IN THE SUPREME COURT OF THE STATE OF NEVADA

IN RE: MANHATTAN WEST MECHANICS LIEN LITIGATION,

APCO CONSTRUCTION, A NEVADA CORPORATION; ACCURACY GLASS & MIRROR COMPANY, INC.; BRUIN PAINTING CORPORATION; BUCHELE, INC.; 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.; CAMCO PACIFIC CONSTRUCTION CO., INC.; CELLCRETE FIREPROOFING OF NEVADA, INC.; CLUB VISTA FINANCIAL SERVICES, LLC; CONCRETE VISIONS, INC.; CREATIVE HOME THEATRE, LLC;

Case No.: 61131

PETITION FOR EN BANC RECONSIDERATION

MARQUIS AURBACH COFFING
10001 Park Run Drive
Las Vegas, Nevada 89145
(702) 382-0711 FAX: (702) 382-5816

CUSTOM SELECT BILLING, INC.; DAVE PETERSON FRAMING, INC.; E&E FIRE PROTECTION, LLC; EZA, P.C.; FERGUSON FIRE AND FABRICATION, INC.; GEMSTONE DEVELOPMENT WEST, INC.; GRANITE CONSTRUCTION COMPANY; HARSCO CORPORATION; 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; PRESSURE GROUT COMPANY; PROFESSIONAL DOOR AND MILL WORKS, LLC; READY MIX, INC.; RENAISSANCE POOLS & SPAS, INC.; REPUBLIC CRANE SERVICE, LLC; STEEL ENGINEERS, INC.; SUNSTATE COMPANIES, INC.; SUPPLY NETWORK, INC.; THARALDSON MOTELS II, INC.; TRI CITY DRYWALL, INC.; UINTAH INVESTMENTS, LLC; AND ZITTING BROTHERS CONSTRUCTION, INC., Real Parties in Interest.

Marquis Aurbach Coffing
Micah S. Echols
Nevada Bar No. 8437
10001 Park Run Drive
Las Vegas, Nevada 89145
Telephone: (702) 382-0711

Howard & Howard Attorneys PLLC
Gwen Rutar Mullins
Nevada Bar No. 3146
Wade B. Gochnour
Nevada Bar No. 6314
3800 Howard Hughes Parkway, Suite 1400, Las Vegas, NV 89169
Telephone: (702) 257-1483

Attorneys for Petitioner APCO Construction

MARQUIS AURBACH COFFING
10001 Park Run Drive
Las Vegas, Nevada 89145
(702) 382-0711 FAX: (702) 382-5816

Peel Brimley LLP
Richard L. Peel
Nevada Bar No. 4359
Michael T. Gebhart
Nevada Bar No. 7718
Eric B. Zimbelman
Nevada Bar No. 9407
3333 E. Serene Avenue, Suite 200
Henderson, Nevada 89074-6571
Telephone: (702) 990-7272

Attorneys for All Other Lien Claimant Petitioners

MARQUIS AURBACH COFFING
10001 Park Run Drive
Las Vegas, Nevada 89145
(702) 382-0711 FAX: (702) 382-5816

MARQUIS AURBACH COFFING
10001 Park Run Drive
Las Vegas, Nevada 89145
(702) 382-0711 FAX: (702) 382-5816

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MARQUIS AURBACH COFFING
10001 Park Run Drive
Las Vegas, Nevada 89145
(702) 382-0711 FAX: (702) 382-5816

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10001 Park Run Drive
Las Vegas, Nevada 89145
(702) 382-0711 FAX: (702) 382-5816

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MARQUIS AURBACH COFFING
10001 Park Run Drive
Las Vegas, Nevada 89145
(702) 382-0711 FAX: (702) 382-5816

I. INTRODUCTION

This petition for en banc reconsideration challenges the panel's conclusion that the doctrine of "partial subordination" allowed $38 million of a total of $110 million subsequent (Mezzanine) deeds of trust to take priority over mechanic's liens previously recorded against the Manhattan West mixed-use property in Las Vegas, Nevada. Pursuant to NRAP 40A, Petitioners (collectively "the Lien Claimants") seek en banc reconsideration of the panel opinion issued on September 24, 2015.[1] Chief Justice Hardesty authored the majority opinion, which was joined by Justice Douglas. Justice Cherry dissented. On rehearing, Chief Justice Hardesty and Justice Douglas denied the petition for rehearing without briefing, and Justice Cherry once again dissented, concluding that he would have granted the petition for rehearing.[2] Aggrieved by these orders, the Lien Claimants now seek en banc reconsideration of the panel opinion.

The panel opinion adopts a policy for Nevada favoring "partial subordination" and rejecting "complete subordination," absent an express statement for complete subordination, in the context of competing priority of mechanic's liens and deeds of trust. In adopting this policy, the panel opinion principally relied upon *Caterpillar Financial Services Corp. v. Peoples National Bank, N.A.*, 710 F.3d 691 (7th Cir. 2013), which was first raised in

[1] The panel opinion issued on September 24, 2015 is attached as **Exhibit 1**.

[2] The order denying rehearing issued on November 24, 2015 is attached as **Exhibit 2**.

MARQUIS AURBACH COFFING
10001 Park Run Drive
Las Vegas, Nevada 89145
(702) 382-0711 FAX: (702) 382-5816

supplemental authorities, under the parameters of NRAP 31(e). However, *Caterpillar* and many of the related authorities rely upon the Uniform Commercial Code, Article 9—Secured Transactions, which is the equivalent of NRS Chapter 104.9109 *et seq.* The panel's departure from well-established Nevada law enforcing mechanic's liens to adopt contrary UCC principles undercuts the policymaking function of this Court in the context of construing ambiguous statutes. *See, e.g., Lehrer McGovern Bovis, Inc. v. Bullock Insulation, Inc.*, 124 Nev. 1102, 1115, 197 P.3d 1032, 1041 (2008) ("The object of the lien statutes is to secure payment to those who perform labor or furnish material to improve the property of the owner.") (citation and internal quotation marks omitted); *see also Westpark Owners' Ass'n v. Dist. Ct.*, 123 Nev. 349, 357, 167 P.3d 421, 427 (2007) ("Given an ambiguous statute, this court must interpret the statute in light of the policy and the spirit of the law . . . .") (citation and internal quotation marks omitted). On this initial basis of maintaining uniformity of the Court's decisions and the policy considerations that favor mechanic's liens, this Court should grant en banc reconsideration.

Even if the Court abides by the panel's interpretation of NRS 108.225 to allow the insertion of UCC principles, the Court should still grant en banc reconsideration on three alternative grounds. First, the panel opinion adopted the "partial subordination" policy based upon the assumption that the "subordination agreement neither stated it intended to create complete subordination nor mentioned the mechanic's lien." Opinion, at *12–13. However, the panel overlooked that the subordination agreement conclusively

establishes lien priority with the condition "as though the Mezzanine Deeds of Trust has been recorded ***subsequent to*** the recordation of the $110,000,000 Senior Debt Deed of Trust." 3 Petitioners' Appendix ("PA") 642, ¶ 1 (emphasis added). Thus, the panel opinion creates a substantial precedential and public policy issue that this Court should review en banc.

