

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

APCO CONSTRUCTION, INC., A  
NEVADA CORPORATION,

Appellant,

vs.

ZITTING BROTHERS CONSTRUCTION,  
INC.,

Respondent.

Case No.: 75197

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Appeal from the Eighth Judicial  
District Court, the Honorable Mark  
Denton Presiding

**APPELLANT'S RESPONSE TO ORDER TO SHOW CAUSE**

**MARQUIS AURBACH COFFING**

Micah S. Echols, Esq.  
Nevada Bar No. 8437  
Cody S. Mounter, Esq.  
Nevada Bar No. 11220  
Tom W. Stewart, Esq.  
Nevada Bar No. 14280  
10001 Park Run Drive  
Las Vegas, Nevada 89145  
Telephone: (702) 382-0711  
Facsimile: (702) 382-5816  
mechols@maclaw.com  
cmounter@maclaw.com  
tstewart@maclaw.com

**SPENCER FANE LLP**

John Randall Jefferies, Esq.  
Nevada Bar No. 3512  
Mary E. Bacon, Esq.  
Nevada Bar No. 12686  
300 S. Fourth Street, Suite 950  
Las Vegas, NV 89101  
Telephone: (702) 408-3400  
Facsimile: (702) 408-3401  
rjeffries@spencerfane.com  
mbacon@spencerfane.com

*Attorneys for Appellant, APCO Construction, Inc.*

MAC:05161-019 3525544\_1

## **APPELLANT’S RESPONSE TO ORDER TO SHOW CAUSE**

Appellant, APCO Construction, Inc. (APCO), by and through their attorneys of record, Marquis Aurbach Coffing and Spencer Fane LLP, hereby submits their Response to Order to Show Cause filed September 19, 2018 (Response).

This Response will address the procedural history of the consolidated actions, detail the finality of the claims asserted by the various parties, and demonstrate how the claims of all parties have been resolved and, thus, that this Court has jurisdiction over the claims at issue in this appeal. *See* NRAP 3A(b)(1).

### **A. THE INITIAL PARTIES AND CASE CONSOLIDATION.**

The claims of all parties can generally be described as claims related to payment of either labor or materials provided to Manhattan West.<sup>1</sup> The district court action was initiated in 2008 during the economic recession, endured three

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<sup>1</sup> This Court ordered APCO to “identify and . . . provide copies of each claim, cross-claim, counterclaim, third-party claim, and claim in intervention asserted in each of the consolidated cases in the district court, even if those claims do not involve [APCO] or [Zitting], specify the date of resolution of each claim, cross-claim, counterclaim, third-party claim, and claims in intervention, and provide copies of all orders, stipulations, or notices dismissing or resolving all claims, cross-claims, counterclaims, third-party claims, and claims in intervention.” Order to Show Cause (Order) at 3. The spreadsheet, Appellant’s Appendix to Appellant’s Response to Order to Show Cause (AA) AA 2022-57, and accompanying appendices, AA 1-2021, are provided to identify each claim, cross-claim, counterclaim, third-party claim, and claim in intervention, provide documentation of the same to the Court, and demonstrate the resolution of the same, in accordance with this Court’s Order.

appeals, and lasted approximately ten years. The dispute centered around Manhattan West spawned many district court cases that were eventually in the Eighth Judicial District Court: A571228, A574391, A574792, A577623, A579963, A580889, A583289, A584730, A587168, A589677, A590319, A592826, A596924, A597089, A606730, A608717, and A608718. At that point, because the “cases [we]re consolidated by the district court, they bec[ame] one case for all appellate purposes.” *Mallin v. Farmers Ins. Exch.*, 106 Nev. 606, 609, 797 P.2d 978, 980 (1990). Throughout the years, the district court case involved approximately 90 parties. *See generally* AA 2022-57 (detailing claims and parties).

