

1 d. In addition, on 7 of those samples, the scratch coat was not
2 properly roughened to receive the brown coat.

3 e. On 1 sample, only 50% of the brown coat was bonded to the
4 scratch coat.

5 In addition, on nearly all samples the thickness of the brown coat and the scratch coat failed to
6 conform to the thickness required by the Plans and Specifications.

7 50. On September 23, 2009, Big-D performed various additional pull tests
8 on the interior Padilla Work. HDR, IGT, Padilla, Big-D, Mr. Chin, two representatives from
9 EXPO (the stucco product manufacturer), and the experts retained by Big-D to perform the
10 testing were all present.

11 51. Based on these further tests, Mr. Chin further determined that the interior
12 Padilla Work also failed to comply with the Plans and Specifications. Mr. Chin further advised
13 IGT to reject the interior Padilla Work. Pretrial Order, Stipulated Fact ¶ 37; Trial Exhibit 52.
14 IGT followed Mr. Chin's advice and rejected the Padilla Work on the interior of the building
15 that same day. Padilla was on the Project site at the time IGT rejected the Padilla Work on the
16 interior of the building and it is undisputed that Padilla was aware that the work had been
17 rejected.

18 52. Given the relevant time constraints, IGT became concerned that the work
19 could impact its upcoming customer meetings. IGT believed there was not sufficient time for
20 the Padilla Work on the interior of the Project to be removed and replaced before the customer
21 meetings. As a result, the parties developed a temporary installation solution by which Big-D
22 would place a decorative colored solution over the Padilla Work on the interior of the building
23 in lieu of the stone that was specified under the Construction Agreement. Pretrial Order,
24 Stipulated Fact ¶ 38; Trial Exhibit 51.

25 53. Big-D completed of the modified Stone Repair Project in October 10,
26 2009.

1 **I. Big-D Requests Padilla to Assist in Defending Interior Work**

2 54. Both IGT and Big-D specifically and repeatedly requested Padilla to
3 participate in testing to determine whether the Padilla Work was suitable. Trial Exhibits 44-46.
4 These invitations were made both *during the construction and after the Padilla Work was*
5 *rejected.*

6 55. Yet, Padilla did nothing to investigate. Padilla concedes it did not
7 investigate whether the brown coat mixture was too stiff, Pretrial Order at 16:13, Designated
8 Testimony, Lopez Deposition at 129:2-9; Padilla concedes it did nothing to investigate whether
9 the two layers of its stucco were sufficiently compacted., *Id.* at 129:10-13, and Padilla concedes
10 it did not investigate whether the water content of the brown coat was sufficient at the time that
11 it was applied. *Id.* at 132:18-22.

12 56. Big-D requested that Padilla assist it in convincing IGT that the interior
13 Padilla Work was suitable. To this end, Big-D and Padilla participated in a conference call on
14 September 29, 2009. Trial Exhibit 53.

15 57. Big-D's project manager testified that the call was postponed for a week
16 after IGT's initial rejection of the interior Padilla Work on September 23, 2009 until September
17 29, 2009 specifically so that Ralph Padilla, the president of Padilla, could be participate; (Mr.
18 Padilla had been out of the country hunting birds in the previous weeks). Testimony of Brent
19 Brinkerhoff (Big-D). Big-D's project manager testified that during the conference call, Padilla
20 committed to get the EXPO product tested to determine whether the product was the cause of
21 the failure in the Padilla Work. Padilla committed to follow-up with Big-D once the tests were
22 completed and it had additional information.

23 58. In November 2009, Big-D again requested that Padilla assist Big-D to
24 defend its work. Big-D further advised Padilla that it was withholding payment until the issues
25 with the Padilla Work had been resolved with IGT. Trial Exhibit 58.

26 59. In response, Padilla stated that it unequivocally refused to participate
27 with Big-D in either providing additional information or participating in testing. Trial Exhibit
28

1 59. Rather, Padilla demanded that it receive immediate payment for the Padilla Work even
2 though IGT had rejected the work. Pretrial Order at 14:18, Designated Testimony, Lopez at
3 43-45. Padilla did not take any action to investigate the product because "*that cost money.*"
4 *Id.* at 44:1-2 (emphasis added).

5 60. Padilla's executive responsible for the Project made clear "we weren't
6 going to participate" in the testing and investigation of Padilla's Work. Pretrial Order at 15:14,
7 Designated Testimony, Lopez at 84: 12-17; *Id.* at 82-84; *Id.* at Exhibit 5.

8 Q. And do you recall, did Big-D in fact request Padilla to assist it to investigate the cause
9 of the failures of the product?

10 A. Yes

11 Q. And what, if anything, did Padilla do to assist Big-D to investigate the cause of the
12 product failure?

13 A. Ask for our money.

14 *Id.*, Lopez at 135:16-23.

15 61. Big-D continued to defend the Padilla Work for weeks after Padilla
16 refused to participate.

17 62. Ultimately, Big-D determined it had not identified any basis on which to
18 convince IGT that the Padilla Work on the interior of the building was suitable and proceeded
19 to resolve its dispute with IGT.

20 J. IGT Settlement.

21 63. After the removal and replacement of the Padilla Work, there was a
22 dispute between IGT and Big-D regarding amounts owed to Big-D for the Project. IGT
23 claimed it was entitled to backcharge Big-D for costs incurred, including costs related to the
24 rejected Padilla Work. As a result of the dispute, IGT withheld nearly \$2 million due to Big-D
25 under the Construction Agreement. Pretrial Order, Stipulated Fact ¶ 52.

26 64. In January 2011, Big-D and IGT agreed to settle their dispute and the
27 settlement was memorialized in a settlement agreement (the "IGT Settlement"). Pretrial Order,
28 Stipulated Fact ¶ 53; Exhibit 78

1 65. The IGT Settlement provided that Big-D would be paid amounts due for
2 the Project and IGT would back-charge Big-D for costs in the amount of \$945,054.00, which
3 amount included costs associated with the original failed stone work and the rejected Padilla
4 Work (the "IGT Backcharges"). Pretrial Order, Stipulated Fact ¶ 54.

5 66. The IGT Backcharges included the costs to remove and replace the
6 Interior Temporary Work with the work that was specified under the Construction Agreement.
7 IGT removed and replaced the Interior Temporary Work months after it was completed.
8 Pretrial Order, Stipulated Fact ¶ 55.

9 **K. Big-D Stops Payment.**

10 67. On September 25, 2009, Padilla prepared a payment request for
11 \$185,991.85. Pretrial Order, Stipulated Fact ¶ 39; Trial Exhibit 9. The payment request
12 indicated that Padilla had completed 85% of the Padilla Work and requested corresponding
13 payment from Big-D.

14 68. On September 29, 2009, Big-D's project manager (Brent Brinkerhoff)
15 signed the payment application in the approved box as he agreed that Padilla had in fact
16 completed 85% of the work. Trial Exhibit 9; Testimony of Brent Brinkerhoff. This was an
17 internal approval that allowed for Big-D's accounting department to "post" the cost of the work
18 completed by Padilla so that Big-D could internally track project cost incurred as of that date.

19 69. Upon this internal approval, Big-D's accounting department was to
20 verify that Padilla's payment application had properly credited amounts previously paid. In
21 mid-October, Big-D's accounting department identified that Padilla's payment application had
22 failed to credit Big-D for the \$25,000 initial payment to Padilla and would require correction.
23 Trial Exhibit 9 (see handwritten note); Testimony of Brent Brinkerhoff (Big-D). At that time,
24 Brent Brinkerhoff advised Big-D accounting department to hold on processing a correction to
25 the payment application amount as outstanding issues still remained with the Padilla Work.

26 70. Big-D placed several telephone calls to Padilla to inquire into the status
27 of testing on the interior Padilla Work that Padilla had committed to provide during the
28

1 September 29, 2009 teleconference. Several of these calls went unreturned and Padilla did not
2 otherwise respond with any update. At the end of October 2009, Big-D spoke with Padilla and
3 indicated that it was holding payment until the issues with the Padilla Work had been resolved.
4 See Trial Exhibit 57.

5 71. On October 28, 2009, Padilla sent Big-D a letter demanding payment of
6 \$174,657.00. Pretrial Order, Stipulated Fact ¶ 40; Trial Exhibit 57.

7 72. Big-D responded to the letter on November 3, 2009. Big-D advised
8 Padilla that IGT was taking the position that the Padilla Work had failed. As a result, Big-D
9 requested from Padilla information to defend the Padilla Work. Big-D indicated that it would
10 not release "any further" payment to Padilla until Padilla "assist[ed] Big-D in establishing that
11 Padilla met all of its obligations under the Subcontract Agreement and that the failure of the
12 product furnished and installed by Padilla was due to factors outside of Padilla's contractual
13 obligations." Pretrial Order, Stipulated Fact ¶ 41; Trial Exhibit 58.

14 73. On November 11, 2009, Padilla responded to Big-D's request for
15 information by stating, "it is Padilla Construction Company of Nevada's position that without
16 third party confirmation that its' [sic] work is sub-standard, Padilla Construction Company of
17 Nevada expects to be paid for its' [sic] work." Trial Exhibit 59. Padilla further stated:
18 "Without proper documentation supporting the allegations, Padilla Construction Company of
19 Nevada must decline [to participate in investigation or testing]." Pretrial Order, Stipulated Fact
20 ¶ 42; Trial Exhibit 59.

21 74. Brent Brinkerhoff testified that in early November, when reviewing his
22 weekly report to mark payments for subcontractors, he inadvertently marked for a check to be
23 released to Padilla. As a result, Big-D prepared a check in the amount of the invoice of
24 \$185,991.95. Pretrial Order, Stipulated Fact ¶ 43; Trial Exhibit 11.

25 75. During a subsequent teleconference between Big-D and Padilla
26 regarding the status of the Padilla work, Padilla referenced the payment received for the
27
28

1 Project. Mr. Brinkerhoff immediately investigated how payment was released to Padilla
2 because he had not intended for a check to be released.

3 76. On November 18, 2009, Big-D advised Padilla, both via electronic mail
4 and voicemail, that it inadvertently mailed the check and further advised that Big-D would be
5 putting a stop payment on the check. Pretrial Order, Stipulated Fact ¶ 44; Trial Exhibit 61.

6 77. Big-D stopped payment on the check prior to it clearing the bank. The
7 check was returned by Padilla's bank marked: "Return Reason -C Stop Payment." Pretrial
8 Order, Stipulated Fact ¶ 45; Trial Exhibit 12.

9 78. The evidence indicated that the release of the payment to Padilla was in
10 fact a mistake because:

11 a. The check drawn to Padilla failed to correct for the \$25,000
12 initial payment made to Padilla, causing an overpayment to Padilla;

13 b. The correspondence of October 28 and November 3, 2009 made
14 clear that Big-D was withholding payment to Padilla until issues with the Padilla Work
15 had been resolved; and

16 c. Both Brent Brinkerhoff (Project Manager) and Forrest McNabb
17 (Senior Vice President) adamantly testified that they had not intended to release
18 payment, were very surprised when they learned a check had been released,
19 immediately notified Padilla of the mistake, and immediately cancelled the check.

20 **L. Evidence Regarding Padilla Work.**

21 79. There was no evidence presented that there was a design flaw or other
22 design issues in the Plans and Specifications for the Padilla Work.

23 80. There is no evidence that any party imposed improper cure times upon
24 Padilla. Further, there was no credible evidence presented that the failures in the Padilla Work
25 were in any part caused by inadequate accommodation of cure times by Big D or that Big D did
26 anything after application of the brown coat in defiance of any clear admonition from Padilla to
27 the effect that anything that Big D was doing was inconsistent with the proper cure time.

1 81. Rather, the evidence presented was that the specific cure times were 2
2 days for the scratch coat and then 7 days for the brown coat (prior to installation of stone). The
3 evidence was that this is consistent with the cure times both recommended by the manufacturer
4 and the requirements of local building code. The evidence was that Big-D imposed quality
5 assurance procedures to ensure that the stone contractor did not install stone work over the
6 Padilla Work until after the 7-day cure time had elapsed.

7 Any of the foregoing Findings of Fact, that would more appropriately be
8 considered to be Conclusions of Law shall be so deemed.

9 From the foregoing Findings of Fact, the Court makes the following:

10 **CONCLUSIONS OF LAW**

11 **I. Padilla's Claims for Relief against Big-D All Fail**

12 In the operative pleading, Padilla's First Amended Complaint, Padilla has asserted three
13 claims for relief against Big-D: breach of contract (First Cause of Action); breach of the
14 implied covenant of good faith and fair dealing (Second Cause of Action); negligence per se
15 (Third Cause of Action). Padilla has also asserted a single claim for relief against F&D
16 ("Claim against Lien Release Bond").

17 **A. First Cause of Action (Breach of Subcontract Agreement)**

18 1. Padilla's First Cause of Action for breach of the Subcontract Agreement
19 fails because Padilla failed to demonstrate an essential element of its claim—that is performed
20 all obligations required under the Subcontract Agreement.

21 2. In Nevada, there are four elements to a claim for breach of contract: "(1)
22 formation of a valid contract; (2) performance or excuse of performance by the plaintiff; (3)
23 material breach by the defendant; and (4) damages." *Laguerre v. Nevada System of Higher*
24 *Education*, 837 F.Supp.2d 1176, 1180 (D. Nev. 2011).

25 3. "If there is anything well settled, it is that the party who commits the first
26 breach of the contract cannot maintain an action against the other for a subsequent failure to
27 perform." *Bradley v. Nevada-California-Oregon Railway*, 42 Nev. 411, 421, 178 P. 906, 908

1 (1919). "Payment of the purchase price is excused where respondent's breach was material."
2 *Thornton v. Agassiz Constr.*, 106 Nev. 676, 678, 799 P.2d 1106, 1108 (Nev. 1990) (citing 4 A.
3 Corbin, Corbin on Contracts § 977; *Hinckley v. Pittsburgh Bessemer Steel Co.*, 121 U.S. 264
4 (1886)).

5 4. As a condition precedent to payment, the Subcontract Agreement
6 required Padilla to properly complete the Padilla Work in accordance with the contract
7 documents and in a good and workmanlike manner:

- 8 • As outlined in "the *drawings and specifications*, including all addenda and
9 modifications issued prior to the execution of this Subcontract." Trial Exhibit
10 1, Section 1.1 (emphasis added).
- 11 • Including "that work generally set forth in the Subcontract, as well as all other
12 related work, including *all work reasonably necessary for a complete Project*,
13 and normally performed by your trade." *Id.*, Section 1.2 (emphasis added).
- 14 • "Every part of [Padilla's] work shall be executed in accordance with the
15 Subcontract Documents *in a workmanlike and skillful manner*." *Id.*, Section
16 1.15 (emphasis added).
- 17 • Padilla also agreed that, "all work shall be done in strict accordance with the
18 Subcontract Documents, *subject to the final approval of [Big-D], the Owner,*
19 *and Architect*." *Id.*, Section 1.1.5 (emphasis added).

20 5. Further, even if these express contractual provisions did not exist,
21 Nevada law is clear that, "[c]ommon law imposes an *implied warranty of workmanlike manner*
22 [on subcontractors], which has been defined as a duty to perform to a reasonably skillful
23 standard. *Olson v. Richard*, 120 Nev. 240, 247, 89 P.3d 31, 35 (Nev. 2004). "Moreover,
24 because contractors and subcontractors understand and accept these duties as a part of their
25 business, they cannot claim surprise when they are sued for a failure to act in a workmanlike
26 manner." *Id.*; see also *Daniel, Mann, Johnson & Mendenhall v. Hilton Hotels Corp.*, 98 Nev.
27 113, 642 P.2d 1086 (Nev. 1982) (upholding instruction to jury that a contractor "had an implied
28 duty to perform in a workmanlike manner").

6. The evidence is clear that the Padilla Work on both the interior and the
exterior of the Project failed for a number of reasons. As a result, Padilla has failed to prove

1 that it properly performed all work under the Subcontract Agreement and its First Claim for
2 Relief for breach of contract fails as a matter of law.

3 7. Because Big-D succeeded in proving that the Padilla Work did not
4 comply with the requirements of the Subcontract Agreement or Padilla's implied warranty to
5 perform in a workmanlike manner, Padilla is deemed to be the party who "first breached" the
6 Subcontract Agreement, excusing Big-D from performance in the form of payment to Padilla.

7 8. Because IGT rejected the Padilla Work and it was removed and replaced,
8 neither law nor equity require that Big-D pay Padilla *any* amount for work that was rejected
9 and removed. As a result, Padilla's claim for payment under the Subcontract Agreement fails
10 and judgment in favor of Big-D on Padilla's First Claim for Relief for Breach of Contract is
11 appropriate.

12 9. Padilla contends that Big-D breached the Subcontract Agreement
13 because Big-D failed to give Padilla written notice and an opportunity to cure prior to rejecting
14 the Padilla Work. This argument fails for several reasons:

15 a. In the Subcontract Agreement, Padilla agreed to be subject to the
16 Owner's decisions and actions and that Big-D "shall have all rights, remedies, powers,
17 and privileges as to, or against You which the Owner has against us." Trial Exhibit 1,
18 Section 1.1. Big-D, itself, was denied the opportunity to remove and replace the Padilla
19 Work on the interior of the building. IGT refused to allow Big-D to perform that work
20 and instead charged Big-D for the costs of such repair.

21 b. It was IGT—the Owner—not Big-D who rejected the Padilla
22 Work. Big-D, in fact, sought to defend the Padilla Work for some time after IGT's
23 direction to remove and replace the Work.

24 c. Further, even if the removal and replacement of the Padilla Work
25 on the exterior of the Project had been at Big-D's own initiative (which it was not), Big-
26 D had authority to remove and replace the Padilla Work under the emergency provision
27
28

1 of Section 3.5 of the Subcontract Agreement because it presented a safety risk given the
2 large panels of stone installed over the faulty Padilla Work.

3 d. Perhaps most glaringly, any failure of Big-D to allow Padilla an
4 opportunity to repair the Padilla Work on the exterior of the Project was without
5 prejudice given that Padilla adamantly refused to participate in the investigation and
6 remediation process on the interior Padilla Work—demonstrating the Padilla would not
7 have sought to repair the Padilla Work on the exterior of the building.

8 **B. Second Cause of Action (Breach of Implied Covenant of Good Faith and**
9 **Fair Dealing)**

10 1. Similarly, Padilla's Second Claim for Relief for breach of the implied
11 covenant of good faith and fair dealing also fails.

12 2. In Nevada, "[e]very contract imposes upon each party a duty of good
13 faith and fair dealing in its performance and enforcement." *A.C. Shaw Cont., Inc. v. Washoe*
14 *Cnty.*, 105 Nev. 913, 914, 784 P.2d 9, 9 (Nev. 1989) (quoting Nevada Revised Statute
15 ("N.R.S.") 104.1203. This implied covenant requires that parties "act in a manner that is
16 faithful to the purpose of the contract and the justified expectations of the other party." *Morris*
17 *v. Bank of Am. Nev.*, 110 Nev. 1274, 1278 n. 2, 886 P.2d 454, 457 n. 2 (Nev. 1994) (internal
18 quotation marks omitted).

19 3. A breach of the implied covenant of good faith and fair dealing occurs
20 when the terms of a contract are complied with but one party to the contract deliberately
21 contravenes the intention of the contract. *See Hilton Hotels v. Butch Lewis Prods.*, 107 Nev.
22 226, 232, 808 P.2d 919, 923 (Nev. 1991). To prevail on a theory of breach of the covenant of
23 good faith and fair dealing, a plaintiff must establish: (1) plaintiff and defendants were parties
24 to a contract; (2) defendants owed a duty of good faith to the plaintiff; (3) defendants breached
25 that duty by performing in a manner that was unfaithful to the purpose of the contract; and (4)
26 plaintiff's justified expectations were denied. *Perry v. Jordan*, 111 Nev. 943, 948, 900 P.2d
27 335, 338 (Nev. 1995).

1 4. The Nevada Supreme Court has held that good faith is a question of fact.
2 *Consolidated Generator-Nevada, Inc. v. Cummins Engine Co., Inc.*, 114 Nev. 1304, 1312, 971
3 P.2d 1251, 1256 (Nev. 1998).

4 5. Padilla failed to present any evidence that Big-D failed to act in good
5 faith under the Subcontract Agreement. While it is undisputed that Big-D did not pay Padilla
6 for the rejected work, there is no evidence that this failure was in bad faith. Rather, the
7 evidence suggested that Big-D did not pay Padilla for the Padilla Work because IGT had
8 rejected the Padilla Work. Big-D made extensive efforts to both: (a) defend the Padilla Work
9 and (b) to get Padilla to participate in the process. The evidence indicates that, notwithstanding
10 the existence of a dispute, Big-D acted in good faith.

11 6. As a result, Padilla's Second Claim for Breach of the Implied Covenant
12 of Good Faith and Fair Dealing in the Subcontract Agreement fails.

13 **C. Third Cause of Action (Negligence Per Se)**

14 1. NRS 624.624 is designed to ensure that general subcontractors promptly
15 pay subcontractors after the general contractor receives payment from the Owner associated
16 with work performed by the subcontractor.

17 2. By its own terms, NRS 624.624 yields to (a) payment schedules
18 contained in subcontract agreements and (b) contractual rights to withhold payments from a
19 subcontractor arising from deficient work.

20 3. Specifically, NRS 624.624 provides payments are due from a higher-
21 tiered contractor under "[a] written agreement with a lower-tiered subcontractor that includes a
22 schedule for payments," as follows:

- 23 (1) On or before the date payment is due; or
24 (2) Within 10 days after the date the higher-tiered contractor
25 receives payment for all or a portion of the work, materials or
26 equipment described in a request for payment submitted by the
27 lower-tiered subcontractor,

26 ↪ whichever is earlier

27 NRS 624.624(1)(a).

28

MARK R. DENTON
DISTRICT JUDGE

DEPARTMENT THIRTEEN
LAS VEGAS, NV 89156

1 4. Further, a general contractor has the right to withhold payment for
2 "[c]osts and expenses reasonably necessary to correct or repair any work which is the subject of
3 the request for payment ..." NRS 624.624(2)(a)(2)(II). NRS 624.624 does require that a
4 general contractor provide written notice to the subcontractor as to the basis for withholding
5 "on or before the date the payment is due." *Id.* at (3).

6 5. Here, it is undisputed that the Subcontract Agreement is a written
7 agreement between Big-D and Padilla. Accordingly, pursuant to NRS 624.624(1)(a) payment
8 is due to Padilla on the date specified in the Subcontract Agreement.

9 a. The Subcontract provided that Padilla was to be paid within ten
10 (10) days after IGT paid Big-D and after IGT accepted the Padilla Work. Trial Exhibit
11 1.³

12 b. Specifically, "we must have first received from the Owner the
13 corresponding periodic payment, *including the approved portion of your monthly*
14 *billing*, unless the Owner's failure to make payment was caused exclusively by us." *Id.*
15 at Section 4.2.

16 6. The Subcontract Agreement provided as follows:

17 a. Payment would be withheld from Padilla for "defective work not
18 remedied" and "your failure to perform any obligation made by You in this
19 Subcontract." *Id.* at Section 4.4(2) and (5).

20 b. "We may offset against any sums we owe You the amount of any
21 money You owe us." *Id.* at Section 4.5.

22 c. Padilla agreed to "indemnify and save harmless [Big-D]"
23 associated with claims arising from "the performance of work under this Subcontract or
24
25

26
27 ³ "Contractor will issue payment to Subcontractor by US Mail ... within ten (10) days of receiving payment from
28 the Owner." Section D.

1 any of the obligations contained in this Subcontract." *Id.* at Section 3.6.

2 7. Here, it is undisputed that IGT never accepted the Padilla Work.
3 Accordingly, payment to Padilla never became due. In fact, Padilla was aware on September
4 16, 2009 that IGT had rejected its work and had directed Big-D to remove and replace it work.
5 Notwithstanding this, Padilla submitted an Application for Payment on September 25, 2009.
6 Padilla had no reasonable expectation that Big-D would pay the September 25, 2009
7 application for payment given that Padilla was aware that its work had been rejected and
8 removed from the Project for failures.

9 8. Even if the payments to Padilla for the rejected Padilla Work had
10 become due, Big-D provided repeated written notices to Padilla of the failures in the Padilla
11 Work that complied with the requirements of NRS 624.624 including the following:

12 a. On September 11, 2009, Big-D provided Padilla management
13 immediate notice of the failures observed in the Padilla Work. Padilla's own project
14 records also demonstrate that Padilla's crews were aware of the separation issue and
15 had, themselves, advised Padilla management.

16 b. On September 15, 2009, Big-D provided Padilla additional notice
17 of the failures and requested that Padilla have the Expo product representative visit the
18 site to observe the work.

19 c. On September 16, 2009, Padilla was physically on the project site
20 and involved in the meeting when IGT gave the direction that the Padilla Work on the
21 exterior of the building was rejected as non-compliant.

22 d. On September 23, 2009, Padilla was on the site with Big-D and
23 two representatives from the EXPO product manufacturer to test the Padilla Work on
24 the interior of the building. Padilla was advised that day that the Padilla Work on the
25 interior of the building was rejected by IGT.
26
27
28

1 e. On September 29, 2009, Padilla participated in a telephone
2 conference with Big-D representatives in which Padilla committed to provide additional
3 information to Big-D to defend the Padilla Work.

4 f. In a teleconference between Padilla and Big-D in late October
5 2009; Big-D advised Padilla that Big-D would not release payment to Padilla until
6 issues with the Padilla Work had been resolved by IGT. Padilla confirmed that
7 teleconference conversation in a letter dated October 28, 2009.

8 g. Big-D unequivocally advised Padilla by a letter dated November
9 3, 2009 that Big-D (i) was requesting Padilla's help to defend the Padilla work and (ii)
10 was withholding payment from Padilla until the issues with the Padilla Work had been
11 resolved.

12 9. Padilla's claim under NRS 624.624 is based on the following:

13 a. Padilla submitted its Application for Payment to Big-D on
14 September 25, 2009.

15 b. Big-D's letter repeating previous conversations regarding
16 withholding was received on November 3, 2009.

17 c. Padilla is entitled to payment as a matter of law under NRS
18 624.624 because Big-D's letter formally advising of the withholding was sent 39 days
19 after Padilla submitted its application for payment.

20 d. Padilla contends that NRS 624.624 imposed a requirement that
21 written notice of withholding be provided within 30 days and Big-D did not provide
22 notice until 39 days after submission of the September 25, 2009 Application for
23 Payment.

24 10. Padilla's argument fails for several reasons:

25 a. First, even if the 30-day requirement for subcontracts without a
26 written schedule for payments were to apply, it is undisputed that Big-D advised Padilla
27 within 30-days that the Padilla work was failing or had been rejected. Big-D notified
28

1 Padilla via several contemporaneous project emails. This correspondence is sufficient
2 to meet NRS 624.624's mandate to provide written notice of withholding because a
3 subcontractor has no reasonable expectation of payment for work that it has been
4 advised is rejected and is to be replaced.

5 b. Second, even if the only written notice that could be considered
6 for purposes of NRS 624.624's written notice requirement were Big-D's November 3,
7 2009 letter advising Padilla it would not be paid until the dispute over workmanship had
8 been resolved, this letter is still sufficient to constitute required written notice to justify
9 withholding payment.

10 i. The issues with resolving the dispute over the Padilla
11 Work were ongoing between September 2009 and November 2009—with an
12 active investigation and dialogue proceeding between Big-D and IGT and Big-D
13 actively requesting participating and information from Padilla.

14 ii. Big-D formally advised Padilla unequivocally in writing
15 that it intended to withhold payment 39 days after Padilla's submission of the
16 Application for Payment.

17 iii. The active dialogue, combined with the November 3,
18 2009 written notice, constitutes sufficient notice to meet the requirements of
19 NRS 624.624.

20 11. Notably, even if this Court were to determine that NRS 624.624 did
21 require payment from Big-D to Padilla associated with the September 25, 2009 Application for
22 Payment (which it does not determine), the following additional factors would be required to be
23 considered:

24 a. First, a determination that payment is due pursuant to NRS
25 624.624 because a contractor's failure to provide timely written notice of withholding to
26 a subcontractor does not bar the contractor from claiming backcharges or damages
27
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1 against the subcontractor. As a result, Big-D's counterclaim against Padilla would
2 remain unaffected by Padilla's Third Claim for Relief.

3 b. Second, the evidence indicates that Padilla's September 25, 2009
4 application for payment failed to credit Big-D for the \$25,000 initial payment to Padilla.
5 As a result, Big-D would be entitled to an offset of \$25,000 for amounts claimed in the
6 September 25, 2009.

7 **II. Padilla Claim for Relief Against F&D Fails**

8 Although F&D's renewed Motion for Judgment as a Matter of Law at the close
9 of the case is not meritorious as to the bases on which it is made insofar as it relates to the
10 mechanic's lien and bond issues, Padilla's claim for relief against F&D fails because Padilla
11 has not proved that it is entitled to any additional payment from Big-D (as discussed in Section
12 II *supra*). In fact, because this Court is awarding damages to Big-D (rather than Padilla), there
13 are no damages to collect against F&D under the bond.

14 **III. Big-D Is Entitled to a Judgment in the Amount of \$600,000.00 on Its Counterclaim**
15 **against Padilla**

16 Big-D's First Claim for Relief in its Counterclaim is for Breach of Contract against
17 Padilla. Big-D asserts that Padilla failed to properly install the Padilla Work and that Big-D
18 incurred substantial damages associated with removing and replacing the Padilla Work. Based
19 upon the foregoing Findings of Fact, Big-D succeeded in proving that it is entitled to damages
20 against Padilla as follows:

21 1. First, the evidence indicates that Padilla failed to install the Padilla Work
22 in compliance with the Plans and Specifications in several material respects, including: failing
23 to properly hydrate the stucco product, failing to properly score the scratch coat, failing to
24 install the brown and scratch coats at the proper thickness, and failing to properly compact the
25 brown coat against the scratch coat.

1 2. The Subcontract Agreement required Padilla to perform the work in
2 compliance with the plans and specifications and to provide a complete and functional stucco
3 system.

4 3. Given that a material requirement of the Subcontract Agreement was for
5 Padilla to install the Padilla Work in a good and workmanlike manner and in accordance with
6 the Plans and Specifications, this failure constitutes a material breach of the Subcontract
7 Agreement that entitles Big-D to recover damages against Padilla.

8 4. Second, even if these express contractual provisions did not exist,
9 Nevada law is clear that, "[c]ommon law imposes *an implied warranty of workmanlike manner*
10 [on subcontractors], which has been defined as a duty to perform to a reasonably skillful
11 standard. *Olson*, 120 Nev. at 247, 89 P.3d at 35. "Moreover, because contractors and
12 subcontractors understand and accept these duties as a part of their business, they cannot claim
13 surprise when they are sued for a failure to act in a workmanlike manner." *Id.*; see also *Daniel*,
14 *Mann, Johnson & Mendenhall*, 98 Nev. 113, 642 P.2d 1086, 1087 (upholding instruction to
15 jury that a contractor "had an implied duty to perform in a workmanlike manner"). By failing
16 to provide an acceptable stucco system, Padilla breached the Subcontract Agreement. As a
17 result, Padilla is not entitled to payment from Big-D for work that was not compliant with the
18 Subcontract Agreement and was ultimately rejected by the project owner, IGT.

19 5. Third, the Subcontract Agreement also required Padilla to "indemnify
20 and save harmless [Big-D]" associated with claims arising from "the performance of work
21 under this Subcontract or any of the obligations contained in this Subcontract." Trial Exhibit 1
22 at Section 3.6.

23 6. It is undisputed that Padilla did not pay Big-D any amounts associated
24 with damage caused by the Padilla Work—constituting a material breach of Padilla's obligation
25 to indemnify Big-D.

26 7. This Court determines that Big-D proved that it was required by IGT to
27 remove and replace the Padilla Work. Big-D proved that it incurred costs to replace the Padilla
28

1 Work and to replace other work that was damaged by the Padilla Work, including portions of
2 stone work.

3 8. Accordingly, this Court determines that Big-D proved it is entitled to
4 recover damages against Padilla. Because the parties stipulated as to the amount of damages to
5 be awarded to Big-D if Big-D were to prevail upon its Counterclaim, Big-D is entitled to a
6 judgment against Padilla in the amount of \$600,000—the stipulated damage figure. *See* Joint
7 Stipulation as to Damages (filed December 3, 2014).

8 **IV. No Spoliation Instruction Is Appropriate or Required.**

9 No spoliation remedy is appropriate for five independent reasons:

10 1. First, Nevada recognizes an “adverse inference” for negligent destruction
11 of evidence.

12 a. An “adverse inference” “is permissible, not required, and it does
13 not shift the burden of proof.” *Bass-Davis v. Davis*, 122 Nev. 442, 448, 134 P.3d 103,
14 106-07 (Nev. 2006). An “adverse inference” instruction informs a jury that it is
15 “permitted” to draw an inference that such evidence may have been unfavorable to the
16 destroying party.

17 b. Here, Padilla, Big-D, and IGT witnesses observed the separation
18 of the Padilla Work. Contemporaneous photographs capture the separation of the
19 Padilla Work. Both Big-D and IGT retained expert consultants to test the Padilla Work.
20 And, finally, there are existing samples remaining of the Padilla Work (without stone
21 installed over top).

22 As a result, there were several pieces of admissible evidence that this Court observed at trial
23 and testimony it consider to determine the Padilla Work failed. Even if this Court allowed
24 itself the “permission” to infer that the portions of the Padilla Work that were discarded may
25 have contained unfavorable evidence to Big-D, this permissible inference does not counter the
26 large amount of evidence that the Padilla Work failed.

1 2. Second, Padilla is not entitled to a spoliation remedy because it failed to
2 seasonably request or demand such a remedy. *Cf. Gault v. Nabisco Biscuit Co.*, 184 F.R.D.
3 620, 622 (D. Nev. 1999) (a party who waits an unreasonable period of time before moving to
4 enforce discovery waives enforcement remedies). Here, Padilla was notified in September
5 2009 that IGT had ordered Big-D to remove and replace its work. Further, Padilla initiated this
6 action in January 2010—at a time when portions of the Padilla Work (without stone) remained
7 installed at the Project. Discovery in this case closed in July 2012. As a result, Padilla was
8 provided a meaningful opportunity to participate in any testing and inspections sufficient to
9 make a spoliation instruction inappropriate.

10 3. Third, it is improper to issue a spoliation sanction against Big-D for
11 removing and destroying the portions of the Padilla Work on which stucco was installed—Big-
12 D did not have custody and control over the evidence.

13 a. Spoliation sanctions are only appropriately issued to a party
14 “controlling the evidence.” *Bass-Davis*, 122 Nev. at 450. “Obviously, the party
15 charged with spoliation must have been in the possession, custody, or control of the
16 evidence in order for the duty to preserve to arise. The party requesting sanctions for
17 spoliation has the burden of proof on such a claim.” *Hammann v. 800 Ideas, Inc.*, 2010
18 U.S. Dist. LEXIS 131097 at *21 (D. Nev. 2010) (denying motion for spoliation related
19 to records of certain 1-800 numbers when there was no evidence that party was in the
20 “possession, custody, or control” of relevant documents, even when party had business
21 relationship with party in control of such documents); *see also Rhodes v. Robinson*, 399
22 Fed. Appx. 160, 165 (9th Cir. 2010) (discussing required proof that “the party with
23 control over [evidence] had a duty to preserve it”) (emphasis added).

24 b. The evidence was clear that IGT—not Big-D—controlled the
25 Project site and that Big-D was directed to remove and replace the Padilla Work on an
26 expedited basis. Padilla was invited to participate in the testing that Big-D did perform
27
28

1 and there is no evidence that Big-D excluded Padilla from any available opportunities to
2 inspect the Padilla Work.

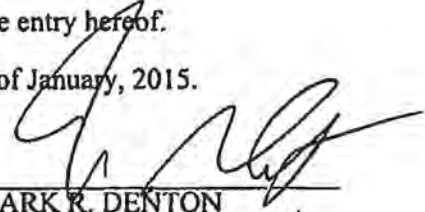
3 4. Finally, and perhaps most compelling, Padilla refused to participate in
4 testing or investigation to defend the Padilla Work to IGT—even after several requests from
5 Big-D for Padilla's assistance. In fact, Padilla's representatives were clear that Padilla did not
6 intend to participate in any such testing or investigation. As a result, it would be improper to
7 order a spoliation remedy when Padilla did not intend to take additional advantage of additional
8 inspection opportunities even if they had been available.

9 Any of the foregoing Conclusions of Law that would more appropriately be
10 considered to be Findings of Fact should be so deemed.

11 NOW, THEREFORE, IT IS HEREBY SO FOUND AND CONCLUDED; and

12 IT IS FURTHER ORDERED that Big D shall have judgment accordingly, the
13 same to be entered concurrently with the entry hereof.

14 DATED this 22^d day of January, 2015.

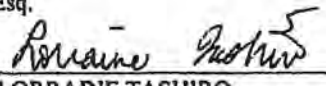
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16 
17 MARK R. DENTON
18 DISTRICT JUDGE

19 CERTIFICATE

20 I hereby certify that on or about the date filed, and as a courtesy not comprising formal written
21 notice of entry, this document was e-served or a copy of this document was placed in the attorney's folder in the
22 Clerk's Office or mailed to:

23 Bruce R. Mundy, Esq.
24 200 South Virginia Street, Eighth Floor
25 Post Office Box 18811
26 Reno, NV 89511-0811

27 HOLLAND & HART
28 Attn: Melissa A. Beutler, Esq.

29 
30 LORRAINE TASHIRO
31 Judicial Executive Assistant
32 Dept. No. XIII

MARK R. DENTON
DISTRICT JUDGE

DEPARTMENT THIRTEEN
LAS VEGAS, NV 89166

EXHIBIT “2”

EXHIBIT “2”

1 JUDGE

2 DISTRICT COURT
3 CLARK COUNTY, NEVADA

4 PADILLA CONSTRUCTION COMPANY OF
5 NEVADA, a Nevada corporation,

6 Plaintiff,

7 vs.

8 BIG-D CONSTRUCTION CORP., a Utah
9 corporation, FIDELITY & DEPOSIT
10 COMPANY OF MARYLAND, a Maryland
11 corporation, DOE CORPORATION I through
12 DOE CORPORATION V, and ROE I through
13 ROE V individuals;

14 Defendants.

15 BIG-D CONSTRUCTION CORP., a Utah
16 corporation,

17 Counter-Claimant,

18 vs.

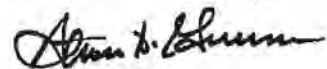
19 PADILLA CONSTRUCTION COMPANY OF
20 NEVADA, a Nevada corporation,

21 Counter-Defendant.

CASE NO.: A-10-609048-C
DEPT. NO.: XIII

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JUDGMENT



CLERK OF THE COURT

22 This matter having come on for a trial on the merits beginning on December 2, 2014.
23 Plaintiff Padilla Construction Company of Nevada ("Padilla"), appearing by and through its
24 counsel, Bruce Mundy, Esq.; Defendant/Counter-Claimant/Third Party-Plaintiff BIG D
25 CONSTRUCTION CORP. ("Big-D") and Defendant FIDELITY & DEPOSIT COMPANY OF
26 MARYLAND ("F&D"), appearing by and through their counsel of record, Melissa A. Beutler,
27 Esq. of Holland & Hart LLP.

28 The Court having received the testimony of witnesses through examination and cross-
examination by the Parties' counsel, received, reviewed, and considered all admissible

MARK R. DENTON
DISTRICT JUDGE

DEPARTMENT THIRTEEN
LAS VEGAS, NV 89155

1 evidence, as well as received, reviewed, and considered the Parties' pleadings and other various
2 filings;

3 The Court having taken the matter under consideration and advisement;

4 The Court having entered Findings of Fact and Conclusions of Law;

5 The Court enters the following Judgment as to all claims in this matter:

6 IT IS ORDERED, ADJUDGED, AND DECREED that judgment is to be entered in
7 favor of Big-D and against Padilla on Big-D's First Claim for Relief against Padilla on its
8 Counterclaim in the principal amount of \$600,000.00 plus any interest, costs, and attorneys'
9 fees permitted by applicable law or contract requirements, in accordance with, and subject to,
10 the Joint Stipulation and Order thereon entered herein on December 3, 2014.

11 IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Padilla's Fourth
12 Claim for Relief against Defendant F&D be, and the same hereby is, DISMISSED WITH
13 PREJUDICE, and (a) the lien recorded by Padilla on November 12, 2009 (Instrument Number
14 200911120000338) in the amount of \$164,674.15 is hereby RELEASED AND
15 DISCHARGED; and (b) the bond issued by Defendant F&D as surety and Big-D as principal
16 on February 24, 2010 (and recorded as Instrument Number 201002240003862) in the amount of
17 \$247,011.22 is hereby RELEASED AND DISCHARGED; and

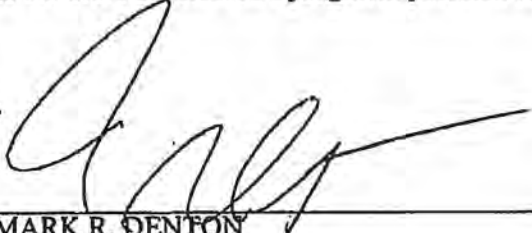
18 IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the following claims
19 in Padilla's First Amended Complaint be, and the same hereby are, DISMISSED WITH
20 PREJUDICE:

- 21 a. First Claim for Relief—Breach of Contract
22 b. Second Claim for Relief—Breach of Implied Covenant of Good Faith
23 c. Third Claim for Relief—Negligence Per Se
24 d. Four Claim for Relief— Claim Against Lien Release Bond; and
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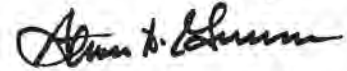
IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the within Judgment shall be the Final Judgment in this matter and is therefore considered a judgment pursuant to NRCP 54.

Dated this 22^d day of January, 2015.



MARK R. DENTON
DISTRICT JUDGE

EXHIBIT 22


CLERK OF THE COURT

ORDR

Melissa A. Beutler
Nevada Bar No. 10948
BIG-D CONSTRUCTION CORP.
3030 S. Highland Drive
Las Vegas, Nevada 89101
Telephone: (702) 474-8233
Facsimile: (702) 474-8133
Melissa.Beutler@big-d.com

Philip J. Dabney, Esq.
Nevada Bar No. 3391
Nicole Lovelock, Esq.
Nevada Bar No. 11187
Holland & Hart LLP
9555 Hillwood Drive, Ste. 200
Las Vegas, Nevada 89134
Telephone: (702) 222-2500
pjdabney@hollandhart.com
nelovelock@hollandhart.com

*Attorneys for Defendant/Counter-Claimant,
Big-D Construction Corp.*

DISTRICT COURT

CLARK COUNTY, NEVADA

**PADILLA CONSTRUCTION COMPANY OF
NEVADA, a Nevada corporation,**

Plaintiff,

vs.

**BIG-D CONSTRUCTION CORP., a Utah
corporation, FIDELITY & DEPOSIT
COMPANY OF MARYLAND, a Maryland
corporation, DOE CORPORATION I through
DOE CORPORATION V, and ROE I through
ROE V individuals,**

Defendants.

**BIG-D CONSTRUCTION CORP., a Utah
corporation,**

Counter-Claimant,

Case No. A-10-609048-C

Dept.: XIII

ORDER

**Hearing Date: May 26, 2015
Hearing Time: 9:00 a.m.**

1 vs.

2 PADILLA CONSTRUCTION COMPANY OF
3 NEVADA, a Nevada corporation,

4 Counter-Defendant.
5
6
7
8
9

10 Defendant/Counterclaimant BIG-D CONSTRUCTION CORP.'s Motion for Attorneys'
11 Fees, Costs, and Interest Pursuant to Judgment and to Amend Judgment came before this court
12 for hearing on May 26, 2015.

13 On March 6, 2015, Big-D filed a Motion for Attorneys' Fees, Costs, and Interest
14 Pursuant to Judgment and to Amend Judgment in the amount of \$1,234,678.55. This Motion
15 sought to Amend the Judgment in the following amounts plus post-judgment interest on those
16 amounts:

17

Category	Amount
Attorneys Fees	\$383,399.00
Expert Fees	\$38,882.34
Bond Fees	\$24,700.00
Other Costs	\$6,344.99
Pre-Judgment Interest	\$164,921.92

23

24 On its Reply on May 18, 2015, Big-D voluntarily removed its claim for Pre-Judgment Interest
25 in response to Padilla's Opposition.

26 Defendant/Counterclaimant BIG-D CONSTRUCTION CORP. was present by and
27 through its counsel of record, Melissa A. Beutler, Esq. Plaintiff/Counterclaimant PADILLA
28

1 CONSTRUCTION COMPANY OF NEVADA was present telephonically by and through its
2 counsel of record, Bruce R. Mundy, Esq. The Court, having fully considered the Motion, the
3 papers on file therein, hearing oral argument, and for good cause appearing, enters the
4 following *having rendered its Decision filed June 16, 2015.*

5 IT IS HEREBY ORDERED THAT Big-D Construction Corp.'s Motion for Attorneys'
6 Fees, Costs, and Interest Pursuant to Judgment and to Amend Judgment is Granted IN PART
7 and Denied IN PART.

8 IT IS HEREBY FURTHER ORDERED THAT Big-D Corp.'s Motion for bond fees is
9 ²GRANTED and Big-D is awarded bond fees in the amount of \$24,700.00.

10 IT IS HEREBY FURTHER ORDERED THAT Big-D Corp.'s Motion for costs to
11 depose Padilla's expert is GRANTED and Big-D is awarded costs to depose Padilla's expert in
12 the amount of \$2,730.00.

13 IT IS HEREBY FURTHER ORDERED THAT Big-D Corp.'s Motion to recover costs
14 incurred to maintain samples is GRANTED and Big-D is awarded costs to maintain the
15 samples in the amount of \$ \$3,614.99.

16 IT IS HEREBY FUTHER ORDERED that Big-D Corp.'s Motion for expert fees is
17 DENIED IN PART.

18 IT IS HEREBY FURTHER ORDERED that Big-D Corp.'s Motion for attorney's fees
19 are recoverable in whole and Big-D is awarded attorneys fees in the amount of \$383,399.00.

20 In summary, the following additional amounts are awarded to Big-D in this ORDER:

Category	Amount
Attorneys Fees	\$383,399.00
Fees to Depose Padilla's Expert	\$2,730.00 (fn. 1)
Bond Fees	\$24,700.00 (fn. 2)
Storage of Stucco	\$3,614.99 (fn. 3)

26 ¹ The supporting documentation for this cost was included as Exhibit B (at July 31, 2012) to the Motion.

27 ² This supporting documentation for this cost was included as Exhibit C to the Motion.

EXHIBIT 23

Case Nos. 67397 & 68683

IN THE SUPREME COURT OF THE STATE OF NEVADA

Electronically Filed
Jan 29 2016 11:30 a.m.
Tracie K. Lindeman
Clerk of Supreme Court

**PADILLA CONSTRUCTION COMPANY OF NEVADA,
A NEVADA CORPORATION,**

Appellant,

vs.

BIG-D CONSTRUCTION CORP., A UTAH CORPORATION,

Respondent.

**APPEAL FROM
THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF CLARK**

THE HONORABLE MARK R. DENTON, DISTRICT COURT JUDGE

A-10-609048-C

APPELLANT'S OPENING BRIEF

Bruce R. Mundy, NSB #6068
200 South Virginia Street, Eighth Floor
Post Office Box 18811
Reno, Nevada 89511-0811
reno-attorney@sbcglobal.net
(775) 851-4228

Attorney for the Appellant

Rule 26.1 Disclosure

Pursuant to NRAP 26.1, the undersigned counsel certifies that Appellant, Padilla Construction Company of Nevada, is a Nevada corporation in good standing, no parent company nor any publicly held company owns any interest in the corporation, and is and has been exclusively represented in this matter by Bruce R. Mundy, Nevada State Bar number 6068, a sole practitioner.

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Jurisdictional Statement

This Court has jurisdiction pursuant to NRAP 3A(b)(1): “A final judgment entered in an action of proceeding commenced in the court in which the judgment is rendered.” The Judgments appealed from include the district court’s Findings of Fact and Conclusions of Law (JA Vol. VII., pg. 813) and Order Granting Attorneys’ Fees, Costs and Interest (JA Vol. VII., pg. 905).

Routing Statement

This appeal is presumptively retained by the Supreme Court because it is an Appeal of a Judgment issued by the business court, Department XIII of the District Court, Clark County, Nevada and Appellant believes an issue involved in the Appeal raises a question of first impression involving the US Bankruptcy Court: Whether a state court has subject matter jurisdiction to award judgment in excess of the Bankruptcy Court’s Chapter 11 approved claim amount.

Statement of Issues for Review

1. Whether Respondent met its burden to prove-up causation in a breach of contract matter?
2. Whether Respondent violated Nevada law, NRS 624.624, for failure to provide the requisite notice prior to withholding payment to Appellant?
3. Whether district court had subject matter jurisdiction to award Judgment in an amount in excess of the Bankruptcy Court Chapter 11 approved claim?

Statement of the Case

The Appellant filed its First Amended Complaint March 9, 2010. Amended, solely to drop a Defendant, the construction project owner, after Respondent construction company posted a bond in lieu of the Appellant’s mechanics’ and materialmen’s Lien. The Complaint alleges Breach of Contract, Breach of Implied

Covenant of Good Faith and Fair Dealing, Negligence per se and a Claim against the lien release bond. The Respondent filed its Answer and Counterclaim April 8, 2010 citing claims for Breach of Contract and Negligence. The Respondent stipulated to dismiss its negligence claim and the district court entered Stipulation and Order to Dismiss August 10, 2015. The case proceeded to a bench trial December 2 & 3, 2014. The court entered its Findings of Facts and Conclusions of Law and Judgment January 22, 2015 for the Respondent in the amount of \$600,000.00. Subsequently, Respondent filed a Motion for Attorneys' Fees, Costs and Interest, which was granted July 22, 2015 in the amount of \$414,433.99 plus interest in the amount of \$59.61 per day starting January 22, 2015.

Statement of Facts

Respondent Big-D Construction Corp. ("Big-D") entered into a construction agreement to build a facility for IGT in Las Vegas, which included a stone façade glued to stucco both on the exterior of the building as well as some parts of the interior. Shortly after the job was finished and IGT occupied the building, stones fell off the exterior façade. IGT's consultant, Ian Chin, a Nevada licensed Architect and Structural Engineer, and Big-D investigated the falling stones and found deficiencies in the adhesive used to bond the stone to the stucco. It was further determined that the stones and underlying stucco needed to be removed and replaced. In preparation for the second stone installation, Big-D entered into a Subcontract in September¹ of 2009 with Appellant, Padilla Construction Company of Nevada ("Padilla").

The second stone installation project commenced with Padilla installing the stucco on the exterior and interior walls where stone panels would be glued. In mid-September, during the stone adhesion coverage process, when stones were pulled

¹ Trial Exhibit, JA Vol. 1, pg. 91

back to check the adhesive coverage, there were several events² when the stone pulled the second (brown) coat of the stucco from the first (scratch) coat. Padilla's theory of the cause of the separations was Big-D's scheduling of the stone installation did not allow its stucco to properly dry (cure)³. At that time, Big-D did not have a theory of cause.⁴ After inspections and conferences between IGT and Big-D, it was decided to substitute a prefabricated cement board that was better suited to the stone adhesive coverage pulling and did not require a cure time.⁵ Padilla left the job and submitted its Payment Request, which was approved⁶, and Big-D issued a check in payment only to stop payment due to unresolved disputes⁷ with Padilla.

Big-D retained the services of IGT's former consultant, Ian Chin, after the conclusion of his relationship with IGT. In the absence of a settlement of the dispute between Big-D and Padilla, Padilla filed a Complaint⁸ March 9, 2010 alleging claims for Breach of Contract, Breach of Implied Covenant of Good Faith and Fair Dealing, Negligence per se and a Claim against the lien release bond. Big-D responded with an Answer and Counterclaim⁹ April 8, 2010 citing claims for Breach of Contract and Negligence. Big-D stipulated to dismiss its negligence claim and the district court entered Stipulation and Order to Dismiss August 10, 2015. The case proceeded to a bench trial December 2 & 3, 2014. The district court entered its Findings of Facts and Conclusions of Law and Judgment¹⁰ January 22, 2015 for the Respondent in the amount of \$600,000.00. Subsequently, Respondent filed a Motion for Attorneys' Fees, Costs and Interest, which was granted¹¹ July 22, 2015 in the amount of

² Trial Exhibit, JA Vol. 3, pg. 261

³ Lopez depo, JA Vol. V., pg. 411, lines 10-25

⁴ TSRCP 1, JA Vol. V., pg. 469, lines 10-23.

⁵ Lopez depo, JA Vol. V., pg. 413, lines 17-21

⁶ TEXH 9, JA Vol. II., pg. 215

⁷ TEXH 61, JA Vol. III., pg. 281

⁸ Complaint, JA Vol. 1, pg. 1

⁹ Answer and Counterclaim, JA Vol. 1, pg. 10.

¹⁰ FF&CL, Judgment, JA Vol. 7, pg. 813

¹¹ Order, JA Vol. 7, pg. 905

\$414,433.99 plus interest in the amount of \$59.61 per day starting January 22, 2015.

Summary of the Argument

Respondent failed to meet its burden to prove causation by a preponderance of evidence; that a Padilla commission or omission caused the complained of separations of its stucco. Appellant also argues Respondent's withholding payment to Padilla, when at the same time admitting it did not know what caused the separations, was a breach of the Subcontract as well as Nevada law, NRS 624.624. In addition, Appellant argues the district court awarded judgment and attorneys' fees, costs and interest in violation of the parties' Stipulation and in excess of the Bankruptcy Court's Chapter 11 allowed claim

Argument

I. STANDARD OF REVIEW FOR FINDINGS AND CONCLUSIONS OF LAW

The district court's factual findings will be upheld if not clearly erroneous, and if supported, by substantial evidence. *Ogawa v. Ogawa*, 125 Nev. 660, 668, 231 P.3d 699 (2009). In the absence of evidence to support the trial court's findings, they are clearly erroneous. *Pink v. Busch*, 100 Nev. 684, 688, 691 P.2d 456 (1984). This Court has defined substantial evidence as evidence that a reasonable mind might accept as adequate to support a conclusion. *Cook v. Sunrise Hospital & Medical Center*, 124 Nev. 997, 1004, 194 P.3d 1214 (2008). The Court reviews conclusions of law de novo. *Grosjean v. Imperial Palace*, 125 Nev. 349, 359, 212 P.3d 1067 (2009).

II. BIG-D FAILED TO CARRY ITS BURDEN OF PROOF

As the Counterclaimant, it is Big-D's duty to present evidence and argument to prove its allegation that Padilla Construction breached the Subcontract. *Nassiri and Johnson v. Chiropractic Physicians' Board*, 130 Nev. Adv. Op., No. 27, pg. 4

(2014). The standard for Big-D's proof is the general civil standard: a preponderance-of-the-evidence. *Id.* at pg. 6. A preponderance of evidence is not a measurement of the greatest number of witnesses, instead, it's the persuasive weight of evidence to lead a trier of fact to find the existence of the contested fact is more probable than its nonexistence. *Brown v. State*, 107 Nev. 164, 166, 807 P.2d 1379 (1991).

The proof elements for a breach of contract claim are: (1) The existence of an enforceable agreement between the parties; (2) Plaintiff/Counter-claimant's performance; (3) Defendant/Counter-defendant's unjustified or unexcused failure to perform; and (4) Damages resulting from the unjustified or unexcused failure to perform. *Nevada Jury Instructions*, (2011) Instruction 13CN.1. A breach of contract claim for damages requires a failure to perform that is material; that the failure to perform defeats the purpose of the contract. *Id.* at Instruction 13CN.42. Integral to the proof of damages is proximate cause, causation: "That is if the damage of which the promisee [Big-D] complains would not have been avoided by the promisor's [Padilla Construction] not breaking [its] promise, the breach cannot give rise to damages." *Clark Cty. Sch. Dist. V Richardson Constr.*, 123 Nev. 383, 396, 168 P.3d 87 (2007). The existence of a valid agreement between the parties was never in dispute. Trial Exhibit¹² (TEXH") 1, Subcontract JA Vol. I. pg. 91.

III. NO EVIDENCE PADILLA CAUSED DAMAGES

The complained of damages arise from the separation of the second (brown) coat of stucco from the first (scratch) coat during the process to check for proper stone adhesive coverage when an installed stone was pulled back from the brown coat to visually check the adhesive coverage. Padilla does not dispute the separations occurred and were observed by everyone involved with the IGT stone project.

What is not known, and the primary focus of the trial, is the causation of the

¹² As stipulated by the parties, Trial Exhibits 1-91 were admitted, JA Vol. V, pg. 456, L 9-24.

separations. Between the parties, there was no dispute the trial was about causation: (1) “the reason we are here today is why did the separations occur” (Padilla Opening, Trial Transcript Day 1 (“TSRCP 1”, JA Vol. V., pg. 440, lines 24-25); (2) “as Mr. Mundy [Padilla trial counsel] characterized this is, frankly, a trial related to causation” (Big-D Opening, TSRCP 1, JA Vol. V., pg. 445, lines 4-5); and (3) the court, “is that [trial related to causation] correct” directed to Mr. Mundy, “That is correct”, the court “All right. The record will so reflect.” TSRCP 1, JA Vol. V., pg. 445, lines 6-11.

It is Padilla’s position the separations were caused by the premature installation of the stone on the stucco before it was fully dry (cured). TSRCP 1, JA Vol. V., pg. 440, line 25 – pg. 441, line 4. According to EXPO, the stucco mix supplier to this job, “Proper curing is essential” and “Proper curing is important especially in hot or windy conditions.” It’s not unduly speculative to imagine the Las Vegas jobsite as hot, and maybe even windy in September. TEXH 26, JA Vol. II., pg. 111, CURING heading). Each stone panel measured four feet wide and thirty inches high and weighed close to forty pounds. TSRCP 1, JA Vol. VI., 597, lines 3-9. Padilla’s analogy was the cause of the separations was no different than the damage caused by parking your car on your new concrete driveway before it fully dried (cured). TSRCP 1, JA Vol. V., pg. 441, lines 2-4. According to Chin, in answer to the question of what the Architect’s plan instruction to determine the most effective procedures for curing and lapse time between coats based on climatic and job conditions, meant:

It means that it’s important to make sure that, first of all, the scratch coat is – has sufficient cure time before you apply the brown coat to it. It’s also – and it talks about making sure that the brown coat has sufficient cure time – as well as the other times involved before you apply anything to it.

So this is very important because you want to make sure that the strength of the materials are up to the point where

you can apply materials to it without causing any damage to the [stucco] system. TSRCP 2, JA Vol. VI., pg. 682, line 22 – pg. 683, line 6.

III. A. CURE TIMES NEVER SETTLED

As will be evident, cure times were far from settled and an ongoing controversy. Chin testified that according to the project specifications, the parties responsible for specifying the cure time included the “contractor, the subcontractor, and the [stucco] materials supplier . . .” TSRCP 2, JA Vol. VI., pg. 29, lines 7 – 13. Lopez, Chief Operating Officer for Padilla Construction Company of Nevada, who worked in the lath and plastering business (stucco) all his adult life including 13 years with Padilla, (Lopez depo, JA Vol. V., pg. 415, lines 1-3, pg. 410, line 21), testified he told Brinkerhoff the brown coat needed to cure 28 days before installing the stone on it. Lopez depo, Vol. V., pg. 416, lines 19-25, pg. 417, lines 1 – 4. After Lopez observed some of the separations, Brinkerhoff testified Lopez’s only response was “the product should have cured for 30 days before the stone was allowed to be installed on it.” TSRCP 1, Vol. V., pg. 593, lines 22-24.

Chin, in his role as an IGT consultant (TSRCP 2, JA Vol. VI., pg. 742, line 20), informed IGT’s counsel, Ferrario, that the scratch coat should cure one day and the brown coat twenty-one days, unless the stucco mix was mixed with latex, then it would require seven to fourteen days. (T Exh 38-1) Chin testified at trial he didn’t believe latex was used in the stucco mix. (TSRCP 2, JA Vol. VI., pg. 741, line 3) Then, IGT’s counsel Ferrario reports “The stucco cure issue continues to evolve. Right now we are operating under a 2 day scratch 7 day brown cure. This is consistent with the county requirements” (verified as minimum intervals, cure time, between plaster coats in the Clark County Building Code, (TEXH 450¹³, JA Vol. V. pg. 400, Table 2512.6) and asks for Chin’s thoughts. TEXH 38, JA Vol. III, pg. 259 Ferrario 09/04/09 email. In response, Chin agrees the seven day cure is consistent

¹³ Admitted, JA Vol., VII, pg. 784, line 2.

with the low published cure time he has reviewed so he doesn't think that it can be shortened; however, he notes that while the two day cure for the scratch coat is consistent with the high published time he has reviewed, he thinks there is a possibility to lower the scratch cure time to one day with a stucco subcontractor inspection after one day to determine if its rigid enough to install the brown coat. TEXH 38, JA Vol. III., pg. 259, Chin 09/04/09 email.

Meanwhile, Brinkerhoff, advised IGT's Stecker on August 28th: (1) "[s]tone installation on Wednesday is contingent on 48 hours cure time" (TEXH 400¹⁴, JA Vol. IV., pg. 368, paragraph four) and in the same paragraph advises he has sent the approved plaster product (EXPO MX3) data to ABB Engineers, PSI Engineering, and the product manufacturer (EXPO) for cure time recommendations. Subsequently, Brinkerhoff testified he received a reply from EXPO (TSRCP 1, JA Vol. VI, pg. 631, lines 6-13) that "normal curing and applications are required." TEXH 32, JA Vol. III., pg. 250. Although he acknowledged receiving cure time recommendations from ABB and PSI, he didn't remember what they were. T Trans D-1, pg. 190, lines 5-15. In answer to the question did he ever find out what the normal curing time was, he answered "We used two days and seven days." TSRCP 1, JA Vol. VI., pg. 631, line 24 - pg. 632, line 2.

Nowhere, is there any evidence of a 'summit' meeting between IGT, Big-D, EXPO and Padilla to resolve the obvious dispute as to the critical cure times. Instead, it appears as the person solely responsible for scheduling work, Brinkerhoff arbitrarily set the cure time to two days for the scratch coat and seven days for the brown coat. During trial, Brinkerhoff testified he had exclusive responsibility for scheduling the work of all subcontractors; Q. Would it be fair to say that, if you didn't schedule it, it was not going to happen? A. Yes, absolutely. TSRCP 1 JA Vol.

¹⁴ Admitted, JA Vol., VI, ;g. 567, line 2

V., pg. 462, lines 12-14.

III. B. BIG-D NEVER TESTED FAILED STUCCO FOR CAUSATION

Big-D never determined the cause of the separations. According to Big-D's Brinkerhoff, answering the question why Big-D didn't terminate the Subcontract with Padilla: "[W]e made a decision based on the rejection of Padilla's work by IGT. We didn't know cause." TSRCP 1, JA Vol. V., pg. 469, lines 10-23. In a letter to Padilla's Lopez dated November 3, 2009, Big-D's counsel, Hurley, stated Big-D "is looking to Padilla to assist in investigating the cause of the failure." TEXH 58, JA Vol. III., pg. 276, paragraph 3. On November 18, 2009, when questioned whether he had released the check to Padilla, Big-D's McNabb responded: "No way. Why would I? Their work is failing. We still don't know who's at fault." TSRCP 1, JA Vol. VI, pg. 650, lines 12-13, TEXH 61, JA Vol. III., pg. 281.

III. C. CHIN'S TESTS WHILE CONSULTANT TO IGT

On April 8, 2010, Big-D filed its Counterclaim alleging "Padilla's Work was substandard and improperly installed and did not comply with the plans and specifications for the Project and/or ASTM Standards." Counterclaim, JA Vol. I., pg. 16, lines 27-28. Nearly seven months after Padilla was informed the project was going in a different direction (Lopez depo, JA Vol. V., pg. 413, lines 1-2) with a concrete board that didn't require a cure time and four months after finding out its payment for the work completed was being held ransom (TEXH 59, JA Vol. III., pg. 277, last paragraph, first sentence) pending Padilla's assistance to find the cause of the separations; Big-D first divulged its allegations as to why the separations occurred.

In support of the Counterclaim, Chin testified at trial about his observations of the stucco separations but failed to put forth evidence that any of the alleged deviations from the plans and specifications were material; caused the separations. For example, Chin's testimony included several references to the thickness of the

stucco coats vs. the project's plans and specifications, but then admitted "whether the brown coat was 2 inches or a quarter of an inch, scratch coat an inch or one-quarter of an inch, it did not affect the bond strength", the strength of the connection between the scratch and brown coats. TSRCP 2, JA Vol. VI., pg. 735, lines 18-21.

As to claims the scratch coats were not properly roughened; nowhere did Chin show any measurement of the grooves; determine whether they were the "approximately 1/8 inch" specified by EXPO. TEXH 37, JA Vol. III., pg. 256, paragraph 3.39B, NOTE. After admitting he never saw grooving of the scratch coat in more than one direction at the jobsite (TSRCP 2, JA Vol., pg. 712, lines 9 11) and commenting on Trial Exhibit 448 (TEXH 448¹⁵, JA Vol. V., pg. 391), three photographs of the same separation showing a minor amount of grooving in a second direction, TSRCP 2, JA Vol. VI., pg. 711, lines 13-14), Chin was unable to identify a percentage of wrong direction grooving that would cause a failure of the bond. TSRCP 2, JA Vol. VII., pg. 749, lines 10-14. He eventually admitted the wrong direction grooving only "maybe contributing to" the lack of bond between the brown coat and the scratch coat. TSRCP, JA Vol. VI., pg. 712, lines 17-19. For Trial Exhibit 438¹⁶, Chin sites no grooving of the scratch coat is evident (TSRCP 2, Vol. VI., pg. 718, lines 24-25), however, admits that he didn't use a 3D camera that can capture the depth dimension, but when questioned, he claimed to have put his hand on the scratch coat at the bottom of the three inch diameter¹⁷ core hole (TSRCP 2, JA Vol. VII., pg. 750, lines 10 – 15); perhaps the grooving, dark shadows on the scratch coat, was more readily observed in (TEXH 438-4, JA Vol. V., pg. 386) with the close-up photograph of the scratch coat and the apparent more direct lighting?

In all instances, when Chin noted no bond between the scratch and brown coats,

¹⁵ TEXH 448, Admitted for limited purpose: not for the truth of the matter asserted, JA Vol. VI, pg. 717, line 13.

¹⁶ Admitted, JA Vol. VI, pg. 720, line 18.

¹⁷ TSRCP 2, JA Vol. VI., pg. 717, line 20.

he admitted no knowledge of when the brown coat had been installed; where in the curing period the stucco might have been or whether sampling/testing was done before the brown coat fully cured? For Trial Exhibit 438, photos of coring/testing on the inside of the building September 17th (TSRCP 2, JA Vol. VI., pg. 720, lines 20-22) as well as trial exhibit (TEXH 15-7, JA Vol. II., pg. 232), which summarizes Chins notes for the 17th testing; Chin admitted he did not know when the brown coat had been installed. TSRCP 2, JA Vol. pg. 749, line 24 – pg. 750, line 2.

Similarly for Trial Exhibit 449¹⁸, (JA Vol. V., pg. 395), the references to the September 22nd testing, Chin admitted he did not know when either the scratch or brown were installed. TSRCP 2, Vol. VII., pg. 751, lines 17-18. Both of the admissions of no knowledge when the relevant stucco was installed also applies to (TEXH 60, JA Vol. III., pg. 279), Chin's November 17, 2009 email to IGT's counsel, Ferrario, reporting on both the September 17th and 22nd testing. Neither TEXH 406¹⁹ nor TEXH 446²⁰ were admitted for the truth of the matter asserted, so neither contributed any evidence of a material breach.

In summary, Big-D failed to carry its burden to present a preponderance of evidence that Padilla's alleged deviations from the plan and specifications were material and caused the complained of damages. That the damage of which Big-D complains would not have been avoided by Padilla not breaking its promise to furnish stucco in compliance with the plans and specifications.

IV BIG-D'S STOP PAYMENT OF CHECK BREACHED THE SUBCONTRACT

The proof elements for a breach of contract claim are: (1) The existence of an enforceable agreement between the parties; (2) Plaintiff/Counter-claimant's

¹⁸ Admitted, JA Vol. VII., pg. 717, line 13.

¹⁹ Admitted for limited purpose: not for the truth of the matter asserted, JA Vol. VI., pg. 709, line 19.

²⁰ Admitted for limited purpose: not for the truth of the matter asserted, JA Vol. VI, pg. 695, line 7-9.

performance; (3) Defendant/Counter-defendant's unjustified or unexcused failure to perform; and (4) Damages resulting from the unjustified or unexcused failure to perform. *Nevada Jury Instructions*, (2011) Instruction 13CN.1. A breach of contract claim for damages requires a failure to perform that is material; that the failure to perform defeats the purpose of the contract. *Id.* at Instruction 13CN.42. Integral to the proof of damages is proximate cause, causation: "That is if the damage of which the promisee [Big-D] complains would not have been avoided by the promisor's [Padilla Construction] not breaking [its] promise, the breach cannot give rise to damages." *Clark Cty. Sch. Dist. V Richardson Constr.*, 123 Nev. 383, 396, 168 P.3d 87 (2007). The existence of a valid agreement between the parties was never in dispute. SUBCONTRACT AGREEMENT, TEXH 1, JA Vol. I., pg. 91.

After leaving the project in mid-September because "they were going in a different direction" (Lopez depo, JA Vol. V., pg. 413, lines 1-2) with a prefabricated cement "board that can handle the pressure of them [stone installers] pulling on it, plus they could install that board and immediately start installing the stone [no cure time]." (*Id.* at pg. 413, lines 17-21), Padilla submitted a Big-D Payment Request form as specified by the Subcontract (TEXH 1, JA Vol. I., pg. 92, paragraph D) for the work completed to date of the 'going in a different direction' notice. Padilla's performance was confirmed by Big-D's Brinkerhoff. Q: Describe for the Court the process of what happens from the time you receive a payment application until the time that a check goes out the door. TSRCP 1, JA Vol. V., pg. 490, lines 22-24. A: "I approved this [TEXH 9, JA Vol. II., pg. 215, Padilla's 09/25 Payment Request] at 82 percent complete, absolutely did. I felt like Padilla had installed 82 percent of the product." TSRCP 1, JA Vol. V., pg. 491 lines 8-10. Brinkerhoff approved the September 25, 2009 Payment Request in the amount of \$185,991.85 for payment

October 25, 2009. TEXH 9, JA Vol. II., pg. 215²¹.

Big-D failed to perform; to pay Padilla in accordance with the approved Payment Request without justification or excuse. According to the district court, Big-D's performance was excused by Padilla's breach of the Subcontract, which occurred before Big-D's alleged breach (Conclusion of Law ("CL") JA Vol. VII., pg.831, lines 5-6); that payment was excused because IGT rejected Padilla's work (CL, JA Vol. VII pg. 831, lines 7-10), and; Big-D was excused from giving the Subcontract mandated notice of default and opportunity to cure because Padilla refused to participate in the investigation of the cause of the failures and any remediation. CL, JA Vol. pg. 831, line 12, pg. 832, line 7.

Notwithstanding Big-D's failure to present a preponderance of evidence that Padilla's alleged deviations from the plans and specifications caused the complained of separations, Padilla's breach could not have been prior to Big-D's. Big-D stopped payment November 18, 2009 of the payment check for the work Brinkerhoff affirmed Padilla had completed in September (TEXH 61, JA Vol. III., pg. 281) and at a time when Big-D admittedly did not know the cause of the separations. On November 18, 2009, when questioned whether he had released the check to Padilla, Big-D's McNabb responded: "No way. Why would I? Their work is failing. We still don't know who's at fault." TSRCP 1, JA Vol. VI, pg. 650, lines 12-13.

There was no justification to withhold Padilla's payment because IGT rejected the stucco in the absence of an erroneous assumption there was only one cause of the separations, Padilla. The assumption of a single potential cause was contradicted by Brinkerhoff:

[A]t the time, we made the decision [substitute cement board in place of stucco] based on the rejection of Padilla's work by IGT. We didn't know the cause. We didn't know whether it was labor related. We didn't know whether it

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was material related. We didn't know whether it was weather condition related." TSRCP, JA Vol. V., 469, lines 18-23.

Additionally, Padilla complained the cause was Big-D's scheduling the installation of the stone before its stucco properly cured²², which was never disputed until April 8, 2010 when Big-D filed its Counterclaim alleging deviations from the plans and specifications caused the damages; rejection of the stucco requiring the removal and replacement. CC, JA Vol. I., pgs. 16 & 17, paragraphs 11-13. Not when Big-D notified Padilla in mid-September 2009 that the project was going in a new direction (Lopez depo, JA Vol. V., pg. 413, lines 1-2) with a cement board that could better stand the stone pulling forces and didn't require a cure time (*Id.* at 413, lines 17-21) nor in Big-D's counsel, Hurley's November 3rd letter stating "Big-D is looking to Padilla to assist in investigating the cause of the failure." TEXH 58, JA Vol. III., pg. 276, third paragraph, last sentence. IGT's rejection of the stucco was not justification to withhold Padilla's payment in November when Big-D admittedly had no knowledge Padilla caused the separations.

Padilla neither refused to participate in the investigation of the failure or remediation. Upon receipt of Big-D's counsel, Hurley's November 3rd letter stating "Big-D is looking to Padilla to assist in investigating the cause of the failure" (TEXH 58, JA Vol. III., pg. 276, third paragraph, last sentence), Padilla responded stating that "without third party confirmation that its work is sub-standard" it expected to be paid. TEXH 59, JA Vol. III., pg. 278. Big-D never responded to the letter, including suggestions for a third party expert to verify the cause of the separations and a proposal for the fair sharing of the costs. The reason? The reality of the situation in November 2009, there was nothing for anyone to investigate. Lopez

²² Padilla's Lopez testified he told Brinkerhoff the brown coat needed to cure 28 days before installing the stone on it. Lopez depo, Vol. V., pg. 416, lines 19-25, pg. 417, lines 1-4. After Lopez observed some of the separations, Brinkerhoff testified Lopez's only response was "the product should have cured for 30 days before the stone was allowed to be installed on it." TSRCP 1, Vol. V., pg. 593, lines 22-24

testified that the same day Brinkerhoff told him the project was going in a different direction, Big-D was “destroying the product [stucco] and ripping stone off the wall and starting over.” (Lopez depo, JA Vol. V., pg. 413, lines 1-2, pg. 412, lines 17-22). Brinkerhoff’s calendar shows “Demo Padilla Substrate” September 14-16, 2009. (TEXH 74, JA Vol. III., pg. 294). As for refusing to participate in the remedial work, installation of the cement board (Durock), Padilla was never asked. Big-D’s Brinkerhoff testified he didn’t “specifically recall that conversation” asking Padilla if they would install the Durock. (TSRCP 1, JA Vol. VI., pg. 504, lines 4-5), nor could Big-D’s McNabb produce proof that a request for proposal, standard in the construction industry for requesting work/materials beyond the terms of the contract, was issued to Padilla for the installation of the Durock. TSRCP 1, JA Vol. VI., pg. 530, lines 21-25. Big-D’s withholding Padilla’s payment at a time when it admittedly did not know the cause of the separations was a material breach of the Subcontract that caused damages to Padilla in the amount of the payment due for its services, and as approved by Big-D’s Brinkerhoff. TEXH 9, JA Vol. II., pg. 215.

V. BIG-D’S FAILURE TO PROVIDE PADILLA NOTICE OF DEFAULT AND OPPORTUNITY TO CURE WAS ANOTHER BREACH

Big-D’s failure to provide Padilla written notice of an alleged defect of its work and resulting opportunity to inspect and to cure the defect is a breach of the implied covenant of good faith and fair dealing. “In every contract or agreement there is an implied promise of good faith and fair dealing. This means that each party impliedly agrees not to do anything to destroy or injure the right of the other to receive the benefits of the contract. Thus, each party has the duty not to prevent or hinder performance by the other party.” *Hilton Hotels v. Butch Lewis Productions*, 107 Nev. 226, 234 808 P.2d 919 (1991). Padilla’s position is the failure of Big-D to provide Padilla written notice of an alleged defect of its work and resulting opportunity to inspect and to cure the defect as provided by the terms of the Subcontract, section

5.1 and Exhibit “Z”, prior to withholding payment, prevented Padilla’s performance and denied it the benefit (payment) of the Subcontract; a breach of the of the implied covenant of good faith and fair dealing. Joint Pre-Trial Memorandum Pursuant to EDCR 2.67. JA Vol. I., pg. 64, lines 12 – 21.

In mid-September 2009²³, Padilla was informed by Big-D’s Brinkerhoff that installation of the stucco, Padilla’s work, was stopped because “they were going in a different direction” (Lopez depo, JA Vol. V., pg. 413, lines 1-2) with a prefabricated cement “board [Durock] that can handle the pressure of them [stone installers] pulling on it, plus they could install that board and immediately start installing the stone [no cure time].” (Lopez depo, JA Vol. V., pg. 413, lines 17-21) This change in material from stucco to a prefabricated cement board didn’t surprise Lopez who had been adamant to that point the only problem with the stucco was the premature installation of the stone before the stucco was allowed to properly cure. Concerned that the stucco wasn’t being allowed to cure properly, when asked who at Big- D he communicated that concern to, he replied “Everyone.” Lopez depo, JA Vol. V., pg. 411, lines 10-25. A switch to a substrate that didn’t require curing time was understandable because Lopez knew Big-D was under pressure from IGT to finish the project in time for some type of IGT event at the project site. Lopez depo, JA Vol. V., pg. 413, line 22 – pg. 414, line 3.

There was no evidence that at the time of the mid-September announcement of going in a new direction that Big-D alleged the separations were caused by a Padilla commission or omission. To the contrary, reference to the advantage of no cure time for the cement board indicated adequate cure time was an issue. Further, trial testimony made it apparent that in mid-September, Big-D couldn’t have given

²³ Lopez testified that the same day Brinkerhoff told him the project was going in a different direction, Big-D was “destroying the product [stucco] and ripping stone off the wall and starting over.” (Lopez depo, JA Vol. V., pg. 413, lines 1-2, pg. 412, lines 17-22). Brinkerhoff’s calendar shows “Demo Padilla Substrate” September 14-16, 2009. (TEXH 74, JA Vol. III., pg. 294).

Padilla notice of a defect/deficiency in their work causing the separations; Big-D was not aware of any. According to Big-D's Brinkerhoff, answering the question why Big-D didn't terminate the Subcontract with Padilla: "[W]e made a decision [substitute cement board in place of stucco] based on the rejection of Padilla's work by IGT. We didn't know cause." TSRCP 1, JA Vol. V., pg. 469, lines 10-23. In a letter to Padilla's Lopez dated November 3, 2009, Big-D's counsel, Hurley, stated Big-D "is looking to Padilla to assist in investigating the cause of the failure." TEXH 58, JA Vol. III., pg. 276, third paragraph, last sentence. On November 18, 2009, when questioned whether he had released the check to Padilla, Big-D's McNabb responded: "No way. Why would I? Their work is failing. We still don't know who's at fault." TSRCP 1, JA Vol. VI, pg. 650, lines 12-13, TEXH 61, JA Vol. III., pg. 281.

According to the pertinent language of Section 5.1 of the Subcontract titled Notice to Cure:

If you [subcontractor] are guilty of a material breach of a provision of this Subcontract, you may be deemed in default of this Subcontract. If you fail, within three (3) days after written notification, to commence and continue satisfactory correction of such default, then at your expense, we will: (a) Provide the most expeditious correction of the default . . . (b) Supply labor, materials, equipment . . . necessary for the satisfactory correction of your default . . . (c) Withhold payment of moneys due you until the work is fully completed and accepted by the Owner. TEXH 1, JA Vol. I., pgs. 101-102, Section 5.1.

When a contract is clear on its face, it will be construed from the written language and enforced as written. *Canfora v. Coast Hotels & Casinos, Inc.*, 121 Nev. 771, 776, 121 P.3d 599 (2005). Clear on its face, Section 5.1 required Big-D provide a written notice to Padilla of a material default and three days for Padilla to commence and continue satisfactory correction of the alleged default before Big-D was entitled to withhold payment to Padilla. In addition to Padilla's Section 5.1 right to inspect, inherent in the right to commence and continue correction of an alleged default is

Nevada Exhibit “Z” right to inspect a claimed defect in its work. The fourth paragraph states in part:

There shall not be any back charge or deduction from the contract price due Padilla for expense alleged to have been caused by Padilla without prior written notice to Padilla, and Padilla having been given a reasonable opportunity to inspect the claimed defect. TEXH 1, JA Vol. I., pg. 106, 4th paragraph. Note – Brinkerhoff stipulated he initialed the Subcontract on behalf of the Big-D. TSRCP 1, JA Vol. V, pg. 464, lines 18-19.