Second, if the Court concludes that this language that the panel overlooked is not sufficiently clear to apply "complete subordination" in favor of the Lien Claimants, the Court should order an evidentiary hearing in the District Court, as required by Nevada law, instead of reading a new provision into the subordination agreement for the benefit of Scott Financial Corporation ("SFC"). *See Fox v. First W. Sav. & Loan Ass'n*, 86 Nev. 469, 473, 470 P.2d 424, 426 (1970) ("When a contract is in any of its terms or provisions ambiguous or uncertain it is primarily the duty of the trial court to construe it ***after*** a full opportunity is afforded all the parties in the case to produce evidence of the facts, circumstances and conditions surrounding its execution and the conduct of the parties thereto.") (emphasis added and citation omitted); *see also Traffic Control Servs., Inc. v. United Rentals Northwest, Inc.*, 120 Nev. 168, 175–176, 87 P.3d 1054, 1059 (2004) (holding that courts cannot revise a contract under the guise of construing it). Because of the limited record, the Court should not presume the absence of prejudice to the Lien Claimants, particularly since they have not been able to challenge numerous assertions from SFC through discovery, including the affidavit of SFC's president,

MARQUIS AURBACH COFFING
10001 Park Run Drive
Las Vegas, Nevada 89145
(702) 382-0711 FAX: (702) 382-5816

Bradley Scott ("Scott"), which was first presented in a supplement to SFC's motion for partial summary judgment. 5 PA 984–995, 996–1004.

Finally, the panel opinion overlooks the Lien Claimants' arguments with regard to the refinance of the loans. Opinion, at *6, n. 2. The recognition that the loans were refinanced would bring this case into an "equitable subrogation" situation, which does not legally operate to impair the mechanic's liens. *See In re Fontainebleau Las Vegas Holdings*, 289 P.3d 1199, 1207 (Nev. 2012) ("Because principles of equity cannot trump an express statutory provision, we conclude that equitable subrogation does not apply against mechanic's lien claimants."). While the result of equitable subrogation and partial subordination is the same (i.e., junior lienholders are permitted to leap-frog intervening lienholders to take a senior position), the panel opinion sidesteps the application of *Fontainebleau* by characterizing partial subordination as contractual. Opinion, at *13–14, n. 7. However, since the Mezzanine note refinanced the prior deeds of trust, this case presents a straightforward equitable subrogation situation prohibited by *Fontainebleau*. *See Houston v. Bank of America*, 119 Nev. 485, 488, 78 P.3d 71, 73 (2003). Thus, the treatment of the loans as a refinance would operate to completely change the legal analysis of this case, and the Court should grant en banc reconsideration on this basis to maintain uniformity of its decisions.

In summary, the Court should grant en banc reconsideration on any of these grounds in accordance with the NRAP 40A(a) standards. If the Court orders the real parties in interest to file an answer to this petition for en banc

MARQUIS AURBACH COFFING
10001 Park Run Drive
Las Vegas, Nevada 89145
(702) 382-0711 FAX: (702) 382-5816

reconsideration, the Court should also grant leave for the Lien Claimants to file a reply and set a schedule for the en banc reconsideration briefing.

II. LEGAL ARGUMENT

A. STANDARD FOR EN BANC RECONSIDERATION.

NRAP 40A(a) provides that this Court will reconsider a panel decision when (1) "reconsideration by the full court is necessary to secure or maintain uniformity of its decisions" or (2) "the proceeding involves a substantial precedential, constitutional or public policy issue." In the instant case, en banc reconsideration is necessary for both of these reasons, particularly because this case concerns the interpretation of certain provisions within NRS Chapter 108 and the underlying policies of this statutory scheme for mechanic's liens.

B. THE PANEL'S ADOPTION OF UCC PRINCIPLES TO INTERPRET NRS 108.225 CONFLICTS WITH THE UNDERLYING PURPOSE OF MECHANIC'S LIENS.

Nevada law has a rich history of enforcing mechanic's liens. *See, e.g., Lehrer McGovern Bovis, Inc.*, 124 Nev. at 1115, 197 P.3d at 1041 ("The object of the lien statutes is to secure payment to those who perform labor or furnish material to improve the property of the owner.") (citation and internal quotation marks omitted). Unlike other statutory schemes that call for a strict construction, this Court has repeatedly recognized that "the mechanic's lien statutes are remedial in character and should be liberally construed." *Id.* (citation omitted). Despite the presumption of a liberal construction, the panel applied a strict construction to NRS 108.225. Opinion, at *13–14. The panel should have liberally construed the statute in favor of complete subordination

MARQUIS AURBACH COFFING
10001 Park Run Drive
Las Vegas, Nevada 89145
(702) 382-0711 FAX: (702) 382-5816

because it is not expressly prohibited. *See id.* ("The Legislature has spoken and has created a specific statutory scheme whereby a mechanic's lien is afforded priority over a subsequent lien, mortgage, or encumbrance in order to safeguard payment for work and materials provided for construction or improvements on land.") (citation omitted). Thus, in construing NRS 108.225, the panel was bound by the underlying policies of the entire statutory scheme, designed to enforce mechanic's liens. *See Westpark Owners' Ass'n*, 123 Nev. at 357, 167 P.3d at 427 ("Given an ambiguous statute, this court must interpret the statute in light of the policy and the spirit of the law . . . .") (citation and internal quotation marks omitted).

Contrary to the underlying purpose of NRS 108.225, the panel opinion relied heavily upon the reasoning of *Caterpillar* which does not construe Nevada law or mechanic's liens. Instead, *Caterpillar* dealt with the priority of financing based on the UCC, which is codified in Nevada as NRS Chapter 104. However, the UCC generally only applies to the sale of goods. *See, e.g.*, NRS 104.2102 ("Unless the context otherwise requires, this article applies to transactions in goods . . . ."). Additionally, NRS Chapter 104 does not construe the interplay between this distinct statutory scheme and mechanic's liens. Further, NRS 104.9334(1) expressly states, "A security interest does not exist under this article in ordinary building materials incorporated into an improvement on land." As such, and unlike NRS Chapter 108, the underlying policies of NRS Chapter 104 do not favor contractors or mechanic's liens. *Cf. Skyrme v. Occidental Mill and Mining Co.*, 8 Nev. 219, 232 (1873) ("[A]

MARQUIS AURBACH COFFING
10001 Park Run Drive
Las Vegas, Nevada 89145
(702) 382-0711 FAX: (702) 382-5816

mechanic's lien is different from a mortgage executed by the consent of the parties") (cited with approval in *Fontainebleau*, 289 P.3d at 1209). Since the statutory purposes of NRS Chapter 108 are fundamentally distinct from the underlying purposes of NRS Chapter 104, this Court should grant en banc reconsideration on this threshold issue to enforce the policies underlying the enforcement of mechanic's liens in Nevada.

C. TO ADVANCE POLICIES CONTRARY TO NRS CHAPTER 108, THE PANEL OPINION ERRONEOUSLY DISREGARDED THE EXPRESS LANGUAGE OF THE SUBORDINATION AGREEMENT THAT SUBORDINATED THE MEZZANINE DEEDS OF TRUST.

