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

NOTICE OF SUPPLEMENTAL AUTHORITIES

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Attorneys for Appellant, APCO Construction, Inc.

Appellants, APCO Construction, Inc. (APCO), by and through their counsel Marquis Aurbach Coffing and Spencer Fane LLP, hereby supplements its response to this Court's order to show cause pursuant to NRAP 31(e). This supplemental authority is based upon this Court's recent opinion, *In re Estate of Sarge*, 134 Nev., Adv. Op. 105 (2018), which was issued December 27, 2018. For the convenience of the Court and all parties to this appeal, APCO has attached a copy of this opinion as **Exhibit 1**.

Specifically, APCO asks this Court to take note of page 2 of the *Sarge* opinion, and analysis related thereto, which provides "[this Court] overrule[s] the consolidation rule announced in *Mallin* [*v. Farmers Insurance Exchange*, 106 Nev. 606, 609, 797 P.2d 978, 980 (1990)] and hold[s] that an order finally resolving a constituent consolidated case is immediately appealable as a final judgment even where the other constituent case or cases remain pending."[1] *In re Estate of Sarge*, 134 Nev., Adv. Op. 105 (2018). This Court's express overruling of the consolidation rule announced in *Mallin* affects this Court's September 9, 2019 order to show cause which directed APCO to identify, generally speaking, whether

[1] The *Mallin* consolidation rule provided that "cases consolidated by the district court become a single case for all appellate purposes" and, as a result, absent certification under NRCP 54(b), "an order that resolves fewer than all claims in a consolidated action is not appealable as a final judgment, even if the order resolves all of the claims in one of the consolidated cases." *In re Estate of Sarge,* 134 Nev., Adv. Op. 105 (citing *Mallin*, 106 Nev. at 609, 797 P.2d at 980 (1990)).

the order granting partial summary judgment in favor of Zitting was a final, appealable order, despite other constituent cases remaining pending. *See generally APCO Constr., Inc., v. Zitting Bros. Constr., Inc.*, Docket No. 75197 (Order to Show Cause, Sep. 9, 2018), attached as **Exhibit 2**. APCO responded, among other things, that NRCP 54(b) certification was proper 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." *See APCO Constr., Inc., v. Zitting Bros. Constr., Inc.*, Docket No. 75197, at 8 (Appellant's Response to Order to Show Cause, Dec. 20, 2018) (citing Nevada Appellate Practice Manual § 3:37 (2018 ed.)), attached as **Exhibit 3**.

However, because this Court has announced that "[c]onsolidated cases retain their separate identities so that an order resolving all of the claims in one of the consolidated cases is immediately appealable as a final judgment under NRAP 3A(b)(1)," *In re Estate of Sarge*, 134 Nev., Adv. Op. 105, the consolidation-rule-analysis ordered by this Court is now seemingly moot. As a result, it appears that, under this new rule, the order granting Zitting partial summary judgment is a final appealable order under NRAP 3A(b)(1).

This notice of supplemental authorities is timely filed according to NRAP 31(e).

Dated this 3rd day of January, 2019.

MARQUIS AURBACH COFFING

By /s/ Tom W. Stewart

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing **NOTICE OF SUPPLEMENTAL AUTHORITIES** was filed electronically with the Nevada Supreme Court on the 3rd day of January, 2019. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

Jorge Ramirez, Esq.
I-Che Lai, Esq.

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

Exhibit 1

134 Nev., Advance Opinion 105

IN THE SUPREME COURT OF THE STATE OF NEVADA

IN THE MATTER OF THE ESTATE OF THELMA AILENE SARGE.

ESTATE OF THELMA AILENE SARGE, BY AND THROUGH THE PROPOSED EXECUTRIX, JILL SARGE; AND ESTATE OF EDWIN JOHN SARGE, BY AND THROUGH THE PROPOSED EXECUTRIX, JILL SARGE,
Appellants,
vs.
QUALITY LOAN SERVICE CORPORATION; AND ROSEHILL, LLC,
Respondents.

No. 73286

FILED

DEC 27 2018

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY [signature]
CHIEF DEPUTY CLERK

Jurisdictional prescreening of an appeal from a district court order granting a motion to dismiss in consolidated district court cases. First Judicial District Court, Carson City; James Todd Russell, Judge.

Appeal may proceed.

Tory M. Pankopf Ltd. and Tory M. Pankopf, Reno,
for Appellants.

McCarthy Holthus LLP and Kristin A. Schuler-Hintz and Thomas N. Beckom, Las Vegas,
for Respondent Quality Loan Service Corporation.

