HUTCHISON & STEFFEN
A PROFESSIONAL LLC
PECCOLE PROFESSIONAL PARK
10080 WEST ALTA DRIVE, SUITE 200
LAS VEGAS, NV 89145

IN THE SUPREME COURT OF THE STATE OF NEVADA

In Re: Manhattan West Mechanic's Lien Litigation

APCO CONSTRUCTION, 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; AND WRG DESIGN, INC.,

Petitioners,

vs.

THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE SUSAN SCANN, DISTRICT JUDGE,

Respondents,

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; CONCRETE VISIONS, INC.; CREATIVE HOME THEATRE, LLC; CUSTOM SELECT BILLING, INC.; DAVE PETERSON FRAMING, INC.; E&E FIRE PROTECTION, LLC; EZA, P.C.;

No. 61131

District Court No. 08A571228
Consolidated with:
08A574391
08A574792
08A577623
09A579963
09A580889
09A583289
09A584730
09A587168
A-09-589195-C
A-09-589677-C
A-09-590319-C
A-09-592826-C
A-09-596924-C
A-09-597089-C
A-09-606730-C
A-10-608717-C
A-10-608718-C

SCOTT FINANCIAL CORPORATION'S ANSWER TO JOINT PETITION FOR WRIT OF MANDAMUS OR PROHIBITION

FERGUSON FIRE AND FABRICATION, INC.; GEMSTONE DEVELOPMENT WEST, INC.; GRANITE CONSTRUCTION COMPANY; HARSCO CORPORATION; 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 MATERIAL HANDLING; PATENT CONSTRUCTION SYSTEMS; PROFESSIONAL DOOR AND MILL WORKS, LLC; READY MIX, INC.; RENAISSANCE POOLS & SPAS, 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; AND ZITTING BROTHERS CONSTRUCTION, INC.,

Real Parties in Interest

SCOTT FINANCIAL CORPORATION'S ANSWER

TO JOINT PETITION FOR WRIT OF MANDAMUS OR PROHIBITION

HUTCHISON & STEFFEN, LLC.

Mark A. Hutchison (4629)
Michael K. Wall (2098)
Peccole Professional Park
10080 Alta Drive, Suite 200
Las Vegas, Nevada 89145

Attorneys for Scott Financial Corporation

HUTCHISON & STEFFEN
A PROFESSIONAL LLC
PECCOLE PROFESSIONAL PARK
10080 WEST ALTA DRIVE, SUITE 200
LAS VEGAS, NV 89145

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AUTHORITIES CITED
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SCOTT FINANCIAL CORPORATION'S ANSWER TO JOINT PETITION FOR WRIT OF MANDAMUS OR PROHIBITION

I. INTRODUCTION

In these proceedings, Petitioners, who are mechanic's lien claimants below, seek a windfall by leaping over the unquestioned pre-existing lien priority of certain purchase money deeds of trust held by Scott Financial Corporation ("SFC"). Petitioners' argument is based on the fallacy that as a matter of public policy, the execution of a Subordination Agreement by SFC, adjusting the priority of the SFC's senior purchase money deeds of trust in relation to an SFC deed of trust that is junior to Petitioner's liens, renders all SFC liens subordinated to Petitioners' liens regardless of the terms of the Subordination Agreement or the intent of SFC. Said another way, Petitioners assert that any adjustment of priority by a lienholder with two liens on a property must result in the complete forfeiture of all priority of both of its liens if an intervening lien exists. Simply adjusting who holds the priority over Petitioners, as opposed to imposing a forfeiture, serves appropriate justice. The trial court so ruled.

Although Petitioners stress the public policy of protecting workers and material suppliers, these policy considerations are not before this Court. This case does not turn on a policy choice about who should have priority over whom in a theoretical universe. This is a legal dispute about who has priority over whom based on firmly established Nevada recording law, contract law, and on the particular facts of this case.

The public policy of Nevada does not favor a windfall to Petitioners based on a misuse of the dictionary definition of the word subordination. Instead, this Court should reaffirm the policy of freedom of contract. Further, as the district court found, the Subordination Agreement, read as a whole, was intended to create partial subordination. This reading of the contract is correct and fair both as a matter of law and fact.

Petitioners attempt to paint a sympathetic picture because they may not get paid for the work they did on the underlying project. Indeed, when a project fails, many involved suffer financially. That is the reason recording laws provide priority of debts. Based on recorded documents, all investors–the purchase money lender, the developer, the workers, and the investors–know at the time they make their investments what interests precede them. Thus, they can make decisions to invest or work or provide materials knowing the risks.

In this case, everyone loses. The project has failed and the property does not have sufficient value to cover the encumbrances. Everyone, from the top to the bottom—the owner, the purchasers, the investors and the workers—will lose a substantial amount. The question here is not who stands to lose, but as to the asset that still remains, who stands in what position of priority to recover a portion of their loss. This petition should be denied for lack of merit.

II. BACKGROUND

1. Statement of Facts

Petitioners challenge the district court's application of contractual partial subordination.[1] At issue before the district court was the relative priority of competing liens encumbering real property commonly referred to as 9205 W. Russell Road, Las Vegas, Nevada (the "Property"). 36 App. 1149 ¶ 1.[2] The

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[1]The term "partial subordination" has been used by courts and by the parties herein to refer to the situation where a first party's interest is subordinated only as to a third party's interest, but not as to an intervening second lienholder's interest. In such a case, the second lienholder's interest is not subordinated, partially or completely. In fact, what has occurred in this case that is referred to as a partial subordination could be better described as a contractual exchange of priorities between the first and third lienholders, with no effect on the second lienholder.

[2]The Appendix provided by Petitioners is divided into three volumes with numbered "Tabs" and is consecutively paginated. The citations to the appendix herein refer to the tab and the page numbers as follows: __ App. ____, where the

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following is the relevant chain of title:

July 5, 2006: Gemstone Apache, LLC, purchased the Property. 36 App. 1149 ¶ 3.

July 5, 2006: A $15,000,000 First Deed of Trust in favor of SFC was recorded in the Official Records of the Clark County Recorder, Book No. 20060705, Inst. No. 0004264. 9 App. 359-78. This was a purchase money deed of trust.

July 5, 2006: A $10,000,000 Junior Deed of Trust in favor of SFC was recorded in the Official Records of the Clark County Recorder, Book No. 20060705, Inst. No. 0004265. 9 App. 380-98. This was also a purchase money deed of trust.

July 5, 2006: A $13,000,000 Third Deed of Trust in favor of SFC was recorded in the Official Records of the Clark County Recorder, Book No. 20060705, Inst. No. 0004266. 9 App. 433-53. This was a line of credit deed of trust.

These first three trust deeds represent SFC's initial purchase money loans and, along with two subsequent deeds discussed hereinafter, have been referred to by the parties as "the Mezzanine Deeds." The term "Mezzanine Deeds" does not accurately describe these deeds, because they are not interim investments for a particular purpose, as that nomenclature might imply. The term was coined early on by lay persons for convenience to refer to the loans collectively, and the name has since been used in documents by the parties and the district court. Nevertheless, the first three trust deeds are not "Mezzanine" in nature; they represent SFC's initial purchase money loans in the Property, and are entitled to

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first priority treatment. Because documents in the appendix and the district court's order refer to these deeds by the title "Mezzanine," for clarity sake, in this Answer we will refer to the first three deeds collectively as "the Mezzanine DOTs."

April 2007: This is the earliest date Petitioners commenced work on the Property, setting the priority date for all mechanic's lienors. 36 App. 1150 ¶ 5; NRS 108.225.

May 22, 2007: A Junior Deed of Trust Amendment in favor of SFC securing an additional $8,000,000 was recorded in the Official Records of the Clark County Recorder, Book No. 20070522, Inst. No. 0004011. 9 App. 486-506.

October 24, 2007: An Amendment to Third Deed of Trust in favor of SFC securing an additional $10,000,000 was recorded in the Official Records of the Clark County Recorder, Book No. 20071024, Inst. No. 0004182. 9 App. 508-13.

February 7, 2008: A $110,000,000 Senior Deed of Trust and Security Agreement with Assignment of Rents and Fixtures Filing in favor of SFC was recorded in the Official Records of Clark County Recorder, Book No. 20080207, Inst. No. 0001482. 9 App.604-25. The title "Senior Deed" when referring to the February 7, 2008 Deed can be confusing because other deeds have also been so labeled. This was the construction loan, and this deed will be referred to herein as "the Construction DOT."

February 7, 2008: An Assumption Agreement between SFC, Gemstone Apache, LLC, and Gemstone Development West, LLC, was recorded in the Official Records of the Clark

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County Recorder, Book No. 20080207, Inst. No. 0001483. 36 App. 1150 ¶ 8. In this agreement, Gemstone Apache conveyed its interest in the Property to Gemstone Development West and Gemstone Development West assumed the Mezzanine DOTs, with amendments thereto.

February 7, 2008: A First Amendment to Senior Deed of Trust and Security Agreement with Assignment of Rents and Fixtures Filing in favor of SFC was recorded in the Official Records of the Clark County Recorder, Book No. 20080207, Inst. No. 0001484. 9 App. 627-39. NOTE: This agreement concerns the Mezzanine DOTs, not the "Construction DOT" regarding the construction loan filed and recorded the same day.

February 7, 2008: A Second Amendment to Junior Deed of Trust and Security Agreement with Assignment of Rents and Fixtures Filing in favor of SFC was recorded in the Official Records of the Clark County Recorder, Book No. 20080207, Inst. No. 0001485. 9 App. 634-39.

February 7, 2008: A Mezzanine Deed of Trust Subordination Agreement (the "Subordination Agreement") was recorded in the Official Records of Clark County Recorder, Book No. 20080207, Inst. No. 0001486. 9 App. 641-48. This is the agreement central to this dispute. In this agreement, SFC modified the priority of its own deeds of trust.