The panel's reliance upon the holding of *Caterpillar* to reach a partial subordination is contingent upon the subordination agreement being silent on priority. *See* Opinion, at *12 (following *Caterpillar* and favoring partial subordination when the subordination agreement is silent on the issue). As such, it follows that if the panel overlooked and disregarded the express lien priority provisions in the subordination agreement, then partial subordination would not apply. Indeed, in the section of the subordination agreement entitled "Lien Priority," the priority is defined "as though the Mezzanine Deeds of Trust had been recorded ***subsequent to*** the recordation of the $110,000,000 Senior Debt Deed of Trust." 3 PA 642, ¶ 1 (emphasis added). Therefore, the panel should have enforced this express and objective intent as written, without any consideration of a subjective element.

In fact, and although it failed to follow its own precepts, the panel opinion clearly articulates this point. Opinion, at *14, n. 7 (citing *Bratcher v.*

MARQUIS AURBACH COFFING
10001 Park Run Drive
Las Vegas, Nevada 89145
(702) 382-0711 FAX: (702) 382-5816

Buckner, 109 Cal. Rptr. 2d 534, 539–540 (Ct. App. 2001) (court relied on subordination agreement, not equitable principles, "to enforce the objective intent of the parties")); *see also Phillips v. Mercer*, 94 Nev. 279, 282, 579 P.2d 174, 176 (1978) (stating that a court should not interpret a contract so as to make a provision meaningless). The panel opinion cites to George A. Nation, III, *Circuity of Liens Arising From Subordination Agreements: Comforting Unanimity No More*, 83 B.U. L. Rev. 591 (2003) to illustrate its adoption of the partial subordination doctrine. However, this law review article acknowledges that "if one wishes to avoid the complete subordination interpretation, it is prudent to avoid the use of the word 'subordination.'" *Id.* at 614. Yet, the subordination agreement in the instant case carries the title "Mezzanine Deeds of Trust Subordination Agreement." 3 PA 641. Moreover, the subordination agreement in the instant case does not contain the alternative language suggested in this article to take the agreement out of complete subordination. 83 B.U. L. Rev. at 614. In essence, the panel applied partial subordination to a hypothetical set of circumstances that do not exist in the instant case. The effect of the panel's favoring of UCC principles over the legal principles and policies underlying NRS Chapter 108 was to erroneously deprive the Lien Claimants of their mechanic's liens. Since the express terms of the subordination agreement place the Mezzanine deeds of trust in a junior position, the Court should grant en banc reconsideration on this basis.

MARQUIS AURBACH COFFING
10001 Park Run Drive
Las Vegas, Nevada 89145
(702) 382-0711 FAX: (702) 382-5816

D. THE PANEL'S ADOPTION OF THE PRINCIPLES IN *CATERPILLAR* IS CONTRARY TO NEVADA LAW FOR CONSTRUING CONTRACTS.

Aside from the fact that the subordination agreement actually does address priority (3 PA 642, ¶ 1) and unambiguously establishes complete subrogation, the panel opinion favors the *Caterpillar* principles for construing subordination agreements in direct conflict to well-established Nevada law. Instead of allowing the factual issues surrounding the lien priority provision in the subordination agreement to be developed in subsequent District Court proceedings, the panel opinion guesses at what the intent of the provision might be. Opinion, at *12 ("We cannot determine any reason SFC would have intended to completely subordinate the Mezzanine Deeds of Trust . . . ."); *Id.* at *13 ("Absent this clear intent . . . ."). The panel opinion overlooks the fact that according to Nevada law, when contract provisions are unclear, the proper remedy is to allow discovery into those issues and an evidentiary hearing. *See Fox*, 86 Nev. at 473, 470 P.2d at 426 ("When a contract is in any of its terms or provisions ambiguous or uncertain it is primarily the duty of the trial court to construe it ***after*** a full opportunity is afforded all the parties in the case to produce evidence of the facts, circumstances and conditions surrounding its execution and the conduct of the parties thereto.") (emphasis added and citation omitted). Additionally, Nevada law does not permit the panel to simply read a partial subordination condition into the subordination agreement where none exists, especially when the Lien Claimants' competing interest is based upon statutory mechanic's liens. *See Traffic Control Servs., Inc.*, 120 Nev. at 175–

MARQUIS AURBACH COFFING
10001 Park Run Drive
Las Vegas, Nevada 89145
(702) 382-0711 FAX: (702) 382-5816

176, 87 P.3d at 1059 (holding that courts cannot revise a contract under the guise of construing it).

In contrast to *Caterpillar*, which concluded in a bench trial (710 F.3d at 692), the instant case was decided at summary judgment while discovery was still open. *Cf.* 4 PA 970, 971–974; 5 PA 1143–1155. As such, numerous factual issues remain, particularly from Scott's affidavit filed as a supplement to SFC's motion for partial summary judgment. 5 PA 996–1004. Since Scott's affidavit was filed as a supplement to summary judgment, the Lien Claimants did not have an opportunity to contest those self-serving statements through discovery. *See* 5 PA 984–995. As a matter of law, self-serving statements cannot support summary judgment. *See Dennison v. Allen Group Leasing Corp.*, 110 Nev. 181, 185, 871 P.2d 288, 290–291 (1994); *see also Clauson v. Lloyd*, 103 Nev. 432, 434–435, 743 P.2d 631, 632–633 (1987). Moreover, the Lien Claimants have not yet deposed Scott. 4 PA 971–974; 5 PA 1137. After the District Court announced its decision, all parties agreed, and the District Court concluded that the ongoing discovery would be stayed pending the outcome of this original proceeding. 5 PA 1137:12–16. Because the panel has identified possible ambiguities in the subordination agreement, the proper remedy was not to read in additional conditions that favor SFC, but rather to send the case back to the District Court for further proceedings. The panel's act of filling in the blanks to favor SFC to satisfy the *Caterpillar* standard directly conflicts with Nevada law for construing contracts. Therefore, the Court should grant en banc reconsideration on this basis.

MARQUIS AURBACH COFFING
10001 Park Run Drive
Las Vegas, Nevada 89145
(702) 382-0711 FAX: (702) 382-5816

MARQUIS AURBACH COFFING
10001 Park Run Drive
Las Vegas, Nevada 89145
(702) 382-0711 FAX: (702) 382-5816

E. THE PANEL OPINION ALSO CONFLICTS WITH THE UNDERLYING POLICIES FAVORING MECHANIC'S LIENS, AS OUTLINED IN *FONTAINEBLEAU*.

While the result of equitable subrogation and partial subordination is the same (i.e., junior lienholders are permitted to leap-frog intervening lienholders to take a senior position), the panel opinion sidesteps the prohibition in *Fontainebleau* against equitable subrogation by characterizing partial subordination as contractual. Opinion, at *13–14, n. 7. However, since the Mezzanine note refinanced the prior deeds of trust, this case presents a straightforward case of equitable subrogation prohibited by *Fontainebleau*. *See Houston*, 119 Nev. at 488, 78 P.3d at 73 (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.") (internal quotation marks and citation omitted). The panel opinion conflicts with *Fontainebleau* because the mechanic's liens should be in first priority. *Fontainebleau*, 289 P.3d at 1207 ("Because principles of equity cannot trump an express statutory provision, we conclude that equitable subrogation does not apply against mechanic's lien claimants.").