Big-D’s failure to give the requisite written notice of a material breach/defect deceived Padilla to any need to defend its work; to have their expert inspect the failed work, and take samples necessary for laboratory analysis while the alleged failed work was available and before the six month shelf life of the EXPO MX3 expired precluding the scientifically necessary control samples. What else would Padilla believe under the circumstances that its work was being replaced with material that doesn’t require cure time and without any notice alleging a breach of the contract or that its work is defective? Padilla’s state of mind that inadequate cure time was the problem, and a problem over which Padilla had no control was unchallenged. The stone installation was exclusively scheduled by Big-D. During trial, Brinkerhoff testified he had exclusive responsibility for scheduling the work of all subcontractors; Q: “Would it be fair to say that, if you didn’t schedule it, it was not going to happen?” A: “Yes, absolutely.” TSRCP 1 JA Vol. V., pg. 462, lines 12-14.

A couple of problems arise from the lack of the Section 5.1 written notice: Padilla was denied an opportunity to cure and mitigate the damages, but this pales in comparison to the denial of Padilla’s opportunity to defend its work while the evidence of failed stucco was still available. Neither of which were fair or in good faith, therefore, Big-D breached the implied covenant of good faith and fair dealing in the Subcontract.

VI. BIG-D VIOLATED NEVADA LAW WITHHOLDING PAYMENT TO PADILLA

Nevada Revised Statute 624.624 (JA Vol. V., pg. 425) specifies the law for payments or withholding payments to subcontractors. “When the language of a statute is plain and unambiguous, a court should give that language its ordinary meaning and not go beyond it.” *Nevada Dept. of Corrections v. York Claims Services*, 131 Nev. Adv. Op., No. 25, pg. 7 (2015). This Court reviews issues of statutory construction de novo. *A.F. Constr. Co. v. Virgin River Casino*, 118 Nev. 699, 703, 56 P.3d 887 (2002). A violation of a statute constitutes negligence per se if the injured party belongs to the class of persons that the statute was intended to protect, and the injury suffered is of the type the statute was intended to prevent. *Vega v. E. Courtyard Associates*, 117 Nev. 436, 440, 24 P.3d 219 (2001).

Big-D and Padilla executed a Subcontract for the IGT project September 3, 2009. TEXH 1, JA Vol. I. pg. 93. After the mid-September “going in a new direction” notice from Big-D, Padilla submitted its Payment Request September 25th to Big-D, which Big-D’s Brinkerhoff acknowledged he signed September 30th with the notation payment was due in thirty days on October 25th. TEXH 9, JA Vol. II., pg. 215, TSRCP 1, JA Vol. V., pg. 474, line 17 – pg. 475, line 10.

NRS 624.624(1), JA Vol. V., pg. 425, pertains to written agreements between a higher-tiered contractor [Big-D] and a lower-tiered subcontractor [Padilla]. Accordingly, if the written agreement [Subcontract] includes a schedule for payments, Big-D

shall pay [Padilla] (1) On or before the date payment is due, or (2) Within 10 days after the date [Big-D] received payment for all or a portion of the work, materials, or equipment described in a request for payment . . . ,
Whichever is earlier.” NRS 624.624(1)(a), Emphasis Added

If the Subcontract does not include a schedule for payments, Big-D

“shall pay [Padilla] (1) Within 30 days after the date the

[Padilla] submits a request for payment, or (2) Within 10 days after the date [Big-D] received payment for all or a portion of the work, labor, or equipment described in a request for payment . . . , **Whichever is earlier.**” NRS 624.624(1)(b), Emphasis Added

The district court concluded NRS 624.624 was designed to ensure general contractors pay subcontractors after the general contractor receives payment from the Owner of the project [IGT]. CL, JA Vol. VII., pg. 833, lines 14-16, Emphasis Added. This is contrary to the plain language of the statute. The relevance of the Owner’s payment to the general contractor in either subsection 1, paragraph a. or b., is the potential to shorten the time for payment if the Owner were to pay either before the payment to the subcontractor is due, (a.), or before 30 days after the subcontractor submits a request for payment, (b). In this instance, the Subcontract did not contain a schedule for payments, therefore, as Brinkerhoff stated as standard practice (TSRCP 1, JA Vol. V., pg. 474, line 18 – pg. 475, line 7), payment was due within 30 days after the date Padilla submitted their Payment Request. TEXH 9, JA Vol. II., pg. 216.

Similarly, the district court concluded “Padilla was to be paid . . . after IGT paid Big-D” according to a term of the Subcontract. CL, JA Vol. VII., pg. 834, lines 9-10. This conclusion is contrary to this Court’s finding that “pay-if-paid provisions are unenforceable because they violate public policy.” *Lehrer McGovern Bovis v. Bullock Insulation*, 124 Nev. 1102, 1117-1118, 197. P.3d 1032 (2008). Also noted in the Subcontract, Section 4.2 (TEXH 1, JA Vol. pg. 101), paragraph above Section 4.3), which contains the statement “As an absolute condition precedent to you receiving payment . . . we must have first received from the Owner the corresponding periodic payment”, there is the handwritten notation, “Nevada Law will take precedence” and initialed by Big-D’s Brinkerhoff.²⁴

²⁴ Brinkerhoff stipulated he initialed the Subcontract on behalf of the Big-D. TSRCP 1, JA Vol. V, pg. 464, lines 18-19.

Big-D had no lawful right to withhold Padilla's payment. Pursuant to NRS 624.624(2), Big-D's right to withhold Padilla's payment was contingent on compliance with subsection 3. According to NRS 624.624(3), if Big-D intended to withhold any amount from its payment to Padilla, Big-D must have given, on or before the date payment was due, a written notice to Padilla of any amount that will be withheld and give a copy of the notice to all other contractors and the Owner. The written notice must:

- (a) Identify the amount of the request for payment that will be withheld from the lower-tiered subcontractor;
- (b) Give a reasonably detailed explanation of the condition or the reason the higher-tiered contract will withhold that amount, including, without limitation, a specific reference to the provision of section of the agreement with the lower-tiered subcontractor, and any documents relating thereto, and the applicable building code, law or regulation with which the lower-tiered subcontractor has failed to comply; and
- (c) Be signed by an authorized agent of the higher-tiered contractor. NRS 624.624(3)(a), (b), (c).

Accordingly, Big-D's NRS 624.624 written notice to Padilla of its intent to withhold payment was due October 25, 2009, in accordance with Brinkerhoff's calculation of the payment due date. TSRCP 1, JA Vol. V., pg. 474, line 18 – pg. 475, line 7, TEXH 9, JA Vol. II., pg. 216. Such notice never occurred, instead, Big-D, citing "unresolved disputes with Padilla" stopped payment November 18th on its check in the amount of Padilla's requested payment. TEXH 12, JA Vol. II., pg. 222, TEXH 61, JA Vol. III., pg. 281. The district court found Big-D's counsel letter dated November 3 (TEXH 58, JA Vol. III., pg. 276) was "sufficient to constitute required written notice to justify withholding payment." CL, JA Vol. VII., pg. 837, lines 8-9. The letter does not conform substantially with the NRS 624.624 written notice requirement; notably, there is no specific reference to the provision or section of the agreement with the lower-tiered subcontractor, and any documents relating thereto, and the applicable building code, law or regulation with which the lower-tiered

subcontractor has failed to comply, which is not surprising, when the gist of the letter is “looking to Padilla to assist in investigating the cause of the failure.” TEXH 58, JA Vol. III., pg. 276, third paragraph, last sentence, Emphasis Added.

In addition to the NRS 624.624 requisite notice before withholding payment, NRS 624.624(4) provides the subcontractor an opportunity to cure alleged reasons for withholding payment. A subcontractor who receives a notice of withholding may: “Correct any condition or reason for the withholding described in the notice of withholding . . .” NRS 624.624(4)(b).

It is obvious the intent of NRS 624.624 is to protect subcontractors’ payments from irrational and undefined reasons for withholding payment and to provide a subcontractor an opportunity to cure, that in the instant matter, Padilla was denied by Big-D’s failure to provide the requisite written notice of the reasons for withholding payment and withholding payment when Big-D admitted it did not know the cause of the separations nor that Padilla was culpable for all potential causes. According to Big-D’s Brinkerhoff:

[A]t the time, we made the decision [substitute cement board in place of stucco] based on the rejection of Padilla’s work by IGT. We didn’t know the cause. We didn’t know whether it was labor related. We didn’t know whether it was material related. We didn’t know whether it was weather condition related.” TSRCP 1, JA Vol. V., pg. 469, lines 10-23.

And according to Big-D’s McNabb, when questioned whether he had released the check to Padilla, Big-D’s McNabb responded: “No way. Why would I? Their work is failing. We still don’t know who’s at fault.” TSRCP 1, JA Vol. VI , pg. 650, lines 12-13.

Big-D’s stopping Padilla’s payment was in violation of NRS 624.624 causing injury in the way of non-payment of the amount Big-D agreed was due for the work performed on the IGT Stone Replacement project. TSRCP 1, JA Vol. V., pg.491 lines 8-10. Big-D was negligent per se.

VII. NO DUTY FOR PADILLA TO INDEMNIFY

According to the district court, Padilla had a duty to indemnify, defend, and hold harmless pursuant to Section 3.6 of the Subcontract. CL pg. 22, lines 22-23. Pursuant to the express language of this section, Padilla's duty arises solely from its acts or omissions, willful or negligent conduct, which as noted above, Big-D has failed to prove-up.

VIII. PADILLA'S CLAIM AGAINST F&D CONTINGENT ON AWARD OF DAMAGES

Although the district court found Big-D's Motion for Judgment as a Matter of Law on the issue of Padilla's claim against the bond posted to release Padilla's lien on the IGT building was not meritorious, it found the issue was moot under the circumstances of the court's denial of Padilla's damages. CL, JA Vol. VII, pg. 838, lines 8-13. In the instance that Padilla shall prevail in this appeal and a finding it is entitled to damages, its claim against F&D should be restored.

IX. PADILLA ENTITLED TO SPOILIATION INSTRUCTION

According to the district court, "it would be improper to order a spoliation remedy when Padilla did not intend to take additional advantage of additional inspection opportunities even if they had been available." CL, JA Vol. VII, pg. 842, lines 6-7. The obstacle to finding the truth in this matter, what caused the separations, is the lack of evidence, more specifically, the absence of any samples of failed stucco: stucco that cured the two and seven day periods specified by Big-D and failed during the stone installation adhesive test; that is, the stone pulled the second coat of stucco from the first coat of stucco after the stucco was properly cured. All of which was the result of Big-D's failure to obtain valid samples when they were available, and to give Padilla fair notice that it needed to obtain samples for a defense.

Big-D had a prelitigation duty to preserve samples of the failed stucco when litigation was reasonably foreseeable. *Bass-Davis v. Davis*, 122 Nev. 442, 450, 134 P.3d 103 (2006). Nothing should have been more apparent to Big-D, at the time of

the stucco separations and IGT's rejection of the stucco, that litigation was imminent and the failed stucco would be relevant. Big-D's McNabb testified that at the time of first event of a stone pulling the stucco apart "our counsel [Bill Hurley] was involved in every communication because it was such a controversial issue. They [IGT] had Mark [Ferrario], their attorney, everything was Mark and Bill and then Valerie [Higgins], their [IGT's] internal counsel. TSRCP 1, JA Vol. VI., pg. 647, lines 17-23. And, at a time when Big-D admitted it didn't know the cause of the separations, and as noted below, IGT was commanding the removal and replacement of the failed stucco, the evidence, its incomprehensible Big-D wouldn't have preserved samples of the failed stucco for both their defense and to prosecute an action if it was established the cause was a third party, such as Padilla.

According to the district court, spoliation sanctions are only appropriate to a party controlling the evidence, which Big-D didn't have because it was IGT that directed Big-D "to remove and replace the Padilla Work on an expedited basis." CL, JA Vol. VII. pg. 841, lines 24 – 26. There is no showing that IGT's order to remove and replace the Padilla Work prohibited IGT from preserving samples of failed work.

According to the district court, Padilla was invited to participate in the testing Big-D performed, and there wasn't any evidence Big-D excluded Padilla from any available opportunities to inspect the Padilla Work. CL, JA Vol. VII., pg. 841, line 26 – pg. 842, line 2. There isn't any evidence that Big-D ever tested failed work that it could have invited Padilla to participate in. As evidenced by the appearance of Chin, former IGT consultant, at trial and Big-D's exclusive reliance on him for proof of Padilla's culpability; there wasn't any Big-D's testing for causation. However, Big-D did exclude Padilla from inspecting failed work with their failure to preserve samples and to give any notice to Padilla of its culpability; alerted to the prospect Padilla would need a defense. Instead, Padilla received notice the project was "going in a different direction" (Lopez depo, JA Vol. V., pg. 413, lines 1-2) with a

prefabricated cement “board that can handle the pressure of them [stone installers] pulling on it, plus they could install that board and immediately start installing the stone [no cure time]” (Lopez depo, JA Vol. V., pg. 413, lines 1-2); nothing that even implies suspicion of Padilla’s culpability.

Brinkerhoff’s calendar shows “Demo Padilla Substrate” September 14-16, 2009. TEXH 74, JA Vol. III., pg. 294. Two weeks before Brinkerhoff approved Padilla’s Payment request (TSRCP 1, JA Vol. V., pg.491 lines 8-10) and seven weeks before Big-D’s counsel’s letter conditioning further payment to Padilla on assistance establishing Padilla met all its obligations under the Subcontract Agreement. TEXH 58, JA Vol. III., pg. 277, last paragraph. Additionally, when Padilla requested “third party confirmation that its work is sub-standard”, Big-D never responded. TEXH 59, JA Vol. III., page 278, last paragraph. In the absence of valid samples, what could be scientifically investigated by anyone? Not once in the course of discovery did Big-D put forth a sample of failed stucco with information of installation dates to confirm specified cure times.

Big-D breached its duty to preserve the failed stucco, at least valid samples, when litigation was reasonably foreseeable and samples of the failed would be relevant. Therefore, Padilla was entitled to an adverse inference instruction that the district court may draw an inference that if samples of the failed stucco were available for testing, the results would have been unfavorable to Big-D.

**X. BIG-D NOT ENTITLED TO JUDGMENT
IN THE AMOUNT OF \$600,000.00**

The district court found Big-D proved it was entitled to recover damages against Padilla, and according to the Joint Stipulation, “judgment against Padilla in the amount of \$600,000.00.” CL, JA Vol. VII., pg. 840, lines 5-6. The district court misread the stipulation: “Padilla stipulates to entry of judgment in the amount of the Allowed Claim (\$123,091.39).” Stipulation (“STIP”), JA Vol. V., pg. 430, lines 1-

2.

Pursuant to Eighth Judicial District Court Rule 7.50, a stipulation is effective if it is in writing subscribed by the party against whom the same shall be alleged. In an effort to reduce trial time, counsel for both Big-D and Padilla discussed the futility of the time proving up alleged damages of more than \$750,000.00, when the fact was the most Big-D could recover pursuant to the Bankruptcy Court's allowed claim and approved Chapter 11 plan, was \$123,091.39²⁵. STIP, JA Vol. V., pg. 430, lines 1-2. Accordingly, counsel for Big-D drafted a Joint Stipulation as to Damages on Big-D Construction Corporation's Counterclaim which was in writing, signed by the President of Padilla Construction Company of Nevada, announced to the court (TSRCP JA Vol. V., pg. 444, line 24 – pg. 445, lines 1-11) and filed December 3, 2014. STIP, JA Vol. V., pg. 427. A settlement agreement is a contract governed by the general principles of contract law, the interpretation of such is reviewed de novo. "We have stated that contracts will be construed from their written language and enforced as written." *The Power Company v. Henry*, 130 Nev. Adv. Op., No. 21, pgs. 6-7 (2014).

According to the Stipulation, pages 3 & 4, paragraph, 6:

Given that any recovery by Big-D against Padilla is limited to the Stipulated Payment, in the event that this Court determines Padilla is liable to Big-D for costs to remove and replace the Padilla Work, Padilla stipulates to entry of judgment in the amount of the Allowed Claim, (\$123,091.39) . . . STIP, JA Vol. V., pg. 429, line 18 – pg. 430, line 2.

The district court misstated the amount of the stipulated judgment as \$600,000.00, which must be corrected to \$123,091.39, the parties' stipulation.

²⁵ During the course of the instant matter, Padilla Construction Company of Nevada filed a Chapter 11 Petition October 11, 2011, after which Big-D and Padilla stipulated to a contingent claim upon Big-D prevailing in the instant manner of a maximum \$600,000.00, to be paid according to the approved plan, which parties agreed, was \$123,091.38. See following Argument, XI.

XI. BIG-D NOT ENTITLED TO ATTORNEY'S FEES, COSTS, INTEREST

Post judgment, Big-D submitted a motion for Attorneys' Fees, Costs and Interest Pursuant to Judgment and to Amend Judgment to \$1,234,678.55. Motion, JA Vol. VII., pg. 854 line 13. Padilla filed an Opposition contesting the district court's jurisdiction to award a judgment in excess of the maximum amount of the Bankruptcy Court's allowed claim, \$600,000.00. Opposition, JA Vol. VII., pg. 865, lines 8-10. Big-D responded that the costs, fees and interest are post-petition debts not impacted by the bankruptcy action. REPLY, JA Vol. VII., pg. 887, lines 12-16. The district court issued an Order awarding Big-D Fees and Costs in the amount of \$414,433.99 and post judgment interest at a daily rate of \$59.61. ORDER, JA Vol. VII., pg. 908 lines 2-7.

Padilla argued the Bankruptcy Court had retained jurisdiction over any and all disputes regarding the operation and interpretation of the Plan and this Order [Confirming Debtors' First Amended Joint Plan of Reorganization, JA Vol. VII., pg. 896, lines 18-22]. TSRCP, JA Vol. VI., pg. 30, lines 23-28. Therefore, whether the fees, costs and interest sought by Big-D was post-petition or not subject to the stipulated claim, was for the Bankruptcy Court to decide, and not the Eighth Judicial District Court. Trans pg. 23, line 23 – pg. 7, line 2.

[W]here the judgment or decree of the Federal court determines a right under a Federal statute, that decision is final . . . and an adjudication under the reorganization provisions of the Bankruptcy Act, effect as res judicata is to be given the Federal order. *Stoll v. Gottlieb*, 305 U.S. 165 (1938).

In the absence of the district court's subject matter jurisdiction to determine Big-D's request for an Amended Judgment exceeding the Bankruptcy Court's allowable claim against Padilla, the district court's Order entered July 22, 2015 is void. *Landreth v. Malik*, 127 Nev. Adv. Op., No. 16, pg. 4 (2011)

XII. CONCLUSION

The district court overlooked Big-D's numerous admissions, by word and conduct, that there is no evidence that a Padilla commission or omission caused the complained of separations. Equally sure, is the fact that the responsibility of no evidence of the cause of the separations is exclusively Big-D's. Big-D's failure to retain samples of the failed stucco was neither precluded nor restrained by IGT's command to remove and replace the stucco. Equally certain, is the fact that Big-D's failure to give Padilla notice required by both Subcontract and Nevada law denied Padilla critical notice of potential culpability for the separations and the need to inspect, investigate, potentially cure, and most importantly, be alerted to the need to prepare a defense. Accordingly, Padilla is entitled to judgment against Big-D for breach of the Subcontract, breach of the implied covenant of good faith and fair dealing, and violation of Nevada law. Irrespective of the Court's decision of liability, the district court's misunderstanding of the stipulated judgment must be corrected and its award of attorney's fees, costs, and interest without subject matter jurisdiction must be voided.

NRAP 28.2 Attorney's Certificate/NRAP 32(8)(A)

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and type style of NRAP 32(a)(6) because:

This brief has been prepared in a proportionally spaced typeface using Microsoft 2013 Word in 14 font size and Times New Roman.

2. I further certify that this brief complies with the page limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either:

Does not exceed 30 pages.

3. Finally, I hereby certify that I have read this appellate brief, and to the best of

my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 28th day of January 2016.

/s/ Bruce R. Mundy

BRUCE R. MUNDY

NV 6068

200 South Virginia Street, Eighth Floor

Post Office Box 18811

Reno, Nevada 89511-0811

reno-attorney@sbcglobal.net

(775) 851-4228

FAX 851-4239

Attorney for: Appellant

EXHIBIT 24

**IN THE SUPREME COURT OF THE
STATE OF NEVADA**

PADILLA CONSTRUCTION
COMPANY OF NEVADA, A
NEVADA CORPORATION,

Appellant,

v.

BIG-D CONSTRUCTION CORP., A
UTAH CORPORATION,

Respondents.

Supreme Court No. 67397
District Court Case No.: A-10-609048
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RESPONDENT'S ANSWERING BRIEF

Nicole E. Lovelock, Esq.
Nevada Bar No. 11187
HOLLAND & HART LLP
9555 Hillwood Drive, 2nd Floor
Las Vegas, Nevada 89134
(702) 669-4600
(702) 669-4650 – fax
nelovelock@hollandhart.com

Melissa A. Beutler, Esq.
Nevada Bar No. 10948
BIG-D CONSTRUCTION CORPORATION
3030 South Highland Drive
Las Vegas, Nevada 89107-1047
Melissa.Beutler@big-d.com

Attorneys for Respondent

RULE 26.1 DISCLOSURE

Pursuant to Nev. R. App. Proc. 26.1, the undersigned counsel certifies that Respondent Big-D Construction Corp. is a Utah Company licensed to perform construction in Nevada. The parent company is Big-D Corporation, a Wyoming Company. Big-D is represented by its in-house counsel, Melissa A. Beutler, Esq. (Bar No. 10809) and Nicole E Lovelock (Bar No. 11187) of Holland & Hart LLP.

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I. STATEMENT OF THE ISSUES¹

1. Did the District Court clearly err in determining that the stucco work performed by Padilla was defective?

2. Did the District Court clearly err in finding that Big-D gave proper notice of withholding to Padilla pursuant to NRS 624.624?

3. Did the District Court abuse its discretion in declining to give itself a spoliation instruction?

4. Did the District Court have the authority to award attorneys' fees and costs to Big-D to defend the Padilla Action?

II. STATEMENT OF THE CASE

Padilla Construction Company of Nevada ("Padilla") commenced a mechanic's lien action in the Eighth Judicial District Court for Clark County (the "Padilla Action"). Padilla was a subcontractor to Big-D Construction Corp. ("Big-D"), who was acting as the general contractor for IGT to construct its office headquarters and related facilities on South Buffalo Drive in Las Vegas, Nevada (the "Project"). Padilla performed stucco work on the Project (the "Padilla Work"). IGT rejected the Padilla Work and required Big-D to remove and replace it.

¹ The defined terms set forth in the Statement of the Issues are defined in the Statement of the Case.

In January 2010, Padilla initiated the Padilla Action even though it is undisputed that the Padilla Work had been rejected by IGT and Big-D had removed and replaced the Padilla Work at IGT's direction. Big-D filed a counterclaim related to the nearly \$1 million incurred by Big-D to remove and replace the Padilla Work and the adjacent work damaged by the defective Padilla Work (the "Big-D Counterclaim").

In October 2011, Padilla filed a Chapter 11 bankruptcy action in the Central District of California (the "Padilla Bankruptcy"). Padilla continued to prosecute the Padilla Action, as it was not stayed by the Padilla Bankruptcy. Big-D filed a proof of claim in the Padilla Bankruptcy and received relief from the automatic stay to continue to prosecute the Big-D Counterclaim. Subsequently, Big-D stipulated to the reorganization plan in the Padilla Bankruptcy, which capped the maximum amount of Big-D's Counterclaim for pre-confirmation claims at \$600,000—subject to actual proof and liquidation in the Padilla Action.

Big-D and Padilla stipulated to nearly all operative facts—except causation. Padilla agrees that the Padilla Work failed but contends that the failure was not the result of workmanship. Critically, Big-D and Padilla stipulated the amount of costs incurred by Big-D to remove and replace the defective Padilla Work exceeded the \$600,000 allowed claim (in order to avoid the need for additional trial time to prove these damages). As a result of the stipulations, the only

remaining issue for trial was causation—was Padilla responsible for the failures in the Padilla Work. If yes, then pursuant to the parties' stipulations, Big-D was entitled to damages in the principal amount of \$600,000.00.

The Padilla Action proceeded to a three-day bench trial in December 2014. Judge Denton issued detailed Findings of Fact and Conclusions of Law and a Judgment in favor of Big-D. The District Court's factual findings were supported by substantial evidence that Padilla failed, in several independent ways, to construct the Padilla Work in compliance with the plans and specifications. Subsequently, Judge Denton awarded Big-D its post-petition costs and fees associated with defending the Padilla Action.

III. STATEMENT OF THE FACTS

The parties stipulated to nearly all operative facts in the Joint Pretrial Memorandum. JA Vol. 1, pg. 45-52. Padilla's Opening Brief mischaracterizes the context of those facts—the most material of which are explained below. Notably, the "Joint Appendix" filed by Padilla selectively omits a number of admitted trial exhibits that were included with the substantial evidence that Padilla's Work was defective. Those exhibits are now included with Respondent's Appendix.

A. The Padilla Work Was Defective; The Owner Directed Big-D to Remove and Replace the Padilla Work.

The Project. Between 2006 and 2008, Big-D acted as the general contractor for the Project—IGT's corporate headquarters. JA Vol. 1, pg. 46:10-7, Pre-Trial

Memorandum, Stipulated Facts. The centerpiece of the Project was an office building constructed with large sandstone panels installed on the exterior and in the interior lobby. IGT took occupancy of the Project in the early summer of 2008. *Id.* at 46:17-22.

After deficiencies were identified with the stone work performed in the initial construction, IGT directed Big-D to remove and replace the original stone work. *Id.* Because the stone could not be removed without damaging the underlying two-coat stucco system, Big-D was required to remove the stucco system as well as the stone. *Id.* at 46: 23-25. IGT directed Big-D to perform the repair work in August and September 2009, with a firm finish deadline to enable IGT to entertain customers in town for the G2E convention in mid-October 2009. *Id.* at 46:27-47:11.

The Padilla Subcontract. Padilla was not involved in the original construction of the Project. In August 2009, Padilla contacted Big-D and requested the opportunity to submit a proposal for the stucco portion of the replacement work. JA Vol. VI, pp. 555:14-557:13 (Brinkerhoff Testimony); JA Vol. II, pp. 223-225 (Tr. Ex. 13). The stucco scope of work required an initial metal lath layer, followed by a two-coat stucco system (the “Padilla Work”). JA Vol. 1, pg. 48:10-19, Pre-Trial Memorandum, Stipulated Facts. Big-D ultimately contracted with Padilla to perform the Padilla Work and the parties executed a

subcontract agreement (the “Subcontract Agreement”). *Id.* at 46:27-47:4. JA Vol. I, pp. 91-107, (Tr. Ex. 1, Subcontract Agreement).

The Subcontract Agreement required Padilla to furnish “all labor, materials, equipment, and necessary services to install complete exterior and interior stucco (plaster) including lath, scratch, and brown coat.” JA Vol. 1, pp. 91-93 (Tr. Ex. 1, Subcontract Agreement). The Subcontract Agreement required Padilla to perform the Padilla Work in compliance with the Plans and Specifications for the Project, which included specific parameters, including the following:

- Minimum plaster thicknesses as specified [in included chart]. JA Vol. 1, pg. 456, (Tr. Ex. 4, Section 09220 at 3.4G).
- The scratch coat was to be “horizontally cross-rake[d] to provide key for second Base Coat (brown coat).” *Id.* at Section 09220 at 3.4C.
- The base coat was to be “applied so that it meets the required total thickness” and “not vary more than 1/4 in.” *Id.* at Section 09220 at 3.4D 1, 2.
- Remove and replace unacceptable plaster and base. *Id.* at Section 09220 at 3.10D.
- Comply with specified plastering standards.²

² The Specifications, at Section 092200 at 1.1 .A, provided that the Padilla Work was to comply with the following plastering standards: (a) ASTM-C926, [contained at JA. Vol. 4, pg. 352-61, Trial Exhibit 89]; (b) Portland Cement Association Plaster (Stucco) Manual, Trial Exhibit 90, [contained at RA. Vol II, pg. 277-325 (Tr. Ex. 90)]; and (c) per Building Code, as locally adopted,

Cure Times. As the specialty subcontractor with substantial expertise in stucco, Padilla was required to both (i) select the stucco product for approval by the Architect [JA Vol. VI, pp. 559:24-566:1 (Brinkerhoff Testimony)] and (ii) control the means and methods of the Padilla Work, including setting the required “cure” times between the stucco coats and before stone work was to be installed over the Padilla Work. JA Vol. VI, pp. 620:10-631:17 (Brinkerhoff Testimony); JA Vol. VI, pp. 682:12-683:13 (Chin Testimony).

Contrary to Padilla’s claim that “cure times were far from settled and an ongoing controversy,” [Opening Br. at 7], the record is clear that the cure times were set at (i) two days between scratch coat and brown coat and (ii) seven days between brown coat and stone installation. JA Vol. VI, pp. 620:10-631:10 (Brinkerhoff Testimony); JA Vol. VI, pp. 685:16-687:11 (Chin Testimony). In fact, IGT’s consultant testified, he was “very comfortable with [the 2-day/7-day cure times] because it was consistent with the Code and all other standards and, especially, the stucco manufacturer’s recommendation.” *Id.* at 685:4-11. Further, Padilla’s assertion that there was no “summit meeting between IGT, Big-D, EXPO and Padilla” related to cure times is inapposite. Opening Br. at 8. Rather, all

[contained at RA. Vol. II, pg. 326-327,(Tr. Ex. 91); JA Vol. 1, pg. 456 (Tr. Ex. 4,, Section 09220 at 1.1 .A).

parties understood that Padilla was responsible for the cure times—and no party objected to the cure times. JA Vol. VI, pp. 739:14-24 (Chin Testimony).

Although the Architect and IGT *reviewed* the proposed cure times, neither party disputed them; they allowed the means and methods to remain in Padilla's hands, as the 2-day/7 day time periods presented no concerning deviation from industry standard or local code. JA Vol. VI, pp. 620:10-631:10 (Brinkerhoff Testimony); JA Vol. VI, pp. 742:14-25 (Chin testimony). In addition, Big-D implemented quality control measures to ensure the stone contractor did not install stone over the Padilla Work until after the seven-day period expired. JA Vol. VI, pp. 583:2-584:8 (Brinkerhoff Testimony).

Failures of the Padilla Work. Shortly after Padilla commenced its work, the two layers of the Padilla Work began to separate from each other. JA Vol. 1, pg. 49:9-13, Pre-Trial Memorandum, Stipulated Facts; RA Vol. 1, pg. 137-156, Tr. Ex. 17 (Padilla's crew's daily logs); RA Vol. 1, pg. 173-202; Tr. Ex. 21 (email to Padilla management). IGT's consultant, Ian Chin, reported that Padilla's Work failed to comply with the Plans and Specification in several respects. JA Vol. VII, pp. 743-786 (Chin Testimony). The testing revealed multiple, independent causes of the failures, including (a) improper thicknesses of the stucco; (b) failure to adequately hydrate the stucco mix; (c) failure to adequately compact the brown and scratch coats; (d) contaminated materials within the stucco mix; and (e) failure to

adequately score the scratch coat to allow the brown coat to bond. *Id.*; JA Vol. IV, pp. 380-382 (Tr. Ex. 406). Any of these failures, alone, would have been a sufficient basis to reject the work.

Padilla was involved in the on-site meetings and invited to all testing sessions. Further, information regarding IGT's testing and results were communicated real-time to Padilla. Accordingly, Padilla's assertion in its Opening Brief that it first learned of the basis for IGT rejecting the stucco in Big-D's counterclaim is false.

Stucco Failures Widespread; Unrelated to Stone Installation. Contrary to Padilla's characterization, the failures in the Padilla Work were widespread. The Padilla Work failed in all of its locations. Although the failures were initially observed during the stone installation, the failures were not limited to areas in which stone was installed over the stucco. Rather, the same failures were identified throughout the entire project—including the interior of the building where it is undisputed that no stone work was installed over the Padilla Work. JA Vol. VI, pp. 722:1-728:25 (Chin Testimony); JA Vol. V, pg. 480:16-481:16 (Brinkerhoff Testimony); JA Vol. III, pp. 279-80 (Tr. Ex. 60). As Big-D's project manager testified regarding the interior stucco, "as we started taking these cores out, you could simply twist them like a mason jar and separate the brown coat from

the scratch coat....there was just no adhesion between the scratch and the brown.” JA Vol. V, pg. 480:16-481:16 (Brinkerhoff Testimony).

IGT Directs Big-D to Remove and Replace the Padilla Work. IGT made the decision to reject the Padilla Work both in the interior and exterior of the Project. JA. Vol. V, pg. 421-24 (IGT Deposition). The basis for IGT’s decision included the recommendation of Mr. Chin that “he didn’t believe it was installed to the standards that would give him high confidence that the system would be able to take and handle stone.” *Id.* As a result, it is undisputed that IGT made the decision to reject the Padilla Work because it determined Padilla failed to comply with the Plans and Specifications. *Id.*; JA Vol. VI, pp. 722:1-728:25 (Chin Testimony); JA Vol. V, pg. 480:16-481:16 (Brinkerhoff Testimony). The Padilla Work on the site further presented a safety concern that required immediate remove and replacement because 40 lb stone panels had been installed over the top of portions of the Padilla work that was failing. JA Vol. VI, pp. 526-27 (McNabb Testimony).

B. Big-D Gave Padilla *Repeated* Notice of the Failures in the Padilla Work and Requested Padilla’s Assistance to Defend the Work.

Padilla was regularly and repeatedly advised of failures of its work both during *and* after the Project. JA Vol. 1, pg. 49:9-50:13, Pre-Trial Memorandum, Stipulated Facts. In addition, Padilla’s own crew advised Padilla management of the failures in the Padilla Work. *Id.* at 49:9-27; RA Vol. 1, pg. 137-156, Tr. Ex. 17 (Daily Field Logs of Padilla’s crew).

During the Project. Both IGT and Big-D specifically and repeatedly requested Padilla to participate in testing to determine whether the Padilla Work was suitable. JA Vol. 1, pg. 50:1-28, Stipulated Facts; JA Vol. III, pg. 265, Tr. Ex. 46 (email informing Padilla “we have another area of separation between the brown and scratch coat” and requesting a telephone call to discuss). JA Vol. V, pp. 486:14-23, 487:4-15 (Brinkerhoff Testimony). Padilla was present during testing performed on-site on September 16 and 23 and was present when the demolition of the Padilla Work commenced. JA Vol. V, pg. 476:24-477:15, 480:2-25 (Brinkerhoff testimony).

These invitations were made both during the construction and after the Padilla Work was rejected. Yet, Padilla did nothing to investigate. Padilla did not investigate whether the brown coat that it was using was too stiff. RA, Vol. II, pg. 352-353 (Lopez Deposition at 129:2-9). Padilla did not investigate whether the two layers of its stucco were sufficiently compacted. *Id.* (Lopez Deposition at 129:10-13). Padilla did not investigate whether the water content of the brown coat was sufficient at the time that it was applied. *Id.* (Lopez Deposition at 132:18-22). When Padilla first became aware of the presence of chunks in its stucco work, its expert, Mr. Roberts, recommended that it investigate the product mix to identify the source of contaminates. *Id.* at 335 (Lopez Deposition at 43-45). Padilla did

not take any action to investigate the product because “*that cost money.*” *Id.* (Lopez Deposition at 44:1-2) (emphasis added).

Padilla’s executive responsible for the Project made clear “we weren’t going to participate” in testing and investigation of Padilla’s Work. *Id.* at 342 (Lopez Deposition at 84: 12-17; 82-84).

Q. And do you recall, did Big-D in fact request Padilla to assist it to investigate the cause of the failures of the product?

A. Yes

Q. And what, if anything, did Padilla do to assist Big-D to investigate the cause of the product failure?

A. Ask for our money.

Id. at 354 (Lopez Deposition at 135:16-23).

After the Project. Even with Padilla’s failure to assist, Big-D continued to defend the Padilla Work for a period of weeks and requested Padilla’s assistance and participation in its efforts. JA Vol. 1, pg. 50:1-7 Stipulated Facts; RA Vol. 1, pg. 237-238, Tr. Ex. 52; JA Vol. 3, pg. 272, Tr. Ex. 55; JA. Vol. III, pg. 268, Tr. Ex. 53 (email confirming teleconference between Big-D and Padilla to discuss plan to defend work); JA Vol V, pg. 469:10-24 (Brinkerhoff Testimony); JA Vol VI, pg. 497-502 (Brinkerhoff Testimony).

This included the following measures: (i) a request for a meeting immediately after IGT rejected the Padilla Work (which was scheduled for September 29, 2009); (ii) several telephone calls from Big-D to Padilla to follow up on the September 29 meeting, JA Vol. 5, pg. 473:13-18 (Brinkerhoff testimony)

and (iii) a formal letter that stated, “Big-D is looking to Padilla to assist in investigating the cause of the failure...It would be a tremendous assistance if Padilla would furnish Big-D with any documentation or other evidence at its disposal which relates to the involvement of IGT or its consultant, Ian Chin.” JA Vol. III, pg. 275- 77, Tr. Ex. 58 (letter from Big-D requesting that Padilla assist Big-D to defend the Padilla work to IGT; confirming payment to be withheld unless and until work could be defended). Padilla unequivocally declined unless it was immediately paid in full for the removed and rejected work. JA Vol. III, pg. 278 (Tr. Ex. 275); JA Vol VI, pg. 497-502 (Brinkerhoff Testimony); RA Vol. II, pp. 352-354 (Lopez Deposition at 135:16-23).

Padilla’s Crews’ Knowledge.

It was no secret that the Padilla work was failing. Even Padilla’s own crews identified the separation. RA Vol. 1, pg. 137-156, Tr. Ex. 17 (Daily Field Logs of Padilla’s crew). Padilla’s field notes indicate as follows:

Date	Notation
September 10, 2009	“The brown is pulling from the scratch on the first two columns that we scratch and brown after the mock-up.”
September 11, 2009	“We have the same problem on the brown coat on the second column when the stone installers do the bonding test the brown pulls from the scratch. Call Joe [Lopez] let him know. Also, Joe [Padilla management] says for me to keep doing the production. ”
September 15, 2009	“Today, 3 more areas where install stone when stone installers pull it to check bonding, brown coat came loose

Date	Notation
	from scratch coat. Joe Lopez [Padilla management] let him know what happened. His response was for me to keep doing what I was doing and that nothing was wrong."
September 16, 2009	"Today, two more areas came loose."

Id. (emphasis added). Padilla management brazenly instructed the Padilla crews to keep working, in spite of identified instances of failure in Padilla's Work. *Id.*

C. Big-D Gave Padilla *Repeated* Notice of the Failures in the Padilla Work and Requested Padilla's Assistance to Defend the Work.

IGT did not give Big-D the opportunity to remove and replace the Padilla Work. JA Vol. VI, pp. 525-536 (McNabb Testimony). On the outside of the building, IGT immediately directed Big-D to place an alternate system. Because there was no longer time to allow the two-coat stucco system to cure before IGT needed the project for its international client event, IGT directed Big-D to use an alternate, slightly less desirable method of construction using a cement board base for the stone instead of the stucco.³ JA Vol. 1, pg. 50:7-13, Pre-Trial Memorandum, Stipulated Facts; JA. Vol. V, pg. 421-24 (IGT Deposition); JA Vol 5, pg. 489-90 (Brinkerhoff testimony); JA Vol. VI, pp. 525-536 (McNabb).

³ Again, Padilla brazenly misrepresents the evidence on this issue. Opening Br. at 3. Contrary to Padilla's representation that Big-D and IGT determined the cement board "was better suited to the stone adhesive coverage pulling," all evidence indicates that the sole basis for the switch was timing and IGT firmly believed it was a less desirable solution than the stucco—not some sort of improvement. JA. Vol. V, pg. 421-24 (IGT Deposition); JA Vol 5, pg. 489-90 (Brinkerhoff testimony)

Months later, IGT informed Big-D that it refused to allow Big-D the opportunity to replace the Padilla Work on the interior of the building. JA Vol. VI, pp. 517-18 (McNabb Testimony); JA Vol. III, pp. 286-290. In fact, the failure of the Padilla Work formed the basis for a dispute between Big-D and IGT and resulted in Big-D paying substantial damages to IGT. JA Vol. VI, pp. 524-26 (McNabb Testimony); JA Vol. III, pp. 283-285 (Tr. Ex. 64).

By a mistaken accounting error, Big-D released a check to Padilla in October 2009. JA Vol. V, pp. 490:20-492:25 (Brinkerhoff Testimony); JA Vol. VI, pp. 494:1-498:1, 507:18-511:8 (Brinkerhoff Testimony); JA Vol. II, pp. 215-220, Tr. Ex. 9 (Payment Request); JA Vol. II, pp. 291-292, Tr. Ex. 73 (Big-D AP History). Big-D immediately stopped payment on the check and called Padilla to advise that the check was released in error and that payment was to be withheld pending further investigation into the causes of the failure of the Padilla Work. JA Vol. VI, pp. 494:1-498:1, 507:18-511:8 (Brinkerhoff Testimony); JA Vol. III, pp. 281-282, Tr. Ex. 61 (Email).

D. District Court Relied on Substantial Evidence that the Padilla Work Was Defective.

Based upon the presentation of the evidence, the District Court considered substantial factual evidence that the Padilla Work was defective and was not constructed in compliance with the Plans and Specifications. This included evidence from:

(i) On-site investigation: JA. Vol. 3, pg. 261-266 (Tr. Ex. 43, 44, 46); RA Vol I, pg. 231-238 (Tr. Ex. 45, 47, 48, 49, 51); ; JA Vol. 5, pg. 48-85; [Chin testimony]

(ii) Photographs of the defective work as it was observed, JA Vol. IV, pp. 374-384, Tr. Ex. 404 and 405;

(iii) Testimony of Big-D on-site project manager, Brent Brinkerhoff, JA Vol. V, pp. 480-86 (Brinkerhoff Testimony); JA Vol. VI, pp. 498-503 (Brinkerhoff Testimony);

(iv) Testimony of Big-D's principal in charge who was onsite, Forrest McNabb, JA Vol. V, pp. 527 (McNabb Testimony);

(v) Testimony of Padilla's executive responsible, Joseph Lopez, JA Vol. V, pp. 407-417 (Lopez Testimony); RA Vol. II, pp. 328-356 (Lopez testimony);

(vi) Testimony of IGT's responsible executive, Robert Stecker, JA Vol. V, pp. 418-424 (IGT Testimony); RA Vol. II, pp. 357-384 (IGT testimony);

(vii) Testimony of IGT's designated on-site expert based upon personal observation and investigation, Ian Chin, JA Vol. VII, pp. 734-784 (Chin Testimony);

(viii) testimony regarding findings of IGT's off-site petrographic analysis, *Id.* and JA. Vol. IV, pp. 380-381 (Tr. Ex. 406); and

(ix) further extensive analysis after the Padilla Work was removed and replaced. JA Vol. VI, pp. 498-503 (Brinkerhoff Testimony).

Chronologically, this included the following sequence of events relied upon by the District Court to determine that the Padilla Work was defective.

On **September 10, 2009**, visual review of the Padilla Work confirmed that the first layer of the Padilla Work was not adequately “scored” to allow bonding to the second layer; Finding of Fact 34 (citing Tr. Ex. 404⁴, 405⁵, 446-50); JA Vol. VI, pp. 696:12-697:8 (Chin Testimony).

On **September 10, 2009**, visual review of the Padilla Work confirmed that it was not properly hydrated with enough water to activate the cementitious properties of the material. Finding of Fact 34 (citing Tr. Ex. 403, 404, 405, 446-50); JA Vol. VI, pp. 702:3-704:1 (Chin Testimony). Big-D immediately contacted Padilla and asked Padilla to investigate the failures. JA. Vol. V, pp. 484:12-24.

On **September 14, 2009**, photographs of the failed work demonstrated that, in contravention of the plans and specifications, the grooving of the Padilla Work is in two directions. JA Vol. VI, pp. 711:12-712:4 (Chin Testimony).

On **September 15, 2009**, Ian Chin’s petrographer reported that microscopic examination of the Padilla Work was consistent with Mr. Chin’s conclusions based

⁴ Contained at JA Vol. 4, pg. 369-73.

⁵ Contained at JA Vol. 4, pg. 374-79.

upon on-site investigation. JA Vol. VI, pp. 702:3-704:1, 704:9-706:20 (Chin Testimony); JA Vol. IV, pp. 380-381 (Tr. Ex. 406).

On **September 16, 2009**, Mr. Chin conducted an on-site investigation of the failed conditions. JA Vol. VI, pp. 707:11-708:15.

On **September 17, 2009**, Mr. Chin analyzed, 3-inch diameter core samples of the Padilla Work. JA Vol. VI, pp. 716-720 (Chin Testimony); JA Vol. IV, pp. 383-386 (Tr. Ex. 438); JA Vol IV, pp. 395-397 (Tr. Ex. 449). Of the 11 samples, the following results were identified: (i) on eight of the samples, the brown coat had failed to bond to the scratch coat; (ii) on seven samples, the scratch coat was not properly scored to receive the brown coat; and (iii) on an eighth sample, the scratch coat was only 50% bonded to the brown coat. JA Vol. IV, pp. 383-386 (Tr. Ex. 438); JA Vol. III, pp. 279-80 (Tr. Ex. 60).

On **September 23, 2009**, Big-D performed testing of several interior areas of the building to determine whether it could defend the Padilla Work. JA Vol. VI, pp. 722:1-728:25 (Chin Testimony); JA Vol. V, pg. 480:16-481:16 (Brinkerhoff Testimony). Those investigations revealed the same types of failures as identified on the exterior of the building. JA Vol. III, pp. 279-80 (Tr. Ex. 60).

E. District Court Awarded Big-D Its Attorneys Fees and Costs as Prevailing Party in the Padilla Action.

On March 6, 2015, Big-D filed a Motion for Attorneys' Fees, Costs, and Interest Pursuant to Judgment and to Amend Judgment in the amount of

\$1,234,678.55. This Motion sought to Amend the Judgment in the following amounts plus post-judgment interest on those amounts:

Category	Amount
Attorneys Fees	\$383,399.00
Expert Fees	\$38,882.34
Lien Release Bond Fees	\$24,700.00
Other Costs	\$6,344.99
Pre-Judgment Interest	\$164,921.92

JA Vol. VII, pg. 849. In its Reply on May 18, 2015, Big-D voluntarily removed its claim for Pre-Judgment Interest in response to Padilla's Opposition; Big-D acknowledged the pre-judgment interest claim was barred by the Padilla Bankruptcy. JA Vol. VII, pg. 885.

The District Court entered an order awarding Big-D the following:

Category	Amount
Attorneys' Fees	\$383,399.00
Fees to Depose Padilla's Expert	\$2,730.00
Bond Fees	\$24,700.00
Storage of Stucco	\$3,614.99
Subtotal	\$414,433.99

JA Vol. VII, pp. 905. Padilla has represented that the Padilla claim was abandoned by the Padilla Bankruptcy and that Padilla, itself, is entitled to any affirmative recovery from the Padilla Action (and that such funds are not to be paid into the Padilla Bankruptcy). As a result, the District Court entered the fee award as Big-D has a contractual right to attorneys' fees in prevailing on defending against the

Padilla claim—which claim was not impacted by the Padilla Bankruptcy. JA Vol. VII, pp. 905.

IV. SUMMARY OF ARGUMENT

The District Court relied on substantial evidence in support of its determination that the Padilla Work was defective. As a result, the District Court's determination is not clearly erroneous and must be upheld. Accordingly, Padilla is not entitled to payment for defective work that Big-D was required to remove and replace immediately after it was installed. Rather, Padilla is responsible to Big-D for the costs to remove and replace the Padilla Work (in the amount stipulated by the parties prior to trial).

Because IGT rejected the Padilla Work and ordered Big-D to remove and replace it, payment to Padilla never became due. Further, even if payment had become due, Big-D complied with the mandate of NRS 624.624 by providing Padilla regular and repeated notice that the Padilla Work failed—and Padilla had actual knowledge.

Further, the District Court did not abuse its discretion in declining to give itself a spoliation instruction based upon Padilla's assertion that Big-D failed to preserve adequate samples of the Padilla Work.

Finally, as the prevailing party in defending against the Padilla Action, Big-D is contractually entitled to its costs and attorneys fees pursuant to the

Subcontract Agreement (and post-judgment interest on such amounts). These costs and fees were not barred by the Padilla bankruptcy.

V. STATEMENT OF THE STANDARD OF REVIEW

As to the factual determination that the Padilla Work was defective, the District Court made specific and detailed factual findings that the Padilla Work was defective. Thus, rather than the preponderance standard proposed by Padilla, this Court must only review whether those factual findings are clearly erroneous. “Where a question of fact has been determined by the trial court, this court will not reverse unless the judgment is clearly erroneous and not based on substantial evidence.” *Kockos v. Bank of Nevada*, 90 Nev. 140, 143 (1974). Accordingly, the correct standard is whether the District Court’s own detailed and extensive factual findings were clearly erroneous.

Regarding the District Court’s evidentiary ruling in declining to give itself a spoliation instruction regarding whether Big-D preserved adequate samples of the Padilla Work, this Court should only disrupt the District Court’s ruling if the District Court abused its discretion. *Sheehan & Sheehan v. Nelson Mallev & Co.*, 121 Nev. 481, 492 (2005) (specifying that a district court’s evidentiary rulings shall not be overturned “absent an abuse of discretion”).

VI. ARGUMENT

A. **The District Court Did Not Clearly Err Because It Based Its Determination that the Padilla Work Was Defective Upon Substantial Evidence.**

The District Court made two distinct categories of factual conclusions that are both supported by substantial evidence—the Padilla Work was defective and Padilla failed to present reliable evidence to the contrary. The trial judge has “the opportunity to hear and perceive the witnesses,” as a result, he or she is “better able to consider and balance the equities than [is this Court] relying solely on the cold record.” *Cunningham v. Cunningham*, 61 Nev. 93 (1941). “It is not [this Court’s] province to determine the credibility of witnesses. It is the exclusive province of the trial court, sitting without a jury, to determine the facts on conflicting evidence and its finding will not be disturbed *unless it is clear that a wrong conclusion was reached*. *Ormachea v. Ormachea*, 67 Nev. 273, 280 (1950) (emphasis added). As a result, there was no clear error.

i. **Substantial Evidence Thoroughly Demonstrated the Padilla Work Was Defective.**

The District Court’s factual determination that the Padilla Work was defective is supported by the overwhelming weight of the evidence. Accordingly, this Court must determine there was no clear error.

First, Padilla contractually agreed to perform the Padilla Work in compliance with the Subcontract Agreement. This included an agreement to meet

the requirements of the plans and specifications, including very precise specifications regarding the thickness of the layers, the method of “scoring” of the base layer, the compaction, and the hydration. See §III, Statement of Facts (“SOF”) pp 3-4.

Second, visual examination on the project site indicated that the Padilla Work failed to comply with the contract provisions. SOF pp. 5-6. This evidence was further supported by the testimony of Ian Chin explaining the on-site pictures. As even an untrained eye can see from the pictures, Padilla failed to score the base layer of the stucco to a sufficient depth to create a “key” for bonding. Similarly, the variation in thicknesses is also apparent. In addition, Padilla failed to score the base layer in a single direction as required by the contract. The District Court noted these obvious nonconformities from the pictures at trial. SOF pp. 5-8.

Third, petrographic analysis of the stucco during the Project revealed that the Padilla Work has at least three independent defects: (a) incorrect thickness, (b) failure to uniformly score, and (c) inadequate hydration to active the cement properties. This was further supported by the testimony of IGT’s consultant that he commissioned petrographic analysis of the Padilla Work; the petrographic report was consistent with his conclusions based upon visual examination; and relied upon the results to determine the Padilla Work was defective. SOF pp. 5-6, 11-12.

Fourth, persons on-site could literally peel one layer of the Padilla Work from the other with bare hands and minimal force—indicating a serious defect. Both Mr. Chin and Brent Brinkerhoff (Big-D) testified of this condition. SOF pp. 4-6, 11-13.

Fifth, the parties took several samples of the stucco work on the interior of the building to perform further tests. Of the eleven usable core samples, eight exhibited serious defects in the form of incorrect thickness of the layers and failure of the layers to bond together. SOF pp. 13.

Sixth, after IGT rejected the Big-D Work, Big-D commissioned an expert to perform further testing and analysis of the Padilla Work in attempt to defend the work as acceptable. Brent Brinkerhoff and Forrest McNabb (Big-D) both testified they were unable to identify a defensible basis to assert to IGT that the Padilla Work was acceptable. SOF pp. 11-13.

Seventh, Mr. Chin testified, unequivocally, that the reason the Padilla Work failed was because the workmanship deviated from the Plans and Specifications. He also testified unequivocally that the length of the cure times both (i) between the first and second coat of the Padilla Work and (ii) between the second coat of the Padilla Work and the exterior stone application had *no bearing* on the failures in the Padilla Work. In fact, Mr. Chin indicated that this conclusion is further reinforced by the fact that the Padilla Work on the interior of the buildings—that

was tested *weeks* after the cure period expired and *never had any stone installed over it*—exhibited the same weakness as the work over which stone was installed. The cure times—the responsibility of Padilla to determine—were, in fact, in compliance with applicable local code. SOF pp. 4-6, 11-13.

Eighth, Big-D requested that Padilla provide any information or analysis to support Padilla's position that the Padilla work failed for reasons other than workmanship. Padilla indicated that it had samples of the material that it would test to determine whether the material, itself, was defective. Padilla never provided any information or took any steps to defend the Padilla Work. SOF pp. 7-10.

ii. **Padilla's Counter-Argument Regarding Causation Is Supported by Minimal Evidence and No Expert Testimony.**

Padilla's factual assertions that, (a) the cause of the failures in the Padilla work was not known, and (b) the cause of the failures in the Padilla work was failure to cure, both mischaracterize the record.

a. **Substantial Evidence Supports the Finding that the Padilla Work Was Defective.**

Contrary to Padilla's assertion, the Padilla Work was rejected by IGT because of workmanship issues. SOF pp. 3-5, 11-13. IGT had petrographically examined the Padilla Work and had its consultant (Ian Chin) investigate the work on site. As a result, (i) IGT knew that the basis for rejecting Padilla's Work was

Padilla's failure to comply with the plans and specification and (ii) Big-D presented substantial evidence in support of this at trial.

First, Padilla's assertion that the "causation of the separations" in the Padilla Work "is not known" is false. Opening Br. at 5. The record is clear that IGT was very firm; it rejected the Padilla Work because the work failed to conform to the Plans in Specifications in several respects: (i) inadequate hydration, (ii) failure to score the first layer sufficiently, and (iii) failure to compact. SOF pp. 3-5, 11-13. At the time the work was rejected, Big-D still disputed IGT's rejection of the Padilla Work on the interior of the building and arduously requested Padilla to step up and defend its work. Later, after months of investigation, Big-D concluded that the Padilla Work was in fact defective and could not be defended to IGT. SOF pp. 11-13. Accordingly, the District Court did not clearly error.

Second, Padilla falsely asserts that Big-D "failed to put forth evidence that any of the alleged deviations from the plans and specifications were material; caused the separations." Opening Br. at 9. In fact, Big-D presented substantial evidence demonstrating that the Padilla Work's failures were caused by the failure to follow the plans and specifications. SOF pp. 7-11. Accordingly, the District Court did not clearly err.

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b. Substantial Evidence Indicates the Failures in the Padilla Work Were Unrelated to Cure Time.

The District Court relied upon the substantial evidence to determine the cause of the failure in the Padilla work was *not* a result of cure times. While Padilla asserts, “It is Padilla’s position the separations were caused by the premature installation of the stone on the stucco before it was fully dry (cured),” this assertion is directly contrary to the weight of the evidence. SOF 3-5, 11-13.

Padilla did not present an expert to offer an opinion in support of this causation. In fact, in support of its assertion, Padilla cites not to evidence in the record but to statements of its counsel during argument to support its “failure to cure theory.” The only evidence in the trial record supporting Padilla’s “failure to cure” theory are citations to the deposition testimony of former Padilla COO, Joseph Lopez. The District Court, as the fact finder, is the proper party to weigh the evidence and determine which factual theory has the most evidence. The District Court did this exercise and relied upon the substantial evidence to make a factual finding that the Padilla Work failed because it was defective and Padilla did not construct the Padilla Work in compliance with the plans and specifications. SOF 1-5, 11-13. As a result, the District Court’s express factual finding that the failures in the Padilla Work were not caused by the cure time are not clearly erroneous and must be upheld.

B. Big-D Had No Obligation to Pay Padilla For the Padilla Work that Was Removed and Rejected; NRS 624.624 Does Not Provide Otherwise.

Big-D is not required by either the subcontract agreement or Nevada's prompt payment statute (NRS 624.624) to pay Padilla for defective work that the Owner rejected and directed Big-D to remove.

i. The Subcontract Does Not Require Big-D to Pay Padilla for Defective Work that Was Rejected by the Project Owner.

As a matter of law, Big-D's obligation to pay Padilla under the Subcontract Agreement was excused because Padilla materially breached the contract by installing defective work. Further, the District Court correctly determined that no implied covenant or equitable theory requires Big-D to pay Padilla for work that was rejected by the Project owner and which Big-D was required to remove and replace on its own dime. Again, this determination was also based upon the factual finding supported by substantial evidence that Padilla's work was defective. Accordingly, there is no basis to find that Big-D breached the express or implied obligation in the Subcontract Agreement.

ii. Big-D Had No Obligation to Give Padilla an Opportunity to "Cure" Work.

Padilla's argument that Big-D must pay Padilla because Padilla was not given an opportunity to cure its work also fails for four reasons. First, Big-D gave Padilla written notice and request to cure the defective Padilla work when the failures were first identified. SOF 7-8. Second, Big-D was obligated to follow the

directions of IGT who directed the Padilla stucco work be removed and replaced with a cement board system (making any further cure request impracticable). SOF 6-7, 10. Third, the safety risk posed by the stone panels on Padilla's Work further excused any required notice to cure. SOF 10. Fourth, Padilla was unwilling to take any actions to investigate or cooperate—making any additional request to cure futile. SOF 8-9. Accordingly, the District Court did not clearly err in determining that Big-D did not have an additional obligations to request Padilla to cure its defaults.

iii. NRS 624.624 Does Not Require Payment to a Subcontractor for Defects of which It Was Aware and Notified.

Nothing in Nevada's prompt payment statutes, NRS 624.624, requires Big-D to pay Padilla for work that the Owner rejected and required Big-D to remove and replace. Padilla argues it is entitled to payment for rejected work claim pursuant to NRS 624.624 based upon two *false* factual assertions: (i) payment to Padilla "was due on October 25, 2009" and (ii) Big-D's first notice of withholding was not provided to Padilla until November 3, 2009.

a. Payment to Padilla Was Not "Due" on October 25, 2009.

The District Court did not clearly err in its factual determination that payment to Padilla was not due on October 25, 2009. The Subcontract provided that Padilla was to be paid within ten (10) days after IGT paid Big-D *and* after IGT

accepted the Padilla Work. JA Vol. 1, pg. 91-104, Trial Exhibit 1.⁶ Specifically, Big-D “must have first received from the Owner the corresponding periodic payment, *including the approved portion of your monthly billing*, unless the Owner’s failure to make payment was caused exclusively by us.” *Id.* at Section 4.2.

NRS 624.624 does not change the timing of when payment is due under a subcontract. The statute is designed to ensure that general subcontractors promptly pay subcontractors after the general contractor receives payment from the Owner associated with work performed by the subcontractor. NRS 624.624 is clear that its provisions yields to (a) payment schedules contained in subcontract agreements and (b) contractual rights to withhold payments from a subcontractor arising from deficient work. Specifically, NRS 624.624 provides payments are due to a subcontractor under “[a] written agreement with a lower-tiered subcontractor that includes a schedule for payments,” that payments are due as follows:

(1) On or before the date payment is due; or

(2) Within 10 days after the date the higher-tiered contractor receives payment for all or a portion of the work, materials or equipment described in a request for payment submitted by the lower-tiered subcontractor,

whichever is earlier

⁶ “Contractor will issue payment to Subcontractor by US Mail ... within ten (10) days of receiving payment from the Owner.” Section D.

NRS 624.624(1)(a).

Further, even after such due date, a general contractor has the right to withhold payment for “[c]osts and expenses reasonably necessary to correct or repair any work which is the subject of the request for payment ...” NRS 624.624(2)(b). NRS 624.624 does require that a general contractor provide written notice to the subcontractor as to the basis for withholding “on or before the date the payment is due.” *Id.* at (3).

Here, it is undisputed that the Subcontract Agreement is a written agreement between Big-D and Padilla. Accordingly, pursuant to NRS 624.624(1)(a), payment is due to Padilla as specified in the Subcontract Agreement—after IGT accepted the Padilla Work.

Padilla dated its Application for Payment on September 25, 2009 and it was received by Big-D on September 30, 2009. Padilla erroneously contends that the payment was “due” on October 29, 2009. This assertion is incorrectly based upon a notation by Big-D’s project manager on an internal accounting document tracking received project payments—which Padilla misconstrues and takes out of context. Yet, the District Court did not clearly err in its factual finding that Padilla’s work had not been approved by IGT by October 29th (and, in fact, had been rejected by IGT on September 20th and replaced by Big-D by October 9, 2009). As a result, because IGT has not accepted Padilla’s work by October 29,

2009, payment to Padilla was not due at that time. As a result, there is no basis to use October 29, 2009 as a payment due date for purposes of NRS 624.624.

b. Big-D Provided Padilla Repeated Written Notice of the Defects in the Padilla Work.

The District Court did not clearly err in determining that Padilla received repeated written notice that its work was defective. Rather, the District Court relied on substantial evidence that Padilla had actual and direct notice of the potential defects in the Padilla Work including the following:

- Real-time notice by Padilla's own crews that the work was separating from itself, SOF 9-10;
- Written notice from Big-D to Padilla requesting that Padilla immediately investigate its work on several occasions, SOF 7-8;
- Telephone notice from Big-D to Padilla following up on Big-D's requests that Padilla investigate the failures in the Padilla Work, SOF 11-13;
- Meetings on-site with the product manufacturer and IGT's consultants discussing the failures in the Padilla Work, SOF 11-13;
- Real-time information that IGT had rejected the Padilla Work and directed Big-D to remove and replace it, SOF 11-13; and
- Finally, formal written notice from Big-D on November 3, 2009 informing Padilla that no payment would be processed unless and until Padilla could assist Big-D to demonstrate that the failures in Padilla's work were caused by factors other than Padilla (which Padilla took no efforts to do), SOF 8-9.

Assuming *arguendo* that payments to Padilla for the rejected Padilla Work had become due, Big-D provided repeated written notices to Padilla of the failures in the Padilla Work. Further, Big-D was authorized by the Subcontract Agreement to withhold payment from Padilla for "defective work not remedied" and "your

failure to perform any obligation made by You in this Subcontract.” JA Vol. 1, pg. 91-104, Trial Exhibit 1, at Section 4.4(2) and (5). As a result, NRS 624.624(3) authorizes Big-D to withhold sums due to Padilla amounts to remove and replace the Padilla Work. Accordingly, NRS 624.624 does not override the subcontract terms to impose any affirmative payment obligations upon Big-D to pay Padilla for work that was rejected and removed.

iv. Padilla’s Reliance on *Lehrer McGovern Bovis* Is Inapposite.

Padilla’s reliance on dicta in *Lehrer McGovern Bovis* is inapposite—it had no bearing on determining whether Big-D gave time notice of withholding to Padilla pursuant to NRS 624.624. *See* Opening Br. at 20. First, NRS 624 was not in effect or being interpreted in *Lehrer McGovern Bovis, Inc. v. Bullock Insulation, Inc.* 124 Nev. 1102, 1117 (2008). Second, the issue here is not whether the payment schedule in the Big-D subcontract is a pay-if-paid clause that would excuse Big-D’s obligation to pay Padilla *if* the owner failed to pay Big-D for Padilla’s work. Rather, the issue is, for the purposes of NRS 624.624 notice of withholding, when was the payment from Big-D to Padilla due. The Subcontract Agreement contained a schedule for payments—payment to Padilla was due after IGT approved Padilla’s work *and* after Big-D received payment attributable to Padilla’s work.

This is not a “pay-if-paid case.” Rather, this is a case where payment to a subcontractor is excused when the subcontractor performs defective work that is rejected by the Owner and which the general contractor is required to remove and replace. The legal rights and obligations in such a circumstance are governed by clear contract provisions and case law interpreting when obligations for payment under a subcontract are excused. Nothing in NRS 624.624 or *Lehrer McGovern Bovis* determine that payment is required when an Owner rejects a subcontractor’s work and requires it to be removed and replaced. This is a contract compliance issue not a prompt payment issue.

v. It Is Undisputed that Padilla’s Application for Payment Is Overstated Even If Padilla Were Entitled to Payment.

Further, even if Padilla were entitled to payment (which it is not), it is undisputed that Padilla’s Application for Payment dated September 25, 2015 is overstated. The Application for Payment fails to credit Big-D for the initial \$25,000.00 deposit made to Padilla prior to starting work. JA Vol. 6, pp. 494-497 (Brinkerhoff testimony). Further, it is undisputed that Big-D was required to pay one of Padilla’s material suppliers directly after the material supplier filed a mechanic’s lien against the Project. Nothing in NRS 624.624 provides that Padilla is entitled to payment for an overstated application for payment. Accordingly, even if Padilla were entitled to payment for the defective and rejected work (which it is not), the amount of damages would be reduced by amounts that Padilla had

previously been paid and amounts that Big-D was required to pay Padilla's subcontractors.

C. The District Court Did Not Abuse Its Discretion in Declining to Give Itself a Spoliation Instruction.

The District Court did not abuse its discretion in electing not to give itself a spoliation instruction. *Sheehan & Sheehan v. Nelson Mallev & Co.*, 121 Nev. 481, 492 (2005) (specifying that a district court's evidentiary rulings shall not be overturned "absent an abuse of discretion"). Padilla asserts it is entitled to a spoliation instruction based on Padilla's contention that Big-D did not retain enough samples of the rejected Padilla Work. For five reasons, the District Court did not abuse its discretion.

First, Padilla does not contend that Big-D failed to preserve stucco samples of Padilla's Work for its testing and investigation. It is undisputed that several stucco samples were preserved and provided to Padilla. Rather, Padilla contends that Big-D failed to retain portions of the stucco over which stone was installed. This argument is a red herring because it is premised upon Padilla's incorrect argument that only the stucco over which stone installation had commenced failed. This is incorrect. IGT was clear that its basis to reject the Padilla Work related to its testing and inspection of Padilla Work over which no stone was installed—including on the interior of the building where no stone was installed. The failures in the Padilla Work were widespread and there is no evidence of any kind that the

Padilla stucco over which stone was installed performed any differently than the stucco (over which no stone was installed) that was rejected by IGT.

Second, the remedy that Padilla requests—tantamount to a direction by the Court that the Padilla Work is not defective—is not supported by Nevada law. Rather, Nevada recognizes an “adverse inference” for negligent destruction of evidence. An “adverse inference” “is permissible, not required, and it does not shift the burden of proof.” *Bass-Davis v. David*, 122 Nev. 442, 449, 34 P.3d 103, 107 (2006). An “adverse inference” instruction informs a jury that it is “permitted” to draw an inference that such evidence may have been unfavorable to the destroying party. Here, Padilla, Big-D, and IGT witnesses observed the separation of the Padilla Work. Contemporaneous photographs demonstrate the separation of the Padilla Work. Both Big-D and IGT retained expert consultants to test the Padilla Work. And, there are existing samples remaining of the Padilla Work that were provided to Padilla during discovery. Even if the district court allowed itself the “permission” to infer that the portions of the Padilla Work that were discarded may have contained unfavorable evidence to Big-D, this permissible inference does not counter the mountain of evidence relied upon by the District Court that the Padilla Work failed.

Third, the concept of an adverse inference instruction is to provide evidentiary balance to a proceeding and ensure the jury understands the scope of

inferences it is permitted to draw based upon the availability of evidence. Such an explanation is not necessary when the fact finder is a sophisticated district court judge—who is well equipped to make such determinations himself. “Adverse inference instructions generally are not appropriate sanctions in bench trials.” *See Thompson v. U.S. Dep’t of Hous. and Urban Dev.*, 219 F.R.D. 93, 105 (D. Md. 2003) (holding the district judge was sophisticated enough to factor in any spoliation issues in its own factual findings).

Fourth, Padilla failed to timely request or demand such a spoliation remedy. When a party waits until trial to seek a remedy that equates to a declaration of victory on an issue, it is appropriate to deny the request. *See JOM, Inc. v. Adell Plastics, Inc.*, 193 F.3d 47, 49-50 (1st Cir. 1999); *Gault v. Nabisco Biscuit Co.*, 184 F.R.D. 620, 622 (D. Nev. 1999).

Fifth, Big-D did not have custody and control over the evidence and had the same access to such evidence as did Padilla. Spoliation sanctions are only appropriately issued to a party “controlling the evidence.” *Bass-Davis*, 122 Nev. at 450.⁷ IGT was the Owner of the Project and required Big-D to remove and replace

⁷ “Obviously, the party charged with spoliation must have been in the possession, custody, or control of the evidence in order for the duty to preserve to arise. The party requesting sanctions for spoliation has the burden of proof on such a claim.” *Hammann v. 800 Ideas, Inc.*, 2010 U.S. Dist. LEXIS 131097 at *21 (D. Nev. 2010) (denying motion for spoliation related to records of certain 1-800 numbers when there was no evidence that party was in the “possession, custody, or control” of relevant documents, even when party had business relationship with party in

the Padilla Work on an expedited basis. Both Big-D and Padilla were on the project site at the time that the order was issued. Had Big-D not removed and replaced the Work, IGT would have inevitably done so. Big-D did not have the option to leave Padilla Work on the exterior of the building for an extended period—meaning that it is not proper to issue a spoliation sanction against Big-D.

As a result, for these five reasons, the District Court did not abuse its discretion in failing to give itself a spoliation instruction.

D. Big-D Is Entitled to Recover Its Attorneys’ Fees, Costs, and Interest.

The District Court had jurisdiction to award Big-D attorneys’ fees and costs related to post-petition matters and costs to defend against Padilla’s affirmative claim. Padilla’s bankruptcy action did not, as a matter of law, impact Big-D’s right to post-petition attorney’s fees and costs to defend Padilla’s affirmative claim or post-petition costs to maintain an NRS 108 bond related to Padilla’s mechanic’s lien.

Post-confirmation “debts” are liabilities of reorganized Chapter 11 debtor and are not affected by the bankruptcy proceeding. 11 U.S.C. Section 1141(d); *In re Nuttall Equipment Co., Inc.*, 188 B.R. 732 (Bkrtcy.W.D.N.Y.1995); *Rozel*, 120 B.R. at 949 (“Generally, a claim or debt must be found to be absolutely owing at

control of such documents). *See also Rhodes v. Robinson*, 399 Fed. Appx. 160, 166 (9th Cir. 2010) (discussing required proof that “the party *with control* over [evidence] had a duty to preserve it”) (emphasis added).

the time of the filing of the petition to be considered a pre-petition item.”). A Chapter 11 plan and confirmation order does not preclude a claimant from seeking post-petition attorneys’ fees. *In re Mariner Post Acute Network, Inc.* 312 B.R. 520 (Bankr. D. Del. 2004). For example, confirmation of a debtor’s chapter 11 plan did not terminate a mortgage agreement or impact the mortgagee’s contractual right to recover attorney fees incurred in litigating its rights under agreement. *In re Sure-Snap Corp.*, 983 F.2d 1015 (11th Cir. 1993). Rather, the effect of the Chapter 11 plan was only to prevent the mortgagee from enforcing the terms of the mortgage agreement against the debtor to collect a pre-confirmation debt. *Id.* Similarly, a creditors post-petition claim against a Chapter 11 debtor was not impacted by plan confirmation when the actions that formed the basis for the claim occurred post-petition, even though the contract was executed pre-petition. *In re Texaco, Inc.*, 218 B.R. 1 (S.D.N.Y. 1998).

Here, the attorneys’ fees and costs that Big-D seeks are post-petition fees not impacted by the bankruptcy action. The bankruptcy petition did not modify Big-D’s contractual right to its attorneys’ fees in defending against Padilla’s claim. *See e.g., In re Sure-Snap Corp.*, 983 F.2d 1015 (11th Cir. 1993). Attorneys’ fees incurred by Big-D post-petition to defend Padilla’s affirmative claim for relief are not impacted by the bankruptcy petition, which only impacts pre-confirmation debts. Padilla prosecuted a mechanic’s lien claim against Big-D.

Further, Big-D was required by IGT to procure a bond to prevent the Padilla lien from being a cloud on the title to the Project. This bond incurred an annual fee of approximately \$5,000—which Big-D was required to pay each year between 2010 and 2015 during the duration of the case. This bond cost has no relation to the Big-D Counterclaim—it arises exclusively from the Padilla mechanic’s lien claim. Further, Big-D did not incur any attorneys’ fees or costs in support of the Big-D Counterclaim that were not necessary to defend the Padilla Action.

As a result, Big-D is entitled to collect its fees and costs against the reorganized Padilla.

VII. CONCLUSION

Accordingly, for the foregoing reasons, this Court should uphold the District Court’s decision and affirm the judgment entered in favor of Big-D.

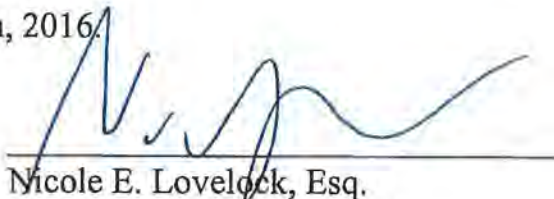
VIII. CERTIFICATE OF COMPLIANCE

I certify that I have read this Answering Brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this Brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found. The Brief complies with the formatting requirements of NRAP 32(a)(4)-

(6) and the type-volume limitation stated in NRAP 32(a)(7) because it is presented in a 14-point Times New Roman font, contains 1,071 lines and 10,024 words, including headings and footnotes, as counted by Microsoft Word—the program used to prepare this brief.

I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 10th day of March, 2016



Nicole E. Lovelock, Esq.
HOLLAND & HART LLP
9555 Hillwood Drive, 2nd Floor
Las Vegas, Nevada 89134
(702) 669-4600
(702) 669-4650 – fax

Melissa A. Beutler, Esq.
Big-D Construction Corporation
3030 South Highland Drive
Las Vegas, Nevada 89107-1047

Attorneys for Respondent

EXHIBIT 25

Case Nos. 67397 & 68683

IN THE SUPREME COURT OF THE STATE OF NEVADA

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Clerk of Supreme Court

**PADILLA CONSTRUCTION COMPANY OF NEVADA,
A NEVADA CORPORATION,**

Appellant,

vs.

BIG-D CONSTRUCTION CORP., A UTAH CORPORATION,

Respondent.

**APPEAL FROM
THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF CLARK**

THE HONORABLE MARK R. DENTON, DISTRICT COURT JUDGE

A-10-609048-C

APPELLANT'S REPLY BRIEF

Bruce R. Mundy, NSB #6068
200 South Virginia Street, Eighth Floor
Post Office Box 18811
Reno, Nevada 89511-0811
reno-attorney@sbcglobal.net
(775) 851-4228

Attorney for the Appellant

Rule 26.1 Disclosure

Pursuant to NRAP 26.1, the undersigned counsel certifies that Appellant, Padilla Construction Company of Nevada ("Padilla"), is a Nevada corporation in good standing, no parent company nor any publicly held company owns any interest in the corporation, and is and has been exclusively represented in this matter by Bruce R. Mundy, Nevada State Bar number 6068, a sole practitioner.

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ARGUMENT

I. NO SUBSTANTIAL EVIDENCE PADILLA OMISSION OR COMMISSION CAUSED THE SEPARATIONS

In its Answering Brief (“AB”), Respondent, Big-D Construction Corp. (“Big-D”), states the District Court made two distinct categories of factual conclusions: (1), that Padilla’s Work was defective and (2), Padilla failed to present reliable evidence to the contrary.¹ The district court’s factual findings will be upheld, if not clearly erroneous, and if supported, by substantial evidence. *Ogawa v. Ogawa*, 125 Nev. 660, 668, 231 P.3d 699 (2009).

The trial issue, as recognized by the District Court, was causation.² Not whether Padilla’s work deviated from the projects plans and specifications, but instead, whether the alleged deviations were material³, *Calloway v. City of Reno*, 116 Nev. 250, 256, 993 P.2d 1259 (2000); caused the claimed damages. The District Court: “is that [trial related to causation] correct” directed to Padilla Counsel; “That is

¹ RAB pg. 21, section A., first sentence.

² RAB pg. 2, last paragraph, first sentence.

³ A failure to perform is material if it defeats the purpose of the contract. Nevada Jury Instruction, 13CN.42.

correct”; the District Court “All right. The record will so reflect.” TSRCP 1, JA Vol. V., pg. 445, lines 6-11. Causation is an essential element of a claim for breach of contract. *Clark Cty. Sch. Dist. V Richardson Constr.*, 123 Nev. 383, 396, 168 P.3d 87 (2007). Causation is defined as the act by which an effect is produced. *Black’s Law Dictionary* 221 (6th ed. 1990). And further, “That is if the damage of which the promisee [Big-D] complains [separations of stucco coats] would not have been avoided by the promisor’s [Padilla] not breaking [its] promise [to complete all work in accordance with the project plans and specification], the breach cannot give rise to damages.” *Clark Cty. Sch. Dist. at 396*.

II. DEFECTIVE IS NOT UNEQUIVOCALLY CAUSATION

According to Big-D, the District Court’s factual determination that the Padilla Work was defective is supported by the overwhelming weight of the evidence.⁴ “A product is ‘defective’ if it is not fit for the ordinary purpose for which such articles are sold and used.” *Black’s Law Dictionary* 418 (6th ed. 1990). At no point has

⁴ RAB pg. 21, section A.i., first sentence.

Padilla denied its Work (product), in some instances, failed to support the stone facade, the purpose for which it was intended. Instead, as agreed by all parties, the disputed issue before the court was not if the product failed, but instead, **what caused the product failure**: Big-D claimed it was because of deviations from the plans and specifications for the project;⁵ and Padilla claimed it was because its product was not allowed to cure long enough before installing the stone facade.⁶

Evidence of causation by Padilla's alleged deviations from the plans and specifications doesn't exist as argued in Padilla's Opening Brief⁷, which is supplemented here, and because Chin's testing was flawed. Contrary to Big-D's assertion, there is no evidence as to compaction, hydration, nor petrographic analysis.⁸ The only exhibit alleging a petrographic study and containing the words hydration or compaction is trial exhibit 406⁹, which Padilla objected to as hearsay¹⁰

⁵ Joint Appendix ("JA") Vol. 1, pg. 000017, paragraphs 12 & 13.

⁶ JA Vol. V, pg. 000411, lines 10-25.

⁷ AOB pg. 9, last paragraph – pg. 10, last full paragraph.

⁸ RAB pg. 22, first partial paragraph, third line of text; last partial paragraph, first sentence.

⁹ JA Vol. IV, pgs. 380-381.

¹⁰ JA Vol. VI, pg. 000704, lines 15-16.

and the District Court allowed “limited admission, not for the truth of the matter asserted, but for what happened in his [Chin’s] mind as to why he acted the way he did.”¹¹ A statement merely offered to show that a statement was made and the listener was affected by the statement, and which is not offered to show the truth of the matter asserted is admissible as non-hearsay. *Grosjean v. Imperial Palace*, 125 Nev. 349, 362, 212 P.3d 1068 (2009). Consequently, the alleged truth of the matters asserted as to petrographic studies, compaction or hydration in trial exhibit 406 were not admitted into evidence.

There wasn’t any testing of the failed product; stucco that had been allowed to cure the requisite time, and was found to have separations between the first coat (scratch) and the second coat (brown). Despite the controversy regarding the correct cure time, there isn’t any evidence of testing of stucco when the scratch coat cured two days and the brown coat cured seven days as specified by Big-D¹² and the bond between the two coats failed. There is nothing in the record relating to any of the

¹¹ JA Vol. VI, pg. 000709, lines 19-23.

¹² JA Vol. VI, pg. 631, line 24 – pg. 632, line 2.

observations/testing Chin¹³ performed, September 17th and 22nd,¹⁴ showing the installation dates of either the scratch or the brown coat, and, Chin testified he didn't know when Padilla installed the examined/tested stucco.¹⁵ The cure time is critical to the strength of the bond between the scratch and the brown coats. According to Chin, in answer to the question of what the Architect's plan instruction to determine the most effective procedures for curing and lapse time between coats based on climatic and job conditions, meant:

It means that it's important to make sure that, first of all, the scratch coat is – has sufficient cure time before you apply the brown coat to it. It's also – and it talks about making sure that the brown coat has sufficient cure time – as well as the other times involved before you apply anything [stone] to it.