Summarizing these transactions, the recorded documents demonstrate that on July 5, 2006, Gemstone Apache LLC, owned the property. 36 App. 1150 ¶ 5. A decision was made to develop the Property, and the project was named

"Manhattan West." 9 App. 359-98. To effectuate this plan, Gemstone entered into a series of purchase money transactions with SFC on July 5, 2006. *Id.* SFC loaned money to Gemstone in the amount of $38 million, represented by the Mezzanine DOTs. 9 App. 359-78; 380-98; 433-53. At that time, there could be no argument that this $38 million debt stood in first priority position. When work commenced on the project in April 2007, all mechanic's lien claimants stood junior in priority to the Mezzanine DOTs. 36 App. 1150 ¶ 5.

SFC made additional loans to Gemstone in May and October of 2007 in the amounts of $8 million and $10 million, respectively. 9 App. 486-506 and 508-13. Thus, the total amount owed to SFC was increased to $56 million. The $18 million in additional loans is not at issue in this petition, because everyone agrees these two loans are not in a priority position.

On February 7, 2008, it was necessary in order to proceed with the project to infuse additional investment capital. 9 App. 604-25. A series of transactions were entered into to effectuate this goal. Most significantly, SFC loaned the owner an additional $110 million, taking in return the Construction DOT. *Id.* Therefore, absent the Subordination Agreement, which will be discussed more fully *infra*, at that time the relative priorities of the debts relevant to this proceeding were undoubtedly:

1st Priority:	SFC Mezzanine Deeds of Trust
	$38 Million
2nd Priority	Petitioners' Mechanic's liens
3rd Priority	SFC additional loans.
	$18 Million
4th Priority	SFC Construction Deed of Trust
	$110 Million.

On February 7, 2008, SFC in its capacity as holder of the Mezzanine DOTs entered into an agreement with itself in its capacity as the holder of the

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Construction DOT and the holder of the other $18 million lien regarding the priority of the debts owed to it. 9 App. 641-48. Only one person signed the agreement: Brad J. Scott in his capacity as President of SFC. 9 App. 646.

The intent of the agreement was for SFC to determine the order in which it wanted to have its debts repaid. 9 App. 641-48 and 29 App. 1002-04. It was not to change the priorities of any other entity, most importantly, the mechanic's lien claimants. *Id.* SFC merely agreed with itself that the first $38 million paid by the borrower would be paid against SFC's Construction DOT (partial subordination of its Mezzanine Deeds in the amount of $38 million to its Construction DOT). *Id.* SFC also subordinated the $18 million lien to the Construction DOT. As to all other parties, priorities remained the same. *Id.* Therefore, following the Subordination Agreement, the priorities were:

1st Priority:	A portion of the SFC Construction DOT in the place of the Original Mezzanine DOTs $38 Million
2nd Priority	Petitioners' Mechanic's liens (same as before)
3rd Priority	Remainder of SFC Construction DOT $72 Million
4th Priority	SFC Original Mezzanine DOTs $38 Million
5th Priority	SFC junior lien $18 Million

So, Petitioners remain in second place, with exactly the same $38 million prior to them, and the other obligations against the property, in exactly the same amounts as before, are junior to Petitioners.

Essentially, SFC by separate agreement with SFC determined in what order SFC's debts would be satisfied, with no impact on Petitioners or anyone

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else. 9 App. 641-48 and 29 App. 1002-04.[3] This type of agreement is referred to as partial subordination. The interests all remain the same, but the parties are free to contract with each other regarding their relative priorities. Incidentally, the result should be the same whether the parties to the subordination agreement are two different entities, or are the same entity as in this case. In either case, nothing in law or logic supports Petitioners' argument that the parties should not be allowed to freely contract the order of payment as between themselves, without affecting the priorities of non-parties to the agreement, so long as the amounts of the interests retain their relative priority positions.

2. Procedural History

The relevant procedural history consists of competing motions for partial summary judgment addressing the Subordination Agreement and priority of competing liens encumbering the Property.

On June 10, 2010, SFC filed a motion for partial summary judgment requesting the court to apply partial subordination based on the Subordination Agreement. 6 App. 157-71. Ten days later, APCO (the primary petitioner in this matter) filed a motion for summary judgment asking the court to apply complete subordination based on its reading of the Subordination Agreement. 7 App. 172-285. Both motions relied on a construction of the agreement itself. *See* 6 App. 157-71 and 7 App. 172-285. Neither relied on any equitable argument for restoring or changing the order of priority. *Id.*

Specifically, Petitioners argued in district court–and still maintain in this petition–that the Subordination Agreement is an agreement for complete subordination based on the language of the agreement that "the indebtedness secured thereby shall in all respects be deemed prior to and superior to the

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[3]It is true that SFC has underlying investors and that the change in priorities affects those investors. Those investors are not party to this action and that fact has no impact on the issues before this Court.

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Mezzanine DOTs," which Petitioners maintain is consistent only with complete subordination to all other interests. 7 App. 177-83. SFC, on the other hand, maintains that a reading of the entirety of the document, not just a chosen phrase, leads to the inescapable conclusion that the agreement was intended to affect only the priorities of the parties to the agreement, or in other words, to effect a partial subordination. *See, e.g.*, 9 App. 642, paragraph 2 entitled "Subordination," which sets forth that the Mezzanine DOTs are subordinated only to the "Senior Debt Notes," and speaks only about priorities available to SFC.

On July 1, 2010, APCO filed opposition to SFC's motion for partial summary judgment and reiterated its arguments contained in its motion for summary judgment requesting complete subordination. 9 App. 293-674. On July 21, 2010, SFC filed its reply to APCO's motion for summary judgment, requesting partial subordination based on the Subordination Agreement. 11 App. 685-698. Likewise, on July 21, 2010, APCO filed its reply in support of its motion for summary judgment. 12 App. 699-713. On July 27, 2010, Department 25, Judge Delaney, heard the competing motions for summary judgment. 13 App. 714-734. The following chart sets forth the contractual subordination theories that were before Department 25 in the competing motions for summary judgment:

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Original Position Before the Subordination Agreement	Position with Complete Subordination (Petitioners' Position)	Position with Contractual Partial Subordination (SFC's Position)
1st Priority: Mezzanine DOTs in the amount of $38 million	1st Priority: Petitioners	1st Priority: Construction DOT in the amount of $38 million
2nd Priority: Petitioners	2nd Priority: Construction DOT	2nd Priority: Petitioners
3rd Priority: SFC's other liens	3rd Priority: Mezzanine DOTs and SFC's other liens	3rd Priority: Remainder of Construction DOT in the amount of $78 million
4th Priority: Construction DOT		4th Priority: Mezzanine DOTs and SFC's other liens

No equitable theory for subordination or subrogation was before the district court. *See* 6 App. 157-71 and 7 App. 172-285. Rather, the issue was contractual partial subordination or complete subordination. *See* 13 App. 714-734 and 25 App. 0944, lines 10-22. At the conclusion of the hearing, Judge Delaney took the matter under advisement and stated that "a decision will not be delayed in coming out." *See* 13 App. 726, lines 24-25. Four months later, instead of issuing a decision, Judge Delaney orally stated that she would rule in favor of the mechanic's lien claimants. 16 App. 782. She again indicated that she would issue a written decision soon to clarify the ruling. *Id.*

Judge Delaney did not issue a written order supporting her oral ruling and the case was administratively transferred to Department 29, Judge Scann (as a part of the internal changing of the assignments of the district judges). Over a year following the hearing, APCO filed a motion for a written order, submitting its owns findings of fact and conclusions of law. 16 App. 775-810. On November 15, 2011, Judge Delaney signed the findings of fact and conclusions

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of law. They were entered on November 22, 2011. 18 App. 838-851. Judge Delaney signed the document sent to her by APCO without change (except a minor inter-lineation of "EDCR"), even though she had never articulated the basis for her prior determination. *Id.* Judge Delaney never stated her rationale, which she had promised to provide. 18 App. 838-851. Thus, the decision Petitioners so passionately defend in this petition is nothing more than the order APCO drafted and presented after Judge Delaney was no longer assigned to the case, more than a year later.

On December 12, 2011, SFC filed a motion to reconsider or for rehearing under NRCP Rule 54(b) and EDCR 2.24 because findings of fact were included in the decision that were not supported by evidence and were not part of SFC's or APCO's arguments. *See* 19 App. 852-877. Specifically, APCO's findings of fact and conclusions of law included a finding stating SFC was asking for equitable remedies. 18 App 848.

At the first oral argument, Judge Delaney had acknowledged that subrogation was not at issue in the matter and that the parties arguments focused on subordination under the Subordination Agreement. 13 App. 728, p. 42, lines 1-7.[4] On January 25, 2012, the motion for rehearing came before the district court. 25 App. 930-969. At the hearing, Judge Scann correctly noted that

[4]Subrogation is the doctrine that allows a party who has paid a debt to recover the payment from a party whose responsibility for the debt is greater. It has nothing to do with subordination of priorities between creditors. *See AT & T Technologies, Inc. v. Reid*,109 Nev. 592, 596, 855 P.2d 533, 535 (1993) ("Generally, subrogation is an equitable doctrine created to accomplish what is just and fair as between the parties. It arises when one party has been compelled to satisfy an obligation that is ultimately determined to be the obligation of another.") (citations and internal punctuation omitted). That equitable doctrine is not related to the subordination issues present in this case.

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equitable subrogation was not argued before Judge Delaney.[5] 25 App. 0944, lines 10-22. The district court acknowledged that the matter included multiple parties and that many matters in the action were still pending. 25 App. 961, lines 4-9. No NRCP Rule 54(b) certification had been issued by the district court. Judge Scann took the matter under advisement. 25 App. 968.