As outlined in their writ petition[3] and supplement,[4] the Lien Claimants set forth facts that the loan amendments served to refinance the original

[3] *See* joint petition at 6, ¶ 2, stating, "In addition to the Construction Loan Agreement, SFC and Gemstone entered into a new Mezzanine Note, dated January 22, 2008, for the principal sum of $46,000,000. 3 App. 543–545. The ***Mezzanine Note refinanced the prior land acquisition loans*** and provided a new interest rate, a new date for the commencement of interest payments and a new maturity date." (emphasis added). *See* joint petition at 7, ¶ 1, stating, "Both the Senior Mezzanine DOT and the Junior mezzanine DOT contained the

MARQUIS AURBACH COFFING
10001 Park Run Drive
Las Vegas, Nevada 89145
(702) 382-0711 FAX: (702) 382-5816

Mezzanine deeds of trust, which focused on the *Fontainebleau* case. Although the panel opinion suggests that the refinance is either non-existent or inconsequential, the loan documents use the term "refinance." *See supra*, n. 3 and citations; 2 PA 312–313; 3 PA 627–632, 634–639. In addition, the Lien Claimants also referred to the original summary judgment order in favor of APCO, which included the refinance of the original Mezzanine deeds of trust in its findings of fact:

> 24. In addition to the Construction Loan Agreement, SFC and Gemstone Development West, Inc. entered into a new Mezzanine Note, dated January 22, 2008, for the principal sum of $46,000,000.
>
> 25. The Mezzanine Note ***refinanced*** the Prior Deeds of Trust as the Senior Mezzanine DOT and the Junior Mezzanine DOT.

4 PA 844, ¶¶ 24–25 (emphasis added). The District Court's initial determination that the loans were refinanced was based upon the actual language of the loan documents that characterized the transaction as a refinance. 2 PA 312–313; 3 PA 627–632, 634–639. In the second summary judgment hearing (which forms the basis of this proceeding), the District Court acknowledged the prior evidence of a refinance, but improperly weighed the evidence to make the factual finding that there was no refinance. 5 PA 1115:5–9, 1150–1151. *See, e.g., Hidden Wells Ranch, Inc. v. Strip Realty, Inc.*, 83 Nev.

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same language noting "The Trustor has requested, and the Beneficiary has agreed, ***to refinance the obligations secured*** by the [Senior/Junior Deed of Trust.] 3 App. 628, 634 (emphasis added)."

[4] *See* Lien Claimants' supplemental brief at 2, ¶ 1: "The prior $46,000,000.00 loans were restructured into a single note for $46,000,000.00, called the Mezzanine Note."

143, 145, 425 P.2d 599, 601 (1967) ("[T]he trial judge may not in granting summary judgment pass upon the credibility or weight of the opposing affidavits or evidence.").

In essence, "subordination" works backwards (i.e., a lowering of the priority of the subordinating party). *See Black's Law Dictionary*, 1653 (10th ed. 2014) (defining "subordination" as "[t]he act or an instance of moving something (such as a right or claim) to a lower rank, class, or position <subordination of a first lien to a second lien>"). Only through the exercise of "partial subordination" can the entity with the junior interest leap-frog ahead of the Lien Claimants. Thus, the doctrine of "partial subordination" requires the application of equitable principles to defeat mechanic's liens, which was previously rejected in *Fontainebleau*. 289 P.3d at 1207. *Cf. Black's Law Dictionary*, 1653 (10th ed. 2014) (defining "equitable subordination" as "[a] court's act of lowering a claim's priority for purposes of equity . . . ."). A refinance of the loans would necessarily invoke the equitable subrogation doctrine, such that any loans that had previously held a priority position with respect to the mechanic's liens would lose that position by virtue of the holding of *Fontainebleau*, 289 P.3d at 1207.

Since *Caterpillar* construed the UCC, the Seventh Circuit reached a different result because a "purchase-money security interest does not lose its status as such, even if . . . the purchase-money obligation has been . . . refinanced." 710 F.3d at 695 (citing UCC § 9-103(f)(3)); *see also* NRS 104.9103(6)(c) (reciting similar language applicable to a purchase-money

MARQUIS AURBACH COFFING
10001 Park Run Drive
Las Vegas, Nevada 89145
(702) 382-0711 FAX: (702) 382-5816

security agreement). As such, the main partial subordination theory of the panel opinion directly conflicts with *Fontainebleau*. Therefore, on this additional basis, the Court should grant en banc reconsideration of the panel opinion.

III. CONCLUSION

In summary, the Court should grant en banc reconsideration of the panel opinion for a variety of reasons. The panel should not have applied policy considerations underlying the Uniform Commercial Code to mechanic's liens. Likewise, since the subordination agreement expressly subordinated the Mezzanine deeds of trust, there was no reason for the panel to adopt the *Caterpillar* rule, stating that a silent subordination agreement implies partial subordination. In any event, the *Caterpillar* rule violates Nevada law for construing ambiguous provisions in contracts, particularly at the summary judgment stage when discovery has not been completed. Finally, the panel opinion directly conflicts with the holding of *Fontainebleau* since the panel's description of partial subordination amounts to the same result as equitable subrogation under the circumstances of the instant case. Therefore, the Lien Claimants urge this Court to grant en banc reconsideration.

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MARQUIS AURBACH COFFING
10001 Park Run Drive
Las Vegas, Nevada 89145
(702) 382-0711 FAX: (702) 382-5816

If the Court orders the real parties in interest to file an answer to this petition for en banc reconsideration, the Court should also grant leave for the Lien Claimants to file a reply and set a schedule for the en banc reconsideration briefing.

Dated this 17th day of December, 2015.

By /s/ Micah S. Echols

Marquis Aurbach Coffing
Micah S. Echols
Nevada Bar No. 8437
10001 Park Run Drive
Las Vegas, Nevada 89145
Telephone: (702) 382-0711

By /s/ Wade B. Gochnour

Howard & Howard Attorneys PLLC
Gwen Rutar Mullins
Nevada Bar No. 3146
Wade B. Gochnour
Nevada Bar No. 6314
3800 Howard Hughes Parkway,
Suite 1400, Las Vegas, NV 89169
Telephone: (702) 257-1483

Attorneys for Petitioner APCO Construction, Inc.

By /s/ Richard L. Peel

Peel Brimley LLP
Richard L. Peel
Nevada Bar No. 4359
Michael T. Gebhart
Nevada Bar No. 7718
Eric B. Zimbelman
Nevada Bar No. 9407
3333 E. Serene Avenue, Suite 200
Henderson, Nevada 89074-6571
Telephone: (702) 990-7272

Attorneys for All Other Lien Claimant Petitioners

MARQUIS AURBACH COFFING
10001 Park Run Drive
Las Vegas, Nevada 89145
(702) 382-0711 FAX: (702) 382-5816

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this petition complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 14-point Times New Roman font.

2. I further certify that this petition complies with the page- or type-volume limitations of NRAP 40 or 40A because it is either:

☒ proportionally spaced, has a typeface of 14 points or more and contains 3,662 words; or

☐ does not exceed _____ pages.