So this is very important because you want to make sure that the strength of the materials are up to the point where you can apply materials to it without causing any damage to the [stucco] system. TSRCP 2, JA Vol. VI., pg. 682, line 22 – pg. 683, line 6.¹⁶ Emphasis added.

While Big-D's Project Manager, Brinkerhoff, described a project procedure that the date Padilla finished a scratch coat or brown coat was marked on the wall so they knew when the cure time started, Big-D never produced evidence showing dates

¹³ AOB pg. 2, pg. 3, Ian Chin was IGT's consultant during the IGT project and subsequently, Big-D's consultant.

¹⁴ JA Vol. VII pg. 000751; Vol. V, TEXH 449, pg. 000395.

¹⁵ JA Vol. VII, pg. 000749, line 24 – pg. 000750, line 2; pg. 000751, lines 15-19.

¹⁶ AOB pgs. 6-7.

marked on the walls that were the subject of Chin's examinations/tests. Instead, the only evidence of any date markings were on stucco samples provided to Padilla's expert in March of 2012 that were marked "Brown coat Finished 9/14", "Sample date 9/18¹⁷." Obviously, rendering any examination/testing of those samples invalid in the absence of the 7 days cure time specified by Big-D for the brown coat. Given Chin's assertion that proper curing is important to the strength of the stucco and the absence of any evidence that the examined/tested stucco had been properly cured, it shouldn't be a surprise that Chin could report he peeled stucco coats apart with his hands¹⁸ and Big-D's Brinkerhoff reported "you could just twist" the stucco coats apart.¹⁹

The absence of documentation for the stucco installation corrupted the veracity of any conclusions drawn from Chin's examination/testing as to the cause of the separations of the two coats of stucco. For instance, if a sample of stucco exhibited a separation of the two coats of stucco and exhibited a deviation from the plans and

¹⁷ JA Vol. VII, pgs. 000793-000796.

¹⁸ JA Vol. VI, pg. 000707, lines 18-20.

¹⁹ JA Vol. VI, pg. 000589, lines 7-9.

specifications, e.g. the scratch coat wasn't grooved the specified one-eighth inch, and the brown coat was only cured four days instead of the specified seven days; what valid conclusion could be made as to the cause of the separations; the lack of proper grooving or the lack of proper curing?

III. NO DUTY FOR PADILLA TO PRESENT CONTRARY EVIDENCE

Big-D's assignment of the burden of proof to Padilla to present reliable evidence contrary to Big-D's alleged proof²⁰ that Padilla's work was defective ignores the lawful assignment of the burden of proof. Instead, it was Big-D's exclusive burden to present evidence and argument to prove the allegations of its Counterclaim. *Nassiri and Johnson v. Chiropractic Physicians' Board*, 130 Nev. Adv. Op., No. 27, pg. 3 (2014). That, pursuant to *Clark Cty. Sch. Dist.*, at 396, but for Padilla's alleged deviations from the project plans and specifications, the complained of separations of the stucco would not have occurred.

Additionally, how was Padilla going to obtain the reliable evidence? Padilla

²⁰ RAB pg. 21, section A. first sentence.

never received any samples of the ‘failed’ work, nor had the opportunity to obtain them.²¹

IV. DUTY TO PAY PADILLA ACCORDING TO TERMS OF THE SUBCONTRACT

Big-D asserts it had no obligation under the terms of the Subcontract to pay Padilla in light of Padilla’s material breaches and IGT’s rejection of the stucco.²² In addition to its AOB argument²³, Padilla asserts that at the time that Padilla was owed a written notice of a material breach/default of the Subcontract or payment²⁴, Big-D did not possess knowledge of a Padilla material breach. As late as November 18, 2009²⁵, when Big-D stopped payment on its check and two months after Padilla left the project, Big-D’s Project Principal-In-Charge McNabb,²⁶ admitted Big-D didn’t know the cause of the failures: “We still don’t know who’s at fault.”²⁷

Big-D’s argument that IGT’s rejection of the stucco justifies not paying Padilla;

²¹ AOB pg. 24, last paragraph, last full sentence – pg. 25, second paragraph.

²² RAB pg. 27, section i.

²³ AOB pg. 15, section V. – pg.18.

²⁴ AOB pg. 17 section 5.1 of Subcontract, pg. 18 Exhibit “Z” to the Subcontract.

²⁵ JA Vol III, pgs. 000281-000282.

²⁶ JA Vol. VI, pg. 000513, line 16.

²⁷ AOB pg. 9, section III. B. last sentence.

ignores the differing justifications for rejection and withholding payment. IGT had a right to reject Padilla's work merely on the premise that it wasn't fit for the purpose IGT was purchasing it for, it was defective, *Black's Law Dictionary* 418 (6th ed. 1990), which under the circumstances of instances when the stucco would not hold the stone facade, it was. According to Chin, his recommendation to IGT was the stucco was not suitable and should be rejected.²⁸ IGT didn't consider the cause of the separations, only that it wasn't fit for IGT's intended use.

On the other hand, withholding payment requires a material breach of the Subcontract and proof of several elements, including causation, *Clark County School Dist. at 396*, which as argued above, there isn't any evidence that a Padilla omission or commission was the cause of the separations.

V. DUTY TO PROVIDE PADILLA AN OPPORTUNITY TO CURE ACCORDING TO THE TERMS OF THE SUBCONTRACT

Big-D argues it "gave Padilla written notice and request to cure the defective Padilla work when the failures were first identified. SOF 7-8."²⁹ A review of the

²⁸ JA Vol. VI, pg. 000714, lines 13-15.

²⁹ AOB pg. 27. Section ii, second sentence.

cites to the record in the Answering Brief's Statement of Facts ("SOF") on pages 7-8 does not find any record that Big-D gave Padilla written notice and request to cure. Not surprising, in that the record as a whole does not contain a written notice to Padilla to cure; an issue raised in its Opening Brief.³⁰

Big-D asserts it "was obligated to follow the directions of IGT who directed the Padilla work be removed and replaced with a cement board system (making any further cure request impractical). SOF 6-7, 10."³¹ Again, the cites to the record in the SOF 6-7, 10, do not support an obligation to IGT to remove and replace Padilla's work to the detriment of Padilla's right to cure. There is nothing in the record indicating that IGT prevented Big-D from providing the requisite written notice of default as specified in Section 5.1 of the Subcontract,³² or mandated Big-D to breach its Subcontract with Padilla.

Big-D's assertion that a safety risk excused any required notice to cure³³ is

³⁰ AOB pg. 15, section V., first sentence; pg. 18, last paragraph, first sentence.

³¹ AOB pg. 27, last sentence beginning with the word "Second" – pg. 28, remainder of sentence.

³² AOB pg. 17, single spaced indented paragraph, Section 5.1 of the Subcontract.

³³ AOB pg. 28, first partial paragraph, sentence beginning with the word "Third."

unsupported by the cites to the record at SOF 10. Lastly, Big-D states “Padilla was unwilling to take any actions to investigate or cooperate-making any additional request to cure futile. SOF 8-9.”³⁴ None of the cites to the record in SOF pgs. 8 and 9 support the statement that Padilla was unwilling to take any actions to investigate or cooperative; except, JA Vol. 1, pg. 49, lines 18-19 that states Padilla made a telephone call to the stucco mix manufacturer to discuss the separations in response to Big-D’s email notice of the separations.

VI. PAYMENT WAS DUE TO PADILLA IN THE ABSENCE
OF WRITTEN NOTICE CONFORMING WITH NRS 624.624(3)

According to Big-D, Padilla wasn’t due payment in conformance with the provisions of NRS 624.624 because payment wasn’t due on October 25, 2009 or because Big-D’s notice of withholding wasn’t given until November 3, 2009.³⁵ In addition to the argument put forth on the issue of NRS 624.624 payment in its opening brief,³⁶ Padilla adds the following.

According to Big-D, payment to Padilla wasn’t due on October 25, 2009 because

³⁴ AOB pg. 28, first partial paragraph, sentence beginning with the work “Fourth.”

³⁵ RAB pg. 28, section iii, first paragraph.

³⁶ AOB pgs. 19-22.

the Subcontract provided Padilla was to be paid within 10 days after Big-D received payment from IGT and after IGT accepted the Padilla work.³⁷ This assertion ignores the plain language of NRS 624.624(1)(a) or (b)³⁸, which clearly limits the condition of when, if ever, the higher-tiered contractor (Big-D) receives payment for the Subcontractor's (Padilla) work from the project owner (IGT) to influencing the date payment is made to the Subcontractor, "whichever is earlier." In the instance of a subcontract with a schedule of payments, the NRS 624.624(1)(a) date payment was due would be prescribed in the schedule of payments, and if earlier than when the Contractor received payment from the project owner, if ever, the date payment was due to the Subcontractor. In the instance of a Subcontract without a NRS 624.624(1)(b) schedule of payments, the due date for payments is dictated by the relevant provisions of the Subcontract, and again, if earlier than when the Contractor received payment from the project owner, if ever, the date payment was due to the Subcontractor. To the extent that Big-D's argument relies on the single factor of

³⁷ RAB pg. 28, section a.

³⁸ JA Vol. V, pg. 425.

when, if ever, it received payment from IGT³⁹, as the excuse not to pay Padilla, it is void as a matter of law. Contract provisions that contravene the law do not create a right of action and must be severed if it does not destroy the symmetry of the contract. *Vincent v. Santa Cruz*, 98 Nev. 338, 341 (1982) The ‘pay if paid’ provision of Section 4.2, including its waiver if Big-D exclusively caused the Owner’s failure to make the payment, was specifically and expressly subordinated to Nevada law by the parties: “Nevada Law will take precedence.”⁴⁰ According to *Lehrer McGovern Bovis v. Bullock Insulation*, 124 Nev. 1102, 1117-1118, 197 P.3d 1032 (2008), “pay-if-paid provisions are unenforceable because they violate public policy.”

Big-D’s reliance on the NRS 624.624(1)(a) provision for agreements “that includes a schedule for payments”⁴¹ is inconsistent with the plain language of the Big-D – Padilla Subcontract⁴²; which does not contain a schedule of payments.

Instead of a Schedule of Payments, the Subcontract provides for monthly

³⁹ RAB pg. 29, first partial paragraph, first full sentence.

⁴⁰ JA Vol. I, pg. 101, handwritten text at end of section 4.2, initialed by Big-D’s Brinkerhoff; JA Vol. V. pg. 461, lines 18-19: “We’ll stipulate that every edit in this contract Mr. Brinkerhoff has initialed.”

⁴¹ RAB pg. 29, second full paragraph, last sentence before indented quoted text.

⁴² JA Vol. I, pgs. 91-107.

payments:

4.2 Billings/Payments⁴³

We agree to make monthly payments to You for that portion of the work satisfactorily performed in the preceding month in accordance with monthly billings prepared by you and approved by us, Architect and Owner . . . on approved forms, with a schedule of values and conditional waivers submitted to us on or before the date outlined in your Subcontract.

D: Payments⁴⁴

[P]ayment Request form, with Schedule of Values and Big-D's Conditional Lien Waiver submitted to Contractor before the **25th** day of each month.

Padilla submitted its payment request on the specified Big-D Construction Payment Request form, 9/25/09.⁴⁵ As Brinkerhoff testified⁴⁶, Padilla's work had been satisfactorily performed. The language which conditions payment approval, in addition to Big-D, also on the Architect and Owner, is ambiguous in practice given the content of the specified payment request and its sole approval by Big-D's Brinkerhoff without anything in the record indicating, although Brinkerhoff had approved the payment request, a final approval was contingent on the approval of

⁴³ JA Vol. I, pg. 101, section 4.2, first two sentences.

⁴⁴ JA Vol. I, pg. 92, paragraph D, first sentence.

⁴⁵ JA Vol. II, pg. 215.

⁴⁶ JA Vol. V, pg. 491, lines 11-12.

both the Architect's and IGT's. Instead, Brinkerhoff testified:

I approved this [Payment Request] at 82 percent complete, absolutely did. I felt like Padilla has installed 82 percent of the product. Was I convinced that the product was going to continue to fail or was failing? No.⁴⁷

Consistent with the conditions of section 4.21 and paragraph D of the Subcontract, above, Padilla was entitled to payment October 25, 2009; as Brinkerhoff testified:

Q It says approved it [Payment Request] and, above, it says payment date 10/25

A Payment date is reflective of the 9/25 date on your pay application.

That's just - -

Q Right

A - - standard procedure.⁴⁸

VII. PADILLA NEVER RECEIVED REQUISITE
NOTICE WITHHOLDING PAYMENT⁴⁹

Big-D argues it "provided repeated written notices of the failures in the Padilla

⁴⁷ JA Vol. V, pg. 491, lines 8-12.

⁴⁸ JA Vol. V., pg. 475, lines 1-6.

⁴⁹ RAB pg. 31, a., Padilla's response.

Work.”⁵⁰ According to section 5.1 Notice to Cure provision of the Subcontract, if

you (subcontractor):

are guilty of a material breach of a provision of this Subcontract, You may be deemed in default of this Subcontract. If You fail, within three (3) days **after written notification**, to commence and continue satisfactory correction of such default, then at your expense, we will: (a) . . . (b) . . . (c) Withhold payment of moneys due You until the work is fully completed and accepted by the Owner. Emphasis added.

Pursuant to NRS 624.624(3): if a Contractor intends to withhold any amount from a payment to be made to a Subcontractor, **the Contractor must give, on or before the date the payment is due, a written notice** to the Subcontractor.

The written notice of withholding must:

(a) Identify the amount of the request for payment that will be withheld from the [Subcontractor];

(b) Give a reasonably detailed explanation of the condition or the reason the [Contractor] will withhold that amount, including, without limitation, a specific reference to the provision or section of the agreement with the [Subcontractor], and any documents relating thereto, and the applicable building code, law or regulation with which the [Subcontractor] has failed to comply; and

(c) Be signed by an authorized agent of the [Contractor].

None of the documents cited by Big-D meet the criteria for notices as described in either the Subcontract or NRS 624.624 as condition precedent to withholding the

⁵⁰ RAB pg. 31, last partial paragraph, first sentence.

October 25th payment due Padilla.

Big-D's document list:⁵¹

1. "Real time notice by Padilla's own crews that the work was separating itself. SOF 9-10." In the face of Padilla's complaints that its product wasn't allowed to cure long enough, this wasn't notice of a material breach as required by the Subcontract or specific reference required by NRS 624.624, but rather a confirmation by Padilla's stucco crew of the peril of the premature installation of the stone façade.
2. "Written notice from Big-D to Padilla requesting that Padilla immediately investigate its work on several occasions, SOF 7-8." A review of the record cites found in the designated pages of the Answering Brief's Statement of Facts did not disclose any written notice to Padilla in conformity to either the requirements of the Subcontract or NRS 624.624.
3. "Telephone notice from Big-D to Padilla" On its face, this is not a written

⁵¹ RAB pg. 31.

notice.

4. "Meetings on-site with the product manufacturer and IGT consultants discussing the failures in the Padilla work, SOF 11-13." A review of the record cites found in the designated pages of the Answering Brief's Statement of Facts did not disclose any written notice to Padilla in conformity to either the requirements of the Subcontract or NRS 624.624.
5. "Real-time information that IGT had rejected the Padilla Work and direct Big-D to remove and replace it, SOF 11-13." A review of the record cites found in the designated pages of the Answering Brief's Statement of Facts did not disclose any written notice to Padilla in conformity to either the requirements of the Subcontract or NRS 624.624.
6. "Finally, formal written notice from Big-D on November 3, 2009 informing Padilla that no payment would be processed unless and until Padilla could assist Big-D demonstrate that the failures in Padilla work were caused by factors other than Padilla (which Padilla took no efforts to do), SOF 8-9." A review of the

record cites found in the designated pages of the Answering Brief's Statement of Facts did not disclose any written notice to Padilla in conformity to either the requirements of the Subcontract or NRS 624.624. Additionally, see this Reply Brief pg. 8, and reference, footnote 21.

Big-D's withholding Padilla's payment it approved September 29th in the absence of the requisite written notice before withholding was both a breach of the Subcontract and NRS 624.624.

VIII. BIG-D NOT ENTITLED TO CLAIMED DEDUCTIONS

According to Big-D, even if Padilla is entitled to payment for its work, it overstated the payment due in its September 25th Payment request.⁵² Big-D admits a \$25,000.00 payment before Padilla started work on the project was precontract⁵³, then at trial first made a claim for a \$25,000.00 credit against the contract amount. There's nothing in the record that the payment was part of the contract amount shown on the Payment Request, which Brinkerhoff approved September 25th.⁵⁴

⁵² RAB pg. 33, section v., first sentence.

⁵³ JA Vol. VI., pg. 494, lines 24-25.

⁵⁴ JA Vol. II, pg. 216

As to the alleged payment of one of Padilla's material suppliers, there is nothing in the record that Big-D ever contacted Padilla to verify, if in fact, it received the materials, and if so, whether Padilla had paid the bill. Instead, in the absence of any cite to the record, Big-D claims "it is undisputed that Big-D was required to pay one of Padilla's material suppliers."⁵⁵

IX. PADILLA WAS ENTITLED TO A SPOILIATION INSTRUCTION

According to Big-D, Padilla contends that Big-D failed to retain portions of the stucco over which stone was installed and that is a red herring because it is premised upon Padilla's incorrect argument that only the stucco over which stone installation had commenced failed.⁵⁶ Fundamental forensics starts with an examination of the failure. According to Chin in response to the question whether he would start his investigation looking at the failed pieces: "Yes. We would do an inspection of the failed site, not just the failed piece, but also the location on the building where the failure occurred to see what was supporting the piece."⁵⁷ Q. [Y]ou're starting with

⁵⁵ RAB pg. 33, section v., third sentence.

⁵⁶ RAB pg. 34, section C., second paragraph, third and fourth sentence.

⁵⁷ JA Vol. VI, pg.734, lines 11-17.

the failure and working out from there? A. “In the case of failure, that’s –we start from – the failure initiates the investigation.”⁵⁸

As argued, above, the alleged deviations from the plans and specifications were not material; did not cause the separations from which this case arises.⁵⁹ Testing of samples that had not failed would thwart any possibility to identify a nexus between the failure and the cause: deviation from the plans and specifications, premature installation of the stone, etc. Even Big-D admitted there was the possibility of causes unrelated to the plans and specifications. According to Brinkerhoff in answer to the question why Big-D never terminated the Subcontract with Padilla: “[W]e made a decision based on the rejection of Padilla's work by IGT. We didn't know the cause. We didn't know whether it was labor related. We didn't know whether it was material related. We didn't know whether it was weather condition related. We didn't know the cause.”⁶⁰ While IGT never determined causation, Big-D acquiesced and never put them to their proof: that the alleged deviations from the plans and

⁵⁸ JA Vol. VI, pg. 734, lines 18-21.

⁵⁹ Reply Brief, pgs. 2-4.

⁶⁰ JA Vol. V, pg. 469, lines 10-24.

specifications were material; caused the separations, the defect. This unilaterally prejudiced Padilla's defense in that by the time Padilla received written notice⁶¹ that Big-D believed the cause of the separations was the alleged deviations from the plans and specifications, no samples of the failed stucco were available, having been destroyed, according to Brinkerhoff's calendar, September 14 – 16th.⁶² In fact, the only samples provided to Padilla were marked "Brown coat Finished 9/14", "Sample date 9/18⁶³." The brown coat had been cured far less than the seven days specified by Big-D.

Big-D argues that the requested adverse inference is not necessary for a sophisticated judge⁶⁴ and Padilla's request was not timely.⁶⁵ Both of these arguments were made in Opposition to Padilla's Motion in Limine II. February 5, 2014, resulting in the District Court deferring its ruling "until all evidence is heard."⁶⁶

⁶¹ JA Vol. I, pg. 10; pg. 16, lines 27-28; pg. 17, lines 13.

⁶² JA Vol. III, pg. 294.

⁶³ JA Vol. VII, pgs. 000793-000796.

⁶⁴ RAB pg. 36, first partial paragraph, first sentence.

⁶⁵ RAB pg. 36, first full paragraph, first sentence.

⁶⁶ Appellant's Supplemental Brief, pg. 000912.

Finally, Big-D argues that sanction in the way of an adverse inference are only appropriately issued to a party ‘controlling the evidence.’” There isn’t anything in the record that Big-D didn’t control the failed stucco. While it is true they were directed to demolish the stucco⁶⁷ to make way for installation of the replacement cement board to mount the stone façade on, there isn’t anything in the record that IGT prohibited them from preserving samples of the failed stucco for future defense, either theirs or Padilla’s. Therefore, their lack of control argument fails.

X. CLAIMED ATTORNEYS’ FEES, COSTS, AND INTEREST ARE NOT POST CONFIRMATION DEBT

Padilla supplements its Opening Brief argument relevant to Attorney’s Fees, Costs, and Interest⁶⁸ to address the issue of post confirmation debt. According to Big-D, the District Court had jurisdiction to award Big-D attorneys’ fees and costs because post confirmation “debts are liabilities of reorganized Chapter 11 debtor and are not affected by the bankruptcy proceeding.”⁶⁹

⁶⁷ JA Vol. III, pg. 294.

⁶⁸ AOB pg. 27.

⁶⁹ RAB pg. 37, section D., first partial paragraph, first sentence.

According to *In re Vickie Lynn Marshall*, 273 B.R. 822, 830 (Bankr.C.D.Cal., 2002), the court found that attorneys' fees and costs arising out of prepetition litigation rooted in prepetition conduct must be treated as prepetition debt, not postpetition debt citing Ninth Circuit cases: *In re Kadjevich*, 220 F.3d 1016 (9th Cir. 2000) and *In re Abercrombie*, 139 F.3d 755 (9th Cir. 1998). In the instant matter, the prepetition conduct occurred in September 2009, the prepetition litigation was filed March 9, 2010 and Padilla's bankruptcy petition was filed October 14, 2011. As a result, and according to *In re Marshall*, Big-D's fees and costs are prepetition debt and subject to the discharge, *In re Marshall*, at 830-831, Padilla received in its bankruptcy case.

XI. CONCLUSION

The District Court's finding of fact that Padilla's omission or commission caused the complained of damages; the separations of the first coat from the second coat of stucco, is not supported by substantial evidence and must be reversed, including those determinations arising from the erroneous findings, Judgment for Big-D and

the associated award of attorney's fees and costs. Instead, there is substantial evidence that Big-D breached the Subcontract, and therefore, Padilla is entitled to Judgment in the amount of the stopped payment check, \$185,991.95.⁷⁰ In the alternative, should this Court determine that Big-D is entitled to money damages, then the District Court's misunderstanding of the Stipulated Judgment and its jurisdiction to award judgment in excess of the claim authorized by the United States Bankruptcy Court must be addressed.

Note: On page 3 of the Respondent's Answering Brief, Respondent points out Appellant's Joint Appendix ("JA") omits a number of admitted trial exhibits. It was agreed between counsels that the JA would include all admitted Trial Exhibits. Our investigation indicates the error arose from the scanning process to create the Joint Appendix PDF Volumes that was not noticed when the Table of Contents was subsequently created. While undersigned counsel takes full responsibility for the administrative error, there was no intention to hide any evidence, and after review

⁷⁰ JA Vol. 2, pg. 221, Trial Exhibit 11.

of the Respondents Appendix and the missing Exhibits, our error did not prejudice the Respondent's Argument.

NRAP 28.2 Attorney's Certificate/NRAP 32(8)(A)

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and type style of NRAP 32(a)(6) because:

This brief has been prepared in a proportionally spaced typeface using Microsoft 2013 Word in 14 font size and Times New Roman.

2. I further certify that this brief complies with the volume limitations of NRAP 32(a)(7)(A)(ii) because it does not contain more than 7,000 words.

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a

reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 25th day of April 2016.

/s/ Bruce R. Mundy

BRUCE R. MUNDY
NV 6068
200 South Virginia Street, Eighth Floor
Post Office Box 18811
Reno, Nevada 89511-0811
reno-attorney@sbcglobal.net
(775) 851-4228
FAX 851-4239
Attorney for: Appellant

EXHIBIT 26

MARQUIS AURBACH COFFING

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

1 **Marquis Aurbach Coffing**
2 Jack Chen Min Juan, Esq.
3 Nevada Bar No. 6367
4 Cody S. Mounteer, Esq.
5 Nevada Bar No. 11220
6 10001 Park Run Drive
7 Las Vegas, Nevada 89145
8 Telephone: (702) 382-0711
9 Facsimile: (702) 382-5816
10 jjuan@maclaw.com
11 cmounteer@maclaw.com
12 Attorneys for APCO CONSTRUCTION

DISTRICT COURT

CLARK COUNTY, NEVADA

13 APCO CONSTRUCTION, a Nevada
14 corporation,

15 Plaintiff,

16 vs.

17 GEMSTONE DEVELOPMENT WEST, INC., A
18 Nevada corporation,

19 Defendant.

Case No.: A571228
Dept. No.: 13

Consolidated with:

A574391; A574792; A577623; A583289;
A587168; A580889; A584730; A589195;
A595552; A597089; A592826; A589677;
A596924; A584960; A608717; A608718 and
A590319

20 AND ALL RELATED MATTERS

21 **NOTICE OF TAKING NRCP RULE 30(B)(6) DEPOSITION OF PERSON MOST**
22 **KNOWLEDGEABLE FOR ZITTING BROTHERS CONSTRUCTION, INC.**

23 PLEASE TAKE NOTICE that pursuant to Rule 30(b)(6) of the Nevada Rules of Civil
24 Procedure, Plaintiff, APCO Construction, by and through its attorneys, Marquis Aurbach
25 Coffing, will take the deposition of Zitting Brothers Construction, Inc. upon oral examination on
26 **June 28, 2017 at 2:00p.m.** before a Notary Public, or before some other officer authorized by
27 law to administer oaths. The deposition will take place at Marquis Aurbach Coffing located at
28 10001 Park Run Drive, Las Vegas, Nevada 89145.

//

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1 Pursuant to NRCP 30(b)(6), Plaintiffs are to required to designate one or more officers,
2 directors, managing agents or other consenting persons most knowledgeable to testify on its
3 behalf with respect to the topics set forth in the attached **Exhibit A**.

4 The deposition will be recorded by stenographic means, and oral examination will
5 continue from day to day until completed. You are invited to attend and cross-examine.

6 Dated this 22nd day of May, 2017.

7 MARQUIS AURBACH COFFING

8
9 By

10 Jack Chen Min Juan, Esq.

11 Nevada Bar No. 6367

12 Cody S. Mounteer, Esq.

13 Nevada Bar No. 11220

14 10001 Park Run Drive

15 Las Vegas, Nevada 89145

16 Attorney(s) for APCO

17 CONSTRUCTION APCO CONSTRUCTION
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EXHIBIT A**RULE 30. DEPOSITIONS BY ORAL EXAMINATION****(B) NOTICE OF EXAMINATION: GENERAL REQUIREMENTS; SPECIAL NOTICE; METHOD OF PRODUCTION OF DOCUMENTS AND THINGS; DEPOSITION OF ORGANIZATION; DEPOSITION BY TELEPHONE.**

(6) A party may in the party's notice and in a subpoena name as the deponent a public or private corporation or a partnership or association or governmental agency and describe with reasonable particularity the matters on which examination is requested. In that event, the organization so named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. A subpoena shall advise a nonparty organization of its duty to make such a designation. The persons so designated shall testify as to matters known or reasonably available to the organization. This subdivision (b)(6) does not preclude taking a deposition by any other procedure authorized in these rules.

[As amended; effective January 1, 2005.]

TOPICS

1. Your claims and facts as alleged against APCO;
2. Documents that you have disclosed in support of your claims against APCO;
3. Your assertion that APCO is liable for any portions of your general and/or lien claims;
4. The percentage/allocation of your general and/or lien claims against APCO versus CAMCO;
5. The payment process, payment details, scope of payments, parties involved, and standard practices of payment, including, but not limited to, all payment applications, approvals, amounts, checks, and releases;
6. Each fact related to your contract agreement with APCO in regard to the Manhattan West Project ("Project") at issue in this matter, including, but not limited to original contact(s), change orders, and ratification agreement(s);
7. Each fact related to your scope of work at the Project;
8. The structure of your business; and
9. Your viability and business status from the time you entered into the subject contract until the date of your deposition, including, but not limited to, whether your company has been sold, transferred control, wound down, and/or claimed bankruptcy.

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **NOTICE OF TAKING NRCP RULE 30(b)(6) DEPOSITION OF PERSON MOST KNOWLEDGEABLE FOR ZITTING BROTHERS CONSTRUCTION, INC.** was submitted electronically for service with the Eighth Judicial District Court on the 22nd day of May, 2017. Electronic service of the foregoing document shall be made in accordance with the E-Service List as follows:¹

Wilson, Elser, Moskowitz, Edelman & Dicker LLP

300 S. 4th St., 11th Floor

Las Vegas, NV 89101

caleb@langsdailelaw.com

"Cody Munteer, Esq." . cmounteer@marquisaurbach.com

"Cori Mandy, Legal Secretary" . cori.mandy@procopio.com

"Donald H. Williams, Esq." . dwilliams@dhwlawlv.com

"Eric Dobberstein, Esq." . edobberstein@mcpalaw.com

"Marisa L. Maskas, Esq." . mmaskas@pezzilloloyd.com

"Martin A. Little, Esq." . mal@juww.com

"Martin A. Little, Esq." . mal@juww.com

6085 Joyce Heilich . heilichj@gtlaw.com

7132 Andrea Rosehill . rosehilla@gtlaw.com

Aaron D. Lancaster . alancaster@gerrard-cox.com

Agnes Wong . aw@juww.com

Amanda Armstrong . aarmstrong@peelbrimley.com

¹ Pursuant to EDCR 8.05(a), each party who submits an E-Filed document through the E-Filing System consents to electronic service in accordance with NRCP 5(b)(2)(D).

MARQUIS AURBACH COFFING

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

1	Andrea Montero .	amontero@gordonrees.com
2		
3	Andrew J. Kessler .	andrew.kessler@procopio.com
4	Becky Pintar .	bpintar@gglt.com
5	Benjamin D. Johnson .	ben.johnson@btjd.com
6	Beverly Roberts .	broberts@trumanlegal.com
7	Brad Slighting .	bslighting@djplaw.com
8		
9	Brian Walters .	bwalters@gordonrees.com
10	Caleb Langsdale .	Caleb@Langsdalelaw.com
11	Calendar .	calendar@litigationervices.com
12	Cheri Vandermeulen .	cvandermeulen@dickinsonwright.com
13	Christine Spencer .	cspencer@dickinsonwright.com
14	Christine Spencer .	cspencer@mcgalaw.com
15	Christine Taradash .	CTaradash@maazlaw.com
16	Cindy Simmons .	csimmons@djplaw.com
17	CNN Cynthia Ney .	neyc@gtlaw.com
18	Courtney Peterson .	cpeterson@maclaw.com
19		
20	Cynthia Kelley .	ckelley@nevadafirm.com
21		
22	Dana Y. Kim .	dkim@caddenfuller.com
23	David J. Merrill .	david@djmerillpc.com
24	David R. Johnson .	djohnson@watttieder.com
25	Debbie Holloman .	dholloman@jamsadr.com
26	Debbie Rosewall .	dr@juwww.com
27		
28	Debra Hitchens .	dhitchens@maazlaw.com

MARQUIS AURBACH COFFING

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

1	Depository .	Depository@litigationsservices.com
2		
3	District filings .	district@trumanlegal.com
4	Donna Wolfbrandt .	dwolfbrandt@dickinsonwright.com
5	Douglas D. Gerrard .	dgerrard@gerrard-cox.com
6	E-File Desk .	EfileLasVegas@wilsonelser.com
7		
8	Eric Dobberstein .	edobbarstein@dickinsonwright.com
9	Eric Zimbelman .	ezimbelman@peelbrimley.com
10	Erica Bennett .	e.bennett@kempjones.com
11	Floyd Hale .	fhale@floydhale.com
12	George Robinson .	grobinson@pezzilloloyd.com
13	Glenn F. Meier .	gmeier@nevadafirm.com
14	Gwen Rutar Mullins .	grm@h2law.com
15		
16	Hrustyk Nicole .	Nicole.Hrustyk@wilsonelser.com
17	I-Che Lai .	I-Che.Lai@wilsonelser.com
18	IGH Bethany Rabe .	rabeb@gtlaw.com
19	IOM Mark Ferrario .	lvitdock@gtlaw.com
20		
21	Jack Juan .	jjuan@marquisaurbach.com
22	Jennifer Case .	jcase@maclaw.com
23	Jennifer MacDonald .	jmacdonald@watttieder.com
24	Jennifer R. Lloyd .	Jlloyd@pezzilloloyd.com
25	Jineen DeAngelis .	jdeangelis@foxrothschild.com
26		
27	Jorge Ramirez .	Jorge.Ramirez@wilsonelser.com
28	Kathleen Morris .	kmorris@mcdonaldcarano.com

MARQUIS AURBACH COFFING

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

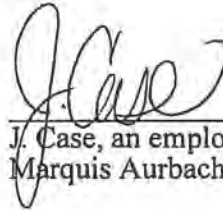
1	Kaytlyn Bassett .	kbassett@gerrard-cox.com
2		
3	Kelly McGee .	kom@juww.com
4	Kenzie Dunn .	kdunn@btjd.com
5	Lani Maile .	Lani.Maile@wilsonelser.com
6	Legal Assistant .	rlegalassistant@rookerlaw.com
7		
8	Linda Compton .	lcompton@ggls.com
9	LVGTDocketing .	lvltdock@gtlaw.com
10	Marie Ogella .	mogella@gordonrees.com
11	Mark M. Jones .	mmj@kempjones.com
12	Matt Carter .	msc@kempjones.com
13	Matthew Carter .	m.carter@kempjones.com
14		
15	Michael R. Ernst .	mre@juww.com
16	Michael Rawlins .	mrawlins@rookerlaw.com
17	Pamela Montgomery .	pym@kempjones.com
18	Phillip Aurbach .	paurbach@maclaw.com
19		
20	Rachel E. Donn .	rdonn@nevadafirm.com
21	Rebecca Chapman .	rebecca.chapman@procopio.com
22	Receptionist .	Reception@nvbusinesslawyers.com
23	Renee Hoban .	rhoban@nevadafirm.com
24	Richard I. Dreitzer .	rdreitzer@foxrothschild.com
25		
26	Richard Tobler .	ritldck@hotmail.com
27	Robert Schumacher .	rschumacher@gordonrees.com
28	Rosey Jeffrey .	rjeffrey@peelbrimley.com

MARQUIS AURBACH COFFING

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

1
2
3
4
5
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7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Ryan Bellows . rbellows@mcdonaldcarano.com
S. Judy Hirahara . jhirahara@caddenfuller.com
Sarah A. Mead . sam@juww.com
Steven Morris . steve@gmdlegal.com
Tammy Cortez . tcortez@caddenfuller.com
Taylor Fong . tfong@marquisaurbach.com
Terri Hansen . thansen@peelbrimley.com
Timother E. Salter . tim.salter@procopio.com
Wade B. Gochnour . wbg@h2law.com
WTM Tami Cowden . cowdent@gtlaw.com



J. Case, an employee of
Marquis Aurbach Coffing

EXHIBIT 27

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Location : District Court Civil/Criminal [Help](#)

REGISTER OF ACTIONS

CASE NO. 08A571228

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

§
§
§
§
§
§

Case Type: **Business Court**
 Date Filed: **09/09/2008**
 Location: **Department 13**
 Cross-Reference Case **A571228**
 Number:

RELATED CASE INFORMATION

Related Cases

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

PARTY INFORMATION

Lead Attorneys

Counter	APCO Construction	Gwen Rutar Mullins
Counter	Asphalt Products Corporation	
Counter	Cactus Rose Construction	
Counter	Camco Pacific Construction Co Inc	Steven L. Morris
Counter	Camco Pacific Construction Co Inc	Steven L. Morris
Counter Claimant	Camco Pacific Construction Company Inc	Zachariah Parry Retained
Counter Claimant	Camco Pacific Construction Company Inc	Steven L. Morris Retained

Counter	Club Vista Financial Services LLC	Mark E. Ferrario, ESQ
Counter	Gemstone Development West Inc	Greg S. Gilbert
Counter	Insulpro Projects Inc	Eric Dobberstein
Counter	Tharaldson Motels II Inc	Martin A. Muckleroy
Counter	Tharaldson, Gary D	Martin A. Muckleroy
Counter	Accuracy Glass & Mirror Company Inc	Dallin T. Wayment
Counter	Ahern Rentals Inc	D. Shane Clifford, ESQ
Counter	APCO Construction	Gwen Rutar Mullins
Counter	Arch Aluminum and Glass Co	Jeffrey R. Albregts
Counter	Atlas Construction Supply Inc	David W Dachelet
Counter	Bank of Oklahoma NA	
Counter	Bruin Painting Corporation	Dallin T. Wayment
Counter	Buchele Inc	Dallin T. Wayment
Counter	Cabinetec Inc	Justin L. Watkins
Counter	Camco Pacific Construction Co Inc	Steven L. Morris
Counter	Camco Pacific Construction Inc	Steven L. Morris
Counter	Cellcrete Fireproofing of Nevada Inc	Robert C. Reade
Counter	Concrete Visions Inc	
Counter	Creative Home Theatre LLC	
Counter	Dave Peterson Framing Inc	Stephen M. Dixon
Counter	E & E Fire Protection LLC	Stephen M. Dixon
Counter	Executive Plastering Inc	Matthew Q Callister
Counter	EZA P.C.	Donald H Williams

Counter	Fast Glass Inc	Michael T. Gebhart
Counter	Fast Glass Inc	Michael T. Gebhart
Counter	Ferguson Fire and Fabrication Inc	Dale B. Rycraft Jr.
Counter	Gemstone Development West Inc	Greg S. Gilbert
Counter	Gerdau Reinforcing Steel	William R. Urga
Counter	Granite Construction Company	David R. Johnson
Counter	Harsco Corporation	Donald H. Williams
Counter	HD Supply Waterworks LP	Dallin T. Wayment
Counter	Heinaman Contract Glazing	Dallin T. Wayment
Counter	Helix Electric of Nevada LLC	Dallin T. Wayment
Counter	Hydropressure Cleaning Inc	
Counter	Inquipco	Jennifer R. Lloyd-
Counter	Insulpro Projects Inc	Eric Dobberstein
Counter	Interstate Plumbing & Air Conditioning	
Counter	John Deere Landscape Inc	
Counter	Las Vegas Pipeline LLC	Pro Se
Counter	Masonry Group Nevada Inc	Becky Pintar
Counter	Nevada Construction Services	Charles Vlasic
Counter	Nevada Prefab Engineers	Mindy C. Fisher
Counter	Nevada Prefab Engineers Inc	Christopher Craft
Counter	Noord Sheet Metal Company	T. James Truman
Counter	Noorda Sheet Metal Company	Stephen M. Dixon
Counter	Northstar Concrete Inc	Jennifer R. Lloyd-
Counter Defendant	Northstar Concrete Inc	Jennifer R. Lloyd- Robinson

Retained

Counter	Pape Materials Handling	Christopher Craft
Counter	Patent Construction Systems	Donald H Williams
Counter	Professional Door and Mill Works LLC	Stephen M. Dixon
Counter	Professional Doors And Millworks LLC	
Counter	Ready Mix Inc	Brian Keith Berman
Counter	Renaissance Pools & Spas Inc	Steven B. Scow
Counter	Republic Crane Service LLC	Richard Allen Koch
Counter	Scott Financial Corporation	Glenn F Meler
Counter	Scott, Bradley J	Matthew S. Carter
Counter	Selectbuild Nevada Inc	Robert E. Schumacher
Counter	Steel Structures Inc	Christopher Craft
Counter	Supply Network Inc	Philip T. Varricchio
Counter	The Pressure Grout Company	
Counter	Tri City Drywall Inc	Jennifer R. Lloyd-
Counter	WRG Design Inc	Dallin T. Wayment
Counter	Zitting Brothers Construction Inc	Reuben Cawley
Cross	APCO Construction	Gwen Rutar Mullins
Cross	Gemstone Development West Inc	
Defendant	Commonwealth Land Title Insurance Co	
Defendant	First American Title Insurance Co	
Defendant	Gemstone Development West Inc	

~~Monica Caffaratti~~
~~Retained~~

Defendant Scott Financial Corporation

Glenn F Meier

Defendant Scott, Bradley J

Jon Randall Jones

Doing Apco Construction

~~Gwen Rutar Mullins~~

Doing Helix Electric

Doing Oz Architecture of Nevada Inc

Donald H Williams

Doing Pape Rents

Christopher Craft

Doing Pape Rents

William R. Urga

Doing Power PlusI

Doing Viking Supplynet

Interpleader Hydropressure Cleaning Inc

Gwen Rutar Mullins

Intervenor Cell Crete Fireproofing Of NV Inc

Robert C. Reade

Intervenor Custom Select Billing Inc

Gwen Rutar Mullins

Intervenor Dave Peterson Framing Inc

~~T. James Truman~~

Intervenor E & E Fire Protectiong LLC

T. James Truman

Intervenor EZA P C

Donald H Williams

Intervenor Granite Construction Company

David R. Johnson

Intervenor Insulpro Projects Inc

Eric Dobberstein

Intervenor National Wood Products, Inc.'s

Richard L Tobler

Intervenor Nevada Prefab Engineers Inc

Martin A. Little

Intervenor Noord Sheet Metal Company

T. James Truman

Intervenor Patent Construction Systems

Donald H Williams
Retained
7023207755(W)

Intervenor Pressure Grout Co

T. James Truman

Intervenor Professional Doors & Millworks LLC

T. James Truman

Intervenor Steel Structures Inc

Martin A. Little

Intervenor Tri-City Drywall Inc

Jennifer R. Lloyd-

Intervenor Camco Pacific Construction Co Inc

Steven L. Morris

Intervenor Camco Pacific Construction Co Inc

Steven L. Morris

Intervenor Club Vista Financial Services LLC

Martin A. Muckleroy

Intervenor Club Vista Financial Services LLC

Martin A. Muckleroy

Intervenor Commonwealth Land Title Ins Co

Intervenor Commonwealth Land Title Ins Co

Intervenor Concrete Visions Inc

Intervenor E & E Fire Protection LLC

Stephen M. Dixon

**Intervenor
Defendant** Fidelity & Deposit Company Of
Maryland

Steven L. Morris
Retained

Intervenor Fidelity And Deposit Co Of Maryland

Steven L. Morris

Intervenor First American Title Insurance Co

Intervenor First American Title Insurance Co

Intervenor Gemstone Development West Inc

~~**Monica Caffaratti**~~

Intervenor Gemstone Development West Inc

~~**Monica Caffaratti**~~

Intervenor Gemstone Development West Inc

Intervenor Gemstone Development West Inc

Intervenor Gemstone Development West Inc

~~**Monica Caffaratti**~~

Intervenor Jeff Helt Plumbing Co LLC

Keith E. Gregory

Intervenor Marshall, Kelly

Intervenor	Nevada Construction Services	Nikola Skrinjaric
Intervenor	Old Republic Surety	Keith E. Gregory
Intervenor	Scott Financial Corporation	Glenn F Meier
Intervenor	Tharaldson Motels II Inc	Martin A. Muckleroy
Intervenor	Tharaldson Motels II Inc	Martin A. Muckleroy
Intervenor Plaintiff	Arch Aluminum And Glass Co. Now Known As Arch Aluminum and Glass LLC	Jeffrey R. Albregts Retained 702-483-5026(W)
Intervenor	Cabinetec Inc	Justin L. Watkins
Intervenor	Cactus Rose Construction Inc	Dallin T. Wayment
Intervenor	Camco Pacific Construction Co Inc	Steven L. Morris
Intervenor	Harsco Corporation	Donald H Williams
Intervenor Plaintiff	Interstate Plumbing & Air Conditioning Inc	Michael T. Gebhart Retained
Intervenor	Las Vegas Pipeline LLC	James E. Shapiro
Intervenor	Northstar Concrete, Inc.	Jennifer R. Lloyd
Intervenor	Pape Material Handling	William R. Urga
Intervenor	S R Bray Corp	Richard L. Peel
Intervenor	Selectbuild Nevada Inc	Robert E. Schumacher
Intervenor	Sunstate Companies Inc	Garry L. Hayes
Intervenor	SWPPP Compliance Solutions LLC	Richard L. Peel

Other	Graybar Electric Company	
Other	HD Supply Construction Supply LP <i>Doing Business As</i> White Cap Construction Supply Inc	
Other	PCI Group, LLC	
Other	RLMW Investments LLC	
Other	United Subcontractors Inc <i>Doing Business As</i> Skyline Insulation	
Other	Wiss, Janney, Elstner Associates, Inc.	Gwen Rutar Mullins
Plaintiff	Apco Construction	Jack Chen Min Juan
Special	Hale, Floyd, ESQ	
Third Party	Camco Pacific Construction Co Inc	Steven L. Morris
Third Party	Fidelity & Deposit Co Of Maryland	Steven L. Morris
Third Party	Fidelity & Deposit Co Of Maryland	Steven L. Morris
Third Party	Dave Peterson Framing Inc	T. James Truman
Third Party	E & E Fire Protection LLC	T. James Truman
Third Party	Insulpro Projects Inc	Eric Dobberstein
Third Party	Noorda Sheet Metal Company	T. James Truman
Third Party	Professional Doors & Millworks LLC	T. James Truman

EVENTS & ORDERS OF THE COURT

09/05/2017 Calendar Call (2:00 PM) (Judicial Officer Denton, Mark R.)

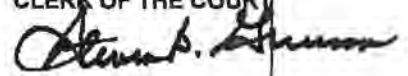
Minutes

09/05/2017 2:00 PM

- APPEARANCES: Jack Chen Min Juan and Cody Mounleer, Attorney for Pltf Elizabeth Stephens, Attorney for IPAC, Chapter 7 Trustee John Taylor and Rich Tobler, Attorneys for National Wood Products I-Che Lai, Attorney for Zitting Brothers Eric Zimbelman, Attorney for Helix Electric of Nevada LLC, Heinaman Contract Glazing, Buchele Inc, Cactus Rose Construction Inc, Fast Glass Inc Benjamin Johnson, Attorney for United Subcontractors Inc d/b/a Skyline William Urga and Michael R. Ernst, Attorneys for Gerdau Reinforcing Steel, Steel Structures Inc, Nevada Prefab Engineers Inc, and Unilah Tracy Truman, Attorney for E & E Fire Steve Morris, Camco Pacific Construction Company Inc Court noted the settlement conference scheduled September 21, 2017. Mr. Juan requested that the calendar call and trial be continued so the parties can proceed with settlement. Further, Mr. Juan stated that the only parties that should remain are those that have complied with the Special Master's questionnaire and have filed their pre-trial disclosures. Mr. Johnson noted confusion with the number of parties in the case, knowing what's going on procedurally, and the Motion for Summary Judgment and Joinders being moved to October. Further, Mr Johnson noted his objection to the striking of his client's claims. Colloquy regarding parties left in the case with claims and proceeding with negotiations. COURT ORDERED deadline for parties who have not complied with the Special Master's questionnaire and have not filed their pretrial disclosures SET Friday, September 8, 2017 by 5:00 pm and FURTHER ORDERED hearing SET Monday, September 11, 2017 on Pltf's Oral Motion to Dismiss Pursuant to Rule 7(b). COURT FURTHER ORDERED the current trial setting VACATED and status check SET October 5, 2017 at 9:00 am to discuss resetting the trial, HEARING ON PLTF'S ORAL MOTION TO DISMISS PURSUANT TO RULE 7 (b): 09/11/2017 9:00 AM STATUS CHECK RE:RESETTING TRIAL: 10/05/2017 9:00 AM CLERK'S NOTE: The above minute order has been distributed via the E-Service Master List.

[Return to Register of Actions](#)

EXHIBIT 28



1 RTRAN

2
3
4
5 DISTRICT COURT
6 CLARK COUNTY, NEVADA

7 APCO CONSTRUCTION,

8 Plaintiffs,

9 vs.

10 GEMSTONE DEVELOPMENT
11 WEST, INC.,

12 Defendants.

CASE NO. 08A571228

DEPT. XIII

13
14 BEFORE THE HONORABLE MARK R. DENTON, DISTRICT COURT JUDGE
15 THURSDAY, OCTOBER 5, 2017

16 **RECORDER'S TRANSCRIPT OF HEARING**
17 **RE: ALL PENDING MOTIONS**

18
19
20 (Appearances on Page 2)

21
22
23
24
25 RECORDED BY: JENNIFER GEROLD, COURT RECORDER

1 APPEARANCES:
2 For the Plaintiffs: CHEN MIN JACK JUAN, ESQ.
3 CODY S. MOUNTEER, ESQ.
4 MARY E. BACON, ESQ.
5 JOHN H. MOWBRAY, ESQ.
6
7 For Camco Pacific Construction Co., Inc.: STEVEN L. MORRIS, ESQ.
8 For various Lien Claimants: ERIC B. ZIMBELMAN, ESQ.
9 For Zitting Brothers Construction, Inc.: I-CHE LAI, ESQ.
10 For various Counter Defendants: MICHAEL R. ERNST, ESQ.
11 For E&E Fire Protection, LLC: JAMES T. TRUMAN, ESQ.
12 For United Subcontractors, Inc.: BENJAMIN JOHNSON, ESQ.
13 For the Intervenors: JOHN B. TAYLOR, ESQ.
14 RICHARD L. TOBLER, ESQ.
15 For Chapter 7 Trustee: ELIZABETH E. STEPHENS, ESQ.
16
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1 Las Vegas, Nevada; Thursday, October 5, 2017

2 [Proceedings commenced at 9:05 a.m.]

3
4 THE COURT: Page 2, Apco Construction versus Gemstone
5 Development. Appearances, please.

6 MR. JUAN: Jack Juan on behalf of Apco, Your Honor.

7 MR. MOUNTEER: Good morning, Your Honor, Cody Munteer on
8 behalf of Apco.

9 MR. MORRIS: Good morning, Your Honor, Steven Morris on behalf
10 of Camco Pacific Construction, Inc.

11 MR. MOWBRAY: John Mowbray on behalf of Apco, Your Honor. I
12 entered last Friday.

13 MS. BACON: And Mary Bacon also on behalf of Apco.

14 MR. ZIMBELMAN: Morning, Your Honor, Eric Zimbelman on behalf
15 of the Peel Brimley lien claimants: Helix Electric of Nevada, SWPP Compliance,
16 Buchele Inc., Cactus Rose, Fast Glass, and Heinaman Contract Glazing.

17 MR. JOHNSON: Ben Johnson on behalf of United Subcontractors.

18 MR. TAYLOR: John Taylor on behalf of Plaintiff and intervention,
19 National Wood Products.

20 MR. TOBLER: Rich Tobler as local counsel for National Wood
21 Products.

22 MS. STEPHENS: Elizabeth Stephens appears for the Interstate
23 Plumbing trustee.

24 MR. LAI: I-Che Lai appearing for Zitting Brothers Construction.

25 MR. TRUMAN: Tracy Truman on behalf of E&E Fire Protection.

1 MR. ERNST: Morning, Your Honor, Michael Ernst on behalf of
2 Gerdau, Steel Structures, and Nevada Prefab Engineers.

3 THE COURT: All right. Would counsel approach? I know it's going
4 to be sort of -- just come up here. I'm going to have a bench conference.

5 [Bench conference - not transcribed]

6 THE COURT: Okay. We start on page 2 and then we get to page --
7 let's see, what is it page 19, where the items are listed that are before the Court
8 today. And I've got Zitting Brothers Construction, Inc.'s motion for partial
9 summary judgment against Apco Construction. And I've got Peel Brimley Lien
10 Claimants' motion for partial summary judgment precluding defenses based on
11 pay-if-paid agreements and then a bunch of joinders; right?

12 MR. JUAN: Correct.

13 THE COURT: All right. So any consensus on the order in which
14 these should go?

15 MR. JUAN: Just one procedural matter, Your Honor, just to let you
16 know. On settlement, there was no global settlement reached. Progress was
17 made with some, but not with others. And based upon that, we're back here
18 before you today. What I was going to inform the Court and the parties was, and
19 some of the parties spoke that they had an opposition to it was, to finish up the
20 depositions that we never got a chance to do because we were hoping to save
21 the money for the settlement.

22 So regardless of how you rule here today, what I ask to do is that we
23 extend discovery out another 45, 60 days so that we can finish up discovery --
24 I'm sorry, depositions only on the remaining settlements that needs to be done. I
25 wanted to inform you of that before you hear any motions of that matter.

1 THE COURT: So what -- are you saying you want to defer hearing of
2 these pending depositions?

3 MR. JUAN: I -- I know -- I didn't know -- I have not had a chance to
4 speak with opposing counsel about that, whether or not we should defer or not,
5 but if we go --

6 THE COURT: Do you want to talk about it?

7 MR. JUAN: If possible.

8 THE COURT: I got some things I can take up if you want to talk.

9 MR. JUAN: Thank you, Judge.

10 MR. ZIMBELMAN: From my perspective, there's nothing to talk
11 about. We're absolutely in opposition --

12 THE COURT: Okay.

13 MR. ZIMBELMAN: -- to any -- any motion to continue discovery. It's
14 been long expired. We've had calendar call. As a result of the calendar call and
15 our joint request, Your Honor dismissed any of the parties that hadn't submitted
16 the pretrial disclosures. I mean, we've come to the eve of trial. We're prepared
17 to set the trial the next time that you can get us in and to hear the motions for
18 summary judgment.

19 MR. JUAN: Your Honor, --

20 THE COURT: Well, that has to do with the status check regarding
21 resetting of trial that's on the calendar as well, okay.

22 MR. JUAN: Your Honor, we have deposed Helix, but there are some
23 parties, like for example Interstate, that filed a pretrial which we never had a
24 chance to depose. There's some parties who by agreement I noticed a
25 deposition forwarding discovery, but we have -- able to hold that off for settlement

1 purposes. Helix doesn't have to participate in depositions, but I don't think it's
2 going to prejudice any other parties for us to have depositions, limited
3 depositions, remaining four, five, six parties. Helix doesn't have to participate in
4 it.

5 If Helix feels that they want to go to trial with [indiscernible] with us,
6 so be it. We can always bifurcate it which, my intent, to bifurcate the trial out,
7 between Apco and each of the individual subs. But for purposes with discussion
8 about depositions, Helix doesn't have to participate in that. That's fine with me.
9 But the remaining subs might and I want to talk the remaining subs and they've
10 asked to depose our people too.

11 THE COURT: Okay. Why don't you step out in the hall and talk a
12 little bit about this so I can take up some other matters then I'll call this thing
13 back, okay?

14 MR. JUAN: Thank you, Judge.

15 [Matter trailed]

16 THE COURT: All right. You may be seated. We're back on the
17 record in the Apco case and counsel went out into the hall to discuss the matter.
18 I understand that there are some different viewpoints as to what should happen
19 relative to scheduling of trial and/or hearing of the motions that are before the
20 Court today, so.

21 MR. JUAN: We're -- we're split.

22 THE COURT: No, not -- really?

23 MR. JUAN: But I think the key -- the key concerns is for those who
24 are opposed to having their clients deposed, they're worried about delaying the
25 trial. And so that's the reason why we ask the Court when, if we set the trial date,

1 when would it be? And if we did, then maybe they would lessen their opposition
2 to having a small window, 30-day period, of depositions only before trial.

3 THE COURT: I'm told that the -- I can put you on the stack of
4 November 28th.

5 MR. ZIMBELMAN: On what, I'm sorry?

6 THE COURT: November 28th.

7 MR. ZIMBELMAN: November 28.

8 THE COURT: That's pretty quick.

9 MR. JUAN: So -- I don't -- with the November 28th, there were two
10 objections to the deposition which was Helix, we've already deposed Helix, and
11 the other ones was Zitting and, depending upon availability of their client, with
12 National Wood. I don't know if -- if the Judge's response to November 28th
13 changes your position. Helix, I don't need to depose you guys, so.

14 MR. ZIMBELMAN: Maybe I can just speak to be clear on not only
15 Helix's position, but all the clients that I represent. If -- if certain subcontractors
16 are willing to submit to depositions that Mr. Juan is requesting, I'm not going to
17 try to do anything to stand in the way. I am certainly not in favor of and will
18 vociferously oppose any attempt to depose my clients so that I don't -- I
19 understand that's not being requested. But what I am concerned about is that
20 this -- these additional depositions somehow force us into, you know, 2018 for
21 trial or delay the opportunity to have a hearing today on the pending motions and
22 that -- to the extent that those things can occur, you know, then that's fine. I'm
23 not going to stand up and say no.

24 THE COURT: Okay.

25 MR. ZIMBELMAN: As long as it doesn't impact my clients directly.

1 THE COURT: Okay.

2 MR. MOWBRAY: Your Honor, may I ask, I'm new to the case, but is
3 the November 28th, would we be set for a time certain or would we just be on a
4 stack?

5 THE COURT: At this point, well, I'm not sure what the stack looks
6 like. Do we have any firm settings on that?

7 THE JEA: No. So they're the oldest case; so they'll be going.

8 THE COURT: It seems to me we could give you a date certain on it.

9 MR ZIMBELMAN: It, you know honestly, we've had conversations
10 about how trial would --

11 THE COURT: What I mean is a firm setting on the stack.

12 MR. MOWBRAY: It is a firm setting.

13 THE COURT: I don't give -- the 28th is when the stack begins, okay.

14 MR. MOWBRAY: Ah.

15 THE COURT: And what I do is I have a calendar call before that and
16 I hear from everybody as to when on the stack you could go --

17 MR. ZIMBELMAN: Right.

18 THE COURT: -- but when I give a firm setting, it's not necessarily on
19 the 28th itself, but its firm during that stack. And then I hear from everybody at the
20 calendar call and identify the date and time for the trial. This is a bench case;
21 right?

22 MR. JUAN: Yes, Your Honor.

23 THE COURT: So how much time is expected?

24 MR. ZIMBELMAN: Well, I think that -- that's what I was going to
25 raise, I mean, to the extent that the case is, you know primarily, and I think it is

1 primarily, if not entirely, about the subcontractors and its buyers that have claims,
2 proving up those claims. You know, each client probably needs a day or so.
3 Some may be a little bit more than others, but to the extent there's a bunch of
4 other issues that are going to be raised we honestly don't know at this point. We
5 don't believe there are. It might be longer and I think, you know, some of the
6 subcontractors' position would be well, I don't want to sit through, you know, ten
7 days of trial while these other subs prove up their claims that have nothing to do
8 with me.

9 There are probably some issues, and particularly, on what happens
10 today that involve everybody and we certainly need to be present for that, but I
11 mean, I think we can all work together cooperatively to make -- to make that
12 work. I just want to give you a heads up for your, you know, calendar and how
13 you might manage the trial because it could be many many days and I've done
14 trials with you where we, you know, push it out over weeks and months if
15 necessary, but.

16 THE COURT: Okay.

17 MR. ZIMBELMAN: You know, given that it's a bench trial; but the fact
18 that there are distinctly different prove ups for the difference in contractors.

19 THE COURT: Okay.

20 MR. JUAN: He's right. When we talked outside and in other lien
21 cases was every day would be a different prove-up date for a sub. And then
22 during that prove up, of course, we get a chance to do our rebuttal to it. That's
23 how we were thinking about it. And then if there is -- and then in the Camco or
24 Apco's defense in chief, case in chief, then of course, all those parties will be at
25 that one day, but assume it's needed. Maybe each day will be a different sub.

1 That's how we were thinking about that.

2 So if we are on a December -- November 28th on a five-week stack
3 with my understanding of one, two, three, four, five, six, seven -- I'm sorry one
4 second, let's take a look here again. Of one, two, three, four, five, six, seven,
5 eight, eight remaining subs against Apco. You know, that's eight -- eight separate
6 days for each of the subs and their prove up. I know there are some subs with
7 separate claims against Camco which I don't know really who they are, so I'll let
8 Steve deal with that.

9 MR. MORRIS: I believe there are ten subcontractors remaining.

10 MR. ZIMBELMAN: And some of that is crossover. My -- some of my
11 clients have claims against both and we'd like to, you know, if I call a witness, I
12 want to have him testify about the claims against both parties.

13 THE COURT: Well, my understanding of what you're saying Mr. Juan
14 is that your thinking is that before I hear the motions that are on today, you want
15 to do these depositions; is that what I'm --

16 MR. JUAN: If possible.

17 THE COURT: Right.

18 MR. JUAN: But what I was trying to do is try to get an agreement
19 from the parties.

20 THE COURT: And have the trial date, you know, something that
21 would be in the not too distant future.

22 MR. JUAN: We can start -- we can start the deposition time period
23 today, if you want to say --

24 THE COURT: Okay.

25 MR. JUAN: -- 30 days from now, we can.

1 THE COURT: That seems --

2 MR. JUAN: Subject to -- subject to National Woods providing their
3 [indiscernible] PMK [indiscernible] period that they noted that to me.

4 THE COURT: That seems reasonable. I can go ahead and just set a
5 date for resumption of the hearing on the motions now. I can set it out and then
6 you know when you have to have your depositions done by.

7 MR. ZIMBELMAN: Well, I would say this: I think those are
8 independent and mutually exclusive issues. There is, you know, there hasn't
9 been a Rule 56(f), that certification, that says hey, I need to take a deposition --

10 THE COURT: No, I understand.

11 MR. ZIMBELMAN: -- to respond to the pay-if-paid issues. It's a real
12 distinct legal question. So I don't see that one has anything to do with the other.

13 THE COURT: Okay.

14 MR. ZIMBELMAN: And so I think, you know, we're here, we ought to
15 go forward. I mean, obviously if you disagree, we'll abide by your ruling but that
16 seems to me to be the right way. Secondly, again, I'm concerned that there's
17 some kind of open-ended ruling about reopening depositions generally. If there's
18 specific names, let's get them on the record.

19 THE COURT: That's what I was going to ask for next is the specific
20 names.

21 MR. JUAN: Well, I can tell you right now: Interstate Plumbing,
22 National Wood, Nevada Prefab, Steel Structures, Uintah which is now d/b/a
23 Sierra Reinforcing, United Subcontractors d/b/a Skyline, Zitting Brothers.

24 MR. JOHNSON: And if they're going to take depositions of United
25 Subcontractors, then we'd -- I'd like to be able to take their depositions as well,

1 so. That list would need to include Apco and Camco.

2 MR. JUAN: I think he wants to depose Joe Palin [phonetic], but
3 there's already been depositions of our [indiscernible] case, but I think that's what
4 he -- based upon my conversation with him. You mean Joe, right?

5 MR. JOHNSON: Sure.

6 THE COURT: All right. Let's do this. I'll set the trial for the 28th.
7 There will be a trial order that will issue and there will be a calendar call that will
8 be set as well. And I could hear -- why don't I hear the motions on -- how about
9 the 9th of November? And get your depositions done in between now and then. Does
10 that work?

11 MR. JUAN: Thank you, Judge.

12 THE COURT: Will that work?

13 MR. JUAN: Yes. Thanks, Judge.

14 MR. MOUNTEER: Your Honor, I have one thing on behalf of Apco
15 too. There was never a motion in limine set for this trial and in this case and I
16 didn't know if it would be possible to, with these new depositions, reopen that
17 motion for summary judgment deadline or motion in limine deadline prior to that
18 calendar call?

19 THE COURT: Any objection to that?

20 MR. ZIMBELMAN: As long as we know what it is.

21 MR. MOUNTEER: We will properly file before the Court on those
22 deadlines and they'll have a chance to respond, Your Honor.

23 MR. LAI: No objections from Zitting Brothers.

24 MR. ERNST: I would just say if that's the case, then we would
25 reserve our right to take their depositions too if it's within this 30-day window that

1 you're opening.

2 THE COURT: Okay. Any problem with that?

3 MR. JUAN: No, because I know they're referring to Joe Palin

4 [phonetic]. I have no problem with that.

5 THE COURT: Okay. Is everybody on the same page?

6 MR. MOUNTEER: I believe so. Yes, Your Honor.

7 THE COURT: Should I have an order that reflects what it is that
8 we've done here?

9 MR. JUAN: Please, Your Honor.

10 THE COURT: Okay. And who will submit that?

11 MR. JUAN: I can draft and submit it.

12 THE COURT: Would you run it by everybody?

13 MR. JUAN: Yes, Your Honor.

14 THE COURT: Okay.

15 MR. JUAN: Thank you, Judge.

16 THE COURT: I think that's fair. Now we got -- when we get the case
17 tried, you know, depending upon what rulings are made on the motions, et
18 cetera, we'll see what happens.

19 MR. ZIMBELMAN: Thank you, Your Honor.

20 MR. JUAN: Thank you, Your Honor.

21 ALL COUNSEL: Thank you, Your Honor.

22 THE COURT: Hold on a sec.

23 THE JEA: Excuse me. I have a question. What's the dispositive
24 motion deadline going to be?

25 THE COURT: What will the responsive deadline be for --

1 THE JEA: The dispositive motion.

2 THE COURT: The what?

3 THE JEA: The dispositive motion and the motion in limine.

4 THE COURT: Oh you mean the deadline for filing that? Yes, she's
5 asking me, my JEA is asking me about the deadline for filing the motions in
6 limine and the what, Rule 56, additional Rule 56 motions.

7 MR. MOUNTEER: I think we could request about ten days after the
8 depositions close. It would give us time to get those depositions.

9 THE COURT: And when will the depositions close?

10 MR. JUAN: Do you want to do November 9th? Have everything held
11 November 9th? Because we already have --

12 THE COURT: That's what I was -- that's when I was going to the
13 motions.

14 [Counsel confer]

15 THE COURT: I could move that that -- the 9th day to the 16th to give it
16 a little bit more time for everybody.

17 MS. BACON: That would be helpful.

18 THE COURT: Would that work?

19 MR. MOUNTEER: Yeah the 16th would be fine with us.

20 THE COURT: Okay. So we'll do that. The hearing on the 16th at
21 9:00 a.m. on these motions that are before the Court today and then any other
22 motions that are going to be filed should be scheduled for that same time; right?

23 MR. JUAN: Yes, Judge.

24 THE COURT: Right?

25 MR. MOUNTEER: Yes, Your Honor.

1 ALL COUNSEL: Yes, Your Honor.

2 THE COURT: So you're going to want to get going with these.

3 MR. ZIMBELMAN: I mean, are we reopening dispositive motions
4 then?

5 THE COURT: Well, I think there was some discussion about
6 somebody wanted to file a 56 motion as I recall. Was that --

7 MR. MOUNTEER: On the new -- on any of these new depositions
8 that we're taking if something comes up. I also think motion in limine issues
9 could really and part of motion in limine issues, I mean, we already have the pay-
10 if-paid issue, maybe NRS 108 issue, but if we can limit the issues at trial through
11 motion in limines it could substantially --

12 THE COURT: Okay. Let's not have any more motions for summary
13 judgment then. Let's just have motions in limine because I think that will perhaps
14 --

15 MR. MOUNTEER: Okay.

16 THE COURT: -- narrow some issues. Okay?

17 MR. JUAN: Thank you, Judge.

18 MR. ZIMBELMAN: And I -- what was the date that was for the
19 motions in limine to be filed?

20 MR. JUAN: November 16.

21 MR. ZIMBELMAN: Oh, filed by the 16th.

22 ALL COUNSEL: No. Heard.

23 THE COURT: No, they're heard on the 16th. Heard on the 16th.

24 MR. ZIMBELMAN: Filed by -- is there a -- do we have a date for
25 that?

1 MR. MOWBRAY: I would suggest a few days after the deposition
2 period closes so that would be what, November --

3 MS. BACON: I suggest at least a week after that.

4 MR. MOUNTEER: Today's the 5th, it would be November 5th.

5 THE COURT: Are you saying November 5th is the deadline by which
6 to file the motions in limine; is that what I just heard?

7 MR. MOUNTEER: I was saying 30 days out that's when the
8 depositions are supposed to be closed.

9 MR. MOWBRAY: That's fair, Your Honor.

10 THE COURT: Okay. All right. Got it?

11 MR. ZIMBELMAN: Let's do that.

12 MR. MORRIS: Your Honor --

13 MR. JUAN: Yes, Your Honor. I have it all and I'll submit -- I'll submit
14 it to everybody.

15 THE COURT: Okay. Very well.

16 MR. MORRIS: Your Honor, if I may just --

17 THE COURT: I still have a question from my JEA.

18 [Court confers with JEA]

19 THE COURT: I thought the depo cutoff was before the 5th. The
20 motion in -- the motions deadline is the 5th; right?

21 MR. JUAN: Yes, Your Honor.

22 THE COURT: So you're going to get those depositions done before that.

23 MR. JUAN: Yes, Your Honor.

24 THE COURT: Okay. Right?

25 MR. JUAN: Yes, Your Honor.

1 THE COURT: So should we set the deadline by which the deposition
2 should be taken?

3 MR. JUAN: October 31st?

4 THE COURT: You don't want to take them on Nevada Day, do you?

5 MR. ZIMBELMAN: No. October 30th.

6 MR. JUAN: October 30th?

7 THE COURT: What's that?

8 MR. JUAN: October 30th?

9 THE COURT: Want to do that? Is that okay, counsel?

10 MR. JUAN: I'm okay. No objections.

11 MR. MORRIS: Your Honor, if I could just add one more thing. There
12 is a matter that I don't believe that a motion in limine would resolve. And I've had
13 some conversation with counsel for some of the subcontractors on this point.
14 With respect to Camco, there's kind of an overriding legal issue that a ruling on
15 the pay-if-paid clause wouldn't resolve completely; although, it could guide us in
16 the right direction and that is, with respect to the facts and circumstances of this
17 case, who is ultimately responsible for payment given the fact that there is no
18 security left, there is no -- there's no property upon which to perfect their lien
19 claims, there is no money being held anymore. These subcontractors are
20 looking exclusively to these general contractors for payment.

21 THE COURT: Right.

22 MR. MORRIS: And it is the position of the general contractors that
23 that, you know, even aside from a pay-if-paid or pay-when-paid, that the generals
24 are not responsible for payment.

25 THE COURT: I know. That's part of what's before the Court on these

1 motions; right? So.

2 MR. MORRIS: To some degree, not completely however.

3 THE COURT: There was -- that issue was --

4 MR. MORRIS: It is.

5 THE COURT: -- addressed though.

6 MR. MORRIS: It is and I just want to make sure that at least as it
7 pertains to Camco that we can get a ruling on that because that will be outcome
8 determinative --

9 THE COURT: Well, there will be a ruling down the road, but I'm not
10 going to make it today.

11 MR. MORRIS: No, no, no, no, no. No, I'm -- I'm just saying to the
12 extent that that leaves any other opening -- if it leaves any other opening besides
13 the pay-if-paid that there's going to be potential liability against Camco, that
14 would -- that would be it for Camco because of probably the only -- only lien
15 claimant that Camco could survive is Skyline Insulation and their claim of a
16 whopping \$39,000. The rest of them, again, what I'm trying to do, Your Honor, is
17 if there's any potential for liability against Camco on any of these claims for --
18 contract claims for payment, I don't want to waste their time because it -- that
19 would be the death now for Camco.

20 THE COURT: Okay. So you're giving a heads up is what you're
21 doing?

22 MR. MORRIS: I want to give it, yes.

23 THE COURT: Okay.

24 MR. MORRIS: The -- the out of fairness to them and getting
25 prepared for trial, if there's any potential for contract liability against Camco,

1 that's going to be the end of it for them. They can't weather that. They're on life
2 support and they have been for all these years and so I think, out of fairness for
3 them and for my client, if we could have a determination on that and it sounds
4 like we will in part with pay-if-paid, pay-when-paid, but conclusively if it is the
5 Court's order that, you know, there is the possibility of that liability being imposed
6 at the time of trial, that's really outcome determinative for my client. They --

7 THE COURT: All right.

8 MR. MORRIS: -- they will not be able to survive that, so.

9 THE COURT: All right. Thank you and that will be -- that's among
10 the things that will be determined by the Court.

11 MR. LAI: Your Honor, just real quick about the deposition cutoff date.
12 Our PMK for Zitting Brothers may have a trial going forward in October in
13 Minnesota so we're trying to make sure that we can get him in for a depo by the
14 cutoff, but if somehow we can't work it out, would the Court be all right with us
15 reaching out to Apco's counsel to reach an alternative date for his deposition?

16 THE COURT: Sure. Whatever you can agree on.

17 MR. JUAN: I think they're trying to tell me that I have to rely on their
18 word; is that correct, counsel, I have to rely on your word?

19 MR. MOWBRAY: That's a cheap shot. That's a cheap shot.

20 MR. JUAN: Yes. I can do that.

21 THE COURT: All right. I'll see you then. What was the date again,
22 the 16th? Okay, Mr. Juan prepare and circulate that order that reflects what's
23 been done today and so we can get everything lined up.

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MR. JUAN: Thank you, Judge.

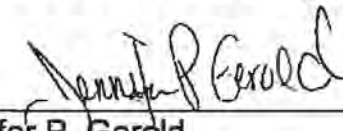
ALL COUNSEL: Thank you, Your Honor.

THE COURT: Okay.

[Hearing concluded at 9:55 a.m.]

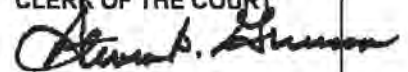
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ATTEST: I do hereby certify that I have truly and correctly transcribed the audio/video proceedings in the above-entitled case to the best of my ability.



Jennifer P. Gerold
Court Recorder/Transcriber

EXHIBIT 29



FFCO
JORGE A. RAMIREZ, ESQ.
Nevada Bar No. 6787
I-CHE LAI, ESQ.
Nevada Bar No. 12247
WILSON, ELSE, MOSKOWITZ, EDELMAN & DICKER LLP
300 South 4th Street, 11th Floor
Las Vegas, NV 89101-6014
Telephone: (702) 727-1400
Facsimile: (702) 727-1401
Jorge.Ramirez@wilsonelser.com
I-Che.Lai@wilsonelser.com
*Attorneys for Lien Clamant,
Zitting Brothers Construction, Inc.*

**DISTRICT COURT
CLARK COUNTY, NEVADA**

APCO CONSTRUCTION, a Nevada
corporation,

Plaintiff,

vs.

GEMSTONE DEVELOPMENT WEST, INC.,
a Nevada corporation,

Defendant.

AND ALL RELATED MATTERS

CASE NO. A571228
DEPT. NO. XIII

Consolidated with:

A574391; A574792; A577623; A583289;
A587168; A580889; A584730; A589195;
A595552; A597089; A592826; A589677;
A596924; A584960; A608717; A608718; and
A590319

Hearing Date: November 16, 2017
Hearing Time: 9:00 a.m.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER GRANTING ZITTING

BROTHERS CONSTRUCTION, INC.'S MOTION FOR PARTIAL SUMMARY

JUDGMENT AGAINST APCO CONSTRUCTION

On November 16, 2017, this Court heard Zitting Brothers Construction, Inc.'s Motion for Partial Summary Judgment Against APCO Construction. Jorge A. Ramirez and I-Che Lai of Wilson Elser Moskowitz Edelman & Dicker, LLP appeared at the hearing for Zitting Brothers Construction, Inc. ("ZBCI"). John Randall Jefferies of Spencer Fane LLP and Cody S. Munteer of Marquis Aurbach Coffing appeared for APCO Construction, Inc. ("APCO"). Having considered ZBCI's motion, the pleadings and papers filed in this case, and oral arguments of counsel, this Court makes the following findings of fact and conclusions of law.

//

1 **FINDINGS OF FACT**

2 **A. APCO's Subcontract with ZBCI**

3 1. Around September 6, 2007, Gemstone Development West, Inc. ("Gemstone") and
4 APCO entered into the ManhattanWest – General Construction Agreement for GMP ("Prime
5 Contract"). Under the Prime Contract, APCO would serve as the general contractor for the
6 ManhattanWest mixed-use development project located at the following Assessor's Parcel Numbers
7 in Clark County, Nevada: 163-32-101-003, 163-32-101-004, 163-32-101-005, 163-32-101-010, and
8 162-32-101-014 (the "Project").

9 2. Around November 17, 2007, APCO and ZBCI entered into a Subcontract Agreement
10 ("Subcontract"). Under the Subcontract, ZBCI would provide framing materials and labor for the
11 Project.

12 3. The Subcontract requires APCO to pay ZBCI 100% of the value of the work
13 completed on a periodic basis—less 10% retention of the value (the "Retention")—only after APCO
14 receives actual payments from Gemstone.

15 4. The Subcontract requires APCO to pay ZBCI the Retention amount for each building
16 of the Project upon (a) the completion of each building; (b) Gemstone's approval of ZBCI's work on
17 the completed building; (c) APCO's receipt of final payment from Gemstone; (d) ZBCI's delivery to
18 APCO all "as-built drawings for [ZBCI]'s scope of work and other close out documents"; and (e)
19 ZBCI's delivery to APCO a release and waiver of claims from ZBCI's "labor, materials and
20 equipment suppliers, and subcontractors providing labor, materials[,] or services to the Project..."
21 The Subcontract deems work on a building to be "complete" as soon as "drywall is completed" for
22 the building.

23 5. Alternatively, if the Prime Contract is terminated, the Subcontract requires APCO to
24 pay ZBCI the amount due for ZBCI's completed work after receipt of payment from Gemstone.

25 6. The conditions precedent of the Subcontract requiring APCO's payment only upon
26 receipt of payment from Gemstone are colloquially known as "pay-if-paid provisions."

27 7. The Subcontract only allows APCO to terminate—with written notice to ZBCI and
28 with cause—the Subcontract for non-performance.

1 8. If any party to the Subcontract "institute[s] a lawsuit ... for any cause arising out of
2 the Subcontract...," the Subcontract expressly authorizes the prevailing party to recover "all costs,
3 attorney's fees[,] and any other reasonable expenses incurred" in connection with the lawsuit. The
4 Subcontract does not provide a rate of interest that would accrue on the amount owed under the
5 Subcontract.

6 9. If any term of the Subcontract is void under Nevada law, the Subcontract expressly
7 provides that the void term would not affect the enforceability of the remainder of the contract.

8 **B. ZBCI's Work under the Subcontract**

9 10. Around November 19, 2007, ZBCI began its scope of work under the Subcontract.

10 11. The Prime Contract was terminated in August 2008, and the Project had shut down on
11 December 15, 2008. APCO never provided ZBCI with a written notice of termination with cause for
12 non-performance.

13 12. Prior to the Project's shutdown, ZBCI submitted written requests to APCO for change
14 orders valued at \$423,654.85. APCO did not provide written disapproval of those change orders to
15 ZBCI within 30 days of each request.

16 13. Also prior to the Project's shutdown, ZBCI had completed its scope of work on
17 Buildings 8 and 9 of the Project, including work on the change orders, without any complaints on the
18 timing or quality of the work. ZBCI had submitted close-out documents for its work, including
19 release of claims for ZBCI's vendors. The value of ZBCI's completed work amounted to
20 \$4,033,654.85.

21 14. At the time of the Project's shutdown, the drywall was completed for Buildings 8 and
22 9.

23 15. To date, ZBCI had only received \$3,282,849.00 for its work on the Project. ZBCI had
24 completed work in the amount of \$347,441.67 on the change orders and \$403,365.49 of the
25 Retention—totaling \$750,807.16— which remains unpaid.

26 16. ZBCI demanded APCO pay the \$750,807.16 still owed on the contract. However,
27 APCO refused to do so, causing ZBCI to initiate proceedings to recover the requested amount.
28

1 **C. Procedural History**

2 17. On January 14, 2008, ZBCI served its Notice of Right to Lien to APCO and
3 Gemstone via certified mail.

4 18. On December 5, 2008, ZBCI served its Notice of Intent to Lien to APCO and
5 Gemstone via certified mail.

6 19. On December 23, 2008, ZBCI recorded its Notice of Lien on the Project with a lien
7 amount of \$788,405.41 and served this document on APCO and Gemstone via certified mail on
8 December 24, 2008.

9 20. On April 30, 2009, ZBCI filed a complaint against Gemstone and APCO and a Notice
10 of Lis Pendens. The complaint alleged 6 claims: (a) breach of contract, (b) breach of implied
11 covenant of good faith and fair dealing, (c) unjust enrichment, (d) violation of Chapter 108 of the
12 Nevada Revised Statutes, (e) claim for priority, and (f) violation of Chapter 624 of the Nevada
13 Revised Statutes.

14 21. On June 10, 2009, APCO answered ZBCI's complaint. APCO's answer alleged 20
15 affirmative defenses, including the tenth affirmative defense alleging that APCO's obligation to
16 ZBCI had been satisfied or excused and the twelfth affirmative defense alleging that ZBCI's failure
17 to satisfy conditions precedent barred ZBCI's breach of contract claim.