On February 1, 2012, the district court issued a minute order granting rehearing. 26 App. 970. It ordered the moving parties to combine and submit one package to the district court of all briefs that had been filed on behalf of the moving parties, plus a summary of the joinders. 26 App. 970. The district court then scheduled a hearing to consider the merits of the cross-motions for summary judgment for March 14, 2012. *Id.*

After the March 14, 2012 hearing, the district court took the matter under advisement. 34 App. 1130. On April 4, 2012, after having given the matter months of consideration, Judge Scann read her findings and order applying contractual partial subordination into the record. 35 App. 1131-1142. Thereafter, on May 7, 2012, the district court entered its "Decision, Order and Judgment," granting SFC's motion for summary judgment as to priority of liens. Exhibit C to the Petition and 36 App. 1148-55. The Decision is based on a statement of undisputed fact and Judge Scann's conclusions of law. *Id.*

III. WRIT PETITION STANDARD OF REVIEW

A writ of mandamus is available to compel the performance of an act the law requires as a duty resulting from an office, trust, or station or to control an arbitrary or capricious exercise of discretion. *International Game Technology, Inc. v. Second*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008). Alternatively, a writ of prohibition is available to arrest the proceedings of a court when the

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[5]Or subrogation of any kind, for that matter. The issue was subordination, not subrogation.

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proceedings exceed the jurisdiction of the court. NRS 34.320; *State of Nevada v. District Court*, 108 Nev. 1030, 1033, 842 P.2d 733, 735 (1992). Both the writ of mandamus and the writ of prohibition are only available if there is no plain, speedy, and adequate remedy in the ordinary course of the law. NRS 34.170; NRS 34.330. The issuance of an extraordinary writ is discretionary with this Court. *See State ex rel. Dep't Transp. v. Thompson*, 99 Nev. 358, 662 P.2d 1338 (1983).

Although this Court generally does not consider petitions challenging orders granting partial summary judgment, this Court has indicated its willingness on rare occasion to entertain such petitions when they present only legal issues, when an appeal following final judgment is not an adequate remedy, when an important issue of law needs clarification and when considerations of sound judicial economy and administration militate in favor of granting the petition. *International Game Technology, Inc. v. Second*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008).

By ordering an answer, this Court has indicated at least preliminarily that this case may be appropriate for writ review. SFC agrees with petitioners that determination of the priorities in this case at this stage will serve the interest of sound judicial economy and administration. SFC believes, however, that this Court should not revisit the district court's factual determinations or the contract construction issues necessarily dependent on material issues of fact. Although this Court reviews a district court's legal determinations *de novo*, *Clark County v. Sun State Properties*, 119 Nev. 329, 334, 72 P.3d 954, 957 (2003), this Court reviews a district court's factual determinations deferentially. *Ogawa v. Ogawa*, 125 Nev. 660, 668, 221 P.3d 699, 704 (2009) (stating that a "district court's factual findings . . . are given deference and will be upheld if not clearly erroneous"); *see also, Picardi v. Eighth Judicial Dist. Court*, 127 Nev. ___, 251 P.3d 723, 725 (2011) ("Questions of law are reviewed *de novo*, but deference is

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given to a district court's factual findings so long as they are supported by substantial evidence.") (citing *D.R. Horton, Inc. v. Green*, 120 Nev. 549, 553, 96 P.3d 1159, 1162 (2004)).

In this case, it cannot be argued that the district court had a mandatory duty to deny SFC's motion for summary judgment, or that the district court lacked jurisdiction over the motion. Therefore, unless this Court can conclude as a matter of law that the district court's decision was in error or that the district court abused its discretion in granting reconsideration, it should decline to grant this petition.

In considering a writ petition, this court gives deference to a district court's factual determinations; but reviews questions of law *de novo*. *Gonski v. Second Judicial Dist. Court of State ex rel. Washoe* 126 Nev. ___, 245 P.3d 1164, 1168 (2010). A district court's order granting summary judgment is reviewed *de novo*. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005).

IV. DISCUSSION

Petitioners' arguments may be broken into four categories. First, Petitioners argue that the Subordination Agreement creates complete subordination based on principles of contract construction. Second, Petitioners argue that as a matter of public policy, contractual partial subordination should not exist in Nevada. In other words, Petitioners believe that parties should be prohibited from freely contracting for partial subordination. Petitioners also collaterally attack application of contractual partial subordination based on an incorrect application of NRS 108.225. The central issue in this matter is the proper application of contractual partial subordination, not elimination of the right of contract. Third, Petitioners argue that the district court did not have jurisdiction to enter summary judgment, notwithstanding no final order was entered. Finally, Petitioners attempt to use *In re Fontainebleau Las Vegas*

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Holdings, LLC 128 Nev. ___, 289 P.3d 1199, (Adv. Op. 53; October 25, 2012), to preclude contractual partial subordination.

1. Partial Subordination is Consistent With Nevada Law.

A. The Subordination Agreement Creates Partial Subordination.

The first question this Court must address is, as a matter of contract construction, does the Subordination Agreement create complete subordination or partial subordination. This, of course, turns on the language of the contract and the intent of the parties to the contract.

Petitioners argue at length that the agreement at issue was intended to effect complete subordination. They support this claim with specious arguments that beg the question. For example, they argue that because SFC knew of the mechanic's liens, it must have intended to be subordinate to them. The opposite argument stands on an equal rhetorical footing: Because SFC knew of the mechanic's lien, it crafted its agreement to avoid subordination to the mechanic's liens.

The district court found as a fact that the parties to the Subordination Agreement intended to create partial subordination and that the contract, when read as a whole, creates partial subordination. 36 App. 1152. This finding is entitled to deference. Further, this was the intent of the parties to the contract, as expressed in their arguments in the district court. SFC did not intend to subordinate its first priority position, and the language of the contract supports SFC's argument that all it did was allow the Construction DOT to step into its shoes with respect to the first position, but only to the extent of the priority debt.

The preeminent rule of contract construction is to ascertain the intention of the contracting parties. *Barringer v. Gunderson*, 81 Nev. 288, 302, 402 P.2d 470, 477 (1965). " 'Furthermore the construction placed upon a contract by the parties thereto is entitled to weight in determining the proper interpretation of the

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instrument.' " *Casino Operations, Inc. v. Graham*, 86 Nev. 764, 769, 476 P.2d 953, 956 (1970) (quoting *Holland v. Crummer Corp.*, 78 Nev. 1, 368 P.2d 63 (1962)); see also, *Davis v. Beling*, 128 Nev. ___, 278 P.3d 501, 515 (Adv. Op. No. 28; June 14, 2012) (the objective of interpreting a contract is to discern the intent of the contracting parties). "Traditional rules of contract interpretation are employed to accomplish that result." *Id.* (quoting *Cline v. Rocky Mountain, Inc.*, 998 P.2d 946, 949 (Wyo. 2000)). A basic rule of contract interpretation is that "[e]very word must be given effect if at all possible." *Musser v. Bank of America*, 114 Nev. 945, 949, 964 P.2d 51, 54 (1998) (quoting *Royal Indem. Co. v. Special Serv.*, 82 Nev. 148, 150, 413 P.2d 500, 502 (1966)). "A court should not interpret a contract so as to make meaningless its provisions." *Phillips v. Mercer*, 94 Nev. 279, 282, 579 P.2d 174, 176 (1978).

For a third party to obtain a benefit from a contract, the court looks to see whether the contracting parties demonstrated a clear intent to benefit the third party and whether the third party's reliance was foreseeable. *Lipshi v. Tracy Investment Co.*, 93 Nev. 370, 380 566 P.2d 819, 825 (1977).

Contrary to Petitioner's statement of facts, SFC's transactions were not refinances of prior loans. Rather, the district court found that none of the deeds of trust were refinance transactions and new money was injected into the project in each transaction. 36 App. 1151-1152 ¶¶ 6, 7,10 and 11. Further, none of the deeds of trust was released or reconveyed. 34 App. 1134-1135, lines 25-1. In all of the amendments to the deeds of trust, the effectiveness of the original deeds of trusts was affirmed. 35 App. 1135, lines 1-2. Each of the deeds of trust remain unpaid and recorded against the Property.

The controversy in this case concerns the effect of SFC's Subordination Agreement. Petitioners are not party to the Subordination Agreement but nevertheless claim they are entitled to a benefit from the Subordination Agreement. The Subordination Agreement modifies and references the

Construction DOT in reference to the Mezzanine DOTs, but does not subordinate the Mezzanine DOTs to any other interest in the Property. 36 App. 1152 ¶ 17. Clause 10 of the Subordination Agreement provides, "[t]his Agreement shall not be construed as affecting the priority of any other liens or encumbrances in favor of SFC on the Trust Property." 9 App. 0645 ¶ 10.[6] Clause 11 states that the Subordination Agreement shall inure to the benefit of SFC, its participants, and their successors and assigns. 9 App. 0645 ¶ 11. The Subordination Agreement does not extend any benefit to third parties. 9 App. 614-649. The district court correctly found that "the clear intent of the Subordination Agreement when read in its entirety reveals no intent to do anything other than ensure the [Construction DOT] would be paid prior to the [Mezzanine DOTs]." 36 App. 1153 ¶ 24.

Clauses 2, 3, and 4 of the Subordination Agreement specifically address how payments from the borrower will be provided toward the Construction DOT rather than toward the Mezzanine DOTs. 9 App. 0642-643 ¶¶ 2, 3, and 4. As such, the district court found: "No language in the Subordination Agreement evidences a clear intent from the parties to the Subordination Agreement to benefit any non-party to the Subordination Agreement." *See* 36 App. 1152, ¶ 17.

Petitioners take exception to the district court's analysis because they want to rely on a single phrase from the Subordination Agreement, rather than the entire document. Specifically, Petitioners rely on one sentence in the Subordination Agreement that states the Construction DOT shall in all respects be deemed prior to and superior to the Mezzanine DOTs as though the

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[6]While this language, read in isolation, could arguably be construed to mean that it applies only to liens and encumbrances belonging to SFC, when this contract is read in its entirety, consistent with the district court's analysis, it is clear the Subordination Agreement was not intended to modify any other liens, including Petitioners' liens. The intent was to subordinate all of SFC's other interests to SFC's interest evidenced by the Construction DOT, not to subordinate those interests to the interests of non-parties to the agreement.