Walsh, Baker & Rosevear and James M. Walsh and Anthony J. Walsh, Reno,
for Respondent Rosehill, LLC.

18-910616

BEFORE PICKERING, GIBBONS and HARDESTY, JJ.

OPINION

By the Court, PICKERING, J.:

In *Mallin v. Farmers Insurance Exchange*, 106 Nev. 606, 609, 797 P.2d 978, 980 (1990), this court held that cases consolidated by the district court become a single case for all appellate purposes. By extension, *Mallin* holds that an order that resolves fewer than all claims in a consolidated action is not appealable as a final judgment, even if the order resolves all of the claims in one of the consolidated cases. Based on foundational problems with *Mallin*, the history of NRCP 42(a), and the United States Supreme Court's recent decision in *Hall v. Hall*, 584 U.S. ___, 138 S. Ct. 1118 (2018), we overrule the consolidation rule announced in *Mallin* and hold that an order finally resolving a constituent consolidated case is immediately appealable as a final judgment even where the other constituent case or cases remain pending. Because the order challenged on appeal here finally resolved one of three consolidated cases, it is appealable and this appeal may proceed.

FACTS AND PROCEDURAL HISTORY

Appellant estates through proposed executrix Jill Sarge (Sarge) filed a complaint for reentry onto real property, asserting that respondent Quality Loan Service Corporation violated NRS 107.080 with respect to its foreclosure of the property.[1] On the same day, Sarge also filed petitions to set aside the estates. The district court consolidated the three cases, stating that "all future pleadings and papers shall be filed under the real property

[1]Sarge later amended the reentry complaint to add respondent Rosehill LLC as a defendant.

case number" corresponding to the complaint for reentry. Later, the district court dismissed the reentry complaint, concluding that the trustee complied with applicable law. This appeal from the dismissal order followed.

The docketing statement suggested that the order dismissing the complaint for reentry was not appealable as a final judgment under NRAP 3A(b)(1), because the claims in the consolidated cases appeared to remain pending. *See Mallin*, 106 Nev. at 609, 797 P.2d at 980. We thus ordered appellants to show cause why the appeal should not be dismissed for lack of jurisdiction. After appellants filed their response, the United States Supreme Court decided *Hall v. Hall*, holding that an order resolving one of several cases consolidated pursuant to FRCP 42(a) is immediately appealable. 584 U.S. ___, 138 S. Ct. 1118. We directed the parties to file supplemental briefs discussing the impact of *Hall* on our interpretation of NRCP 42(a); specifically, we asked the parties to address whether in light of *Hall*, cases consolidated in the district court should continue to be treated as a single case for appellate purposes.[2]

Appellants urge us to interpret NRCP 42(a) as the Supreme Court interpreted FRCP 42(a) in *Hall*. They assert that NRCP 42(a) is modeled after FRCP 42(a) and cases interpreting FRCP 42(a) are thus strongly persuasive. Further, one of the cases *Mallin* relied upon, *Huene v. United States*, 743 F.2d 703 (9th Cir. 1984), was overturned by *Hall* and no longer supports the holding in *Mallin*.

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[2]The district court cites no authority in its order allowing consolidation. It appears that NRCP 42(a) is the only provision permitting consolidation, and the parties do not contend that the cases were consolidated under a different provision. We thus presume that consolidation was ordered pursuant to NRCP 42(a).

Quality Loan asserts that the holding in *Hall* is not binding on this court and the doctrine of stare decisis requires that *Mallin* remain the law. Quality Loan also contends that the holding of *Hall* is not well suited to Nevada and its courts of general jurisdiction. Rosehill argues that *Hall* did not overrule *Huene* and has no application to this court's decision in *Mallin*.

DISCUSSION

In *Mallin*, the court sua sponte questioned whether an order resolving one of two consolidated cases is appealable as a final judgment without a certification of finality under NRCP 54(b). 106 Nev. at 608-09, 797 P.2d at 980. The court answered in the negative based on policy considerations. Allowing an appeal before the entire consolidated action was resolved, the court reasoned, could complicate the district court proceedings and cause duplication of efforts by the appellate court. *Id.* at 609, 797 P.2d at 980. The district court, it concluded, "is clearly in the best position to determine whether allowing an appeal would frustrate the purpose for which the cases were consolidated." *Id.* Accordingly, "when cases are consolidated by the district court, they become one case for all appellate purposes." *Id.* Under this rule, an order resolving fewer than all claims in a consolidated action is not an appealable final judgment unless it is certified as final under NRCP 54(b). *Id.*

The court in *Mallin* did not acknowledge the rule allowing consolidation, NRCP 42(a). But analyzing consolidation must necessarily start with the rule authorizing it. And as discussed below, NRCP 42(a) does not support the result reached in *Mallin*.