18 22. Around June 16, 2009, ZBCI provided a Notice of Foreclosure of Mechanic's Lien,
19 and this notice was published in accordance with Nev. Rev. Stat. 108.239.

20 23. On April 7, 2010, ZBCI recorded its Amended Notice of Lien with a lien amount of
21 \$750,807.16 and served this document on APCO and Gemstone via certified mail around the same
22 date.

23 24. APCO does not dispute that ZBCI complied with all requirements to create, perfect,
24 and foreclose on its lien under Chapter 108.

25 25. On April 29, 2010, APCO responded to ZBCI's interrogatories that requested, *inter*
26 *alia*, APCO's explanation for refusing payment to ZBCI and APCO's grounds for the tenth and
27 twelfth affirmative defenses. ZBCI had sent those interrogatories to obtain more details about
28 APCO's defenses against ZBCI's complaint and to narrow the issues for discovery and trial.

PLUMBING FOURTH FLOOR																	
\$	73,093	\$	73,093	\$	2,192.79	\$	219.28	\$	1,973.51	\$	71,831	\$	7,183.11	\$	8,924.97	88.00%	100.00%
\$	7,233	\$	7,233	\$	216.98	\$	21.70	\$	195.28	\$	7,088	\$	708.79	\$	853.43	88.00%	100.00%
\$	18,478	\$	18,478	\$	554.28	\$	55.43	\$	498.85	\$	18,108	\$	1,810.85	\$	2,180.17	90.00%	100.00%
\$	79,331	\$	79,331	\$	2,378.93	\$	237.89	\$	2,141.94	\$	77,744	\$	7,774.44	\$	9,381.08	88.00%	100.00%
\$	31,071	\$	31,071	\$	932.13	\$	93.21	\$	834.92	\$	20,898	\$	2,089.80	\$	5,064.57	93.00%	100.00%
\$	37,040	\$	37,040	\$	1,852.00	\$	185.20	\$	1,666.80	\$	35,188	\$	3,518.80	\$	5,370.80	95.00%	100.00%
\$	55,613	\$	55,613	\$	-	\$	-	\$	-	\$	11,103	\$	1,110.28	\$	45,520.60	20.00%	50.00%
\$	15,975	\$	15,975	\$	3,195.00	\$	319.50	\$	2,875.50	\$	7,088	\$	708.76	\$	8,788.28	50.00%	100.00%
\$	5,594	\$	5,594	\$	-	\$	-	\$	-	\$	5,472	\$	547.23	\$	658.81	98.00%	100.00%
\$	8,668	\$	8,668	\$	856.60	\$	85.66	\$	770.94	\$	7,709	\$	770.94	\$	1,827.54	80.00%	95.00%
\$	2,112	\$	2,112	\$	-	\$	-	\$	-	\$	-	\$	-	\$	2,112.00	0.00%	100.00%
\$	10,120	\$	97,820	\$	1,012.00	\$	101.20	\$	910.80	\$	80,568	\$	8,055.60	\$	17,017.80	91.74%	100.00%
ELECTRICAL																	
\$	29,450	\$	29,450	\$	-	\$	-	\$	-	\$	22,097	\$	2,209.68	\$	9,582.68	75.00%	76.00%
\$	32,300	\$	15,840	\$	-	\$	-	\$	-	\$	16,840	\$	1,684.00	\$	1,684.00	100.00%	100.00%
\$	22,800	\$	22,800	\$	-	\$	-	\$	-	\$	12,403	\$	1,240.30	\$	11,637.30	54.40%	64.00%
\$	14,250	\$	14,250	\$	4,000.00	\$	400.00	\$	3,600.00	\$	12,735	\$	1,273.50	\$	2,788.50	98.37%	98.37%
\$	12,350	\$	12,350	\$	-	\$	-	\$	-	\$	8,930	\$	893.00	\$	8,113.00	58.11%	58.11%
\$	1,000	\$	1,900	\$	-	\$	-	\$	-	\$	1,900	\$	180.00	\$	180.00	100.00%	100.00%
\$	22,800	\$	22,800	\$	-	\$	-	\$	-	\$	21,600	\$	2,160.00	\$	3,390.00	94.74%	94.74%
\$	108,000	\$	108,000	\$	45,000.00	\$	4,500.00	\$	40,500.00	\$	98,436	\$	9,843.60	\$	17,407.60	92.86%	92.86%
\$	83,000	\$	83,000	\$	4,000.00	\$	400.00	\$	3,600.00	\$	78,000	\$	7,900.00	\$	11,900.00	95.18%	95.00%
\$	50,000	\$	83,928	\$	10,000.00	\$	1,000.00	\$	9,000.00	\$	82,744	\$	8,274.40	\$	37,468.40	88.80%	75.00%
\$	85,000	\$	85,000	\$	-	\$	-	\$	-	\$	76,500	\$	7,650.00	\$	16,150.00	90.00%	100.00%
\$	400,000	\$	400,000	\$	-	\$	-	\$	-	\$	380,000	\$	38,000.00	\$	58,000.00	95.00%	100.00%
\$	75,000	\$	75,000	\$	3,500.00	\$	350.00	\$	3,150.00	\$	71,250	\$	7,125.00	\$	10,875.00	95.00%	100.00%
\$	10,000	\$	10,000	\$	-	\$	-	\$	-	\$	-	\$	-	\$	10,000.00	0.00%	0.00%
\$	75,000	\$	75,000	\$	3,500.00	\$	350.00	\$	3,150.00	\$	71,250	\$	7,125.00	\$	10,875.00	95.00%	100.00%
\$	10,000	\$	10,000	\$	-	\$	-	\$	-	\$	-	\$	-	\$	10,000.00	0.00%	0.00%
\$	75,000	\$	75,000	\$	-	\$	-	\$	-	\$	67,750	\$	6,775.00	\$	14,025.00	90.33%	100.00%
\$	10,000	\$	10,000	\$	-	\$	-	\$	-	\$	-	\$	-	\$	10,000.00	0.00%	0.00%
\$	75,000	\$	75,000	\$	-	\$	-	\$	-	\$	67,750	\$	6,775.00	\$	14,025.00	90.33%	100.00%
\$	10,000	\$	10,000	\$	-	\$	-	\$	-	\$	-	\$	-	\$	10,000.00	0.00%	0.00%
\$	874,315	\$	874,315	\$	78,507.71	\$	7,850.77	\$	88,858.94	\$	816,830	\$	81,583.05	\$	320,087.58	70.44%	70.44%
\$	15,142,910	\$	13,246,954	\$	1,228,999.64	\$	122,898.95	\$	1,104,299.89	\$	9,772,085	\$	977,208.48	\$	4,452,077.16	73.77%	74.12%
GRADING CHANGE ORDERS																	
\$	-	\$	59,308	\$	-	\$	-	\$	-	\$	53,377	\$	2,699.87	\$	8,699.87	90.00%	90.00%
\$	-	\$	447	\$	-	\$	-	\$	-	\$	447	\$	22.34	\$	22.34	100.00%	100.00%
\$	-	\$	88,338	\$	-	\$	-	\$	-	\$	70,871	\$	3,533.55	\$	21,201.29	80.00%	80.00%
\$	-	\$	453	\$	-	\$	-	\$	-	\$	453	\$	22.84	\$	22.84	100.00%	100.00%
\$	-	\$	394,330	\$	-	\$	-	\$	-	\$	307,578	\$	15,378.68	\$	102,131.61	78.00%	78.00%
\$	-	\$	542,877	\$	-	\$	-	\$	-	\$	432,626	\$	21,828.28	\$	131,877.46	79.67%	80.00%
SUBTOTAL GRADING CHANGE ORDERS																	
BUILDING CHANGE ORDERS																	
\$	-	\$	14,247	\$	-	\$	-	\$	-	\$	13,628	\$	1,362.80	\$	1,362.75	100.00%	100.00%
\$	-	\$	106,514	\$	-	\$	-	\$	-	\$	-	\$	-	\$	-	0.00%	0.00%
\$	-	\$	72,877	\$	-	\$	-	\$	-	\$	-	\$	-	\$	-	0.00%	0.00%
\$	-	\$	123,965	\$	-	\$	-	\$	-	\$	-	\$	-	\$	-	0.00%	0.00%
\$	-	\$	318,489	\$	-	\$	-	\$	-	\$	-	\$	-	\$	-	0.00%	0.00%
\$	-	\$	27,573	\$	-	\$	-	\$	-	\$	-	\$	-	\$	-	0.00%	0.00%
\$	-	\$	381,487	\$	-	\$	-	\$	-	\$	-	\$	-	\$	-	0.00%	0.00%
\$	-	\$	736,852	\$	-	\$	-	\$	-	\$	-	\$	-	\$	-	0.00%	0.00%
\$	-	\$	315,611	\$	22,978	\$	1,148.78	\$	10,339.05	\$	17,232	\$	1,723.18	\$	7,487.10	75.00%	75.00%
\$	-	\$	302,978	\$	320,275	\$	4,564.13	\$	44,317.15	\$	131,310	\$	13,131.01	\$	210,096.11	40.00%	40.00%

Document C: Contractor Costs Detail

Genstone Development West, Inc.
Manhattan West Condominiums

General Contractor Cost Detail-APCO

PHASE	DESCRIPTION	BUDGET	CONST. DRAW JULY Invoices	EXPENSE YEAR TO DATE	% OF BUDGET	EXPENSE % OF BUDGET
General Conditions						
1000	GENERAL CONDITIONS					
1000	APCO Contractor Fee	\$ 4,996,086.00	\$ 432,257.25	\$ 3,225,814.25	64.56%	\$ 1,770,471.75
1310	General Conditions	\$ 7,095.00		\$ 5,452.53	76.85%	\$ 1,642.47
1330	Submittals	\$ 4,500.00		\$ 3,872.07	86.05%	\$ 627.93
1500	Mobilization	\$ 50,000.00		\$ 47,500.00	95.00%	\$ 2,500.00
1780	Closeout Documents	\$ 4,000.00		\$ -	0.00%	\$ 4,000.00
TOTAL BUDGET AMOUNT		\$ 5,061,681.00	\$ 432,257.25	\$ 3,221,436.85	64.15%	\$ 1,779,244.15
Site Improvements						
2000	SITEWORK					
2200	Site Prep & Mass Excavation	\$ 2,754,700.00		\$ 2,914,650.00	105.81%	\$ (159,950.00)
2300	Mass Excavation	\$ -		\$ -	#DIV/0!	\$ -
2510	Sites Water	\$ 647,000.00		\$ 476,770.00	73.69%	\$ 170,230.00
2530	Site Sanitary Sewer	\$ 615,000.00		\$ 590,400.00	96.00%	\$ 24,600.00
2580	Site electric	\$ -		\$ -	#DIV/0!	\$ -
2600	Storm Sewer	\$ 511,000.00		\$ 500,780.00	98.00%	\$ 10,220.00
2740	Asphaltic concrete Paving	\$ 512,350.00	\$ 8,500.00	\$ 43,927.50	8.57%	\$ 468,422.50
2750	Concrete Paving and Approaches	\$ -		\$ -	#DIV/0!	\$ -
2770	Curbs and Gutters	\$ 190,020.00		\$ -	0.00%	\$ 190,020.00
2775	Sidewalks	\$ 230,000.00		\$ -	0.00%	\$ 230,000.00
2780	Unit Pavers	\$ 221,844.00		\$ -	0.00%	\$ 221,844.00
2800	Irrigation System	\$ -		\$ -	#DIV/0!	\$ -
2820	Fencing	\$ -		\$ -	#DIV/0!	\$ -
2870	Site furnishings	\$ 100,000.00		\$ -	0.00%	\$ 100,000.00
2900	Landscaping	\$ 345,000.00		\$ -	0.00%	\$ 345,000.00
TOTAL BUDGET AMOUNT		\$ 6,138,824.00	\$ 8,500.00	\$ 4,920,527.50	79.68%	\$ 1,600,586.50
Clubhouse/Pool/Pool House/ Guard House						
18000	ALLOWANCES					
18000	Pools	\$ 460,000.00		\$ -	0.00%	\$ 460,000.00
TOTAL BUDGET AMOUNT		\$ 460,000.00	\$ -	\$ -	0.00%	\$ 460,000.00
Framing Contract						
6100	Rough Framing	\$ 3,610,000.00		\$ 3,609,996.98	100.00%	\$ 3.02
TOTAL BUDGET AMOUNT		\$ 3,610,000.00	\$ -	\$ 3,609,996.98	100.00%	\$ 3.02
Condo Construction						
3000	CONCRETE					
3300	Cast in Place Concrete	\$ 9,277,108.00	\$ 54,116.00	\$ 8,979,940.50	96.80%	\$ 297,167.50
3450	Precast Concrete	\$ 1,000,000.00	\$ 258,250.00	\$ 516,500.00	51.65%	\$ 483,500.00
4000	MASONRY					
4100	CMU	\$ 1,531,800.00		\$ 583,509.00	38.09%	\$ 948,291.00
5000	METALS					
5100	Structural Steel	\$ 13,658,981.50	\$ 968,592.13	\$ 12,072,063.21	88.72%	\$ 584,918.29
5500	Miscellaneous Metals (Ind)	\$ -		\$ -	#DIV/0!	\$ -
6000	CARPENTRY					
6200	Milwork	\$ 1,900,000.00	\$ 597,870.40	\$ 647,068.72	34.06%	\$ 1,252,931.28
6400	Architectural Woodwork	\$ -		\$ -	#DIV/0!	\$ -
7000	THERMAL / MOISTURE PROTECTION					
7100	Waterproofing	\$ 557,293.00	\$ 104,005.22	\$ 440,713.00	79.08%	\$ 116,580.00
7220	Insulation	\$ 359,840.00	\$ 71,790.00	\$ 156,060.00	43.37%	\$ 203,780.00
7240	EPIS/Secco	\$ 1,455,600.00	\$ 502,497.80	\$ 580,807.80	39.90%	\$ 874,792.20
7530	EPDM Roofing 60 mil	\$ -		\$ -	#DIV/0!	\$ -
7650	Fashing	\$ -		\$ -	#DIV/0!	\$ -
7720	Roof Hatches w/ladder	\$ 876,596.00	\$ 436,897.00	\$ 736,599.28	84.03%	\$ 139,996.72
7810	Sprayed on Fireproofing	\$ 260,000.00	\$ 28,740.00	\$ 240,840.00	92.63%	\$ 19,160.00
7900	Caulking and Sealants	\$ -		\$ -	#DIV/0!	\$ -
8000	DOORS & WINDOWS					
8100	HM doors and Frames	\$ -		\$ -	#DIV/0!	\$ -
8200	Wood Doors and Frames	\$ -		\$ -	#DIV/0!	\$ -
8310	Access Panels	\$ -		\$ -	#DIV/0!	\$ -
8360	Overhead Doors	\$ -		\$ -	#DIV/0!	\$ -
8400	Storefront	\$ 183,000.00	\$ 54,450.00	\$ 127,115.00	69.46%	\$ 55,885.00
8560	Vinyl Windows	\$ 1,052,375.00		\$ 992,844.00	94.34%	\$ 59,531.00

04314

0578

PHASE	DESCRIPTION	BUDGET	CONST. DRAW JULY Invoices	EXPENDITURE YEAR TO DATE	% OF BUDGET	REMAINING BUDGET
8700	Door Hardware	\$ -	\$ -	\$ -	#DIV/0!	\$ -
8800	Glass and glazing	\$ 5,100,000.00	\$ 807,500.00	\$ 952,500.00	18.68%	\$ 4,147,500.00
9000	FINISHES					
6415	Granite	\$ 332,000.00	\$ 2,755.00	\$ 15,545.00	4.98%	\$ 315,455.00
9200	LGHF and Drywall	\$ 4,332,100.50	\$ 648,107.50	\$ 2,547,857.50	58.81%	\$ 1,784,243.00
9250	GWB w/light gauge metal framing	\$ -	\$ -	\$ -	#DIV/0!	\$ -
9300	Ceramic Tile	\$ -	\$ -	\$ -	#DIV/0!	\$ -
9520	ACT	\$ -	\$ -	\$ -	#DIV/0!	\$ -
9600	Flooring	\$ 1,650,000.00	\$ -	\$ -	0.00%	\$ 1,650,000.00
9680	Carpet	\$ -	\$ -	\$ -	#DIV/0!	\$ -
9720	Wallcovering @22.00 sq.	\$ -	\$ -	\$ -	#DIV/0!	\$ -
9900	Painting	\$ 1,111,236.00	\$ -	\$ -	0.00%	\$ 1,111,236.00
10000	SPECIALTIES					
10180	Toilet Partitions	\$ -	\$ -	\$ -	#DIV/0!	\$ -
10440	Interior Signage	\$ -	\$ -	\$ -	#DIV/0!	\$ -
10520	Fire extinguishers and Cabinets	\$ -	\$ -	\$ -	#DIV/0!	\$ -
10550	Mail Boxes	\$ -	\$ -	\$ -	#DIV/0!	\$ -
10800	Bathroom Accessories	\$ -	\$ -	\$ -	#DIV/0!	\$ -
11000	EQUIPMENT					
11000	APPLIANCES	\$ 336,000.00	\$ -	\$ -	0.00%	\$ 336,000.00
14000	CONVEYING SYSTEMS					
14200	HYDRAULIC ELEVATORS	\$ 1,729,979.00	\$ 267,287.00	\$ 1,119,871.32	64.73%	\$ 610,107.68
15000	MECHANICAL					
15000	FIRE PROTECTION	\$ -	\$ -	\$ -	#DIV/0!	\$ -
15010	PLUMBING	\$ 8,272,200.00	\$ 711,159.77	\$ 5,372,550.83	64.95%	\$ 2,899,649.17
15020	H.V.A.C.	\$ 2,395,100.00	\$ 396,769.16	\$ 1,324,884.04	55.32%	\$ 1,070,215.96
16000	ELECTRICAL					
16000	ELECTRICAL	\$ 6,310,356.00	\$ 580,822.00	\$ 4,745,557.00	75.20%	\$ 1,564,799.00
TOTAL BUDGET AMOUNT		\$ 83,878,888.00	\$ 8,491,804.13	\$ 43,162,828.20	87.77%	\$ 20,828,738.80
SUBTOTAL OF GENERAL CONTRACTOR COSTS		\$ 76,838,160.00	\$ 8,832,384.38	\$ 64,572,789.33	0.00%	\$ 24,293,379.47
Unit Upgrade Expenses						
18000	Building CO 00028 Electrical Options B8	\$ 45,180.18	\$ -	\$ 27,096.10	60.00%	\$ 18,084.08
18000	Building CO 00032 Electrical Options B9	\$ 43,803.27	\$ -	\$ 26,281.96	60.00%	\$ 17,521.31
19010	Building CO 00033 Plumbing Options B9	\$ 34,100.40	\$ -	\$ 13,525.12	25.00%	\$ 40,575.37
19010	Building CO 00034 Plumbing Options B9	\$ 64,863.28	\$ -	\$ 16,240.84	25.00%	\$ 48,722.52
4100	Building CO 00037 B8 & B9 Option Changes	\$ 18,009.00	\$ -	\$ 18,009.00	100.00%	\$ -
5100	Building CO 00038.1 Cable Hand Rail Opt B8 & B9	\$ 21,821.20	\$ -	\$ -	0.00%	\$ 21,821.20
11000	Building CO 00038.1 Building B & B Fireplaces	\$ 16,580.70	\$ -	\$ -	0.00%	\$ 16,580.70
16000	Building CO 00047 Building B & B Low Voltage	\$ 80,884.23	\$ 15,223.56	\$ 15,223.56	25.00%	\$ 45,670.67
6200	Building CO 00049 Building B & B Closet Organizers	\$ 18,882.08	\$ -	\$ -	0.00%	\$ 18,882.08
16000	Building CO 00060 Building B & B Electrical Upgrades	\$ 26,836.36	\$ -	\$ -	0.00%	\$ 26,836.36
10800	Building CO 00062 Building B & B Shower Doors & Mirrors	\$ 18,740.88	\$ -	\$ -	0.00%	\$ 18,740.88
TOTAL BUDGET AMOUNT		\$ 380,371.56	\$ 15,223.56	\$ 118,374.88	#DIV/0!	\$ 27,3394.88
TOTAL GC COSTS INCLUDING UPGRADES		\$ 79,328,531.56	\$ 8,847,607.94	\$ 64,691,164.21	0.00%	\$ 24,320,714.31
Approved Change Orders (Approved AIA 702)						
2830	Grading CO 00081 - Bluelife Chem Food & Star Tank	\$ 88,308.20	\$ -	\$ 53,577.40	\$ -	\$ 5,930.80
2810	Grading CO 00082 - Fire Hydrant Permits	\$ 448.76	\$ -	\$ 448.76	\$ -	\$ -
2830	Grading CO 00090 - Revelons Utility Sheets 11/14/07	\$ 88,336.72	\$ -	\$ 70,670.98	\$ -	\$ 17,667.74
2300	Grading CO 00094 - Encroachment Permit	\$ 452.81	\$ -	\$ 452.81	\$ -	\$ -
2630	Grading CO 00095 - WRG Plans 11-01-07	\$ 384,330.13	\$ -	\$ 307,877.50	\$ -	\$ 86,752.63
7810	Building CO 00091 Additional Fireproofing B7	\$ 13,628.00	\$ -	\$ 13,628.00	\$ -	\$ -
18020	Building CO 00012 HVAC Thru Delta S B8	\$ 22,875.67	\$ 11,487.83	\$ 17,231.75	\$ -	\$ 5,743.92
18020	Building CO 00013.1 HVAC Thru Delta S B2/3	\$ 328,276.17	\$ 49,241.28	\$ 131,310.07	\$ -	\$ 196,965.10
4100	Building CO 00023 Masonry Delta S B8/9	\$ 12,083.00	\$ -	\$ 12,083.00	\$ -	\$ -
18000	Building CO 00038 Electrical C2 Split B8/9	\$ 68,444.00	\$ -	\$ 33,866.40	\$ -	\$ 22,577.60
18000	Building CO 00042 Electrical Changes Delta 3	\$ 88,723.00	\$ -	\$ 24,180.78	\$ -	\$ 72,542.22
16000	Building CO 00043 Electrical Changes Delta 8	\$ 98,740.00	\$ -	\$ 24,935.00	\$ -	\$ 74,805.00
TOTAL BUDGET AMOUNT		\$ 1,172,755.48	\$ 80,728.11	\$ 889,770.44	#DIV/0!	\$ 482,985.04
GRAND TOTAL OF GENERAL CONTRACTOR COSTS		\$ 80,801,287.04	\$ 7,908,316.05	\$ 65,572,934.65	64.79%	\$ 25,122,352.40
TOTAL RETENTION			\$ (700,631.81)	\$ (5,292,137.38)	#DIV/0!	\$ 6,281,137.38
NET CASH ADVANCES		\$ 60,601,287.04	\$ 8,307,447.15	\$ 80,084,792.18		\$ 30,414,487.83



**NEVADA
CONSTRUCTION
SERVICES**

October 20, 2008

**Scott Financial Corporation
15010 Sundown Drive
Bismarck, ND 58503
Attn: Brad J. Scott**

RE: DRAW REQUEST ON THE FOLLOWING PROJECT:

**MANHATTANWEST CONDOS PHASE I	Gross	\$4,991,752.48
NCS PROJECT# 07-10-11Y-JO	Retention	\$470,719.24
Senior Construction Draw #10	Net	\$4,521,033.24

Less funds returned to SFC that were not disbursed by NCS **\$1,375,440.75**
(Please see attached document and detail on document C)

****Please request additional funding of \$3,145,592.49**

****Please note: NCS will need the full net amount of \$4,521,033.24 sent by wire to fund the current draw request.**

Please find enclosed the most recent draw request and inspection report for your review. In addition, any pending reallocations are attached for your review. NCS accepts that these reallocations are approved when this draw is funded.

The amount of the draw has been approved for payment as the work completed meets or exceeds the amount requested.

Please make note of the available construction loan balances and notify us immediately of any discrepancies.

If you have any questions, please do not hesitate to give our office a call.

Sincerely,


Jennifer Olivares
Disbursement Agent

2500 N. Buffalo, Suite 140 • Las Vegas, NV 89128
Office (702) 251-1150 • Fax (702) 251-5918

160 Country Estates Circle, Suite 3 • Reno, NV 89511
Office (775) 324-7733 • Fax (775) 324-5212

00372

0580

ManhattanWest

Apco June Payment

Reason		Amount
Reimbursement for Containment Solutions/Las Vegas Pipeline	\$	15,000.00
Reimbursement for Enco Southwest/Las Vegas Pipeline	\$	29,823.00
Apco self-performed work	\$	45,124.85
Apco Contractor Fees	\$	330,187.81
Advance to Accuracy Glass from Apco Contractor Fees	\$	(90,000.00)
Total remaining to disburse to Apco for June	\$	330,235.46

Apco July Payment

Reason		Amount
Reimbursement for Accuracy advance in June	\$	90,000.00
Apco self-performed work	\$	38,308.05
Apco Contractor Fees	\$	371,716.05
Payment to WRG from Apco Contractor Fees	\$	(11,396.00)
Total remaining to disburse to Apco for July	\$	488,628.10

Other funds remaining

		Amount
June Jeff Heit - check on hold per Owner	\$	306,461.20
July Jeff Heit - check on hold per Owner	\$	224,091.99
July Jeff Heit/Apco reimbursement - check on hold per Owner	\$	26,024.00
Total funds on hold	\$	556,577.19

TOTAL FUNDS WIRED BACK TO SFC	\$	1,375,440.75
--------------------------------------	-----------	---------------------

00373

0581



Scott Financial Corporation
15010 Sundown Drive
Bismarck, ND 58503
Attn: Brad J. Scott

****MANHATTANWEST CONDOS PHASE I
NCS PROJECT# 07-10-11Y-JO
Senior Construction Draw #10**

Gross	\$4,991,752.48
<u>Retention</u>	<u>\$470,719.24</u>
Net	\$4,521,033.24

Please find enclosed the most recent draw request and inspection report for your review. In addition, any pending reallocations are attached for your review. NCS accepts that these reallocations are approved when this draw is funded.

The amount of the draw has been approved for payment as the work completed meets or exceeds the amount requested.

Please make note of the available construction loan balances and notify us immediately of any discrepancies.

If you have any questions, please do not hesitate to give our office a call.

Sincerely,

phases

Jennifer Olivares
Disbursement Agent

2500 N. Buffalo, Suite 140 • Las Vegas, NV 89128
Office (702) 251-1150 • Fax (702) 251-5918

160 Country Estates Circle, Suite 3 • Reno, NV 89511
Office (775) 324-7733 • Fax (775) 324-5212

0582

TO OWNER: MASHJIAN MEK
NEW MI BOSTON 024

Lawrence, NY 05453

285 E. Piquette Ave., Ste. 300
Eas. Village, Norwalk 06850

At the end of the study, the authors found that the intervention was effective in reducing the risk of HIV infection.

2. What category changes did you make? 2.617.050.22

4. TOTAL COMPLETED & STORED TO DATE _____ 5

5: PETER J. MAGE
rel. 10-16 of completed work
75 5-3374 80274

D. 5 % of Sales Worth \$ 273,106.75

5/21/1989

7 LESS PREPARED RESOURCES FOR PAYMENT *

4-231155-24

to the company of _____

PREVIOUS LANDFILL OWNER	1/1/1972	11
TOTAL APPROVED THIS MONTH	71/10/1970	

Journal of Interpersonal Violence 29(1)

0583

2577.059A22E

Figure 1 (continued)

Page 3 of 10

[illegible]

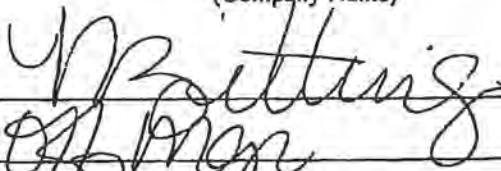
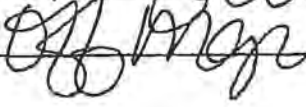
EXHIBIT 19

CONDITIONAL WAIVER AND RELEASE
UPON PROGRESS PAYMENT

Property Name: MANHATTAN WEST
Property Location: RUSSEL RD
Undersigned's Customer: APCO CONSTRUCTION
Invoice/Payment Application Number: _____
Payment Amount: \$18450.00

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

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

Dated: 7/14/08
ZITTING BROTHERS CONSTRUCTION
(Company Name)
By: 
Its: 

CONDITIONAL WAIVER AND RELEASE
UPON PROGRESS PAYMENT

Property Name: MANHATTAN WEST
Property Location: RUSSEL RD. LAS VEGAS
Undersigned's Customer: APCO CONSTRUCTION
Invoice/Payment Application Number: 73828
Payment Amount: \$180231.35

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

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

Dated: 6/30/08

Gitting Bros
(Company Name)
By: [Signature]
Its: Office Manager

APCO CONSTRUCTION

3432 N. 5th Street • North Las Vegas, NV 89032
Phone: (702) 734-0198 • Fax: (702) 734-0398
E-mail: apcoconstruction.com • NCL: 14563

UNCONDITIONAL WAIVER AND RELEASE UPON PROGRESS PAYMENT


Property Name:	<u>Manhattan West</u>
Property Location:	<u>Russell Road & I-215, Las Vegas, Nevada</u>
Undersigned's Customer:	<u>APCO Construction</u>
Inv./Pmt Application No:	<u>Payment Application #7 (May 2008)</u>
Payment Amount:	<u>\$27,973.80</u>

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

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

Dated: 03/03/08

Zitting Brothers Construction Inc.

Signature: 

Print: Sam Zitting

Title: pres.

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



3432 N. 5th Street • North Las Vegas, NV 89032
Phone: (702) 734-0198 • Fax: (702) 734-0396
E-mail: apcoconstruction.com • NCL: 14563

**UNCONDITIONAL WAIVER AND RELEASE
UPON PROGRESS PAYMENT**

Property Name: Manhattan West Buildings 8+9
Property Location: Russell Road & I-215, Las Vegas, Nevada
Undersigned's Customer: Zitting Bros.
Inv./Pmt Application No: May 2008 Invoices
Payment Amount: Paid In Full through May 31, 2008

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

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

Dated: 8/20/08

Stock Building Supply

Signature: Greg Wall

Print: Greg Wall

Title: Asst. Mgr. Cedar City, UT

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

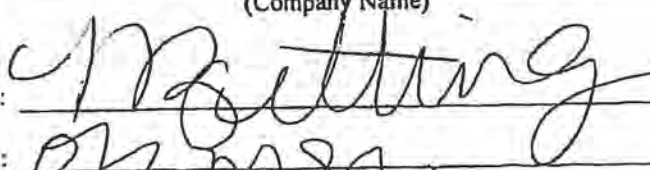
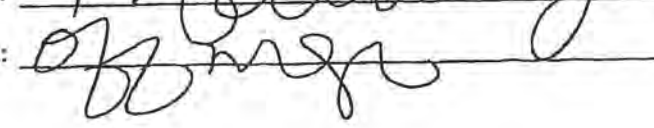
APCO00044637

CONDITIONAL WAIVER AND RELEASE
UPON PROGRESS PAYMENT

Property Name: MANHATTAN WEST
Property Location: RUSSELL RD
Undersigned's Customer: APCO CONSTRUCTION
Invoice/Payment Application Number: _____
Payment Amount: \$27971.00

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

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

Dated: 6/12/08 ZITTING BROTHERS CONSTRUCTION
(Company Name)
By: 
Its: 



APCO CONSTRUCTION

3432 N. 5th Street • North Las Vegas, NV 89032
Phone: (702) 734-0198 • Fax: (702) 734-0398
E-mail: apcoconstruction.com • NCL: 14563

UNCONDITIONAL WAIVER AND RELEASE UPON PROGRESS PAYMENT

Property Name:	<u>Manhattan West</u>
Property Location:	<u>Russell Road & I-215, Las Vegas, Nevada</u>
Undersigned's Customer:	<u>APCO Construction</u>
Inv./Pmt Application No:	<u>Payment Application #6 (April 2008)</u>
Payment Amount:	<u>\$156,574.60</u>

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

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

Dated: 6/21/08

Zitting Brothers Construction Inc.

Signature: [Signature]

Print: Natalie Zitting

Title: Officer

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

APCO00044651

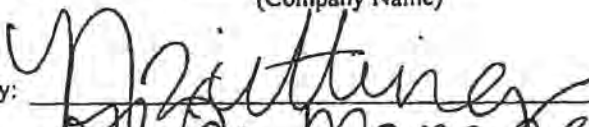
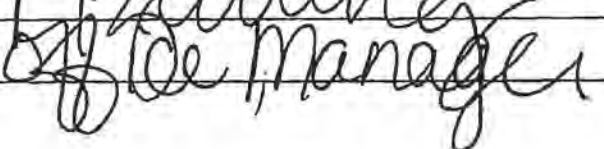
CONDITIONAL WAIVER AND RELEASE
UPON PROGRESS PAYMENT

Property Name: MANHATTAN WEST
Property Location: LAS VEGAS NV
Undersigned's Customer: APCO CONSTRUCTION
Invoice/Payment Application Number: 502
Payment Amount: \$156,574.24

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

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

Dated: 4/21/08 ZITTING BROTHERS CONSTRUCTION
(Company Name)

By: 
Its: 

APCO CONSTRUCTION

3432 N. 5th Street • North Las Vegas, NV 89032
Phone: (702) 734-0198 • Fax: (702) 734-0396
E-mail: apcoconstruction.com • NCL: 14563

UNCONDITIONAL WAIVER AND RELEASE UPON PROGRESS PAYMENT

Property Name:	Manhattan West
Property Location:	Russell Road & I-215, Las Vegas, Nevada
Undersigned's Customer:	APCO Construction
Inv./Pmt Application No:	Payment Application #5 (Mar. 2008)
Payment Amount:	\$424,688.70

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

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

Dated: 5/21/08

Zitting Brothers Construction Inc.

Signature: [Signature]

Print: [Signature]

Title: Office Manager

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

APCO00044675

0609

CONDITIONAL WAIVER AND RELEASE
UPON PROGRESS PAYMENT

Property Name: MANHATTAN WEST
Property Location: RUSSEL RD, LAS VEGAS
Undersigned's Customer: APCO CONSTRUCTION
Invoice/Payment Application Number: 502
Payment Amount: \$424,689.03

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

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

Dated: 4/8/08 ZITTING BROTHERS CONSTRUCTION
(Company Name)

By: [Signature]
Its: Office Manager



3432 N. 5th Street • North Las Vegas, NV 89032
Phone: (702) 734-0198 • Fax: (702) 734-0396
E-mail: apcoconstruction.com • NCL: 14563

**UNCONDITIONAL WAIVER AND RELEASE
UPON PROGRESS PAYMENT**

Property Name:	<u>Manhattan West</u>
Property Location:	<u>Russell Road & I-215, Las Vegas, Nevada</u>
Undersigned's Customer:	<u>APCO Construction</u>
Inv./Pmt Application No:	<u>Payment Application #4 (Feb. 2008)</u>
Payment Amount:	<u>\$495,604.60</u>

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

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

Dated: 4/23/08

Zitting Brothers Construction Inc.

Signature: [Signature]

Print: Roy Zitting

Title: owner

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

APCO00044684

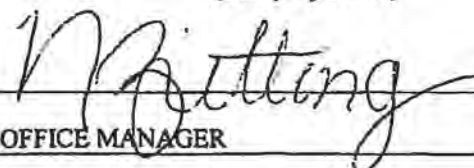
**ZITTING BROTHERS CONSTRUCTION, INC.
CONDITIONAL WAIVER AND RELEASE
UPON PROGRESS PAYMENT**

Property/Project Name: MANHATTAN WEST
Property Location: RUSSEL RD
Undersigned's Customer: APCO CONSTRUCTION
Invoice/Payment Application Number: 4
Payment Amount: \$495,604.44

Upon receipt by the undersigned of a check in the above referenced Payment Amount payable to the undersigned, and when the check has been properly endorsed and has been paid by the bank on which it is drawn, this document becomes effective to release and the undersigned shall be deemed to waive any notice of lien right under U.C.A. §38-1, any private bond right under U.C.A. §14, any claim for payment and any rights under any similar ordinance, rule or statute related to payment rights that the undersigned has on the above described Property to the following extent:

This release covers a progress payment for the work, materials or equipment furnished by the undersigned to the Property/Project or to Zitting Brothers Construction, Inc., the Owner or any other person or entity that does or may claim an interest in the project or property which are the subject of the Invoice or Payment Application, and does not cover any retention withheld. The undersigned warrants that he either has already paid or will use the money he receives from this progress payment promptly to pay in full all his laborers, subcontractors, materialmen and suppliers for all work, materials or equipment that are the subject of this waiver and release. The undersigned shall indemnify and hold harmless Zitting Brothers Construction, Inc., the Owner or any other person or entity that does or may claim an interest in the project and or property from any and all losses, fines, suits, damages, expenses, claims, demands and actions of any kind resulting from the undersigned's failure to pay in full all its/his/her laborers, subcontractors, materialmen and suppliers for all work, materials or equipment that were supplied or used on the project/property through the date of this waiver and release.

Dated: 2/19/08 ZITTING BROTHERS CONSTRUCTION
(Company Name)

By: 
Its: OFFICE MANAGER

APCO00044698



APCO CONSTRUCTION

3432 N. 5th Street • North Las Vegas, NV 89032
Phone: (702) 734-0198 • Fax: (702) 734-0396
E-mail: apcoconstruction.com • NCL: 14563

UNCONDITIONAL WAIVER AND RELEASE UPON PROGRESS PAYMENT

Property Name:	<u>Manhattan West</u>
Property Location:	<u>Russell Road & I-215, Las Vegas, Nevada</u>
Undersigned's Customer:	<u>APCO Construction</u>
Inv./Pmt Application No:	<u>Payment Application #003 (Jan. 2008)</u>
Payment Amount:	<u>\$408,225.70</u>

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

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

Dated: 3/18/08Zitting Brothers Construction Inc.Signature: Print: Natalie ZittingTitle: Office Manager

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

APCO00044699


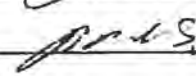
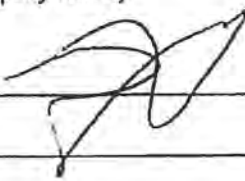
CONDITIONAL WAIVER AND RELEASE
UPON PROGRESS PAYMENT

Property Name: MANHATTAN WEST
Property Location: WEST LAS VEGAS
Undersigned's Customer: APCO CONSTRUCTION
Invoice/Payment Application Number: _____
Payment Amount: \$408,225.33

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

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Dated: 1/20/08 ZITTING BROTHERS CONSTRUCTION
(Company Name)

By: 
Its:  



APCO CONSTRUCTION

3432 N. 5th Street • North Las Vegas, NV 89032
Phone: (702) 734-0198 • Fax: (702) 734-0396
E-mail: apcoconstruction.com • NCL: 14563

UNCONDITIONAL WAIVER AND RELEASE UPON PROGRESS PAYMENT

Property Name:	<u>Manhattan West</u>
Property Location:	<u>Russell Road & I-215, Las Vegas, Nevada</u>
Undersigned's Customer:	<u>APCO Construction</u>
Inv./Pmt Application No:	<u>Payment Application #002 (Dec. 2007)</u>
Payment Amount:	<u>\$567,148.60</u>

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

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Dated: 2-29-08

Zitting Brothers Construction Inc.

Signature: 

Print: WILLIAM ZITTING

Title: V.P.

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APCO00044714

0615



APCO CONSTRUCTION

3432 N. 5th Street • North Las Vegas, NV 89032
Phone: (702) 734-0198 • Fax: (702) 734-0396
E-mail: apcoconstruction.com • NCL: 14563

UNCONDITIONAL WAIVER AND RELEASE UPON PROGRESS PAYMENT

Property Name:	Manhattan West
Property Location:	Russell Road & I-215, Las Vegas, Nevada
Undersigned's Customer:	APCO Construction
Inv./Pmt Application No:	Payment Application #001.2 (Nov. 2007)
Payment Amount:	\$368,785.00

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

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

Dated: 02/07/08

Zitting Brothers Construction Inc.

Signature: 

Print: Sam Zitting

Title: owner

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APCO00044728

0616

CONDITIONAL WAIVER AND RELEASE
UPON PROGRESS PAYMENT

Property Name: MANHATTAN WEST
Property Location: 9121 WEST RUSSELL RD, LAS VEGAS
Undersigned's Customer: APCO CONSTRUCTION
Invoice/Payment Application Number: 73663
Payment Amount: \$368,785.00

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

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

Dated: 2/6/08 ZITTING BROTHERS CONSTRUCTION
(Company Name)
By: Natalie Zitting
Its: Office Manager

APCO CONSTRUCTION

3432 N. 5th Street • North Las Vegas, NV 89032
Phone: (702) 734-0198 • Fax: (702) 734-0396
E-mail: apcoconstruction.com • NCL: 14563

UNCONDITIONAL WAIVER AND RELEASE UPON PROGRESS PAYMENT

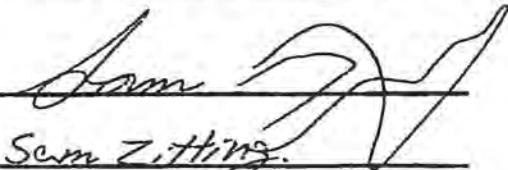
Property Name:	Manhattan West
Property Location:	Russell Road & I-215, Las Vegas, Nevada
Undersigned's Customer:	APCO Construction
Inv./Pmt Application No:	Payment Application #001 (Partial)
Payment Amount:	\$800,000.00

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

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

Dated: 02/01/08

Zitting Brothers Construction Inc.

Signature: 

Print: Sam Zitting

Title: pres.

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

APCO00044744

**CONDITIONAL WAIVER AND RELEASE
UPON PROGRESS PAYMENT**

Property Name: Manhattan West
Property Location: 3432 North 5th street Las Vegas
Undersigned's Customer: APCO construction
Invoice/Payment Application Number: 1
Payment Amount: \$800,000

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

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

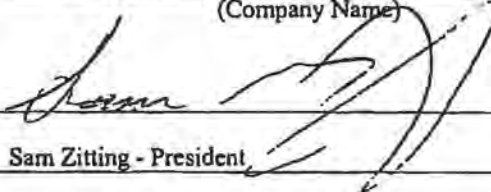
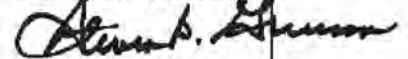
Dated: 1/28/08 Zitting Brothers Construction
(Company Name)
By: 
Its: Sam Zitting - President

EXHIBIT 20



1 RTRAN

2
3
4
5 DISTRICT COURT
6 CLARK COUNTY, NEVADA

7 APCO CONSTRUCTION,

8 Plaintiffs,

9 vs.

10 GEMSTONE DEVELOPMENT
11 WEST, INC.,

12 Defendants.

CASE NO. 08A571228

DEPT. XIII

13
14 BEFORE THE HONORABLE MARK R. DENTON, DISTRICT COURT JUDGE
15 THURSDAY, NOVEMBER 16, 2017

16 **RECORDER'S TRANSCRIPT OF HEARING**
17 **RE: ALL PENDING MOTIONS**

18
19
20 (Appearances on Page 2)

21
22
23
24
25 RECORDED BY: JENNIFER GEROLD, COURT RECORDER

1 APPEARANCES:

2 For the Plaintiffs: JOHN JEFFERIES, ESQ.
3 CODY S. MOUNTEER, ESQ.

4 For Camco Pacific Construction Co., Inc.: STEVEN L. MORRIS, ESQ.

5 For various Lien Claimants: ERIC B. ZIMBELMAN, ESQ.

6 For Zitting Brothers Construction, Inc.: I-CHE LAI, ESQ.
7 JORGE A. RAMIREZ, ESQ.

8 For various Counter Defendants: MICHAEL R. ERNST, ESQ.

9 For E&E Fire Protection, LLC: JAMES T. TRUMAN, ESQ.

10 For National Wood Products, Inc.: JOHN B. TAYLOR, ESQ.
11 RICHARD L. TOBLER, ESQ.

1 Las Vegas, Nevada; Thursday, November 16, 2017

2 [Proceedings commenced at 9:05 a.m.]

3
4 THE COURT: Apco Construction versus Gemstone Development.
5 Appearances, please.

6 MR. MORRIS: Good morning, Your Honor, Steven Morris on behalf
7 of Camco Pacific Construction Company, Inc.

8 MR. JEFFERIES: John Jefferies, Spencer Fane, on behalf of Apco.

9 MR. MOUNTEER: Good morning, Your Honor, Cody Munteer on
10 behalf of Apco.

11 MR. ZIMBELMAN: Morning, Your Honor, Eric Zimbelman on behalf
12 of the Peel Brimley lien claimants, Helix, Fast Glass, Buchele, Heinaman, and I
13 always forget, several others -- couple others.

14 MR. TOBLER: Rich Tobler on behalf of Third-Party Intervenor,
15 National Wood Products.

16 MR. TAYLOR: John Taylor also on behalf of National Wood
17 Products.

18 MR. LAI: I-Che Lai appearing for Zitting Brothers.

19 MR. ERNST: Morning, Your Honor, Michael Ernst on behalf of Steel
20 Structures, Nevada Prefab Engineers and Gerdau Steel Reinforcing. Also with
21 me is our newest admin to the bar, Kyle Wayan [phonetic].

22 MR. RAMIREZ: Jorge Ramirez also on behalf of Zitting Brothers.

23 MR. TRUMAN: Tracy Truman on behalf of E&E Fire.

24 THE COURT: All right. The first item I'll take up is the motion to
25 withdraw. That's Peel Brimley firm; correct?

1 MR. ZIMBELMAN: Yes, Your Honor. That's me. It's with regard to
2 Buchele. It appears that Mr. Buchele has passed away. Buchele, the entity, is
3 long gone and we've had no contact with them for some time. There's really
4 nothing I can do for them at this point.

5 THE COURT: All right. I've received no written opposition to it.
6 Apparently, there is no opposition to it. Cause appearing that motion's granted.

7 MR. ZIMBELMAN: Thank you, Your Honor.

8 THE COURT: Okay. Thank you. Now, let me tell you what's going to
9 have to happen here. You have two alternatives. One, you can just briefly argue
10 the matters, because I'm in the middle of a jury trial -- I'm at the end of a jury trial,
11 we're settling jury instructions at 10 o'clock. We're behind on it. So I have very
12 little time here.

13 So the idea would be you just emphasize the things you want me to
14 take into account and I'll -- I'm going to have to take the case under advisement,
15 okay, and issue a ruling -- rulings. The alternative is that I pass this to Tuesday,
16 next Tuesday at 10 o'clock in the morning. I know we have calendar call on
17 Monday, I believe, but you know, I can hear from you longer on Tuesday than I
18 can today. Today's got to be very brief. Okay? It's well -- the case is well
19 briefed, so, I mean --

20 MR. ZIMBELMAN: Yeah.

21 THE COURT: -- if you want to just deem it submitted, I'll --

22 MR. ZIMBELMAN: I think we -- very brief comments and deem it
23 submitted.

24 THE COURT: Just emphasize the things you want me to pay
25 particular attention to because I --

1 MR. ZIMBELMAN: That would work for me.

2 THE COURT: -- you know, I don't have a law clerk in this case, you
3 understand that. I'm, you know, working on it without that assistance because
4 my law clerk's been screened off of it, so. Okay?

5 MR. ZIMBELMAN: Which would you like to take? Are you guys okay
6 with that?

7 MR. MOUNTEER: I think we're okay with that, Your Honor, and
8 maybe just brief oral arguments. I don't know if you want to set a time limit or
9 something, but just to mention on each motion would be fine.

10 THE COURT: Yeah. I want to have you finished with this case by
11 say, 25 after 9:00. Okay? Because I've got some other things I've got here.

12 MR. ZIMBELMAN: By what time, I'm sorry?

13 THE COURT: 25 after 9:00.

14 MR. ZIMBELMAN: I can do my part in, you know, five minutes.

15 THE COURT: Okay.

16 MR. ZIMBELMAN: Okay. Do you want to go motion by motion or do
17 you want to hear from one party or all --

18 THE COURT: Well, they're -- a lot of them are joinders, so.

19 MR. ZIMBELMAN: Some of them, yeah.

20 THE COURT: Again, I can give you more time on Tuesday if you
21 want to do that.

22 MR. ZIMBELMAN: Yeah, again, Your Honor's familiar with these
23 issues. To me, it's relatively straight forward.

24 THE COURT: Okay. Well, let's go then. I'm going to have to cut you
25 off if you're not done by --

1 MR. ZIMBELMAN: I understand.

2 THE COURT: Okay.

3 MR. ZIMBELMAN: Can I do the motion for summary judgment
4 regarding pay-if-paid?

5 THE COURT: Okay. Is that okay with everybody?

6 MR. ZIMBELMAN: It might be the most pressing.

7 MR. MOUNTEER: Sure.

8 THE COURT: Okay.

9 MR. ZIMBELMAN: Thank you, Your Honor. So the only thing I would
10 like that -- obviously, we briefed this well, but I'd like you to focus on two things.
11 One is the *Bullock* decision. It's extremely clear the Supreme Court has spoken
12 on the fact that pay-if-paid is void and unenforceable. While there's a reference
13 in a footnote to a limited exception, that just doesn't apply, right. And if you read
14 the actual statute, NRS 624.624, that limited exception is simply talking about the
15 remedy for stopping work. It's at 626. And that extends to 45 days, right.

16 The subcontractors that go need to actually issue a notice of intent to
17 stop work, stop work on the project, terminate the contract, and you know, and be
18 entitled to some of the other remedies that 626 entitles it to. Including, you know,
19 to have its change orders be deemed approved, to have its pay application be
20 deemed approved, to be immune from defenses that might come back to it.
21 624.624 spells out exactly when the general contractor can withhold money and
22 the only times it can withhold money. And the only times it can do that is by
23 issuing a notice of withholding.

24 None of that has happened. It's never happened. It's been nine
25 years. My clients are entitled to be paid and it's as simple as that. You can't just

1 hide behind this agreement that says, you'll look to the owner, because that's
2 pay-if-paid. And that is what's prohibited expressly by the Supreme Court.

3 THE COURT: Is that the *Manhattan West* -- is that the case you're
4 referring to? Which case were you referring to a minute ago?

5 MR. ZIMBELMAN: The *Bullock* decision.

6 THE COURT: The *Bullock* decision.

7 MR. ZIMBELMAN: Yeah. *Lehrer McGovern Bovis versus Bullock*.

8 THE COURT: Okay.

9 MR. ZIMBELMAN: Right. And there were a couple of decisions, the
10 second one, the Supreme Court sort of amended it by putting in a footnote that,
11 you know, everybody wants to rely on now and say oh, there might be a limited
12 exception for pay-if-paid, but the statute 624.624 is extremely clear that there
13 really isn't an exception, anytime. It works in favor of the lower tiered
14 subcontractor, right, because it says exactly when they have to be paid.

15 And the absolute outside is 30 days after submitting a request for
16 payment if there's no schedule of payments . And one of the arguments that's
17 been made is that the schedule of payments is you'll get when we get paid, right.
18 That that's -- that's just the same thing. That's a completely circular argument.
19 So if you're -- if you have an obligation to pay, you can't avoid it and the statute
20 says you can't have provisions -- conditions, stipulations, or provisions that avoid
21 the obligations of the statute.

22 THE COURT: Okay.

23 MR. ZIMBELMAN: So I think -- I think the legislature and the
24 Supreme Court have been very clear and have made it extremely difficult to get
25 around that provision. Thank you.

1 THE COURT: All right. Thank you. We're -- okay. Are there any of
2 the joinders want to say anything very briefly? Okay.

3 MR. LAI: Zitting Brothers actually submitted a separate motion for
4 summary judgment that sort of followed along what Eric Zimbelman had said in
5 his and I can briefly summarize those arguments, if you'd like.

6 THE COURT: Well, is that okay with you?

7 MR. MOUNTEER: That's fine with me, Your Honor.

8 THE COURT: Go ahead.

9 MR. LAI: Kind of tagging on, Zitting also asserted the avoidance of
10 the pay-if-paid provision, but more importantly in its motion for summary
11 judgment, Zitting has also asserted the fact that Apco, at this stage of the
12 litigation, cannot assert any other defenses besides the enforceability of the pay-
13 if-paid provision because under Rule 37 subsection (c) subsection (1), there's an
14 automatic preclusion unless Apco can show that this nondisclosure and other
15 defenses was substantially justified or that the late disclosure at this end of the
16 game did not harm Zitting. And they can't show that based on the briefing. And
17 the Court can look at the briefing for a detailed explanation for that purpose.

18 But moving on to the actual merits of the breach of contract claim,
19 which we discussed in our motion, was that there's a strict legal issue on the
20 liability for breach of contract that this Court can resolve as a matter of law. For
21 example, under the contracts sections 9.4 specifically, indicates that if there's a
22 termination of the prime contract between the owner and Apco, it provides an
23 automatic payment for all the work completed by Zitting. And more importantly,
24 under section NRS 624.626, if Apco's right that the contract between Zitting and
25 Apco are terminated, that statute also provides for automatic payment for all the

1 work completed to date. These are automatic payments. Zitting doesn't need to
2 submit any request for payment. These are amount that are due and payable as
3 of date of termination. And Apco's never refuted that the contracts were
4 terminated so on that specific issue alone, it warrants a liability finding by this
5 Court on breach of contract.

6 THE COURT: All right.

7 MR. MOUNTEER: Good morning, Your Honor, Cody Mounteer on
8 behalf of Apco. Let me touch on Zitting's motion first. With all due respect,
9 counsel's argued issues that have not been briefed in the pleadings, so we'd like
10 to reserve our right to address those contractual defenses. And I wanted to
11 specifically discuss these contractual defenses because we did, in fact, through
12 our 30(b)(6) witness testify to the defenses that we have. Zitting was at the
13 deposition, took over a hundred pages of deposition of Ms. Mary Jo Allen
14 regarding payment, regarding the contract clauses, and it was clear what the
15 defenses are.

16 This was also six months before we even had the opportunity to take
17 Mr. Zitting's deposition. And Mr. Zitting's deposition, you could see, Your Honor,
18 has completely and 100 percent contradicting statements from the declaration
19 that he provided to this Court. And with the short time that I have before this
20 Court, I want to draw attention to that because for the very reason alone that Mr.
21 Sam Zitting testified to this Court on July 31st, that we had drywall complete in
22 Buildings 8 and 9 and then testified during his deposition that he was not aware if
23 drywall was completed and that he didn't know or have any documents to
24 support the drywall was completed. When in fact, we have provided evidence in
25 our moving papers to show that Buildings 8 and 9 were in fact anywhere between

1 60 to 80 percent complete; creates an issue of material fact for this Court to hear
2 and to reserve over for trial to deny Zitting's motion in its entirety.

3 Moving onto the pay-if-paid. Your Honor, I'm going to refer to Helix in
4 general, I know there's been a lot of moving parties, but they're the ones that
5 primarily brought the motion and there's been joinders and also will apply to
6 Zitting too. What they're asking the Court to do is give an advisory opinion.
7 What we've shown in our moving papers is that the pay-if-paid clause is not clear
8 and that's through, if you want to call it *Bullock* or *Lehrer*, I call it the *Lehrer* case.
9 *Lehrer* one was clarified by *Lehrer* two. There was a lot of confusion between
10 the two cases. That's why we had to have *Lehrer* two come out only a few short
11 months later. The revised opinion in *Lehrer* two attempted to clarify portions of
12 the decision regarding the inconsistent verdicts.

13 Now, without explanation, the new decision actually removed the
14 language that the pay-if-paid provisions are per se unenforceable and replaced it
15 with this. Pay-if-paid provisions entered into subsequent to the legislature's
16 amendment are enforceable only in limited circumstances and are subject to the
17 restrictions laid out in the statute. The restrictions laid out in the statute are in our
18 brief, but specifically, You Honor, I want to touch on three of them, two, three, and
19 four. The Court needs to consider factors that are laid out in the statute whether
20 the clause is unreasonable under the circumstances, was not within the
21 contemplation of the parties at the time the agreement was entered into or for
22 which the lower-tier subcontractor is not responsible. Those are factors in fact
23 that need facts applied. We have to have facts.

24 The payment schedule in the contracts that was spoken of by Helix
25 have specific pre-conditions that have to be met. During Mr. Zitting's deposition

1 he admitted those pre-conditions weren't met. The fact of the matter is, we have
2 to know whether Helix even met those pre-conditions because if those pre-
3 conditions in the contract were not met, that brings us all back to a famous case
4 that was decided by this Court, *Padilla*. I'm sure Your Honor's familiar with it.
5 Where the Supreme Court came down and Your Honor had held that if we have
6 pre-conditions in a contract for payment, and those pre-conditions are not met so
7 payment's not due, we don't even get to the pay-if-paid clause.

8 So there are a number of factors. One, we have inconsistent
9 testimony by Zitting that should deny their entire motion so the Court can actually
10 have Mr. Zitting on the stand and test his voracity to the statements that he's
11 already provided this Court. And two, we have to have facts to be able to apply it
12 to NRS 624 statute in order to grant these motions. And without those, granting
13 would be nothing more than an advisory opinion by the Court so we respectfully
14 request both those two motions be denied. Thank you, Your Honor.

15 THE COURT: Okay.

16 MR. MORRIS: Very quickly, Your Honor. Steven Morris on behalf of
17 Camco. We would join in the arguments presented by Apco's counsel. We'd
18 also draw the Court's attention to Camco's proposition, specifically Exhibit B,
19 Your Honor, and this is Bates labeled Camco-MW00030. Camco was in a
20 somewhat of a different situation as Your Honor will recall from these facts.
21 Camco was the follow-on general contractor on this project after the Apco
22 contract was terminated in or about August 2008. Camco was on the project
23 approximately four months before funding was pulled.

24 Camco's dealings with the various subcontractors were different and
25 the differences are pointed out in -- in the Exhibit B, the Bates number that I just

1 presented Your Honor. So again, we would join with the arguments made with
2 respect to the pay-if-paid and Camco is in a different position. Your Honor, we
3 respectfully request this. This trial can be streamlined as it pertains to Camco,
4 essentially, these lien claimants, some of which don't even have contracts with
5 Camco are alleging that Camco should be the de facto lender and owner of the
6 project and guarantor for the amounts that they claim to be due and owing when
7 those amounts never came through Camco and that is pointed out in the exhibit
8 that I presented. I'll submit on that, Your Honor.

9 THE COURT: All right. Thank you.

10 MR. ZIMBELMAN: May I have one minute to reply on the *Padilla*
11 issue?

12 THE COURT: Yes.

13 MR. ZIMBELMAN: As the Court probably knows, *Padilla* is not a
14 published decision and it was referred to by counsel as that famous -- it's
15 probably famous to Your Honor because you were the trial judge, but it's not
16 famous to me. I am, however, familiar with it and from what I can tell from the
17 Supreme Court's own published decision, nobody ever raised the pay-if-paid
18 question in that case. And it certainly wasn't addressed by the Supreme Court's
19 decision.

20 And furthermore, as I understand *Padilla*, there was an allegation that
21 *Padilla* had done shoddy work and that that had been brought to *Padilla's*
22 attention by the general contractor. *Padilla* ignored those concerns and never
23 satisfied the owner as to the quality of its work. We don't know if a notice of
24 withholding had been made or what conditions had occurred there. None of that
25 is apparent from the Supreme Court's unpublished decision.

1 So I can tell you here, and you'll see it in one of our motions in limine,
2 there is no evidence, zero evidence of -- of improper work, of defective work, of
3 work that failed to comply or to conform to contract. So that's clearly not the
4 same factual situation and again, legally, pay-if-paid wasn't apparently
5 addressed. Maybe it was in your court, it certainly isn't in the Supreme Court's
6 decision, so. Thank you.

7 THE COURT: All right. Thank you.

8 MR. LAI: Your Honor, if I could respond.

9 THE COURT: Real quickly.

10 MR. LAI: Just going to put some comments about the Rule 37
11 conclusion. Apco's relying on a 30(b)(6) deposition that occurred in 2017, seven
12 years after they swore up-and-down that the only defense that they're relying on
13 was the pay-if-paid provision. We actually sent specific interrogatories back in
14 2010 asking them to provide all factual basis for the fact that Zitting did not
15 comply with the condition precedent to the contract, their specifically -- their 12th
16 affirmative defense. And Apco in their response mentioned only the pay-if-paid
17 provision.

18 We crafted a very limited discovery plan to explore solely that issue
19 and prepare motions for summary judgment solely on that specific issue and they
20 raise a defense seven years later on a 30(b)(6) deposition that wasn't even a
21 30(b)(6) witness for the affirmative defenses. Their 30(b)(6) witness on
22 affirmative defenses actually testified under oath that they're still relying on the
23 pay-if-paid provision and that was also taken place one month before their
24 deposition testimony that they're relying on right there.

25 So Zitting and the rest of the subcontractors have been misled for

1 seven years by this defense that they're asserting on. Now, they're
2 [indiscernible] at the 11th hour and that's fundamentally unfair, Your Honor.

3 THE COURT: All right. Thank you.

4 MR. MOUNTEER: You -- briefly, just 30 seconds. Your Honor, if
5 you'll recall for the first time that we want to talk about any prejudice, they've had
6 our 30(b)(6) deposition for six months. We testified to many defenses. We were
7 able to get our discovery plan and everything figured out exactly what Mr. Zitting
8 was testified to not even 30 days ago. There's no prejudice here. The case must
9 be tried on its merits.

10 MR. ZIMBELMAN: Can I give the Court one citation on that *Padilla* --

11 THE COURT: Quickly.

12 MR. ZIMBELMAN: -- question? There actually is a published
13 Supreme Court decision from 2016 that affirmed the pay-if-paid provisions in
14 *Bullock* and that is the *Cashman Equipment* decision and it's 380 P.3rd 844 132
15 Nevada Advanced Opinion 69.

16 THE COURT: All right.

17 MR. ZIMBELMAN: Thank you, Your Honor.

18 THE COURT: I got a slew of -- yeah what are you going to address?

19 MR. TAYLOR: Just one really quick comment on one of the motions
20 in limine before we close up. National Wood, in our complaint we said that we
21 found Apco and Camco to be jointly and separately liable for our claims. The
22 special master asked us to allocate between one and the other and it said that
23 that was for budgeting purposes only, it wouldn't be held against us.

24 So we did allocate between the portion of our claim that related to the
25 time before Camco and the portion that related after. But at no point in time did

1 we ever say we were backing off of our complaint saying joint and several
2 liability. Recently, Apco said well, we didn't understand that you meant joint and
3 several when you said joint and several so we clarified that later, but clarifying it
4 later shouldn't -- has not prejudiced Apco. They could have prepared their
5 defense entirely totally from day one based on our language of our complaint.
6 Thank you.

7 THE COURT: All right. Did you want to address that?

8 MR. JEFFERIES: Your Honor, Randy Jefferies. We filed a motion in
9 limine that has seven motions subsumed in one. I just want to address our
10 motion number seven given the time constraints.

11 THE COURT: I thought you were going to respond to what he just
12 said.

13 MR. JEFFERIES: I -- I am because he essentially addressed my
14 motion in limine on September 30, 2016, National disclosed specifically to Apco
15 \$30,110. On March 3, 2017, again confirmed the damages they were seeking
16 against Apco was \$30,110. And then six days ago we get a disclosure of 1. --
17 approximately 1.2 million dollars. And that is clearly improper under any set of
18 circumstances and they were making those \$30,000 disclosures and
19 designations within their joint and severable context. Secondly, within our motion
20 in limine number seven is we're asking the Court to restrict Helix to the damages
21 that its PMK testified to.

22 THE COURT: Okay. This is all briefed, right?

23 MR. JEFFERIES: It is.

24 THE COURT: Okay. Thanks.

25 MR. ZIMBELMAN: Just briefly on the Helix part --

1 THE COURT: Okay.

2 MR. ZIMBELMAN: -- of the motion in limine seven. You know, their
3 motion was based in part upon the special master questionnaires which, of
4 course, were, you know, were intended to be informative only. But nonetheless,
5 it's out there and that special master questionnaire from Helix clearly identified
6 Helix's damages of about 2.9 million and we've subsequently reduced that.

7 THE COURT: Right.

8 MR. ZIMBELMAN: But those were intended against both Apco and
9 Camco together. That was our position. It's always been our position.

10 THE COURT: All right. Thank you very much. That's all the time I've
11 got so the matter stands submitted. It's been briefed. I'll issue my rulings as
12 soon as I can. I'll see you Monday at the calendar call at 2 o'clock.

13 ALL COUNSEL: Thank you, Your Honor.

14 [Hearing concluded at 9:27 a.m.]

15 * * * * *

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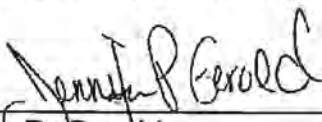
20

21 ATTEST: I do hereby certify that I have truly and correctly transcribed the
22 audio/video proceedings in the above-entitled case to the best of my ability.

23

24

25



Jennifer P. Gerold
Court Recorder/Transcriber

EXHIBIT 21


CLERK OF THE COURT

NJUD
Melissa A. Beutler, Esq. (10948)
HOLLAND & HART LLP
9555 Hillwood Drive, 2nd Floor
Las Vegas, Nevada 89134
Phone: (702) 669-4600
Facsimile: (702) 669-4650
mabeutler@hollandhart.com
*Attorneys for Defendant/Counterclaimant
Big-D Construction Corp.*

DISTRICT COURT
CLARK COUNTY, NEVADA

PADILLA CONSTRUCTION COMPANY OF
NEVADA, a Nevada corporation,

Plaintiff,

vs.

BIG-D CONSTRUCTION CORP., a Utah
corporation, FIDELITY & DEPOSIT
COMPANY OF MARYLAND, a Maryland
corporation, DOE CORPORATION I through
DOE CORPORATION V, and ROE I through
ROE V individuals;

Defendants.

BIG-D CONSTRUCTION CORP., a Utah
corporation,

Counter-Claimant,

vs.

PADILLA CONSTRUCTION COMPANY OF
NEVADA, a Nevada corporation,


Counter-Defendant.

CASE NO.: A-10-609048-C
DEPT. NO.: XIII

NOTICE OF ENTRY OF FINDINGS OF
FACT AND CONCLUSIONS OF LAW
AND
JUDGMENT

PLEASE TAKE NOTICE that the Court entered a *Findings of Fact and Conclusions of
Law*, attached hereto as Exhibit "1," and a *Judgment*, attached hereto as Exhibit "2," on the 22nd
day of January, 2015.

DATED: January 23, 2015.


Melissa A. Beutler, Esq. (10948)
9555 Hillwood Drive, 2nd Floor
Las Vegas, Nevada 89134
Attorneys for Big-D Construction

CERTIFICATE OF MAILING

I hereby certify that on the 23rd day of January, 2015, I served a true and correct copy of the attached **NOTICE OF ENTRY OF FINDINGS OF FACT AND CONCLUSIONS OF LAW AND JUDGMENT** by placing a true and correct copy of the aforementioned in the U.S. mail, postage prepaid in full, addressed to the following:

Bruce R. Mundy, Esq. (6068)
200 South Virginia St., Eighth Fl.
Reno, Nevada 89511
Attorneys for Padilla Construction Co. of Nevada



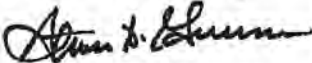
An Employee of Holland and Hart, LLP

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EXHIBIT “1”

EXHIBIT “1”

**DISTRICT COURT
CLARK COUNTY, NEVADA**


CLERK OF THE COURT

PADILLA CONSTRUCTION COMPANY OF
NEVADA, a Nevada corporation,

Plaintiff,

vs.

BIG-D CONSTRUCTION CORP., a Utah
corporation, FIDELITY & DEPOSIT
COMPANY OF MARYLAND, a Maryland
corporation, DOE CORPORATION I through
DOE CORPORATION V, and ROE I through
ROE V individuals;

Defendants.

CASE NO.: A-10-609048-C
DEPT. NO.: XIII

**FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

BIG-D CONSTRUCTION CORP., a Utah
corporation,

Counter-Claimant,

vs.

PADILLA CONSTRUCTION COMPANY OF
NEVADA, a Nevada corporation,

Counter-Defendant.

THIS MATTER having come on for non-jury trial on December 2 and 3, 2014,
Plaintiff, PADILLA CONSTRUCTION COMPANY OF NEVADA, appearing by and through
BRUCE R. MUNDY, ESQ., and Defendants, BIG-D CONSTRUCTION CORP. and
FIDELITY & DEPOSIT COMPANY OF MARYLAND, appearing by and through, MELISSA
BEUTLER, ESQ. of the Law Firm, HOLLAND & HART, LLP;

AND, the Court having heard the testimony of witnesses, having reviewed the evidence
provided by the Parties, having heard the arguments of counsel, and having read and considered
the briefs of counsel and good cause appearing;

1 NOW, therefore, the Court hereby enters the following

2 **FINDINGS OF FACT**

3 **A. The Project**

4 1. International Game Technology ("IGT") constructed a show place
5 international headquarters in Las Vegas, Nevada (the "Project"). Pretrial Order, Stipulated Fact
6 ¶ 1.

7 2. In June 2006, Big-D entered into a construction agreement with IGT (the
8 "Construction Agreement") to act as the general contractor on the Project. *Id.* at ¶ 2.

9 3. The Project's design called for a significant portion of the exterior and
10 the interior lobby to be finished with large sandstone panels to be installed over a two-coat
11 stucco system. *Id.* at ¶ 3.

12 4. IGT occupied the nearly completed Project in the summer of 2008. *Id.* at
13 ¶ 4.

14 5. After a piece of large stone tile fell from a high elevation on the exterior
15 of the Project in December 2008, IGT initiated an investigation into the installation of the stone
16 work during the spring of 2009. *Id.* at ¶ 5.

17 6. IGT determined the original stone installation was unsafe and rejected
18 the work. IGT required Big-D to remove and replace all of the interior and exterior stone work
19 (with the exception of a few isolated areas of low-elevation, interior stone). IGT prepared
20 design documents from the stone replacement project in June 2009. *Id.* at ¶ 6.

21 7. However, because the stone could not be removed without damaging the
22 underlying stucco substrate, IGT also directed Big-D to remove and replace the original, two-
23 coat stucco system in addition to replacing the stone installation (the "Stone Replacement
24 Project"). *Id.* at ¶ 7.

25 **B. Padilla Subcontract Agreement**

26 8. In August, 2009, prior to receiving confirmation that Big-D would
27 perform the Stone Replacement Project, IGT contacted Padilla Construction Company of
28

1 Nevada ("Padilla") about performing the stucco work for the Stone Replacement Project. In
2 early August 2009, after Big-D agreed to perform the Stone Replacement Project, Padilla
3 contacted Big-D directly to inquire about performing the stucco portion of the Stone
4 Replacement Project. Testimony of Brent Brinkerhoff (Big-D).

5 9. On August 13, 2009, Padilla provided Big-D written information on its
6 company, including a description of its experience and references. Trial Exhibit 13. Big-D
7 reviewed the information, checked the references, and determined that Padilla was qualified to
8 complete the Work. Testimony of Brent Brinkerhoff (Big-D).

9 10. On August 18, 2009, Padilla, IGT, Ian Chin (IGT's expert consultant),
10 HDR (the architect), and Big-D attended a meeting on the Project site to discuss the
11 replacement project, including its schedule and quality control requirements. Trial Exhibit 15.

12 11. Subsequent to the meeting, on August 19, 2009, Big-D issued a notice to
13 proceed with the work to Padilla and further advised Padilla that it intended to issue it a
14 subcontract agreement. Trial Exhibit 23.

15 12. On August 24, 2009, Padilla entered into the Subcontract Agreement
16 with Big-D to furnish all labor, materials, equipment, and necessary services to install complete
17 exterior and interior stucco (Plaster) including, lath, scratch, and brown coat (the "Padilla
18 Work") for the Stone Replacement Project. Trial Exhibit 1, Subcontract Agreement; Pretrial
19 Order, Stipulated Facts ¶ 8.

20 13. The Padilla Work was required to conform to the Plans and
21 Specifications which are included as Trial Exhibit 3, Plans and Trial Exhibit 4, Specifications.
22 Pretrial Order, Stipulated Facts ¶ 9.

23 14. Under the terms of the Subcontract Agreement, Big-D was to pay Padilla
24 \$214,868 for the completion of the Padilla Work. Pretrial Order, Stipulated Fact ¶ 10; Trial
25 Exhibit 1.

26 15. On August 25, 2009, Big-D paid Padilla a \$25,000 initial payment prior
27 to Padilla commencing the Padilla Work. Pretrial Order, Stipulated Fact ¶ 11; Trial Exhibit 5.

1 16. Big-D was required to complete the Stone Replacement Project by the
2 beginning of October 2009—in time for IGT to host a large customer event at the Project. The
3 schedule was aggressive but achievable and all parties, including Padilla, were aware of the
4 schedule requirements. Testimony of Brent Brinkerhoff (Big-D).

5 **C. Stucco Installation Process**

6 17. The two-coat stucco system in the Padilla Work involved an initial coat
7 (called the scratch coat) and a second coat (called the brown coat). Pretrial Order, Stipulated
8 Fact ¶ 18.

9 18. A metal lath system was to be installed underneath the two-coats of
10 stucco material. *Id.* at 19.

11 19. The stucco material was to be purchased as a preblended cement + sand
12 mixture provided in bag form from a supplier. *Id.* at 20.

13 20. After the scratch coat was installed, it was to cure (properly dry) before
14 the brown coat was installed. *Id.* at 21.

15 21. To adhere the brown coat to the scratch coat, the scratch coat was to be
16 scored with grooves, and then the brown coat was to be installed on top of the scratch coat and
17 pressed firms into the grooves. *Id.* at 22.

18 22. Once the brown coat was installed, it was to cure before the stone
19 veneer was installed. *Id.* at 23.

20 23. The Specifications included specific requirements regarding the
21 installation of the Padilla Work, including the following:

22 a. Minimum plaster thicknesses as specified [in included chart].
23 Trial Exhibit 4, Section 09220 at 3.4G.

24 b. The scratch coat was to be “[h]orizontally cross-rake[d] to
25 provide key for second Base Coat (brown coat).” *Id.* at Section 09220 at 3.4C.

26 c. The base coat was to be “[a]ppplied so that it meets the required
27 total thickness” and “not vary more than 1/4 IN.” *Id.* at Section 09220 at 3.4D 1, 2.

1 d. Remove and replace unacceptable plaster and base. *Id.* at Section
2 09220 at 3.10D.

3 24. The Specifications, at Section 092200 at 1.1.A, provided that the Padilla
4 Work was to comply with the following plastering standards: (a) ASTM-C926, Trial Exhibit
5 89; (b) Portland Cement Association Plaster (Stucco) Manual, Trial Exhibit 90; and (c) per
6 Building Code, as locally adopted, Trial Exhibit 91. *Trial Exhibit 4*, Section 09220 at 1.1.A.

7 **D. Stucco Mix Selection/Determination of Cure Time.**

8 25. On August 26, 2009, Padilla requested approval for the stucco mix
9 identified as Expo MX³. Pretrial Order, Stipulated Fact ¶ 25; Trial Exhibit 26.

10 26. That same day, HDR, IGT's architect approved use of the EXPO MX3
11 stucco mix product. Pretrial Order, Stipulated Fact ¶ 26; Trial Exhibit 28.

12 27. Pursuant to both the Subcontract Agreement and industry practice,
13 Padilla was responsible for determining the appropriate cure time to be allowed between the
14 two coats of the stucco and prior to installation of stone. Testimony of Ian Chin (IGT);
15 Testimony of Brent Brinkerhoff (Big-D).

16 28. As part of the Architect's approval of the product, the Architect (HDR)
17 directed that Padilla install the stucco product in accordance with the manufacturer's cure
18 instructions. Trial Exhibit 31. On or about August 26, 2009, Padilla consulted with the EXPO
19 representative. In response, the EXPO representative provided information to Padilla on
20 August 26, , 2009, that specified that "standard cure times" applied. Trial Exhibit 32. Standard
21 cure times were at least 1 day for the scratch coat and 7 days for the brown coat. Trial Exhibit
22 37; 38-2.

23 29. IGT further requested Mr. Chin review the proposed cure times to
24 confirm they were appropriate. Trial Exhibit 38-2. On September 2, 2009, Mr. Chin confirmed
25 that the standard cure times were consistent with published industry materials and compliant
26 with local building codes. *Id.*

27

28

1 **E. Performance of the Work.**

2 30. Padilla started onsite work on August 31, 2009, at 1:00 p.m., with lath
3 installation. Pretrial Order, Stipulated Fact ¶ 27; Trial Exhibit 17, (PADILLA000100).

4 31. Padilla's on-site superintendent prepared and maintained daily logs of
5 the progress of Padilla's work. Pretrial Order, Stipulated Fact ¶ 29; Trial Exhibit 17,
6 (PADILLA000083-102).

7 32. After Padilla installed the brown coat on each area of the exterior, Big-D
8 caused the brown coat to be marked with the date and time so that it could ensure that the
9 brown coat was allowed to cure for the full seven day period. Testimony of Brent Brinkerhoff.

10 **F. Padilla Work on Exterior Separates.**

11 33. On September 10, 2009, project representatives observed separation
12 between the brown and scratch coats during installation of stone on two exterior columns
13 (XC@X4 and XC@X3). Pretrial Order, Stipulated Fact ¶ 30. In addition, Padilla's on-site
14 superintendent reported separation to Padilla management. *Id.*; Trial Exhibit 17
15 (PADILLA000090).

16 34. On September 10, 2009, IGT informed Ian Chin of Wiss Janey, its
17 consultant, of the separation and requested his professional opinion as to how to proceed. Trial
18 Exhibit 403. Mr. Chin reviewed photographs of the work and observed the following visual
19 deficiencies in the Padilla Work: (a) the Padilla Work was not appropriately "scored" in a
20 manner that would allow proper bonding between the brown coat and the scratch coat as
21 required by the Plans and Specifications; and (b) the Padilla Work did not appear to be properly
22 hydrated for the brown coat to become cementitious. Trial Exhibits 403, 404, 405, 446-450.

23 35. Mr. Chin further requested that IGT provide him samples of the installed
24 product for testing. Pursuant to his request, IGT removed portions of the Padilla Work and
25 overnighted them to Mr. Chin's laboratory for testing. Testimony of Ian Chin (IGT).

26 36. On September 11, 2009, Padilla's on-site superintendent reported
27 separation issues to Padilla management. Pretrial Order, Stipulated Fact ¶ 31; Trial Exhibit 21.

1 37. That same day, IGT provided Mr. Chin with photographs of the
2 separations. Testimony of Ian Chin (IGT).

3 38. Even though IGT, Big-D and Padilla were all aware of the separation, as
4 of the morning of September 14, 2009, both Padilla and Big-D believed that any issues with
5 separation were only incidental issues and did not indicate a wide-spread problem with the
6 Padilla Work. Testimony of Brent Brinkerhoff (Big-D); Trial Exhibit 400.

7 39. As the stone work continued over the Padilla Work on September 14,
8 2014, it became evidence that there was a global failure in the Padilla Work.

9 40. It is undisputed that Padilla was actively aware of the separation issues
10 as they were occurring. In fact, field notes by Padilla's superintendent show that Padilla's
11 crews reported the separation to Padilla management. Rather than investigate and seek to
12 remediate, Padilla management simply instructed its crews to keep working. Trial Exhibit 17,
13 PADILLA000090 to 96. Padilla's field notes indicate as follows:

Date	Notation
September 10, 2009	"The brown is pulling from the scratch on the first two columns that we scratch and brown after the mock-up."
September 11, 2009	"We have the same problem on the brown coat on the second column when the stone installers do the bonding test the brown pulls from the scratch. Call Joe [Lopez] let him know. Also, Joe [Padilla management] says for me to keep doing the production."
September 15, 2009	"Today, 3 more areas where install stone when stone installers pull it to check bonding, brown coat came loose from scratch coat. Joe Lopez [Padilla management] let him know what happened. His response was for me to keep doing what I was doing and that nothing was wrong."
September 16, 2009	"Today, two more areas came loose."

24 *Id.* (emphasis added). Padilla management instructed the Padilla crews to keep working,
25 despite the indications of failure in Padilla's Work. *Id.* at PADILLA000091 and 95.

26 41. On September 15, 2009, in addition to the dialogue at the project site
27 regarding the separation, Big-D's management informed Padilla's management of the then
28

1 wide spread failure of the Padilla Work. Big-D requested Padilla to investigate and enlist the
2 support of the manufacturer of the product. (forward IGT's report of separation). Pretrial
3 Order, Stipulated Fact ¶ 32; Trial Exhibit 44. Padilla placed a telephone call to the EXPO
4 representative Mark Arriolla to discuss the issues. Pretrial Order, Stipulated Fact ¶ 32; Trial
5 Exhibit 47.