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Mezzanine DOTs had been recorded subsequently to the recordation of the Construction DOT. See 7 App. 0210, First ¶ 1. In response to Petitioners' argument, the district court found:

> [T]he clear language of the Subordination Agreement when read in its entirety demonstrates that . . . the Subordination Agreement modifies and references the [Senior DOT] in reference to the [Mezzanine DOTs] and does not subordinate the [Mezzanine DOTs] to any other interest in the [Property].

36 App. 1152 ¶ 17. This analysis and conclusion is supported by the plain language of the Subordination Agreement. Thus, the contract was intended to create partial subordination between the parties to the contract only.

B. Partial Contractual Subordination is Consistent With Nevada's Policy of Allowing Freedom of Contract.

Nevada's public policy allows parties to enjoy freedom of contracting to the greatest extent possible. *Easton Bus. Opp. v. Town Executive Suites*, 126 Nev. ___, 230 P.3d 827, 834 (2010) (citing 5 *Williston on Contracts, supra,* § 12:3). Requiring that all subordination be complete subordination, regardless of the intent of the parties, derogates a first priority lien holder's right to convey its priority position by contract. *See Easton*, 230 P.3d at 834 (finding that Nevada public policy requires the greatest freedom of contracting). Whereas complete subordination restricts a first priority lienholder's right to contract its position, partial subordination permits any party to bargain for the placement of the first priority lien position.

Contractual partial subordination advances Nevada's public policy of promoting the greatest freedom of contracting. Complete subordination restricts a lien holder's right to contract its priority position with junior lienholders. Because the first lienholder is entitled to priority over junior lienholders, it should be permitted to contract its priority without being beholden to junior lienholders. Any person, whether or not a junior lienholder, should be permitted to contract for the first priority lien position without providing a windfall to a

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non-party to the agreement.

Public policy strongly favors encouraging lenders to fund construction projects in the State of Nevada. Allowing lenders to freely enter into contracts to secure their priority and/or transfer their interests creates stability and predictability for the lenders. Common sense dictates a lender, especially one funding millions of dollars, will be unlikely to lend money unless it believes it will either be able to be paid back or obtain a portion of the amounts lent through its security. Such lending, specifically in the context of construction loans, benefits not only the borrowers, but also third parties such as the contractors and material suppliers.

Simply put, without sufficient security for their loans, banks will not lend, or at the very least will lend at higher interest rates, which will increase the risk of loss for a failure of lien priority. The lack of funding, or higher interest rates (which would simply deter borrowing), means fewer loans, fewer construction projects, and fewer jobs (especially for the contractors and material suppliers). An insecure lending environment benefits no one.

C. Comparison of Complete Subordination to Partial Contractual Subordination.

The doctrine of complete subordination would require that if a first lienholder subordinates its interest to a third lienholder, the first lienholder's interest would also be subordinate to a second lienholder even though the second lienholder is not in privity of contract with either the first or third lienholders. *See AmSouth Bank v. J&D Financing Corp.*, 679 So. 2d 695 (Ala.1996); *Old Stone Mortgage and Realty Trust v. New Georgia Plumbing, Inc.* 231 S.E.2d 785 (Ga. Ct. App. 1977); *Blickenstaff v. Clegg*, 97 P.3d 439 (Idaho 2004). Complete subordination can provide a windfall to a second lienholder if it is not a party to the first and third lienholders agreement and the second lienholder is not an intended third party beneficiary.

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Partial subordination, on the other hand, alters priority of liens between first and third lienholders by agreement and has no effect on a second priority lien holder. *Bratcher v. Buckner*, 90 Cal.App.4th 1177 (Ct. App. 4th Civ. 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); *In the Matter of Cliff's Ridge Skiing Corp.* 12 B.R. 753 (Bankr. W.D. Mich. 1991); *Mid-Ohio Chemical Co., Inc. v. Petry*, 140 F.Supp.2d 828 (S.D. Ohio 2000); *Grise v. White*, 247 N.E.2d. 385 (Mass. 1969). The second lienholder is not disadvantaged or advantaged by the first priority and third priority lienholders' agreement because the third priority lienholder only obtains the position of the first position lienholder to the amount of the first priority lien. *Id.* Thus, the total sum of liens prior to the second lienholder does not change with partial subordination.

Here the district court properly applied contractual partial subordination and found the following priority of liens:

First Priority:	Construction DOT in the amount of $38 million
Second Priority:	Mechanic lien claimants
Third Priority:	Remainder of the Construction DOT
Fourth Priority:	Mezzanine DOTs and SFC liens.

See 35 App. 1135, lines 18-21.

Contractual partial subordination does not change Petitioners priority or prejudice them. The following is the priority before contractual partial subordination and after contractual subordination:

Position Before Subordination Agreement	**Position with Contractual Partial Subordination**
1st Priority: Mezzanine DOTs in the amount of $38 million	1st Priority: Construction DOT in the amount of $38 million

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2nd Priority: Petitioners	2nd Priority: Petitioners
3rd Priority: Construction DOT	3rd Priority: Remainder of Construction DOT
	4th Priority: Mezzanine DOTs and SFC liens

Petitioners' interest is unaffected.

D. Partial Subordination Serves the Public Policy of Nevada.

Petitioners' primary argument is that partial contractual subordination is not available in Nevada as a matter of law. According to Petitioners, any subordination must be complete, which Petitioners assert, but cannot establish, is a majority opinion among the states.[7] The question, then, as a matter of public policy, is whether contractual partial subordination is available in Nevada. We submit that the answer to this question is yes. Partial subordination is consistent with expressed Nevada public policy.

By agreement, SFC, the holder of both the Mezzanine Deeds and the Construction DOT, simply changed the priority as to which loan was entitled to payment of the first $38 million. The $38 million started in first place, and ended in first place. At no time did it move to third place, nor was any party's preference changed. Petitioners began in second place, and that is exactly where they remain. The interest that is superior to Petitioners' is the same; it is simply held pursuant to a different loan. Had SFC simply sold its priority interest to an uninterested third party for value, no one would argue that the third party did not

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[7]Petitioners assert that complete subordination is a majority position among states, but cite no authority for that proposition. Petitioners cannot establish that complete subordination is a majority rule based on any authority cited so far in these proceedings. Further, our research shows that a majority of states have arrived at the opposite conclusion, allowing for contractual partial subordination when a contract provides for such. We see no reason for disallowing parties to contract their priorities, so long as they do not impact the priorities of other parties.

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step into the priority position SFC held, in front of petitioners. That is in essence all that has happened here.

SFC agreed, for valuable consideration, to procure investment capital by allowing the new investor (who in this case just happens to also be SFC), who would otherwise be in third position, to step into first position, but only to the extent of the amount SFC already had in first position, an amount SFC had the right to control. As between SFC's Construction loan and SFC's Mezzanine loan, SFC "subordinated" its interest, but as between SFC and all other lien holders or claimants, SFC maintained its first priority position, essentially selling it by contract to the provider of the construction loan. Petitioners' argument that any subordination must be complete subordination would interfere with the rights of first priority lienholders to protect their interests in a project (and by so doing protect the interests of junior lienholders) by bringing in additional investment by selling their first priority position to a new money lender. If the first priority lender does not sell more than it has, how can it be argued that a second lienholder is prejudiced?

One method of selling the first priority interest is a partial subordination agreement between the first and third party, allowing the third party to step into the shoes of the first to the degree agreed, not to exceed the full amount of the obligation already in first place. This type of arrangement is consistent with this state's consistent public policy favoring the right of contract. It does not interfere with this state's laws regarding priority of interests based on recordation. Most particularly, Petitioners outrage and claim of foul is feigned; Petitioners have suffered no loss because their interest before and after the subordination is the same. They are in second position to the original $38 million loan.

Incidentally, the analysis would be the same regardless of whether the first lender and the subsequent lender were the same, as in this case, or were unrelated

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parties. Nothing should preclude the first priority lender from transferring that priority by contract to the full extent of the priority, or to any extent the first priority lender chooses, because junior lienors' positions are not changed simply because the payee of the first interest is changed. It cannot be over stressed that in this case, the first interests never became subordinate to any other interest. The $38 million first priority interest was always superior in time and right to Petitioners' lien claims, and it remains so.

After applying partial contractual subordination, the court in *In re Kobak*, 280 B.R. 164, 170 (Bkrtcy., N.D.Ohio, 2002) explained that the doctrine "promotes positive economic benefits and fosters commercial transactions and economic efficiency" because the parties to a subordination agreement hold separate and distinct loans that could be sold or transferred independently. Contractual partial subordination does not restrict the transferability of priority. The court further explained that the complete subordination argument amounts to "legal gotcha" which does not enhance the efficiency of anything and discourages lending to distressed parties. *Id.* at 170.

Moreover, the court in *Duraflex Sales & Service Corp. v. W.H.E. Mechanical Contractors*, 110 F.3d 927 (2nd Cir. 1997), explained that partial contractual subordination agreements "accelerate the flow of cash to troubled projects–financial relief that promotes the development of assets that secure payments to all lienholders." *Duraflex*, 110 F.3d at 936. The lien claimants are protected by contractual partial subordination because they remain in the same priority position they bargained for and partial subordination permits new money to come into projects without prejudice to the lien holders. The district court acknowledged this benefit when it found that "[Petitioners] received a benefit from the construction funding including funds advanced and secured by the Construction DOT." 36 App. 1153 ¶ 28. Without the ability to bring new money into a project by way of contractual partial subordination, the lien claimants

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suffer and projects are less likely to be completed.