## **B. THE DISTRICT COURT ORDERS THE SALE OF MANHATTAN WEST**

Nearly five years ago, the district court ordered the sale of Manhattan West and ordered the sale would be “free and clear of all liens” and that “all liens on [Manhattan West] . . . be transferred to the net proceeds from the sale.” AA 1788; *see also* AA 1714-80 (ordering sale of property). However, the district court ordered the net proceeds from the sale be transferred into an interest-bearing account pending resolution of the ongoing dispute over priority that had emerged between Manhattan West’s lender, Scott Financial Corporation, and the various

mechanics' lienholders.<sup>2</sup> *See* AA 1788-89; *see also In re Manhattan W. Mech.'s Lien Litig.*, 131 Nev., Adv. Op. 70, 359 P.3d 125, 128 (2015). Eventually, this Court determined holding “the priority of the mechanic’s lien remains junior to the amount secured by the original senior lien” held by Scott Financial Corporation. *Id.* Following this Court’s priority determination, the district court eventually ordered the proceeds of the sale disbursed to Manhattan West’s lender, Scott Financial Corporation. AA 1788-90 (releasing net proceedings from sale to Scott Financial Corporation).

**C. SPECIAL MASTER’S ORDER DISMISSING ALL PARTIES WHO FAILED TO FILE SPECIAL MASTER QUESTIONNAIRE.**

Following the sale of the property and despite the massive number of parties and claims involved in the consolidated action, several events disposed of a vast number of the remaining parties and claims prior to trial. The first such event was the October 7, 2016 order entered adopting the special master’s recommendation that any party who had not completed the special master’s questionnaire was

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<sup>2</sup> Additionally, Gemstone declared bankruptcy during litigation and effectively abandoned its claims. As a result, many parties had partial summary judgment entered against Gemstone. AA 2003-04. The district court, however, denied the claims regarding lien amount priority. AA 2003-04. Later, Gemstone failed to file a questionnaire with the special master and, as a result, had its claims and the remaining claims against it dismissed from the action. *See* AA 1791-93; *see also KDI Sylvan Pools v. Workman*, 107 Nev. 340, 810 P.2d 1217 (1991).

dismissed from the litigation. AA 1791-93. Indeed, the special master ordered every party who wished to proceed in the litigation to complete a questionnaire by September 23, 2016 and warned that any party who did not would be deemed to have “abandoned any claim related to this litigation.” AA 1793. Following that order, the only parties remaining in the litigation were:

- APCO;
- Zitting;
- Steel Structures, Inc.;
- Unitah Investments, LLC;
- E&E Fire Protection;
- SWPP Compliance Solutions, LLC;
- Helix Electric of Nevada, Inc.;
- Fast Glass, Inc.;
- Buchele, Inc.;
- Accuracy Glass & Mirror Co.;
- Camco Pacific Construction Co.;
- Nevada Prefab Engineers, Inc.;
- Noorda Sheet Metal;
- Insulpro Projects, Inc.;

- Interstate Plumbing and Air Conditioning, LLC;
- Heinaman Contract Glazing, Inc.;
- Cardo WRF fka WRG Design, Inc.;
- Cactus Rose Construction, Inc.;
- National Wood Products, Inc.; and,
- United Subcontractors dba Sky Line Insulation.

*See* AA 1792 (listing remaining parties).

**D. ORDER DISMISSING PARTIES WHO FAILED TO FILE PRE-TRIAL DISCLOSURES.**

The next such event took place on September 5, 2017 at a calendar call on the claims of the remaining parties in the case. AA 1795-96. During the calendar call, APCO, Helix, and other parties orally moved to dismiss those parties that had not filed their pre-trial disclosures. AA 1795. The district court set the final pre-trial disclosure date for September 8, 2017. AA 1795. The district court set a follow-up hearing on the matter for September 11, 2017. AA 1796. At that hearing, and pursuant to the district court's order, the only parties that remained in the litigation were:

- APCO;
- Zitting;
- Helix Electric of Nevada, Inc.;

- National Wood Products, Inc.;
- Camco Pacific Construction, Co;
- E&E Fire Protection ,LLC;
- SWPP Compliance Solutions, LLC;
- Fast Glass, Inc.;
- Heinaman Contract Glazing, Inc.;
- Cactus Rose Construction, Inc.;
- Interstate Plumbing and Air Conditioning, LLC;
- Nevada Prefab Engineers, Inc.;
- Steel Structures, Inc.;
- Uintah Investments, LLC; and,
- United Subcontractors dba Sky Line Insulation.<sup>3</sup>

*See* AA 1796 (listing remaining parties).