Dated this 17th day of December, 2015.

By /s/ Micah S. Echols

Marquis Aurbach Coffing
Micah S. Echols
Nevada Bar No. 8437
10001 Park Run Drive
Las Vegas, Nevada 89145
Telephone: (702) 382-0711

By /s/ Wade B. Gochnour

Howard & Howard Attorneys PLLC
Gwen Rutar Mullins
Nevada Bar No. 3146
Wade B. Gochnour
Nevada Bar No. 6314
3800 Howard Hughes Parkway,
Suite 1400, Las Vegas, NV 89169
Telephone: (702) 257-1483

Attorneys for Petitioner APCO Construction, Inc.

MARQUIS AURBACH COFFING
10001 Park Run Drive
Las Vegas, Nevada 89145
(702) 382-0711 FAX: (702) 382-5816

By /s/ Richard L. Peel

Peel Brimley LLP
Richard L. Peel
Nevada Bar No. 4359
Michael T. Gebhart
Nevada Bar No. 7718
Eric B. Zimbelman
Nevada Bar No. 9407
3333 E. Serene Avenue, Suite 200
Henderson, Nevada 89074-6571
Telephone: (702) 990-7272

Attorneys for All Other Lien Claimant Petitioners

MARQUIS AURBACH COFFING
10001 Park Run Drive
Las Vegas, Nevada 89145
(702) 382-0711 FAX: (702) 382-5816

MARQUIS AURBACH COFFING
10001 Park Run Drive
Las Vegas, Nevada 89145
(702) 382-0711 FAX: (702) 382-5816

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **PETITION FOR EN BANC RECONSIDERATION** was filed electronically with the Nevada Supreme Court on the 17th day of December, 2015. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

Glenn Meier	J. Jones
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Richard Peel	Donald Williams
Martin Little	Robin Perkins
Garry Hayes	Keith Gregory
Jeffrey Albregts	Eric Dobberstein
R. Reade	A. Maupin
Michael Gebhart	Philip Varricchio
Jennifer Lloyd	Steven Morris
Brian Berman	Mark Ferrario

I further certify that I served a copy of this document by mailing a true and correct copy thereof, postage prepaid, addressed to:

The Honorable Susan W. Scann
Eighth Judicial District Court, Dept. 29
200 Lewis Avenue
Las Vegas, Nevada 89155

Tony Ditty
1017 E. Grand Avenue
Escondido, CA 92025

T. Truman
3654 N. Rancho Drive
Las Vegas, NV 89130

Andrew Kessler
1450 Frazee Rd, #100
San Diego, CA 92108

/s/ Leah Dell
Leah Dell, an employee of
Marquis Aurbach Coffing

MARQUIS AURBACH COFFING
10001 Park Run Drive
Las Vegas, Nevada 89145
(702) 382-0711 FAX: (702) 382-5816

Exhibit 1

131 Nev., Advance Opinion 70

IN THE SUPREME COURT OF THE STATE OF NEVADA

IN RE: MANHATTAN WEST MECHANIC'S LIEN LITIGATION.

No. 61131

FILED

SEP 24 2015

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

APCO CONSTRUCTION, A NEVADA CORPORATION; ACCURACY GLASS & MIRROR COMPANY, INC.; BRUIN PAINTING CORPORATION; BUCHELE, INC.; 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.; CAMCO PACIFIC CONSTRUCTION CO., INC.; CELLCRETE FIREPROOFING OF NEVADA, INC.; CLUB VISTA FINANCIAL SERVICES, LLC; CONCRETE VISIONS, INC.; CREATIVE HOME THEATRE, LLC; CUSTOM

15-28849

SELECT BILLING, INC.; DAVE PETERSON FRAMING, INC.; E&E FIRE PROTECTION, LLC; EZA, P.C.; FERGUSON FIRE AND FABRICATION, INC.; GEMSTONE DEVELOPMENT WEST, INC.; GRANITE CONSTRUCTION COMPANY; HARSCO CORPORATION; 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.; PAPÉ MATERIAL HANDLING; PATENT CONSTRUCTION SYSTEMS; PRESSURE GROUT COMPANY; PROFESSIONAL DOOR AND MILL WORKS, LLC; READY MIX, INC.; RENAISSANCE POOLS & SPAS, INC.; REPUBLIC CRANE SERVICE, LLC; STEEL ENGINEERS, INC.; SUNSTATE COMPANIES, INC.; SUPPLY NETWORK, INC.; THARALDSON MOTELS II, INC.; TRI CITY DRYWALL, INC.; UINTAH INVESTMENTS, LLC; AND ZITTING BROTHERS CONSTRUCTION, INC.,
Real Parties in Interest.

Original petition for writ of mandamus and prohibition challenging a district court order granting summary judgment in a mechanic's lien action.

Petition denied.

Howard & Howard Attorneys PLLC and Wade B. Gochnour and Gwen Rutar Mullins, Las Vegas,
for Petitioner APCO Construction.

Sterling Law, LLC, and Beau Sterling, Las Vegas; Peel Brimley LLP and Richard L. Peel and Michael T. Gebhart, Henderson,
for Petitioners Accuracy Glass & Mirror Company, Inc.; Bruin Painting Corporation; Buchele, Inc.; 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.

Lionel Sawyer & Collins and A. William Maupin, Las Vegas; Meier & Fine, LLC, and Glenn F. Meier and Rachel E. Donn, Las Vegas; Hutchinson & Steffen, LLC, and Michael K. Wall, Las Vegas,
for Real Party in Interest Scott Financial Corporation.

Kemp, Jones & Coulthard, LLP, and J. Randall Jones, Las Vegas,
for Real Parties in Interest Bradley J. Scott and Scott Financial Corporation.

Snell & Wilmer, LLP, and Robin E. Perkins, Las Vegas,
for Real Party in Interest Ahern Rentals, Inc.

Holley, Driggs, Walch, Puzey & Thompson and Jeffrey R. Albregts, Las Vegas,
for Real Party in Interest Arch Aluminum and Glass Co.

Tony Ditty, Escondido, California,
for Real Party in Interest Atlas Construction Supply, Inc.

Premier Legal Group and R. Christopher Reade, Las Vegas,
for Real Party in Interest Cellcrete Fireproofing of Nevada, Inc.

Grant Morris Dodds PLLC and Steven L. Morris, Henderson,
for Real Party in Interest Camco Pacific Construction Co., Inc.

Greenberg Traurig, LLP, and Mark E. Ferrario, Tami Cowden, and Moorea Katz, Las Vegas,
for Real Parties in Interest Club Vista Financial Services, LLC; and Tharaldson Motels II, Inc.

Koch & Scow, LLC, and David R. Koch, Henderson,
for Real Parties in Interest Creative Home Theatre, LLC; and Renaissance Pools & Spas, Inc.

T. James Truman & Associates and T. James Truman, Las Vegas,
for Real Parties in Interest Dave Peterson Framing, Inc.; E&E Fire Protection, LLC; Noorda Sheet Metal Company; Pressure Grout Company; and Professional Door and Mill Works, LLC.

Williams & Associates and Donald H. Williams, Las Vegas,
for Real Parties in Interest Eza, P.C.; Harsco Corporation; and Patent Construction Systems.