In another case directly on point, *In Re Price Waterhouse Ltd.*, 46 P.3d 408 (Ariz. 2002), the Arizona Supreme Court adopted contractual partial subordination and rejected complete subordination. The property in *In Re Price Waterhouse Ltd.* was subject to the following liens:

1st Priority: $7.5 million in favor of Canadian Company

2nd Priority: $350,000 in favor of mechanic lien claimant

3rd Priority: $3 million in favor of First Mortgage Bank

Id. at 411. At the time the $3 million loan was provided, Canadian Company and First Mortgage Bank entered into a subordination agreement. The subordination agreement did not involve the mechanic's lien claimant and expressly provided that Canadian Company subordinated its lien to First Mortgage Bank. The mechanic's lien claimant advanced the argument that Canadian Company completely subordinated its entire $7.5 million loan to First Mortgage Bank with the theory of complete subordination. As Petitioners do here, the mechanic's lien claimant argued that in the subordination agreement Canadian Company waived all priority to the third party lien holder without any reservation of first priority status. The mechanic's lien claimant argued, just as Petitioners do here, that the parties to the subordination agreement knew of the mechanic's lien claimant's lien, thereby showing that the parties to the subordination agreement intended complete subordination. *Id.* at 410-411.

Notwithstanding these arguments, the Arizona Supreme Court rejected the complete subordination approach because it affects the rights of others not in privity with the subordination agreement, and the mechanic's lien claimant was not an intended third party beneficiary of the subordination agreement. *Id.* at 412. The Arizona Supreme Court found the following priority as a result of the subordination agreement:

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1st Priority: $3 million in favor of First Mortgage Bank
$4.5 million in favor of Canadian Company
2nd Priority: $350,000 in favor of mechanic lien claimant
3rd Priority: $3 million in favor of Canadian Company

Id. at 411. The contracting of the $3 million priority did not disadvantage or advantage the mechanic's lien claimant because the $3 million priority that Canadian Company contracted to First Mortgage Bank did not change the priority of the mechanic's lien claimant. The mechanic lien claimant's lien was subject to the $7.5 million loan both prior to and after the subordination agreement.

Petitioner's assert at page 40 of their petition that "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." Then follows a policy argument that new money construction lenders should not be allowed to leap-frog over intervening mechanic's lienors. This statement and this section of argument demonstrates Petitioner's fundamental misunderstanding of this case.

First, petitioners fail to comprehend that the Construction DOT is not a loan from an unrelated third party. It is an additional loan secured by SFC. More importantly, SFC is not attempting to place the new construction money in front of the mechanic's lienors. SFC's initial investment of $38 million is already in front of the mechanic's lienors. What SFC has attempted to do, and what it has accomplished in our view and in the view of the district court, is to allow the Construction DOT to assume the priority SFC already has, as an incentive to lend additional money. The additional money from the Construction DOT remains inferior to the mechanic's lienors, but the amount already superior to the mechanic's lienors remains superior.

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SFC has not disadvantaged the mechanic's lienors by allowing an amount clearly owed to it in first priority to be paid to another in return for consideration in the form of an additional investment in the project and immediate payment of fees. As the sole party entitled to the initial payment, it should not matter to the mechanic's lienors whether SFC takes that payment directly in satisfaction of the prior debt, or directs that payment to a subsequent lender, so long as payment of that amount removes the interest that is prior to the mechanic's lienors. SFC is not attempting to place anyone in front of the mechanic's lienors who is not already there. SFC has merely directed the payment due to it to another, and has placed itself, to the extent of that first place payment, in last place. The mechanic's lienors should not be allowed to leap over that interest that was in place long before construction began into first place based on a narrow dictionary reading of the word subordination that allows only for complete subordination when partial subordination is intended, is consistent with Nevada contract and recording statute policy, and does not prejudice the junior lienors in the recordation chain.

E. Complete Subordination Undermines the Public Policy of Nevada.

Arguments for complete subordination neglect to recognize that contractual partial subordination only permits the third lienholder to bargain for the priority right that already belonged to the first priority lienholder. *See Bratcher v. Buckner*, 90 Cal.App.4th 1177 (Ct. App. 4th Civ. 2001) (finding that complete subordination ignores the fact that the lower priority lienholder is only succeeding to the first priority lienholder's claim to the extent of the amount of that claim).

Petitioners' public policy arguments confuse the analysis by claiming a third position lienholder obtains a benefit from removing the first lienholder, thereby improving its position by lessening the risk to its loan on the property.

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This argument ignores Nevada contract law because it requires priority elevation of an intervening lienholder without the intervening lienholder being an intended beneficiary of the contract. Further, this argument is based on a scenario, not present here, which hypothesizes a third party taking first position in an amount in excess of the amount already in first position. If an agreement intended to switch positions between a first party and third party lender in the amount that is already in first position is construed to require subordination of the first and third position interests, moving a second lienholder into first position, it is the second lienholder, not the third party lender, that would get a windfall from the fortuity of a subordination agreement not intended to benefit it.

Petitioners rely on *Old Stone Mortg. and Realty Trust v. New Georgia Plumbing, Inc.*, 231 S.E.2d 785 (Ga.App. 1976) (Old Stone 1), as a case adopting complete subordination over partial. *Old Stone* 1, however, did not involve a comparison of complete subordination to partial subordination, nor did it even discuss the concept of partial subordination. There, a first lender of a small amount purported to subordinate its entire claim to a third lender of a large amount and to move the entire third lender's lien in front of a mechanic's lienor in second place. *Id.* at 786. With no discussion of partial subordination (as that defense was not raised), the court simply held that when the first lender moved into third place, it did so with respect to both the third and the second lienholders, under circumstances where the second lienholder would have been severely prejudiced if the entirety of the third lender's lien had been put in front. *Id.* at 787.

On certiorari to the Georgia Supreme Court (essentially an appeal from the appeal), the parties argued for the first time that the subordination agreement was enforceable because it was limited, a doctrine not the same as partial subordination, but related thereto. *Old Stone Mortg. & Realty Trust v. New Georgia Plumbing, Inc.*, 236 S.E.2d 592 (Ga. 1977) (Old Stone 2). The Georgia

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Supreme Court rejected the argument because it was not factually supported. The Georgia Supreme Court did not reject the concept of partial subordination or join any alleged majority allowing complete subordination only. Instead, the Georgia Supreme Court construed the agreement and concluded that it intended complete subordination. *Id.* at 594. The Georgia Supreme Court stated that the cases cited to it allowing enforcement of limited subordination were "consistent with our decision in this case," and hinged its decision on the following conclusion:

> Nor is the present subordination agreement couched in language which would permit the interpretation that the senior and junior security deed holders were merely switching positions in the scale of priorities, *i.e.*, that they had executed a subrogation type agreement which would not adversely affect the rights of intervening lienholders.

Id. at 593. Thus, rather than rejecting partial subordination, as Petitioners have argued, the Georgia Supreme Court embraced it. Had the agreement been a subordination agreement of the type that would merely have switched priority positions without adversely affecting the rights of intervening lienholders, the Georgia Supreme Court would have honored it. Such is the agreement in this case.

Blickenstaff v. Clegg, 97 P.3d 439 (Idaho 2004), relying on a misreading of *Old Stone* 2, does reject partial subordination. We suggest that case is poorly reasoned based on pedantic analysis. There, a third loan was fully subordinated resulting in prejudice to a second lienor. The district court rewrote the agreement to subordinate only the portion of the first lien already in first place. The Idaho Supreme Court concluded based on a definition of the word subordinate that it could never elevate a third lien into first position, even partially. We suggest this Court reject any reasoning that allows a windfall to a second lienor when a third party by contract merely steps into the shoes of the party in first place, regardless of whether that third party purchases the first priority, or by subordination

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agreement switches places with the first party, where the second party's interest is not prejudiced.

Petitioners rely on *National Bank of Washington v. Equity Investors*, 518 P.2d 1072 (Wash. 1974). *National Bank of Washington* does not address partial contractual subordination or complete subordination. It addresses the effect of optional future advances under a construction loan, *i.e.*, a situation where additional debt is put in front of the second position lienholder.

The analysis in *National Bank of Washington* is not applicable to contractual partial subordination or complete subordination because it does not address the fact that contractual partial subordination does not place the intervening lienholder in a disadvantaged position. The intervening lienholder has the same position before and after contractual partial subordination, thereby negating the concern that a new lender could come into a project and apply the new loan money as it sees fit.

Noticeably absent in cases adopting complete subordination is meaningful analysis of the benefits of complete subordination. As noted in *Bratchner*, the courts in *Shaddix* and *McConnell,* which adopt complete subordination, provided little rationale for their decisions. *Bratcher*, 90 Cal.App.4th at 1188 (citing *Shaddix*, 128 So. at 224 and *McConnell*, 292 S.W.2d at 638). Likewise, the rationale in *AmSouth Bank v. J&D Financing Corp.*, 679 So. 2d 695 (Ala. 1996), fails to recognize that with contractual partial subordination, the third priority lienholder is only succeeding to the first priority lienholder's claim to the extent of the amount of that claim. *Id.* Common sense also supports contractual partial subordination over complete subordination. With complete subordination the party that receives the benefit is the non-contracting party. Such a result is nonsensical because parties to a subordination agreement should be able to contract without including an intervening lien that is neither advantaged nor disadvantaged by contractual partial subordination.

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F. Complete Subordination Contradicts Nevada's Third-Party Beneficiary Law.

Complete subordination is inconsistent with Nevada's third-party beneficiary law, granting a benefit to a third party even when the contracting parties express no intent to bestow such a benefit.

Petitioners argue that because they are not mentioned in the Subordination Agreement by name, contractual partial subordination cannot be applied. *See* Petition, p. 27. Petitioners' argument misstates Nevada's third-party beneficiary law and also fails to address the district court's third party beneficiary analysis.