6 42. Mr. Chin received the results of laboratory testing, evaluating the
7 installed Padilla Work on September 15, 2009. Testimony of Ian Chin; Trial Exhibit 406. The
8 laboratory testing results provided technical support for the failures in the Padilla Work that
9 were readily visible on the Project site and identified the following deficiencies in the Padilla
10 Work:

11 a. Hydration. Padilla failed to properly hydrate its stucco mix.
12 Without adequate water, the Padilla stucco failed to activate the cement. In turn, the
13 cement did not turn into a paste to bind all of the components—i.e., the sand and other
14 aggregate components in the stucco— to form a solid mass. Testimony of Ian Chin
15 (IGT).

16 b. Compaction. Padilla failed to properly compact the Padilla
17 Work. The second coat of stucco must be applied with sufficient pressure against the
18 first coat. Padilla did not install the brown coat with sufficient pressure against a scratch
19 coat to make sure that it was properly bonded to the scratch coat.

20 c. Scoring. Padilla failed to properly “score” the first layer of
21 stucco. The first layer of stucco should have created a “key” for the second layer of
22 stucco to bond firmly to. The scoring on the first layer of stucco was insufficient to
23 create such a “key” and therefore, the second layer of stucco could not bond to it.
24 Testimony of Ian Chin (IGT).

25 d. Contamination. Padilla conceded that the Padilla Work
26 contained contaminates in the form of “raisin-like” particles that adhered to the Other
27
28

1 Subcontractor Work. Pretrial Order at 14:11,18-20, Designated Testimony, Lopez
2 Deposition at 32:5-37:7¹; 43:1-45:20.

3 The failure to properly hydrate the mixture and properly score the scratch coat were so
4 apparent they can be confirmed by visual inspection of the photographs of the Padilla Work.
5 Exhibits 402, 403, and 404.

6 43. The separate issue culminated with a meeting on site on September 16,
7 2009, at 11:00 a.m.. Pretrial Order, Stipulated Fact ¶ 34; Trial Exhibit 46. IGT, HDR (the
8 Architect); Mr. Chin; Big-D; and Padilla representatives were all on site for the meeting. Trial
9 Exhibit 15.

10 44. Based upon his visual observations and the results of the laboratory
11 testing, Mr. Chin advised IGT that the Padilla Work on the exterior of the building should be
12 rejected. Testimony of Ian Chin. IGT rejected the Padilla Work on the exterior of the building
13 pursuant to Mr. Chin's advice, including but not limited to Mr. Chin's belief that if the exterior
14 of the building was not installed to the standards, there should be diminished confidence in the
15 system's ability to take and handle future application of stone. Pretrial Order at 18:16-19;
16 Designated Testimony, IGT Deposition at pp. 85-88.²

17 45. Padilla was present at the Project site on September 16, 2009 when IGT
18 rejected the Padilla Work on the exterior of the building. Therefore, it is undisputed that
19 Padilla was immediately aware that IGT had rejected its work. That same day, Big-D
20 requested that IGT allow testing of the interior Padilla Work prior to rejecting it. Big-D made
21
22
23

24 ¹ "A: I saw in the cement what appeared to be chunks of brown clay....The speculation was that
25 when they mixed the cement for this project, this pre-sanded cement, they had left in the barrel
26 for the mixing process some leftover stucco in that barrel and that is what we were seeking, was
the remnants of them not having a clean bowl." Id. at 32:5-35:10.

27 ² Mr. Stecker was designated by IGT as a Rule 30(b)(6) witness and provided deposition testimony. Portions of
28 that deposition testimony have been designated to be included with the trial record, *Exhibit D*, IGT Deposition
(excerpts) (Stipulated Designation, Pretrial Memorandum at pp 17-19).

1 arrangements for the testing to occur on September 23, 2009 and Padilla requested the
2 manufacturer of the stucco product to send representatives to participate in and observe the
3 testing.

4 **G. IGT Directs Different Exterior System After Rejection of Padilla Work.**

5 46. Because the IGT Stone Repair was required to be completed by October
6 2009, IGT determined on September 17, 2009 that there was insufficient time to replace the
7 rejected Padilla Work on the exterior of the building with a similar two-coat stucco system. As
8 a result, IGT decided to replace the Padilla Work with a cement board product instead. The
9 cement board product would not require cure time prior to installation of the exterior stone.

10 47. At IGT's direction, Big-D and its subcontractors immediately
11 demolished the rejected Padilla Work on the exterior of the building on September 17, 2009.

12 **H. Big-D Defends Padilla Work on Interior of Building.**

13 48. On September 16, 2009, when IGT rejected the Padilla Work on the
14 exterior of the Project, Big-D defended the Padilla Work on the interior of the Project. Big-D
15 maintained that it believed that the interior Padilla Work was compliant with the Plans and
16 Specifications. IGT and Big-D agreed to perform testing on the interior of the Project to
17 determine whether the interior Padilla Work was in fact suitable. They scheduled the testing
18 for September 23, 2009. Pretrial Order, Stipulated Fact ¶ 36; Trial Exhibit 55.

19 49. On September 17, 2009, Ian Chin performed various tests on the interior
20 of the Project to evaluate the Padilla Work. The testing revealed that the interior Padilla Work
21 was also insufficient and failed to comply with the Plans and Specifications.

22 a. Mr. Chin took 14, 3-inch diameter core samples of the Padilla
23 Work.

24 b. Of those samples, 3 were un-usable.

25 c. Of the 11 usable samples, on 8 samples, the brown coat was not
26 properly bonded to the scratch coat. The brown coat was only bonded to the scratch
27 coat on 3 of the usable samples.

1 would that change order work be included in the APCO
2 application which was submitted a few days later to the
3 owner?

4 A. Yes.

5 Q. And if I understand it correctly, it was
6 essentially included without substantial review by
7 APCO, it was simply passed on; is that correct?

8 A. Correct.

9 Q. Now, the certification on the APCO
10 application to the owner has the certification that the
11 application includes work which has been completed in
12 accordance with contract documents and should be paid
13 for. How do you reconcile that with the pass-through
14 attitude that APCO apparently took?

15 A. Per the prime contract, the owner had the
16 ultimate decision, and the subcontract agreements, as
17 to what was approved. It was the owner -- the owner
18 was the one that approved the percentage of completion
19 and the payment of the subcontractors. That's a
20 standard form that's used, and until it's verified and
21 it's approved, those are just -- those are -- it's just
22 a form until the final amount. Then the owner approves
23 it, and then the billings have to be revised based on
24 their approval, and that's what's paid.

25 Q. Did you keep any record of the amount in

1 dollars of work for which applications for payment were
2 made, but the owner disapproved of them?

3 A. I didn't do that, I'm sorry. I didn't do the
4 billings. Shannon Havelly did.

5 Q. I'm sorry, who did?

6 A. Shannon Havelly.

7 Q. And I thought -- at least on some of the
8 certifications, you started signing them in lieu of
9 Shannon; is that correct?

10 A. Yeah, towards the end. Yes, sir.

11 Q. At that point did you take over Shannon's
12 other functions or just that one function?

13 A. That was mainly Shannon's function. I only
14 did the last few billings.

15 Q. So, for example, we have had some testimony
16 about Zitting submitting change orders in excess of a
17 hundred thousand dollars and the owner only approving
18 17,000?

19 A. Yes.

20 Q. Do you recall that?

21 Is there some separate accounting where I
22 could see for Zitting and for Interstate, change order
23 requests submitted and disapproved by the owner, and a
24 cumulative total of that amount?

25 A. Can you repeat that, please?

1 Q. Right. What I'm looking for is do your
2 accounting records reflect anywhere amounts that the
3 subcontractors contend they are entitled to versus what
4 the owner has approved?

5 A. On the summary sheet --

6 MR. MOUNTEER: When you say "summary sheet,"
7 I mean you're looking at Zitting, do you have a summary
8 sheet for --

9 THE WITNESS: I don't have anything for
10 Interstate. I have nothing to look at for Interstate.

11 BY MR. DABBIERI:

12 Q. I understand that, and I had brought
13 something -- I was going to bring some documents with
14 me, but we can use Zitting's, and correct me if I'm
15 wrong, the same processes and procedures would apply to
16 all subcontractors, correct?

17 MR. MOUNTEER: You need to respond.

18 A. Yes, sir. Exhibit 84 from Zitting --

19 BY MR. DABBIERI:

20 Q. I'm sorry. What?

21 MR. MOUNTEER: That's APCO 106189.

22 MR. DABBIERI: Give me a second. I hope to
23 get to it shortly. I apologize. I did hope to be
24 there in person.

25 MR. LAI: Hey, Jon, just to help you out, are

1 you referring to the table with the Bates number of
2 APCO 106196?

3 MR. DABBIERI: I'm trying to locate it. We
4 are getting close to it. I do now have 106196.

5 THE WITNESS: Could you repeat your question?
6 BY MR. DABBIERI:

7 Q. I'll rephrase it.

8 What I'm looking for is what documentation
9 would reveal the difference between the amount the
10 subcontractor has requested payment for and what the
11 owner has authorized payment for, and if you look at
12 106196 --

13 MR. LAI: That's Exhibit Allen 75.

14 BY MR. DABBIERI:

15 Q. That's a summary of the amounts billed, but I
16 take it that is the amount billed after the adjustment
17 process if a change order was disputed; is that
18 correct?

19 A. This Allen 75 represents what was submitted
20 to the owner on behalf of -- on behalf of Zitting.

21 Q. If the owner disapproved a portion of the
22 payment application so that, as I understood it, there
23 would be an adjustment and a rebilling, correct?

24 A. Yes.

25 Q. Now, would this Exhibit 75 reflect the first

1 billing or the adjusted billing?

2 A. Well, this is -- in this case, this one I did
3 was actually what was submitted to them.

4 Q. Regardless of whether the owner approved it?

5 A. What happened here was on Zitting number 9
6 where the amount was changed, we submitted for -- in
7 June, July and August, we submitted billings to the
8 owner, and there was no going back and forth. They
9 changed it and we found out after the fact.

10 Q. Well, were there -- I mean, there were
11 obviously other instances where a subcontractor's
12 initial billing was not approved by the owner and a
13 revised billing was submitted; is that correct?

14 A. Yes.

15 Q. Now, on your -- was that true for Interstate?

16 A. Without a document, I can't tell you.

17 Q. I apologize, but I think I'm somewhat
18 repeating the question, but I'm trying to find out if
19 there's anywhere where there is a summary of disputed
20 work --

21 A. No, sir.

22 Q. -- by subcontractors?

23 A. There's no summary of that, no.

24 Q. There's no summary where I could compare how
25 much a subcontractor contends its owed, versus what the

1 owner has approved; is that a fair statement?

2 A. That's a fair statement.

3 Q. And again, and I had hoped to show this to
4 you in person, but there is an application for payment
5 by APCO submitted to ManhattanWest, which has -- starts
6 with APCO control number 35436, and continues to APCO
7 35453, and it is application number 11 and it is dated
8 October 3 of 2008. Are you familiar with that
9 application?

10 A. Yes.

11 Q. Why was that submitted?

12 A. It was the invoice to Gemstone, payment
13 application number 11 through the end of the job.

14 Q. Why the delay in submission?

15 A. I have no idea.

16 Q. Does this pay application include work by
17 subcontractors which the owner contested?

18 A. I have no idea.

19 Q. Did APCO receive any response to this payment
20 application?

21 A. The only response that we know is what was
22 paid by the owner to the subcontractors.

23 Q. Was that paid after October of 2008?

24 A. Yes.

25 Q. And it was for work performed during the time

1 APCO what the general contractor?

2 A. Yes.

3 Q. And you have records reflecting those
4 payments?

5 A. Yes.

6 Q. And have those been included in the
7 disclosures?

8 A. Yes.

9 Q. Do you recall when those documents were
10 disclosed, since there's been I think nine or ten
11 different disclosures?

12 A. They were disclosed by Nevada Construction
13 Services.

14 Q. Not by APCO?

15 A. I received copies of the checks and they
16 probably were put in my files, because I had to post
17 joint checks releasing those billings off of my
18 accounts payable, and also reduce the revenue.

19 Q. Are you aware of any instances where APCO
20 felt that a change order should be approved and
21 Gemstone disagreed?

22 A. Not my scope.

23 Q. You weren't involved in any of that?

24 A. None of it.

25 Q. APCO's payment applications, how would one

1 tell from an APCO payment application, the
2 subcontractors who performed the work which is included
3 in the APCO payment application?

4 A. Do you have a document? One of my payment
5 applications?

6 MR. MOUNTEER: Sorry, Jon, to cut in here.

7 MR. DABBIERI: No, that's fine.

8 MR. MOUNTEER: On the documents you
9 referenced earlier, you had like a line number for the
10 payment application. On your payment application, do
11 you recall whether it specifically said that line was
12 for a particular sub or not?

13 THE WITNESS: Oh, geez, I don't know if their
14 name was on there.

15 BY MR. DABBIERI:

16 Q. As I recall, that was where you were taking
17 the Zitting payment application and putting down your
18 line number.

19 A. Correct.

20 Q. Is there somewhere that shows something of
21 the reverse, where I could take the APCO payment
22 application and determine which line items reflect work
23 done by Interstate?

24 A. There was a report that was given to Nevada
25 Construction Services, and it was done in three

1 different ways. It was an Excel spreadsheet that
2 number one, each line item was listed and the
3 subcontractor was listed next to it. And then we would
4 sort it by sub, so another spreadsheet was generated,
5 whereas Interstate would be listed all together and
6 next to their -- next to their name would be the line
7 number that they were on. Then what we also had was
8 the summary sheet -- one moment -- which is Allen
9 Exhibit 74, so it would summarize on this sheet the
10 total amount of monies that were billed for that sub
11 for that month. And it was turned in and it was also
12 part of discovery with the pay applications.

13 Q. So just to make sure I understand, your Excel
14 spreadsheets would show, when an APCO payment
15 application was being submitted, there would be an
16 Excel spreadsheet that would also reflect on an APCO
17 line item basis, which subcontractor had performed the
18 work for that line item; is that correct?

19 A. Correct, and the amount billed.

20 Q. And so if a subcontractor had performed work
21 that was shown through, say, ten or fifteen different
22 line items on the APCO payment application, the -- for
23 each line item that subcontractor's name would appear
24 each time, correct?

25 A. Yes, sir.

1 Q. And the amount billed by that subcontractor
2 with respect to that particular APCO line item?

3 A. That is correct. Sir, this was done --

4 Q. And --

5 A. Go ahead.

6 Q. I'm sorry, you go ahead.

7 A. That's all right.

8 Q. I do recall seeing the summary that just had
9 for each contractor the amount included in that
10 particular APCO pay application. Has there been marked
11 today an exhibit that also includes that more extensive
12 line item breakdown?

13 A. Today?

14 Q. Right, among the documents you've been shown
15 today.

16 A. No, sir.

17 MR. LAI: Only for Zitting Brothers. That's
18 the only document that we discussed in terms of more
19 detailed breakdowns.

20 MR. DABBIERI: I'm sorry, was that directed
21 to me or the witness?

22 MR. LAI: That was directed to you, in case
23 you were curious about the exhibits presented today.

24 THE WITNESS: That detailed list that I just
25 explained to you was not exhibited today.

1 MR. DABBIERI: Okay. That was my question.
2 Just give me a moment here to look over my
3 notes.

4 BY MR. DABBIERI:

5 Q. Was the way you processed Interstate payment
6 applications any different from the way the Zitting
7 payment applications were processed?

8 A. No, sir.

9 Q. So essentially your responses to counsel as
10 to how everything was done for Zitting would also apply
11 to Interstate?

12 A. Yes, sir.

13 MR. DABBIERI: In that case I have no other
14 questions. Actually, I do have one area.

15 BY MR. DABBIERI:

16 Q. Do you know, did Interstate have two
17 contracts or one with APCO?

18 A. One.

19 Q. Did it submit each month a single pay
20 application, or one for each aspect of its work?

21 A. Each aspect of its work, sir.

22 Q. So there were two separate pay applications?

23 A. Yes, sir.

24 MR. DABBIERI: Okay. That completes my
25 questions.

1 MR. LAI: I have three quick ones and should
2 be done. Just follow-up.

3 MR. MOUNTEER: Okay.

4 FURTHER EXAMINATION

5 BY MR. LAI:

6 Q. Ms. Allen, APCO has completed work on the
7 project before it left work on August 21st, 2008,
8 correct?

9 A. There was work performed, yes.

10 Q. As APCO's payment applications, did the owner
11 also retain a portion of the amount from APCO's
12 progress payments?

13 A. Was there a retention held?

14 Q. Right, just for APCO's payments?

15 A. Yes, everyone.

16 Q. This was for APCO's work itself as well,
17 correct?

18 A. Yes.

19 Q. Has APCO ever requested a payment for its
20 retention amount?

21 A. No.

22 Q. And are you aware of any communications from
23 Gemstone or its representatives to not pay any of the
24 subcontractors after August 21st, 2008?

25 A. Could you repeat that question?

1 Q. Sure. Are you aware of any communications
2 from Gemstone or its representatives to not pay any of
3 the subcontractors after August 21st, 2008?

4 A. If I'm understanding this correctly --

5 Q. And I can rephrase.

6 A. -- Gemstone had Nevada Construction Services
7 actually pay the August payment application.

8 Q. Right. My question was did someone from
9 Gemstone or its agent like someone from Nevada
10 Construction Services tell APCO, hey, don't pay any of
11 the applications submitted by any subs to you after you
12 stop work on the project?

13 A. Not to my knowledge, sir. I didn't speak to
14 Gemstone. I had no communication.

15 MR. LAI: I have no further questions.

16 MR. MOUNTEER: With that we will conclude the
17 deposition. Thank you, Jon.

18 MR. DABBIERI: Thank you.

19 MR. LAI: Off the record.

20 (PROCEEDINGS ADJOURNED AT 12:13 PM)

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CERTIFICATE OF REPORTER

STATE OF NEVADA)
)
COUNTY OF CLARK) ss:

I, June W. Seid, a Certified Court Reporter
licensed by the State of Nevada, certify: That I
reported the deposition of MARY JO ALLEN, on Wednesday,
July 19, 2017, at 9:15 a.m.;

That prior to being deposed, the witness was
duly sworn by me to testify to the truth. That I
thereafter transcribed my said stenographic notes via
computer-aided transcription into written form, and
that the typewritten transcript is a complete, true and
accurate transcription of my said stenographic notes.
That review of the transcript was requested.

I further certify that I am not a relative,
employee or independent contractor of counsel or of any
of the parties involved in the proceeding; nor a person
financially interested in the proceeding; nor do I have
any other relationship that may reasonably cause my
impartiality to be questioned.

IN WITNESS WHEREOF, I have set my hand in my
office in the County of Clark, State of Nevada, this
30th day of July, 2017.

June W. Seid

JUNE W. SEID, CCR NO. 485

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DEPOSITION ERRATA SHEET

Assignment No. J0585160

Case Caption: APCO Construction vs. Gemstone

DECLARATION UNDER PENALTY OF PERJURY

I declare under penalty of perjury that I have read the entire transcript of my deposition taken in the captioned matter or the same has been read to me, and the same is true and accurate, save and except for changes and/or corrections, if any, as indicated by me on the DEPOSITION ERRATA SHEET hereof, with the understanding that I offer these changes as if still under oath.

Signed on the _____ day of

_____, 20__.

MARY JO ALLEN

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MARY JO ALLEN

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MARY JO ALLEN

EXHIBIT 17

MARQUIS AURBACH COFFING

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

1 **Marquis Aurbach Coffing**
2 Jack Chen Min Juan, Esq.
3 Nevada Bar No. 6367
4 Cody S. Mounteer, Esq.
5 Nevada Bar No. 11220
6 10001 Park Run Drive
7 Las Vegas, Nevada 89145
8 Telephone: (702) 382-0711
9 Facsimile: (702) 382-5816
10 jjuan@maclaw.com
11 cmounteer@maclaw.com
12 Attorneys for APCO CONSTRUCTION

DISTRICT COURT

CLARK COUNTY, NEVADA

13 APCO CONSTRUCTION, a Nevada
14 corporation,

Plaintiff,

vs.

13 GEMSTONE DEVELOPMENT WEST, INC., A
14 Nevada corporation,

Defendant.

Case No.: A571228
Dept. No.: 13

Consolidated with:

A574391; A574792; A577623; A583289;
A587168; A580889; A584730; A589195;
A595552; A597089; A592826; A589677;
A596924; A584960; A608717; A608718 and
A590319

16 AND ALL RELATED MATTERS

NOTICE OF TAKING NRCP RULE 30(B)(6) DEPOSITION OF PERSON MOST

KNOWLEDGEABLE FOR ZITTING BROTHERS CONSTRUCTION, INC.

19 PLEASE TAKE NOTICE that pursuant to Rule 30(b)(6) of the Nevada Rules of Civil
20 Procedure, Plaintiff, APCO Construction, by and through its attorneys, Marquis Aurbach
21 Coffing, will take the deposition of Zitting Brothers Construction, Inc. upon oral examination on
22 the TBD (please contact counsel for APCO for availability) day of April, 2017 at the hour
23 of TBD a.m., before a Notary Public, or before some other officer authorized by law to
24 administer oaths. The deposition will take place at Marquis Aurbach Coffing located at 10001
25 Park Run Drive, Las Vegas, Nevada 89145.

26 //

27 //

1 Pursuant to NRCP 30(b)(6), Plaintiffs are to required to designate one or more officers,
2 directors, managing agents or other consenting persons most knowledgeable to testify on its
3 behalf with respect to the topics set forth in the attached **Exhibit A**.

4 The deposition will be recorded by stenographic means, and oral examination will
5 continue from day to day until completed. You are invited to attend and cross-examine.

6 Dated this 29th day of March, 2017.

7
8 MARQUIS AURBACH COFFING

9
10 By /s/Cody Mounteer, Esq.
11 Jack Chen Min Juan, Esq.
12 Nevada Bar No. 6367
13 Cody S. Mounteer, Esq.
14 Nevada Bar No. 11220
15 10001 Park Run Drive
16 Las Vegas, Nevada 89145
17 Attorney(s) for APCO
18 CONSTRUCTION APCO CONSTRUCTION
19
20
21
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EXHIBIT A**RULE 30. DEPOSITIONS BY ORAL EXAMINATION****(B) NOTICE OF EXAMINATION; GENERAL REQUIREMENTS; SPECIAL NOTICE; METHOD OF PRODUCTION OF DOCUMENTS AND THINGS; DEPOSITION OF ORGANIZATION; DEPOSITION BY TELEPHONE.**

(6) A party may in the party's notice and in a subpoena name as the deponent a public or private corporation or a partnership or association or governmental agency and describe with reasonable particularity the matters on which examination is requested. In that event, the organization so named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. A subpoena shall advise a nonparty organization of its duty to make such a designation. The persons so designated shall testify as to matters known or reasonably available to the organization. This subdivision (b)(6) does not preclude taking a deposition by any other procedure authorized in these rules.

[As amended; effective January 1, 2005.]

TOPICS

1. Your claims and facts as alleged against APCO;
2. Documents that you have disclosed in support of your claims against APCO;
3. Your assertion that APCO is liable for any portions of your general and/or lien claims;
4. The percentage/allocation of your general and/or lien claims against APCO versus CAMCO;
5. The payment process, payment details, scope of payments, parties involved, and standard practices of payment, including, but not limited to, all payment applications, approvals, amounts, checks, and releases;
6. Each fact related to your contract agreement with APCO in regard to the Manhattan West Project ("Project") at issue in this matter, including, but not limited to original contact(s), change orders, and ratification agreement(s);
7. Each fact related to your scope of work at the Project;
8. The structure of your business; and
9. Your viability and business status from the time you entered into the subject contract until the date of your deposition, including, but not limited to, whether your company has been sold, transferred control, wound down, and/or claimed bankruptcy.

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **NOTICE OF TAKING NRCP RULE 30(b)(6) DEPOSITION OF PERSON MOST KNOWLEDGEABLE FOR ZITTING BROTHERS CONSTRUCTION, INC.** was submitted electronically for service with the Eighth Judicial District Court on the 29th day of March, 2017. Electronic service of the foregoing document shall be made in accordance with the E-Service List as follows:¹

Wilson, Elser, Moskowitz, Edelman & Dicker LLP

300 S. 4th St., 11th Floor

Las Vegas, NV 89101

		Select All	Select None		
Bennett Tueller Johnson & Deere					
Name	Email			Select	
Benjamin D. Johnson	ben.johnson@btjd.com	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
Kenzie Dunn	kdunn@btjd.com	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
Cadden & Fuller LLP					
Name	Email			Select	
Dana Y. Kim	dkim@caddenfuller.com	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
S. Judy Hirahara	jhirahara@caddenfuller.com	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
Tammy Cortez	tcortez@caddenfuller.com	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
David J. Merrill P.C.					
Name	Email			Select	
David J. Merrill	david@djmerillpc.com	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
Dickinson Wright, PLLC					
Name	Email			Select	
Cheri Vandermeulen	cvandermeulen@dickinsonwright.com	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
Christine Spencer	cspencer@dickinsonwright.com	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
Donna Wolfbrandt	dwolfbrandt@dickinsonwright.com	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
Eric Dobberstein	edobberstein@dickinsonwright.com	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
Durham Jones & Pinegar					
Name	Email			Select	
Brad Sighting	bsighting@djplaw.com	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
Cindy Simmons	csimmons@djplaw.com	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
Fennemore Craig Jones Vargas					
Name	Email			Select	
Patrick J. Sheehan	psheehan@fcjlaw.com	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>

¹ Pursuant to EDCR 8.05(a), each party who submits an E-Filed document through the E-Filing System consents to electronic service in accordance with NRCP 5(b)(2)(D).

MARQUIS AURBACH COFFING

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

Fennemore Craig, P.C.	Name	Email	Select
	Adam Miller	amiller@fdaw.com	<input checked="" type="checkbox"/>
Fox Rothschild	Name	Email	Select
	Jineen DeAngelis	jdeangelis@foxrothschild.com	<input checked="" type="checkbox"/>
	Richard I. Dreitzer	rdreitzer@foxrothschild.com	<input checked="" type="checkbox"/>
G.E. Robinson Law	Name	Email	Select
	George Robinson	grobison@gezzillojpyd.com	<input checked="" type="checkbox"/>
GERRARD COX & LARSEN	Name	Email	Select
	Aaron D. Lancaster	alancaster@gerrard-cox.com	<input checked="" type="checkbox"/>
	Douglas D. Gerrard	dgerrard@gerrard-cox.com	<input checked="" type="checkbox"/>
	Kaytlyn Bassett	kbassett@gerrard-cox.com	<input checked="" type="checkbox"/>
Gibbs, Giden, Locher, Turner & Senet LLP	Name	Email	Select
	Becky Pintar	bpintar@ggit.com	<input checked="" type="checkbox"/>
	Linda Compton	lcompton@ggls.com	<input checked="" type="checkbox"/>
Gordon & Rees	Name	Email	Select
	Robert Schumacher	rschumacher@gordonrees.com	<input checked="" type="checkbox"/>
Gordon & Rees LLP	Name	Email	Select
	Andrea Montero	amontero@gordonrees.com	<input checked="" type="checkbox"/>
	Brian Walters	bwalters@gordonrees.com	<input checked="" type="checkbox"/>
	Marie Ogella	mogella@gordonrees.com	<input checked="" type="checkbox"/>
GRANT MORRIS DODDS	Name	Email	Select
	Steven Morris	steve@qmdlegal.com	<input checked="" type="checkbox"/>
Greenberg Traurig, LLP	Name	Email	Select
	6085 Joyce Heilich	heilich@gtlaw.com	<input checked="" type="checkbox"/>
	7132 Andrea Rosehill	rosehill@gtlaw.com	<input checked="" type="checkbox"/>
	CNN Cynthia Ney	neyc@gtlaw.com	<input checked="" type="checkbox"/>
	IGH Bethany Rabe	rabe@gtlaw.com	<input checked="" type="checkbox"/>
	IQM Mark Ferrario	mferrario@gtlaw.com	<input checked="" type="checkbox"/>
	LVGTDocketing	lvtdock@gtlaw.com	<input checked="" type="checkbox"/>
	WTM Tamí Cowden	cowdent@gtlaw.com	<input checked="" type="checkbox"/>
HOLLEY DRIGGS WALCH FINE WRAY PUZEY & THOMPSON	Name	Email	Select
	Glenn F. Meier	gmeier@nevadafirm.com	<input checked="" type="checkbox"/>
	Renee Hoban	rhoban@nevadafirm.com	<input checked="" type="checkbox"/>
Holley Driggs Walch Fine Wray Puzey & Thompson			

MARQUIS AURBACH COFFING

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

1	Name	Email	<input checked="" type="checkbox"/>	Select
2	Cynthia Kelley	ckelley@nevadafirm.com	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
3	Rachel E. Donn	rdonn@nevadafirm.com	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
4	Howard & Howard			
5	Name	Email	<input checked="" type="checkbox"/>	Select
6	Gwen Rutar Mullins	grm@h2law.com	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
7	Wade B. Gochmour	wbg@h2law.com	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
8	Jolley Urga Woodbury & Little			
9	Name	Email	<input checked="" type="checkbox"/>	Select
10	Agnes Wong	aw@juww.com	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
11	Debbie Rosewall	dr@juww.com	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
12	Kelly McGee	kmg@juww.com	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
13	Martin A. Little, Esq.	mal@juww.com	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
14	Martin A. Little, Esq.	mal@juww.com	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
15	Michael R. Ernst	mre@juww.com	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
16	Sarah A. Mead	sam@juww.com	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
17	Kemp, Jones & Coulthard			
18	Name	Email	<input checked="" type="checkbox"/>	Select
19	Erica Bennett	e.bennett@kempjones.com	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
20	Mark M. Jones	mmj@kempjones.com	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
21	Matt Carter	mc@kempjones.com	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
22	Matthew Carter	m.carter@kempjones.com	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
23	Pamela Montgomery	pym@kempjones.com	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
24	Law Offices of Floyd Hale			
25	Name	Email	<input checked="" type="checkbox"/>	Select
26	Debbie Holkoman	dholkoman@jamsac.com	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
27	Floyd Hale	fhale@floyd hale.com	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
28	Law Offices of Sean P. Hillin, P.C.			
29	Name	Email	<input checked="" type="checkbox"/>	Select
30	Caleb Langsdale, Esq.	caleb@langsdalelaw.com	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
31	Litigation Services & Technologies			
32	Name	Email	<input checked="" type="checkbox"/>	Select
33	Calendar	calendar@litigationservices.com	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
34	Depository	Depository@litigationservices.com	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
35	Marquis Aurbach Coffing			
36	Name	Email	<input checked="" type="checkbox"/>	Select
37	Cody Munteer, Esq.	cmunteer@marquisaurbach.com	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
38	Courtney Peterson	cpeterson@maclaw.com	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
39	Jack Juan	jjuan@marquisaurbach.com	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
40	Jennifer Case	jcase@maclaw.com	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
41	Philip Aurbach	paurbach@maclaw.com	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
42	Taylor Fong	tfong@marquisaurbach.com	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>

MARQUIS AURBACH COFFING

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

McCullough, Dobberstein & Evans, Ltd.			
Name	Email	Select	Select
Christine Spencer	cspencer@mcgalaw.com	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
Eric Dobberstein, Esq.	edobberstein@mcgalaw.com	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
McDonald Carano Wilson, LLP			
Name	Email	Select	Select
Kathleen Morris	kmorris@mcdonaldcarano.com	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
Ryan Bellows	rbellows@mcdonaldcarano.com	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
Meier Fine & Wray, LLC			
Name	Email	Select	Select
Receptionist	Reception@mvbusinesslawyers.com	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
Morrill & Aronson			
Name	Email	Select	Select
Christine Taradash	CTaradash@maazlaw.com	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
Morrill & Aronson P.L.C.			
Name	Email	Select	Select
Debra Hitchens	dhitchens@maazlaw.com	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
Peel Brimley LLP			
Name	Email	Select	Select
Amanda Armstrong	aarmstrong@peelbrimley.com	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
Eric Zimelman	ezimelman@peelbrimley.com	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
Rosey Jeffrey	rjeffrey@peelbrimley.com	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
Pezzillo Lloyd			
Name	Email	Select	Select
Jennifer R. Lloyd	jlloyd@pezzilloloyd.com	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
Marisa L. Maskas, Esq.	mmaskas@pezzilloloyd.com	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
Procopio Cory			
Name	Email	Select	Select
Timothy E. Salter	tm.salter@procopio.com	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
Procopio Cory Hargreaves & Savitch			
Name	Email	Select	Select
Andrew J. Kessler	andrew.kessler@procopio.com	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
Rebecca Chapman	rebecca.chapman@procopio.com	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
Procopio Cory Hargreaves & Savitch LLP			
Name	Email	Select	Select
Cori Mandy, Legal Secretary	cori.mandy@procopio.com	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
Richard L. Tobler, Ltd.			
Name	Email	Select	Select
Richard Tobler	rttdock@hotmail.com	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
Rooker Rawlins			
Name	Email	Select	Select
Legal Assistant	mlegalassistant@rookerlaw.com	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
Michael Rawlins	mrawlins@rookerlaw.com	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
T. James Truman & Associates			
Name	Email	Select	Select

MARQUIS AURBACH COFFING

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

Beverly Roberts	broberts@trumanlegal.com	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
District filings	district@trumanlegal.com	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
The Langsdale Law Firm			
Name	Email		Select
Caleb Langsdale	Caleb@Langsdalelaw.com	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
Watt, Tieder, Hoffer & Fitzgerald, L.L.P.			
Name	Email		Select
David R. Johnson	djohnson@watttieder.com	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
Jennifer MacDonald	jmacdonald@watttieder.com	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
Williams & Associates			
Name	Email		Select
Donald H. Williams, Esq.	dwilliams@dhwlawlv.com	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
Wilson Elser Moskowitz Edelman & Dicker			
Name	Email		Select
E-File Desk	EfileasVegas@wilsonelser.com	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
Hrustyk Nicole	Nicole.Hrustyk@wilsonelser.com	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
Jorge Ramirez	Jorge.Ramirez@wilsonelser.com	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
Wilson Elser Moskowitz Edelman & Dicker LLP			
Name	Email		Select
Lani Maile	Lani.Maile@wilsonelser.com	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
Wilson, Elser			
Name	Email		Select
I-Che Lai	I-Che.Lai@wilsonelser.com	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>

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

N/A

J. Case
J. Case, an employee of
Marquis Aurbach Coffing

EXHIBIT 18

BUILDING 8	
LANDSCAPING	Not started
REINFORCING STEEL LABOR	Complete
REINFORCING STEEL MATERIAL	Complete
EXCAVATE FOOTINGS	Complete
PLACE FOOTINGS	Complete
FORM/PLACE WALLS	Complete
FORM/PLACE COLUMNS	Complete
PLACE SLAB ON GRADE	Complete
FORM/PLACE DECK	Complete
LTWEIGHT CONCRETE	Not started
PRECAST FLOOR 1	Not started
PRECAST FLOOR 2	Not started
PRECAST FLOOR 3	Not started
PRECAST FLOOR 4	Not started
MASONRY CMU	Not started
THIN BRICK VENEER	Not started
GRANITE	Not started
MISC. STEEL	Not started
WOOD FRAMING L1 LABOR/EQU	Complete
WOOD FRAMING L1 MATERIAL	Complete
WOOD FRAMING L2 LABOR/EQU	Complete
WOOD FRAMING L2 MATERIAL	Complete
WOOD FRAMING L3 LABOR/EQU	Complete
WOOD FRAMING L3 MATERIAL	Complete
WOOD FRAMING L4 LABOR/EQU	Complete
WOOD FRAMING L4 MATERIAL	Complete
WOOD FRAMING RF LABOR/EQU	Complete
WOOD FRAMING RF MATERIAL	Complete
FINISH CARPENTRY	Not started
INSULATION	Substantially complete
ROOFING	Substantially complete
WATERPROOFING	Below grade perimeter walls substantially complete and backfilled
STUCCO	Scratch and brown coat in progress
WINDOWS	Substantially complete
DRYWALL	Wall and ceiling drywall hanging in progress
FLOORING	Not started
PAINTING	Not started
APPLIANCES	Not started
ELEVATORS	Not started
MECH. MOBILIZATION	As progress requires/justifies
MECH. SUBMITTALS	As progress requires/justifies
MECH. GENERAL CONDITIONS	As progress requires/justifies
MECH. CLOSEOUT DOCUMENTS	As progress requires/justifies

PLUMBING BELOW PODIUM	
PERMIT	As progress requires/justifies
EXCAVATION/BACKFILL	Substantially complete
U/G SANITARY PIPING	Substantially complete
U/G STORM PIPING	Substantially complete
PRECAST STRUCTURES	Not started
PLUMBING FIRST FLOOR	
A/G WASTE & VENT	Substantially complete
DRAINS/CARRIERS	Substantially complete
SLEEVES/INSERTS	Substantially complete
A/G STORM PIPING	Substantially complete
A/G DOMESTIC WATER	Substantially complete
A/G GAS PIPING	Substantially complete
TUBS & HOOKUPS	Substantially complete
PLUMBING FIXTURES	Not started
PLUMBING EQUIPMENT	Not started
CONDENSATE PIPING	Substantially complete
PLUMBING TESTING	In progress
PLUMBING IDENTIFICATION	Not started
INSULATION - FIRESTOP	In progress
PLUMBING SECOND FLOOR	
A/G WASTE & VENT	Substantially complete
DRAINS/CARRIERS	Substantially complete
A/G STORM PIPING	Substantially complete
A/G DOMESTIC WATER	Substantially complete
A/G GAS PIPING	Substantially complete
TUBS & HOOKUPS	Substantially complete
PLUMBING FIXTURES	Not started
PLUMBING EQUIPMENT	Not started
CONDENSATE PIPING	Substantially complete
PLUMBING TESTING	In progress
PLUMBING IDENTIFICATION	Not started
INSULATION - FIRESTOP	In progress
PLUMBING THIRD FLOOR	
A/G WASTE & VENT	Substantially complete
DRAINS/CARRIERS	Substantially complete
A/G STORM PIPING	Substantially complete
A/G DOMESTIC WATER	Substantially complete
A/G GAS PIPING	Substantially complete
TUBS & HOOKUPS	Substantially complete
PLUMBING FIXTURES	Not started
PLUMBING EQUIPMENT	Not started
CONDENSATE PIPING	Substantially complete
PLUMBING TESTING	In progress
PLUMBING IDENTIFICATION	Not started
INSULATION - FIRESTOP	In progress

WOOD FRAMING L1 LABOR/EQUIP	\$	199,015	\$	-	\$	-	\$	-	\$	199,015	\$	19,901.50	\$	19,901.50	100.00%	100.00%
WOOD FRAMING L1 MATERIAL	\$	245,918	\$	-	\$	-	\$	-	\$	245,918	\$	24,591.80	\$	24,591.80	100.00%	100.00%
WOOD FRAMING L2 LABOR/EQUIP	\$	177,141	\$	-	\$	-	\$	-	\$	177,141	\$	17,714.10	\$	17,714.10	100.00%	100.00%
WOOD FRAMING L2 MATERIAL	\$	229,547	\$	-	\$	-	\$	-	\$	229,547	\$	22,954.70	\$	22,954.70	100.00%	100.00%
WOOD FRAMING L3 LABOR/EQUIP	\$	177,141	\$	-	\$	-	\$	-	\$	177,141	\$	17,714.10	\$	17,714.10	100.00%	100.00%
WOOD FRAMING L3 MATERIAL	\$	228,039	\$	-	\$	-	\$	-	\$	228,039	\$	22,803.90	\$	22,803.90	100.00%	100.00%
WOOD FRAMING L4 LABOR/EQUIP	\$	182,032	\$	-	\$	-	\$	-	\$	182,032	\$	18,203.20	\$	18,203.20	100.00%	100.00%
WOOD FRAMING L4 MATERIAL	\$	148,941	\$	-	\$	-	\$	-	\$	148,941	\$	14,894.10	\$	14,894.10	100.00%	100.00%
WOOD FRAMING RF LABOR/EQUIP	\$	81,848	\$	-	\$	-	\$	-	\$	81,848	\$	8,184.80	\$	8,184.80	100.00%	100.00%
WOOD FRAMING RF MATERIAL	\$	179,580	\$	-	\$	-	\$	-	\$	179,580	\$	17,958.00	\$	17,958.00	100.00%	100.00%
FINISH CARPENTRY	\$	800,000	\$	169,178.68	\$	18,917.87	\$	152,260.81	\$	210,042	\$	21,004.19	\$	410,962.28	55.01%	10.00%
INSULATION	\$	91,800	\$	40,485.00	\$	4,048.50	\$	38,436.50	\$	82,820	\$	8,282.00	\$	17,442.00	90.00%	99.00%
ROOFING	\$	220,020	\$	6,308.72	\$	630.87	\$	5,677.85	\$	158,180	\$	15,818.00	\$	17,164.18	99.00%	100.00%
WATERPROOFING	\$	123,800	\$	-	\$	-	\$	-	\$	46,170	\$	4,616.97	\$	17,822.24	77.83%	90.00%
STUCCO	\$	399,700	\$	238,792.50	\$	23,879.25	\$	214,813.25	\$	238,172	\$	23,817.20	\$	128,927.50	75.00%	76.00%
WINDOWS	\$	254,000	\$	-	\$	-	\$	-	\$	685,133	\$	68,513.25	\$	437,430.75	65.00%	75.00%
DRYWALL	\$	900,000	\$	217,832.50	\$	21,783.25	\$	195,880.25	\$	-	\$	-	\$	300,000.00	0.00%	0.00%
FLOORING	\$	300,000	\$	-	\$	-	\$	-	\$	-	\$	-	\$	353,117.50	0.00%	0.00%
PAINTING	\$	785,000	\$	-	\$	-	\$	-	\$	-	\$	-	\$	112,000.00	0.00%	0.00%
APPLIANCES	\$	112,000	\$	-	\$	-	\$	-	\$	-	\$	-	\$	104,348.10	88.94%	0.00%
ELEVATORS	\$	274,928	\$	117,031.00	\$	11,703.10	\$	105,327.90	\$	189,531	\$	18,953.10	\$	3,060.00	84.00%	84.00%
MECH. MOBILIZATION	\$	12,600	\$	-	\$	-	\$	-	\$	10,600	\$	1,060.00	\$	112.50	100.00%	100.00%
MECH. SUBMITTALS	\$	1,125	\$	-	\$	-	\$	-	\$	1,125	\$	112.50	\$	889.22	68.00%	68.00%
MECH. GENERAL CONDITIONS	\$	1,174	\$	-	\$	-	\$	-	\$	1,208	\$	120.82	\$	1,000.00	0.00%	0.00%
MECH. CLOSEOUT DOCUMENTS	\$	1,000	\$	-	\$	-	\$	-	\$	-	\$	-	\$	-	0.00%	0.00%
MECH. FIRST FLOOR	\$	5,260	\$	-	\$	-	\$	-	\$	5,260	\$	526.00	\$	526.00	100.00%	100.00%
PERMIT	\$	24,818	\$	-	\$	-	\$	-	\$	24,818	\$	2,481.84	\$	2,481.84	100.00%	100.00%
PRE-ROCKLINE SET PIPING	\$	19,895	\$	-	\$	-	\$	-	\$	19,895	\$	1,989.47	\$	1,989.47	100.00%	100.00%
FAU MATERIALS	\$	19,895	\$	-	\$	-	\$	-	\$	19,895	\$	1,989.47	\$	1,989.47	100.00%	100.00%
ROUGH DUCT	\$	19,895	\$	14,771.04	\$	1,477.10	\$	13,293.94	\$	19,895	\$	1,989.47	\$	1,989.47	100.00%	100.00%
CONDENSER MATERIALS	\$	19,895	\$	-	\$	-	\$	-	\$	19,895	\$	1,989.47	\$	1,989.47	100.00%	100.00%
SET CONDENSERS	\$	4,924	\$	984.74	\$	98.47	\$	886.27	\$	4,924	\$	492.37	\$	492.37	100.00%	100.00%
SET TRIM	\$	4,924	\$	-	\$	-	\$	-	\$	-	\$	-	\$	4,923.88	0.00%	0.00%
START UP	\$	4,924	\$	-	\$	-	\$	-	\$	-	\$	-	\$	-	0.00%	0.00%
MECH. SECOND FLOOR	\$	24,818	\$	-	\$	-	\$	-	\$	24,818	\$	2,481.84	\$	2,481.84	100.00%	100.00%
PRE-ROCKLINE SET PIPING	\$	19,895	\$	-	\$	-	\$	-	\$	19,895	\$	1,989.47	\$	1,989.47	100.00%	100.00%
FAU MATERIALS	\$	19,895	\$	-	\$	-	\$	-	\$	19,895	\$	1,989.47	\$	1,989.47	100.00%	100.00%
ROUGH DUCT	\$	19,895	\$	19,894.72	\$	1,989.47	\$	17,725.25	\$	19,895	\$	1,989.47	\$	1,989.47	100.00%	100.00%
CONDENSER MATERIALS	\$	19,895	\$	-	\$	-	\$	-	\$	19,895	\$	1,989.47	\$	1,989.47	100.00%	100.00%
SET CONDENSERS	\$	4,924	\$	984.74	\$	98.47	\$	886.27	\$	4,924	\$	492.37	\$	492.37	100.00%	100.00%
SET TRIM	\$	4,924	\$	-	\$	-	\$	-	\$	-	\$	-	\$	4,923.88	0.00%	0.00%
START UP	\$	4,924	\$	-	\$	-	\$	-	\$	-	\$	-	\$	-	0.00%	0.00%
MECH. THIRD FLOOR	\$	24,818	\$	-	\$	-	\$	-	\$	24,818	\$	2,481.84	\$	2,481.84	100.00%	100.00%
PRE-ROCKLINE SET PIPING	\$	19,895	\$	-	\$	-	\$	-	\$	19,895	\$	1,989.47	\$	1,989.47	100.00%	100.00%
FAU MATERIALS	\$	19,895	\$	-	\$	-	\$	-	\$	19,895	\$	1,989.47	\$	1,989.47	100.00%	100.00%
ROUGH DUCT	\$	19,895	\$	19,894.72	\$	1,989.47	\$	17,725.25	\$	19,895	\$	1,989.47	\$	1,989.47	100.00%	100.00%
CONDENSER MATERIALS	\$	19,895	\$	-	\$	-	\$	-	\$	19,895	\$	1,989.47	\$	1,989.47	100.00%	100.00%
SET CONDENSERS	\$	4,924	\$	984.74	\$	98.47	\$	886.27	\$	4,924	\$	492.37	\$	492.37	100.00%	100.00%
SET TRIM	\$	4,924	\$	-	\$	-	\$	-	\$	-	\$	-	\$	4,923.88	0.00%	0.00%
START UP	\$	4,924	\$	-	\$	-	\$	-	\$	-	\$	-	\$	-	0.00%	0.00%
MECH. FOURTH FLOOR	\$	24,818	\$	-	\$	-	\$	-	\$	24,818	\$	2,481.84	\$	2,481.84	100.00%	100.00%
PRE-ROCKLINE SET PIPING	\$	19,895	\$	-	\$	-	\$	-	\$	19,895	\$	1,989.47	\$	1,989.47	100.00%	100.00%
FAU MATERIALS	\$	19,895	\$	-	\$	-	\$	-	\$	19,895	\$	1,989.47	\$	1,989.47	100.00%	100.00%
ROUGH DUCT	\$	19,895	\$	19,894.72	\$	1,989.47	\$	17,725.25	\$	19,895	\$	1,989.47	\$	1,989.47	100.00%	100.00%
CONDENSER MATERIALS	\$	19,895	\$	-	\$	-	\$	-	\$	19,895	\$	1,989.47	\$	1,989.47	100.00%	100.00%
SET CONDENSERS	\$	4,924	\$	984.74	\$	98.47	\$	886.27	\$	4,924	\$	492.37	\$	492.37	100.00%	100.00%
SET TRIM	\$	4,924	\$	-	\$	-	\$	-	\$	-	\$	-	\$	4,923.88	0.00%	0.00%
START UP	\$	4,924	\$	-	\$	-	\$	-	\$	-	\$	-	\$	-	0.00%	0.00%
MECH. FIFTH FLOOR	\$	24,818	\$	-	\$	-	\$	-	\$	24,818	\$	2,481.84	\$	2,481.84	100.00%	100.00%
PRE-ROCKLINE SET PIPING	\$	19,895	\$	-	\$	-	\$	-	\$	19,895	\$	1,989.47	\$	1,989.47	100.00%	100.00%
FAU MATERIALS	\$	19,895	\$	-	\$	-	\$	-	\$	19,895	\$	1,989.47	\$	1,989.47	100.00%	100.00%
ROUGH DUCT	\$	19,895	\$	19,894.72	\$	1,989.47	\$	17,725.25	\$	19,895	\$	1,989.47	\$	1,989.47	100.00%	100.00%
CONDENSER MATERIALS	\$	19,895	\$	-	\$	-	\$	-	\$	19,895	\$	1,989.47	\$	1,989.47	100.00%	100.00%
SET CONDENSERS	\$	4,924	\$	984.74	\$	98.47	\$	886.27	\$	4,924	\$	492.37	\$	492.37	100.00%	100.00%
SET TRIM	\$	4,924	\$	-	\$	-	\$	-	\$	-	\$	-	\$	4,923.88	0.00%	0.00%
START UP	\$	4,924	\$	-	\$	-	\$	-	\$	-	\$	-	\$	-	0.00%	0.00%
MECH. SIXTH FLOOR	\$	24,818	\$	-	\$	-	\$	-	\$	24,818	\$	2,481.84	\$	2,481.84	100.00%	100.00%
PRE-ROCKLINE SET PIPING	\$	19,895	\$	-	\$	-	\$	-	\$	19,895	\$	1,989.47	\$	1,989.47	100.00%	100.00%
FAU MATERIALS	\$	19,895	\$	-	\$	-	\$	-	\$	19,895	\$	1,989.47	\$	1,989.47	100.00%	100.00%
ROUGH DUCT	\$	19,895	\$	19,894.72	\$	1,989.47	\$	17,725.25	\$	19,895	\$	1,989.47	\$	1,989.47	100.00%	100.00%
CONDENSER MATERIALS	\$	19,895	\$	-	\$	-	\$	-	\$	19,895	\$	1,989.47	\$	1,989.47	100.00%	100.00%
SET CONDENSERS	\$	4,924	\$	984.74	\$	98.47	\$	886.27	\$	4,924	\$	492.37	\$	492.37	100.00%	100.00%
SET TRIM	\$	4,924	\$	-	\$	-	\$	-	\$	-	\$	-	\$	4,923.88	0.00%	0.00%
START UP	\$	4,924	\$	-	\$	-	\$	-	\$	-	\$	-	\$	-	0.00%	0.00%
MECH. SEVENTH FLOOR	\$	24,818	\$	-	\$	-	\$	-	\$	24,818	\$	2,481.84	\$	2,481.84	100.00%	100.00%
PRE-ROCKLINE SET PIPING	\$	19,895	\$	-	\$	-	\$	-	\$	19,895	\$	1,989.47	\$	1,989.47	100.00%	100.00%
FAU MATERIALS	\$	19,895	\$	-	\$	-	\$	-	\$	19,895	\$	1,989.47	\$	1,989.47	100.00%	100.00%
ROUGH DUCT	\$	19,895	\$	19,894.72	\$	1,989.47	\$	17,725.25	\$	19,895	\$	1,989.47	\$	1,989.47	100.00%	100.00%
CONDENSER MATERIALS	\$	19,895	\$	-	\$	-	\$	-	\$	19,895	\$	1,989.47	\$	1,989.47	100.00%	100.00%
SET CONDENSERS	\$	4,924	\$	984.74	\$	98.47	\$	886.27	\$	4,924	\$	492.37	\$	492.37	100.00%	100.00%
SET TRIM	\$	4,924	\$	-	\$	-	\$	-	\$	-	\$	-	\$	4,923.88	0.00%	0.00%
START UP	\$	4,924	\$	-	\$	-	\$	-	\$	-	\$	-	\$	-	0.00%	0.00%
MECH. EIGHTH FLOOR	\$	24,818	\$	-	\$	-	\$	-	\$	24,818	\$	2,481.84	\$	2,481.84	100.00%	100.00%
PRE-ROCKLINE SET PIPING	\$	19,895	\$	-	\$	-	\$	-	\$	19,895	\$	1,989.47	\$	1,989.47	100.00%	100.00%
FAU MATERIALS	\$	19,895	\$	-	\$	-	\$	-	\$	19,895	\$	1,989.47	\$	1,989.47	100.00%	100.00%
ROUGH DUCT	\$	19,895	\$	19,894.72	\$	1,989.47	\$	17,725.25	\$	19,895	\$	1,989.47	\$	1,989.47	100.00%	100.00%
CONDENSER MATERIALS	\$	19,895	\$	-	\$	-	\$	-	\$	19,895	\$	1,989.47	\$	1,989.47	100.00%	100.00%
SET CONDENSERS	\$	4,924	\$	984.74	\$	98.47	\$	886.27	\$	4,924	\$	492.37	\$	492.37	100.00%	100.00%
SET TRIM	\$	4,924	\$	-	\$	-	\$	-	\$	-	\$	-	\$	4,923.88	0.00%	0.00%
START UP	\$	4,924	\$	-	\$	-	\$	-	\$	-	\$	-	\$	-	0.00%	0.00%
MECH. NINTH FLOOR	\$	24,818	\$	-	\$	-	\$	-	\$	24,818	\$	2,481.84	\$	2,481.84	100.00%	100.00%
PRE-ROCKLINE SET PIPING	\$	19,895	\$	-	\$											



2500 North Buffalo Drive
Suite 140
Las Vegas, Nevada 89143

CONSTRUCTION PROGRESS REPORT

Project Name: Manhattan West Condominiums
Project Address: Las Vegas, NV

Date: 9/4/2008

Site Visit No.: 10 Date: 9/4/2008
ManhattanWest Senior Construction Draw No.: 9
Contractor Pay Application No.: 10 Date: 7/31/2008
For The Period: 7/1/2008 to 7/31/2008

FUNDING STATEMENT


This analysis is based on a review of the documentation provided, conditions of the project observed on the date of the field inspection and/or verbal communications. See attached schedule of values, percentages of completion, loan budget line item comments and photographs.

The work and progress appear to be adequate and sufficient and Nevada Construction Services recommends funding ManhattanWest Senior Construction Draw # 9 (Contractor Pay Application #10), dated, July 31, 2008, for the amount approved by the borrower of \$6,307,487.13.

EXECUTIVE SUMMARY

Building 2 has the first, second and third level concrete slabs poured, the concrete elevator/stair shaft walls complete, the fireproofing complete for the third level, the perimeter framing and exterior drywall complete, the window frames and glass near completion, the common area HVAC, plumbing, electrical and fire sprinkler rough-ins in progress, the common area partition wall framing near complete, the common area drywall hung and the taping substantially complete, the roofing complete, the rooftop units' curbs installed and the stucco finish coat in progress. Building 3 has the first, second and third level concrete slabs poured, the concrete elevator/stair shaft walls poured, the fireproofing complete for the third level, the roofing substantially complete, the perimeter steel stud framing and exterior drywall complete, the aluminum window frames and glass near completion, the stucco lath in progress, the common area steel stud framing and drywall started. Building 7 has the first and second level concrete poured, the structural steel erection near completion, the fireproofing complete through the eighth level, the partition wall framing in progress through the ninth level, all rough-ins in progress through the eighth level and the drywall hanging started. Building 9 has the roofing complete, the stucco lath substantially complete, the stucco scratch, brown and finish coats in progress at varying stages of completion in different sections, the concealed rough-ins complete, the wall drywall hung and the taping and ceiling drywall hanging in progress. Building 8 has the roofing substantially complete, the exterior drywall hung, the stucco in progress, the concealed rough-ins complete and the drywall hanging and taping in progress.

Conformance to Original Specifications Statement: All work completed as of date of inspection appears to conform to current plans, specifications and addenda.


Keith Schleichardt
Inspector

A. Budget

- The project appears to be within the contract budget.
 -
- The project should be completed within the contract budget.
 -
- Pay Applications (Draw Request)
 - The amounts requested are consistent with the value and types of completed construction work in place.
 - Materials stored on site are stored in protected and secure environment to prevent any damage or loss.
 - Materials stored off site are/are not stored in accordance with contract documents requirements.
 - Not applicable at this time.
- Project Changes
 - The proposed change orders should not adversely impact the budget.
 - The costs of the proposed change orders appear to be fair and reasonable.
 - The budget set aside (contingency) for changes appears adequate.
 -

B. Schedule

- The revised project schedule has been submitted to the owner for approval
 - this statement is assuming the pending change orders revising the contract amount and duration are approved
- The project should be completed by the revised schedule.
 - the project should be completed by the pending change orders adjusted time allowances
- Project Changes
 - The proposed changes should not adversely impact the schedule.
 - the proposed change orders request additional contract duration for delays
 - The time requests for proposed changes appear reasonable.
- Recent Milestones and Activities
 - Buildings 2, 8 & 9 stucco in progress; Building 3 stucco lath started
- Upcoming Milestones and Activities
 - Completion of Building 7 structural steel erection
 - Exterior stucco on Buildings 2, 8 and 9
- Project Documentation
 - The contractor is updating (revising) the project schedule accurately and on a regular basis.

C. Quality

- In-place construction work
 - The quality of the work in place construction work appears to be in compliance with the project plans and specifications.
 -
- Contractor-Subcontractor Coordination
 - The project is sufficiently manned.
 - The Contractor/Subcontractor job site coordination meetings are being held.
 - Sufficient pre-work instructions are being given to the job site subcontractors, by the A/E and/or CM.
 -
- Project Inspections
 - All required code, quality assurance, manufacturers' A/E and CM inspections are being performed. These inspections have been within codes and guidelines required.
 - The project milestones/critical interfaces/systems integration events and activities have been identified. The required/necessary inspections have been coordinated with same.
 -
- Project Changes
 - The proposed changes appear to be consistent with the scope and nature of the project.
 - The proposed changes should not adversely impact the quality of the project.
 -
- Project Documentation
 - The project's record drawings are being regularly updated.
 - All addenda, change documentation, RFIs, ASIs, etc. are being regularly posted into the project's working and record set of plans and specifications.
 - The project's closeout documentation and instructions are adequate to ensure an efficient closeout.

D. Issues

Issues which could adversely impact either the baseline budget, schedule or quality, if they are not resolved properly, are described discussed and evaluated below. Where helpful or useful, photos accompany the text.

- There were no adverse effect issues noted during this inspection.

■ Issue 1

- Identification: Owner / Developer has discharged and replaced the original General Contractor
- Impact: None apparent at this time
- Resolution: New General Contractor has mobilized and assumed project General Contractor responsibilities



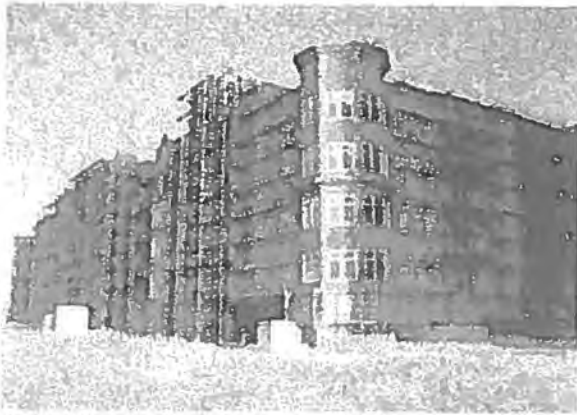
■ Issue 2

- Identification:
- Impact:
- Resolution:

■ Issue 3

- Identification
- Impact:
- Resolution:

Project Photos



Building 9 south elevation - stucco scratch, brown and finish in progress



Building 9 north elevation



Building 9 second floor typical unit interior elevation



Building 8 second floor corridor interior elevation



Building #8 north elevation

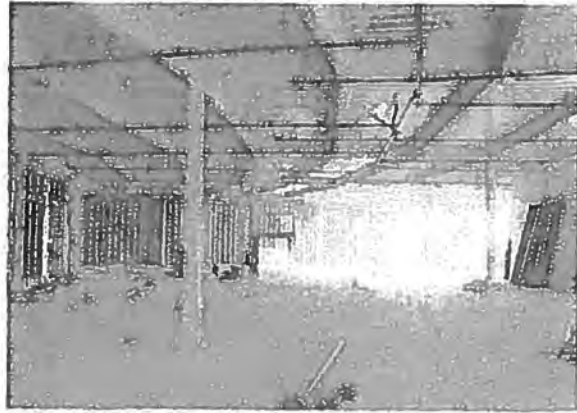


Building 8 third floor typical unit interior elevation

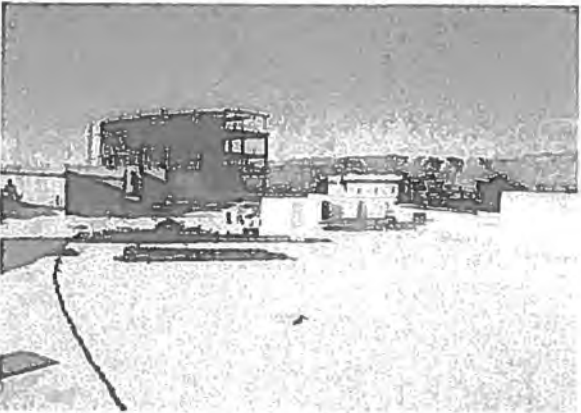
Project Photos



Building #2 west elevation - stucco lath and stucco scratch, brown and finish in progress



Building 3 first floor south half interior elevation



Building 3 roof - membrane roofing substantially complete, screen and parapit walls' stucco lath in progress



Building 3 west elevation



Building 7 east elevation



Building #7 north and west elevations

Budget Line Item Comments

Loan Budget Line Item	Comment
GRADING	
MOBILIZATION	Substantially complete
SITE PREP/MASS EXCAVATION	Substantially complete
SITE WATER	Substantially complete
SITE STORM SEWER	Substantially complete
SITE SANITARY SEWER	Substantially complete
INSURANCE	As progress requires/justifies
ON/OFFSITE IMPROVEMENTS	
OFFSITES RUSSELL PAVING	Not started
OFFSITES RUSSELL CURB/GUTTER	Not started
OFFSITES SIDEWALKS RUSSELL	Not started
ASPHALT PAVING PHASE 1	Not started
CURB/GUTTER PHASE 1	In progress
SIDEWALKS PHASE 1	Not started
BRICK PAVERS PHASE 1	Not started
SITE FURNISHINGS PHASE 1	Not started
POOLS	Not started
ELECTRICAL ENGINEERING	As progress requires/justifies
MOBILIZATION	As progress requires/justifies
OFFICE TRAILER/ADMIN 24 Mos	As progress requires/justifies
PRJT. ENG, CAD, PRJT. ASST.	As progress requires/justifies
ELECTRICAL PERMITS	As progress requires/justifies
SUBMITTALS	As progress requires/justifies
SUPERVISION/PLANNING/COORD	As progress requires/justifies
FURNISH LANDSCAPE LIGHTING	Not started
FURNISH COURTYARD LIGHTING	Not started
FURNISH SPORTS LIGHTING	Not started
FURNISH PARKING POLE LIGHTING	Not started
APCO CONTRACTOR FEE	As progress requires/justifies

BUILDING 2	
LANDSCAPING	Not started
REINFORCING STEEL LABOR	Complete
REINFORCING STEEL MATERIAL	Complete
EXCAVATE FOOTINGS	Complete
PLACE FOOTINGS	Complete
FORM/PLACE LOWER WALLS	Complete
FORM/PLACE LOWER COLUMNS	Complete
PLACE/FINISH SLAB ON GRADE	Complete
FORM/PLACE MID DECK	Complete
FORM/PLACE MID WALLS	Complete
FORM/PLACE MID COLUMNS	Complete
FORM/PLACE UPPER DECK	Complete
PRECAST FLOOR 1	In progress
PRECAST FLOOR 2	In progress
PRECAST FLOOR 3	In progress
PRECAST FLOOR 4	In progress
MASONRY CMU	Substantially complete
THIN BRICK VENEER	Not started
GRANITE	Not started
STEEL	Complete
FINISH CARPENTRY	Not started
FIREPROOFING	Complete
INSULATION	Substantially complete
ROOFING	Substantially complete
WATERPROOFING	Substantially complete
STUCCO	Brown and finish in progress at varying areas of the exterior
WINDOWS	Frames installed; glass in progress and near completion
STOREFRONT DOORS	In progress
LGMF/DRYWALL	Exterior board complete; Interior board near completion, with common area drywall taping near completion
FLOORING	Not started
PAINTING	Not started
ELEVATORS	Not started
MECH. MOBILIZATION	As progress requires/justifies
MECH. SUBMITTALS	As progress requires/justifies
MECH. GENERAL CONDITIONS	As progress requires/justifies
MECH. CLOSEOUT DOCUMENTS	As progress requires/justifies
HVAC PERMIT	As progress requires/justifies
HVAC PRE-ROCK/LINE SET PIPE	Substantially complete
HVAC EQUIP/FSD MATERIALS	In progress
HVAC ROUGH DUCT	In progress
HVAC SET EQUIPMENT	Not started
HVAC SET TRIM	Not started
HVAC FSD - DD TESTING	Not started
HVAC START UP	Not started

PLUMBING PERMIT	As progress requires/justifies
EXCAVATION/BACKFILL	Substantially complete
W/G SANITARY PIPING	Substantially complete
W/G STORM PIPING	Substantially complete
PRECAST STRUCTURES	Not started
BLDG. WATER SERVICE	Substantially complete
SLEEVES/INSERTS	Substantially complete
A/G WASTE & VENT	Substantially complete
DRAINS/CARRIERS	Substantially complete
A/G STORM PIPING	Substantially complete
A/G DOMESTIC WATER	Substantially complete
PLUMBING TESTING	In progress
PLUMBING FIXTURES	Not started
PLUMBING EQUIPMENT	In progress
PLBG. INSULATION - FIRESTOP	Substantially complete
ELECTRICAL ENGINEERING	As progress requires/justifies
ELECTRICAL MOBILIZATION	As progress requires/justifies
OFFICE TRAILER/ADMIN 24 Mos	As progress requires/justifies
PRJT. ENG. CAD, PRJT. ASST.	As progress requires/justifies
ELECTRICAL PERMITS	As progress requires/justifies
SUBMITTALS	As progress requires/justifies
SUPERVISION/PLANNING/COORD	As progress requires/justifies
LIGHT FIXTURE PACKAGE	Stored
DISTRIBUTION PACKAGE	Rough-in substantially complete
LOW VOLT SYS FA, CCTV, CA	Rough-in substantially complete
2nd SUBLEVEL GAR UG & DECK	Substantially complete
1st SUBLEVEL GAR UG & DECK	Substantially complete
1st FLOOR ROUGH & TRIM	In progress
2nd FLOOR ROUGH & TRIM	In progress
3rd FLOOR ROUGH & TRIM	In progress
4th FLOOR ROUGH & TRIM	In progress
ROOF PLAN	In progress
APCO CONTRACTOR FEE	As progress requires/justifies

BUILDING 3	
LANDSCAPING	Not started
REINFORCING STEEL LABOR	Substantially complete
REINFORCING STEEL MATERIAL	Substantially complete
EXCAVATE FOOTINGS	Complete
PLACE FOOTINGS	Complete
FORM/PLACE LOWER WALLS	Complete
FORM/PLACE LOWER COLUMNS	Complete
PLACE/FINISH SLAB ON GRADE	Complete
FORM/PLACE MID DECK	Complete
FORM/PLACE MID WALLS	Complete
FORM/PLACE MID COLUMNS	Complete
FORM/PLACE UPPER DECK	Complete
PRECAST FLOOR 1	Not started
PRECAST FLOOR 2	Not started
PRECAST FLOOR 3	Not started
PRECAST FLOOR 4	Not started
MASONRY CMU	Not started
THIN BRICK VENEER	Not started
GRANITE	Not started
STEEL	Complete
FINISH CARPENTRY	Not started
FIREPROOFING	Complete
INSULATION	In progress
ROOFING	Substantially complete
WATERPROOFING	Below grade perimeter walls substantially complete; backfilling in progress
STUCCO	Lath started
WINDOWS	Frames substantially complete and glass in progress; additional materials stored and in progress
STOREFRONT DOORS	Frames substantially complete and glass in progress; additional materials stored and in progress
LGMF/DRYWALL	In progress
FLOORING	Not started
PAINTING	Not started
ELEVATORS	Not started
MECH. MOBILIZATION	As progress requires/justifies
MECH. SUBMITTALS	As progress requires/justifies
MECH. GENERAL CONDITIONS	As progress requires/justifies
MECH. CLOSEOUT DOCUMENTS	As progress requires/justifies
HVAC PERMIT	As progress requires/justifies
HVAC PRE-ROCK/LINE SET PIPING	In progress
HVAC EQUIP/FSD MATERIALS	In progress
HVAC ROUGH DUCT	In progress
HVAC SET EQUIPMENT	Not started
HVAC SET TRIM	Not started
HVAC FSD - DD TESTING	Not started
HVAC START UP	Not started

PLUMBING PERMIT	As progress requires/justifies
EXCAVATION/BACKFILL	Substantially complete
U/G SANITARY PIPING	Substantially complete
U/G STORM PIPING	Substantially complete
PRECAST STRUCTURES	Not started
BLDG. WATER SERVICE	Substantially complete
SLEEVES/INSERTS	Substantially complete
A/G WASTE & VENT	In progress
DRAINS/CARRIERS	In progress
A/G STORM PIPING	Substantially complete
A/G DOMESTIC WATER	In progress
PLUMBING TESTING	In progress
PLUMBING FIXTURES	Not started
PLUMBING EQUIPMENT	In progress
INSULATION - FIRESTOP	In progress
ELECTRICAL ENGINEERING	As progress requires/justifies
ELECTRICAL MOBILIZATION	As progress requires/justifies
OFFICE TRAILER/ADMIN 24 Mos	As progress requires/justifies
PRJT. ENG, CAD, PRJT. ASST.	As progress requires/justifies
ELECTRICAL PERMITS	As progress requires/justifies
SUBMITTALS	As progress requires/justifies
SUPERVISION/PLANNING/COORD	As progress requires/justifies
LIGHT FIXTURE PACKAGE	Stored on site
DISTRIBUTION PACKAGE	Rough-In In progress
LOW VOLT SYS FA, CCTV, CA	Rough-In In progress
2nd SUBLEVEL GAR UG & DECK	Substantially complete
1st SUBLEVEL GAR UG & DECK	Substantially complete
1st FLOOR ROUGH & TRIM	In progress
2nd FLOOR ROUGH & TRIM	In progress
3rd FLOOR ROUGH & TRIM	In progress
4th FLOOR ROUGH & TRIM	Not started
ROOF PLAN	Not started
APCO CONTRACTOR FEE	As progress requires/justifies

BUILDING 7	
LANDSCAPE	Not started
REINFORCING STEEL LABOR	Complete through the ninth level and tenth level in progress
REINFORCING STEEL MATERIAL	Complete through the ninth level and tenth level in progress
EXCAVATE FOOTINGS	Substantially complete
PLACE FOOTINGS	Substantially complete
FORM/PLACE WALLS	Substantially complete
FORM/PLACE COLUMNS	Substantially complete
PLACE SLAB ON GRADE	Substantially complete
FORM/PLACE DECK	Substantially complete
PLACE 2ND FLOOR	Substantially complete
PLACE 3RD FLOOR	Substantially complete
PLACE 4TH FLOOR	Substantially complete
PLACE 5TH FLOOR	Substantially complete
PLACE 6TH FLOOR	Substantially complete
PLACE 7TH FLOOR	Substantially complete
PLACE 8TH FLOOR	Substantially complete
PLACE 9TH FLOOR/ROOF	Substantially complete
MASONRY CMU	Not started
GRANITE	Not started
STEEL	Near completion - roof trusses and decking in progress
MISC STEEL	Fabricated steel stairs, landings, railings stored on site; installation in progress
FINISH CARPENTRY	Not started
FIREPROOFING	Complete through the ninth level; tenth in progress
INSULATION	Not started
ROOFING	Not started
WATERPROOFING	Below grade perimeter walls substantially complete and backfilled
GLASS/GLAZING	Draw for deposit/stored/fabricated materials?
LGMF/DRYWALL	Framing in progress through ninth floor; fire separation drywall and taping in progress on second, third and fourth floors
FLOORING	Not started
PAINTING	Not started
APPLIANCES	Not started
ELEVATORS	Not started
MECH. MOBILIZATION	As progress requires/justifies
MECH. SUBMITTALS	As progress requires/justifies
MECH. GENERAL CONDITIONS	As progress requires/justifies
MECH. CLOSEOUT DOCUMENTS	As progress requires/justifies
HVAC FIRST FLOOR	
PERMIT	As progress requires/justifies
PRE-ROCK/LINE SET PIPING	In progress
FAU MATERIALS	In progress
ROUGH DUCT	In progress
CONDENSER MATERIALS	Not started
SET CONDENSERS	Not started
SET TRIM	Not started
START UP	Not started

HVAC SECOND FLOOR	
PRE-ROCK/LINE SET PIPING	In progress
FAU MATERIALS	In progress
ROUGH DUCT	In progress
CONDENSER MATERIALS	Not started
SET CONDENSERS	Not started
SET TRIM	Not started
START UP	Not started
HVAC THIRD FLOOR	
PRE-ROCK/LINE SET PIPING	In progress
FAU MATERIALS	In progress
ROUGH DUCT	In progress
CONDENSER MATERIALS	Not started
SET CONDENSERS	Not started
SET TRIM	Not started
START UP	Not started
HVAC FOURTH FLOOR	
PRE-ROCK/LINE SET PIPING	In progress
FAU MATERIALS	In progress
ROUGH DUCT	In progress
CONDENSER MATERIALS	Not started
SET CONDENSERS	Not started
SET TRIM	Not started
START UP	Not started
HVAC FIFTH FLOOR	
PRE-ROCK/LINE SET PIPING	In progress
FAU MATERIALS	In progress
ROUGH DUCT	In progress
CONDENSER MATERIALS	Not started
SET CONDENSERS	Not started
SET TRIM	Not started
START UP	Not started
HVAC SIXTH FLOOR	
PRE-ROCK/LINE SET PIPING	In progress
FAU MATERIALS	In progress
ROUGH DUCT	In progress
CONDENSER MATERIALS	Not started
SET CONDENSERS	Not started
SET TRIM	Not started
START UP	Not started
HVAC SEVENTH FLOOR	
PRE-ROCK/LINE SET PIPING	In progress
FAU MATERIALS	In progress
ROUGH DUCT	In progress
CONDENSER MATERIALS	Not started
SET CONDENSERS	Not started
SET TRIM	Not started
START UP	Not started

HVAC EIGHTH FLOOR	
PRE-ROCK/LINE SET PIPING	In progress
FAU MATERIALS	In progress
ROUGH DUCT	In progress
CONDENSER MATERIALS	Not started
SET CONDENSERS	Not started
SET TRIM	Not started
START UP	Not started
HVAC NINTH FLOOR	
PRE-ROCK/LINE SET PIPING	In progress
FAU MATERIALS	In progress
ROUGH DUCT	In progress
CONDENSER MATERIALS	Not started
SET CONDENSERS	Not started
SET TRIM	Not started
START UP	Not started
HVAC COMMON AREA/ROOF	
PRE-ROCK/LINE SET PIPING	In progress
FAU-RTU MATERIALS	In progress
ROUGH DUCT	In progress
RTU MATERIALS	Deposit/stored/fabrication
SET EQUIPMENT	Not started
SET TRIM	Not started
START UP	Not started
PLUMBING BELOW PODIUM	
PERMIT	As progress requires/justifies
EXCAVATION/BACKFILL	Substantially complete
U/G SANITARY PIPING	Substantially complete
U/G STORM PIPING	Substantially complete
PRECAST STRUCTURES	Not started
BLDG WATER SERVICE	Substantially complete
PLUMBING FIRST FLOOR	
A/G WASTE & VENT	In progress
DRAINS/CARRIERS	In progress
SLEEVES/INSERTS	Substantially complete
A/G STORM PIPING	In progress
A/G DOMESTIC WATER	In progress
A/G GAS PIPING	In progress
TUBS & HOOKUPS	In progress
PLUMBING FIXTURES	In progress
PLUMBING EQUIPMENT	Not started
CONDENSATE PIPING	Not started
PLUMBING TESTING	Not started
PLUMBING IDENTIFICATION	Not started
INSULATION - FIRESTOP	In progress

PLUMBING SECOND FLOOR	
A/G WASTE & VENT	In progress
DRAINS/CARRIERS	In progress
SLEEVES/INSERTS	Substantially complete
A/G STORM PIPING	In progress
A/G DOMESTIC WATER	In progress
A/G GAS PIPING	In progress
TUBS & HOOKUPS	In progress
PLUMBING FIXTURES	In progress
PLUMBING EQUIPMENT	Not started
CONDENSATE PIPING	Not started
PLUMBING TESTING	Not started
PLUMBING IDENTIFICATION	Not started
INSULATION - FIRESTOP	In progress
PLUMBING THIRD FLOOR	
A/G WASTE & VENT	In progress
DRAINS/CARRIERS	In progress
SLEEVES/INSERTS	Substantially complete
A/G STORM PIPING	In progress
A/G DOMESTIC WATER	In progress
A/G GAS PIPING	In progress
TUBS & HOOKUPS	In progress
PLUMBING FIXTURES	In progress
PLUMBING EQUIPMENT	Not started
CONDENSATE PIPING	Not started
PLUMBING TESTING	Not started
PLUMBING IDENTIFICATION	Not started
INSULATION - FIRESTOP	In progress
PLUMBING FOURTH FLOOR	
A/G WASTE & VENT	In progress
DRAINS/CARRIERS	In progress
SLEEVES/INSERTS	Substantially complete
A/G STORM PIPING	In progress
A/G DOMESTIC WATER	In progress
A/G GAS PIPING	In progress
TUBS & HOOKUPS	In progress
PLUMBING FIXTURES	In progress
PLUMBING EQUIPMENT	Not started
CONDENSATE PIPING	Not started
PLUMBING TESTING	Not started
PLUMBING IDENTIFICATION	Not started
INSULATION - FIRESTOP	In progress

PLUMBING FIFTH FLOOR	
A/G WASTE & VENT	In progress
DRAINS/CARRIERS	In progress
SLEEVES/INSERTS	Substantially complete
A/G STORM PIPING	In progress
A/G DOMESTIC WATER	In progress
A/G GAS PIPING	In progress
TUBS & HOOKUPS	In progress
PLUMBING FIXTURES	In progress
PLUMBING EQUIPMENT	Not started
CONDENSATE PIPING	Not started
PLUMBING TESTING	Not started
PLUMBING IDENTIFICATION	Not started
INSULATION - FIRESTOP	In progress
PLUMBING SIXTH FLOOR	
A/G WASTE & VENT	In progress
DRAINS/CARRIERS	In progress
SLEEVES/INSERTS	Substantially complete
A/G STORM PIPING	In progress
A/G DOMESTIC WATER	In progress
A/G GAS PIPING	In progress
TUBS & HOOKUPS	In progress
PLUMBING FIXTURES	In progress
PLUMBING EQUIPMENT	Not started
CONDENSATE PIPING	Not started
PLUMBING TESTING	Not started
PLUMBING IDENTIFICATION	Not started
INSULATION - FIRESTOP	In progress
PLUMBING SEVENTH FLOOR	
A/G WASTE & VENT	In progress
DRAINS/CARRIERS	In progress
SLEEVES/INSERTS	Substantially complete
A/G STORM PIPING	In progress
A/G DOMESTIC WATER	In progress
A/G GAS PIPING	In progress
TUBS & HOOKUPS	In progress
PLUMBING FIXTURES	In progress
PLUMBING EQUIPMENT	Not started
CONDENSATE PIPING	Not started
PLUMBING TESTING	Not started
PLUMBING IDENTIFICATION	Not started
INSULATION - FIRESTOP	In progress
PLUMBING EIGHTH FLOOR	
A/G WASTE & VENT	In progress
DRAINS/CARRIERS	In progress
SLEEVES/INSERTS	Substantially complete
A/G STORM PIPING	In progress
A/G DOMESTIC WATER	In progress
A/G GAS PIPING	In progress
TUBS & HOOKUPS	In progress
PLUMBING FIXTURES	In progress
PLUMBING EQUIPMENT	Not started
CONDENSATE PIPING	Not started
PLUMBING TESTING	Not started
PLUMBING IDENTIFICATION	Not started
INSULATION - FIRESTOP	In progress

