br><i>Retained</i><br>9498526700(W)                  |
| Counter Defendant Harsco Corporation                   | <b>Donald H Williams</b><br><i>Retained</i><br>7023207755(W)                 |
| Counter Defendant HD Supply Waterworks LP              | <b>Dallin T. Wayment</b><br><i>Retained</i><br>7029907272(W)                 |

|                   |  |   |
|-------------------|--|---|
| Counter Defendant | Heinaman Contract Glazing              | <b>Dallin T. Wayment</b><br><i>Retained</i><br>7029907272(W)            |
| Counter Defendant | Helix Electric of Nevada LLC           | <b>Dallin T. Wayment</b><br><i>Retained</i><br>7029907272(W)            |
| Counter Defendant | Hydropressure Cleaning Inc             |   |
| Counter Defendant | Inquipco                               | <b>Jennifer R. Lloyd-Robinson</b><br><i>Retained</i><br>702-233-4225(W) |
| Counter Defendant | Insulpro Projects Inc                  | <b>Eric Dobberstein</b><br><i>Retained</i><br>7023824002(W)             |
| Counter Defendant | Interstate Plumbing & Air Conditioning |   |
| Counter Defendant | John Deere Landscape Inc               |   |
| Counter Defendant | Las Vegas Pipeline LLC                 | <b>James E. Shapiro</b><br><i>Retained</i><br>7025647067(W)             |
| Counter Defendant | Masonry Group Nevada Inc               | <b>Becky Pintar</b><br><i>Retained</i><br>702-301-6412(W)               |
| Counter Defendant | Nevada Construction Services           | <b>Charles Vlastic</b><br><i>Retained</i>                               |
| Counter Defendant | Nevada Prefab Engineers                | <b>Mindy C. Fisher</b><br><i>Retained</i><br>7026997500(W)              |
| Counter Defendant | Nevada Prefab Engineers Inc            | <b>Christopher Craft</b><br><i>Retained</i><br>702-699-7500(W)          |
| Counter Defendant | Noord Sheet Metal Company              | <b>T. James Truman</b><br><i>Retained</i><br>702-256-0156(W)            |
| Counter Defendant | Noorda Sheet Metal Company             | <b>Stephen M. Dixon</b><br><i>Retained</i><br>702-256-0156(W)           |
| Counter Defendant | Northstar Concrete Inc                 | <b>Jennifer R. Lloyd-Robinson</b><br><i>Retained</i><br>702-233-4225(W) |