For Petitioners to claim a benefit from the Subordination Agreement they must first show that they were intended third-party beneficiaries. *See Lipshie v. Tracy Inv. Co.*, 93 Nev. 370, 379, 566 P.2d 819, 825 (1977) (to obtain third-party beneficiary status, there must clearly appear a promissory intent to benefit the third party in the agreement). Petitioners did not and could not show that they were an intended beneficiary of the Subordination Agreement. There is no language in the Subordination Agreement that specifically addresses Petitioners other than clause 10, which expressly states that the Subordination Agreement does not affect other liens. 9 App. 645 ¶ 10. Clauses 2, 3, and 4 of the Subordination Agreement specifically address how payments from the borrower will be provided toward the Construction DOT rather than toward the Mezzanine DOTs. 9 App. 0642-643 ¶¶ 2, 3, and 4. This is significant because SFC is the only party to the Subordination Agreement as it was the holder of both the Mezzanine DOTs and the Construction DOT. The Subordination Agreement addresses the terms of payment within one entity, not payments or priority to third parties that are not parties to the Subordination Agreement, such as Petitioners. Further, Clause 11 states that the Subordination Agreement shall inure to the benefit of SFC, its participants, and their successors and assigns. 9 App. 0645 ¶ 11. The Subordination Agreement does not extend a benefit to third

parties that are not party to the Subordination Agreement.

The district court correctly concluded that "the clear intent of the Subordination Agreement when read in its entirety reveals no intent to do anything other than ensure the [Construction DOT] would be paid prior to the Mezzanine DOTs." 36 App. 1153 ¶ 24. As such, the district court expressly found, "[n]o language in the Subordination Agreement evidences a clear intent from the parties to the Subordination Agreement to benefit any non-party to the Subordination Agreement." See 36 App. 1152, ¶ 17. This finding of fact, coupled with Petitioners failure to provide any meaningful analysis of how they are an intended third-party beneficiary, reveals that, as a matter of law, they are not third-party beneficiaries of the Subordination Agreement.

A dictionary analysis of the word "subordination" does not bring Petitioners into privity of contract with SFC. *See In Re Price Waterhouse Ltd.*,46 P.3d 408, 412 (Ariz. 2002) (rejecting mechanic's lien claimants' argument for complete subordination because it affects the rights of others not in privity of contract).

G. Partial Contractual Subordination is Not Inconsistent With NRS 108.225.

Petitioners' analysis of NRS 108.225 misstates facts. NRS 108.225 provides contractors the right to recover for work performed and materials provided on a construction project before any lienholder whose lien attaches after construction. NRS 108.225 does not preclude a first priority and third priority lienholder from contracting their respective priorities. Much of the Petition focuses on the argument that Nevada law supports and protects mechanic's liens from interests that arise thereafter. SFC agrees. But the argument is misplaced, because in this case, the interests from which the mechanic's lienors want to be protected arose before, not after the priority date of their interest.

Central to the district court's analysis is the fact that in July of 2006, prior

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to the commencement of construction for any work of improvement on the Property, the Mezzanine DOTs secured obligations totaling $38,000,000 and they were never released or reconveyed. 36 App. 1151, ¶¶ 13-14. Petitioners commenced work with knowledge that their lien was junior to the $38 million Mezzanine DOTs. Petitioners' NRS 108.225 priority is unaffected by the Subordination Agreement because the Mezzanine DOTs are still attached to the Property senior to Petitioner's lien.

H. There is No Evidence SFC Intended to Subordinate Its Interests to Petitioners.

Petitioners have set forth a number of red herring arguments arguing that SFC intended to subordinate its own interests to the Petitioners'. These arguments lack merit.

Petitoners' suggest that because SFC obtained a policy of title insurance, SFC consented to losing the priority for which it had bargained. Petition pages 45-47. Petitioners' focus on this insurance policy is tantamount to suggesting that because a person has homeowners' insurance, they consent to having their house burned down. Simply because a party elects to protect itself from the risk of harm in the future does not mean it consents to that harm.

The purchase of an insurance policy demonstrates nothing other than prudence. *Landmark Bank v. Ciaravino*, 752 S.W.2d 923, 932 (E.D. Mo. 1988) (holding that evidence of title insurance was irrelevant and if anything "the existence of title insurance was further evidence of prudence"). The limited value of evidence of ownership of an insurance policy, as well as the public policy of encouraging parties to insure themselves, is reflected in such statutes as NRS 48.135 (excluding from evidence information of insurance to demonstrate liability). The same principal should be applied in this instance.

Further, even if this Court were to review the insurance policy as provided by Petitioners, this policy supports SFC's claims; namely, it shows that it was

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SFC's intention that the June 2006 loans were to be in first position. The fact that an insurance company was willing to provide a policy to protect that position would have given SFC further assurances that the insurance company, after its research, likewise believed SFC to be in first position. Common sense would dictate that an insurance company generally would not issue a policy if it believed it was likely to need to pay out on it. Therefore, the lien claimants' arguments regarding the subject title insurance policy should be disregarded by this Court.

Petitioners have argued that because one of SFC's investors was paid a 5% fee as incentive to enter into the Subordination Agreement and the construction loan, this Court should conclude that SFC was not concerned about its priority loans and instead was willing to accept as security the personal guarantee of the investor. This argument is circular, and proves nothing. The fact that a party contracted for a partial first priority position and also required a personal guarantor to protect its interest is not evidence that party also intended to place others in priority to it.

All of the investments in this case have been through SFC. Nevertheless, there are investors whose interests are represented herein by SFC. Although it is not necessary to the decision of this case, the following underlying relationships have been referred to in the Petition, and require some clarification.

After the Property was acquired and some initial development had taken place, it was time to begin construction of the Manhattan West project. Club Vista Financial Services, LLC, was SFC's sole participant (investor) on the initial three loans, and had already made $38 million worth of investment loans by this point. It was decided that the Manhattan West Senior Loan (the Construction Loan) would be participated out to other lenders in addition to Club Vista Financial Services.

The structure of the Construction Loan, as negotiated by the participating

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banks and Mr. Tharaldson, (who wholly owns Club Vista Financial Services), required Tharaldson to guaranty the Construction loan to the full amount of the $110 million. Tharaldson, not being a principal in the developer of the project, agreed to do this on the condition that he receive a fee for his guaranty of 5% of the principal balance, due annually.[8] Because the participating banks were funding the Construction Loan, and Club Vista's $38 million in Mezzanine Loans were in first priority, the participating banks and Tharaldson agreed that the banks could have Club Vista's first priority position (which was owned by Tharaldson).

The intention of the subordination was expressly that the Construction Loan participating banks would have the first priority position against the Manhattan West property that Club Vista's Mezzanine Loans enjoyed at that time; there was no discussion of any potential mechanic's lien against the property in the documents.

The parties to the subordination agreement intended that the Construction Loan Agreement would be in first priority position on the Manhattan West property. This makes sense, considering that no potential mechanic's lien claimants were included in any of the negotiations regarding the Tharaldson guaranty, the Guarantor Fee, or the Subordination Agreement.

Petitioners take the position that these events conclusively demonstrate an intention by Tharaldson and the participating banks to subordinate the Construction Loan to any potential lien claimants on the Manhattan West project. As the above-cited documents conclusively demonstrate, this was simply not the case. Setting aside for the moment the utter lack of any documents supporting Petitioners' spin on the facts, it also runs counter to the evidence as well as

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[8]These facts are not reflected in the Appendix, but are referred to by Petitioners without citation, and are generally not disputed.

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common sense. It would be strange indeed for the participating banks to ask for a subordination for the benefit of unnamed and unknown lien claimants rather than their own benefit. Petitioners' argument presumes that SFC intended to act against its own interest. Tharaldson himself, who was the principal participant of Club Vista Financial Services, would also stand to lose money on that deal. It therefore makes far more sense to interpret the documents for what they are, rather than adopt the wild speculation contained in the petition.

2. The District Court Did Not Err or Abuse Its Discretion in Revisiting the Issue of Priority and Granting Reconsideration, Thereby Correcting a Clearly Erroneous Application of the Law.

Petitioners complain that Judge Scann should not have revisited the decision of Judge Delaney. In their section heading, in a transparent attempt to bring this argument within the purview of a writ standard, Petitioners go so far as to assert that Judge Scann "exceeded her jurisdiction" in so doing. Wisely, in the text of the argument, Petitioners do not argue that Judge Scann lacked authority (or jurisdiction) to revisit a non-final pretrial determination properly pending before her, as such an argument would be specious. Instead, they argue that Judge Scann abused her discretion in so doing, and that NRCP 54(b) "does not provide a separate basis for reconsidering prior written orders." The first argument is wrong as a matter of fact; the second argument is nonsense.

NRCP 54(b) provides:

> **(b) Judgment Involving Multiple Parties.** When multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the rights and liabilities of all the parties.

NRCP 54(b) is not "a separate basis for reconsidering prior written

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orders;" it is primary legal authority authorizing reconsideration at any time before a decision, written or otherwise, becomes final either by certification or because a final judgment has been entered in the case. *See Lee v. GNLV Corp.*, 116 Nev. 424, 996 P.2d 416 (2000) (defining final judgment). One cannot reconcile the language of the Rule–"the order or other form of decision is subject to revision at any time"–with Petitioners' argument that the Rule does not authorize reconsideration in appropriate cases. The issue before this Court is whether Judge Scann was correct in granting rehearing, not whether she had authority so to do.

In this case, there is no dispute that no final judgment has been entered in the district court, and Judge Delaney's prior order regarding priorities was never certified as final pursuant to NRCP Rule 54(b). This Court has confirmed that district courts have authority to rehear motions under NRCP 54(b) in cases involving multiple parties when there is no NRCP 54(b) certification. *Bower v. Harrah's Laughlin, Inc.* 125 Nev. 470, 479, 215 P. 3d 709, 716 (2009) (citing *Mallin v. Farmers Insurance Exchange*, 106 Nev. 606, 609, 797 P. 2d 278, 980 (1990)).[9] Petitioners NRCP 54(b) argument should be rejected.