PLUMBING NINTH FLOOR	
A/G WASTE & VENT	In progress
DRAINS/CARRIERS	In progress
SLEEVES/INSERTS	Substantially complete
A/G STORM PIPING	In progress
A/G DOMESTIC WATER	Not started
A/G GAS PIPING	Not started
TUBS & HOOKUPS	Not started
PLUMBING FIXTURES	Not started
PLUMBING EQUIPMENT	Not started
CONDENSATE PIPING	Not started
PLUMBING TESTING	Not started
PLUMBING IDENTIFICATION	Not started
INSULATION - FIRESTOP	Not started
ELECTRICAL	
ELECTRICAL ENGINEERING	As progress requires/justifies
ELECTRICAL MOBILIZATION	As progress requires/justifies
OFFICE TRAILER/ADMIN 24 Mos	As progress requires/justifies
PRJT. ENG, CAD, PRJT. ASST.	As progress requires/justifies
ELECTRICAL PERMITS	As progress requires/justifies
SUBMITTALS	As progress requires/justifies
SUPERVISION/PLANNING/COORD	As progress requires/justifies
LIGHT FIXTURE PACKAGE	Stored on site
DISTRIBUTION PACKAGE	Rough-in in progress
LOW VOLT SYS FA, CCTV, CA	Rough-in in progress
GENERATOR	Not started
UNDERSLAB BRANCH CONDUIT	Substantially complete
GARAGE & 1st FLR CONDUIT &	Substantially complete
1st FLR RGH WALLS/CEILINGS	In progress
1st FLR DEVICE & FIXTURE TRIM	Not started
2nd FLR RGH WALLS/CEILINGS	In progress
2nd FLR DEVICE & FIXTURE TRIM	Not started
3rd FLR RGH WALLS/CEILINGS	In progress
3rd FLR DEVICE & FIXTURE TRIM	Not started
4th FLR RGH WALLS/CEILINGS	In progress
4th FLR DEVICE & FIXTURE TRIM	Not started
5th FLR RGH WALLS/CEILINGS	In progress
5th FLR DEVICE & FIXTURE TRIM	Not started
6th FLR RGH WALLS/CEILINGS	In progress
6th FLR DEVICE & FIXTURE TRIM	Not started
7th FLR RGH WALLS/CEILINGS	In progress
7th FLR DEVICE & FIXTURE TRIM	Not started
8th FLR RGH WALLS/CEILINGS	In progress
8th FLR DEVICE & FIXTURE TRIM	Not started
9th FLR RGH WALLS/CEILINGS	Not started
9th FLR DEVICE & FIXTURE TRIM	Not started
APCO CONTRACTOR FEE	As progress requires/justifies

BUILDING 8	
LANDSCAPING	Not started
REINFORCING STEEL LABOR	Complete
REINFORCING STEEL MATERIAL	Complete
EXCAVATE FOOTINGS	Complete
PLACE FOOTINGS	Complete
FORM/PLACE WALLS	Complete
FORM/PLACE COLUMNS	Complete
PLACE SLAB ON GRADE	Complete
FORM/PLACE DECK	Complete
LTWEIGHT CONCRETE	Not started
PRECAST FLOOR 1	Not started
PRECAST FLOOR 2	Not started
PRECAST FLOOR 3	Not started
PRECAST FLOOR 4	Not started
MASONRY CMU	Not started
THIN BRICK VENEER	Not started
GRANITE	Not started
MISC. STEEL	Not started
WOOD FRAMING L1 LABOR/EQU	Complete
WOOD FRAMING L1 MATERIAL	Complete
WOOD FRAMING L2 LABOR/EQU	Complete
WOOD FRAMING L2 MATERIAL	Complete
WOOD FRAMING L3 LABOR/EQU	Complete
WOOD FRAMING L3 MATERIAL	Complete
WOOD FRAMING L4 LABOR/EQU	Complete
WOOD FRAMING L4 MATERIAL	Complete
WOOD FRAMING RF LABOR/EQU	Complete
WOOD FRAMING RF MATERIAL	Complete
FINISH CARPENTRY	Not started
INSULATION	Substantially complete
ROOFING	Substantially complete
WATERPROOFING	Below grade perimeter walls substantially complete and backfilled
STUCCO	Scratch and brown coat in progress
WINDOWS	Substantially complete
DRYWALL	Wall and ceiling drywall hanging in progress
FLOORING	Not started
PAINTING	Not started
APPLIANCES	Not started
ELEVATORS	Not started
MECH. MOBILIZATION	As progress requires/justifies
MECH. SUBMITTALS	As progress requires/justifies
MECH. GENERAL CONDITIONS	As progress requires/justifies
MECH. CLOSEOUT DOCUMENTS	As progress requires/justifies

HVAC FIRST FLOOR	
PERMIT	As progress requires/justifies
PRE-ROCK/LINE SET PIPING	Substantially complete
FAU MATERIALS	Not started
ROUGH DUCT	In progress
CONDENSER MATERIALS	Rooftop units substantially installed
SET CONDENSERS	Rooftop units substantially installed
SET TRIM	Not started
START UP	Not started
HVAC SECOND FLOOR	
PRE-ROCK/LINE SET PIPING	Substantially complete
FAU MATERIALS	Not started
ROUGH DUCT	In progress
CONDENSER MATERIALS	Rooftop units substantially installed
SET CONDENSERS	Rooftop units substantially installed
SET TRIM	Not started
START UP	Not started
HVAC THIRD FLOOR	
PRE-ROCK/LINE SET PIPING	Substantially complete
FAU MATERIALS	Not started
ROUGH DUCT	In progress
CONDENSER MATERIALS	Rooftop units substantially installed
SET CONDENSERS	Rooftop units substantially installed
SET TRIM	Not started
START UP	Not started
HVAC FOURTH FLOOR	
PRE-ROCK/LINE SET PIPING	Substantially complete
FAU MATERIALS	Not started
ROUGH DUCT	In progress
CONDENSER MATERIALS	Rooftop units substantially installed
SET CONDENSERS	Rooftop units substantially installed
SET TRIM	Not started
START UP	Not started
HVAC COMMON AREA/ROOF	
PRE-ROCK/LINE SET PIPING	In progress
FAU MATERIALS	Not started
ROUGH DUCT	In progress
RTU MATERIALS	In progress
SET EQUIPMENT	In progress
SET TRIM	Not started
START UP	Not started

PLUMBING BELOW PODIUM	
PERMIT	As progress requires/justifies
EXCAVATION/BACKFILL	Substantially complete
U/G SANITARY PIPING	Substantially complete
U/G STORM PIPING	Substantially complete
PRECAST STRUCTURES	Not started
PLUMBING FIRST FLOOR	
A/G WASTE & VENT	Substantially complete
DRAINS/CARRIERS	Substantially complete
SLEEVES/INSERTS	Substantially complete
A/G STORM PIPING	Substantially complete
A/G DOMESTIC WATER	Substantially complete
A/G GAS PIPING	Substantially complete
TUBS & HOOKUPS	Substantially complete
PLUMBING FIXTURES	Not started
PLUMBING EQUIPMENT	Not started
CONDENSATE PIPING	Substantially complete
PLUMBING TESTING	In progress
PLUMBING IDENTIFICATION	Not started
INSULATION - FIRESTOP	In progress
PLUMBING SECOND FLOOR	
A/G WASTE & VENT	Substantially complete
DRAINS/CARRIERS	Substantially complete
A/G STORM PIPING	Substantially complete
A/G DOMESTIC WATER	Substantially complete
A/G GAS PIPING	Substantially complete
TUBS & HOOKUPS	Substantially complete
PLUMBING FIXTURES	Not started
PLUMBING EQUIPMENT	Not started
CONDENSATE PIPING	Substantially complete
PLUMBING TESTING	In progress
PLUMBING IDENTIFICATION	Not started
INSULATION - FIRESTOP	In progress
PLUMBING THIRD FLOOR	
A/G WASTE & VENT	Substantially complete
DRAINS/CARRIERS	Substantially complete
A/G STORM PIPING	Substantially complete
A/G DOMESTIC WATER	Substantially complete
A/G GAS PIPING	Substantially complete
TUBS & HOOKUPS	Substantially complete
PLUMBING FIXTURES	Not started
PLUMBING EQUIPMENT	Not started
CONDENSATE PIPING	Substantially complete
PLUMBING TESTING	In progress
PLUMBING IDENTIFICATION	Not started
INSULATION - FIRESTOP	In progress

PLUMBING FOURTH FLOOR	
A/G WASTE & VENT	Substantially complete
DRAINS/CARRIERS	Substantially complete
A/G STORM PIPING	Substantially complete
A/G DOMESTIC WATER	Substantially complete
A/G GAS PIPING	Substantially complete
TUBS & HOOKUPS	Substantially complete
PLUMBING FIXTURES	Not started
PLUMBING EQUIPMENT	Not started
CONDENSATE PIPING	Substantially complete
PLUMBING TESTING	In progress
PLUMBING IDENTIFICATION	Not started
INSULATION - FIRESTOP	In progress
ELECTRICAL	
ELECTRICAL ENGINEERING	As progress requires/justifies
ELECTRICAL MOBILIZATION	As progress requires/justifies
OFFICE TRAILER/ADMIN 24 Mos	As progress requires/justifies
PRJT. ENG, CAD, PRJT. ASST.	As progress requires/justifies
ELECTRICAL PERMITS	As progress requires/justifies
SUBMITTALS	As progress requires/justifies
SUPERVISION/PLANNING/COORD	As progress requires/justifies
LIGHT FIXTURE PACKAGE	In progress
DISTRIBUTION PACKAGE	Rough-ins complete
LOW VOLT SYS FA, CCTV, CA	Rough-ins complete
UNDERSLAB BRANCH CONDUIT	Substantially complete
GARAGE & 1st FLR CONDUIT &	Substantially complete
1st FLR RGH WALLS/CEILINGS	Complete
1st FLR DEVICE & FIXTURE TRIM	Not started
2nd FLR RGH WALLS/CEILINGS	Complete
2nd FLR DEVICE & FIXTURE TRIM	Not started
3rd FLR RGH WALLS/CEILINGS	Complete
3rd FLR DEVICE & FIXTURE TRIM	Not started
4th FLR RGH WALLS/CEILINGS	Complete
4th FLR DEVICE & FIXTURE TRIM	Not started
APCO CONTRACTOR FEE	As progress requires/justifies

BUILDING 9	
LANDSCAPING	Not started
REINFORCING STEEL LABOR	Complete
REINFORCING STEEL MATERIAL	Complete
EXCAVATE FOOTINGS	Complete
PLACE FOOTINGS	Complete
FORM/PLACE WALLS	Complete
FORM/PLACE COLUMNS	Complete
PLACE SLAB ON GRADE	Complete
FORM/PLACE DECK	Complete
LTWT CONCRETE	Not started
PRECAST FLOOR 1	Not started
PRECAST FLOOR 2	Not started
PRECAST FLOOR 3	Not started
PRECAST FLOOR 4	Not started
MASONRY CMU	Not started
THIN BRICK VENEER	Not started
GRANITE	Not started
MISC. STEEL	Not started
WOOD FRAMING L1 LABOR/EQ	Complete
WOOD FRAMING L1 MATERIAL	Complete
WOOD FRAMING L2 LABOR/EQ	Complete
WOOD FRAMING L2 MATERIAL	Complete
WOOD FRAMING L3 LABOR/EQ	Complete
WOOD FRAMING L3 MATERIAL	Complete
WOOD FRAMING L4 LABOR/EQ	Complete
WOOD FRAMING L4 MATERIAL	Complete
WOOD FRAMING RF LABOR/EQ	Complete
WOOD FRAMING RF MATERIAL	Complete
FINISH CARPENTRY	Not started
INSULATION	Substantially complete
ROOFING	Substantially complete
WATERPROOFING	Below grade perimeter walls substantially complete and backfilled
STUCCO	Scratch and brown coat in progress
WINDOWS	Substantially complete
DRYWALL	Wall and ceiling drywall hanging in progress
FLOORING	Not started
PAINTING	Not started
APPLIANCES	Not started
ELEVATORS	Not started
MECH. MOBILIZATION	As progress requires/justifies
MECH. SUBMITTALS	As progress requires/justifies
MECH. GENERAL CONDITIONS	As progress requires/justifies
MECH. CLOSEOUT DOCUMENTS	As progress requires/justifies

HVAC FIRST FLOOR	
PERMIT	As progress requires/justifies
PRE-ROCK/LINE SET PIPING	Substantially complete
FAU MATERIALS	Not started
ROUGH DUCT	In progress
CONDENSER MATERIALS	Rooftop units substantially installed
SET CONDENSERS	Rooftop units substantially installed
SET TRIM	Not started
START UP	Not started
HVAC SECOND FLOOR	
PRE-ROCK/LINE SET PIPING	Substantially complete
FAU MATERIALS	Not started
ROUGH DUCT	In progress
CONDENSER MATERIALS	Rooftop units substantially installed
SET CONDENSERS	Rooftop units substantially installed
SET TRIM	Not started
START UP	Not started
HVAC THIRD FLOOR	
PRE-ROCK/LINE SET PIPING	Substantially complete
FAU MATERIALS	Not started
ROUGH DUCT	In progress
CONDENSER MATERIALS	Rooftop units substantially installed
SET CONDENSERS	Rooftop units substantially installed
SET TRIM	Not started
START UP	Not started
HVAC FOURTH FLOOR	
PRE-ROCK/LINE SET PIPING	Substantially complete
FAU MATERIALS	Not started
ROUGH DUCT	In progress
CONDENSER MATERIALS	Rooftop units substantially installed
SET CONDENSERS	Rooftop units substantially installed
SET TRIM	Not started
START UP	Not started
HVAC COMMON AREA/ROOF	
PRE-ROCK/LINE SET PIPING	In progress
FAU-RTU MATERIALS	Not started
ROUGH DUCT	In progress
RTU MATERIALS	In progress
SET EQUIPMENT	In progress
SET TRIM	Not started
START UP	Not started

PLUMBING BELOW PODIUM	
PERMIT	As progress requires/justifies
EXCAVATION/BACKFILL	Substantially complete
U/G SANITARY PIPING	Substantially complete
U/G STORM PIPING	Substantially complete
PRECAST STRUCTURES	Not started
PLUMBING FIRST FLOOR	
A/G WASTE & VENT	Substantially complete
DRAINS/CARRIERS	Substantially complete
SLEEVES/INSERTS	Substantially complete
A/G STORM PIPING	Substantially complete
A/G DOMESTIC WATER	Substantially complete
A/G GAS PIPING	Substantially complete
TUBS & HOOKUPS	Substantially complete
PLUMBING FIXTURES	Not started
PLUMBING EQUIPMENT	Not started
CONDENSATE PIPING	Substantially complete
PLUMBING TESTING	In progress
PLUMBING IDENTIFICATION	Not started
INSULATION - FIRESTOP	In progress
PLUMBING SECOND FLOOR	
A/G WASTE & VENT	Substantially complete
DRAINS/CARRIERS	Substantially complete
A/G STORM PIPING	Substantially complete
A/G DOMESTIC WATER	Substantially complete
A/G GAS PIPING	Substantially complete
TUBS & HOOKUPS	Substantially complete
PLUMBING FIXTURES	Not started
PLUMBING EQUIPMENT	Not started
CONDENSATE PIPING	Substantially complete
PLUMBING TESTING	In progress
PLUMBING IDENTIFICATION	Not started
INSULATION - FIRESTOP	In progress
PLUMBING THIRD FLOOR	
A/G WASTE & VENT	Substantially complete
DRAINS/CARRIERS	Substantially complete
A/G STORM PIPING	Substantially complete
A/G DOMESTIC WATER	Substantially complete
A/G GAS PIPING	Substantially complete
TUBS & HOOKUPS	Substantially complete
PLUMBING FIXTURES	Not started
PLUMBING EQUIPMENT	Not started
CONDENSATE PIPING	Substantially complete
PLUMBING TESTING	In progress
PLUMBING IDENTIFICATION	Not started
INSULATION - FIRESTOP	In progress

PLUMBING FOURTH FLOOR	
A/G WASTE & VENT	Substantially complete
DRAINS/CARRIERS	Substantially complete
A/G STORM PIPING	Substantially complete
A/G DOMESTIC WATER	Substantially complete
A/G GAS PIPING	Substantially complete
TUBS & HOOKUPS	Substantially complete
PLUMBING FIXTURES	Not started
PLUMBING EQUIPMENT	Not started
CONDENSATE PIPING	Substantially complete
PLUMBING TESTING	In progress
PLUMBING IDENTIFICATION	Not started
INSULATION - FIRESTOP	In progress
ELECTRICAL	
ELECTRICAL ENGINEERING	As progress requires/justifies
ELECTRICAL MOBILIZATION	As progress requires/justifies
OFFICE TRAILER/ADMIN 24 Mos	As progress requires/justifies
PRJT. ENG, CAD, PRJT. ASST.	As progress requires/justifies
ELECTRICAL PERMITS	As progress requires/justifies
SUBMITTALS	As progress requires/justifies
SUPERVISION/PLANNING/COORD	As progress requires/justifies
LIGHT FIXTURE PACKAGE	In progress
DISTRIBUTION PACKAGE	Rough-ins complete
LOW VOLT SYS FA, CCTV, CA	Rough-ins complete
UNDERSLAB BRANCH CONDUIT	Substantially complete
GARAGE & 1st FLR CONDUIT &	Substantially complete
1st FLR RGH WALLS/CEILINGS	Complete
1st FLR DEVICE & FIXTURE TRIM	Not started
2nd FLR RGH WALLS/CEILINGS	Complete
2nd FLR DEVICE & FIXTURE TRIM	Not started
3rd FLR RGH WALLS/CEILINGS	Complete
3rd FLR DEVICE & FIXTURE TRIM	Not started
4th FLR RGH WALLS/CEILINGS	Complete
4th FLR DEVICE & FIXTURE TRIM	Not started
APCO CONTRACTOR FEE	As progress requires/justifies

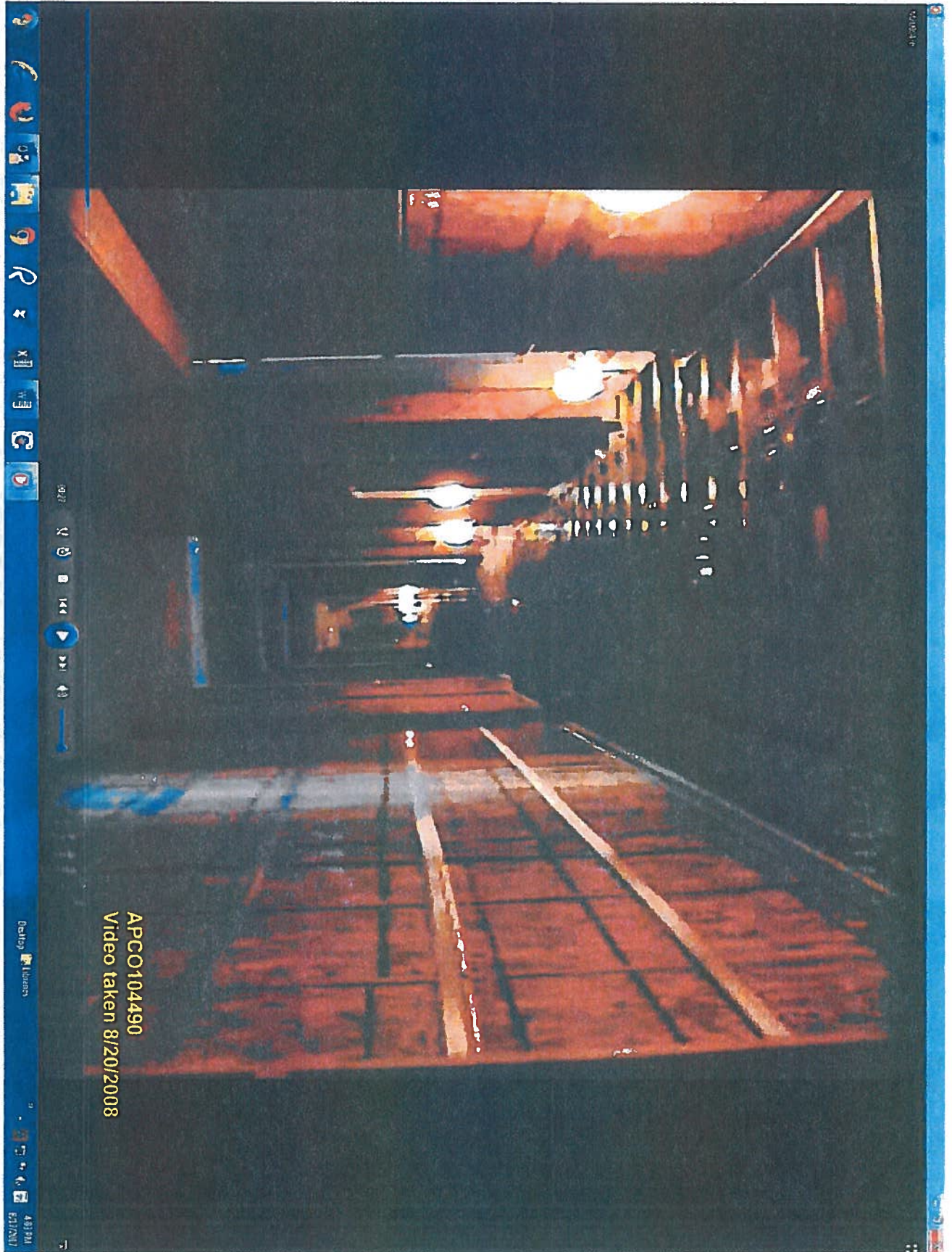
NCS Loan Budget Item Status/Activity

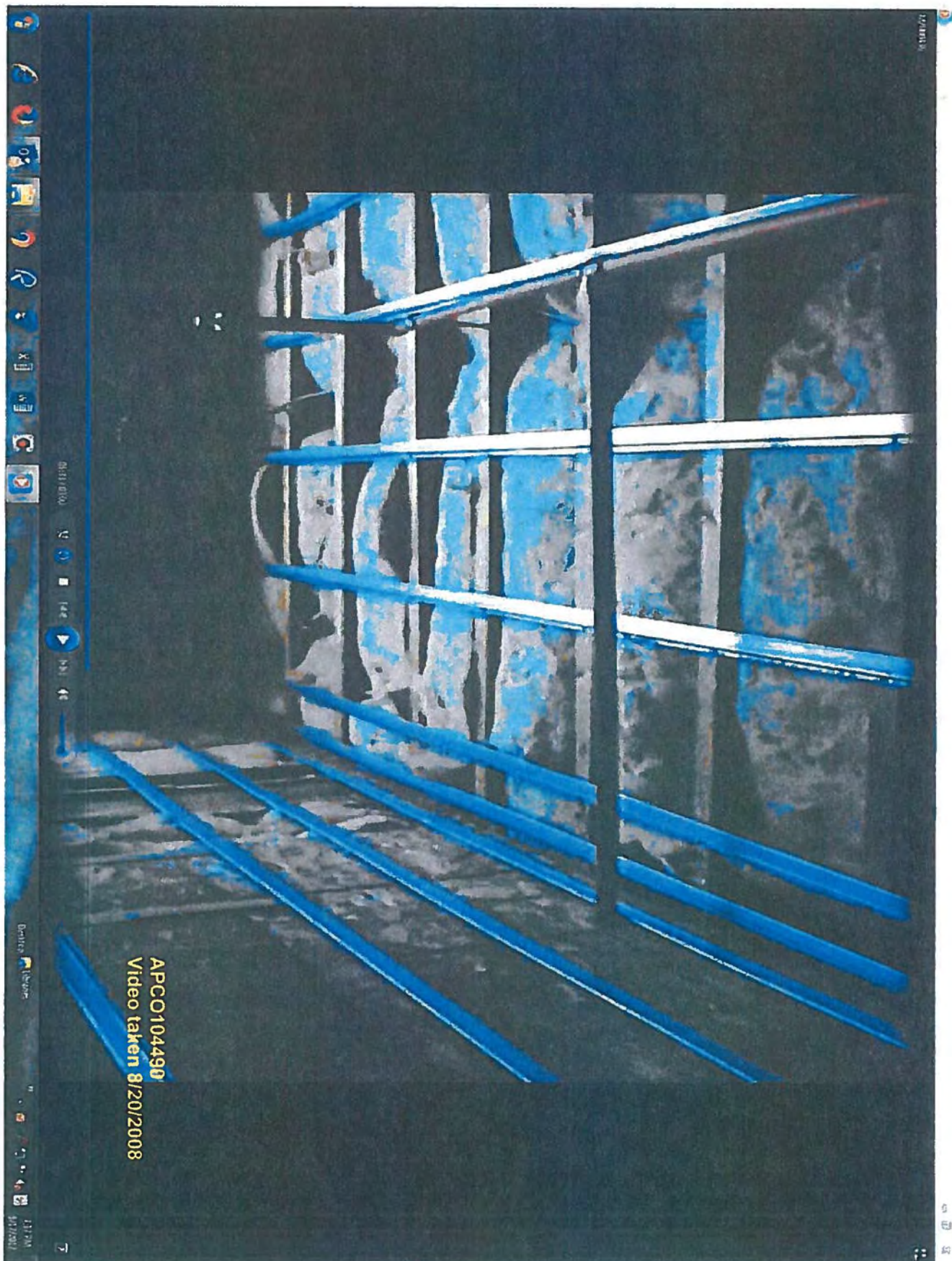
Loan Budget Item	Original Loan Budget Amount	APCO Request Change Order Amount	Revised Budget Amount	Borrower's Requested Gross This Draw	Retention Withheld This Draw	Borrower's Requested Net This Draw	Borrower's Requested Gross To Date	Retention Withheld To Date	Line Item Balance Remaining Including Retention	Total Percentage Requested	Inspection Percentage Observed
GRADING											
MOBILIZATION	\$ 45,000	\$ -	\$ 45,000	\$ -	\$ -	\$ -	\$ 45,000	\$ 2,250.00	\$ 2,250.00	100.00%	100.00%
SITE PREP/MASS EXCAVATION	\$ 2,559,000	\$ -	\$ 2,559,000	\$ -	\$ -	\$ -	\$ 2,559,000	\$ 127,950.00	\$ 127,950.00	100.00%	100.00%
SITE WATER	\$ 647,000	\$ -	\$ 647,000	\$ -	\$ -	\$ -	\$ 647,000	\$ 31,638.00	\$ 42,118.00	98.41%	99.00%
SITE STORM SEWER	\$ 511,000	\$ -	\$ 511,000	\$ -	\$ -	\$ -	\$ 511,000	\$ 25,039.00	\$ 35,259.00	98.00%	100.00%
SITE SANITARY SEWER	\$ 815,000	\$ -	\$ 815,000	\$ -	\$ -	\$ -	\$ 815,000	\$ 29,520.00	\$ 54,120.00	98.00%	99.00%
INSURANCE	\$ 150,700	\$ -	\$ 150,700	\$ -	\$ -	\$ -	\$ 150,700	\$ 7,535.00	\$ 7,535.00	100.00%	100.00%
SUBTOTAL GRADING	\$ 4,527,700	\$ -	\$ 4,527,700	\$ -	\$ -	\$ -	\$ 4,482,800	\$ 224,130.00	\$ 268,230.00	99.00%	99.71%
ON/OFFSITE IMPROVEMENTS											
OFFSITES RUSSELL PAVING	\$ 222,750	\$ -	\$ 222,750	\$ -	\$ -	\$ -	\$ -	\$ -	\$ 222,750.00	0.00%	0.00%
OFFSITES RUSSELL CURB/GUTTER	\$ 62,000	\$ -	\$ 62,000	\$ -	\$ -	\$ -	\$ -	\$ -	\$ 77,000.00	0.00%	0.00%
OFFSITES SIDEWALKS RUSSELL	\$ 210,000	\$ -	\$ 210,000	\$ -	\$ -	\$ -	\$ -	\$ -	\$ 10,000.00	0.00%	0.00%
ASPHALT PAVING PHASE 1	\$ 269,600	\$ -	\$ 269,600	\$ 8,500.00	\$ 850.00	\$ 7,650.00	\$ 43,078	\$ 4,392.75	\$ 250,065.25	15.17%	28.00%
CURB/GUTTER PHASE 1	\$ 113,020	\$ -	\$ 113,020	\$ -	\$ -	\$ -	\$ -	\$ -	\$ 113,020.00	0.00%	0.00%
SIDEWALKS PHASE 1	\$ 220,000	\$ -	\$ 220,000	\$ -	\$ -	\$ -	\$ -	\$ -	\$ 220,000.00	0.00%	0.00%
BRICK PAVERS PHASE 1	\$ 255,000	\$ -	\$ 221,944	\$ -	\$ -	\$ -	\$ -	\$ -	\$ 221,944.00	0.00%	0.00%
SITE FURNISHINGS PHASE 1	\$ 100,000	\$ -	\$ 100,000	\$ -	\$ -	\$ -	\$ -	\$ -	\$ 100,000.00	0.00%	0.00%
POOLS	\$ 460,000	\$ -	\$ 460,000	\$ -	\$ -	\$ -	\$ -	\$ -	\$ 460,000.00	0.00%	0.00%
ELECTRICAL ENGINEERING	\$ 8,200	\$ -	\$ 8,200	\$ -	\$ -	\$ -	\$ -	\$ -	\$ 8,200.00	0.00%	0.00%
MOBILIZATION	\$ 8,500	\$ -	\$ 8,500	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	0.00%	0.00%
OFFICE TRAILER/ADMIN 24 Mos.	\$ 4,800	\$ -	\$ 4,800	\$ -	\$ -	\$ -	\$ -	\$ -	\$ 4,800.00	0.00%	0.00%
PLUT. ENG. CAD, PRJT. ASST.	\$ 3,000	\$ -	\$ 3,000	\$ -	\$ -	\$ -	\$ -	\$ -	\$ 3,000.00	0.00%	0.00%
ELECTRICAL PERMITS	\$ 2,600	\$ -	\$ 2,600	\$ -	\$ -	\$ -	\$ -	\$ -	\$ 2,600.00	0.00%	0.00%
SUBMITTALS	\$ 400	\$ -	\$ 400	\$ -	\$ -	\$ -	\$ 400	\$ 40.00	\$ 40.00	100.00%	100.00%
SUPERVISION/PLANNING/COORD	\$ 4,800	\$ -	\$ 4,800	\$ -	\$ -	\$ -	\$ -	\$ -	\$ 4,800.00	0.00%	0.00%
FURNISH LANDSCAPE LIGHTING	\$ 157,000	\$ -	\$ 157,000	\$ -	\$ -	\$ -	\$ -	\$ -	\$ 157,000.00	0.00%	0.00%
FURNISH COURTYARD LIGHTING	\$ 40,000	\$ -	\$ 40,000	\$ -	\$ -	\$ -	\$ -	\$ -	\$ 40,000.00	0.00%	0.00%
FURNISH SPORTS LIGHTING	\$ 8,000	\$ -	\$ 8,000	\$ -	\$ -	\$ -	\$ -	\$ -	\$ 8,000.00	0.00%	0.00%
FURNISH PARKING POLE LIGHT	\$ 32,000	\$ -	\$ 32,000	\$ -	\$ -	\$ -	\$ -	\$ -	\$ 32,000.00	0.00%	0.00%
APCO CONTRACTOR FEE	\$ 148,893	\$ -	\$ 148,893	\$ 565.25	\$ 56.53	\$ 508.72	\$ 4,398	\$ 438.07	\$ 145,924.20	2.53%	2.53%
SUBTOTAL ON/OFFSITES	\$ 2,376,553	\$ -	\$ 2,376,553	\$ 9,065.25	\$ 908.53	\$ 8,156.72	\$ 48,726	\$ 4,872.82	\$ 2,077,043.45	2.30%	2.87%
BUILDING 2											
LANDSCAPING	\$ 80,000	\$ -	\$ 80,000	\$ -	\$ -	\$ -	\$ -	\$ -	\$ 90,000.00	0.00%	0.00%
REINFORCING STEEL LABOR	\$ 300,000	\$ -	\$ 340,000	\$ 10,200.00	\$ 1,020.00	\$ 9,180.00	\$ 340,000	\$ 34,000.00	\$ 34,000.00	100.00%	100.00%
REINFORCING STEEL MATERIAL	\$ 380,000	\$ -	\$ 508,813	\$ -	\$ -	\$ -	\$ 508,813	\$ 50,881.25	\$ 50,881.25	100.00%	100.00%
EXCAVATE FOOTINGS	\$ 248,500	\$ -	\$ 248,500	\$ -	\$ -	\$ -	\$ 248,500	\$ 24,850.00	\$ 24,850.00	100.00%	100.00%
PLACE FOOTINGS	\$ 200,000	\$ -	\$ 200,000	\$ -	\$ -	\$ -	\$ -	\$ -	\$ 20,000.00	100.00%	100.00%
FORM/PLACE LOWER WALLS	\$ 300,000	\$ -	\$ 300,000	\$ -	\$ -	\$ -	\$ 300,000	\$ 30,000.00	\$ 30,000.00	100.00%	100.00%
FORM/PLACE LOWER COLUMNS	\$ 85,000	\$ -	\$ 85,000	\$ -	\$ -	\$ -	\$ 85,000	\$ 8,500.00	\$ 8,500.00	100.00%	100.00%
PLACE/FINISH SLAB ON GRADE	\$ 130,000	\$ -	\$ 130,000	\$ -	\$ -	\$ -	\$ 130,000	\$ 13,000.00	\$ 13,000.00	100.00%	100.00%
FORM/PLACE MID DECK	\$ 450,000	\$ -	\$ 450,000	\$ -	\$ -	\$ -	\$ 450,000	\$ 45,000.00	\$ 45,000.00	100.00%	100.00%
FORM/PLACE MID WALLS	\$ 390,000	\$ -	\$ 390,000	\$ -	\$ -	\$ -	\$ 390,000	\$ 39,000.00	\$ 39,000.00	100.00%	100.00%
FORM/PLACE MID COLUMNS	\$ 85,000	\$ -	\$ 85,000	\$ -	\$ -	\$ -	\$ 85,000	\$ 8,500.00	\$ 8,500.00	100.00%	100.00%
FORM/PLACE UPPER DECK	\$ 450,000	\$ -	\$ 475,900	\$ -	\$ -	\$ -	\$ 475,900	\$ 47,590.00	\$ 47,590.00	100.00%	100.00%
PRECAST FLOOR 1	\$ 25,000	\$ -	\$ 25,000	\$ 8,350.00	\$ 835.00	\$ 5,715.00	\$ 12,700	\$ 1,270.00	\$ 13,570.00	50.80%	50.00%
PRECAST FLOOR 2	\$ 25,000	\$ -	\$ 25,000	\$ 8,350.00	\$ 835.00	\$ 5,715.00	\$ 12,700	\$ 1,270.00	\$ 13,570.00	50.80%	50.00%
PRECAST FLOOR 3	\$ 25,000	\$ -	\$ 25,000	\$ 8,350.00	\$ 835.00	\$ 5,715.00	\$ 12,700	\$ 1,270.00	\$ 13,570.00	50.80%	50.00%
PRECAST FLOOR 4	\$ 25,000	\$ -	\$ 25,000	\$ 8,350.00	\$ 835.00	\$ 5,715.00	\$ 12,700	\$ 1,270.00	\$ 13,570.00	50.80%	50.00%

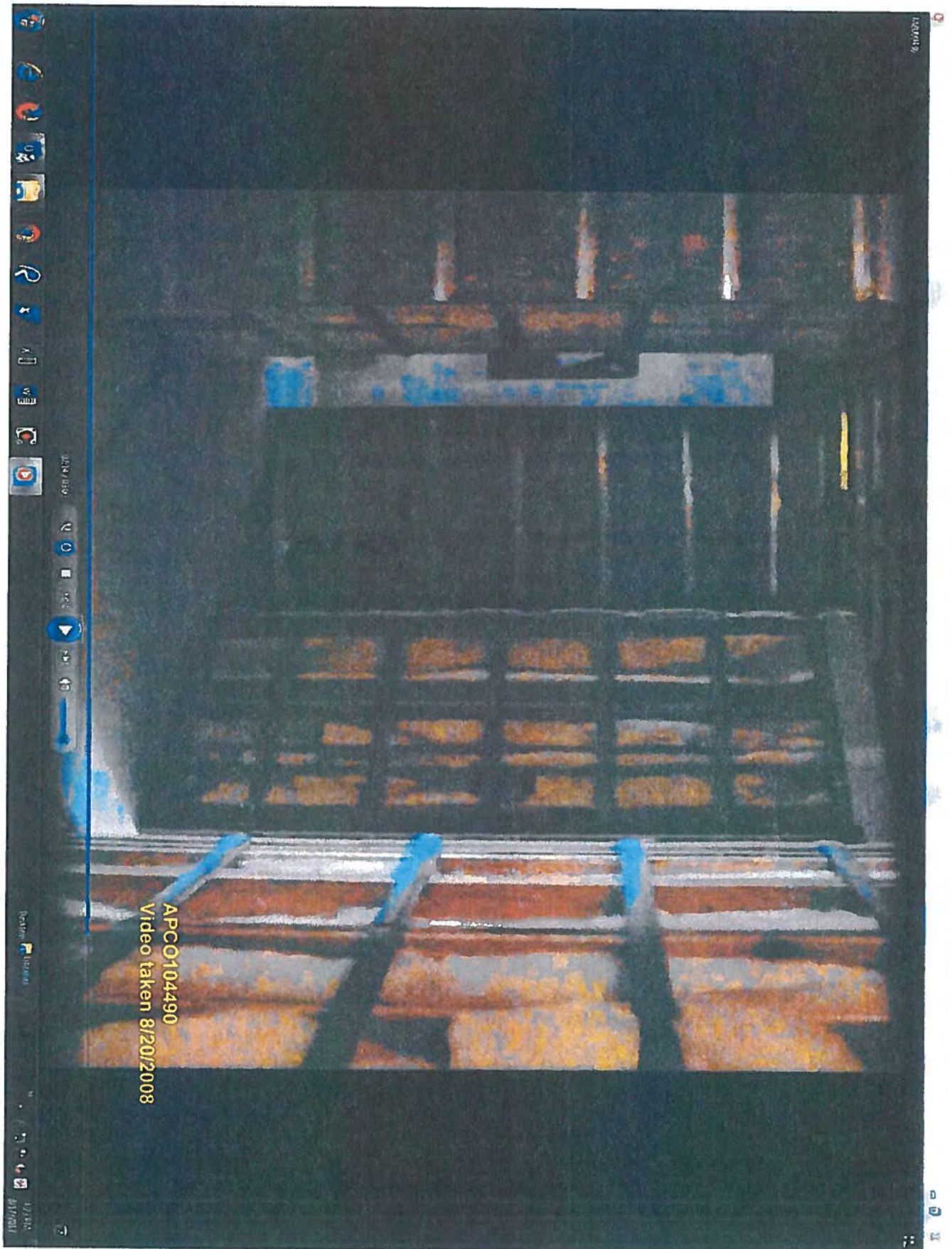
2nd FLOOR ROUGH & TRIM	\$ 25,000	\$ 25,000	\$ -	\$ -	\$ -	\$ 17,500	\$ 1,750.00	\$ 9,250.00	70.00%	75.00%
3rd FLOOR ROUGH & TRIM	\$ 25,000	\$ 25,000	\$ -	\$ -	\$ -	\$ 17,500	\$ 1,750.00	\$ 9,250.00	70.00%	75.00%
4th FLOOR ROUGH & TRIM	\$ 25,000	\$ 25,000	\$ 17,500.00	\$ 1,750.00	\$ 15,750.00	\$ -	\$ -	\$ -	0.00%	0.00%
ROOF PLAN	\$ 2,500	\$ 2,500	\$ -	\$ -	\$ -	\$ -	\$ -	\$ 2,500.00	0.00%	0.00%
APCO CONTRACTOR FEE	\$ 748,413	\$ 748,413	\$ 81,280.34	\$ 8,128.03	\$ 55,152.31	\$ 572,034	\$ 57,203.44	\$ 234,042.08	78.41%	78.41%
SUBTOTAL BUILDING 2	\$ 11,113,021	\$ 10,560,072	\$ 982,789.25	\$ 98,278.93	\$ 884,510.33	\$ 6,716,842	\$ 871,684.16	\$ 2,714,914.71	82.65%	89.24%
BUILDING 3										
LANDSCAPING	\$ 90,000	\$ 90,000	\$ -	\$ -	\$ -	\$ -	\$ -	\$ 90,000.00	0.00%	0.00%
REINFORCING STEEL LABOR	\$ 300,000	\$ 364,250	\$ 6,327.50	\$ 892.76	\$ 6,234.76	\$ -	\$ -	\$ 40,025.00	99.90%	100.00%
REINFORCING STEEL MATERIAL	\$ 350,000	\$ 508,813	\$ -	\$ -	\$ -	\$ -	\$ -	\$ 50,681.25	100.00%	100.00%
EXCAVATE FOOTINGS	\$ 248,500	\$ 248,500	\$ -	\$ -	\$ -	\$ -	\$ -	\$ 24,850.00	100.00%	100.00%
PILE FOOTINGS	\$ 200,000	\$ 200,000	\$ -	\$ -	\$ -	\$ -	\$ -	\$ 20,000.00	100.00%	100.00%
FORMPLACE LOWER WALLS	\$ 300,000	\$ 300,000	\$ -	\$ -	\$ -	\$ -	\$ -	\$ 30,000.00	100.00%	100.00%
FORMPLACE LOWER COLUMNS	\$ 85,000	\$ 85,000	\$ -	\$ -	\$ -	\$ -	\$ -	\$ 8,500.00	100.00%	100.00%
PLACE/FINISH SLAB ON GRADE	\$ 130,000	\$ 130,000	\$ 15,000.00	\$ 1,500.00	\$ 13,500.00	\$ -	\$ -	\$ 22,000.00	92.31%	100.00%
FORMPLACE MID DECK	\$ 450,000	\$ 450,000	\$ -	\$ -	\$ -	\$ -	\$ -	\$ 45,000.00	100.00%	100.00%
FORMPLACE MID WALLS	\$ 300,000	\$ 300,000	\$ -	\$ -	\$ -	\$ -	\$ -	\$ 30,000.00	100.00%	100.00%
FORMPLACE MID COLUMNS	\$ 85,000	\$ 85,000	\$ -	\$ -	\$ -	\$ -	\$ -	\$ 8,500.00	100.00%	100.00%
FORMPLACE UPPER DECK	\$ 400,000	\$ 602,800	\$ 24,118.00	\$ 2,411.80	\$ 21,706.40	\$ -	\$ -	\$ 60,200.00	100.00%	100.00%
PRECAST FLOOR 1	\$ 25,000	\$ 25,000	\$ 8,350.00	\$ 835.00	\$ 5,715.00	\$ 12,700	\$ 1,270.00	\$ 13,570.00	50.80%	50.00%
PRECAST FLOOR 2	\$ 25,000	\$ 25,000	\$ 8,350.00	\$ 835.00	\$ 5,715.00	\$ 12,700	\$ 1,270.00	\$ 13,570.00	50.80%	50.00%
PRECAST FLOOR 3	\$ 25,000	\$ 25,000	\$ 8,350.00	\$ 835.00	\$ 5,715.00	\$ 12,700	\$ 1,270.00	\$ 13,570.00	50.80%	50.00%
PRECAST FLOOR 4	\$ 32,100	\$ 32,100	\$ -	\$ -	\$ -	\$ 16,050	\$ 1,605.00	\$ 17,055.00	50.00%	50.00%
MASONRY CMU	\$ 151,200	\$ 151,200	\$ -	\$ -	\$ -	\$ -	\$ -	\$ 151,200.00	0.00%	0.00%
THIN BRICK VENEER	\$ 18,000	\$ 18,000	\$ -	\$ -	\$ -	\$ -	\$ -	\$ 18,000.00	0.00%	0.00%
STEEL	\$ 2,120,000	\$ 2,120,000	\$ 180,480.80	\$ 18,048.08	\$ 182,414.72	\$ 2,078,288	\$ 207,828.84	\$ 251,358.41	97.94%	100.00%
FINISH CARPENTRY	\$ 25,000	\$ 25,000	\$ 19,581.33	\$ 1,958.13	\$ 17,023.20	\$ 19,581	\$ 1,958.13	\$ 7,376.80	78.33%	80.00%
FIREPROOFING	\$ 32,000	\$ 32,000	\$ -	\$ -	\$ -	\$ 34,200	\$ 3,420.00	\$ 3,420.00	100.00%	100.00%
INSULATION	\$ 67,280	\$ 57,280	\$ -	\$ -	\$ -	\$ -	\$ -	\$ 57,280.00	0.00%	40.00%
ROOFING	\$ 184,000	\$ 242,080	\$ 189,430.60	\$ 18,943.06	\$ 170,487.72	\$ 189,431	\$ 18,943.06	\$ 72,372.28	78.00%	80.00%
WATERPROOFING	\$ 173,400	\$ 174,450	\$ 68,377.13	\$ 6,837.71	\$ 81,539.42	\$ 131,691	\$ 13,169.13	\$ 55,927.79	75.48%	90.00%
STUCCO	\$ 331,100	\$ 331,100	\$ -	\$ -	\$ -	\$ -	\$ -	\$ 331,100.00	0.00%	2.00%
WINDOWS	\$ 119,400	\$ 268,500	\$ -	\$ -	\$ -	\$ 246,000	\$ 24,600.00	\$ 45,300.00	92.30%	90.00%
STOREFRONT DOORS	\$ 34,100	\$ 91,500	\$ 54,450.00	\$ 5,445.00	\$ 49,005.00	\$ 54,450	\$ 5,445.00	\$ 42,405.00	59.51%	60.00%
LOMF/DRYWALL	\$ 1,838,046	\$ 302,000	\$ 70,000.00	\$ 7,000.00	\$ 83,000.00	\$ 170,000	\$ 17,000.00	\$ 149,000.00	58.28%	40.00%
FLOORING	\$ 300,000	\$ 300,000	\$ -	\$ -	\$ -	\$ -	\$ -	\$ 300,000.00	0.00%	0.00%
PAINTING	\$ 85,000	\$ 85,000	\$ -	\$ -	\$ -	\$ -	\$ -	\$ 85,000.00	0.00%	0.00%
ELEVATORS	\$ 306,582	\$ 306,582	\$ -	\$ -	\$ -	\$ 234,189	\$ 23,418.90	\$ 95,791.61	70.39%	0.00%
MECH. MOBILIZATION	\$ 3,760	\$ 3,760	\$ -	\$ -	\$ -	\$ 3,760	\$ 376.00	\$ 376.00	100.00%	100.00%
MECH. SUBMITTALS	\$ 338	\$ 338	\$ -	\$ -	\$ -	\$ 205	\$ 20.50	\$ 153.00	60.74%	60.74%
MECH. GENERAL CONDITIONS	\$ 632	\$ 632	\$ -	\$ -	\$ -	\$ 362	\$ 36.16	\$ 208.47	68.00%	68.00%
MECH. CLOSEOUT DOCUMENTS	\$ 300	\$ 300	\$ -	\$ -	\$ -	\$ -	\$ -	\$ 300.00	0.00%	0.00%
HVAC PERMIT	\$ 1,200	\$ 1,200	\$ -	\$ -	\$ -	\$ 1,200	\$ 120.00	\$ 120.00	100.00%	100.00%
HVAC PRE-ROCKLINE SET PIPING	\$ 37,450	\$ 37,450	\$ -	\$ -	\$ -	\$ -	\$ -	\$ 37,450.00	0.00%	10.00%
HVAC EQUIPPED MATERIALS	\$ 29,880	\$ 29,880	\$ 5,992.00	\$ 599.20	\$ 5,392.80	\$ 6,992	\$ 599.20	\$ 24,567.20	20.00%	20.00%
HVAC ROUGH DUCT	\$ 29,880	\$ 29,880	\$ -	\$ -	\$ -	\$ -	\$ -	\$ 29,880.00	0.00%	10.00%
HVAC SET EQUIPMENT	\$ 29,880	\$ 29,880	\$ -	\$ -	\$ -	\$ -	\$ -	\$ 29,880.00	0.00%	0.00%
HVAC SET TRIM	\$ 7,480	\$ 7,480	\$ -	\$ -	\$ -	\$ -	\$ -	\$ 7,480.00	0.00%	0.00%
HVAC FSD - DO TESTING	\$ 7,480	\$ 7,480	\$ -	\$ -	\$ -	\$ -	\$ -	\$ 7,480.00	0.00%	0.00%
HVAC STARTUP	\$ 2,870	\$ 2,870	\$ -	\$ -	\$ -	\$ -	\$ -	\$ 2,870.00	0.00%	0.00%
PLUMBING PERMIT	\$ 48,992	\$ 48,992	\$ -	\$ -	\$ -	\$ 2,841	\$ 284.13	\$ 312.83	99.00%	100.00%
EXCAVATION/BACKFILL	\$ 24,850	\$ 24,850	\$ -	\$ -	\$ -	\$ 48,502	\$ 4,850.21	\$ 5,340.13	99.00%	100.00%
UG SANITARY PIPING	\$ 83,311	\$ 83,311	\$ -	\$ -	\$ -	\$ 24,502	\$ 2,450.15	\$ 2,708.65	99.00%	100.00%
UG STORM PIPING	\$ 83,311	\$ 83,311	\$ -	\$ -	\$ -	\$ 82,478	\$ 8,247.79	\$ 9,080.80	99.00%	100.00%

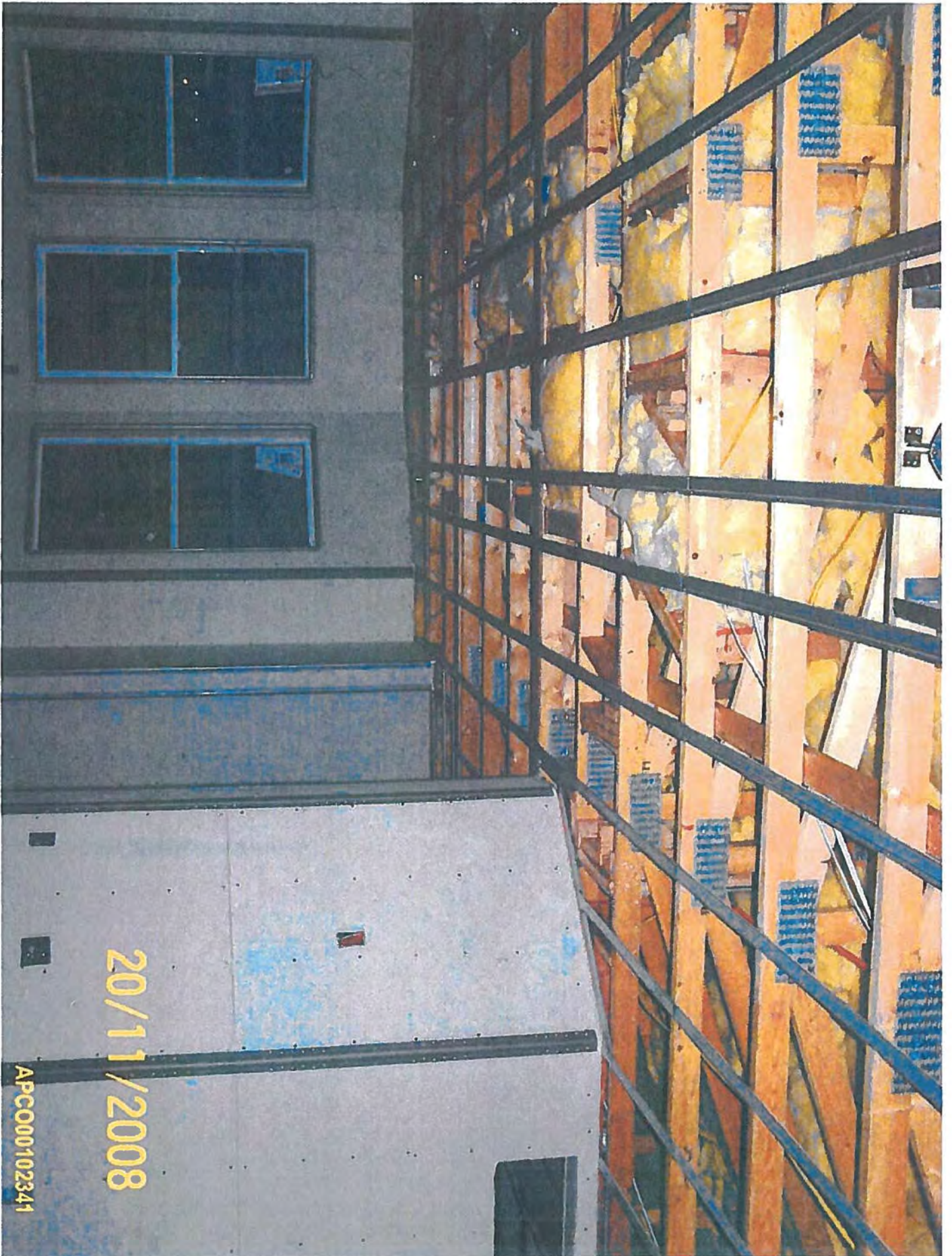
PLUMBING IDENTIFICATION	760	\$	750	\$	753.80	\$	75.38	\$	578.42	\$	28,921	\$	2,892.08	\$	750.00	0.00%	81.40%	0.00%
INSULATION - FIRESTOP	3,769	\$	47,103	\$	753.80	\$	75.38	\$	578.42	\$	28,921	\$	2,892.08	\$	21,074.28	0.00%	81.40%	0.00%
PLUMBING SECOND FLOOR																		
AG WASTE & VENT	43,730	\$	43,730	\$	8,748.00	\$	874.80	\$	7,873.20	\$	34,084	\$	3,408.40	\$	12,244.40	80.00%	80.00%	98.00%
DRAINS/CARRIERS	6,207	\$	6,207	\$	1,241.40	\$	124.14	\$	1,117.26	\$	4,958	\$	495.80	\$	1,737.98	80.00%	80.00%	99.00%
SLEEVES/INSERTS	3,707	\$	3,707	\$	370.70	\$	37.07	\$	333.63	\$	3,336	\$	333.63	\$	704.33	80.00%	80.00%	99.00%
AG STORM PIPING	5,287	\$	5,287	\$	1,037.40	\$	103.74	\$	933.66	\$	1,950	\$	195.00	\$	3,021.80	35.00%	35.00%	99.00%
AG DOMESTIC WATER	85,999	\$	85,999	\$	13,189.80	\$	1,318.98	\$	11,870.82	\$	39,589	\$	3,958.94	\$	30,359.84	60.00%	60.00%	90.00%
AG GAS PIPING	12,029	\$	12,029	\$	4,811.80	\$	481.18	\$	4,330.62	\$	4,812	\$	481.20	\$	7,898.58	40.00%	40.00%	90.00%
TUBS & HOOKUPS	10,884	\$	10,884	\$	2,273.60	\$	227.36	\$	3,046.24	\$	4,274	\$	427.40	\$	8,837.78	40.00%	40.00%	10.00%
PLUMBING FIXTURES	19,118	\$	19,118	\$	1,811.80	\$	181.18	\$	1,630.62	\$	1,912	\$	191.20	\$	17,387.38	10.00%	10.00%	10.00%
PLUMBING EQUIPMENT	11,872	\$	11,872	\$	1,167.20	\$	116.72	\$	1,050.48	\$	1,167	\$	116.72	\$	10,821.52	10.00%	10.00%	20.00%
CONDENSATE PIPING	5,107	\$	5,107	\$	1,021.40	\$	102.14	\$	919.26	\$	1,021	\$	102.14	\$	4,187.74	20.00%	20.00%	20.00%
PLUMBING TESTING	3,868	\$	3,868	\$	773.60	\$	77.36	\$	696.24	\$	774	\$	77.40	\$	3,171.78	20.00%	20.00%	26.00%
PLUMBING IDENTIFICATION	750	\$	750	\$	-	\$	-	\$	-	\$	-	\$	-	\$	750.00	0.00%	0.00%	0.00%
INSULATION - FIRESTOP	3,769	\$	47,103	\$	753.80	\$	75.38	\$	578.42	\$	28,921	\$	2,892.08	\$	21,074.28	61.40%	61.40%	90.00%
PLUMBING THIRD FLOOR																		
AG WASTE & VENT	43,730	\$	43,730	\$	8,748.00	\$	874.80	\$	7,873.20	\$	34,084	\$	3,408.40	\$	12,244.40	80.00%	80.00%	90.00%
DRAINS/CARRIERS	6,207	\$	6,207	\$	1,241.40	\$	124.14	\$	1,117.26	\$	4,958	\$	495.80	\$	1,737.98	80.00%	80.00%	90.00%
SLEEVES/INSERTS	3,707	\$	3,707	\$	370.70	\$	37.07	\$	333.63	\$	3,336	\$	333.63	\$	704.33	80.00%	80.00%	90.00%
AG STORM PIPING	5,287	\$	5,287	\$	1,037.40	\$	103.74	\$	933.66	\$	1,950	\$	195.00	\$	3,021.80	40.00%	40.00%	80.00%
AG DOMESTIC WATER	85,999	\$	85,999	\$	13,189.80	\$	1,318.98	\$	11,870.82	\$	39,589	\$	3,958.94	\$	30,359.84	60.00%	60.00%	90.00%
AG GAS PIPING	12,029	\$	12,029	\$	4,811.80	\$	481.18	\$	4,330.62	\$	4,812	\$	481.20	\$	7,898.58	30.00%	30.00%	80.00%
TUBS & HOOKUPS	10,884	\$	10,884	\$	2,273.60	\$	227.36	\$	3,046.24	\$	4,274	\$	427.40	\$	8,837.78	20.00%	20.00%	20.00%
PLUMBING FIXTURES	19,118	\$	19,118	\$	1,811.80	\$	181.18	\$	1,630.62	\$	1,912	\$	191.20	\$	17,387.38	10.00%	10.00%	10.00%
PLUMBING EQUIPMENT	11,872	\$	11,872	\$	1,167.20	\$	116.72	\$	1,050.48	\$	1,167	\$	116.72	\$	10,821.52	10.00%	10.00%	10.00%
CONDENSATE PIPING	5,107	\$	5,107	\$	1,021.40	\$	102.14	\$	919.26	\$	1,021	\$	102.14	\$	4,187.74	20.00%	20.00%	20.00%
PLUMBING TESTING	3,868	\$	3,868	\$	773.60	\$	77.36	\$	696.24	\$	774	\$	77.40	\$	3,171.78	20.00%	20.00%	20.00%
PLUMBING IDENTIFICATION	750	\$	750	\$	-	\$	-	\$	-	\$	-	\$	-	\$	750.00	0.00%	0.00%	0.00%
INSULATION - FIRESTOP	3,769	\$	47,103	\$	753.80	\$	75.38	\$	578.42	\$	28,921	\$	2,892.08	\$	21,074.28	61.40%	61.40%	90.00%
PLUMBING FOURTH FLOOR																		
AG WASTE & VENT	43,730	\$	43,730	\$	4,373.00	\$	437.30	\$	3,935.70	\$	30,611	\$	3,061.10	\$	18,180.10	70.00%	70.00%	90.00%
DRAINS/CARRIERS	6,207	\$	6,207	\$	1,241.40	\$	124.14	\$	1,117.26	\$	3,104	\$	310.40	\$	3,413.86	50.00%	50.00%	90.00%
SLEEVES/INSERTS	3,707	\$	3,707	\$	370.70	\$	37.07	\$	333.63	\$	3,336	\$	333.63	\$	704.33	90.00%	90.00%	100.00%
AG STORM PIPING	5,287	\$	5,287	\$	1,586.10	\$	158.61	\$	1,427.49	\$	2,115	\$	211.50	\$	3,383.68	40.00%	40.00%	90.00%
AG DOMESTIC WATER	85,999	\$	85,999	\$	10,799.70	\$	1,079.97	\$	9,719.73	\$	33,000	\$	3,299.95	\$	36,299.95	50.00%	50.00%	90.00%
AG GAS PIPING	12,029	\$	12,029	\$	4,811.80	\$	481.18	\$	4,330.62	\$	5,015	\$	501.50	\$	8,915.95	50.00%	50.00%	60.00%
TUBS & HOOKUPS	10,884	\$	10,884	\$	1,068.40	\$	106.84	\$	961.56	\$	1,068	\$	106.80	\$	9,722.44	10.00%	10.00%	10.00%
PLUMBING FIXTURES	19,118	\$	19,118	\$	1,811.80	\$	181.18	\$	1,630.62	\$	1,912	\$	191.20	\$	17,387.38	10.00%	10.00%	10.00%
PLUMBING EQUIPMENT	11,872	\$	11,872	\$	1,167.20	\$	116.72	\$	1,050.48	\$	1,167	\$	116.72	\$	10,821.52	10.00%	10.00%	10.00%
CONDENSATE PIPING	5,107	\$	5,107	\$	1,021.40	\$	102.14	\$	919.26	\$	1,021	\$	102.14	\$	4,187.74	20.00%	20.00%	20.00%
PLUMBING TESTING	3,868	\$	3,868	\$	773.60	\$	77.36	\$	696.24	\$	774	\$	77.40	\$	3,171.78	20.00%	20.00%	20.00%
PLUMBING IDENTIFICATION	750	\$	750	\$	-	\$	-	\$	-	\$	-	\$	-	\$	750.00	0.00%	0.00%	0.00%
INSULATION - FIRESTOP	3,769	\$	47,103	\$	753.80	\$	75.38	\$	578.42	\$	28,921	\$	2,892.08	\$	21,074.28	61.40%	61.40%	90.00%
PLUMBING FIFTH FLOOR																		
AG WASTE & VENT	43,730	\$	43,730	\$	4,373.00	\$	437.30	\$	3,935.70	\$	30,611	\$	3,061.10	\$	31,922.80	30.00%	30.00%	80.00%
DRAINS/CARRIERS	6,207	\$	6,207	\$	620.70	\$	62.07	\$	558.63	\$	4,968	\$	496.80	\$	1,737.98	80.00%	80.00%	90.00%
SLEEVES/INSERTS	3,707	\$	3,707	\$	370.70	\$	37.07	\$	333.63	\$	3,336	\$	333.63	\$	704.33	80.00%	80.00%	100.00%
AG STORM PIPING	5,287	\$	5,287	\$	793.05	\$	79.31	\$	713.74	\$	1,322	\$	132.20	\$	4,097.43	25.00%	25.00%	50.00%
AG DOMESTIC WATER	85,999	\$	85,999	\$	6,569.90	\$	656.99	\$	5,912.91	\$	16,500	\$	1,649.98	\$	8,149.23	26.00%	26.00%	40.00%
AG GAS PIPING	12,029	\$	12,029	\$	2,405.80	\$	240.58	\$	2,165.22	\$	2,408	\$	240.80	\$	9,683.78	20.00%	20.00%	40.00%
TUBS & HOOKUPS	10,884	\$	10,884	\$	1,098.40	\$	109.84	\$	988.56	\$	1,098	\$	109.80	\$	9,722.44	10.00%	10.00%	10.00%
PLUMBING FIXTURES	19,118	\$	19,118	\$	955.90	\$	95.59	\$	860.31	\$	959	\$	95.90	\$	18,257.89	5.00%	5.00%	5.00%
PLUMBING EQUIPMENT	11,872	\$	11,872	\$	1,167.20	\$	116.72	\$	1,050.48	\$	1,167	\$	116.72	\$	10,821.52	10.00%	10.00%	10.00%
CONDENSATE PIPING	5,107	\$	5,107	\$	1,021.40	\$	102.14	\$	919.26	\$	1,021	\$	102.14	\$	4,187.74	20.00%	20.00%	20.00%
PLUMBING TESTING	3,868	\$	3,868	\$	366.80	\$	36.68	\$	329.12	\$	367	\$	36.70	\$	3,519.89	10.00%	10.00%	10.00%

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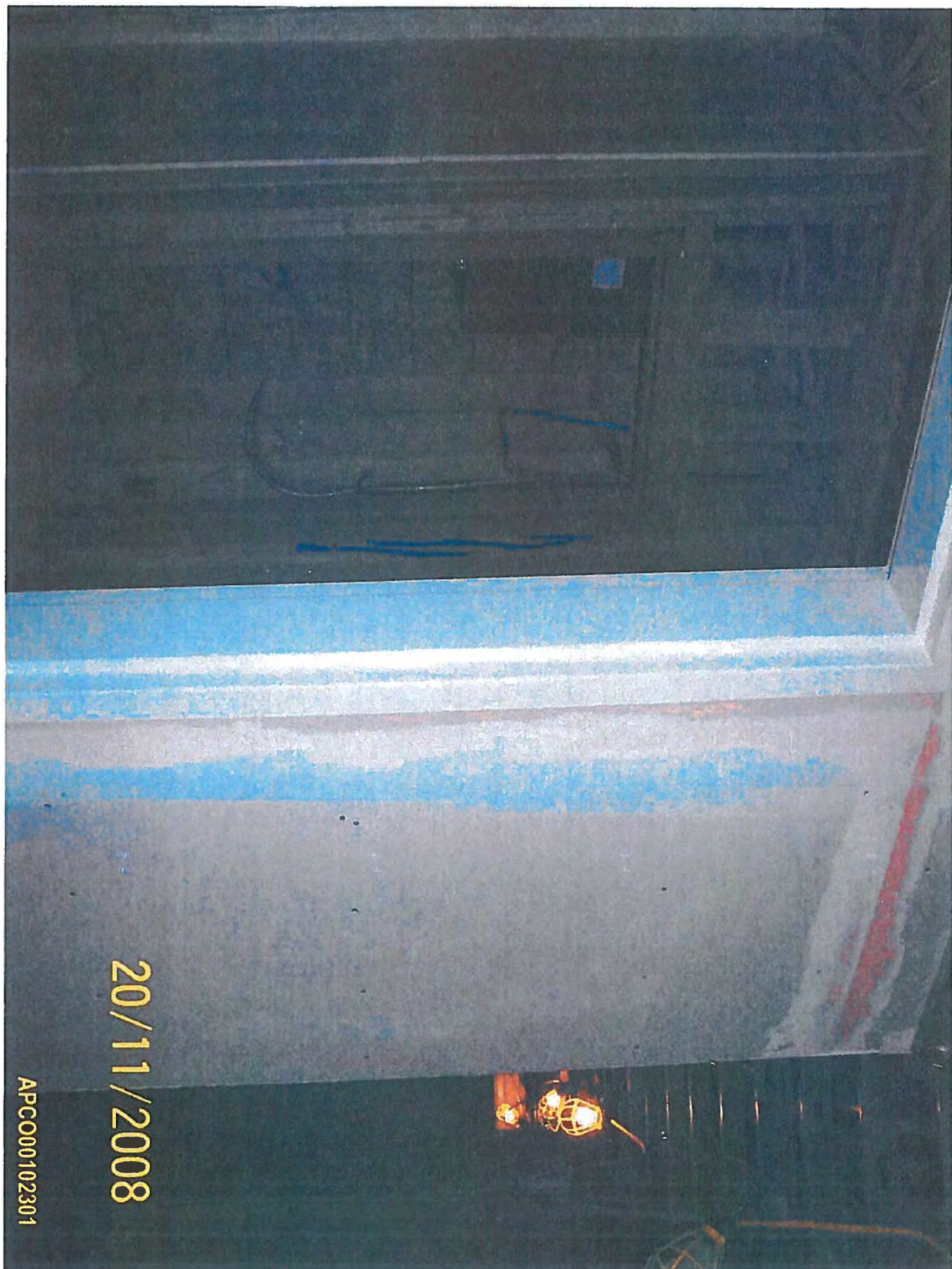
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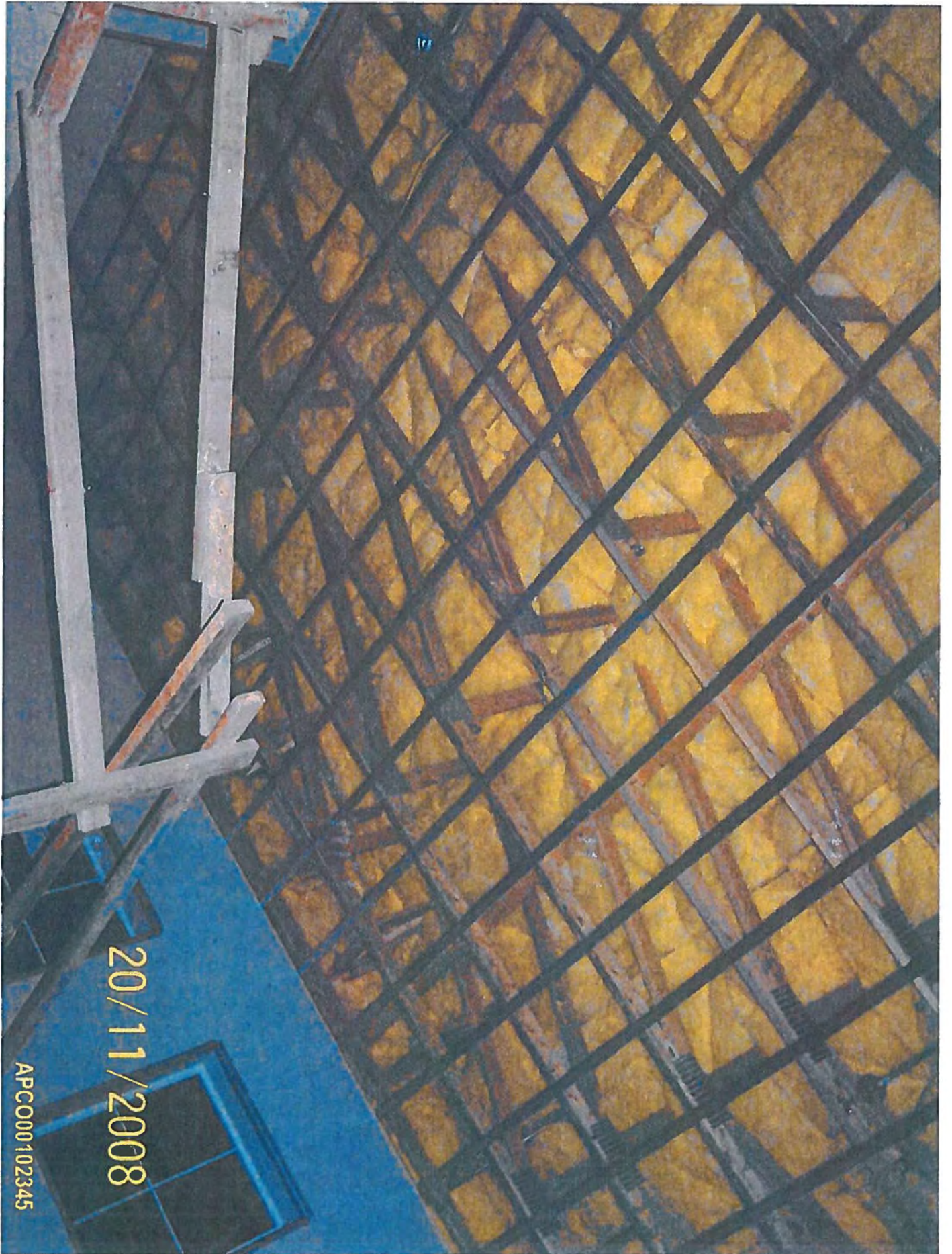




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APC000102321





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APC000102345





EXHIBIT 12

1 **NDEP**
2 **JORGE RAMIREZ, ESQ.**
3 Nevada Bar No. 6787
4 **I-CHE LAI, ESQ.**
5 Nevada Bar No. 12247
6 **WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP**
7 300 South 4th Street, 11th Floor
8 Las Vegas, NV 89101-6014
9 Telephone: (702) 727-1400
10 Facsimile: (702) 727-1401
11 Jorge.Ramirez@wilsonelser.com
12 I-Che.Lai@wilsonelser.com
13 *Attorneys for Lien Clamanl,*
14 *Zitting Brothers Construction, Inc.*

DISTRICT COURT
CLARK COUNTY, NEVADA

10 **APCO CONSTRUCTION, a Nevada**
11 **corporation,**

12 **Plaintiff,**

13 **vs.**

14 **GEMSTONE DEVELOPMENT WEST, INC.,**
15 **a Nevada corporation,**

16 **Defendant.**

CASE NO. A571228
DEPT. NO. XIII

Consolidated with:

A574391; A574792; A577623; A583289;
A587168; A580889; A584730; A589195;
A595552; A597089; A592826; A589677;
A596924; A584960; A608717; A608718; and
A590319

17 **AND ALL RELATED MATTERS**

ZITTING BROTHERS CONSTRUCTION,
INC.'S NOTICE OF TAKING
CONTINUED DEPOSITION OF APCO
CONSTRUCTION PURSUANT TO NRCP
30(b)(6)

DATE: July 19, 2017
TIME: 9:00 a.m.

(DATE CHANGE ONLY)

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1 representatives, attorneys, experts, and all other persons acting or purporting to act on its behalf.

2 4. The term "Manhattan West Project" refers to the real property commonly referred to
3 as Manhattan West mixed used development project at issue in this case and generally located at
4 9205 West Russell Road, Clark County, Nevada.

5 5. The term "Contract" refers to the agreement you entered into with Gemstone
6 regarding the Manhattan West Project, including but not limited to the original contact(s), change
7 orders, and any ratification agreements.

8 6. The term "Sub-Contract" refers to the agreement you entered into with ZBCI
9 regarding the Manhattan West Project, including but not limited to the original contact(s), change
10 orders, and any ratification agreements.

12 **Areas of Examination Pursuant to Nev. R. Civ. P. 30(b)(6)**

13 Pursuant to Nev. R. Civ. P. 30(b)(6), the designated witness(es) of APCO Construction will
14 provide deposition testimony with respect to matters known or reasonable available to APCO
15 Construction regarding the subjects described below:

- 16
- 17 1. All facts fact related to the Contract;
 - 18 2. All facts fact related to the Sub-Contract;
 - 19 3. All facts related to ZBCI's work under the Sub-Contract, including but not limited to
20 the scope and quality of ZBCI's work;
 - 21 4. All facts related to your process for obtaining payment under the Contract;
 - 22 5. All facts related to your process for paying sub-contractors under the Sub-Contract
23 and sub-contracts with other sub-contractors;
 - 24 6. All facts related to all payments you received in connection with the Manhattan West
25 Project;
 - 26 7. All facts related to all payments you made to ZBCI in connection with the Manhattan
27 West Project;
 - 28

1 8. All facts related to all payments you made to sub-contractors other than ZBCI in
2 connection with the Manhattan West Project;

3 9. All facts related to your communications with Gemstone regarding the Manhattan
4 West Project;

5 10. All facts related to your communications with ZBCI regarding the Manhattan West
6 Project;

7 11. All facts related to your assertion that you are not liable for any portion of ZBCI's
8 general and/or lien claims against you;

9 12. All facts related to your defenses against ZBCI's claims as alleged in ZBCI's
10 complaint in this case; and

11 13. All documents that you have disclosed in support of your defenses against ZBCI's
12 claims against you.

13 DATED this 17th day of July, 2017.

14
15
16 WILSON ELSE MOSKOWITZ EDELMAN &
DICKER LLP

17
18 By: 

Jorge Ramirez, Esq.
Nevada Bar No. 6787
I-Che Lai, Esq.
Nevada Bar No. 12247
300 South 4th Street, 11th Floor
Las Vegas, NV 89101
Telephone: (702) 727-1400
Facsimile: (702) 727-1401
*Attorneys for Lien Claimant,
Zitting Brothers Construction, Inc.*

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of Wilson Elser Moskowitz Edelman & Dicker LLP, and that on this 17th day of July, 2017, I served a true and correct copy of the foregoing **ZITTING BROTHERS CONSTRUCTION, INC.'S NOTICE OF TAKING CONTINUED DEPOSITION OF APCO CONSTRUCTION PURSUANT TO NRCP 30(b)(6)** document 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;
- ☒ via electronic means by operation of the Court's electronic filing system, upon each party in this case who is registered as an electronic case filing user with the Clerk;
- ☐ via hand-delivery to the addressees listed below;
- ☐ via facsimile;
- ☐ by transmitting via email the document listed above to the email address set forth below on this date before 5:00 p.m.

Bennett Tueller Johnson & Deere

Contact

Benjamin D. Johnson
Chalise Walsh

Email

ben.johnson@btjd.com
cwalsh@btjd.com

Brian K. Berman, Chtd.

Contact

Brian K. Berman, Esq.

Email

b.k.berman@att.net

Cadden & Fuller LLP

Contact

Dana Y. Kim
S. Judy Hirahara
Tammy Cortez

Email

dkim@caddenfuller.com
jhirahara@caddenfuller.com
tcortez@caddenfuller.com

David J. Merrill P.C.

Contact

David J. Merrill

Email

david@djmerillpc.com

Dickinson Wright, PLLC

Contact

Cheri Vandermeulen
Christine Spencer

Email

cvandermeulen@dickinsonwright.com
cspencer@dickinsonwright.com

1	Donna Wolfbrandt	dwolfbrandt@dickinsonwright.com
2	Eric Dobberstein	edobberstein@dickinsonwright.com
3	<hr/>	
3	Durham Jones & Pinegar	
4	Contact	Email
4	Brad Slighting	bslighting@djplaw.com
5	Cindy Simmons	csimmons@djplaw.com
6	<hr/>	
6	Fox Rothschild	
7	Contact	Email
7	Jineen DeAngelis	jideangelis@foxrothschild.com
8	<hr/>	
8	G.E. Robinson Law	
9	Contact	Email
9	George Robinson	grobinson@pezzillolloyd.com
10	<hr/>	
11	GERRARD COX & LARSEN	
12	Contact	Email
12	Aaron D. Lancaster	alancaster@gerrard-cox.com
13	Douglas D. Gerrard	dgerrard@gerrard-cox.com
13	Kaytlyn Bassett	kbassett@gerrard-cox.com
14	<hr/>	
14	Gibbs, Giden, Locher, Turner & Senet LLP	
15	Contact	Email
15	Becky Pintar	bpintar@gglt.com
16	Linda Compton	lcompton@gglts.com
17	<hr/>	
17	Gordon & Rees	
18	Contact	Email
18	Robert Schumacher	rschumacher@gordonrees.com
19	<hr/>	
20	Gordon & Rees LLP	
21	Contact	Email
21	Andrea Montero	amontero@gordonrees.com
22	Brian Walters	bwalters@gordonrees.com
22	Marie Ogella	mogella@gordonrees.com
23	<hr/>	
23	GRANT MORRIS DODDS	
24	Contact	Email
24	Steven Morris	steve@gmdlegal.com
25	<hr/>	
26	Greenberg Traurig, LLP	
27	Contact	Email
27	6085 Joyce Heilich	heilichj@gtlaw.com
28	7132 Andrea Rosehill	rosehilla@gtlaw.com
28	CNN Cynthia Ney	neyc@gtlaw.com

IGH Bethany Rabe	rabeb@gtlaw.com
IOM Mark Ferrario	lvlitdock@gtlaw.com
LVGTDocketing	lvlitdock@gtlaw.com
MOK Moorea Katz	katzmo@gtlaw.com
WTM Tami Cowden	cowdent@gtlaw.com

HOLLEY DRIGGS WALCH FINE WRAY PUZEY & THOMPSON

Contact	Email
Glenn F. Meier	gmeier@nevadafirm.com
Renee Hoban	rhoban@nevadafirm.com

Holley Driggs Walch Fine Wray Puzey & Thompson

Contact	Email
Cynthia Kelley	ckelley@nevadafirm.com
Rachel E. Donn	rdoon@nevadafirm.com

Howard & Howard

Contact	Email
Gwen Rutar Mullins	grm@h2law.com
Kellie Piet (Legal Assistant)	kdp@h2law.com
Wade B. Gochnour	wbg@h2law.com

Jolley Urga Woodbury & Little

Contact	Email
Agnes Wong	aw@juww.com
Elizabeth J. Martin	em@juww.com
Kelly McGee	kom@juww.com
Martin A. Little, Esq.	mal@juww.com
Martin A. Little, Esq.	mal@juww.com
Michael R. Ernst	mre@juww.com
Michael R. Ernst, Esq.	mre@juww.com

Kemp, Jones & Coulthard

Contact	Email
Erica Bennett	e.bennett@kempjones.com
J. Randall Jones	r.jones@kempjones.com
Janet Griffin	jlg@kempjones.com
Mark M. Jones	mmj@kempjones.com
Matt Carter	msc@kempjones.com
Matthew Carter	m.carter@kempjones.com
Pamela Montgomery	pym@kempjones.com

Law Offices of Floyd Hale

Contact	Email
Debbie Holloman	dholloman@jamsadr.com
Floyd Hale	fhale@floydhale.com

Law Offices of Sean P. Hillin, P.C.**Contact**

Caleb Langsdale, Esq.

Emailcaleb@langsdaletlaw.com

Litigation Services & Technologies**Contact**

Calendar

Depository

Emailcalendar@litigation-services.netDepository@litigation-services.net

Marquis Aurbach Coffing**Contact**

Cally Hatfield

Cody Mounteer, Esq.

Courtney Peterson

Jack Juan

Jennifer Case

Phillip Aurbach

Taylor Fong

Emailchatfield@maclaw.comcmounteer@marquisaurbach.comcpeterson@maclaw.comjjuan@marquisaurbach.comjcase@maclaw.compaurbach@maclaw.comtfong@marquisaurbach.com

McCullough, Perez & Dobberstein, Esq.**Contact**

Eric Dobberstein, Esq.