#### **E. PARTIES DISMISSED BY STIPULATION**

Some of those parties were subsequently dismissed by stipulation prior to trial:

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<sup>3</sup> United Subcontractors settled with Camco and is now moving to enforce that settlement. AA 1973-97. However, neither party had claims that implicate the finality of Zitting's claims against APCO at issue here. *See* AA 2022-57 (detailing claims and parties).

- Interstate Plumbing and Air Conditioning, LLC, AA 1802-03;
- Nevada Prefab Engineers, Inc, AA 1797-98; and
- Steel Structures, Inc., AA 1797-98.

#### **F. UINTAH LOSES SUMMARY JUDGMENT**

Additionally, Uintah Investments, LLC, had summary judgment entered on all of its claims. AA 1804-11.

#### **G. ZITTING'S PARTIAL SUMMARY JUDGMENT.**

Then, Zitting had partial summary judgment entered against APCO on January 2, 2018, prior to trial, which is the underlying judgment on appeal here. AA 1812-22. Although Zitting brought claims against APCO and Gemstone, at the time Zitting moved for partial summary judgment, Zitting had no other claims or defenses pending against any other party in the litigation. CITE. Zitting moved for partial summary judgment on its claims of breach of contract and NRS 108 claims against APCO. AA 1812-22. Zitting's motion for partial summary judgment was granted on its breach of contract and NRS 108 claims, CITE, and the district court ordered that, as a result, *all of* Zitting's remaining claims—even those against Gemstone—were moot. AA 1821. Accordingly, the partial summary judgment order disposed of all of Zitting's claims and defenses in the multi-party action.



APCO then moved for NRCP 54(b) certification of the partial summary judgment order because it was “a final judgment as to one or more but fewer than all of the parties” and “there [wa]s no just reason for delay.” NRCP 54(b); *see also Mallin v. Farmers Ins. Exch.*, 106 Nev. 606, 610, 797 P.2d 978, 981 (1990). As a result, because the partial summary judgment order “finally dispose[d] of all claims and defenses of one . . . part[y] in a multi-party action, leaving the action pending as to the claims and/or defenses of other parties,” the district court’s NRCP 54(b) certification of that order was proper. Nevada Appellate Practice Manual § 3:37 (2018 ed.) (citing *Loomis v. Whitehead*, 124 Nev. 65, 67 n.3, 183 P.3d 890, 891 n.3 (2008)).

#### **H. REMAINING PARTIES PROCEED TO TRIAL.**

Finally, on January 17-19, 23-24, 31, and February 6, 2018, the other, remaining parties proceeded to trial against either APCO or Camco, with the following outcomes:

- Helix Electric of Nevada, Inc.: trial completed, judgment rendered in favor of APCO, AA 1823-93, and against Camco, AA 1939-48, judgment appealed in Docket No. 77320;
- National Wood Products, Inc.: trial completed, judgment rendered in favor of APCO, AA 1823-93, and against Camco, AA 1901-12, judgment appealed in Docket No. 77320;
- Camco Pacific Construction, Co: trial completed, judgment entered against Camco in favor of multiple parties, AA 1894-1972;

- E&E Fire Protection, LLC: trial completed, judgment entered against Camco, AA 1894-1900;
- SWPPP Compliance Solutions, LLC: trial completed, judgment entered against Camco, AA 1949-1960;
- Fast Glass, Inc.: trial completed, judgment entered against Camco. AA 1913-25;
- Heinaman Contract Glazing, Inc.: trial completed, judgment entered against Camco. AA 1926-38; and,
- Cactus Rose Construction, Inc.: trial completed, judgment entered against Camco. AA 1961-72.