The correct issue for this Court's consideration is what the standard for granting reconsideration is, and whether the district court erred or abused its discretion in applying that standard. It must be acknowledged that standards regarding when reconsideration should be granted are restraints on the bringing of such motions by parties and guidelines for the exercise of discretion of courts. They are not limitations on the court's inherent jurisdiction or authority recognized by NRCP 54(b) to grant reconsideration in appropriate cases. In *L & T Corp. v. City of Henderson*, 98 Nev. 501, 504, 654 P.2d 1015, 1017 (1982),

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[9]Interestingly, in *Bower*, this Court did not set any rigid standard for the granting of rehearing, instead noting generally the district court's authority so to do when warranted, as codified in NRCP 54(b).

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this Court stated: "First of all, '[a]dministrative agencies have an inherent authority to reconsider their own decision, since the power to decide in the first instance carries with it the power to reconsider.'") (quoting *Trujillo v. General Electric Co.*, 621 F.2d 1084, 1086 (10th Cir.1980)). The same is certainly true of this Court, and of the district court; both are possessed of inherent authority to reconsider their own decisions.

While the standards for rehearing and reconsideration are designed to discourage applications, they nevertheless must be construed broadly enough to allow the district court sufficient discretion to correct errors and insure that cases are properly handled in the first instance. The rehearing standards are intended to provide guidelines to assist in the exercise of discretion, not to preclude a district court from granting relief where warranted. For example, pursuant to NRAP 40(c) (this Court's rule on rehearing), a party seeking rehearing from this Court cannot reargue matters presented in the briefs and oral arguments, and no point may be raised for the first time on rehearing. Arguably, nothing new and nothing old leaves nothing that can be brought on rehearing, but this does not prevent this Court from granting rehearing on occasion when circumstances so warrant. The rule sets standards for review, not limitations on this Court's authority. Similarly, cases construing NRCP 54(b) and EDCR 2.24 set standards for review, not limits on authority.

Relying solely on *Moore v. City of Las Vegas*, 92 Nev. 402, 405, 551 P.2d 244 (1976), Petitioners seem to be of the opinion that the only time rehearing or reconsideration may be granted is upon a showing of "the discovery of new evidence or an intervening development or taint in the controlling law." *Moore* should not be read so narrowly.

In *Moore*, after a district judge lost his re-election bid, the subsequently appointed judge reconsidered and granted a motion for summary judgment that had twice previously been denied. After recognizing that the new judge had

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discretion to grant the motion, this Court concluded that the new judge had abused that discretion because no new factual or legal argument had been presented, and the circumstances were unchanged. In light of Nevada's narrow stance on motions for summary judgment in the seventies, where motions granting summary judgment were rarely upheld and the standard was the slightest doubt, it is not surprising that this Court considered a motion granting summary judgment shortly before trial an abuse of discretion when that same motion had twice previously been denied and the circumstances were unchanged. In reversing, this Court wisely stated: "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. This is not such a case." *Id.* at 404. Unlike *Moore*, we believe this case to be one of those cases that warranted reconsideration, and so did Judge Scann.

The standard for reconsideration in Nevada is not nearly so narrow as a strict reading of *Moore* might suggest. This Court has held that when a district court's prior ruling is based on a clearly erroneous application of the law, another district court may revisit that ruling. *See Masonry & Tile Contractors v. Jolley, Urga, Wirth Ass'n,* 113 Nev. 737, 741, 941 P.2d 486, 489 (1997). In *Masonry & Tile Contractors*, the parties filed cross-motions for summary judgment in front of the initial trial judge. 113 Nev. at 739, 941 P.2d at 488. Shortly after issuing a decision, the initial judge removed himself from the case. 113 Nev. at 739-40, 941 P.2d at 488. Several months later, the defendants filed a motion for reconsideration before the judge then assigned, which the judge eventually denied. 113 Nev. at 740, 941 P.2d at 488. When the second judge passed away, another judge was assigned to the case. *Id.* The defendants then filed a third motion for summary judgment raising the same issue decided by the initial judge and reconsidered by the second judge. *Id.* The third judge granted the defendants' motion for summary judgment. *Id.* On appeal, appellants (plaintiffs)

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contended that the third judge "lacked authority to reconsider" the initial judge's ruling. 113 Nev. at 741, 941 P.2d at 489. In affirming the third judge's decision, this Court held that "[a] district court may reconsider a previously decided issue if substantially different evidence is subsequently introduced or the decision is clearly erroneous." *Id.*

So, based on *Moore* and *Masonry & Tile Contractors*, there are multiple bases for reconsideration, including that the decision of the first judge was wrong. Judge Scann concluded that it was, and this Court should affirm that decision. It would make no sense to send this matter back to Judge Scann with a mandate to follow a decision that this Court deems incorrect as a matter of law. *See also Gibbs v. Giles*, 96 Nev. 243, 607 P.2d 118 (1980) (affirming broad discretion of district courts to grant reconsideration without setting forth any restrictive standard) (superceded by statute on other grounds, recognized in *State of Washington v. Bagley*, 963 P.2d 498, 500, 114 Nev. 788, 791 (1998)).

Having agreed to hear this petition, this Court should deny relief because the district court reached the correct decision as a matter of law.

Petitioners' argument also fails to recognize that precluding a district court from revising erroneous orders prior to entry of a final judgment would cause unnecessary duplication of efforts in the appellate courts. The district court has and needs to have the authority to revise orders prior to matters coming before this Court, particularly when errors in judgment have been made that are recognized by the district court. Here, Judge Delaney incorrectly entered a finding drafted by Petitioners that stated SFC sought equitable remedies. 18 App. 0848, line 28. As Judge Scann correctly noted in the hearing of the motion to reconsider, no party argued for equitable subrogation. 25 App. 0944, lines 10-22. SFC's claims below were based on contract, and on a claim of partial subordination.

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3. *In Re Fontainebleau* Has No Relevance to the Issues of Priority in this Matter Because Those Issues Are Governed by Law, Not Equity.

In Petitioners' attempt to find justification for their claim to a windfall they think they have obtained because SFC entered into a Subordination Agreement with itself, Petitioners incorrectly argue that contractual partial subordination is an equitable remedy. Relying on this fallacy, Petitioners misapply the holding of *In Re Fontainebleau Las Vegas Holdings, LLC*, 128 Nev. ___, 289 P.3d 1199 (Adv. Op. 53; October 25, 2012).

At issue in *Fontainebleau* was whether equitable subrogation (not concepts related to contractual subordination agreements) applied to mechanic's lien claims.[10] This case can be distinguished from *Fontainebleau* on the simple basis that in this case, there is no discharged lien. Central to the doctrine of equitable subrogation is the factual situation present when a prior encumbrance is paid off. *Id.* In this case, Judge Scann found that the Mezzanine DOTs were never paid off, released or reconveyed. 36 App. 1150-1151. Without the Mezzanine DOTs being paid off, equitable subrogation cannot apply to the Construction DOT.

Further, the issue of equitable subrogation was not before the district court in this case. *See* 4 App. 32-48. SFC filed its motion for partial summary judgment requesting contractual partial subordination, not an equitable remedy. *See* 6 App. 157-170. As articulated by Judge Scann at the motion for rehearing, "nobody argued equitable subrogation . . ." before Judge Delaney. 25 App. 0944, lines 10-22. Thus, the holding with regard to equitable subrogation in *Fontainebleau* is not applicable to this case. Further, it is undisputed that the Subordination Agreement is between SFC as to both the first priority and third

[10]This Court also addressed the issue of whether subordination agreements signed by mechanic lien claimants were enforceable, but that issue is not present in this case.

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priority. The Petitioners are not parties to the Subordination Agreement; accordingly, the *Fontainebleau* holding addressing mechanic's lien claimants subordination agreements is not applicable.

To better understand why *Fontainebleau* has no application to this case one must understand equitable subrogation. Fortunately, this Court provided that understanding in *Fontainebleau*, as follows:

> In *Houston*, we recognized that the doctrine of equitable subrogation "permits 'a person who pays off an encumbrance to assume the same priority position as the holder of the previous encumbrance.' " *Id.* (quoting *Mort v. U.S.*, 86 F.3d 890, 893 (9th Cir.1996)). In other words, the doctrine "enables 'a later-filed lienholder to leap-frog over an intervening lien [holder].' " *American Sterling Bank v. Johnny Mgmt. LV*, 126 Nev.___,___, 245 P.3d 535, 539 (2010) (alteration in original) (quoting *Hicks v. Londre*, 125 P.3d 452, 456 (Colo.2005)); see Grant S. Nelson & Dale A. Whitman, *Adopting Restatement Mortgage Subrogation Principles: Saving Billions of Dollars for Refinancing Homeowners*, 2006 BYU L.Rev. 305, 305 n. 2 (2006) (lien priority is critical due to the risk "that the foreclosure proceeds will be insufficient to pay the [lien] in full"). "The practical effect of equitable subrogation is a revival of the discharged lien and underlying obligation and assignment to the payor or subrogee, permitting the subrogee to enforce the seniority of the satisfied lien against junior lienors." *American Sterling*, 126 Nev. at ___, 245 P.3d at 539. Although equitable subrogation has the effect of an assignment of the discharged lien, it is not an absolute right and will not be granted if it will result in injustice or prejudice to an intervening lienor.

Id. at 1209. The contractual partial subordination agreement in this case shares no characteristics with a claim of equitable subrogation. Equitable subrogation "has the effect of an assignment of a discharged lien." *Id.* Once a lien is discharged, it ceases to exist and has no place of priority. In equity, in some circumstances that place of priority is restored and given to another whose priority is behind another claimant. In this case, there is no discharged lien. The Subordination Agreement did not have the effect of satisfying the original encumbrance, as the district court found as a matter of fact. Equitable subrogation "is a revival of the discharged lien and underlying obligation." The underlying obligation in this case was never satisfied. New money was brought in, but the original debt remained, and it remained in first position. No

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discharged lien was revived. Equitable subrogation "permits a person who pays off an encumbrance to assume the same priority position as the holder of the previous encumbrance." *Id* (internal punctuation omitted). In this case, the first encumbrance was not paid off.