Fennemore Craig Jones Vargas and David W. Dachelet, Las Vegas,
for Real Party in Interest Ferguson Fire and Fabrication, Inc.

Watt, Tieder, Hoffar & Fitzgerald, LLP, and David R. Johnson, Las Vegas,
for Real Party in Interest Granite Construction Company.

Dickinson Wright PLLC and Eric Dobberstein, Las Vegas,
for Real Party in Interest Insulpro Projects, Inc.

Keith E. Gregory & Associates and Keith E. Gregory, Las Vegas,
for Real Party in Interest Jeff Heit Plumbing Co., LLC.

Varricchio Law Firm and Philip T. Varricchio, Las Vegas,
for Real Parties in Interest John Deere Landscape, Inc.; and Supply Network, Inc.

Smith & Shapiro, LLC, and James E. Shapiro, Henderson,
for Real Party in Interest Las Vegas Pipeline, LLC.

Jolley Urga Wirth Woodbury & Little and Martin A. Little, Las Vegas,
for Real Parties in Interest Nevada Prefab Engineers; Papé Material Handling; and Steel Engineers, Inc.

Pezzillo Lloyd and Jennifer R. Lloyd, Las Vegas,
for Real Parties in Interest Northstar Concrete, Inc.; and Tri City Drywall, Inc.

Brian K. Berman, Las Vegas,
for Real Party in Interest Ready Mix, Inc.

Law Office of Hayes & Welsh and Garry L. Hayes, Henderson,
for Real Party in Interest Sunstate Companies, Inc.

Procopio, Cory, Hargreaves & Savitch, LLP, and Andrew J. Kessler, San Diego, California,
for Real Party in Interest Uintah Investments, LLC.

Wilson, Elser, Moskowitz, Edelman & Dicker, LLP, and Reuben H. Cawley, Las Vegas,
for Real Party in Interest Zitting Brothers Construction, Inc.

Cabinetec, Inc.; Concrete Visions, Inc.; Custom Select Billing, Inc.; Gemstone Development West, Inc.; Hydropressure Cleaning; Inquipco; Republic Crane Service, LLC,
In Pro Se.

BEFORE HARDESTY, C.J., DOUGLAS and CHERRY, JJ.

OPINION

By the Court, HARDESTY, C.J.:

In this writ proceeding, we must determine whether a subordination agreement that subordinates a lien for original land financing to a new construction deed of trust affects the priority of a mechanic's lien for work performed after the date of the original loan but before the date of the construction deed of trust. Because contractual partial subordination differs from complete subordination, we agree that a contractual partial subordination by creditors of a common debtor do not subordinate a first priority lien to a mechanic's lien. Further, nothing in NRS 108.225 changes the priority of a mechanic's lien to a partially

subordinated lien recorded before the mechanic's lien became effective. Thus, the priority of the mechanic's lien remains junior to the amount secured by the original senior lien.

PROCEDURAL AND FACTUAL HISTORY

Gemstone Apache, LLC (Apache), intended to develop a mixed-use property (Manhattan West) in Las Vegas. Real party in interest Scott Financial Corporation (SFC) made multiple loans to Apache for this purpose. The first three loans, which were recorded in July 2006, totaled $38 million (the Mezzanine Deeds of Trust) and financed the purchase of the property. In April 2007, petitioner APCO Construction (APCO),[1] the contractor hired by Apache, began construction on Manhattan West, setting the priority date for mechanic's lien services. In May and October of 2007, the Mezzanine Deeds of Trust were amended to secure additional funds for the project.[2]

In early 2008, Gemstone Development West, LLC (GDW), purchased Manhattan West from Apache, assuming Apache's loan obligations. To obtain financing for construction, GDW borrowed an additional $110,000,000 from SFC (the Construction Deed of Trust), recording the deed of trust on February 7, 2008. As part of the overall

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[1]There are multiple petitioners appearing in this matter, and petitioners have filed a joint petition with this court. We collectively refer to petitioners as APCO.

[2]Although APCO frames these amendments as a refinance, the parties present no argument regarding whether these amendments served to refinance the Mezzanine Deeds of Trust or what effect a refinance would have on lien priority, and thus, we do not consider this issue. *See Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006).

transaction, SFC and GDW entered into a subordination agreement subordinating the Mezzanine Deeds of Trust to the Construction Deed of Trust. SFC indicated that its intent for the subordination agreement was for SFC to determine "in what order SFC's debts would be satisfied." The subordination agreement did not state whether the subordination was complete or partial, nor did it address the priority of any potential mechanics' liens.

The relationship between APCO and GDW deteriorated. APCO stopped work on Manhattan West and filed suit against GDW, SFC, and others. SFC and APCO both moved for summary judgment on the issue of lien priority. SFC argued that the subordination agreement partially subordinated the Mezzanine Deeds of Trust to the Construction Deed of Trust, giving the Construction Deed of Trust senior priority for $38 million and leaving APCO's mechanics' liens unaffected. APCO argued that the subordination agreement completely subordinated the Mezzanine Deeds of Trust to the Construction Deed of Trust, prioritizing the Mezzanine Deeds of Trust after APCO's mechanics' liens and the Construction Deed of Trust. It further argued that NRS 108.225 precluded the Construction Deed of Trust from taking priority over APCO's mechanics' liens.

The district court initially granted summary judgment in favor of APCO, but, after SFC filed a motion for reconsideration, the district court granted summary judgment in favor of SFC.[3] The district

[3]APCO argues that the district court erred in reconsidering the motion. APCO's argument is without merit because NRCP 54(b) permits the district court to revise a judgment that adjudicates the rights of less than all the parties until it enters judgment adjudicating the rights of all

continued on next page...

court determined that the subordination agreement only partially subordinated the Mezzanine Deeds of Trust to the Construction Deed of Trust and left the mechanics' liens in the second-priority position. APCO petitioned for a writ of mandamus[4] to compel the district court to vacate its order and recognize APCO's mechanics' liens as holding a first priority.

DISCUSSION

"A writ of mandamus is available to compel the performance of an act that the law requires as a duty resulting from an office, trust, or station or to control an arbitrary or capricious exercise of discretion." *Int'l Game Tech., Inc. v. Second Judicial Dist. Court*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008) (internal citation omitted); *see* NRS 34.160. We exercise our discretion to entertain this writ petition because an important issue of law requires clarification—whether a mechanic's lien takes priority over a contractually subordinated debt by creditors of a common debtor either because (1) the subordination agreement constitutes a complete subordination, or (2) NRS 108.225 (Nevada's mechanic's lien statute) precludes the partial subordination of an existing lien.

...continued
the parties. *See Bower v. Harrah's Laughlin, Inc.*, 125 Nev. 470, 479, 215 P.3d 709, 716 (2009). Here, the district court's order determining lien priority adjudicated the rights of only a few of the parties.

[4]In the alternative, APCO petitions for a writ of prohibition, arguing that the district court did not have authority to rehear the case. We conclude, however, that a writ of prohibition is improper here because the district court had jurisdiction to hear and determine the motion to reconsider pursuant to NRCP 54(b). *See Goicoechea v. Fourth Judicial Dist. Court*, 96 Nev. 287, 289, 607 P.2d 1140, 1141 (1980) (stating that this court will not issue a writ of prohibition "if the court sought to be restrained had jurisdiction to hear and determine the matter under consideration").