Counter Defendant Northstar Concrete Inc

**Jennifer R. Lloyd-Robinson**  
*Retained*  
702-233-4225(W)

Counter Defendant Pape Materials Handling

**Christopher Craft**  
*Retained*  
702-699-7500(W)

Counter Defendant Patent Construction Systems

**Donald H Williams**  
*Retained*  
7023207755(W)

Counter Defendant Professional Door and Mill Works LLC

**Stephen M. Dixon**  
*Retained*  
702-256-0156(W)

Counter Defendant Professional Doors And Millworks LLC

Counter Defendant Ready Mix Inc

**Brian Keith Berman**  
*Retained*  
7023820702(W)

Counter Defendant Renaissance Pools & Spas Inc

**Steven B. Scow**  
*Retained*  
7023185040(W)

Counter Defendant Republic Crane Service LLC

**Richard Allen Koch**  
*Retained*  
7024513900(W)

Counter Defendant Scott Financial Corporation

**Glenn F Meier**  
*Retained*  
7026731000(W)

Counter Defendant Scott, Bradley J

**Matthew S. Carter**  
*Retained*  
7023856000(W)

Counter Defendant Selectbuild Nevada Inc

**Robert E. Schumacher**  
*Retained*  
702-577-9300(W)

Counter Defendant Steel Structures Inc

**Christopher Craft**  
*Retained*  
702-699-7500(W)

Counter Defendant Supply Network Inc

**Philip Thomas Varricchio**  
*Retained*  
7023867002(W)

Counter Defendant The Pressure Grout Company

Counter Defendant Tri City Drywall Inc

**Jennifer R. Lloyd-**

|   |   |
|---|---|
|   | <b>Robinson</b><br><i>Retained</i><br>702-233-4225(W)               |
| Counter Defendant Uintah Investments LLC            | <b>Andrew J. Kessler, ESQ</b><br><i>Retained</i><br>619-525-3858(W) |
| Counter Defendant WRG Design Inc                    | <b>Dallin T. Wayment</b><br><i>Retained</i><br>7029907272(W)        |
| Counter Defendant Zitting Brothers Construction Inc | <b>Reuben Cawley</b><br><i>Retained</i><br>702-727-1400(W)          |
| Cross Claimant APCO Construction                    | <b>Gwen Rutar Mullins</b><br><i>Retained</i><br>702-257-1483(W)     |
| Cross Defendant Gemstone Development West Inc       |   |
| Defendant Commonwealth Land Title Insurance Co      |   |
| Defendant First American Title Insurance Co         |   |
| Defendant Gemstone Development West Inc             | <b>Monica Caffaratti</b><br><i>Retained</i><br>510-921-8155(W)      |
| Defendant Scott Financial Corporation               | <b>Glenn F Meier</b><br><i>Retained</i><br>7026731000(W)            |
| Defendant Scott, Bradley J                          | <b>Jon Randall Jones</b><br><i>Retained</i><br>7023856000(W)        |
| Doing Business As Apco Construction                 | <b>Gwen Rutar Mullins</b><br><i>Retained</i><br>702-257-1483(W)     |
| Doing Business As Helix Electric                    |   |
| Doing Business As Oz Architecture of Nevada Inc     | <b>Donald H Williams</b><br><i>Retained</i><br>7023207755(W)        |
| Doing Business As Pape Rents                        | <b>Christopher Craft</b><br><i>Retained</i><br>702-699-7500(W)      |

**Doing Business As Pape Rents**

**William R. Urga**  
*Retained*  
7026997500(W)

**Doing Business As Power Plus!**

**Doing Business As Viking Supplynet**

**Interpleader      Hydropressure Cleaning Inc**

**Gwen Rutar Mullins**  
*Retained*  
702-257-1483(W)

**Intervenor      Cell Crete Fireproofing Of NV Inc**

**Robert C. Reade**  
*Retained*  
702-794-4411(W)

**Intervenor      Custom Select Billing Inc**

**Gwen Rutar Mullins**  
*Retained*  
702-257-1483(W)

**Intervenor      Dave Peterson Framing Inc**

**T. James Truman**  
*Retained*  
702-256-0156(W)

**Intervenor      E & E Fire Protectiong LLC**

**T. James Truman**  
*Retained*  
702-256-0156(W)

**Intervenor      EZA P C**

**Donald H Williams**  
*Retained*  
7023207755(W)

**Intervenor      Granite Construction Company**

**David R. Johnson**  
*Retained*  
9498526700(W)

**Intervenor      Insulpro Projects Inc**

**Eric Dobberstein**  
*Retained*  
7023824002(W)

**Intervenor      Nevada Prefab Engineers Inc**

**Martin A. Little**  
*Retained*  
7026997500(W)

**Intervenor      Noord Sheet Metal Company**

**T. James Truman**  
*Retained*  
702-256-0156(W)

**Intervenor      Patent Construction Systems**

**Donald H Williams**  
*Retained*  
7023207755(W)

|                                 |   |   |
|---------------------------------|---|---|
| <b>Intervenor</b>               | <b>Pressure Grout Co</b>                      | <b>T. James Truman</b><br><i>Retained</i><br>702-256-0156(W)            |
| <b>Intervenor</b>               | <b>Professional Doors &amp; Millworks LLC</b> | <b>T. James Truman</b><br><i>Retained</i><br>702-256-0156(W)            |
| <b>Intervenor</b>               | <b>Steel Structures Inc</b>                   | <b>Martin A. Little</b><br><i>Retained</i><br>7026997500(W)             |
| <b>Intervenor</b>               | <b>Tri-City Drywall Inc</b>                   | <b>Jennifer R. Lloyd-Robinson</b><br><i>Retained</i><br>702-233-4225(W) |
| <b>Intervenor<br/>Defendant</b> | <b>APCO Construction</b>                      | <b>Gwen Rutar Mullins</b><br><i>Retained</i><br>702-257-1483(W)         |
| <b>Intervenor<br/>Defendant</b> | <b>APCO Construction</b>                      | <b>Gwen Rutar Mullins</b><br><i>Retained</i><br>702-257-1483(W)         |
| <b>Intervenor<br/>Defendant</b> | <b>Camco Pacific Construction Co Inc</b>      | <b>Steven L. Morris</b><br><i>Retained</i><br>702-938-2244(W)           |
| <b>Intervenor<br/>Defendant</b> | <b>Camco Pacific Construction Co Inc</b>      | <b>Steven L. Morris</b><br><i>Retained</i><br>702-938-2244(W)           |
| <b>Intervenor<br/>Defendant</b> | <b>Club Vista Financial Services LLC</b>      | <b>Martin A. Muckleroy</b><br><i>Retained</i><br>702-949-3100(W)        |
| <b>Intervenor<br/>Defendant</b> | <b>Club Vista Financial Services LLC</b>      | <b>Martin A. Muckleroy</b><br><i>Retained</i><br>702-949-3100(W)        |
| <b>Intervenor<br/>Defendant</b> | <b>Commonwealth Land Title Ins Co</b>         |   |