## **II. ANALYSIS**

### **A. THE PARTIAL SUMMARY JUDGMENT ORDER RESOLVES ALL CLAIMS ASSERTED BY ZITTING.**

The order states that “[i]t is not clear whether the summary judgment order finally resolves [Zitting]’s claim for breach of contract and breach of the implied covenant of good faith and fair dealing asserted against [Gemstone].” Order at 3. As a result, this Court ordered APCO to “specifically discuss how [Zitting]’s claims for foreclosure, breach of contract and breach of the implied covenant of good faith and fair dealing in district court case A-09-589195-C were resolved.” Order at 3-4.

The partial summary judgment order resolves all claims asserted by Zitting, including those asserted against Gemstone. AA 1812-22. Indeed, the partial

summary judgment order explicitly provides that Zitting prevailed on its breach of contract and foreclosure claims, AA 1821, and that its remaining claims—including the breach of the implied covenant of good faith and fair dealing claims against Gemstone—are moot. AA 1821. Thus, Zitting’s claims against Gemstone were fully resolved by the partial summary judgment order.

## **B. THE FORECLOSURE CLAIMS WERE RESOLVED**

The Court then noted that it was “unclear whether [Zitting]’s claims for foreclosure of a mechanic’s lien . . . have been fully resolved” because the partial summary judgment order “does not resolve priorities and lienable amounts, enter judgment, or direct a sale of the property.” Order at 2 (citing NRS 108.239; *Simmons Self-Storage Partners, LLC v. Rib Roof, Inc.*, 127 Nev. 86, 247 P.3d 1107 (2011)).

Beginning in 2006, Scott Financial Corporation initially lent Gemstone roughly \$38,000,000 to finance Manhattan West. *In re Manhattan W. Mech.’s Lien Litig.*, 131 Nev. Adv. Op. 70, 359 P.3d 125, 128 (2015) (“The first three loans . . . totaled \$38 million . . . and financed the purchase of [Manhattan West].”). Following the project’s collapse and subsequent litigation, on April 23, 2013, the district court ordered the sale of Manhattan West for \$20,000,000—an amount less than Scott Financial Corporation was purportedly owed. *See* AA

1720-26. Following that sale, priority of the various lienholders was resolved by this Court, with Scott Financial Corporation determined to be in first position and, thus, entitled to have their entire lien paid first. *See In re Manhattan W. Mech.’s Lien Litig.*, 131 Nev., Adv. Op. 70, 359 P.3d 125, 128 (2015) (holding “the priority of the mechanic’s lien remains junior to the amount secured by the original senior lien.”). Following that determination, on April 14, 2016, the district court ordered disbursements of the \$20,000,000 sale proceeds of Manhattan West to be disbursed to Scott Financial Corporation. AA 1788-90.

Typically, the final judgment in a mechanic’s lien enforcement action is the order that “determine[s] whether the property’s sale is to proceed.” *Simmons Self-Storage Partners, LLC v. Rib Roof, Inc.*, 127 Nev. 86, 91, 247 P.3d 1107, 1110 (2011). Here, however, the district court previously ordered Manhattan West’s sale, and, thus, the only remaining issues were the mechanics’ lien amounts between the remaining parties whose claims were not satisfied by the foreclosure sale. Indeed, NRS 108.239(11) provides that “[i]f the proceeds of [a foreclosure] sale, . . . are not sufficient to satisfy all liens to be included in the decree of sale, . . . the proceeds must be apportioned according to the right of the various lien claimants.” NRS 108.239(12), however, mandates that “[e]ach party whose claim is not satisfied . . . is entitled to personal judgment for the residue against the party

legally liable for it if that person has been personally summoned or has appeared in the action.” Thus, because the sale of Manhattan West was completed pursuant to NRS 108.239, each party remaining in the action was entitled to pursue a personal judgment against the other parties whom they believed were legally liable for their lien amounts. As a result, the order granting Zitting partial summary judgment—and the other parties’ findings of fact, conclusions of law, and orders granting judgment after trial—constitute final orders pursuant to NRAP 3A(b)(1).