This court applies the rules of statutory interpretation when interpreting the Nevada Rules of Civil Procedure. *In re Estate of Black*, 132 Nev. 73, 76, 367 P.3d 416, 418 (2016). Rules are enforced as written if their text is clear. *Beazer Homes Nev., Inc. v. Eighth Judicial Dist. Court*, 120 Nev. 575, 579-80, 97 P.3d 1132, 1135 (2004). If a rule is ambiguous, we consult other sources to decipher its meaning, including its history. *Leven v. Frey*, 123 Nev. 399, 405, 168 P.3d 712, 716 (2007) (citing *McKay v. Bd. of Supervisors*, 102 Nev. 644, 650-51, 730 P.2d 438, 443 (1986)). "When a legislature adopts language that has a particular meaning or history, . . . a court may presume that the legislature intended the language to have meaning consistent with previous interpretations of the language." *Beazer*, 120 Nev. at 580-81, 97 P.3d at 1135-36.

NRCP 42(a) states:

> When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all of the matters in issue in the actions; it may order all the actions consolidated; and it may make such order concerning proceedings therein as may tend to avoid unnecessary costs or delay.

Before *Mallin*, this court recognized the ambiguity of the term "consolidation." The term can mean that "several actions are combined into one, lose their separate identities and become a single action" or that "several actions are tried together but each retains its separate character." *Randall v. Salvation Army*, 100 Nev. 466, 470, 686 P.2d 241, 243 (1984). Based on this ambiguity, the court must consider the history of the rule to decipher the meaning of consolidation.

Before adoption of the Nevada Rules of Civil Procedure, consolidation was permitted under Nevada Compiled Laws § 9025 (Supp. 1943-1949). This law was based on the Federal Rules of Civil Procedure and contained the exact language found in FRCP 42(a). *Mikulich v. Carner*, 68 Nev. 161, 169-70, 228 P.2d 257, 261 (1951). In *Mikulich*, this court considered the effect of Nevada Compiled Laws § 9025 on cases joined for trial. The respondent argued that because two cases against defendants/appellants were consolidated in the district court, the same jury rendered verdicts against defendants/appellants, and defendants/appellants paid one of the judgments without reservation, defendants/appellants admitted liability and had no right of appeal from the judgment in favor of respondent. *Id.* at 169, 228 P.2d at 262. The *Mikulich* court rejected the respondent's argument, noting that the district court had not consolidated the actions, but joined them together for trial, and such joinder did not merge the two cases into a single case. *Id.* at 168-69, 228 P.2d at 260-61. In support, *Mikulich* cited *Johnson v. Manhattan Railway Co.*, 289 U.S. 479 (1933), where the United States Supreme Court, construing FRCP 42(a), held that consolidation does not merge suits. *Id.* at 169, 228 P.2d at 261. The *Mikulich* court recognized that Nevada Compiled Laws § 9025 was identical to FRCP 42(a) and the federal courts consistently held that consolidation for the purpose of joint trial does not merge the cases into a single cause of action. *Id.* at 169-70, 228 P.2d at 261.

Thus, when Nevada adopted its Rules of Civil Procedure in 1952, this court had already held in *Mikulich* that joinder for trial under Nevada Compiled Laws § 9025 does not merge two suits into a single suit and cited with approval authority holding that consolidation under a rule containing language identical to § 9025 did not result in merger. The language of Nevada Compiled Laws § 9025 carried over to NRCP 42(a), unchanged. *Compare* Nev. Compiled Laws § 9025 (Supp. 1943-1949), *with* NRCP 42(a) (1953). And nothing in the discussions regarding the adoption of the Nevada Rules of Civil Procedure indicates that any changes to the meaning of consolidation were intended. To the contrary, the discussions contain numerous recommendations that Nevada's rules be based on the federal rules. *E.g., Report of Committee on Civil Practice*, Vol. 16, No. 1 Nev. State Bar Journal, Jan. 1951, at 20-22; *Proceedings of the Twenty-Third Annual Meeting of the State Bar of Nevada*, Vol. 16, No. 2 Nev. State Bar Journal, Apr. 1951, at 76-77, 101. Accordingly, it is proper to presume that the meaning of the rule under NRCP 42(a) was consistent with the interpretation given to it under Nevada Compiled Laws § 9025.[3] *See Beazer*, 120 Nev. at 580-81, 97 P.3d at 1135-36. *Mallin* did not acknowledge the history of NRCP 42(a) or this court's opinion in *Mikulich*.