|                                 |   |  |
|---------------------------------|---|--|
| <b>Intervenor<br/>Defendant</b> | <b>Commonwealth Land Title Ins Co</b>             |  |
| <b>Intervenor<br/>Defendant</b> | <b>Concrete Visions Inc</b>                       |  |
| <b>Intervenor<br/>Defendant</b> | <b>E &amp; E Fire Protection LLC</b>              | <b>Stephen M. Dixon</b><br><i>Retained</i><br>702-256-0156(W)  |
| <b>Intervenor<br/>Defendant</b> | <b>Fidelity &amp; Deposit Company Of Maryland</b> | <b>Steven L. Morris</b><br><i>Retained</i><br>702-938-2244(W)  |
| <b>Intervenor<br/>Defendant</b> | <b>Fidelity And Deposit Co Of Maryland</b>        | <b>Steven L. Morris</b><br><i>Retained</i><br>702-938-2244(W)  |
| <b>Intervenor<br/>Defendant</b> | <b>First American Title Insurance Co</b>          |  |
| <b>Intervenor<br/>Defendant</b> | <b>First American Title Insurance Co</b>          |  |
| <b>Intervenor<br/>Defendant</b> | <b>Gemstone Development West Inc</b>              | <b>Monica Caffaratti</b><br><i>Retained</i><br>510-921-8155(W) |
| <b>Intervenor<br/>Defendant</b> | <b>Gemstone Development West Inc</b>              | <b>Monica Caffaratti</b><br><i>Retained</i><br>510-921-8155(W) |
| <b>Intervenor<br/>Defendant</b> | <b>Gemstone Development West Inc</b>              |  |
| <b>Intervenor<br/>Defendant</b> | <b>Gemstone Development West Inc</b>              |  |
| <b>Intervenor<br/>Defendant</b> | <b>Gemstone Development West Inc</b>              | <b>Monica Caffaratti</b><br><i>Retained</i><br>510-921-8155(W) |
| <b>Intervenor<br/>Defendant</b> | <b>Jeff Heit Plumbing Co LLC</b>                  | <b>Keith E. Gregory</b><br><i>Retained</i><br>7023823636(W)    |
| <b>Intervenor<br/>Defendant</b> | <b>Marshall, Kelly</b>                            |  |
| <b>Intervenor<br/>Defendant</b> | <b>Nevada Construction Services</b>               | <b>Nikola Skrinjaric</b><br><i>Retained</i><br>702-667-3000(W) |