Emailedobberstein@mcpalaw.com

McCullough, Perez & Dobberstein, Ltd.**Contact**

Christine Spencer

Emailcspencer@mcpalaw.com

McDonald Carano Wilson, LLP**Contact**

Kathleen Morris

Ryan Bellows

Emailknorris@mcdonaldcarano.comrbellows@mcdonaldcarano.com

Meier Fine & Wray, LLC**Contact**

Receptionist

EmailReception@nvbusinesslawyers.com

Morrill & Aronson**Contact**

Christine Taradash

EmailCTaradash@maazlaw.com

Morrill & Aronson P.L.C.**Contact**

Debra Hitchens

Emaildhitchens@maazlaw.com

Peel Brimley LLP**Contact****Email**

Amanda Armstrong

aarmstrong@peelbrimley.com

Eric Zimbelman

ezimbelman@peelbrimley.com

Kathy Gentile

kgentile@peelbrimley.com

Ronnie Cox

rcox@peelbrimley.com

Rosey Jeffrey

rjeffrey@peelbrimley.com

Pezzillo Lloyd**Contact****Email**

Jennifer R. Lloyd

jlloyd@pezzillolloyd.com

Marisa L. Maskas, Esq.

mmaskas@pezzillolloyd.com

Procopio Cory**Contact****Email**

Timother E. Salter

tim.salter@procopio.com

Procopio Cory Hargreaves & Savitch**Contact****Email**

Andrew J. Kessler

andrew.kessler@procopio.com

Carla Clark, Legal Secretary

carla.clark@procopio.com

Rebecca Chapman

rebecca.chapman@procopio.comRebecca Chapman, Legal
Secretaryrebecca.chapman@procopio.com

Scott R. Omohundro

scott.omohundro@procopio.com

Timothy E. Salter

tim.salter@procopio.com

Procopio Cory Hargreaves & Savitch LLP**Contact****Email**

Cori Mandy, Legal Secretary

cori.mandy@procopio.com

Procopio, Cory, Hargreaves & Savitch**Contact****Email**

Elmer Flores

elmer.flores@procopio.com

Joseph Frank

joseph.frank@procopio.com

Procopio, Cory, Hargreaves & Savitch**Contact****Email**

Lenore Joseph

calendaring@procopio.com

Richard L. Tobler, Ltd.**Contact****Email**

Richard Tobler

rltldck@hotmail.com

Rooker Rawlins**Contact**

Legal Assistant
Michael Rawlins

Email

rlegalassistant@rookerlaw.com
mrawlins@rookerlaw.com

T. James Truman & Associates**Contact**

District filings

Email

district@trumanlegal.com

The Langsdale Law Firm**Contact**

Caleb Langsdale

Email

Caleb@Langsdalelaw.com

Varricchio Law Firm**Contact**

Paralegal
Philip T. Varricchio

Email

paralegal@varricchiolaw.com
phil@varricchiolaw.com

Watt, Tieder, Hoffar & Fitzgerald, L.L.P.**Contact**

David R. Johnson
Jennifer MacDonald

Email

djohnson@watttieder.com
jmacdonald@watttieder.com

Williams & Associates**Contact**

Donald H. Williams, Esq.

Email

dwilliams@dhwlawlv.com

BY 

An Employee of WILSON ELSEER MOSKOWITZ
EDELMAN & DICKER LLP

EXHIBIT 13

1 **DECLARATION OF MARY JO ALLEN IN SUPPORT OF MOTION FOR**
2 **RECONSIDERATION OF COURT'S ORDER GRANTING ZITTING BROTHERS**
3 **CONSTRUCTION, INC.'S PARTIAL MOTION FOR SUMMARY JUDGMENT ON**
4 **ORDER SHORTENING TIME**

5 Mary Jo Allen, declares as follows:

6 1. I am over the age of 18 years and have personal knowledge of the facts stated
7 herein, except for those stated upon information and belief, and as to those, I believe them to be
8 true. I am competent to testify as to the facts stated herein in a court of law and will so testify if
9 called upon.

10 2. I am one of two designated NRCP 30(b)(6) witnesses for APCO Construction in
11 lead case A571228 and associated consolidated actions, and I make this Declaration in support of
12 APCO's Motion for Reconsideration of Court's Order Granting Zitting Brothers Construction,
13 Inc.'s Partial Motion for Summary Judgment on Order Shortening Time.

14 3. As one of APCO's NRCP 30(b)(6) designees, I educated myself in the topics of
15 my prior declaration and testimony by speaking with APCO employees, utilizing documents at
16 APCO's disposal, and reviewed APCO's NRS 51.135 business records prior to preparing my
17 declaration or giving testimony.

18 4. I also familiarized myself with APCO's business records prior to executing my
19 prior declaration and giving any testimony to ensure all statements therein were truthful and
20 accurate.

21 5. More specifically, during my preparation as an NRCP 30(b)(6) witness for
22 APCO, I made myself aware of all facts in my prior declaration as one of APCO's NRCP
23 30(b)(6) representative through speaking with APCO employees including Joe Pelan and Brian
24 Benson, and reviewing the Project's records, including but not limited to the drywaller's billings.

25 6. I am the Accounts Payable Clerk for APCO. I am directly responsible for
26 cataloging approved change orders and pay applications that occur during the regular course of
27 business.

28 7. I have personal knowledge as APCO's Accounts Payable Clerk that when APCO
29 receives approved change orders they are copied and cataloged to be paid on receipt of funds.

8. I was able to confirm that the photos in question taken of the Project were in fact taken by Brian Benson, APCO's other NRCP 30(b)(6) witness, and done so in his regular course of business.

9. APCO was not paid for its work on the Project for June, July or August 2008.

10. APCO lost approximately \$8,000,000 on this job, and APCO did not acquire the property. Instead, APCO endured a \$900,000 legal battle on behalf of itself and its subcontractors to endeavor to get priority and paid from the owner.

Pursuant to NRS § 53.045, I declare under penalty of perjury under the laws of the State of Nevada that the foregoing is true and correct.

Dated this 5th day of January, 2018.

Mary Jo Allen

EXHIBIT 14

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Location : District Court Civil/Criminal [Help](#)

REGISTER OF ACTIONS

CASE No. 08A571228

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

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Case Type: **Business Court**
 Date Filed: **09/09/2008**
 Location: **Department 13**
 Cross-Reference Case Number: **A571228**

RELATED CASE INFORMATION

Related Cases

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

PARTY INFORMATION

Lead Attorneys

Counter	APCO Construction	Gwen Rutar Mullins
Counter	Asphalt Products Corporation	
Counter	Cactus Rose Construction	
Counter	Camco Pacific Construction Co Inc	Steven L. Morris
Counter	Camco Pacific Construction Co Inc	Steven L. Morris
Counter Claimant	Camco Pacific Construction Company Inc	Zachariah Parry Retained
Counter Claimant	Camco Pacific Construction Company Inc	Steven L. Morris Retained

Counter	Club Vista Financial Services LLC	Mark E. Ferrario, ESQ
Counter	Gemstone Development West Inc	Greg S. Gilbert
Counter	Insulpro Projects Inc	Eric Dobberstein
Counter	Tharaldson Motels II Inc	Martin A. Muckleroy
Counter	Tharaldson, Gary D	Martin A. Muckleroy
Counter	Accuracy Glass & Mirror Company Inc	Dallin T. Wayment
Counter	Ahern Rentals Inc	D. Shane Clifford, ESQ
Counter	APCO Construction	Gwen Rutar Mullins
Counter	Arch Aluminum and Glass Co	Jeffrey R. Albregts
Counter	Atlas Construction Supply Inc	David W. Dachelet
Counter	Bank of Oklahoma NA	
Counter	Bruin Painting Corporation	Dallin T. Wayment
Counter	Buchele Inc	Dallin T. Wayment
Counter	Cabinetec Inc	Justin L. Watkins
Counter	Camco Pacific Construction Co Inc	Steven L. Morris
Counter	Camco Pacific Construction Inc	Steven L. Morris
Counter	Cellcrete Fireproofing of Nevada Inc	Robert C. Reade
Counter	Concrete Visions Inc	
Counter	Creative Home Theatre LLC	
Counter	Dave Peterson Framing Inc	Stephen M. Dixon
Counter	E & E Fire Protection LLC	Stephen M. Dixon
Counter	Executive Plastering Inc	Matthew Q. Callister
Counter	EZA P.C.	Donald H Williams

Counter	Fast Glass Inc	Michael T. Gebhart
Counter	Fast Glass Inc	Michael T. Gebhart
Counter	Ferguson Fire and Fabrication Inc	Dale B. Rycraft Jr.
Counter	Gemstone Development West Inc	Greg S. Gilbert
Counter	Gerdau Reinforcing Steel	William R. Urga
Counter	Granite Construction Company	David R. Johnson
Counter	Harsco Corporation	Donald H. Williams
Counter	HD Supply Waterworks LP	Dallin T. Wayment
Counter	Heinaman Contract Glazing	Dallin T. Wayment
Counter	Helix Electric of Nevada LLC	Dallin T. Wayment
Counter	Hydropressure Cleaning Inc	
Counter	Inquipco	Jennifer R. Lloyd
Counter	Insulpro Projects Inc	Eric Dobberstein
Counter	Interstate Plumbing & Air Conditioning	
Counter	John Deere Landscape Inc	
Counter	Las Vegas Pipeline LLC	Pro Se
Counter	Masonry Group Nevada Inc	Becky Pintar
Counter	Nevada Construction Services	Charles Vlasic
Counter	Nevada Prefab Engineers	Mindy C. Fisher
Counter	Nevada Prefab Engineers Inc	Christopher Craft
Counter	Noord Sheet Metal Company	T. James Truman
Counter	Noorda Sheet Metal Company	Stephen M. Dixon
Counter	Northstar Concrete Inc	Jennifer R. Lloyd
Counter Defendant	Northstar Concrete Inc	Jennifer R. Lloyd Robinson

Retained

Counter	Pape Materials Handling	Christopher Craft
Counter	Patent Construction Systems	Donald H Williams
Counter	Professional Door and Mill Works LLC	Stephen M. Dixon
Counter	Professional Doors And Millworks LLC	
Counter	Ready Mix Inc	Brian Keith Berman
Counter	Renaissance Pools & Spas Inc	Steven B. Scow
Counter	Republic Crane Service LLC	Richard Allen Koch
Counter	Scott Financial Corporation	Glenn F Meier
Counter	Scott, Bradley J	Matthew S. Carter
Counter	Selectbuild Nevada Inc	Robert E. Schumacher
Counter	Steel Structures Inc	Christopher Craft
Counter	Supply Network Inc	Phillip T. Varricchio
Counter	The Pressure Grout Company	
Counter	Tri City Drywall Inc	Jennifer R. Lloyd-
Counter	WRG Design Inc	Dallin T. Wayment
Counter	Zitting Brothers Construction Inc	Reuben Cawley
Cross	APCO Construction	Gwen Rutar Mullins
Cross	Gemstone Development West Inc	
Defendant	Commonwealth Land Title Insurance Co	
Defendant	First American Title Insurance Co	
Defendant	Gemstone Development West Inc	

~~Monica Caffaratti~~
~~Retained~~

Defendant Scott Financial Corporation

Glenn F Meler

Defendant Scott, Bradley J

Jon Randall Jones

Doing Apco Construction

~~Gwen Rutar Mullins~~

Doing Helix Electric

Doing Oz Architecture of Nevada Inc

Donald H Williams

Doing Pape Rents

Christopher Craft

Doing Pape Rents

William R. Urga

Doing Power Plus!

Doing Viking Supplynet

Interpleader Hydropressure Cleaning Inc

Gwen Rutar Mullins

Intervenor Cell Crete Fireproofing Of NV Inc

Robert C. Reade

Intervenor Custom Select Billing Inc

Gwen Rutar Mullins

Intervenor Dave Peterson Framing Inc

~~T. James Truman~~

Intervenor E & E Fire Protectiong LLC

T. James Truman

Intervenor EZA P C

Donald H Williams

Intervenor Granite Construction Company

David R. Johnson

Intervenor Insulpro Projects Inc

Eric Dobberstein

Intervenor National Wood Products, Inc.'s

Richard L Tobler

Intervenor Nevada Prefab Engineers Inc

Martin A. Little

Intervenor Noord Sheet Metal Company

T. James Truman

Intervenor Patent Construction Systems

Donald H Williams
Retained
7023207755(W)

Intervenor Pressure Grout Co

T. James Truman

Intervenor Professional Doors & Millworks LLC

T. James Truman

Intervenor Steel Structures Inc

Martin A. Little

Intervenor Tri-City Drywall Inc

Jennifer R. Lloyd-

Intervenor Camco Pacific Construction Co Inc

Steven L. Morris

Intervenor Camco Pacific Construction Co Inc

Steven L. Morris

Intervenor Club Vista Financial Services LLC

Martin A. Muckleroy

Intervenor Club Vista Financial Services LLC

Martin A. Muckleroy

Intervenor Commonwealth Land Title Ins Co

Intervenor Commonwealth Land Title Ins Co

Intervenor Concrete Visions Inc

Intervenor E & E Fire Protection LLC

Stephen M. Dixon

Intervenor Fidelity & Deposit Company Of
Defendant Maryland

Steven L. Morris
Retained

Intervenor Fidelity And Deposit Co Of Maryland

Steven L. Morris

Intervenor First American Title Insurance Co

Intervenor First American Title Insurance Co

Intervenor Gemstone Development West Inc

~~**Monica Caffaratti**~~

Intervenor Gemstone Development West Inc

~~**Monica Caffaratti**~~

Intervenor Gemstone Development West Inc

Intervenor Gemstone Development West Inc

Intervenor Gemstone Development West Inc

~~**Monica Caffaratti**~~

Intervenor Jeff Helt Plumbing Co LLC

Kelth E. Gregory

Intervenor Marshall, Kelly

Intervenor	Nevada Construction Services	Nikola Skrinjaric
Intervenor	Old Republic Surety	Kelth E. Gregory
Intervenor	Scott Financial Corporation	Glenn F Meler
Intervenor	Tharaldson Motels II Inc	Martin A. Muckleroy
Intervenor	Tharaldson Motels II Inc	Martin A. Muckleroy
Intervenor Plaintiff	Arch Aluminum And Glass Co Now Known As Arch Aluminum and Glass LLC	Jeffrey R. Albrechts Retained 702-483-5026(W)
Intervenor	Cabinetec Inc	Justin L. Watkins
Intervenor	Cactus Rose Construction Inc	Dallin T. Wayment
Intervenor	Camco Pacific Construction Co Inc	Steven L. Morris
Intervenor	Harsco Corporation	Donald H. Williams
Intervenor Plaintiff	Interstate Plumbing & Air Conditioning Inc	Michael T. Gebhart Retained
Intervenor	Las Vegas Pipeline LLC	James E. Shapiro
Intervenor	Northstar Concrete, Inc.	Jennifer R. Lloyd
Intervenor	Pape Material Handling	William R. Urga
Intervenor	S R Bray Corp	Richard L. Peel
Intervenor	Selectbuild Nevada Inc	Robert E. Schumacher
Intervenor	Sunstate Companies Inc	Garry L. Hayes
Intervenor	SWPPP Compliance Solutions LLC	Richard L. Peel

Other	Graybar Electric Company	
Other	HD Supply Construction Supply LP <i>Doing Business As</i> White Cap Construction Supply Inc	
Other	PCI Group, LLC	
Other	RLMW Investments LLC	
Other	United Subcontractors Inc <i>Doing Business As</i> Skyline Insulation	
Other	Wiss, Janney, Elstner Associates, Inc.	Gwen Rutar Mullins
Plaintiff	Apco Construction	Jack Chen Min Juan
Special	Hale, Floyd, ESQ	
Third Party	Camco Pacific Construction Co Inc	Steven L. Morris
Third Party	Fidelity & Deposit Co Of Maryland	Steven L. Morris
Third Party	Fidelity & Deposit Co Of Maryland	Steven L. Morris
Third Party	Dave Peterson Framing Inc	T. James Truman
Third Party	E & E Fire Protection LLC	T. James Truman
Third Party	Insulpro Projects Inc	Eric Dobberstein
Third Party	Noorda Sheet Metal Company	T. James Truman
Third Party	Professional Doors & Millworks LLC	T. James Truman

EVENTS & ORDERS OF THE COURT

10/05/2017 All Pending Motions (9:00 AM) (Judicial Officer Denton, Mark R.)

Minutes

10/05/2017 9:00 AM

- APPEARANCES: Jack Juan, Cody Mounteer, John Mowbray, and Mary Bacon, Attorneys for Apco Steven Morris, Attorney for Camco Pacific Construction Co Inc Eric Zimbelman, Attorney for Defts Helix Electric of Nevada, SWPP Compliance Solution, Buchele Inc, Cactus Rose Construction Inc, Fast Glass Inc, and Heinaman Contract Glazing Benjamin Johnson, Attorney for United Subcontractors Inc John Taylor and Rich Tobler, Attorneys for National Wood Products Elizabeth Stephens, Attorney for Trustee I-Che Lai, Attorney for Pltf, Zitting Brothers Construction Inc. Tracy Truman, Attorney for E & E Fire Michael Ernst, Attorney for Gerdau Reinforcing Steel, Steel Structures Inc, and Nevada Prefab Engineers
CONFERENCE AT BENCH: Court disclosed that the wife of its current Law Clerk, Andrew Lajoie, is the niece of Steven Morris. Counsel acknowledged their agreement to proceed in light of the Court's disclosure. Further, Court advised that Mr. Lajoie would be screened from this case. Mr. Juan advised that at the settlement conference no global settlement was reached; however, progress was made with some. Further, Mr. Juan requested discovery be extended another 45 days to finish up depositions, which resulted in colloquy as to deferring the hearing on the motions pending depositions. Mr. Zeimbelman noted his opposition. COURT ORDERED, matter TRAILED for counsel to discuss the matter further. MATTER RECALLED - Court noted that there are some different points as to what should happen relative to scheduling of trial and/or hearing the motions that are before the Court today. Mr. Juan advised that the key concern is for those who are opposed to having their clients deposed and the trial being delayed. Court advised the case could be placed on the November 28, 2017 stack, which lead to further discussion as to that date changing any of the parties' position, the case having a date certain on the stack, the amount of time trial would require, and the specific depositions that would be taken. It was estimated that each subcontractor would take a day. After hearing from counsel, COURT ORDERED trial date SET November 28, 2017 at 9:00 am; new trial order to issue and a calendar call date will be set as well. COURT FURTHER ORDERED that the Motions on today's calendar CONTINUED to November 16, 2017 at 9:00 am. COURT FURTHER ORDERED that the deadline for taking depositions is October 30, 2017. COURT FURTHER ORDERED that any motions in limine be filed by November 5, 2017 will be SET for hearing on November 16, 2017 at 9:00 am; no more motions for summary judgment can be filed. Additional colloquy. Mr. Juan to prepare and circulate an order reflecting what has been done today. CLERK'S NOTE: This Minute Order has been amended to reflect that motions in limine will be SET for hearing on November 16, 2107 at 9:00 a.m.

[Return to Register of Actions](#)

EXHIBIT 15

SUBCONTRACT AGREEMENT

PROJECT: **The West Manhattan Condominiums** Contract NO. **168-3** APCO Construction Project No. **168**
PROJECT LOCATION: West Russell Road and Rocky Hill Street, Las Vegas, NV, 89148

OWNER: **Gemstone Development West, Inc., 9121 West Russell Rd, Unit 117, Las Vegas Nevada 89148**

ARCHITECT/ENGINEER: **OZ Architecture**, 303.861.5704 Huron Street, Denver, CO, 80202. **Redwine Engineering** (303) 575-9510 700 17th Street, Denver, CO 80202. **Jordan & Skala Engineers**, (702) 362-5111, 2900 S. Rancho Dr, Suite 102, Las Vegas Nevada 89102. **WRG Engineering** (702) 990-9300 3011 West Horizon Ridge Parkway, Suite 100, Henderson Nevada 89052.

THIS AGREEMENT (hereinafter "the Subcontract") is entered into in consideration of the mutual promises made this 17th day of April, 2007, between:

ASPHALT PRODUCTS CORPORATION also known as **APCO Construction**, (hereinafter called the "Contractor")
3432 N. Fifth Street, North Las Vegas, Nevada 89032. Office: (702) 734-0198, Fax: (702) 734-0396. Nevada
Contractors License No. **14563**.

And

Zitting Brothers Construction, Inc. (hereinafter called the "Subcontractor").
P.O. Box 178
Hurricane, UT 84737
P 435-635-4068 F 435-635-4137



Subcontractor's NV Contractor's License No. **58955**

Limit: **Unlimited**

Contractor and Subcontractor agree as follows:

1. Contract Documents

- 1.1 The Contract Documents for this Subcontract Agreement, shall include all exhibits and other documents attached hereto or made a part thereof by reference, all drawings designed by **OZ Architecture, Redwine Engineering, Jordan & Skala Engineers, WRG Engineering** and approved by **Gemstone Development West, Inc.** and the Primary Contract between the Owner and Contractor (hereinafter "the Prime Contract"), including all exhibits, and other documents attached thereto or made part hereof by reference, the Project Specifications and Contract Documents, the Project Plans, and all addendum and subsequent modifications issued thereto. (All Contract Documents identified herein shall be hereinafter collectively referred to as the "Contract Documents").
- 1.2 The Contract Documents are available in Contractor's office. Subcontractor acknowledges that it has carefully examined the Contract Documents and fully understands them. Copies of the Plans and Specifications will be provided to Subcontractor, upon request, at Subcontractor's Cost. Subcontractor shall, prior to the commencement of the Work, review and compare all of the Subcontract Documents relating to the performance of the Subcontractor and any and all errors, ambiguities and inconsistencies shall immediately be reported to the Contractor in writing and resolved to Subcontractor's satisfaction.

APCO Construction 
Subcontractor 

- 1.3 Subcontractor is bound to the Contractor to the same extent and duration that Contractor is bound to Owner. Subcontractor assumes toward Contractor all obligations, liabilities and responsibilities that Contractor, by the Contract Documents, has assumed toward the Owner in the Prime Contract. Contractor shall further have the benefit of all rights, remedies, redress and limitations in respect to Subcontractor and all things done and used by Subcontractor in performance of its Work, which the Owner and its agents have against Contractor in the Contract Documents or by law. Any and all decisions by the Owner or its agents relative to interpretation of the Contract Documents or any ambiguity or discrepancy therein shall be binding on the Subcontractor to the same extent such are binding on Contractor. Subcontractor shall bind lower tier subcontractors and suppliers to full compliance with all Contract Documents, including all performance obligations and responsibilities which subcontractor assumes toward Contractor.

2. Scope of Work

- 2.1 Subcontractor agrees to furnish all supervision and labor, furnish and install all materials, equipment and supplies required, and do all things necessary to fully complete all of the items of work ("the Subcontract Work"), referred to in Exhibit "A": Subcontractor Scope of Work And Exhibit "B": ZBL S2 Bid proposal #REV5574 Dated 10-05-07
- 2.2 Subcontractor warrants to Contractor and Owner that all Work shall be performed in a neat, skillful, good and workmanlike manner and will be fit for its intended use both as to workmanship and materials. Subcontractor agrees that all materials and equipment furnished by Subcontractor shall be new and of the best description and quality of their respective kinds, unless otherwise specified and ordered by Contractor in writing. Subcontractor warrants that the materials and equipment furnished and the Work performed will strictly comply with the Contract Documents and this Subcontract, and shall be satisfactory to Owner and Contractor.

2.3 Equal Opportunity Clause

During the performance of any contract, Subcontractor, unless exempt, agrees as follows:

- 2.3.1 Subcontractor will not discriminate against any employee or applicant for employment because of race, color, religion, sex or national origin. Subcontractor will take affirmative action to ensure that color, religion, sex or national origin. Such action shall include, but not limited to the following; employment, upgrading, demotion or transfer, recruitment or recruitment advertising, layoff or termination, rates of pay or other forms of compensation, and selection for training, including apprenticeship. Subcontractor agrees to post in conspicuous places, available to employee and applicants for employment, notices to be provided by the government contracting officer setting forth the provisions of this nondiscrimination clause.
- 2.3.2 Subcontractor will, in all solicitations or advertisements for employees placed by or on behalf of Subcontractor, state that all qualified applicants will receive consideration for employment without regard to race, color, religion, sex or national origin.

3. Contract Price and Payments

- 3.1 In consideration of the strict and complete and timely performance of all Subcontract Work, Contractor agrees to pay Subcontractor or in the payment quantities and schedules as is more fully described in Exhibit "A": Subcontractor's Scope of Work. And exhibit "B": Z.B.C. (Subcontractor) S2 bid proposal #REV5574 dated 10-05-07
- 3.2 In Consideration of the promises, covenants and agreements of Subcontractor herein contained, and the full, faithful and prompt performance of the Work in accordance with the Contract Documents, Contractor agrees to pay, and Subcontractor agrees to receive and accept as full compensation for doing all Work and

furnishing all materials and equipment contemplated and embraced in this Subcontract, and for all loss or damage arising out of the nature of said Work, or from all actions of the elements or from any unforeseen difficulties or obstacles which may arise or be encountered in the performance of the Work, and for all risks of every description connected with the Work, and for all expense incurred by or in consequence of the suspension, interruption or discontinuance of the Work, and for well and faithfully completing the Work and the whole thereof in the manner and according to the requirements and instructions of Contractor and Owner or Owner's agents in charge of the Work, if any, payment in the amount of the Subcontract Price.

- 3.3 Subcontractor, upon request of Contractor, and on such date as Contractor shall designate, shall submit to Contractor, in form and content acceptable to Contractor, a monthly billing, no later than the 25th of each month, showing quantities of Subcontract work that has been satisfactorily completed in the preceding month, as well as backup material for same for submittal to the Owner. Failure to submit by the 25th of each month may result in that monthly payment application being rolled over to the following month. Subcontractor shall also submit an original executed Conditional Release, in the form required by Contractor, verifying payment of all laborers, subcontractors, equipment and material suppliers. Subcontractor shall also furnish required releases from any sub-subcontractors and/or materials suppliers that have notified Contractor of their presence on the Project. Subcontractor further agrees to provide all required employment security department, fringe benefit trust funds, certified payroll, and/or other reports as may be required by the Contractor or the Contract Documents.
- 3.4 The progress payment to Subcontractor shall be one hundred percent (100%) of the value of Subcontract work completed (less 10% retention) during the preceding month as determined by the Owner, less such other amounts as Contractor shall determine as being properly withheld as allowed under this Article or as provided elsewhere in this Subcontract. The estimates of Owner as to the amount of Work completed by Subcontractor shall be binding upon Contractor and Subcontractor and shall conclusively establish the amount of Work performed by Subcontractor. As a condition precedent to receiving partial payments from Contractor for Work performed, Subcontractor shall execute and deliver to Contractor, with its application for payment, a full and complete release (**Forms attached**) of all claims and causes of action Subcontractor may have against Contractor and Owner through the date of the execution of said release, save and except those claims specifically listed on said release and described in a manner sufficient for Contractor to identify such claim or claims with certainty. Upon the request of Contractor, Subcontractor shall provide an Unconditional Waiver of Release in form required by Contractor for any previous payment made to Subcontractor. Any payments to Subcontractor shall be conditioned upon receipt of the actual payments by Contractor from Owner. Subcontractor herein agrees to assume the same risk that the Owner may become insolvent that Contractor has assumed by entering into the Prime Contract with the Owner.
- 3.5 Progress payments will be made by Contractor to Subcontractor within 15 days after Contractor actually receives payment for Subcontractor's work from Owner. The progress payment to Subcontractor shall be one hundred percent (100%) of the value of Subcontract work completed (less 10% retention) during the preceding month as determined by the Owner, less such other amounts as Contractor shall determine as being properly withheld as allowed under this Article or as provided elsewhere in this Subcontract. The estimates of Owner as to the amount of Work completed by Subcontractor shall be binding upon Contractor and Subcontractor and shall conclusively establish the amount of Work performed by Subcontractor. As a condition precedent to receiving partial payments from Contractor for Work performed, Subcontractor shall execute and deliver to Contractor, with its application for payment, a full and complete release (**Forms attached**) of all claims and causes of action Subcontractor may have against Contractor and Owner through the date of the execution of said release, save and except those claims specifically listed on said release and described in a manner sufficient for Contractor to identify such claim or claims with certainty. Upon the request of Contractor, Subcontractor shall provide an Unconditional Waiver of Release in form required by Contractor for any previous payment made to Subcontractor. Any payments to Subcontractor shall be conditioned upon receipt of the actual payments by Contractor from Owner. Subcontractor herein agrees to

assume the same risk that the Owner may become insolvent that Contractor has assumed by entering into the Prime Contract with the Owner.

3.6 Contractor shall have the right at all times to contact lower tier subcontractors and suppliers to verify that they are being paid by Subcontractor for labor or materials furnished for use in the Subcontract Work. If it appears that labor, material or other costs incurred in the performance of the Subcontract Work are not being paid when due, Contractor may take whatever steps it deems necessary to insure that the progress payments will be utilized to pay such costs, including, but not limited to, the issuance of joint checks payable to the claimant after written notice to Subcontractor, or additionally, making payment directly to claimant after written notice to Subcontractor. If such payment by Contractor exceeds the balance of payments due or to become due to Subcontractor from Contractor, then Subcontractor shall be liable to Contractor for the difference.

3.7 Contractor is hereby expressly granted the right to off set any sums due the Subcontractor under the provisions of this Subcontract against any obligation that may be due from Subcontractor to Contractor regardless of the source of said obligation. When requested by Contractor, Subcontractor shall furnish to Contractor a verified and itemized statement showing the names and addresses of all entities who have furnished or may furnish labor, materials, and/or equipment for the Subcontract Work together with the amount due or to become due for such work.

3.8 The 10 percent withheld retention shall be payable to Subcontractor upon, and only upon the occurrence of all the following events, each of which is a condition precedent to Subcontractor's right to receive final payment hereunder and payment of such retention: (a) Completion of the entire project described in the Contract Documents; (b) The approval and final acceptance of the project Work by Owner; (c) Receipt of final payment by Contractor from Owner; (d) Delivery to Contractor from Subcontractor all as-built drawings for it's scope of work and other close out documents; (e) Delivery to Contractor from Subcontractor a Release and Waiver of Claims from all of Subcontractor's laborers, material and equipment suppliers, and subcontractors providing labor, materials or services to the Project, (Forms attached). If any sub-subcontractor, supplier or other person refuses to furnish a release or waiver required by the Owner or Contractor, the Subcontractor shall, upon the request of Contractor, furnish a bond satisfactory to the owner and Contractor to indemnify them against any such claim or lien. Should the existence of any unsatisfied or undischarged claim, obligation or lien arising in conjunction with Subcontractor's Work become known after final payment is received from Contractor, Subcontractor shall promptly pay on demand all actual amounts Contractor and/or Owner pay in bonding around, satisfying, discharging or defending any such claim, obligation or lien, including all costs and attorney's fees incurred in connection therewith. Final payment shall not relieve Subcontractor from liability, or for warranty or guaranty, or for indemnity obligations for faulty or defective Work. *(F) Building is considered complete as soon as drywall is completed.*

3.9 Subcontractor agrees that Contractor shall have no obligation to pay Subcontractor for any changed or extra work performed by Subcontractor until or unless Contractor has actually been paid for such work by the Owner. *Unless contractor has executed & approved change order directing subcontractor to perform certain changes in writing and certain changes have been completed by subcontractor.*

3.10 Progress payments and Final Payment shall not be considered or construed as evidence of acceptance of any part of Subcontractor's work until final acceptance of the Project by Owner.

4. Prosecution of Work

4.1 TIME IS OF THE ESSENCE OF THIS SUBCONTRACT.

(a) Seven (7) copies of all Subcontractor submittals shall be received by Contractor to suit the requirements of the approved CPM target schedule unless otherwise agreed to in writing by Contractor. Subcontractor agrees to provide plan-sized sheets for all submittals of required size

24"x36" including one (1) sepia & five (6) blue line prints. Product specifications shall be provided in standard 8-1/2" by 11" paper, three hole punched and inserted into three ring binders labeled "The Manhattanwest Condominiums". Any required re-submittals shall be submitted within five working days of receipt of request from the Owner.

- (b) Final acceptance and approval of this Subcontract Agreement is contingent upon approval of Subcontractor's Submittals by the Owner/Architect/Engineer.
- (c) Any delays in the submittal process caused in whole or part by Subcontractor may be grounds for immediate termination of this Subcontract Agreement and subject Subcontractor to damages as provided in Sections 8 and 9 below.

Subcontractor agrees to commence the Subcontract Work within five (5) calendar days after receiving notification from Contractor to proceed, or within such other time as may be specified by Contractor, and to proceed at such points as Contractor may designate, and to continue diligently in its performance in accordance with the Contractor's project schedule and at a pace that will cause no delay in the progress of the Contractor's or other subcontractor's work.

- 4.2 Upon request, Subcontractor shall promptly provide Contractor with scheduling information, in the format required in the Contract Documents, or any other information relating to the order or nature of the Subcontract Work. Subcontractor agrees that the project schedule may be revised by Contractor as work progresses. Contractor may require Subcontractor to prosecute segments of the Subcontract Work in phases as Contractor may specify. Subcontractor shall comply with instructions given by Contractor, including any instructions to suspend, delay or accelerate the Subcontract Work. Subcontractor shall not be entitled to any extra compensation from Contractor for any such suspension, delay or acceleration unless specifically agreed to in writing by the Contractor and Owner and paid for by Owner. The Owner's payment to Contractor of extra compensation for any such suspension, delay, or acceleration shall be a condition precedent to Subcontractor's right, if any, to receive such extra compensation from Contractor.
- 4.3 Subcontractor shall keep the work area reasonably clean of debris, daily, resulting from the performance of its work and shall remove from the work area all debris generated by the execution of the Subcontract work. Non-compliance with verbal direction from Prime Contractor's Project Superintendent for cleanup shall result in one (1) written notice for clean-up. Upon failure to properly police the debris from their own activity, 24 hours after written notification this subcontractor will be fined \$500.00 plus the cost for clean-up.
- 4.4 Subcontractor, in undertaking to complete the Subcontract Work within the time specified, avows that it has considered ordinary delays incident to such work; including, but not limited to delays in securing materials, equipment or workmen, and minor changes, omissions or additions, unavoidable casualties, normal weather conditions, strikes or lockouts. If Subcontractor shall be delayed in the performance of the Work by any act or neglect of the Owner or Architect, or by agents or representatives of either, or by changes ordered in the Work, or by fire, unavoidable casualties, national emergency, or by any cause other than the intentional interference of Contractor, Subcontractor shall be entitled, as Subcontractor's exclusive remedy, to an extension of time reasonably necessary to compensate for the time lost due to the delay, but only if Subcontractor shall notify Contractor in writing within twenty four (24) hours after such occurrence, and only if Contractor shall be granted such time extension by Owner. No time extension will be allowed for delays or suspensions of work caused or contributed to by Subcontractor, and no time extension will be granted Subcontractor that will render Contractor liable for liquidated damages or other loss under the Contract Documents. The Subcontractor understands that this is an aggressive schedule and that should the Subcontractor fail to staff the Project with the proper workforce, to stay on schedule, then it is understood that the Subcontractor will have its workforce work overtime and/or weekends to maintain the pace of the schedule solely at the subcontractors expense.

- 4.5 In addition to other damages and remedies provided in this Subcontract, Subcontractor agrees to pay any liquidated damages that may be assessed against the Contractor by the Owner, as provided in the Contract Documents, for any project delays caused by Subcontractor. Such damages shall be paid for each working day the Subcontract Work remains incomplete beyond the time specified for subcontract completion plus any extension thereof agreed to in writing by the Contractor, and granted by Owner.
- 4.6 Contractor shall not be liable to Subcontractor for delays caused by reason of fire or other casualty, or on account of riots, strikes, labor trouble, terrorism, acts of God, cataclysmic event, or by reason of any other event or cause beyond Contractor's control, or contributed to by Subcontractor.
- 4.7 All Subcontract work done and all Subcontract materials delivered to the project site shall become Contractor's property, and said material shall not be removed by Subcontractor or any other party from the project site without Contractor's written consent. After completion and final acceptance of the Subcontract work and final payment, Subcontractor shall promptly remove all remaining material, equipment and debris of Subcontractor.

5. Changes and Claims

- 5.1 Contractor may order or direct changes, additions, deletions or other revisions in the Subcontract work without invalidating the Subcontract. No changes, additions, deletions, or other revisions to the Subcontract shall be valid unless made in writing. Subcontractor mark up shall be limited to 10% overhead and profit in addition to the direct cost of the work. No markup shall be allowed on over time for original scope of work acceleration.
- 5.2 Subcontractor, prior to the commencement of such changed or revised work, shall submit, (within 24 hours of request) to Contractor, written copies of the cost or credit proposal, including work schedule revisions, for changes, additions, deletions or other revisions in a manner consistent with the Contract Documents. Contractor shall not be liable to Subcontractor for a greater sum, or additional time extensions, than Contractor obtains from Owner for such additional work, less reasonable overhead and profit due to Contractor, and also less professional and attorney's fees, costs, and other expenses incurred by Contractor in the collection of any such sum or time extension. Payment to Subcontractor for such work shall be conditioned upon Contractor's actual receipt of payment from the Owner and such payment by Owner to Contractor with whatever documentation or support, as Contractor may deem necessary to negotiate with Owner.
- 5.3 In any dispute between Contractor and Owner as to amount, classification, price, time or value of Subcontract Work, or any Subcontract material or supplies, or any delay in the prosecution of the Subcontract work caused by Owner, or any other matter whatsoever pertaining to the Subcontract work, Subcontractor agrees to promptly and adequately provide Contractor with whatever documentation or support as Contractor may deem necessary to negotiate with Owner.
- 5.4 Contractor may dispute, appeal resist, litigate or arbitrate any decision of Owner, without being deemed to have admitted any obligation or liability to Subcontractor, and if the decision shall be against Contractor, then Subcontractor shall be bound thereby. Subcontractor may, at its own expense, participate with Contractor in arbitration or legal proceedings. Subcontractor shall bear part or all costs, including attorneys' fees and legal expenses, incurred by Contractor in any such proceeding involving a claim, which, if allowed, would result in one or more payments to Subcontractor. Subcontractor's costs shall bear to the total amount sought in the proceeding. Prosecution of any such claim or proceeding shall be at the sole risk of Subcontractor, and Contractor shall have no liability for or in relation to the outcome.

6. Assignments

- 6.1 Subcontractor shall not assign or sublet the Subcontract or any part of the Subcontract Work or any payments due hereunder, without prior written consent of Contractor. Any such assignment made by Subcontractor without Contractor's prior written consent is void, and shall be grounds for termination of this Subcontract by Contractor, terminates the Subcontractor's right to any further payment and authorizes Contractor to withhold all monies due or to become due to Subcontractor.

7. Taxes

- 7.1 All applicable taxes, contributions, interest and/or penalties due under any federal, state, or municipal statute or regulation arising from Subcontractor's Work are included in the price to be paid to Subcontractor under the Subcontract. Subcontractor shall indemnify, defend, and save Contractor and Owner harmless from all liability, loss, and expense resulting from Subcontractor's failure to satisfy such obligations. Subcontractor shall, on demand, provide proof that all taxes and other charges have been, and are being properly paid.
- 7.2 If Contractor is assessed or charged for any Subcontractor taxes, contributions, interest or penalties, Contractor shall have the right to withhold such amount from funds due or the become due under the Subcontract, and to pay directly to taxing authorities any sums otherwise due Subcontractor, but not otherwise subject to offset in accordance with Section 3 above, upon receipt of a tax levy from such taxing authority.

8. Default and Termination

- 8.1 If, in the opinion of Contractor or Owner, Subcontractor fails, at any time, to supply a sufficient number of properly skilled workmen or sufficient materials and equipment of the proper quality; or fails to adequately or timely perform the Subcontract work to the satisfaction of Contractor or Owner; or becomes insolvent or makes any filing under the Acts of Congress relating the bankruptcy; or fails, neglects and/or refuses to comply with the project plans and specification; or fails to perform the Subcontract work in a good and workmanlike manner; or causes any stoppage of the work of the other trades upon the project; or fails to correct defective work; or fails to comply in any other respect with the terms and conditions of this Subcontract, Contractor may declare a default by Subcontractor as herein provided.
- 8.2 Contractor shall provide prompt written notice of default to Subcontractor, by regular mail or as may otherwise be considered to reasonably provide notice to Subcontractor at Subcontractor's place of business described above. Such notice shall be complete upon deposit at a regular receptacle of the U.S. mail, Fax Transmission or upon actual hand delivery as provided herein.

In the event of default by Subcontractor as provided above, Contractor may, at his option, demand Subcontractor to cure or otherwise correct the default and breach within three calendar days after written notice by Contractor. If, after three days, Subcontractor has failed to cure and correct the default, Contractor may, at his sole option, provide any such labor, materials or equipment as may be necessary to complete the Work covered by this Subcontract Agreement and thereafter deduct the cost thereof from any money then due or thereafter to become due to Subcontractor under this Agreement. Alternatively, Contractor may terminate Subcontractor's right to proceed with the Work and thereafter enter upon the premises and take control of all materials, tools, equipment, and/or appliances of Subcontractor, and may employ any other person, persons, or organizations to finish the Work and provide the labor, materials and equipment to accomplish that purpose. Following completion of the Work by the Contractor or other persons or organizations, all unused materials, tools, equipment and/ or appliances shall be returned to

Subcontractor. Subcontractor shall not be entitled to rent or payment of any kind for the use of Subcontractor owned equipment or materials, nor shall Contractor be liable for any damages arising from said use unless resulting from gross negligence, or willful destruction by Contractor.

In the event Subcontractor has provided a payment or performance bond to Contractor, in accordance with Section 10 of this Agreement, and following expiration of the three days cure period, Contractor will make notice and demand by registered mail upon Subcontractor's surety to complete the Work covered by this Subcontract Agreement. In the event Subcontractor's surety fails to notify Contractor within 10 days after receipt of notice and demand by Contractor of surety's election to complete the work on behalf of Subcontractor, such failure shall be deemed a waiver by surety to exercise its rights to complete the Work. Thereafter, Contractor may at his sole option, complete the Work as otherwise provided by this Section.

- 8.3 In case of any such termination of Subcontractor's right to proceed with the Work, Subcontractor shall not be entitled to receive any further payment under this Subcontract Agreement until the Work undertaken by Contractor in his prime contract is completely finished. At that time, if the unpaid balance of the amount to be paid under this Agreement exceeds the expenses incurred by Contractor in finishing Subcontractor's Work, such excess shall be paid by Contractor to Subcontractor; but, if such expense shall exceed the unpaid balance, then Subcontractor shall promptly pay to Contractor the amount by which such expense exceeds the unpaid balance.

"Expense" as referred to in this Section shall include all direct and indirect costs incurred by Contractor for furnishing labor, materials, and equipment; to complete the Work covered by this Subcontract Agreement. "Expense" shall further include, but shall not be limited to, replacement of Subcontractor costs, liquidated damages incurred by Contractor, extended field office overhead, and home office overhead, Contractor's attorneys fees and costs, and any and all other damages sustained by Contractor by reason of Subcontractor's default.

- 8.4 In the event Contractor elects to use its own labor forces to complete Subcontractor's Work, Subcontractor and Subcontractor's surety agree to pay Contractor for such Work at the following rates: (a) Labor – At Contractor's then prevailing labor rates, plus labor burden, including, but not limited to, employment taxes, liability insurance, workmen compensation insurance, and all other benefits; (b) Contractor Owned Equipment-At the then prevailing Equipment Rental Rates as established by the Blue Book for Construction Equipment as published by Data Quest; all rental costs shall be determined by dividing the monthly rental rate by twenty-two days per month to determine a daily rental rate. Hourly rental rates shall be determined by dividing the daily rate by eight; (c) Materials, Rental Equipment-Direct Invoice Costs, including transportation, if any; (d) Replacement Subcontractor-Direct Invoice Costs paid Replacement Subcontractor; (e) Field and home office overhead; (f) Ten percent profit on all expenses indicated in a-e above.

In lieu of computing overhead, as provided for above, Contractor may, at his sole option, elect to assess a charge, on items a, b, and c above, of 15% for General Overhead expenses. In addition, Contractor may assess a charge on items a, b, and c above 10% for Profit. Contractor shall be entitled to an additional markup on any and all of such expenses. Contractor shall also be entitled to an additional markup of 5% for General Overhead and 10% for Profit on all expenses and cost incurred pursuant to item d and e above.

- 8.5 If the cost to complete the Subcontract work is more than the unpaid balance of the Subcontract, then Subcontractor shall be liable to Contractor for the deficiency, and Contractor may hold, sell or otherwise realize upon any Subcontractor materials or equipment, or take other steps to collect the deficiency, including making a claim against Subcontractor's surety.

- 8.6 Whether Contractor exercises one or more of the above options or rights, nothing contained herein shall release Subcontractor within the specified time. Subcontractor agrees in the event of default that it will immediately assign and turn over to Contractor all sub-contracts, material contracts, or orders, bills of lading for material en route, and any other necessary data or information that would minimize the cost of completion of the Subcontract work.

9. Termination for ~~Convenience~~ Nonperformance

- 9.1 Right to Terminate for ~~Convenience~~ Nonperformance. The Contractor shall have the right to terminate for ~~convenience~~ Nonperformance, at any time, and with ~~or without~~ cause, Subcontractor's performance of all or part of the Subcontract or Subcontract Work, as defined in paragraph 2.1.

- 9.2 Notice to Subcontractor. The Contractor shall provide Subcontractor with written notice of the termination two calendar days in advance of the effective date of the termination. The two-day period shall begin to run upon receipt of the termination for ~~convenience~~ Nonperformance notice by the Subcontractor.

- 9.3 Subcontractor's Obligations. Upon receipt of the written notice of termination, the Subcontractor shall:

- A. Stop all work or its performance of all the Subcontractor or Subcontract Work that has been terminated, or stop work on the part of the Subcontract Work that has been terminated if its performance of only part of the Subcontract Work has been terminated.
- B. Enter into no further sub-subcontracts or place any orders for supplies, materials, or facilities, except as necessary to complete any portion of the Subcontract Work not terminated for convenience.
- C. Terminate all sub-subcontracts or orders to the extent related to the terminated Subcontract Work.
- D. As directed by the Contractor, transfer title and deliver to the Contractor any fabricated or unfabricated parts, work in progress, completed work, supplies, and other materials produced or acquired for the Subcontractor or Subcontract Work terminated and the completed or partially completed plans, drawings, information, and other property that, if the Subcontract had been completed, the Subcontractor would be required to furnish to the Contractor.
- E. Complete non-terminated portions of the Subcontractor Work if the Subcontractor's performance of only a part of the Subcontract Work has been terminated.
- F. Use its best efforts to sell, as directed by the Contractor, any materials of the types referred to in paragraph (D) above; provided, however, that the Subcontractor is not required to extend credit to any purchaser of this material and may acquire the material under the conditions prescribed by, and at prices approved by, the Contractor. The proceeds from the sale of such material shall be applied to reduce any payment due from the Contractor under this Subcontract, and credited to the price or cost of the Subcontract Work, or paid in any other manner directed by the Contractor.
- G. Submit with 60 days of the effective date of termination, to the Contractor, a written termination claim, along with all documentation required to support the claim.
- H. Take any other action toward termination as directed by the General Contractor.

- 9.4 Effect of Owner's Termination of Contractor. If there has been a termination of the Contractor's contract with the Owner, the Subcontractor shall be paid the amount due from the Owner to the Contractor for the Subcontractor's completed work, as provided in the Contract Documents, after payment by the Owner to the Contractor.
- 9.5 Compensation. If the Contractor's contract has not been terminated, the Contractor shall pay the Subcontractor as follows:
- A. The direct cost of the work performed by Subcontractor prior to termination.
 - B. Overhead, general, and administrative expenses (including those for any sub-subcontracts) in an amount equal to 5% percent of direct costs.
 - C. 5% percent profit of the total of the amounts allowed in paragraphs (A) and (B) above. If, however, it appears that the Subcontractor would have sustained a loss on the entire Subcontract had it been completed, no profit shall be compensated by the Contractor, and the amounts paid for the termination shall not be compensated for.
- 9.6 Items Not Compensated. The Subcontractor shall not be compensated for.
- A. Any accounting, legal, clerical, or other expenses incurred by the Subcontractor in the preparation of the Subcontractor's termination claim.
 - B. Unabsorbed overhead and anticipated lost profits.
- 9.7 Permitted Deductions. The Contractor shall be entitled to deduct from any payment due the Subcontractor (A) any advance payment it has made to the Subcontractor for work not yet performed under the terms of the Subcontract and (B) the amount of any claim that the Contractor has against the Subcontractor.
- 9.8 Consideration. If no work has been performed by the Subcontractor at the time of termination, Subcontractor shall be paid the sum of \$100.00 for its undertaking an obligation to perform.
- 9.9 Settlement and Release of Any and All Claims. The settlement of termination costs pursuant to Paragraph 9.5 of this Clause shall constitute a settlement and release of any and all claims, known and unknown by the Subcontractor, arising prior to termination.

10. Bonds

- 10.1 Should the Contractor require it, the Subcontractor shall execute a Labor and Material Bond and Faithful Performance Bond in an amount equal to 100% of the Subcontract Price in Section 3. Said bonds shall be executed by a corporate surety acceptable to Contractor, shall name Asphalt Products Corporation as an Obligatee, and shall further name and protect all persons and entities to the same extent as may be required of Contractor pursuant to the Prime Contract. The cost of the bonds shall be added to the Subcontract amount. The terms of this Subcontract Agreement are incorporated by reference into the bonds required by this section, and the terms, conditions, and remedies of Contractor, shall prevail over any similar terms contained in said bond. By issuing a bond to Subcontractor pursuant to this Agreement, the Subcontractor's surety specifically agrees to be bound to Contractor to the same extent and in the same amount as Subcontractor.

11. Indemnity and Insurance -

11.1 INSURANCE REQUIREMENTS – Unless the Contract Documents require otherwise, Subcontractor agrees to procure and maintain, at his sole cost and expense, the following insurance coverage,

1. **Worker's Compensation:** Coverage A. Statutory policy form; Coverage B. Employer's liability; Bodily injury by accident - \$1,000,000 each accident; Bodily injury by disease- \$1,000,000 each employee. Coverage shall be maintained in accordance with NRS 616 and 617.
2. **Commercial Auto Coverage:** Auto liability limits of not less than \$1,000,000 each accident combined bodily injury and property damage liability insurance including, but not limited to, owned autos, hired or non-owned autos.
3. **Comprehensive General Liability or Commercial General Liability, "Occurrence Form" only.** "Claims Made" is not acceptable. The limits of liability shall not be less than:

VOID

 - a) Comprehensive General Liability: \$1,000,000 combined single limit bodily/property damage per occurrence or,
 - b) Commercial General Liability: The limits of liability shall not be less than: Each Occurrence limit - \$1,000,000; Personal injury limit - \$1,000,000; Products Completed Operations Aggregate Limit - \$5,000,000; General Aggregate Limit (other than products-completed operations).
4. **Excess Liability:** Umbrella Form or Follow Form Excess where necessary to meet required minimum amounts of coverage.
5. **The Project is covered by an OCIP.** Subcontractor shall enroll into this OCIP. Subcontractor shall be responsible for a deductible/SIR equal to that of the subcontractors' non-OCIP GL policy; not to be less than \$20,000 for light hazard trade contractors, \$25,000 for medium hazard trade contractors and \$75,000 for high hazard trade contractors.
6. Any deductible or self-insured retention must be declared on the Certificate and is subject to prior approval.
7. Liability Policy forms must include: a) Premises and operation with no X, C or U exclusions; b) Products and completed operations coverage (Subcontractor agrees to maintain this coverage for a minimum of 1 year following completion of his work); c) Full blanket contractual coverage; d) Broad form property damage including completed operations or its equivalent; e) An endorsement naming Asphalt Products Corporation, Gemstone LVS, LLC. and any other required interest as additional insured(s); f) An endorsement stating: "Such coverage as is afforded by this policy for the benefit of the additional insured(s) shall be noncontributing with the coverage provided under this policy."

8. **Other Requirements:** (a) All policies must contain an endorsement affording an unqualified thirty (30) days notice of cancellation to the additional insured(s) in the event of cancellation or reduction in coverage; (b) All policies must be written by insurance companies whose rating in the most recent Best's rating guide, is not less than A:VII Rating must be shown on Certificate under "Companies Affording Coverage"; (c) Certificates of insurance with the required endorsement evidencing the coverage must be delivered to APCO Construction prior to commencement of any work under this Contract; (see attached samples) (d) If the Subcontractor fails to secure and maintain the required insurance, Asphalt Products Corporation shall have the right (without obligation to do so, however) to secure same in the name and for the account of the Subcontractor in which event the Subcontractor shall pay the costs thereof and furnish upon demand all information that may be required in connection therewith. (e) Liability insurance policies containing warranties must be reviewed for prior approval and acceptance by Contractor. (f) The Subcontractor's insurance shall be primary with respects to Asphalt Products Corporation, its officers, employees and volunteers.

11.2 INDEMNIFICATION

- a) **General Indemnity:** All work covered by this agreement that is performed at the project site, or performed in preparing or delivering materials or equipment to the project site, or in providing services for the Project, shall be at the sole risk of the Subcontractor. Subcontractor, to the fullest extent permitted by law, with respect to all such work which is covered by or incidental to this agreement, shall defend all claims through legal counsel acceptable to Contractor, and indemnify and hold Contractor, its insurance carriers and bonding companies, Owner and any other interested party designated by Contractor, or their agents, employees or representatives (collectively referred to as "Indemnities") harmless from and against any claim, liability, loss, damage, cost, expense, including attorney's fees, awards, fines or judgments arising by reason of the death or bodily injury to persons, injury or damage to tangible property, including the loss of use therefrom, whether or not it is caused in part by an Indemnitee; provided, however, that the Subcontractor shall not be obligated under this agreement to indemnify the Indemnities with respect to damages which are ultimately determined to be due the sole negligence or willful misconduct of the Indemnities.
- b) **Indemnity Not Limited:** In any and all claims against the Indemnities by any employee of the Subcontractor, or lower tier subcontractor, anyone directly or indirectly employed by any of them or anyone for whose acts any of them may be liable, the indemnification obligation under this Paragraph shall not be limited in any way by any limitation on the amount or type of damages, compensation or benefits payable under any Workers' or Workmen Compensation Acts, disability benefit acts or other employee benefit acts. Said indemnity is intended to apply during the period of this Agreement and shall survive the expiration or termination of the Agreement until such time as action on account of any matter covered by such indemnity is barred by the applicable Statute of Limitations.

12. Warranty and Guarantee

- 12.1 Subcontractor agrees to promptly repair, rebuild, replace or make good, without cost to Contractor or Owner, any defects due to faulty workmanship and/or materials which may appear within the guarantee or warranty period established in the Contract Documents. If no such period is stipulated in the contract Documents, then Subcontractor's guarantee shall be for a period of two year from the date Certificate of Occupancy is obtained for the project. Subcontractor shall require similar guarantees from all vendors and lower tier subcontractors.

APCO Construction 
Subcontractor SZ

13. Patents

- 13.1 Subcontractor agrees to pay all applicable patent royalties and license fees and to defend all suits or claims made for infringement of any patent rights involved in the Subcontract work.

14. Compliance with Regulations, Applicable Law and Safety

- 14.1 All Work, labor, services and materials to be furnished by Subcontractor shall strictly comply with all applicable federal, state, and local laws, rules, regulations, statutes, ordinances, building codes, and directives now in force or hereafter in effect as may be required by the Prime Contract. Subcontractor shall satisfy and comply with the foregoing as a part of the Subcontract without any additional compensation.
- 14.2 Subcontractor agrees that the prevention of accidents to workmen engaged in the work under the Subcontract is solely its responsibility. If requested, Subcontractor shall submit a safety plan for review by Contractor. Contractor's review of any safety plan shall not be deemed to release Subcontractor, or in any way diminish its indemnity or other liability as assumed under the Subcontract, nor shall it constitute an assumption of liability by Contractor.
- 14.3 When so ordered, Subcontractor shall stop any part of the Work that the Contractor or Owner deems unsafe until corrective safety measures, satisfactory to Contractor and or Owner, have been taken. Should Subcontractor neglect to adopt such corrective measures, Contractor may do so and deduct the cost from payments due or to become due to Subcontractor. Upon request, Subcontractor shall timely submit copies of all accident or injury reports to Contractor.
- 14.4 Subcontractor agrees to cooperate with the Contractor in efforts to prevent injuries to workmen employed by either party in carrying out operations covered by this agreement, and to adopt and place in effect OSHA requirements and such practical suggestions as may be offered by the Contractor and/or the Owner to promote safety and safe working conditions. Should the Subcontractor fail to fulfill its obligations in relation to safety matters on the job site, at the option of the Contractor, this Agreement, upon ten (10) days written notice to Subcontractor, may be cancelled, and the Subcontractor required to immediately remove his equipment and employees from the project.

15. Damage to Work

- 15.1 All loss or damage to Subcontractors' work resulting from any cause whatsoever shall be borne and sustained by Subcontractor and shall be solely at its risk until final acceptance by Contractor, Owner, or Owner's Representative. Subcontractor shall at all times and at its sole expense fully secure and protect against any damage, injury, destruction, theft or loss, all work and all labor, materials, supplies, tools and equipment furnished by Subcontractor or its sub-subcontractors, laborers and material men. Subcontractor shall at its sole expense promptly repair or replace damage to the work of others, or to any part of the project, resulting from Subcontractor's activities.

other than that of fire

SZ
mm

16. Inspection and Approvals

- 16.1 Contractor and Owner at all times shall have the right to inspect Subcontractor's materials, workmanship and equipment. Subcontractor shall provide facilities necessary to effect such inspection, whether at the place of manufacture, the project site, or any intermediate point. This point of inspection may be exercised at any time during performance of the Subcontract Work.
- 16.2 Any Subcontract work or material furnished that fails to meet the requirements or specifications of the Contract Documents, or the Subcontract, shall be promptly removed and replaced by Subcontractor at its own cost and expense. If, in the opinion of Contractor or Owner, it would not be economical or expedient to

correct or remedy all or any part of the rejected Subcontract work or materials, then Contractor, at its option may deduct from payments due or to become due to Subcontractor either: (a) such amount as in Contractor's sole judgment represents the difference between the fair value of the Subcontract work and materials rejected and the value if same had been performed in full compliance with the Contract documents; or (b) such reductions in price that are provided for or determined for this purpose under the Contract Documents.

16.3 The Subcontractor shall keep, maintain and require its subcontractors and suppliers to keep and maintain all books, papers, records, files, accounts, reports, bid documents with backup data, and all other materials relating to the Contract Documents and Project.

16.4 All of the material set forth in paragraph 16.3 shall be made available to the Owner and to Contractor for auditing, inspection and copying and shall be produced, upon request, at either the Owner's offices or such other place as Contractor may specify. Said request for information shall be limited to instances when specifically required to comply with a request for information by the Owner, and should not be construed as a general right by Contractor to request proprietary or privileged information of Subcontractor.

17. Arbitration

17.1 Contractor shall have the option to, and Subcontractor shall be required to resolve all claims, disputes and matters in question arising out of, or relating to the Subcontract, or breach thereof, except for claims which have been waived by the making or acceptance of final payment, by submission to arbitration in the time period and in accordance with the Contract Documents.

17.2 In accordance with Paragraph 17.1, Subcontractor hereby waive its right to otherwise litigate any and all such disputes, claims and matters in question in any court or governmental tribunal in any jurisdiction. If Subcontractor submits any matter to arbitration hereunder, at its sole option, Contractor may refuse to arbitrate any such disputes, claims, and matters in question. In that event, and in only that event, Subcontractor may litigate the matters subject to its demand for arbitration.

17.3 All arbitration and other legal proceedings instituted pursuant to this Section shall be conducted in Las Vegas, Nevada, or at such other venue as Contractor and Subcontractor shall agree to in writing.

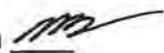
17.4 The award rendered by the arbitrator(s) shall be final and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction.

17.5 Unless otherwise agreed in writing, the Subcontractor shall carry on the Subcontract work and maintain the schedule of work pending arbitration or litigation, and the Contractor shall continue to make payments in accordance with the Subcontract.

17.6 To the extent not prohibited by their contracts with others, the claims and disputes of Owner, Contractor, Subcontractor and other Subcontractors involving a common question of fact or law shall be heard by the same arbitrator(s) in a single proceeding.

17.7 This Agreement to arbitrate shall not apply to any claim of contrition or indemnity asserted by one party to the Subcontract against the other party and arising out of any action brought in a state or federal court, or in arbitration by a person who is under no obligation to arbitrate the subject matter of such action with either of the parties hereto; or does not consent to such arbitration.

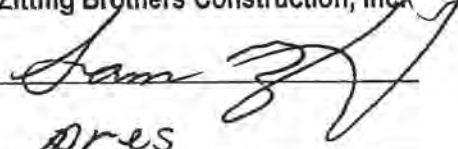
17.8 In any dispute arising over the application of paragraph 17.7, all questions regarding the arbitration requirements of this section shall be decided by the appropriate court and not by arbitration.

APCO Construction 
Subcontractor 52

18. Miscellaneous

- 18.1 Contractor's waiver of any of the provisions of the Subcontract, or Contractor's failure to exercise any options or legal remedies provided therein, shall not be construed as a general waiver of its right thereafter to require such compliance or to exercise such option or remedy.
- 18.2 The Subcontract, including all Contract Documents as provided in Section One, comprises the entire Agreement between the parties relating to the Subcontract Work and no other agreements, representations, terms, provisions or understandings concerning the Subcontract Work have been made. All modifications or amendments to the Subcontract must be in writing.
- 18.3 To the best knowledge and belief of the parties, the Subcontract contains no provision that is contrary to Federal or State law, ruling or regulation. However, if any provision of this Subcontract shall conflict with any such law, ruling or regulation, then such provision shall continue in effect to the extent permissible. The illegality of any provisions, or parts thereof, shall not affect the enforceability of any other provisions of this Subcontract.
- 18.4 The Subcontract shall be construed and interpreted according to the laws of the State of Nevada.
- 18.5 In the event either party employs an attorney to institute a lawsuit or to demand arbitration for any cause arising out of the Subcontract Work or the Subcontract, or any of the Contract Documents, the prevailing party shall be entitled to all costs, attorney's fees and any other reasonable expenses incurred therein.
- 18.6 All sections and headings are descriptive only and are not controlling.
- 18.7 Contractor's rights and remedies under the Subcontract are not exclusive and Contractor shall have all other remedies available at law or in equity to enforce the Subcontract.

IN WITNESS WHEREOF: The parties hereto have executed this Agreement for themselves, their heirs, executors, successors, administrators, and assignees on the day and year first above written.

Zitting Brothers Construction, Inc.

pres
TITLE

APCO CONSTRUCTION

Project Manager
TITLE

APCO Construction 
Subcontractor SE

EXHIBIT 'A'
Subcontractor Scope of Work
APCO Contract No. 0168

This Agreement includes the supply of all labor, materials, tools, equipment, supervision, management, permits and taxes necessary to complete the BELOW SCOPE OF WORK for the referenced Project in accordance with the Contract Documents including Addenda/Delta Number(s) ____ through ____ Subcontractor acknowledges that he has performed his own take-off, site visit and therefore, any items necessary to complete the work depicted in accordance with the Contract Documents, shall be included in this Agreement. The Subcontractor also acknowledges that all of the costs related to the successful completion of the work including any unforeseen or unseen items, or as described herein, are included in the amount reflected in the schedule below.

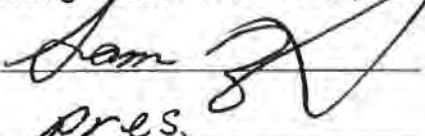
The Scope of Work shall specifically include but not be limited to the following list of bid items:

Wood Framing, Sheathing, and Shimming Complete: Complete work per governing codes, furnish and install all necessary Design, Labor, Material, Equipment, Cartage, Freight, Supervision, Taxes and Necessary Insurance to install and complete all ~~Class~~ ^{Labor} and Glazing, including ~~Spandrel Glass~~ ^{Materials} per plans by ~~OZ Architecture, Redwine Engineering, Jordan & Skala Engineers, WRG Engineering~~ ^{Submittals} (see attached Project Drawing List) for the amount of **Fourteen Million Four Hundred and Sixty One Thousand and no/100, (\$14,461,000.00)** for the project. The breakdown for these costs are as follows: SZ

Building Type 1 Podium:	\$ 1,805,000.00 X 6 Buildings = 10,830,000.00
Building Type 4 Podium:	\$ 1,400,000.00 X 1 Building = 1,400,000.00
Building Type 5 Podium:	\$ 1,115,500.00 X 2 Buildings = 2,231,000.00
	<u>Total = 14,461,000.00</u>


Our understanding of the clarifications / qualifications associated with your bid is as follows: Your proposal is hereby amended to reflect the terms and conditions of this subcontract. APCO Construction may at its option exercise its right to choose any or all alternate/option items of work as shown on your proposal at the stated alternate price during the course of construction

Zitting Brothers Construction, Inc.


pres.
TITLE

APCO CONSTRUCTION


Project Manager
TITLE

APCO Construction 
Subcontractor SZ

SPECIAL CONDITIONS

In addition to the conditions outlined in the Subcontract Agreement, the following Special Conditions shall form a part of the Subcontract Agreement.

- (a) The Subcontractor shall be responsible for clean up of employees break & lunch trash on the job site. Subcontractor employees are not to wander around the Owner/General Contractor jobsite office area while on duty. No parking of private vehicles will be allowed in the Owners Operations Area. NO EXCEPTIONS.
- (b) The Contractor will provide an adequate temporary construction area for staging.
Enclosed with security fence. SZ
- (c) The Contractor will provide reasonable access to all working areas.
- (d) The Subcontractor shall be responsible for the cleaning of his work area and removing its debris and all work shall be left in a clean condition following his activities. The APCO shall be the sole judge to determine the cleanliness.
- (e) The Contractor will provide one (1) set of full size conformed construction documents for the Subcontractor's use. Additional sets may be purchased by the Subcontractor from a source designated by the Contractor. Plan change drawings will be supplied in the same quantities.
- (f) Subcontractor must submit a "Daily Work Report" (see attached Appendix 'C') prior to 10:00 a.m. the following day for all work performed on the job site the previous day. Subcontractor monthly pay requests will not be accepted for processing unless all "Daily Work Reports" for the pay period have been submitted to the Contractor.
- (g) Subcontractor is required to submit a Payroll Certificate representing all work performed on the job site on a monthly basis. The Payroll Certificate must be submitted no later than the 1st of the month for all work performed during the previous month. Subcontractor shall use a format similar to AIA G702 & G703.
- (h) The Subcontractor is required to attend weekly site progress meetings and to participate in the preparation of Monthly updates of the Project schedule.
- (i) The Contractor cannot guarantee continuity of progress of work; Subcontractor shall employ as many mobilizations as required to complete the work as required by the project schedule.
- (j) The Subcontractor shall provide drinking water for its own employee's.
- (k) Subcontractor shall at all times protect stored equipment, materials from: damage from weather, sun. Materials shall be stored off the ground and not in contact the ground.
- (l) APCO Construction cannot guarantee price stability and therefore cannot grant any additional monies to subcontractor due to escalation of price between bid/quote time and when materials/labor/shipping is actually purchased and/or incorporated into the project. *See exhibit "B" for exception on material pricing. SZ*

EXHIBIT 16

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DISTRICT COURT
CLARK COUNTY, NEVADA

APCO CONSTRUCTION, a Nevada
corporation,

Plaintiff,

vs.

CASE NO. A571228
DEPT. NO. XIII

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

Defendants.

AND ALL RELATED MATTERS.

THE DEPOSITION OF

MARY JO ALLEN

PMK on behalf of APCO

VOLUME II

Wednesday, July 19, 2017
9:15 a.m.

2300 West Sahara Avenue, Suite 770
Las Vegas, Nevada

June W. Seid, CCR No. 485

1 APPEARANCES OF COUNSEL

2
3 For Plaintiff:

4 CODY S. MOUNTEER, ESQ.
5 Marquis Aurbach & Coffing
6 10001 Park Run Drive
7 Las Vegas, Nevada 89145
8 702.382.0711
9 702.207.6072 Fax
cmounteer@maclaw.com

10 For Helix Electrical of Nevada, LLC:

11 ERIC B. ZIMBELMAN, ESQ.
12 Peel Brimley, LLP
13 3333 East Serene Avenue
14 Suite 200
15 Henderson, Nevada 89074
16 702.990.7272
17 702.990.7273 Fax
ezimbelman@peelbrimley.com

18 For National Wood Products, Inc.:

19 JOHN B. TAYLOR, ESQ.
20 Cadden & Fuller, LLP
21 114 Pacifica
22 Suite 450
23 Irvine, California 92618
24 949.788.0827
25 949.450.0650 Fax
jtaylor@caddenfuller.com

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APPEARANCES OF COUNSEL (continued)

For Lien Clamant, Zitting Brothers Construction, Inc.:

I-CHE LAI, ESQ.
Wilson Elser Moskowitz
Edelman & Dicker, LLP
300 South Fourth Street
11th Floor
Las Vegas, Nevada 89101
702.727.1400
702.727.1401 Fax
I-Che.Lai@wilsonelser.com

For Interstate Plumbing & Air Conditioning:

JONATHAN S. DABBIERI
Sullivan Hill Lewin Rez & Engel
228 South Fourth Street
First Floor
Las Vegas, Nevada 89101
702.382.6440
702.384.9102 Fax
dabbieri@shlaw.com
(Appearing Telephonically)

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I N D E X

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70	APCO Construction's answers to Zitting Brothers Construction, Inc.'s first request for interrogatories	109
71	ManhattanWest General Construction Agreement for GMP, ZBCI002090 through 2141	113
72	Subcontract agreement APCO and Zitting Brothers Construction, Inc., APCO00044592 through 44624	114
73	Scott Financial Corporation correspondence, April 28, 2009 to Nevada State Contractor's Board, CAMCO-MW 00029 through 37	122
74	APCO Construction ManhattanWest Subcontractor Summary documents, APCO 106198 through 106218	131
75	ManhattanWest Billings Submitted To Owner By APCO On Behalf of Zitting Brothers Construction, APCO 106196	141

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E X H I B I T S

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76	Application and certificate for payment to APCO Construction from Zitting Brothers Construction, starting APCO00044740	152
77	Application and certificate for payment to APCO Construction from Zitting Brothers Construction, starting APCO00044724	158
78	Application and certificate for payment to APCO Construction from Zitting Brothers Construction, starting APCO00044710	161
79	Application and certificate for payment to APCO Construction from Zitting Brothers Construction, starting APCO00044695	163
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3	86	Application and certificate for	188
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7	87	Document titled Camco Buildings 8 & 9,	190
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10		Subcontractors from APCO Construction,	
11		with attachment, APCO 106288 AND	
12		106287	

INFORMATION TO BE SUPPLIED

	Page	Line
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1 Deposition of MARY JO ALLEN

2 July 19, 2017

3 (Prior to the commencement of the deposition, all
4 of the parties present agreed to waive the statements
5 by the court reporter pursuant to Rule 30(b)(4) of the
6 Nevada Rules of Civil Procedure.)

7
8 Thereupon--

9 MARY JO ALLEN,
10 was called as a witness, and having been previously
11 duly sworn, was examined and testified as follows:

12 (Exhibit 69 marked
13 for identification.)

14 EXAMINATION

15 BY MR. LAI:

16 Q. Good morning, my name is I-Che Lai. I'm an
17 attorney with the law firm of Wilson Elser. My firm
18 represents Zitting Brothers in this case.

19 Could you state your full name for the
20 record.

21 A. Mary Jo Allen, M-a-r-y J-o A-l-l-e-n.

22 Q. Ms. Allen, you had your deposition taken
23 yesterday; is that correct?

24 A. Yes, sir.

25 Q. Have you consumed any drugs, medication or

1 alcohol within the past 24 hours?

2 A. No.

3 Q. Do you believe that there is anything to
4 prevent you from giving your best and most truthful
5 testimony today?

6 A. No.

7 Q. Any reason why we can't go forward that you
8 can think of?

9 A. No, sir.

10 Q. Your current employer is APCO Construction,
11 correct?

12 A. Yes.

13 Q. Just to avoid any confusion, when I say APCO
14 in today's deposition, I mean APCO Construction; do you
15 understand?

16 A. Yes.

17 Q. The next question I ask all witnesses. You
18 may have covered them yesterday, have you ever been
19 convicted of a felony?

20 A. No, sir.

21 Q. Have you ever been convicted of a crime
22 involving dishonesty, deceit, larceny or fraud?

23 A. No.

24 Q. In front of you is an exhibit premarked Allen
25 Exhibit 69. Do you see that?

1 A. Yes, sir.

2 Q. Have you ever seen this document before?

3 A. Yes, sir.

4 Q. Did you read this document before coming here
5 today?

6 A. Yes, sir. I read about a million documents.

7 Q. So this is one of the millions that you read?

8 A. Yes, sir.

9 Q. Do you agree to testify today on behalf of
10 APCO?

11 A. Yes, sir.

12 Q. On the topics concerning payment and payment
13 related questions, correct?

14 A. Yes, sir.

15 Q. Are you prepared to go over those topics
16 today?

17 A. Yes, sir.

18 Q. So you just testified that you reviewed about
19 a million documents for your preparation. Can you
20 describe briefly what type of documents did you review
21 for your preparation?

22 A. My job files, the documents that APCO
23 disclosed for the specific subs that are involved in
24 these depositions. The documents that they disclosed.

25 Q. When did you review these documents?

1 A. Oh, my goodness. Over the last month maybe.

2 Q. You can ballpark it.

3 A. A month.

4 Q. How long was that review approximately; was
5 it hours or days?

6 A. Hours, days. Well, I did a little here, a
7 little there. At times I spent, you know a whole day
8 doing it. I have a regular job that I have to do in
9 between all of this, so I can't just stop functioning;
10 do you know what I mean?

11 Q. I understand. Hopefully we will get you out
12 of here today as soon as possible so you can get back
13 to your real job.

14 Did you talk to anyone other than your
15 attorney?

16 A. My boss Joe Pelan, Brian Benson. Not really,
17 no, that's it.

18 Q. What did you guys generally talk about with
19 respect to this deposition?

20 A. I read Brian Benson's deposition and I asked
21 him questions about it. Joe Pelan when I was reviewing
22 documents, I would show them to him and we discussed
23 them. ManhattanWest in general. That was about it.

24 Q. When you talked to Mr. Benson about his
25 deposition testimony, did you ever have a conversation

1 about anything in that testimony of his that was
2 incorrect, in your opinion?

3 A. No.

4 Q. Did you take any notes during your
5 preparation for this deposition?

6 A. Yes.

7 Q. And that was during the month or so that you
8 prepared?

9 A. Yes.

10 Q. Do you still have a copy of those notes?

11 A. Not here.

12 Q. Is it back at your office?

13 A. Sure.

14 Q. Do you still have those notes?

15 A. Sure.

16 Q. Any reason why you took the notes when you
17 did your preparation?

18 A. Because I'm old and I forget things, so as I
19 read things I write it down and it refreshes my memory
20 so I can go back and review.

21 MR. LAI: Counsel, if you can, I would like
22 to get a copy of those notes that she prepared, if
23 possible.

24 BY MR. LAI:

25 Q. Other than your review of those documents and

1 talking to Mr. Pelan and Mr. Benson, is there anything
2 else you did in preparation for your deposition?

3 A. No.

4 (Exhibit 70 marked
5 for identification.)

6 MR. MOUNTEER: Let's go off the record really
7 quick if you don't mind.

8 MR. LAI: Sure.

9 (Off-record discussion held.)

10 BY MR. LAI:

11 Q. Ms. Allen, the court reporter handed you a
12 document that's marked as Allen 70; do you see that
13 document?

14 A. Yes, sir.

15 Q. Have you ever seen that document before?

16 MR. DABBIERI: Excuse me, would you kindly
17 identify what the document is.

18 MR. LAI: Sure. The document marked as
19 Exhibit Allen 70 is APCO Construction's answers to
20 Zitting Brothers Construction's first request for
21 interrogatories.

22 MR. DABBIERI: Thank you.

23 A. I know this was in the binders and saw it in
24 there yesterday.

25 BY MR. LAI:

1 Q. The binder documents that you reviewed in
2 preparation?

3 A. Yes.

4 Q. Did you assist in providing answers to this
5 set of requests for interrogatories marked as Allen 70?

6 A. If there was a question asked by someone that
7 was completing these, I believe Joe did this. Let me
8 look and see.

9 Q. Take your time.

10 A. I would have given them financial numbers.
11 For example, the amount that was paid.

12 Q. I saw you gesturing to a page. What page are
13 you looking at, just so I have an idea what you're
14 referencing?

15 A. What I just looked at was page 6 of 50.

16 Q. So when you're gesturing to the numbers, are
17 you talking about the sum of about 3.2 million?

18 A. Yes, sir.

19 Q. So is it fair to say that your role with
20 respect to providing responses to these set of
21 interrogatories dealt with the financial part of the
22 project?

23 A. Yes, sir.

24 Q. Let me direct your attention to page 46. Do
25 you see that page?

1 A. Um-hum.

2 Q. Do you have any reason why this page is
3 unsigned?

4 A. No.

5 Q. Were you ever asked to sign a verification
6 for these interrogatories?

7 A. No.

8 Q. Based on your review of these set of
9 interrogatory responses, with respect to the financial
10 part of the questions, is there anything in there that
11 you saw that should be changed or clarified in any way?
12 And you can take your time to look through the
13 documents if you need to.

14 A. Not without my documents in front of me, I
15 could not verify anything under oath, I'm sorry.

16 Q. Let's talk about the ManhattanWest mixed use
17 condominium project, which I'll refer to as the project
18 as shorthand. What was -- scratch that.

19 APCO's role with respect to the project was
20 general contractor, correct?

21 A. Yes, sir.

22 Q. And that role lasted until September 20,
23 2008, correct?

24 A. August 21st, 2008.

25 Q. And when did APCO's role as general

1 contractor for the project begin?

2 A. Approximately September of '07.

3 Q. And that began when APCO signed a contract
4 with Gemstone Development West to serve as the general
5 contractor, correct?

6 A. Yes.

7 Q. And I'll refer to Gemstone as shorthand.

8 Any other general contractors during the time
9 that APCO served as a general contractor that you're
10 aware of?

11 A. On August the 15th of 2008, we were served a
12 termination notice, and Gemstone signed a contract with
13 CAMCO on August the 15th of 2008.

14 Q. Do you recall what was the reason that
15 Gemstone gave for serving that notice of termination?

16 A. I believe it was called breach
17 nonperformance. Not without the document in front of
18 me.

19 Q. Were you involved with the project?

20 A. Yes, sir.

21 Q. Can you describe briefly your involvement
22 with the project?

23 A. Bookkeeper.

24 Q. And that includes bookkeeping for the work
25 done by Zitting?

1 A. Yes, sir.

2 Q. Does your role require an understanding of
3 the contracts entered into by APCO with respect to the
4 project?

5 A. Which contract, sir?

6 Q. The prime contract with Gemstone and the
7 subcontract with Zitting Brothers.

8 A. For the most part, yes, sir. I'm not legal
9 counsel, I don't make legal conclusions, but I do
10 understand what has to be done. My role is to make
11 sure that people were paid.

12 Q. Sure. Isn't it fair to say your
13 understanding from any of those two contracts was to
14 get an understanding about how to do the bookkeeping
15 for the project, correct?

16 A. Yes, sir.

17 (Exhibit 71 marked
18 for identification.)

19 BY MR. LAI:

20 Q. Ms. Allen, the court reporter has handed you
21 a document marked as Exhibit Allen 71. Do you see that
22 document?

23 A. Yes, sir.

24 Q. What is this document?

25 A. This is an executed copy of the contract

1 between Gemstone and APCO.

2 Q. Was this the contract between Gemstone and
3 APCO that you've seen before during your role as the
4 bookkeeper for the project?

5 A. Yes, sir.

6 Q. Do you believe that this is a true and
7 correct and complete copy of that contract that you've
8 seen before as a bookkeeper for the project?

9 A. Yes, sir.

10 Q. And this was a document that you read before
11 during your role as a bookkeeper for the project?

12 A. Somewhat, yes, sir.

13 Q. I understand there's a lot of legalese, but
14 roughly you looked through it, correct?

15 A. Yes, sir.

16 (Exhibit 72 marked
17 for identification.)

18 BY MR. LAI:

19 Q. Ms. Allen, the court reporter has handed you
20 a document marked as Exhibit Allen 72. Do you see that
21 document in front of you?