Finally, equitable subrogation allows a third encumbrancer to leap-frog its lien over that of a second encumbrancer but only if the second encumbrancer is not prejudiced. It is this kind of equitable realignment of priorities that this Court said was not available when the encumbrancer in second position is a mechanic's lienor.

In this case, the issue of priority is legal, not equitable. It is not the third lienor who is attempting to leap-frog over Petitioners, it is Petitioners who are attempting to leap-frog over SFC based on the fortuity that SFC agreed to subordinate its unpaid, first priority debt to a third-party lender (who in this case just happens to also be SFC) in order to obtain additional financing. But SFC never agreed to give up the first position priority of the original debt, which is and has always has been superior to Petitioners' position in second place behind the original Mezzanine DOTs. That original debt has never been paid off and it has never lost its priority position over the mechanic's lienors. This is the critical point of this action. The $38 million dollar debt represented by the Mezzanine DOTs was prior to the mechanic's lienors on the critical date, when the work of improvement commenced. It was never paid off. It still exists and it still has priority. It is not SFC who is attempting to leap-frog a new debt over the mechanic's lienors. It is the mechanic's lienors who are attempting to leap-frog over the original first priority debt based on the hope that this Court will find that by partially subrogating that existing debt to a party providing new money in third place, SFC has unwittingly lost its priority position in favor of the second parties, who would get a windfall if the debt ahead of them does not remain ahead of them, where it has always been.

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The question for this Court to resolve is whether SFC is correct in its argument that partial contractual subordination is available as a matter of contract based on Nevada's policy to allow freedom of contract, or Petitioners are correct that any subordination is necessarily complete, regardless of the intent of the parties or the language of the contract. This Court must reject Petitioners' position both as a matter of law and of fact. The district court found as a fact that the contract when read as a whole evidenced that the intent of the parties was for partial contractual subordination. Unless this Court is willing to conclude that parties cannot enter into contractual agreements for partial subordination under any circumstance, this Court should accept the district court's factual determination that the agreement in this case is for partial contractual subordination. It is generally not the function of a writ to determine disputed issues such as the meaning of a contract where that meaning is related to factual matters or the intent of the parties.

Without citing the holding in *Fontainebleau*, Petitioners attempt to extend *Fontainebleau* language to contractual subordination. For equitable subrogation to apply, a junior lienholder is required to payoff a senior lienholder's lien to obtain the senior lienholder's priority. *American Sterling Bank v. Johnny Management LV, Inc.*, 126 Nev. ___, 245 P.3d 535, 537 (2010). Equitable subrogation, as referenced in the title of the doctrine, is accomplished by principles of equity. Here, the Mezzanine DOTs remain recorded against the Property and they were recorded prior the date Petitioners commenced construction. 36 App.1150-1151. NRS 108.225 provides contractors the right to recover for work and materials performed on a construction project before any lienholder whose lien attaches after construction. At no time did the Petitioners enter an agreement for a priority greater than the Mezzanine DOTs, rather the Construction DOT entered into an agreement to obtain this priority. NRS 108.225 does not preclude a first priority and third priority lienholder from

contracting their respective priorities.

In *Fontainebleau*, while rejecting the doctrine of equitable subrogation with mechanic liens, this Court suggested that the lender had "ample means to minimize its financial risks through the proper channels of contractual subordination." *In re Fontainebleau Las Vegas Holdings*, 128 Nev. at ___, 289 P.3d at 1212 (citing *Ex Parte Lawson,* 6 So.3d 7, 15-16 (Ala.2008). By virtue of the Subordination Agreement, the Petitioners lien is not waived, impaired or modified. The Mezzanine DOTs are still senior to Petitioners liens. The Mezzanine DOTs agreement with the Construction DOT does not provide the Petitioners the right to leap over the Mezzanine DOTs. Thus, contractual partial subordination is the mechanism for lenders to protect their interests in the Property and maintain the existing priority of the mechanic lien claimants.

Petitioners argue that equitable principals are required for contractual partial subordination. Contractual partial subordination arises as a result of a subordination agreement, not equity. *Bratcher v. Buckner*, 90 Cal.App.4th 1177 (Ct. App. 4th Civ. 2001) (the court relying upon the language of subordination agreement for partial subordination); *In Re Price Waterhouse Ltd.*, 46 P.3d 408 (Ariz. 2002) (the court construed the language of the subordination agreement when adopting partial subordination). Equitable subrogation is not based in contract, whereas contractual partial subordination arises as a direct result of a contract. Partial contractual subordination does not exist without a contractual agreement.

Petitioners cite to dicta in *In Re Price Waterhouse*, 46 P.3d 408, 410 (Ariz. 2002), for the proposition that partial subordination is reliant on equitable principals. Petition, p. 12. First, Petitioners have misstated the argument. The court in *Price Waterhouse* stated that the result obtained by partial subordination "appears fully equitable," not that the action was one in equity. The court might just as well have used the term "fair" to describe the result. Further, in *Price*

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Waterhouse, the issue was "the effect of a subordination agreement between first and third lienholders." *In Re Price Waterhouse Ltd.*, 46 P.3d 408, 410 (Ariz. 2002). The holding was that the agreement between [first lienholder] and [third lien holder] has no effect whatever upon [second lienholder's] lien. *Id.* at 411. The court then rejected the theory of complete subordination because complete subordination affects the rights of others not in privity of contract and under a contractual third-party beneficiary analysis. *Id* at 411. A first lienholder is permitted to contract it priority status by way of partial contractual subordination without resorting to equity. *See also, Bratcher v. Buckner*, 90 Cal.App.4th 1177, 1186 (Ct. App. 4th Civ. 2001) ("[S]ubordination agreements, like contracts in general, are subject to the rule that they must be interpreted to enforce the objective intent of the parties."). Despite the statement in *Price Waterhouse* that the result of allowing partial subordination "appears fully equitable," the holding of the case was to uphold on contract principles a partial subordination agreement. *Price Waterhouse* does not remotely aid Petitioners' cause.

V. CONCLUSION

The petition should be denied.

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Waterhouse, the issue was "the effect of a subordination agreement between first and third lienholders." *In Re Price Waterhouse Ltd.*, 46 P.3d 408, 410 (Ariz. 2002). The holding was that the agreement between [first lienholder] and [third lien holder] has no effect whatever upon [second lienholder's] lien. *Id.* at 411. The court then rejected the theory of complete subordination because complete subordination affects the rights of others not in privity of contract and under a contractual third-party beneficiary analysis. *Id* at 411. A first lienholder is permitted to contract it priority status by way of partial contractual subordination without resorting to equity. *See also, Bratcher v. Buckner*, 90 Cal.App.4th 1177, 1186 (Ct. App. 4th Civ. 2001) ("[S]ubordination agreements, like contracts in general, are subject to the rule that they must be interpreted to enforce the objective intent of the parties."). Despite the statement in *Price Waterhouse* that the result of allowing partial subordination "appears fully equitable," the holding of the case was to uphold on contract principles a partial subordination agreement. *Price Waterhouse* does not remotely aid Petitioners' cause.

V. CONCLUSION

The petition should be denied.

DATED this 18 day of March, 2013.

HUTCHISON & STEFFEN, LLC.

Mark A. Hutchison (4629)
Michael K. Wall (2098)
10080 West Alta Drive, Suite 200
Las Vegas, NV 89145
Tel: (702) 385-2500
Fax: (702) 385-2086

Attorneys for Scott Financial Corporation

HUTCHISON & STEFFEN
A PROFESSIONAL LLC
PECCOLE PROFESSIONAL PARK
10080 WEST ALTA DRIVE, SUITE 200
LAS VEGAS, NV 89145

HUTCHISON & STEFFEN
A PROFESSIONAL LLC
PECCOLE PROFESSIONAL PARK
10080 WEST ALTA DRIVE, SUITE 200
LAS VEGAS, NV 89145

CERTIFICATE OF SERVICE

I certify that I am an employee of HUTCHISON & STEFFEN, LLC and that on this date **SCOTT FINANCIAL CORPORATION'S ANSWER TO JOINT PETITION FOR WRIT OF MANDAMUS OR PROHIBITION** was filed electronically with the Clerk of the Nevada Supreme Court, and therefore electronic service was made in accordance with the master service list as follows:

Glenn Meier
Wade Gochnour
David Dachelet
David Johnson
Beau Sterling
Richard Peel
Martin Little
Jeffrey Albregts
R. Reade
Michael Gebhart
Jennifer Lloyd
Brian Berman
J. Jones
Reuben Cawley
Gwen Mullins
Donald Williams
Keith Gregory
Eric Dobberstein
Philip Varricchio
Stven Morris
Mark Ferrario

DATED this 18th day of March, 2013.

An employee of Hutchison & Steffen, LLC

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CERTIFICATE OF MAILING

Pursuant to NRAP 25(b), I certify that I am an employee of HUTCHISON & STEFFEN, LLC and that on this 18th day of March, 2013, I caused the document entitled **SCOTT FINANCIAL CORPORATION'S ANSWER TO JOINT PETITION FOR WRIT OF MANDAMUS OR PROHIBITION**, to be served as follows:

- ☒ by placing same to be deposited for mailing in the United States Mail, in a sealed envelope upon which first class postage was prepaid in Las Vegas, Nevada; and/or
- ☐ pursuant to NRCP 5(b)(2)(D), to be sent via facsimile; and/or
- ☐ pursuant to EDCR 8.05(a) and 8.05(f), to be electronically served through the Eighth Judicial District Court's electronic filing system, with the date and time of the electronic service substituted for the date and place of deposit in the mail; and/or
- ☐ via electronic mail;

to the attorneys listed below at the address, email, and/or facsimile number indicated below:

The Honorable Susan W. Scann
Department 29, Eighth Judicial District Court
330 S. Third Street
Las Vegas, NV 89101

An employee of Hutchison & Steffen, LLC