**C. NRCP 54(B) WAS NECESSARY BECAUSE IT DISPOSED OF ALL CLAIMS OF ONE PARTY IN AN ONGOING MULTI-PARTY ACTION.**

Next, the Court stated that, assuming Zitting’s claims against Gemsone have been fully resolved, “it appears that the NRCP 54(b) certification may have been unnecessary.” Order at 2. The Court further noted that “[a]lthough [APCO] represent[ed] . . . that several claims in the consolidated cases proceeded to trial and are awaiting judgments from the district court, it appears from the district court docket sheet that several judgments were entered after the conclusion of trial” and, as a result, “it appears that the claims [APCO] asserts remain pending may have been resolved by the district court.” Order at 2-3.

The district court granted partial summary judgment in favor of Zitting on December 29, 2017. AA 1812-22. When the district court granted partial

summary judgment in favor of Zitting, claims still existed for many other parties. *See, e.g.*, Section I.H. Indeed, many of the claims would not proceed to trial until January and February of 2018. *See, e.g.*, Section I.H. Thus, APCO moved for NRCP 54(b) certification of the partial summary judgment order because, at the time, it was “a final judgment as to one or more but fewer than all of the parties” and “there [wa]s no just reason for delay.” NRCP 54(b); *see also Mallin v. Farmers Ins. Exch.*, 106 Nev. 606, 610, 797 P.2d 978, 981 (1990). As a result, because the partial summary judgment order “finally dispose[d] of all claims and defenses of one . . . part[y] in a multi-party action, leaving the action pending as to the claims and/or defenses of other parties,” the district court’s NRCP 54(b) certification of that order was proper. Nevada Appellate Practice Manual § 3:37 (2018 ed.) (citing *Loomis v. Whitehead*, 124 Nev. 65, 67 n.3, 183 P.3d 890, 891 n.3 (2008)).

**D. NO CLAIMS REMAIN ACTIVE IN THE DISTRICT COURT.**

Finally, the Court ordered APCO to “identify any claims, cross-claims, counterclaims, third-party claims, and claims in intervention that remain pending in the district court, and the case number in which those claims remain.”<sup>4</sup> Order at

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<sup>4</sup> Additionally, the Court noted that “even if “[Zitting]’s claims in case A-09-589195-C have been fully resolved, it is not clear whether all claims asserted by or against respondent in the 16 cases consolidated with case A-09-589195-C have

4. As demonstrated by the provided spreadsheet, AA 2022-57, and appendix, *see generally* AA 1-2021, and explained above, no claims, cross-claims, counterclaims, third-party claims, or claims in intervention remain pending in the in the district court.<sup>5</sup>

Dated this 19th day of December, 2018.

MARQUIS AURBACH COFFING

By /s/Cody S. Munteer  
Micah S. Echols, Esq.  
Nevada Bar No. 8437  
Cody S. Munteer, Esq.  
Nevada Bar No. 11220  
Tom W. Stewart, Esq.  
Nevada Bar No. 14280  
10001 Park Run Drive  
Las Vegas, Nevada 89145  
*Attorneys for Appellant, APCO  
Construction, Inc.*

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been resolved. . .”. Order at 3-4. As demonstrated by the provided spreadsheet, AA 2022-57, and appendix, *see generally* AA 1-2021, and explained above, no claims, cross-claims, counterclaims, third-party claims, and claims in intervention asserted by or against Zitting remain pending in the in the district court.

<sup>5</sup> Counsel has worked diligently to provide and produce the documentation required by this Court’s Order. However, should this Court examine this Response and find a deficiency, APCO requests this Court grant APCO leave to supplement this response to address any deficiency.

## **CERTIFICATE OF SERVICE**

I hereby certify that the foregoing APPELLANT'S RESPONSE TO ORDER TO SHOW CAUSE was filed electronically with the Nevada Supreme Court on the 19th day of December, 2018. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

Jorge Ramirez, Esq.

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

I-Che Lai, Esq.  
Wilson, Elser, Moskowitz, Edelman & Dicker LLP  
300 South 4th Street, 11th Floor  
Las Vegas, Nevada 89101-6014  
*Attorneys for Respondent, Zitting Brothers Construction, Inc.*

/s/ Michelle Monkarsh  
an employee of Marquis Aurbach Coffing