Compounding the problem, the federal cases relied upon in *Mallin* have now been overruled. In *Hall v. Hall*, 584 U.S. ___, 138 S. Ct. 1118 (2018), the United States Supreme Court considered whether an order that resolves fewer than all the claims in a consolidated action is appealable as a final judgment absent certification from the district court. The Supreme Court first determined that the term "consolidate," as used in FRCP 42(a), is ambiguous; it can mean "the complete merger of discrete units" or "joining together discrete units without causing them to lose their independent character." *Id.* at ___, 138 S. Ct. at 1124-25. It therefore turned to the historical meaning of the term, reaching back to the enactment of the first consolidation statute in 1813. *Id.* at ___, 138 S. Ct. at 1125-31. Citing several cases, including *Johnson*, the Supreme Court concluded "that constituent cases retain their separate identities at least to the extent that a final decision in one is immediately appealable by the losing party." *Id.* at ___, 138 S. Ct. at 1131.

"[U]nder the doctrine of stare decisis, [this court] will not overturn [precedent] absent compelling circumstances for so doing. Mere

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[3]NRCP 42 was amended in 1971, but the amendment affected only NRCP 42(b).

disagreement does not suffice." *Adam v. State*, 127 Nev. 601, 604, 261 P.3d 1063, 1065 (2011) (alterations in original) (quoting *Sec'y of State v. Burk*, 124 Nev. 579, 597, 188 P.3d 1112, 1124 (2008)). We are reluctant to depart from the doctrine of stare decisis; however, we will not adhere to it so stringently "that the . . . law is forever encased in a straight jacket." *Id.* (quoting *Rupert v. Stienne*, 90 Nev. 397, 400, 528 P.2d 1013, 1015 (1974)). Given that *Mallin* did not consider the rule authorizing consolidation or acknowledge relevant case law and that the federal cases it relied on have since been overruled, *Mallin*'s holding that consolidated cases become one case for appellate purposes is no longer sound. In addition, the Supreme Court's decision in *Hall* interpreting FRCP 42(a) is "strong persuasive authority" regarding the interpretation of NRCP 42(a). *Exec. Mgmt., Ltd. v. Ticor Title Ins. Co.*, 118 Nev. 46, 53, 38 P.3d 872, 876 (2002) (internal quotation marks omitted). For these reasons, we conclude weighty and compelling circumstances exist warranting the departure from the doctrine of stare decisis. *See Burk*, 124 Nev. at 597, 188 P.3d at 1124; *Nettles v. Rumberger, Kirk & Caldwell, P.C.*, ___ So. 3d ___, 2018 WL 4174681 (Ala. Aug. 31, 2018) (overruling prior case law construing Alabama Rule of Civil Procedure 42(a) and adopting the Supreme Court's decision in *Hall*). We thus overrule our decision in *Mallin* to the extent it holds that cases consolidated in the district court become a single case for all appellate purposes. Consolidated cases retain their separate identities so that an order resolving all of the claims in one of the consolidated cases is immediately appealable as a final judgment under NRAP 3A(b)(1).

The district court order challenged in this appeal completely resolved the reentry complaint. Accordingly, the order is appealable under NRAP 3A(b)(1), and this appeal may proceed. Appellants shall have 60 days from the date of this opinion to file and serve the opening brief and appendix. Thereafter, briefing shall proceed in accordance with NRAP 31(a)(1). We caution the parties that failure to timely file briefs may result in the imposition of sanctions. NRAP 31(d).

_______________, J.
Pickering

We concur:

_______________, J.
Gibbons

_______________, J
Hardesty

Exhibit 2

IN THE SUPREME COURT OF THE STATE OF NEVADA

APCO CONSTRUCTION, INC., A NEVADA CORPORATION,
Appellant,
vs.
ZITTING BROTHERS CONSTRUCTION, INC.,
Respondent.

No. 75197

FILED

SEP 19 2018

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER TO SHOW CAUSE

This is an appeal from a district court order granting a motion for partial summary judgment, purportedly certified as final under NRCP 54(b), an order denying a motion for reconsideration of that order, an order awarding attorney fees, costs, and prejudgment interest and an oral order granting a motion in limine. Our initial review of the docketing statement, amended docketing statement, and documents before this court reveals potential jurisdictional defects.