|                             |   |   |
|-----------------------------|---|---|
| <b>Intervenor Defendant</b> | <b>Old Republic Surety</b>  | <b>Keith E. Gregory</b><br><i>Retained</i><br>7023823636(W)               |
| <b>Intervenor Defendant</b> | <b>Scott Financial Corp</b>   | <b>Glenn F Meier</b><br><i>Retained</i><br>7026731000(W)                  |
| <b>Intervenor Defendant</b> | <b>Scott Financial Corporation</b>  | <b>Glenn F Meier</b><br><i>Retained</i><br>7026731000(W)                  |
| <b>Intervenor Defendant</b> | <b>Scott Financial Corporation</b>  | <b>Glenn F Meier</b><br><i>Retained</i><br>7026731000(W)                  |
| <b>Intervenor Defendant</b> | <b>Scott Financial Corporation</b>  | <b>Glenn F Meier</b><br><i>Retained</i><br>7026731000(W)                  |
| <b>Intervenor Defendant</b> | <b>Tharaldson Motels II Inc</b>   | <b>Martin A. Muckleroy</b><br><i>Retained</i><br>702-949-3100(W)          |
| <b>Intervenor Defendant</b> | <b>Tharaldson Motels II Inc</b>   | <b>Martin A. Muckleroy</b><br><i>Retained</i><br>702-949-3100(W)          |
| <b>Intervenor Plaintiff</b> | <b>Ahern Rental Inc</b>   | <b>D. Shane Clifford, ESQ</b><br><i>Retained</i><br>7028211821(W)         |
| <b>Intervenor Plaintiff</b> | <b>Arch Aluminum And Glass Co <i>Now Known As</i> Arch Aluminum and Glass LLC</b> | <b>Jeffrey Richard Albregts</b><br><i>Retained</i><br>702-791-0308(W)     |
| <b>Intervenor Plaintiff</b> | <b>Cabinetec Inc</b>  | <b>Justin L. Watkins</b><br><i>Retained</i><br><del>702-562-6000(W)</del> |
| <b>Intervenor Plaintiff</b> | <b>Cactus Rose Construction Inc</b>   | <b>Dallin T. Wayment</b><br><i>Retained</i><br>7029907272(W)              |
| <b>Intervenor Plaintiff</b> | <b>Camco Pacific Construction Co Inc</b>  | <b>Steven L. Morris</b><br><i>Retained</i><br>702-938-2244(W)             |
| <b>Intervenor Plaintiff</b> | <b>Harsco Corporation</b>   | <b>Donald H Williams</b><br><i>Retained</i><br>7023207755(W)              |

**Intervenor Plaintiff** HD Supply Waterworks LP

**Intervenor Plaintiff** Interstate Plumbing & Air Conditioning Inc

**Dallin T. Wayment**  
*Retained*  
7029907272(W)

**Intervenor Plaintiff** Las Vegas Pipeline LLC

**Intervenor Plaintiff** Northstar Concrete, Inc.

**Jennifer R. Lloyd-Robinson**  
*Retained*  
702-233-4225(W)

**Intervenor Plaintiff** Pape Material Handling

**William R. Urga**  
*Retained*  
7026997500(W)

**Intervenor Plaintiff** S R Bray Corp

**Richard L. Peel**  
*Retained*  
7029907272(W)

**Intervenor Plaintiff** Selectbuild Nevada Inc

**Robert E. Schumacher**  
*Retained*  
702-577-9300(W)

**Intervenor Plaintiff** Sunstate Companies Inc

**Garry L. Hayes**  
*Retained*  
7024343444(W)

**Intervenor Plaintiff** SWPPP Compliance Solutions LLC

**Richard L. Peel**  
*Retained*  
7029907272(W)

**Other** Graybar Electric Company

**Other** HD Supply Construction Supply LP *Doing Business As* White Cap Construction Supply Inc

**Other** PCI Group, LLC

**Other** Wiss, Janney, Elstner Associates, Inc.

**Richard I Dreitzer**  
*Retained*  
702-669-3600(W)

**Plaintiff** Apco Construction

**Gwen Rutar Mullins**  
*Retained*  
702-257-1483(W)

**Third Party Defendant** Camco Pacific Construction Co Inc

**Steven L. Morris**  
*Retained*  
702-938-2244(W)

**Third Party**            **Fidelity & Deposit Co Of Maryland**  
**Defendant**

**Steven L. Morris**  
*Retained*  
702-938-2244(W)

**Third Party Plaintiff Dave Peterson Framing Inc**

**T. James Truman**  
*Retained*  
702-256-0156(W)

**Third Party Plaintiff E & E Fire Protection LLC**

**T. James Truman**  
*Retained*  
702-256-0156(W)

**Third Party Plaintiff Insulpro Projects Inc**

**Eric Dobberstein**  
*Retained*  
7023824002(W)

**Third Party Plaintiff Noorda Sheet Metal Company**

**T. James Truman**  
*Retained*  
702-256-0156(W)

**Third Party Plaintiff Professional Doors & Millworks LLC**

**T. James Truman**  
*Retained*  
702-256-0156(W)