22 A. Yes, sir.

23 Q. Do you recognize document Allen 72?

24 A. Yes, sir.

25 Q. Was this the subcontract between APCO and

1 Zitting regarding the project you're familiar with?

2 A. Yes, sir.

3 Q. Is this document marked Allen 72 a true and
4 correct copy of the subcontract?

5 A. Yes, sir.

6 Q. Let me direct your attention to page 16 of
7 17. It has a number that we lawyers call Bates
8 numbers, APCO 00044607. Do you see that page?

9 A. Yes, sir.

10 Q. Is it your understanding that the total
11 original price for this contract is 14,461,000 dollars?

12 A. For the entire project, phase 1 and phase 2,
13 yes, sir.

14 Q. When you say for the entire project, that's
15 for the entire project with respect to Zitting,
16 correct?

17 A. Yes, sir.

18 Q. Is it your understanding that Zitting would
19 provide work on a per building basis as set forth on
20 this page?

21 A. The phase 1 portion of the project, which is
22 the first phase that was being performed at this time,
23 there were two buildings that Zitting was doing,
24 building 8 and building 9. They were the only wood
25 frame buildings.

1 Q. Is it your understanding that Zitting would
2 be paid on a per building basis?

3 A. Yes.

4 Q. On the page Bates stamped APCO 00044607, do
5 you see three rows, building type 1, building type 4,
6 building type 5.

7 A. Yes.

8 Q. Where do buildings 8 and 9 fit in there for
9 these three rows that you see there?

10 A. You know, I believe -- I don't even want to
11 say because I'm not sure. I believe it was podium 5.

12 Q. But you're not sure?

13 A. No, because there were two buildings and they
14 were identical.

15 I believe so, sir. That would have to be it,
16 building type 5 podium.

17 Q. Can I direct your attention to page 3 of 7
18 that has a Bates stamp of APCO 00044594?

19 A. Um-hum.

20 Q. Do you see the section 3.4 on that page?

21 A. Yes, sir.

22 Q. In there, there's three terms that are in
23 parentheses that says less ten percent retention. Do
24 you see that?

25 A. Yes, sir.

1 Q. What is your understanding of a retention?

2 A. Retention is not due on the project until the
3 project has totally been completed in its entirety.
4 Not only that, the owner has to accept all the work
5 that was completed, the as-builts must be in, the
6 closeouts must be in, and retention is then paid from
7 the owner and will then be paid to the subcontractors.
8 It is not due until all those five things have been
9 completed.

10 Q. Understood. And during the course of
11 Zitting's work on the project, Zitting received
12 progress payments, correct?

13 A. Yes, sir.

14 Q. In the course of making those progress
15 payments, there were retention that were withheld; is
16 that correct?

17 A. Yes, sir.

18 Q. You testified that Zitting would not get
19 those retentions until certain conditions were met,
20 correct?

21 A. Yes, sir.

22 Q. Until those conditions were met, was there an
23 actual retention check being issued to anyone and held
24 by anyone?

25 A. No.

1 Q. The retention would only be withheld if the
2 work had already been approved and completed by
3 Zitting, correct?

4 A. When completed by all subcontractors.

5 Q. Let me clarify. When you say completed by
6 all subcontractors, that's only when the retention is
7 being paid to Zitting, correct?

8 A. The project had to be completed in its
9 entirety. This contract was bound to the prime
10 contract. They signed this -- in 1.3 they are bound to
11 the same terms of the prime contract.

12 The prime contract states that no retention
13 will be released until the entire project is completed
14 in its entirety.

15 Q. Understood. And I'm not talking about when
16 the actual retention is released to Zitting, I'm
17 talking about the process before that, basically when
18 the progress payments are authorized to be issued,
19 where someone retains ten percent of that progress --

20 A. The bank.

21 Q. Right, the bank retains ten percent of that
22 amount. Before the bank can even retain that amount
23 and once the payment was authorized, that work for
24 which the proper assignment was assigned to, that had
25 to be approved and completed by Zitting, correct?

1 A. The work that was paid for, the 90 percent
2 that was paid, yes. The percentage of work that was
3 completed was approved by the owner. The owner
4 approved the percentage. They were the one that told
5 us what to pay the subcontractors.

6 Q. Right, so the only reason why the retention
7 was not paid right away was that there were other
8 conditions that may depend on other subcontractors,
9 correct?

10 A. The job in its entirety.

11 Q. Earlier you testified that the retention
12 would be released once the entire project is complete;
13 is that correct?

14 A. Yes.

15 Q. Let me direct your attention to page 4 of 17,
16 which is the next page.

17 A. I believe Zitting had terms in there.

18 Q. Right, can I direct you to section 3.8?

19 A. Um-hum. The building was not completed.
20 Neither building. Neither 8 nor 9 was completed.

21 Q. Understood. But I haven't asked any
22 questions with respect to buildings 8 or 9, so there
23 was no questions pending.

24 A. Sorry.

25 Q. I'm not trying to be rude, I'm trying to make

1 the record clear. I know you're very excited to answer
2 questions.

3 Can I have you read the first sentence up
4 until part A, where it starts with "the ten percent
5 withheld" into the record, please.

6 A. "The ten percent withheld retention shall be
7 payable to subcontractor upon and only upon the
8 occurrence of the following events, each of which is a
9 condition precedent to the subcontractor's right to
10 receive final payment hereunder and payment of such
11 retainer."

12 Q. Earlier you talked about how the release of
13 retention is conditioned precedent to the completion.
14 Can I have you read the handwritten part at the end of
15 section 3.8 into the record.

16 A. F, down here, sir?

17 Q. Yes.

18 A. "Building is considered complete as soon as
19 the drywall is complete."

20 Q. Do you see two sets of initials to the right
21 of that?

22 A. I do.

23 Q. Do you recognize any of those initials?

24 A. I believe that's Sam Zitting's and Sean
25 Bowen's.

1 Q. Do you have any reason to dispute that it was
2 Sean Bowen's initials to the right of that?

3 A. No, sir.

4 Q. Since I'm a layperson, I'm completely foreign
5 to the process of construction. Just from my
6 understanding of the retention amount, is it fair to
7 say that's sort of like a temporary discount that
8 expires once a certain work is done; is that a fair way
9 to describe it?

10 A. No. Retention is a guarantee that there's no
11 problems with the work. If a contractor has to go back
12 in -- subcontractor, excuse me, has to go back in and
13 do work, it's kind of like holding a piece of guarantee
14 until everything is accepted.

15 Q. Let me direct your attention to page APCO
16 00044613.

17 A. Page 12 of 17?

18 Q. No, it actually has no page number at the
19 bottom. So if you look at the Bates number at the
20 bottom right corner, look for page 44613. Do you
21 recognize this page?

22 A. Yes, sir.

23 Q. What is this page showing?

24 A. It's an AIA payment application form.

25 Q. This is the payment application form that you

1 believe Zitting Brothers used during the course of
2 seeking progress payments, correct?

3 A. I believe so. Do you have one that I could
4 see?

5 Q. We will get into it shortly, that way you can
6 have an idea what we are talking about in more detail.
7 In the bottom right corner of this page you're looking
8 at, do you see where it says, "Architect's certificate
9 for payment"?

10 A. Yes, sir.

11 Q. Even though there's this section on this
12 page, did APCO require an architect's certificate
13 before making progress payments to Zitting for the
14 project?

15 A. No, sir.

16 (Exhibit 73 marked
17 for identification.)

18 BY MR. LAI:

19 Q. Ms. Allen, the court reporter's handing you a
20 document marked as Exhibit Allen 73. Have you ever
21 seen this document before?

22 A. No, sir.

23 Q. Even though you haven't seen this document
24 before, can I direct your attention to the bottom on
25 the first page where it starts with APCO Construction;

1 do you see that?

2 A. Yes, sir.

3 Q. Can you read that to yourself, starting that
4 section right there all the way through where -- all
5 the way to the section where it begins with "Upon
6 receiving sufficient hard cost funds."

7 MR. DABBIERI: Excuse me, can we have the
8 document identified, please?

9 MR. LAI: Yes, this is a document that has
10 Bates number CAMCO-MW00029. It's a letter dated April
11 28, 2009 from Scott Financial Corporation to Nevada
12 State Contractors Board.

13 MR. DABBIERI: Thank you.

14 BY MR. LAI:

15 Q. To the next page.

16 A. I'm sorry, what am I supposed to do?

17 Q. Just read --

18 A. From this point on?

19 Q. From this point on to the next page, ending
20 with the paragraph starting with, "Upon receiving such
21 hard cost funds." I'll be asking you questions about
22 that section.

23 Do the sections that you've read accurately
24 summarize the process for paying subcontractors for
25 their work on the project at the time that APCO was the

1 general contractor?

2 A. Yes, sir.

3 Q. Do you know who holds or controls the funds
4 for the project?

5 A. The bank.

6 Q. When say the bank, do you know the name of
7 the bank?

8 A. Right there, Scott Financial.

9 Q. This document marked as Allen 73 mentions a
10 company by the name of Nevada Construction Services; do
11 you see that reference?

12 A. Yes, sir.

13 Q. Do you know who Nevada Construction Services
14 is?

15 A. Yes.

16 Q. Who is that?

17 A. They were the disbursement company hired by
18 Gemstone to verify and release the funds.

19 Q. Can you walk me through briefly about the
20 process of how a subcontractor would get paid based on
21 what you've seen for the project?

22 A. Once the payment application was approved by
23 the owner, they would -- the owner would approve the
24 percentage of complete for each subcontractor. They
25 would then approve the payment application once it was

1 done. Once everything was approved, if there were
2 changes to be made, the changes would be made.

3 The subcontractors would have to rebill their
4 billings according to what the owner approved. We
5 would then redo the AIA payment application with the
6 subcontractors' proper amounts that were approved by
7 the owner.

8 That AIA document plus all the backup would
9 go to Nevada Construction Services, every invoice from
10 every subcontractor would accompany it. So if Zitting
11 billed a hundred thousand dollars, that hundred
12 thousand dollars was on the payment application, their
13 bill would also accompany it. Every sub. They would
14 review, they would send their inspectors out, once
15 everything was approved by Nevada Construction Services
16 after Gemstone approved it, then they would release
17 funds -- prior to July, they would release the funds to
18 APCO. APCO would then pay the subcontractors the
19 monies that the owner approved for them.

20 After July, Nevada Construction Services
21 actually did joint checks with the subcontractors and
22 APCO.

23 Q. Okay. So I have a few follow-up questions to
24 clarify my understanding of that process. Just walk me
25 through. So the payment application goes to the owner,

1 meaning Gemstone, correct?

2 A. Yes.

3 Q. And this application came from APCO, correct?

4 A. Yes.

5 Q. And this application from APCO, does it
6 contain payment applications from the subs?

7 A. Once everything was approved, yes, sir.

8 Q. When you say once everything is approved,
9 approved by who?

10 A. The owner.

11 Q. And the owner would only approve payment only
12 after an inspection of the work, correct?

13 A. By them, yes, sir.

14 Q. And only if the work inspected was
15 satisfactory, correct?

16 A. To them, yes.

17 Q. In other words, they wouldn't release any
18 payments if the work was unsatisfactory, correct?

19 A. Correct.

20 Q. Did APCO have to approve the subs' payment
21 application as well?

22 A. No, sir, the owner.

23 Q. And you mentioned earlier that -- excuse me,
24 scratch that. Start over.

25 You mentioned earlier that at some point a

1 joint check was issued to the subs after July 2008,
2 correct?

3 A. Yes, sir.

4 Q. Do you know the reason why they wanted the
5 joint checks to be issued?

6 A. Yes, sir.

7 Q. What is the reason?

8 A. At that point when the checks were ready to
9 be issued, APCO was already terminated.

10 Q. When you say terminated, what do you mean by
11 that?

12 A. The owner terminated our contract on August
13 the 15th, 2008.

14 Q. Just to make sure I understand the time frame
15 then, you mentioned the owner terminated the contract
16 August 15, so what is the significance of August 21st,
17 2008?

18 A. That's when we left the project.

19 Q. So there was a time period between when APCO
20 was terminated and the point at which APCO left the
21 project?

22 A. That is correct.

23 Q. So what did APCO do during that time period
24 after it was terminated by the owner until August 21st?

25 A. I believe in the termination letter it gave

1 them so many days.

2 Q. So many days to do what exactly?

3 A. To rectify some problems or something. It
4 wasn't my decision, sir. That was a legal decision.

5 Q. I understand. I'm not asking you why you
6 yourself decided to terminate. I'm not asking you
7 that. I'm trying to gain an understanding of that
8 six-day period between the 15th and 21st, what APCO did
9 at the project. You mentioned there were some
10 problems, correct?

11 A. Evidently.

12 Q. Do you recall what type of problems?

13 A. It's not my scope of work.

14 Q. How much has APCO applied for payment from
15 Gemstone to date for their work on the project?

16 A. I don't have documents in front of me. I
17 can't tell you.

18 Q. Let me direct your attention to Exhibit Allen
19 70. Hopefully it will jog your memory. Should be in
20 front of you, Allen 70. We will look at page 40 of 50.
21 So does this refresh your recollection about how much
22 APCO has applied for payment from Gemstone?

23 A. Can you repeat your question that you're
24 asking?

25 Q. Sure, I'll start over.

1 How much has APCO applied for payment from
2 Gemstone to date for their work on the project?

3 A. It would have been 60 million dollars,
4 according to this, 60, 69. 69,494,018.21.

5 Q. And this includes both contract work and
6 change order work, correct?

7 A. Yes, sir, according to this.

8 Q. For what time period does this work cover?

9 A. It says through August of 2008.

10 Q. Did it begin in November 2007? I'm trying to
11 find the beginning time.

12 A. September of 2007.

13 MR. MOUNTEER: I'm going to make a quick
14 objection here. Maybe it could be just a clarification
15 for the record potentially. You're asking questions
16 regarding application for payments.

17 MR. LAI: Correct.

18 MR. MOUNTEER: You're referring to an
19 interrogatory that's talking about a lien, which in my
20 mind is separate from application of payment. So are
21 we talking about how much APCO is asking Gemstone to
22 pay on behalf of your client, or are we saying here's a
23 lien amount that's thrown on the property? Because
24 they are two completely different legal avenues and
25 ramifications regarding these.

1 I just want to make sure we're on the same
2 page here regarding the record. You can ask questions
3 about both, but I don't want to get a confused record
4 if you're talking about the lien versus applications to
5 Gemstone. Do you see what I'm saying?

6 MR. LAI: I understand what you're saying.
7 And I don't know whether the lien amount is the same as
8 the amount applied for. That's what I'm asking her,
9 does she know whether the lien amount accurately
10 reflects what was applied for.

11 MR. MOUNTEER: I just want to make sure it's
12 clear, they are two separate things.

13 MR. LAI: Right. No problem.

14 MR. MOUNTEER: With that clarification, go
15 ahead.

16 BY MR. LAI:

17 Q. And the payments that are being applied for
18 are done through monthly payment applications, correct?

19 A. Yes, sir.

20 Q. And you believe that APCO first applied for
21 payment sometime in September 2007?

22 A. Could have been the first payment application
23 request. I don't recollect, sir, without my documents
24 in front of me.

25 Q. Sure, and we will look at those documents

1 momentarily.

2 Do you know how much APCO has received from
3 Gemstone to date? And you can ballpark the number.

4 A. No. I don't remember.

5 (Exhibit 74 marked
6 for identification.)

7 BY MR. LAI:

8 Q. Ms. Allen, the court reporter is handing you
9 a document marked Allen 74. Have you seen this
10 document before?

11 A. Yes, sir.

12 Q. What is this document?

13 A. This is a summary of all the bills of the
14 payments and how they were requested, whom to be paid
15 for this payment application.

16 Q. Is it fair to say that this document reflects
17 the amount applied for by APCO to Gemstone?

18 A. Yes, sir.

19 Q. And on here I see that the first page is
20 showing an application number 2 for November 2007; do
21 you see that?

22 A. Yes, sir.

23 Q. As far as you know, is this the first
24 application that was submitted to Gemstone?

25 A. No, it says number 2 up there.

1 Q. So this is not the first application for
2 payment that you're aware of?

3 A. No, sir.

4 Q. Where is application number 1?

5 A. I don't know. It's not here.

6 Q. I'll represent to you that this document came
7 from your counsel, so I wasn't sure whether or not
8 there was a payment application number 1 at all.

9 A. There was a payment application number 1. I
10 believe this document was not generated for the first
11 payment application.

12 When the project started, there was no
13 funding in place. APCO signed a contract with the
14 owner in September, and the funding was not in place
15 until January of '08, if I'm -- and the first payment,
16 because Gemstone didn't have any -- things weren't in
17 place. I believe an invoice was done differently.

18 Q. Okay. And do you know who prepared this
19 document marked as Allen 74?

20 A. Shannon Havelly.

21 Q. Who is Shannon?

22 A. She was the girl that did the billings to the
23 owner.

24 Q. Any reason why this document was prepared to
25 begin with?

1 A. It was to help Nevada Construction Services.

2 Q. Was it prepared at their request?

3 A. No.

4 Q. I see that document has a bunch of tables
5 with a lot of amounts indicated. Do you know from
6 which documents did Shannon use to derive these numbers
7 to put in this exhibit here?

8 A. Their billings.

9 Q. When you say "their billings," do you mean --

10 A. The subcontractor billings.

11 Q. I see there's a column for gross billings; do
12 you see that?

13 A. Yes.

14 Q. Is it fair to say that the gross billings do
15 not reflect the deduction of the retention amount?

16 A. Correct.

17 Q. And has the owner withheld retention amounts
18 from all the subs?

19 A. Yes, sir.

20 Q. Is it the same ten percent as Zitting?

21 A. Yes, sir.

22 Q. And I see also an application number. Are
23 these the application numbers referring to APCO's
24 payment application number?

25 A. Yes, sir.

1 Q. And as far as you know, for each table with
2 the list of subcontractors, do you believe that this is
3 a complete list of the subs for each payment numbers?
4 For example, on the first page, does that show a
5 complete list of subs for payment application number 2?

6 A. Yes, sir.

7 Q. So other than payment application number 1,
8 are there any other payment application numbers that
9 you're aware of that are missing from this document?

10 A. From this exhibit?

11 Q. Exhibit Allen 74.

12 MR. MOUNTEER: Just to clarify for the
13 record, it appears Exhibit 74 is the subcontractor
14 summaries, which wouldn't typically be placed in this
15 particular numerical order, but have been compiled it
16 appears by counsel just for ease through application 2
17 through 11.

18 MR. LAI: Sure.

19 MR. MOUNTEER: Is that a fair representation?

20 MR. LAI: That's a fair representation.

21 MR. DABBIERI: Excuse me, could I get the
22 Bates number of that document?

23 MR. LAI: Sure. APCO 106198 through 106218.

24 MR. DABBIERI: Thank you.

25 BY MR. LAI:

1 Q. So, Ms. Allen, do you believe there's any
2 payment applications that are not addressed in this
3 exhibit, other than application number 1, application
4 being from APCO?

5 A. No, sir. I believe they are there.

6 Q. Let me direct your attention to page APCO
7 106207. Excuse me, 106206. Do you see at the bottom
8 where it states, "See changes made by owner, next nine
9 pages"; do you see that?

10 A. Yes.

11 Q. Who wrote that, if you know?

12 A. I did.

13 Q. Any reason why you made that notation at the
14 bottom there?

15 A. Yes, sir.

16 Q. What's the reason?

17 A. This was what was submitted to the owner,
18 originally 220,000 dollars for Zitting, and if you look
19 on the next page, that's what we received back from
20 Nevada Construction Services that was approved by the
21 owner.

22 Q. When did you make this notation for "see
23 changes made by owner"?

24 A. When I did my binders for discovery, when I
25 put everything together.

1 Q. In other words, you made these changes during
2 the course of litigation?

3 A. Just this right here, see notes.

4 Q. That's what I'm referring to, just that note,
5 you made that notation during the course of this case;
6 is that correct?

7 A. Yes, sir.

8 Q. Any reason why you only made a notation for
9 Zitting and not for any other subs?

10 A. Because this was put in Zitting's books that
11 I compiled. I made a different binder for each
12 subcontractor.

13 Q. Understood. And just for the record, I'm not
14 trying to criticize your decision for doing that, I'm
15 trying to get an understanding about why notations were
16 written in certain places so that I understand what's
17 going on.

18 A. This is what I submitted, and this is what I
19 got back from Nevada Construction Services when they
20 cut the joint checks.

21 Q. When you're saying this is what you got back
22 from Nevada Construction Services, since this is not a
23 videotaped deposition, for the record are you referring
24 to APCO 106207?

25 A. Yes, sir.

1 Q. When you got back changes from Nevada
2 Construction Services as shown on APCO 106207, was this
3 the first time that APCO received any markups to the
4 application billings from the owner or a representative
5 of the owners?

6 A. Without document -- for this pay application?

7 Q. Right.

8 A. Just for June?

9 Q. Just for all the applications, was this the
10 first time that this happened?

11 A. That I received it back marked up like this?

12 Q. Yes.

13 A. Yes, because prior to this, the billings did
14 not go into Nevada Construction Services until the
15 owner told us what was approved. And all the pay
16 applications for the subcontractors would have to be
17 revised based on what the owner approved as a
18 percentage of completion.

19 MR. MOUNTEER: Can I make one quick question?

20 MR. LAI: Sure.

21 MR. MOUNTEER: For clarification, we are
22 talking about two different documents here, ending in
23 206 and 207. Just to ask the client really quick, the
24 notations on 207 that are handwritten, did you have any
25 additions to those handwritten notations?

1 THE WITNESS: No, sir.

2 MR. MOUNTEER: So you made no markups on 207?

3 THE WITNESS: No, sir.

4 MR. MOUNTEER: So when you referenced the
5 additions that you made at the beginning of litigation,
6 it was only "See changes made by owner"?

7 THE WITNESS: Correct.

8 MR. MOUNTEER: Just so we are clear that we
9 understand that this page has not been altered during
10 litigation, referring to ending 207.

11 MR. LAI: Yes.

12 MR. MOUNTEER: Thank you.

13 BY MR. LAI:

14 Q. Ms. Allen, the only reason why there's no
15 applications as far as Exhibit Allen 74 shows, after
16 August 2008, was because APCO was no longer general
17 contractor for the project, correct?

18 A. After August?

19 Q. Right.

20 A. That's correct.

21 Q. Did APCO receive any payment application
22 after August 2008 from any subs?

23 A. I don't understand your question.

24 Q. Sure. I see that APCO hasn't submitted any
25 payment applications to the owner after August 2008,

1 correct?

2 A. They were dated through the period of August
3 2008.

4 Q. Right. And even though there were no payment
5 applications submitted to the owner, did APCO in fact
6 receive any payment applications from the subs after
7 August 2008?

8 A. APCO's payment application for August wasn't
9 done August 31st. It would have been done -- you have
10 to get the subs' bills and then compile it, so it would
11 be done, you know, just like any other one.

12 Q. I understand. I guess I'll phrase my
13 question differently. Did APCO receive any
14 applications from the subs for payment, but APCO itself
15 did not submit an application to the owner for payment
16 of those amounts sought by the subs?

17 A. The billings that we received by the end of
18 August for the period through the end of August --

19 Q. Correct.

20 A. -- for subcontractors, were put on an August
21 billing to the owners, yes, they were.

22 Q. So as far as you know, any time that APCO
23 received a payment application from the subs after the
24 billing cycle for August 2008, APCO did, in fact,
25 submit those applications to the owner?

1 A. Yes.

2 Q. Any reason why this exhibit Allen 74 did not
3 reflect any applications after the billing cycle for
4 August 2008?

5 A. That is the billing cycle for August 2008.

6 Q. Maybe there's a misunderstanding between us.

7 A. I must not understand the question.

8 Q. Right. After the payment application number
9 11 shown on APCO 106218, did APCO receive any payment
10 applications from the subs?

11 A. No.

12 Q. Not that you're aware of?

13 A. No, sir.

14 Q. As far as you know, the owner has withheld a
15 retention amount from all the subs, not just Zitting,
16 for their work on the project?

17 A. Yes, sir.

18 Q. Has APCO ever received any payment of the
19 retention amount?

20 A. No, sir.

21 Q. And just for clarity of the record then, that
22 means APCO has not paid any retention amount to anyone;
23 is that correct?

24 A. That is correct.

25 Q. Is the information on Exhibit Allen 74 true

1 and accurate, as far as you know, in terms of the
2 calculation of the gross billings --

3 A. Yes.

4 Q. -- in the list of the gross billings?

5 Just so that we have a clear record, it's
6 important for you to wait until my question is fully
7 asked before you answer; do you understand that?

8 A. Yes, sir.

9 Q. Let's talk about the payment applications
10 that Zitting submitted for the project.

11 (Exhibit 75 marked
12 for identification.)

13 BY MR. LAI:

14 Q. Ms. Allen, the court reporter has handed you
15 a document marked as Allen 75. Do you recognize this
16 document?

17 A. Yes, sir.

18 Q. What is this document?

19 A. I prepared it.

20 Q. Can you describe what this document is?

21 A. If you take from Exhibit 74 the amounts for
22 Zitting on each payment application, this is where
23 their payment applications, it's a summary of them.
24 Okay? If you look at 74 and you look at payment
25 application 2, you see that it was 1,298,650, that's

1 the first line, payment application number 2 for
2 November of 2007, less the retention, that's the net
3 billed to the owner.

4 Next one says payment application number 3 in
5 Allen Exhibit 74, says 630,000 dollars for payment
6 application for December, that is the second line, and
7 so on and so forth.

8 This is just a summary of what APCO billed
9 the owner on behalf of Zitting.

10 MR. DABBIERI: I'm sorry, can we get a Bates
11 number, please?

12 MR. LAI: Sure APCO 106196.

13 BY MR. LAI:

14 Q. Ms. Allen, when did you prepare the document
15 marked as Allen 75?

16 A. During this litigation.

17 Q. Any reason why you prepared this document?

18 A. Yes, sir.

19 Q. What is the reason?

20 A. We submitted a binder for each subcontractor,
21 like I told you before.

22 Q. And is it fair to say that the information
23 reflected on Exhibit Allen 75 came from Zitting's
24 payment applications?

25 A. Yes, sir. The payment applications that were

1 submitted to the owner.

2 Q. Is it fair to say that the column on Allen 75
3 showing APCO pay app with a pound sign, that
4 corresponds to APCO's payment application number that
5 we looked at for Exhibit Allen 74?

6 A. Yes, sir.

7 Q. And on the column where it states less ten
8 percent retention, that came from your understanding of
9 the subcontract with Zitting Brothers, correct?

10 A. Yes, sir.

11 Q. Would you direct your attention real quick to
12 Allen 71, which is the prime contract with Gemstone.
13 I'll have you turn to page ZBCI002127. I'll have you
14 look at section 5.07 retainage, subsection A. Do you
15 see that section?

16 If you see it, can you read subsection A into
17 the record, please.

18 A. "Each progress payment shall be subject to
19 retainage equal to five percent multiplied by the
20 contract of such progress payments, the standard
21 retention."

22 Q. Is it fair to say that the prime contract
23 between Gemstone and APCO only references a five
24 percent retention amount?

25 A. That's what this document says.

1 Q. But as far as you know during your role as
2 the bookkeeper, ten percent is the amount that
3 controls; is that correct?

4 A. That is correct.

5 Q. Do you know why there's a difference between
6 the five percent shown in the prime contract and the
7 ten percent shown in the subcontract?

8 A. I do not.

9 Q. Going back to Exhibit Allen 75, which is that
10 table in front of you, the columns showing net amount
11 billed owner, that's just the gross amount less the ten
12 percent retention amount, correct?

13 A. Correct.

14 Q. And does this document reflect a complete
15 list of Zitting payment applications that APCO is aware
16 of?

17 A. Yes, sir.

18 Q. So in other words, November 2007 was the
19 first time that APCO received a payment application
20 from Zitting Brothers; is that correct?

21 A. Yes, sir.

22 Q. And in June 2008 was the last time that APCO
23 received a payment application from Zitting Brothers;
24 is that correct?

25 A. That was submitted to the owner, yes, sir,

1 that I know of.

2 Q. I understand you added a qualifier that was
3 submitted to the owner, but did APCO receive a payment
4 application from Zitting Brothers that was not
5 submitted to the owner?

6 A. Not to my knowledge.

7 Q. Then to the best of your knowledge, the row
8 showing the total amount, that's a sum of all the
9 amounts indicated for the respective columns, correct?

10 A. Yes.

11 Q. Is this information in this exhibit accurate,
12 as far as you know?

13 A. Yes, sir.

14 Q. And to clarify, the amount that we are
15 looking at, Exhibit Allen 75, only reflects the amount
16 that APCO billed Gemstone for Zitting work, not the
17 amount actually paid to Zitting, correct?

18 A. This document reflects what was billed to
19 Gemstone.

20 Q. And not the amount actually paid to Zitting;
21 is that correct?

22 A. I don't have those documents in front of me.

23 Q. So you don't know whether this reflects the
24 amount actually paid to Zitting?

25 A. I don't recollect.

1 Q. Do you know whether Zitting has completed
2 work for the project for the total amount of
3 4,033,654.85. Does that number ring a bell to you?

4 A. Not without papers in front of me.

5 Q. And the numbers shown on Exhibit Allen 75,
6 this reflects both the contract work and the change
7 order work, correct?

8 A. The change order work that was submitted to
9 the owner.

10 Q. And approved, correct?

11 A. Not all of it was approved, sir.

12 Q. Is there a reason for APCO to submit a bill
13 containing change orders that was not approved by the
14 owner?

15 A. The owner was the one that would determine
16 what was approved. If Zitting gave us a change order
17 billing, we would give it to the owner. The owner
18 would say yes or no.

19 Q. Understood. So during the application review
20 process that's when, as far as you know, the owner
21 would approve or disapprove of the change order work
22 being billed, correct?

23 A. Correct.

24 Q. Let's go back to Exhibit Allen 70, which is
25 the answers to Zitting Brothers interrogatories that we

1 look at earlier. I'll direct your attention to the
2 last page. Do you recognize this last page on Exhibit
3 Allen 70 showing a table for response to interrogatory
4 number 3?

5 A. Um-hum.

6 Q. What is this table showing?

7 A. These are the actual payments made to Zitting
8 in the amount of \$3,282,848.55.

9 Q. And who prepared this table on -- in Exhibit
10 Allen 70?

11 A. I probably did. It looks like my work.

12 Q. You have no reason to doubt --

13 A. No.

14 Q. -- that you prepared this?

15 A. Yes, I'm sure I did.

16 Q. Is this information in this exhibit accurate,
17 as far as you know?

18 A. Yes, sir.

19 Q. Is the column showing date of payment, as far
20 as you know, the date that the check was issued to
21 Zitting Brothers?

22 A. Yeah. The check -- it would be the check of
23 the date -- the actual check date. That's what this
24 is.

25 Q. And the amount paid for Zitting Brothers,

1 this is the gross amount less the ten percent retention
2 amount, correct?

3 A. Correct.

4 Q. What does the column showing percent paid on
5 completion of phase 1 only, what does that mean?

6 A. Would probably be based upon the gross amount
7 of their contract, their contract amount and divide it
8 in to get a percentage, so they were paid 90 percent of
9 their contract.

10 Q. So the percentage is actually -- scratch
11 that.

12 So you're saying that the amount paid, at
13 least for this percentage shown in this column, is only
14 a percentage of the total contract price? Because I'm
15 trying to get an understanding about what 22 percent
16 meant for the amount paid for 800,000 dollars.

17 A. I am thinking that what this is, is if you
18 took 800,000 dollars and you divide it into the
19 contract amount, that is how you came up with 22
20 percent. Without a calculator and all the documents, I
21 can't say that right now.

22 Q. So you just don't know really the reason why
23 those percentages were shown the way it is and why the
24 column was there?

25 You have to give a verbal response since this

1 is not a videotaped deposition.

2 A. Yes.

3 Q. Do you agree that the approximate amount of
4 3.2 million dollars paid to Zitting, that was for owner
5 approved work on the project completed by Zitting
6 before August 2008; do you agree with that statement?

7 A. Through August, yes. Yeah.

8 Q. And this was after an inspection by
9 Gemstone's representatives, correct?

10 A. Correct.

11 Q. Do you know whether or not there was a ten
12 percent retention amount check cut for these progress
13 payments referenced on this table in Allen 70?

14 A. No retention checks were ever cut, sir.

15 Q. As far as APCO knows, is the date August 28,
16 2008 the date of the last payment to Zitting for the
17 work on the project?

18 A. From while APCO was on the job?

19 Q. Just in general, before and after. Do you
20 know when was the last payment to Zitting for their
21 work on the project?

22 A. I know that they worked for CAMCO.

23 Q. How do you know that?

24 A. In their documents.

25 Q. When you say those documents --

1 A. There was a ratification document, and I
2 believe it was 2027 in the very back of their booklet,
3 that showed that they had billings to CAMCO. 20...

4 Q. You mentioned billings to CAMCO, but did you,
5 in fact, see a ratification agreement between CAMCO or
6 the owner and Zitting Brothers?

7 A. I did not see -- there was just one sheet of
8 paper that said ratification-something at the top.

9 Q. But you don't recall exactly what that page
10 was showing, correct?

11 A. It showed billings to APCO -- monies --
12 change orders to APCO, and billings to CAMCO, and
13 monies due from CAMCO, and monies due from APCO and
14 CAMCO. So it listed that there were billings, actual
15 billings to CAMCO.

16 Q. But as of the time when APCO was the general
17 contractor, August 28, 2008 was the last time that APCO
18 saw a check issued to Zitting for its work on the
19 project; is that correct?

20 A. From APCO's -- while they were under APCO's
21 watch, that was the last check that was issued to them
22 for the work that they performed while APCO was the
23 general contractor.

24 Q. Let me direct your attention to page --
25 staying on the same exhibit, 6 of 50.

1 MR. DABBIERI: If we can have the control
2 number, please.

3 MR. LAI: Page 6 of 50 for APCO's response to
4 Zitting Brothers interrogatories.

5 MR. DABBIERI: All right. Thank you.

6 BY MR. LAI:

7 Q. Do you see where it states on line 24,
8 where -- I'll read it for the record. Where it states,
9 "However, from the information obtained from Zitting
10 Brothers' discovery requests propounded upon APCO, it
11 appears that Gemstone may have paid Zitting Brothers at
12 least 364,760 dollars." Do you see that?

13 A. Yes.

14 Q. Earlier when you were talking about you saw
15 billings from Zitting to CAMCO, is that what you're
16 referring to?

17 A. I didn't write this, so I have no idea.

18 Q. So you don't know where that number came
19 from, 364,760?

20 A. Not me, sir. I can only tell you that what
21 is on this table that was paid to Zitting Brothers --

22 Q. Are you -- sorry, I didn't mean to cut you
23 off.

24 A. -- which is on line 16.

25 Q. Are you aware of any unpaid balance to

1 Zitting for its work on the project at the time when
2 APCO was the general contractor?

3 A. No, sir.

4 MR. LAI: We have been going about an hour or
5 so. Do you want to take a break? I can keep going.
6 It's up to you.

7 MR. MOUNTEER: How long do you think you have
8 left?

9 MR. LAI: My outline shows three pages left.
10 But it could be an hour or could take longer.

11 (Whereupon, a recess was taken.)

12 (Exhibit 76 marked
13 for identification.)

14 BY MR. LAI:

15 Q. Ms. Allen, the court reporter handed you a
16 document marked as Allen 76. Jon, this is the document
17 Bates number APCO 44740 to 743, and also has another
18 set of Bates number of APCO 106220 and 106222. And
19 then it has another set of Bates number of APCO
20 000744746, 737, 106221, 106223.

21 MR. DABBIERI: Thank you very much.

22 BY MR. LAI:

23 Q. Ms. Allen, do you recognize the document
24 marked as Allen 76?

25 A. Yes, sir.

1 Q. What is the document shown as Allen 76?

2 A. Would you like me to tell you what every page
3 is, sir?

4 Q. If you can. You can walk us through it.

5 A. This is Zitting's payment application number
6 1 through period 11/25/07. Whereas, sir, if I refer to
7 this document Exhibit 75, you will see that noted as
8 number 2 payment application, APCO's number 2 payment
9 application. You will see they billed a gross amount
10 of 1,298,650 with a ten percent retention. And a net
11 amount of 1,168,785.

12 The pages subsequently following the first
13 page is the detail of the work performed on the
14 specific buildings. And if you look on Exhibit Number
15 44743, you will see the amount of 1,298,850 as a total.
16 That is the work that is completed to date, which
17 agrees with that. That's their payment application.
18 And they were paid the 1,168,785, looks like in two
19 installments. The first one being 800,000 dollars.

20 You will see an unconditional progress
21 release that they received the 800,000 dollars on 2/1,
22 and then they also received a check for 368,785, an
23 unconditional progress release, and there's also a copy
24 of the check.

25 Exhibits number 44746 and 44737, these are

1 internal accounting sheets that we prepare when we pay
2 someone, as we pay the checks, and they relate to this
3 payment application.

4 Q. Thank you, Ms. Allen. I appreciate the
5 explanation. I have some follow-up question dealing
6 with Allen 76. Turning to page APCO 44741, which is
7 the second page of the exhibit, do you see handwritten
8 notations on this page?

9 A. Yes, sir.

10 Q. Do you know who made these notations?

11 A. Yes.

12 Q. Who?

13 A. Shannon Havelly.

14 Q. That's the Shannon you mentioned earlier,
15 correct?

16 A. Yes.

17 Q. So in other words, these are notations made
18 by APCO, correct?

19 A. Yes, sir.

20 Q. What do the notations mean?

21 A. Zitting's billing, their schedule of values,
22 which is column C, schedule of value; do you see that,
23 sir?

24 Q. Yes.

25 A. On 44741, you will see that is on all the

1 next three pages, totaling their contract of
2 14,481,000. That is their original schedule where they
3 are billing against.

4 Their billing and schedule is mirrored on
5 APCO's billing and schedule to the owner. So on our
6 billing, you will find that we have a line for building
7 number 8, first level, 199,015 dollars. So this is the
8 line on APCO's billing where that amount of money was
9 placed, so that Nevada Construction Services could
10 follow that.

11 Our billing had line numbers, because our
12 billing was so large and it consumed all the
13 subcontractors. It was 11-12 pages long, so every
14 sub's schedule of values was on our schedule of values,
15 so we would tell Nevada Construction Services for ease
16 that this 19,500 dollars was put on APCO's billing line
17 462. The 172,000 was put on APCO's line 463, and so on
18 and so forth.

19 Is that clear?

20 Q. That was very clear. Thank you very much.
21 Let me direct your attention to APCO 00044746, it's the
22 internal reporting that you mentioned earlier.

23 A. 46?

24 Q. And then I'll have you look at 737 as well.
25 So earlier you testified that you used the word "we"

1 prepared this document. Did APCO prepare this page
2 right here?

3 A. Yes.

4 Q. Was this prepared after receiving a payment
5 application from Zitting Brothers?

6 A. Yes, sir.

7 Q. At the bottom to the right, do you see where
8 there's an approved for payment section?

9 A. Um-hum.

10 Q. Do you recognize those signatures?

11 A. Yes.

12 Q. Who do you recognize?

13 A. If you'll see, Shannon's name is on the
14 bottom. She actually prepared it. Approved for
15 payment is above it, is the R and the circle is Randy
16 Nickerl. And then the person above that is someone
17 from our corporate office, because every check over
18 10,000 dollars had to have two signatures. So these
19 checks would go over to our corporate office for
20 signature, and that's who signed the check.

21 And if you don't mind, I'll look at the check
22 to see whose signature it is.

23 Q. Sure. Take your time.

24 A. Oh, hell, this is a voided one.

25 I believe it must have been -- it was either

1 Jay Smith or Terry Mendenhall.

2 Q. And they are with APCO, right?

3 A. Yes. No -- yes. They are the --

4 Q. For clarification of the record, are they
5 with APCO?

6 A. Yes.

7 Q. You don't recall the specific name, but you
8 know they are with APCO?

9 A. Yes.

10 Q. Let me direct your attention, staying on page
11 44746, do you see the column where it says request?

12 A. Yes.

13 Q. And where it says quantity and there's a
14 percentage behind it -- below it?

15 A. Um-hum.

16 Q. What does that percentage mean?

17 A. It's when you take 800,000 dollars and divide
18 it into 1,805,000, it's 44 percent of that.

19 Q. Let's take a quick reference back to Allen
20 72, do a side by side. I'll have you look at page APCO
21 00044607. Do you see on Exhibit Allen 76 where it
22 indicates estimated contract dollar of 1.8 million, an
23 approximate number, on Exhibit Allen 75. Sorry, 76?

24 A. Where I see what?

25 Q. On Exhibit Allen 76, this internal report.

1 A. Oh, okay.

2 Q. Do you see a column where it says estimated
3 contract dollar?

4 A. Um-hum.

5 Q. Do you see 1.8 million?

6 A. Um-hum.

7 Q. Do you believe that accurately reflects on
8 Exhibit Allen 72, building type 1 podium? So do you
9 believe that building 8 or 9 dealt with building type 1
10 podium?

11 A. Yes. All I said before when you asked me the
12 question, and I was not sure of it, that is why I
13 wasn't sure.

14 Q. You've been very good about that. That's why
15 I want to go back and clarify for the record, now that
16 you've had a chance to look at the documents.

17 A. This is -- I don't know what the hell a
18 podium is.

19 Q. I don't know either.

20 A. You know what, that's why this is very
21 confusing to me. So I'm sorry. Now I know, I guess.

22 MR. LAI: Allen 77.

23 (Exhibit 77 marked
24 for identification.)

25 BY MR. LAI:

1 Q. Ms. Allen, the court reporter handed you a
2 document marked as Allen 77. Do you recognize that
3 document? And you can look at Exhibit Allen 75 side by
4 side. You should keep that out as handy reference
5 going forward.

6 A. Yes, sir.

7 Q. What is Allen 77 showing?

8 A. This is Zitting Brothers' payment application
9 number 2 through December 25th of '07.

10 Q. Does this exhibit correspond to the row on
11 Exhibit Allen 75 for APCO payment application number 3?

12 A. Yes, sir.

13 Q. Going to page APCO 44723, is this the same
14 internal report that you referenced earlier for Exhibit
15 Allen 76 dealing with a report you will prepare after
16 receiving a payment application from Zitting?

17 A. Yes.

18 Q. At the bottom, do you see the approved for
19 payment? The section for approved for payment?

20 A. Um-hum.

21 Q. As far as you know, are these signed by an
22 APCO employee?

23 A. Yes.

24 Q. The last page of this exhibit, do you believe
25 that this is a check issued for the payment on this

1 application?

2 A. Yes, sir. This would tell me that they
3 received the check because it's nonconditional
4 progress.

5 Q. And that's one of the conditions for
6 receiving progress payments?

7 A. Yes, sir. That's APCO 106224.

8 Q. And according to this application then --
9 excuse me, sorry, Allen 75, as part of the payment for
10 this progress payment, the owner withheld \$63,016.46?

11 A. Sir, I would like to bring something up at
12 this point, because I know you're going to notice it.
13 APCO rounded the retention to an even amount.

14 Q. Sure.

15 A. This was just -- it was pennies. Okay? Just
16 to simplify things.

17 If you notice there, it's a formula there
18 that rounds it. It's not much difference and you will
19 find that on all subcontract -- most of the subcontract
20 payments were done like that, just about all of them.

21 Q. Sure, and we will ballpark it. So the amount
22 for retention; is that correct?

23 A. Yes. This is what was withheld from their
24 check.

25 Q. From this particular application?

1 A. Probably from all of theirs. You may find
2 pennies difference. This was just a formula of ten
3 percent.

4 Q. But the ballpark number of 63,000 dollars,
5 that came from this application, correct?

6 A. Yes, sir, that's correct.

7 (Exhibit 78 marked
8 for identification.)

9 MR. LAI: Jon, the documents we are looking
10 at are pretty much the applications for payment from
11 Zitting, including internal report prepared by APCO in
12 response to the application, as well as a check for the
13 payment. That's what we have been looking at so far.

14 MR. DABBIERI: Right, and I've been able to
15 track and follow. I have all the documents here, so if
16 you give me the APCO number I can locate it pretty
17 quickly and I appreciate that.

18 MR. LAI: Sure.

19 BY MR. LAI:

20 Q. Ms. Allen, the court reporter has handed you
21 a document marked Allen 78. Do you recognize this
22 document?

23 A. Yes, sir.

24 Q. What is Allen 78 showing?

25 A. This is Zitting Brothers' payment application

1 number 3 through the period of January of '07,
2 requesting payment for 408,225.33, which is the same
3 amount listed on APCO Exhibit Number 75 under APCO's
4 payment of pay application number 4.

5 Q. Even though this shows a period of January
6 2007, it's actually for January 2008, correct?

7 A. Yes, sir. They probably just made a typo.
8 It's a common thing that people do at the beginning of
9 the year.

10 Q. I assumed so, because the contract date on
11 this shows --

12 A. Right.

13 Q. -- October 8, 2007. You can't really have an
14 application before the contract, correct?

15 A. It would be nice. Correct.

16 Q. And this was an application that APCO
17 received from Zitting, correct?

18 A. Yes.

19 Q. Going to page APCO 44709, which is the
20 internal report, again this is an internal report
21 prepared by APCO, correct?

22 A. Yes, sir.

23 Q. At the bottom do you see the signature field
24 for approved for payment?

25 A. Yes.

1 Q. Again, these are signed by APCO employees,
2 correct?

3 A. Yes.

4 Q. Now, I see that the prepared signature line
5 doesn't have Shannon's name anymore. Do you recognize
6 that signature?

7 A. Mine.

8 Q. Again, the retention for this application was
9 for approximately 45,358 dollars?

10 A. Yes. Rounded.

11 Q. But the accurate retention amount is listed
12 on Allen 75, correct?

13 A. Correct.

14 (Exhibit 79 marked
15 for identification.)

16 BY MR. LAI:

17 Q. Ms. Allen, the court reporter handed you a
18 document marked Allen 79. Do you recognize this
19 document?

20 A. Yes, sir.

21 Q. What is Allen 79 showing?

22 A. It is Zitting's application payment number 4.
23 Once again, they messed up on the date. This should be
24 2008. It's 2007. Why it was signed 2007, I don't
25 know.

1 Q. And this reflects the application that's part
2 of APCO payment application number 5?

3 A. That's correct, on Exhibit 75.

4 Q. And this was the application that APCO
5 received from Zitting?

6 A. Yes.

7 Q. Directing your attention to page APCO 44694,
8 the internal report again. This was a report that was
9 prepared by APCO, correct?

10 A. Yes, sir.

11 Q. And the signature field for approved for
12 payment, again, that's signed by an APCO employee,
13 correct?

14 A. Yes, sir.

15 Q. And the retention amount for this application
16 was approximately \$55,067, correct?

17 A. 55,067. No cents.

18 (Exhibit 80 marked
19 for identification.)

20 BY MR. LAI:

21 Q. Ms. Allen, do you recognize the exhibit
22 marked as Allen 80?

23 A. Yes, sir.

24 Q. What does Exhibit Allen 80 show?

25 A. Zitting Brothers payment application for the

1 period of March 2008.

2 Q. This will correspond to APCO payment
3 application number 6?

4 A. Yes, sir.

5 Q. This was the application that APCO received
6 from Zitting?

7 A. Yes, sir.

8 Q. Again, directing your attention to the
9 internal report with APCO 44677 --

10 A. Yes, sir.

11 Q. Again, this was a report prepared by APCO?

12 A. Yes, sir.

13 Q. And the signature in the approved for payment
14 signature block, again, that's signed by APCO employee?

15 A. Can I say something here?

16 Q. Sure.

17 A. That you need to understand. This approved
18 for payment is the money that was given to us by the
19 owner and approved by the owner. I was to be made
20 sure, and they were to be made sure, that the
21 subcontractor was paid exactly what was allocated and
22 approved by the owner. That's why these say approved
23 for payment.

24 That is the way that this is approved. The
25 approval from APCO is to make sure that what is given

1 to us from Nevada Construction Service via approval by
2 the owner is paid to the sub. That is what's verified
3 right here, and that is what is telling you here. This
4 is what we billed to Gemstone. They approved these
5 amounts of money, and were given to APCO, and then APCO
6 had to give them every dime that was paid to APCO on
7 behalf of Zitting was paid to Zitting.

8 No monies were held, not a penny, other than
9 maybe the rounding of this retention. Okay? But other
10 than that, every dime received from the owner, Nevada
11 Construction Services, Scott Financial to APCO, was
12 paid directly. This was saying that that was -- that
13 was approved.

14 Q. And I appreciate the explanation.

15 A. Okay. I just wanted to make sure that you
16 understood that.

17 Q. Right. I definitely appreciate that because
18 again, I didn't prepare the document so I don't
19 understand your thought process, so I appreciate that.

20 A. I want you to understand that our job, my job
21 was to make sure what was paid by the owner was paid to
22 the subs. I actually cut the checks. That was my end.
23 So when we received approval from the owner that
24 Zitting Brothers was approved to be paid \$1,168,785,
25 they had to be paid that money. And that's what those

1 approvals on those sheets are, to make sure that what
2 we were paid, they were paid. We had no control and
3 couldn't hold a dime for anybody.

4 And not only that, once they receive this
5 money, they would sign an unconditional. If you saw
6 this unconditional release, that release had to go to
7 Nevada Construction Services before any monies for the
8 next month could be paid. We had to prove that those
9 subcontractors were paid that money.

10 Q. Understood.

11 A. So it was a very, very secure process to make
12 sure that the subs were paid. Every dime that was
13 received was paid to Zitting. No monies were held.
14 Nobody got any extra money.

15 Q. And for this application shown on Allen 80,
16 again, the retention amount for this application is
17 47,188 dollars, correct, roughly?

18 A. Yes. And that's another thing. The
19 retention was told to us what we had to hold. And we
20 had to hold ten percent.

21 Q. When you say told to us, who told you to hold
22 on to ten percent?

23 A. The owners and the bank, and I believe Nevada
24 Construction Services.

25 Q. Had they told you specifically to hold on to

1 that money?

2 A. That's what they held onto. That's what they
3 released.

4 MR. LAI: Allen 81.

5 (Exhibit 81 marked
6 for identification.)

7 THE WITNESS: APCO never held the money, just
8 so you understand that. The bank held the money.

9 BY MR. LAI:

10 Q. I'm only --

11 A. The deduct for retention. Maybe that's the
12 proper way it should have been phrased. They told us
13 what to deduct from the payment applications. So our
14 payment application, if you have one, will show a ten
15 percent retention held.

16 The bank held the money, APCO did not hold
17 any funds for anybody. Every dime paid for a specific
18 supplier, sub, was paid to them.

19 Q. I understand. The reason I'm not saying
20 anything is because I'm trying to give the court
21 reporter some time to mark the exhibit. Every time you
22 say something she needs to write it down. We will wait
23 a bit.

24 Ms. Allen, the document being handed to you
25 is a document marked as Exhibit Allen 81. Do you

1 recognize this exhibit?

2 A. Yes, sir.

3 Q. What is Exhibit Allen 81 showing?

4 A. It is Zitting Brothers' payment application
5 for the period ending April of 2008, along with the
6 same document, sir, their unconditional release showing
7 they accepted the check, a copy of the accounting
8 paper, the check, which also relates to Allen 75, which
9 is on line APCO pay application 7.

10 Q. And the check was issued for this payment
11 application, correct?

12 A. It's 156,000.

13 Q. So that's correct?

14 A. Yes, sir. There's an unconditional progress
15 release saying that they received it.

16 Q. So the fact that this application appears to
17 be unsigned by Zitting, it did not preclude a check
18 being issued for this application, correct?

19 A. They were paid.

20 Q. So the signature, the fact that it's
21 unsigned, it didn't matter in the end, correct?

22 A. Evidently not, sir. They were paid.

23 Q. Going to the internal accounting sheet that
24 you referenced, again, that's prepared by APCO,
25 correct?

1 A. Yes, sir.

2 Q. And the retention amount being retained was
3 about 70,397 dollars, correct?

4 A. Yes.

5 Q. And the approved for payment signature block,
6 again, that's signed by an APCO employee, correct?

7 A. Yes, sir.

8 (Exhibit 82 marked
9 for identification.)

10 BY MR. LAI:

11 Q. Ms. Allen, Exhibit 82, do you recognize this?

12 A. Yes, sir.

13 Q. What does Exhibit Allen 82 show?

14 A. It is Zitting Brothers application through
15 May of 2008, along with the same supporting documents
16 and APCO sheets, and a copy of the check which relates
17 to APCO 75, line -- billing number 8.

18 Q. And this is the application that APCO
19 received from Zitting?

20 A. Yes.

21 Q. I direct your attention to the internal
22 accounting sheet that we have been looking at. That's
23 APCO 44644?

24 A. Yes, sir.

25 Q. Again, this is a document prepared by APCO?

1 A. Yes, sir.

2 Q. And the approved for payment signature line,
3 that's signed by an APCO employee?

4 A. Yes.

5 Q. And the retention amount for this was 3,108
6 dollars, about?

7 A. Yes, sir.

8 Q. Turning your attention to the top where it
9 says total to date, do you see that column on the
10 internal accounting sheet?

11 A. Um-hum.

12 Q. Where it states quantity 100 percent; do you
13 see that?

14 A. Yes.

15 Q. What does 100 percent mean to you?

16 A. They billed 100 percent of the project before
17 retention was held.

18 Q. Does that mean that APCO -- sorry, scratch
19 that.

20 Does that mean that Zitting could not bill
21 any more for the work on buildings 8 and 9 since it's
22 showing a hundred percent?

23 A. That is correct.

24 Q. What would happen if they submitted a payment
25 application after this for additional work for building

1 8 and 9; would it be declined by the owner?

2 A. Unless it was a change order.

3 Q. So the 100 percent here, that doesn't reflect
4 the completion of the project for that building?

5 A. That is correct. Their portion of the work
6 only.

7 (Exhibit 83 marked
8 for identification.)

9 BY MR. LAI:

10 Q. Ms. Allen, the court reporter has handed you
11 a document marked Exhibit Allen 83. Do you recognize
12 that document?

13 A. There's more than one invoice in here, sir.

14 Q. When you say that, what do you mean?

15 MR. MOUNTEER: Just for clarification, you've
16 got application period 6/25/08, and if you jump to --
17 it starts a whole new Bates stamp number ZBCI. I don't
18 know if that's clipped together wrong or not, but
19 you've got an APCO production on a Zitting Brothers
20 production.

21 THE WITNESS: That's correct.

22 BY MR. MOUNTEER:

23 Q. I'll for sure stress the foundational
24 question of whether or not you recognize these
25 documents.

1 A. Not this one.

2 Q. When you say "not this one," can you identify
3 the Bates number?

4 A. ZBC1002025.

5 MR. DABBIERI: Could I have the name of that
6 document, because I don't have any ZB docs.

7 MR. LAI: These are applications and
8 certificates for payment. These are part of Zitting
9 Brothers' initial disclosures.

10 MR. DABBIERI: Thank you.

11 BY MR. MOUNTEER:

12 Q. So Ms. Allen, just to kind of shortcut the
13 process then, you're saying that you don't recognize
14 the documents with the Bates number of ZBCI2025 through
15 2029; is that correct?

16 A. These are dated November of '08, and we were
17 off the project then.

18 Q. So it's correct you don't recognize the
19 number with those Bates numbers as referenced?

20 A. I never paid these. I don't recognize them,
21 I'm sorry.

22 Q. No need to apologize.

23 A. And this release, I don't know why this
24 release came.

25 Q. The release, what's the Bates number on it?

1 A. It's an APCO, and it's got a 9/18 date, which
2 doesn't even relate to this date on this billing.

3 Q. Let's go through this document bit by bit
4 just to make sure we understand what you recognize and
5 what you don't recognize.

6 A. Okay.

7 Q. Looking now at APCO 106209 through 106213, do
8 you recognize the document with these Bates numbers?

9 A. Yes, sir.

10 Q. What is that document showing?

11 A. That is a billing that we received from
12 Zitting Brothers through the period of June 25th, '08,
13 which is -- what was part of the billing that went into
14 the owner that's listed on payment application number
15 9.

16 Q. When you say payment application number 9,
17 that's APCO's payment application number 9?

18 A. Yes, sir.

19 Q. Now, stay on the page with the page number of
20 APCO 106209; do you see that page?

21 A. Um-hum.

22 Q. I see there's a lot of notations on here,
23 handwritten notations; do you see that?

24 A. Um-hum.

25 Q. Do you know who made these notations?

1 A. Nevada Construction Services.

2 Q. Do you know what these notations mean?

3 A. They were asking for releases from the
4 different suppliers. Those are supplier names of
5 Zitting.

6 Q. Do you see near the top of this page where it
7 has three sets of numbers, 37,608.55, 3761, and
8 33,847.55; do you see those three sets of numbers?

9 A. Um-hum.

10 Q. Do you know what those numbers mean?

11 A. Oh, now I know what this is. That was what
12 was approved by the owner on this. Out of this pay
13 application there was another billing that -- another
14 sheet that you're missing. And it was change orders
15 that Zitting Brothers billed for in June. They billed
16 200,000 dollars gross, and of that 200,000 dollars
17 gross, the owner only approved 17,000 dollars.

18 Q. Okay, just to --

19 A. Let's go back to Exhibit Number 74. Here,
20 I'll give you mine.

21 Q. You can look at yours. I have my own. Thank
22 you, though.

23 A. If you could look at payment application
24 number -- that one right there, the one that's
25 handwritten on by Nevada Construction Services, you

1 will see that Zitting Brothers, what was approved for
2 them was 37,608.55. You see that number at the top of
3 this payment application, Exhibit 83, that you refer
4 to? Right there, sir.

5 Q. Okay.

6 A. That is the gross amount that was approved
7 for them.

8 Q. So just make sure we have a clear
9 understanding of what these numbers all mean, let me
10 know if I'm incorrect.

11 A. No.

12 Q. So there was an application that Zitting
13 Brothers submitted that was approximately 220,000
14 dollars for the June 2008 billing period, correct?

15 A. It consisted of two billings.

16 Q. That totaled to about 220K, correct?

17 A. Yes.

18 Q. And the number 37,608.55 that's shown on
19 Allen 83, that's the gross billing approved by the
20 owner, correct?

21 A. Correct.

22 Q. And that's the same number shown on Exhibit
23 Allen 74 on page APCO 106207, correct?

24 A. Correct.

25 Q. And the number next to that on Allen 83, the

1 3,761.00 number, is that the retention amount retained
2 for the approved gross billing? A ten percent amount?

3 A. Yes, sir.

4 Q. Is the number next to that, the 33847.55, is
5 that the gross amount less the ten percent retention
6 amount shown on Allen 83?

7 A. That is the amount of the joint check that
8 was issued by Nevada Construction Services.

9 Q. So the 33847.55, that was ultimately the
10 payment made by the owner, correct?

11 A. Yes, sir.

12 Q. Let me direct your attention to the document
13 that you didn't recognize beginning with ZBCI002025.

14 A. Um-hum.

15 Q. On this page, do you see number 8 where it
16 says current payment due 33,847.49?

17 A. I'm sorry. What are we talking about again?

18 Q. It's the payment application you don't
19 recognize. It's the ones with the Bates number of
20 ZBCI2025.

21 A. Let me see if they revised it.

22 Q. Do you see the number 8, current payment due?

23 A. Okay.

24 Q. Do you believe this is a revised payment
25 application to reflect the amount that was actually

1 accounting for the owner approved changes?

2 A. Oh, yes, sir, sorry.

3 Q. No reason to doubt that?

4 A. No. That looks like the numbers.

5 Q. In other words, you believe that the ZBCI
6 payment application that you didn't recognize before
7 was a companion to the application you saw earlier for
8 Allen 83?

9 A. It was what was approved by the owner.

10 Q. Then the conditional waiver that you didn't
11 recognize before with the Bates number of APCO 106236;
12 do you see that?

13 A. Um-hum.

14 Q. Do you believe that this also is associated
15 with the payment application that was approved by the
16 owner shown on Allen 83?

17 A. Yes, sir.

18 Q. Going to the internal accounting sheet with
19 the Bates number of APCO 104226, did APCO prepare this
20 document?

21 A. Yes, sir.

22 Q. And is that your signature at the prepared
23 signature line?

24 A. Yes.

25 Q. Did you prepare this on September 1st, 2008?

1 A. Possibly, yes.

2 Q. No reason to doubt that?

3 Would there be any reason why this would be
4 prepared after APCO left the project on August 21st,
5 2008?

6 A. Certainly. I probably found out -- this
7 check was cut August the 28th. We left the job August
8 the 21st. At that point, Nevada Construction Services
9 cut the joint checks and gave them -- gave us notice as
10 to what was paid after they were paid.

11 We had a payable on our books for Zitting
12 Brothers. It had to be removed. And also the revenue
13 that we had booked for the owner had to be decreased by
14 the amount of money paid to the subcontractors. So we
15 had what we called a joint checking account that was
16 kind of an accounting procedure that you have to do.

17 If you will note, you will see APCO 44625 in
18 that packet, which is a piece of paper that looks like
19 a check.

20 When a joint check was paid to a
21 subcontractor, and the money did not enter into APCO's
22 bank account, to release the payable and to reduce the
23 revenue, we would have to flow the money through APCO's
24 account. So what we would do was we would manually
25 show the money coming in for this check, and then the

1 money going out for the check, so it would just zero it
2 out.

3 In order to do that, we would have to run a
4 paper check, which is this, that ties to this, because
5 Nevada Construction Services paid these bills and never
6 gave APCO any of the money.

7 Do you understand that procedure, sir?

8 Q. Yes. I think you gave a pretty good
9 explanation. So my follow-up question was, other than
10 the 33,847.55 are there any other account payable
11 amount for Zitting Brothers for you to zero out as you
12 just explained?

13 A. No, sir, because this was all that was
14 approved by the owner.

15 Q. During the time that APCO what the general
16 contractor, correct?

17 A. That's correct.

18 Q. So you're not aware of any other amounts
19 approved by the owner after APCO left the project,
20 correct?

21 A. No, sir. Only what was listed on that
22 ratification form. I don't know the numbers by heart
23 that they show -- no, those were billings. No.

24 MR. LAI: Allen 84.

25 (Exhibit 84 marked

1 for identification.)

2 BY MR. LAI:

3 Q. Ms. Allen, the court reporter handed you a
4 document marked Exhibit Allen 84. Do you recognize
5 this document?

6 A. I do.

7 Q. What is this document?

8 A. It is a document that I did, prepared.

9 Q. When did you prepare this document?

10 A. During the litigation.

11 Q. Any reason why you prepared this document?

12 A. Yes.

13 Q. What is that reason?

14 A. For my studying what was billed and what was
15 paid. In the top box right there, is what was billed
16 from Zitting to APCO.

17 Q. Do you recall the exact date when you
18 prepared this document?

19 A. No.

20 Q. Is it fair to say that the numbers reflected
21 here is accurate through August of 2008?

22 A. Yes, sir. These are the billings that I
23 submitted to the owner, which agrees with this.

24 Q. And staying with Allen 84 then, these are a
25 number that was current as of the time that APCO was

1 the general contractor, correct?

2 A. Yes, sir.

3 Q. So it doesn't reflect any amount that would
4 come in after APCO left the project, correct?

5 A. Correct.

6 (Exhibit 85 marked
7 for identification.)

8 BY MR. LAI:

9 Q. Ms. Allen, the court reporter has handed you
10 a document marked Exhibit Allen 85. Do you recognize
11 this document?

12 A. No.

13 Q. So you've never seen this document before?

14 A. It's dated January of '09.

15 Q. I understand, so you've never seen this
16 document before?

17 A. Not to my knowledge.

18 Q. Do you know whether or not APCO has ever
19 received this document?

20 A. I haven't seen that, so I can't say that. Do
21 you have -- that's all I have.

22 MR. DABBIERI: I'm sorry, could I have the
23 name of that document and a control number, preferably
24 if you have an APCO number.

25 MR. LAI: Sure. Unfortunately, it's not an

1 APCO number. It's an application and certificate for
2 payment. It has a Bates number of ZBCI 002037 through
3 2041.

4 MR. DABBIERI: Thank you.

5 BY MR. LAI:

6 Q. Let me direct your attention to the last
7 page, even though you haven't seen this document
8 before. Do you see near the middle of this page where
9 it indicates an item number beginning with Z-000-001?

10 A. Yes.

11 Q. Are you familiar with these three rows here,
12 001, 2 and 4?

13 A. Only number 1, sir. It was a change order
14 that was issued by APCO for installing windows for
15 41,000 dollars. The others, sir --

16 Q. You don't recognize the other two -- or three
17 actually, going to the bottom?

18 A. I didn't have anything to do with change
19 orders or the processing of change orders. I do know
20 that we submitted a bill for approximately 200,000
21 dollars. I don't know if you have it, and I don't know
22 where that relates to here, and they were not approved
23 by the owner.

24 Q. Let's take this by piecemeal so we have a
25 clear record of what's going on. Speaking with respect

1 to C-000-001 where it says window installation; do you
2 see that?

3 A. Um-hum.

4 Q. Was that a change order approved by the
5 owner?

6 A. It was a change order approved by APCO.

7 Q. Has the owner made any payment on that change
8 order?

9 A. Yes.

10 Q. And is the number reflected on this page
11 showing 20,500 dollars, is that the only payment made
12 by the owner towards that change order?

13 A. Yes.

14 Q. Any reason why they only paid half?

15 A. Because that's all that was billed. If you
16 would go back to Allen Exhibit 83, that billing is
17 dated 6/23/08. This is the billing that APCO received
18 from Zitting for the period of June.

19 If you will look on APCO 106213, you will see
20 that Zitting through June, that went in with the June
21 payment application, billed 20,500 dollars.

22 Now you're showing me another invoice from
23 Zitting that is also dated through -- it's dated
24 6/30/08, that they are billing an additional 20,000
25 dollars on.

1 This is what we received for June, and this
2 is what we billed the owner, and this is what the owner
3 approved to pay.

4 Q. So just to kind of clarify for the record,
5 you were looking at Exhibit Allen 83 and saying that
6 Zitting Brothers applied for payment for 20,500 dollars
7 for that change order; is that correct?

8 A. That is correct.

9 Q. And do you understand that in Exhibit Allen
10 85, that Zitting Brothers was applying for the
11 remainder of the 41,000 dollars; is that your
12 understanding?

13 A. That's what the invoice says.

14 Q. Now, looking at the change order for the item
15 number below that, with C-00-002 on Exhibit Allen 85;
16 do you see where it states changes to plan, asterisk
17 AR?

18 A. I see that, sir.

19 Q. Do you know whether or not the owners ever
20 approved that for payment?

21 A. I could not tell you that.

22 Q. Same thing for the one below that, C-00-004,
23 where it states options on buildings 8 and 9; do you
24 see that?

25 A. 17,000?

1 Q. Right. Do you believe that --

2 A. Excuse me, sir.

3 Q. Sure.

4 THE WITNESS: I don't know. Just go ahead.

5 BY MR. LAI:

6 Q. It may be helpful for us to look at Allen 83
7 for that questioning.

8 Do you believe that the owner had previously
9 approved this item and paid for this item before?

10 A. Yes.

11 Q. Now going below that, looking at C0-00-004,
12 changes to plan, asterisk GR; do you see that?

13 A. Yes.

14 Q. Do you know whether or not the owner has ever
15 approved the payment for that amount?

16 A. No, it was never approved.

17 Q. When you say never approved, for the amounts
18 we discussed so far, do you mean you've seen a document
19 coming from the owner disapproving it, or you're not
20 aware of any document approving it?

21 A. The invoice that was submitted for the change
22 orders in June that you do not have here, for some
23 reason they only approved 17,000 dollars and the
24 billing was for 200,000 dollars, with different changes
25 orders on them.

1 Q. Now, speaking with respect to the two items
2 on Exhibit Allen 85 where it states changes to plans
3 asterisk AR and asterisk GR, do you know for a fact
4 whether or not these were the change orders not
5 approved by the owner in the June 2008 pay application?

6 A. Without the other invoice here that you don't
7 have, I can't say that for sure.

8 Q. Now, when the owner disapproved payment for a
9 change order, how is that communicated to you or APCO?

10 A. When we submit a payment application with a
11 change order or any item on it -- when Zitting gave us
12 a bill, we would take their bill, we would put it on
13 our bill exactly as they submitted it. We would give
14 the owner that. They would then come back and say, no,
15 this is only approved and this is only approved, so we
16 would have to notify Zitting and say, okay, this is
17 what's approved. You have to revise your billing
18 accordingly.

19 Q. Right. And when you say you get back a
20 communication from the owner about what's approved,
21 what's not approved, is that like a formal document
22 that's submitted by the owner to APCO showing all this
23 out, or is it a phone call; how is that communicated?

24 A. Sometimes e-mail, sometimes phone call. You
25 know, I wasn't the one that did the payment

1 applications, so it would be transmitted to Shannon
2 Havelly, but the owner would tell us what was approved.

3 Q. And as far as you know, for the application
4 in Exhibit Allen 85, do you know whether or not the
5 amount requested in the application was ever paid to
6 Zitting?

7 A. Sir, this was never received before APCO was
8 off the -- it was received far after APCO was off the
9 job. January of '09? Our payment applications and
10 everything were in to the owner and payments were made
11 long before that.

12 This is -- do you have proof that this was
13 sent to APCO? Because I don't have any.

14 Q. That's what I'm asking you --

15 A. No.

16 Q. -- whether or not you know whether or not
17 APCO received this?

18 A. This invoice was prepared January of '09.
19 APCO left the job August the 21st of '08. So...

20 Q. So then is it fair to say that you have no
21 knowledge whether or not the amount requested in Allen
22 85 was ever paid to Zitting?

23 A. That's correct.

24 (Exhibit 86 marked
25 for identification.)

1 BY MR. LAI:

2 Q. Ms. Allen, the reporter handed you a document
3 marked as Exhibit 86. Have you ever seen this document
4 before?

5 A. No, sir. It's also dated and signed January
6 30th of '09.

7 Q. Even though you haven't seen this document
8 before, do you have an understanding that this
9 application for Allen 86 is seeking the payment of
10 retention amount withheld by the owner?

11 A. I could see that based on the front page,
12 sir, yes.

13 Q. And that's because the amount requested is
14 ten percent of the gross billing to date, correct?

15 A. It's the amount that's listed as the
16 retention on this billing that you just gave to me --

17 Q. When you --

18 A. -- which is Exhibit 85. That's correct, and
19 it's zeroed out on that.

20 Q. Do you know whether or not Zitting had
21 completed owner-approved work for 4,033,654.85?

22 A. What I know is when APCO left the job they
23 completed a total of gross monies 3,647,608.55 that was
24 approved by the owner.

25 Q. And that's from your understanding of Exhibit

1 Allen 84, correct? There should be an exhibit stamp at
2 the bottom.

3 A. Yes, that's correct.

4 Q. And you're not aware whether or not Zitting
5 completed owner-approved work after APCO left the
6 project, correct?

7 A. Not to my knowledge, sir.

8 Q. Do you know whether or not the amount
9 requested in the application for Allen 86 was ever paid
10 to Zitting?

11 A. Not to my knowledge, sir.

12 MR. LAI: We have been going about an hour,
13 do you want to take a break?

14 THE WITNESS: Go ahead.

15 MR. MOUNTEER: How much longer do you have?

16 MR. LAI: 15-20 minutes tops.

17 MR. MOUNTEER: Let's go ahead.

18 (Exhibit 87 marked
19 for identification.)

20 BY MR. LAI:

21 Q. Ms. Allen, the court reporter has handed you
22 a document marked Allen 87. Have you seen this
23 document before?

24 A. If I would have, I wouldn't have paid any
25 attention to it.

1 Q. So this document looks foreign to you; is
2 that correct?

3 A. It's a schedule. I don't deal with the
4 schedules, I'm sorry. I don't even understand them.

5 Q. Me neither. So you're not the only one.

6 A. Okay, good.

7 MR. LAI: Exhibit 88.

8 (Exhibit 88 marked
9 for identification.)

10 BY MR. LAI:

11 Q. Ms. Allen, the court reporter has handed you
12 a document marked as Exhibit Allen 88. Have you ever
13 seen this document before?

14 A. Yes, sir.

15 Q. What is Exhibit Allen 88?

16 A. There's two pages here. One is a notice to
17 all the subcontractors by in-house counsel, telling
18 them that APCO stopped work as of 5:00 p.m. on
19 Thursday, August the 23rd -- 21st.

20 Q. Earlier you testified that APCO did, in fact,
21 stop work on August 21st, correct?

22 A. That's correct.

23 Q. Does stopping work mean that APCO no longer
24 paid its subcontractors?

25 A. Our subcontractors were paid everything that

1 was approved by the owner through August of 2008.

2 Q. And staying on the first page of Allen 88
3 where it says APCO 106288; can you read the first
4 paragraph under subsection note?

5 A. Where is that at?

6 Q. It's near the bottom. Can you read that into
7 the record?

8 A. "Note, pursuant to statute APCO is only
9 stopping work on this project. At this time it has not
10 terminated its contract with Gemstone. As such, all
11 subcontractors until advised in writing by APCO
12 Construction remain under contract with APCO
13 Construction."

14 Q. Are you aware of any writing by APCO
15 Construction to its subcontractors about whether or not
16 APCO would terminate the contracts with the
17 subcontractors?

18 A. I had no legal -- I don't understand it.

19 Q. That's why I'm asking if you're aware of
20 any --

21 A. I'm sorry.

22 Q. That's okay.

23 A. Not my scope of work.

24 Q. Are you aware of any communications between
25 APCO and Zitting Brothers after the stop work date on

1 the project?

2 A. Not that -- I can't recollect, sir. I'm
3 sorry, but...

4 Q. And CAMCO become the general contractor after
5 APCO left, correct?

6 A. Yes, sir.

7 Q. Do you know whether or not CAMCO asked
8 Zitting to continue work on the project?

9 A. The only way I would have known that was on
10 that ratification form that was in Zitting's disclosure
11 book showing there were billings to CAMCO.

12 Q. And do you still have that binder with the --

13 A. It was disclosed by Zitting. It was a
14 Z2-something, somewhere in the back of the book.

15 Q. Do you know whether or not Gemstone asked
16 Zitting to continue work on the project after APCO
17 stopped work?

18 A. Based on showing that there were billings,
19 yes, they would have asked them to continue.

20 MR. LAI: Those are all the questions I have.
21 I'll pass the witness.

22 MR. MOUNTEER: Jon, how long do you think you
23 have?

24 MR. DABBIERI: My best guess would be three
25 minutes, maybe less, maybe a little bit more, but in

1 that general time frame.

2 MR. MOUNTEER: Okay. If it's okay with the
3 court reporter, I would prefer just plugging through
4 and getting this done.

5 (Off-record discussion held.)

6 EXAMINATION

7 BY MR. DABBIERI:

8 Q. (Telephonically) Ms. Allen, this may be a
9 little disjointed because I'm moving from topic to
10 topic and trying not to repeat too much what you've
11 already been asked. You did testify concerning the
12 preparation you've done and gave a description of what
13 you have reviewed. Did you review anything specific to
14 Interstate?

15 A. My job files and the binders. I looked
16 through the documents that Interstate disclosed, I
17 guess you call it, in the binders.

18 Q. And did you create at any time a binder
19 specific to Interstate?

20 A. Yes.

21 Q. To the best of your knowledge, is that
22 included in what has been disclosed --

23 A. Yes.

24 Q. -- by APCO?

25 A. Yes.

1 Q. And you also testified concerning some notes
2 you made. Did you make notes with respect to
3 Interstate?

4 A. I guess the notes that I made were
5 transferred into the binder. That was kind of a -- do
6 you understand what I'm saying? As I made notes, then
7 I, you know, transferred. But if I saw something that
8 when I was looking through the book, I made a note for
9 me to remember something. That's it. Nothing major.

10 Q. My impression was that these notes were
11 created relatively recently as you were preparing to be
12 deposed; is that correct?

13 A. Yes, some.

14 MR. MOUNTEER: Jon, this is Cody. If there's
15 any notes, we can verify it and we will stipulate to
16 produce them to you.

17 MR. DABBIERI: Okay. Then I'll stop asking.

18 MR. MOUNTEER: Yes.

19 BY MR. DABBIERI:

20 Q. You testified concerning how change orders
21 were processed. What would happen if a change order
22 was disputed, if Interstate, for example, presented a
23 change order, would APCO review that for accuracy and
24 completeness or would it simply pass it on to the
25 owner?

1 A. I did not have anything to do with change
2 orders. I really cannot testify to that. I believe
3 everything was passed on to the owner. The only thing
4 that APCO might request was backup to support it.
5 Everything that was given to us, was given to the
6 owner. They had the ultimate decision whether or not
7 something was approved or not.

8 Q. Did APCO submit changes orders to the owner?

9 A. I didn't do them. I believe so.

10 Q. To the best of your knowledge, were any of
11 those disputed by the owner?

12 A. To the best of my knowledge, I believe they
13 were. Some were disputed, sure. As to what, I can't
14 tell you.

15 Q. Were those -- your turn.

16 A. No, go ahead.

17 Q. Were those disputes resolved?

18 A. No.

19 Q. Does APCO contend it is owed money by
20 Gemstone?

21 A. Nobody is owed any money. The Supreme Court
22 made a decision and released all the liens to pay the
23 bank. Nobody's going to get any money. It's done.
24 APCO's not going to get any money. It's over.

25 Q. Well, and without arguing too fine a point,

1 there's a difference between a contractual obligation
2 to pay, and a lien against a property. To the best of
3 your knowledge, does APCO contend that Gemstone has a
4 contractual obligation to pay APCO money?

5 A. Yes.

6 Q. How much is that?

7 A. I have no idea.

8 Q. Is that amount inclusive of anything which
9 the subcontractors contend are owed to it -- to them?

10 A. I guess you could say that.

11 Q. And do you know how much that is?

12 A. I don't.

13 Q. When a subcontractor presented APCO with a
14 billing which included change order work -- let me
15 rephrase that.

16 What was the sequence and the timing of a sub
17 preparing its application for payment to APCO and then
18 APCO presenting its application for payment to the
19 owner; was there a lag there?

20 A. Possibly a few days that it would be given to
21 them for their review for approval, because you would
22 have to compile all the numbers onto our pay
23 application.

24 Q. So when a subcontractor's pay application
25 included change order work, would that application --

1 **IN THE SUPREME COURT OF THE STATE OF NEVADA**

2 APCO CONSTRUCTION, INC., A
3 NEVADA CORPORATION,

4 Appellant,

5 vs.

6 ZITTING BROTHERS CONSTRUCTION,
7 INC.,

8 Respondent.

Case No. 75197

District Court Case No. A571228

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9 **APPENDIX TO DOCKETING STATEMENT**
10 **IN CASE NO. 75197**

11 **SPENCER FANE, LLP**

John H. Mowbray, Esq. (Bar No. 1140)

John Randall Jefferies, Esq. (Bar No. 3512)

Mary Bacon, Esq. (Bar No. 12686)

SPENCER FANE LLP

300 South 4th Street, Suite 950

Las Vegas, Nevada 89101

Telephone: (702) 408-3400

Facsimile: (702) 408-3401

Email: jmowbray@spencerfane.com

rjefferies@spencerfane.com

mbacon@spencerfane.com

15 *and*

16 **MARQUIS AURBACH COFFING**

Micah Echols, Esq.

Cody S. Mounteer, Esq. (Bar No. 11220)

10001 Park Run Drive

Las Vegas, NV 89145

Telephone: 702.207.6089

Email: cmounteer@maclaw.com

Attorneys for Appellant APCO Construction, Inc.

19 **APPENDIX TO DOCKETING STATEMENT**

20 **DOCUMENTS**

BATE STAMP

VOLUME

			NO.	
1	A	District Court Case Docket	1-98	I
2	B	September 21, 2017 Notice of Entry of Order Granting Plaintiff's Oral Motion to Dismiss	99-105	I-II
3	C	Findings of Fact, Conclusions of Law, and Order Granting Zitting Brothers Construction, Inc.'s Motion for Partial Summary Judgment Against APCO Construction entered on December 27, 2017	106-117	II
4	D	Order Denying APCO Construction, Inc.'s Motion for Reconsideration of Court's Order Granting Zitting Brothers Construction, Inc.'s Partial Motion for Summary Judgment entered on January 25, 2018	118-120	II
5	E	Notice of Entry of Judgment for the Findings of Fact, Conclusions of Law, and Order Granting Zitting Brothers Construction, Inc.'s Motion for Partial Summary Judgment Against APCO Construction was entered on January 2, 2018	121-134	II
6	F	Notice of Entry of Order Denying APCO Construction, Inc.'s Motion for Reconsideration of Court's Order Granting Zitting Brothers Construction, Inc.'s Partial Motion for Summary Judgment entered on January 31, 2018	135-139	II
7	G	Last-filed version of all complaints, counterclaims, and/or cross-claims filed in the district court, any tolling motion, the order challenged on appeal and written notice of entry for any attached orders	140-1066	II-IV
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