Contractual subordination allows creditors of a common debtor to contractually rearrange the priority of their enduring liens or debt positions. *See* Robin Russell, *Distinction Between Contractual and Equitable Subordination*, 2 Tex. Prac. Guide: Fin. Transactions § 10:10 (Robin Russell & J. Scott Sheehan eds., 2014); *see also* George A. Nation, III, *Circuity of Liens Arising From Subordination Agreements: Comforting Unanimity No More*, 83 B.U. L. Rev. 591, 591-92 (2003) (describing subordination). Central to this case is the distinction between complete and partial contractual subordination, which differ on their rearrangements of the priorities of lienholders.

In a complete subordination, the agreement subordinating the senior lien to a junior lien effectively also subordinates the senior lien to intervening liens.[5] *See* George A. Nation, III, *Circuity of Liens Arising From Subordination Agreements: Comforting Unanimity No More*, 83 B.U. L. Rev. 591, 593 (2003). Here, for example, the Mezzanine Deeds of Trust would simply become junior to the Construction Deed of Trust, which would remain junior to the mechanics' liens, thus moving the mechanics' liens to first priority. In contrast, partial subordination gives a junior lien

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[5]Complete subordination occurs when the effect of a subordination agreement subordinates the first-priority lien to the third-priority lien but also has the effect of subordinating the first-priority lien to the second-priority lien. For example, there are three liens on a property with the following priority: lien A for $10,000, lien B for $5,000, and lien C for $20,000. Complete subordination would mean that the subordination agreement between the holders of lien A and lien C resulted in the following priority: lien B for $5,000, lien C for $20,000, and then lien A for $10,000. *See* George A. Nation, III, *Circuity of Liens Arising From Subordination Agreements: Comforting Unanimity No More*, 83 B.U. L. Rev. 591, 593 (2003).

priority over a senior lien to the extent that it does not affect the priority of the intervening lien; thus, the junior lien only has priority over the intervening lien in the amount of the senior lien.[6] *Id.* at 593-94; *Caterpillar Fin. Servs. Corp. v. Peoples Nat'l Bank, N.A.*, 710 F.3d 691, 693-94 (7th Cir. 2013). In other words, in partial subordination, the priority of liens is contractually rearranged without affecting the position of any intervening lien. *Caterpillar*, 710 F.3d at 693-94. Here, the Construction Deed of Trust would partially subordinate the Mezzanine Deeds of Trust, giving the Construction Deed of Trust $38 million in first priority, leaving the mechanics' liens in second priority, and placing the remainder of the Construction Deed of Trust in third priority over the Mezzanine Deeds of Trust.

At issue is whether the subordination agreement effected a complete subordination and whether Nevada caselaw and statutes preclude partial subordination.

The subordination agreement effected a partial subordination

APCO argues that the district court erred when, in granting summary judgment in favor of SFC, it determined that the subordination agreement was intended to create a partial subordination, not a complete

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[6]Partial subordination occurs when the effect of a subordination agreement subordinates a first-priority lien to a third-priority lien without affecting the priority of the second lien. For example, using the factual scenario from footnote 4, partial subordination occurs when the holders of lien A and lien C agree to subordinate lien A to lien C. After the agreement, the lien priority would be lien C for $10,000, lien B for $5,000, the remaining amount of lien C ($10,000), and then lien A for $10,000. *See* George A. Nation, III, *Circuity of Liens Arising From Subordination Agreements: Comforting Unanimity No More*, 83 B.U. L. Rev. 591, 593-94 (2003).

subordination. We review an order granting summary judgment de novo, viewing all evidence "in a light most favorable to the nonmoving party." *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). We have held that "[s]ummary judgment is appropriate under NRCP 56 when the pleadings, depositions, answers to interrogatories, admissions, and affidavits, if any, that are properly before the court demonstrate that no genuine issue of material fact exists, and the moving party is entitled to judgment as a matter of law." *Id.* at 731, 121 P.3d at 1031. Additionally, "[w]hen the facts in a case are not in dispute, contract interpretation is a question of law, which this court reviews de novo." *Lehrer McGovern Bovis, Inc. v. Bullock Insulation, Inc.*, 124 Nev. 1102, 1115, 197 P.3d 1032, 1041 (2008).

Different courts have reached different conclusions about whether a general subordination agreement effects complete or partial subordination. *See Caterpillar*, 710 F.3d at 693-94; *In re Price Waterhouse Ltd.*, 46 P.3d 408, 410 (Ariz. 2002); *see also* George A. Nation, III, *Circuity of Liens Arising From Subordination Agreements: Comforting Unanimity No More*, 83 B.U. L. Rev. 591, 592-93 (2003). The minority view concludes that a general subordination agreement results in complete subordination. *See, e.g., AmSouth Bank, N.A. v. J & D Fin. Corp.*, 679 So. 2d 695, 698 (Ala. 1996). Relying on *Black's Law Dictionary*'s definition of "subordination agreement," this view contends that "[b]y definition, 'subordination' contemplates a reduction in priority. Nothing in the definition contemplates *raising* a lower priority lienholder up to the position of the subordinating party." *Id.* Thus, this view holds that lienholders can only step into the shoes of another lienholder when the

agreement explicitly indicates that there is a transfer of priority rights. *Id.*

In contrast, the United States Court of Appeals for the Seventh Circuit adopted the majority approach and held in favor of partial subordination when the subordination agreement was silent on the issue. *Caterpillar*, 710 F.3d at 693-94. This approach holds that nonparties are unaffected by the subordination agreement and "simply swaps the priorities of the parties to the subordination agreement." *Id.* It reasoned that the party agreeing to subordinate its higher-priority lien surely wants the subsequent loan to occur so that the debtor would be strengthened, but that complete subordination would "drop the subordinating creditor to the bottom of the priority ladder," thus benefiting "a nonparty to the subordination agreement." *Id.* Therefore, as a practical matter, the court "c[ould]n't think why [the subordinating party] would have insisted on complete subordination." *Id.* at 694.

We agree with the reasoning in *Caterpillar*. In the instant case, complete subordination would move APCO's mechanics' liens (nonparties to the subordination agreement) into the first-priority position and leave SFC's liens junior to all mechanics' liens. Partial subordination, however, would leave $38,000,000 of the Construction Deed of Trust in first priority and the mechanics' liens in the same position they were in prior to the subordination agreement. We cannot determine any reason SFC would have intended to completely subordinate the Mezzanine Deeds of Trust, only for APCO's mechanics' liens to then take the first-priority position. Moreover, this aligns with SFC's claimed intent for the subordination agreement—that it should be "allowed to freely contract the order of payment as between" itself. The subordination agreement neither

stated it intended to create complete subordination nor mentioned the mechanic's lien. Absent this clear intent, we conclude that a common-sense approach weighs in favor of partial subordination.