First, it appears that the summary judgment order may not be properly certified as final. *See Taylor Const. Co. v. Hilton Hotels Corp.*, 100 Nev. 207, 209, 678 P.2d 1152, 1153 (1984) (noting that the district court "cannot create finality when [an] order is not amenable to certification"). NRCP 54(b) allows an order to be certified as final where the order completely removes a party from the action. NRCP 54(b) and drafter's note (2004 amendment); *Mallin v. Farmers Ins. Exch.*, 106 Nev. 606, 610, 797 P.2d 978, 981 (1990) ("[C]ertification [may be] based on the complete removal of a party from the action in the district court."). Appellant states that claims involving itself remain pending in the district court. And it appears that claims involving respondent may also remain pending. It is not clear whether the summary judgment order finally resolves

18-36735

respondent's claim for breach of contract and breach of the implied covenant of good faith and fair dealing asserted against Gemstone Development West, Inc. in district court case A-09-589195-C. These claims were not pleaded in the alternative and the summary judgment order does not mention Gemstone. It is also unclear whether respondent's claims for foreclosure of a mechanic's lien in district court case A-09-589195-C have been fully resolved. *See* NRS 108.239; *Simmons Self-Storage v. Rib Roof*, 127 Nev. 86, 247 P.3d 1107 (2011) (discussing final judgments in mechanic's lien actions). The summary judgment order does not resolve priorities and lienable amounts, enter judgment, or direct a sale of the property. In addition, even if respondent'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 been resolved. *See Mallin*, 106 Nev. at 609, 797 P.2d at 980 (consolidated cases "become one case for all appellate purposes;" an order resolving fewer than all of the claims in consolidated actions is not a final judgment). Accordingly, it appears that claims involving both appellant and respondent may remain pending in the district court and the summary judgment order was not amenable to certification under NRCP 54(b).

Second, assuming that the above-identified claims have been fully resolved, it appears that the NRCP 54(b) certification may have been unnecessary. Although appellant represents in its docketing statement 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. Thus, it appears that the claims appellant asserts remain pending may have been resolved by the district court. If all claims in all the consolidated cases were resolved prior to entry of the July 30, 2018, certification order, the certification order is unnecessary, and an appeal would be proper from the order resolving the last claim in all of the consolidated cases. *See* NRAP 3A(b)(1) (allowing an appeal from a final judgment); *Lee v. GNLV Corp.*, 116 Nev. 424, 426, 996 P.2d 416, 417 (2000) (defining a final judgment); *Mallin,* 106 Nev. at 609, 797 P.2d at 980. *But see Hall v. Hall*, 584 U.S. ___, 138 S. Ct. 1118 (2018) (holding that when a constituent consolidated case is finally decided, that case is immediately appealable).

Accordingly, appellant shall have 45 days from the date of this order to show cause why this appeal should not be dismissed for lack of jurisdiction.[1] In responding to this order, appellant should identify and, if it has not already done so, 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 appellant or respondent, 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. Appellant shall specifically discuss how respondent's claims for foreclosure, breach of contract and breach of the

[1]We note that the other orders identified in the notice of appeal may be subject to review on appeal from the final judgment. *See Arnold v. Kipp*, 123 Nev. 410, 168 P.3d 1050 (2007); *Consolidated Generator v. Cummins Engine*, 114 Nev. 1304, 1312, 971 P.2d 1251, 1256 (1998). However, in the absence of final judgment or judgment properly certified as final under NRCP 54(b), it does not appear that these orders are subject to review or independently appealable.

implied covenant of good faith and fair dealing in district court case A-09-589195-C were resolved. Appellant shall also 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. If appellant believes that no claims remain pending, it shall identify the order resolving the last remaining claim in the consolidated cases and discuss the timeliness of the notice of appeal from service of notice of entry of that order. Respondent may file any reply within 20 days of service of appellant's response. We caution that failure to demonstrate that this court has jurisdiction may result in the dismissal of this appeal.

Briefing of this appeal is suspended pending further order of this court.[2]

It is so ORDERED.

Douglas, C.J.

cc: Marquis Aurbach Coffing
Spencer Fane LLP/Las Vegas
Spencer Fane LLP/Phoenix
Wilson, Elser, Moskowitz, Edelman & Dicker, LLP/Las Vegas

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[2]Given this order, the August 30, 2018, motion for an extension of time to file the opening brief is denied as moot.

Exhibit 3

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

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APPELLANT'S RESPONSE TO ORDER TO SHOW CAUSE

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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.[1] The district court action was initiated in 2008 during the economic recession, endured three

[1] 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.[2] *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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[2] 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.[3]

See AA 1796 (listing remaining parties).

E. PARTIES DISMISSED BY STIPULATION

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

[3] 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 Aril 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."[4] Order at

[4] 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.[5]

Dated this 19th day of December, 2018.

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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.

[5] 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:

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