NRS 108.225 does not preclude partial subordination

APCO argues that, while parties may contractually subordinate the priorities of their liens, NRS 108.225 does not permit partial subordination, only complete subordination; specifically, APCO asserts that NRS 108.225 prevents SFC from partially subordinating the Mezzanine Deeds of Trust in favor of the Construction Deed of Trust. That statute, which protects the right to payment for those who have worked to improve property, states, in pertinent part, that mechanics' and materialmen's liens are senior to "[a]ny lien, mortgage or other encumbrance which may have attached to the property after the commencement of construction of a work of improvement." NRS 108.225(1)(a); *see In re Fontainebleau Las Vegas Holdings, LLC*, 128 Nev., Adv. Op. 53, 289 P.3d 1199, 1211 (2012); *Hardy Cos., Inc. v. SNMARK, LLC*, 126 Nev. 528, 538, 245 P.3d 1149, 1156 (2010). SFC argues that NRS 108.225 does not preclude other lienholders from contracting for a partial subordination with respect to their lien priorities. This court reviews questions of statutory construction de novo. *I. Cox Constr. Co. v. CH2 Invs., LLC*, 129 Nev., Adv. Op. 14, 296 P.3d 1202, 1203 (2013).

The statute gives priority to mechanics' liens over liens that attach after the commencement of the work of improvement. It does not, however, address subordination agreements between other lienholders.[7]

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[7]To be sure, contractual partial subordination differs from equitable subrogation, which we addressed in *In re Fontainebleau Las Vegas Holdings, LLC*, 128 Nev., Adv. Op. 53, 289 P.3d 1199, 1209-12 (2012)

continued on next page...

This court does not "fill in alleged legislative omissions based on conjecture as to what the [L]egislature would or should have done." *Falcke v. Cnty. of Douglas*, 116 Nev. 583, 589, 3 P.3d 661, 665 (2000) (internal quotations omitted). Therefore, we conclude that NRS 108.225 does not prohibit negotiations between lienholders with priority over mechanics' liens and those with lesser priority in situations where the mechanics' liens will be left in exactly the same position as if the subordination agreement had never occurred. In other words, the statute does not preclude partial subordination.

Here, when APCO began work on Manhattan West, it did so with notice of SFC's Mezzanine Deeds of Trust and knowledge that its mechanics' liens would be in second priority to those liens. Crucially, nothing about the subordination agreement alters the amount of debt that APCO was junior to, and thus, the subordination agreement does not violate NRS 108.225. To read the statute in a way that would grant APCO first priority even though the subordination agreement did not prejudice

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...continued
(concluding that NRS 108.225 precludes the application of equitable doctrines that would advance the priority of a junior lienholder above the priority of a mechanic's lien). We note that *Fontainebleau*'s distinguishing factor is that the mechanic's lien claimants there were *parties* to the subordination agreement and attempted to subordinate their priority positions despite NRS 108.225's constraints. *Id.* at 1208. Unlike *Fontainebleau*, APCO is not a party to the subordination agreement and the subordination agreement has not changed APCO's priority *position*. Here, the contractual partial subordination arises as a result of a subordination agreement, not equity principles. *See, e.g., Bratcher v. Buckner*, 109 Cal. Rptr. 2d 534, 539-40 (Ct. App. 2001) (court relied on subordination agreement, not equitable principles, "to enforce the objective intent of the parties").

APCO's lien position—or change APCO's status whatsoever—would be an over-reading of the statute.

CONCLUSION

The district court did not improperly determine that the subordination contract effected a partial subordination. Further, NRS 108.225 does not preclude parties from contracting for a partial subordination.

Accordingly, we deny APCO's petition for a writ of mandamus and prohibition.

_____, C.J.
Hardesty

I concur:

_____, J.
Douglas

CHERRY, J., dissenting:

I would not entertain this writ at this stage of the proceedings. A short order stating that intervention is unnecessary at this time would suffice.

I am troubled by the fact that this court previously denied APCO's request for a stay, which would have allowed the district court to conclude this case with a final disposition that could then be appealed to this court.

In reviewing the district court's order granting Scott Financial Corporations' motion for summary judgment filed on May 7, 2012, some three years ago, the order states:

> IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that SFC's loan of $110,000,000.00 is in first position priority regarding the other claimants in the principal amount of $38,000,000.00. Thereafter, the mechanic lien claimants are in second position and the remainder of SFC's $110,000,000.00 principal amount loan, namely $72,000,000.00 in principal is in third position, and the Original Mezzanine Deeds of Trust along with the post-April 2007 Mezzanine Deeds of Trust are in junior priority position to the aforementioned encumbrances.
>
> IT IS FURTHER ORDERED, ADJUDGED AND DECREED a further stay of this litigation is granted pending a petition to the Nevada Supreme Court provided such is timely filed and for which no bond is required.

In cases such as this one, where the right to appeal a final disposition is still viable, the best practice would have been to not only deny APCO's motion for a stay, but also to immediately deny APCO's writ as soon as possible without the necessity of extensive appellate proceedings.

For the above reasons, I would agree the writ should be denied, but I worry that in considering the writ, we are sending the wrong message to the Nevada Bar concerning pretrial extraordinary writs.[1]

Cherry, J.
Cherry

[1]This is not to say that the published opinion by the majority is not an excellent appellate disposition because it is a well-written opinion affirming the district court in all respects.

Exhibit 2

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.; FERGUSON FIRE AND FABRICATION,

No. 61131

FILED

NOV 24 2015

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

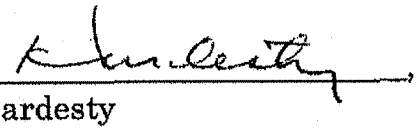
15-35998

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.

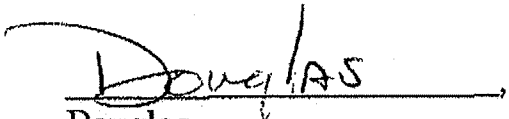
ORDER DENYING REHEARING

Rehearing denied. NRAP 40(c).

It is so ORDERED.



Hardesty, CJ.



Douglas, J.

CHERRY, J., dissenting: I would grant rehearing in this matter, for the reasons set forth in my previous dissent.

Cherry, J.
Cherry

cc: Sterling Law, LLC
Howard & Howard Attorneys PLLC
Marquis Aurbach Coffing
Peel Brimley LLP/Henderson
Maupin Naylor Braster
Andrew J. Kessler
Brian K. Berman
Watt, Tieder, Hoffar & Fitzgerald, LLP
Koch & Scow, LLC
Fennemore Craig Jones Vargas/Las Vegas
Williams & Associates
Dickinson Wright PLLC
Law Office of Hayes & Welsh
Meier & Fine, LLC
Kemp, Jones & Coulthard, LLP
Smith & Shapiro, LLC
Holley, Driggs, Walch, Fine Wray Puzey & Thompson/Las Vegas
Keith E. Gregory & Associates
Greenberg Traurig, LLP/Las Vegas
Jolley Urga Wirth Woodbury & Little
Hutchison & Steffen, LLC
Varricchio Law Firm
Premier Legal Group
Wilson, Elser, Moskowitz, Edelman & Dicker, LLP/Las Vegas
Snell & Wilmer, LLP/Las Vegas
Grant Morris Dodds PLLC
T. James Truman & Associates
Tony Ditty, Esq.