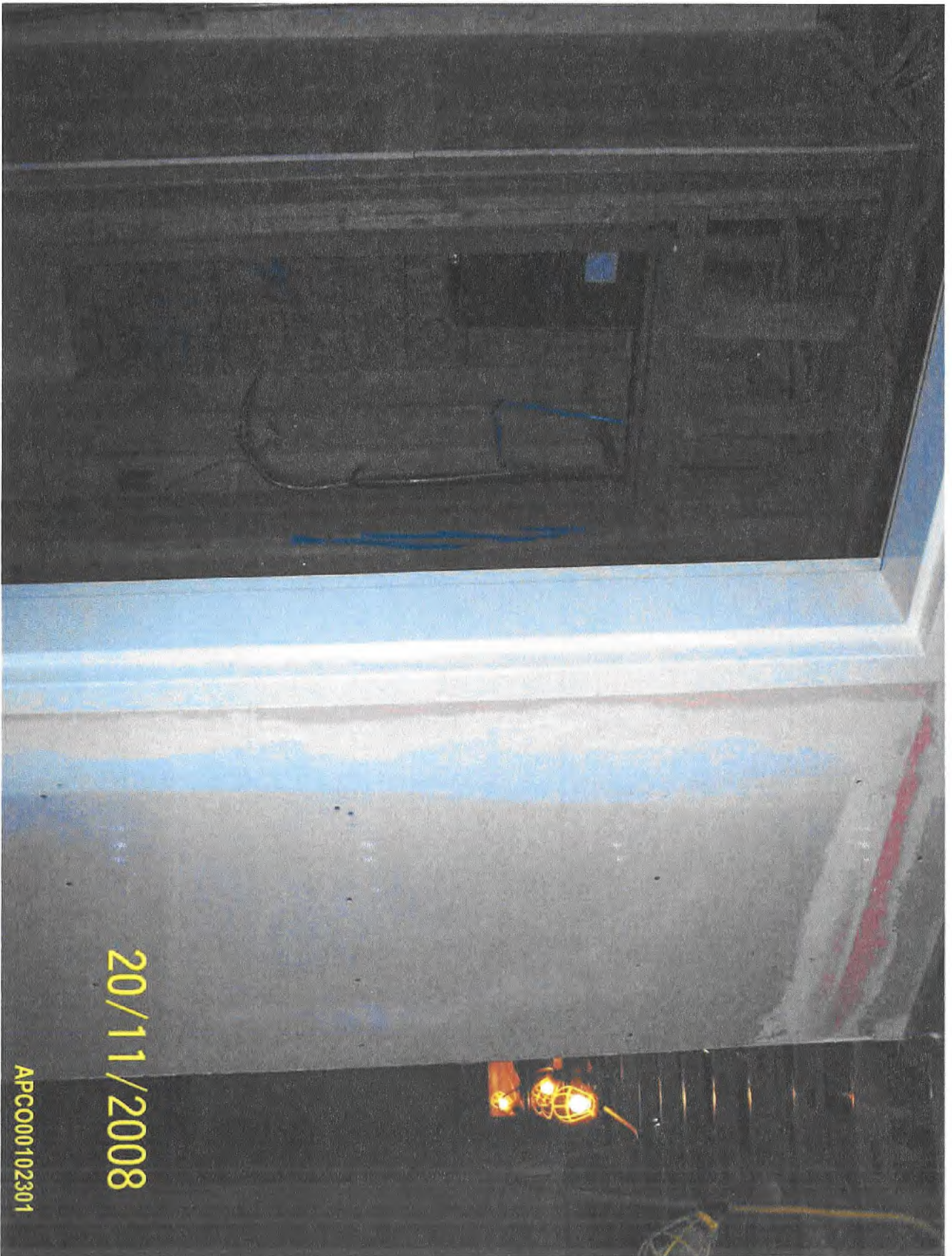




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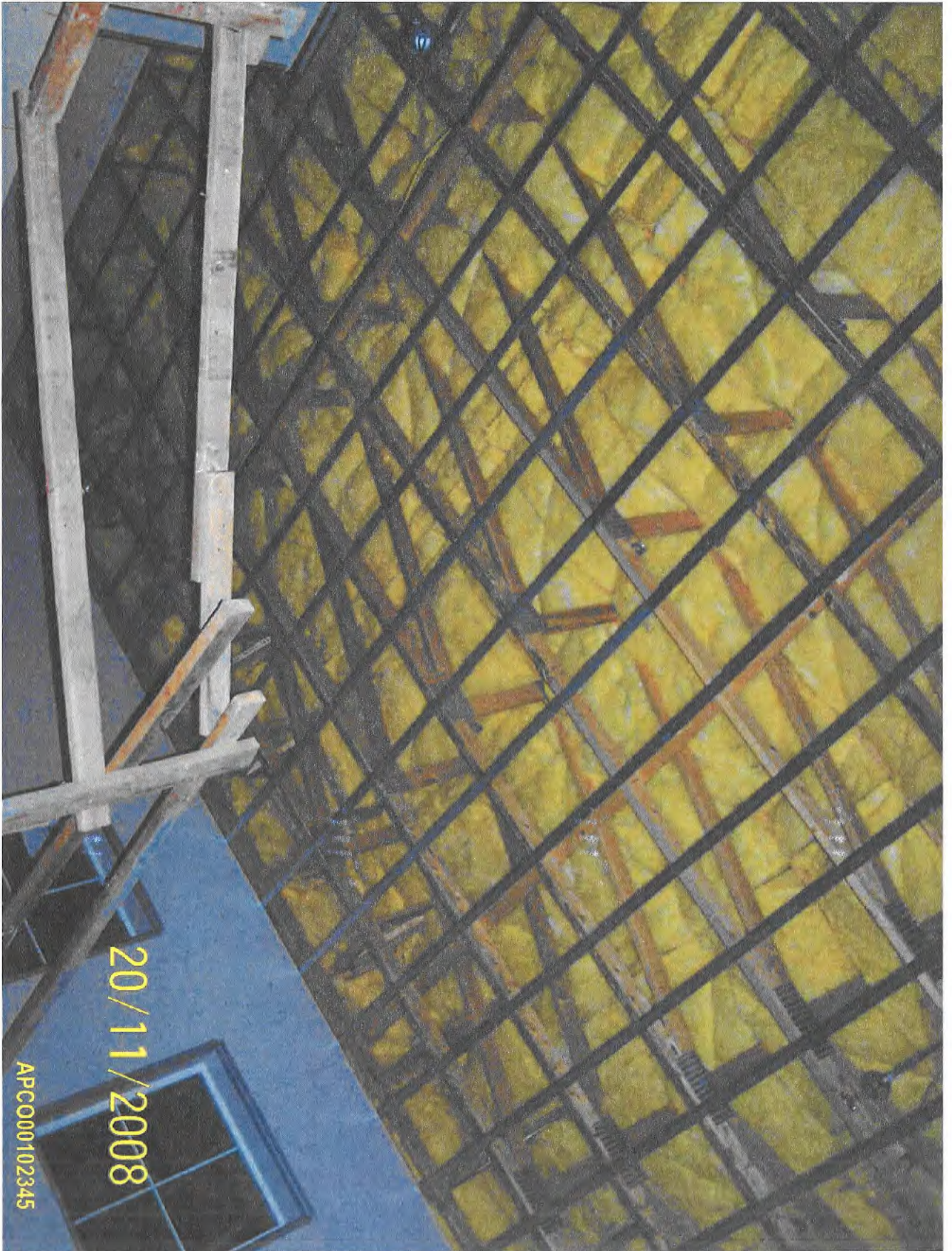




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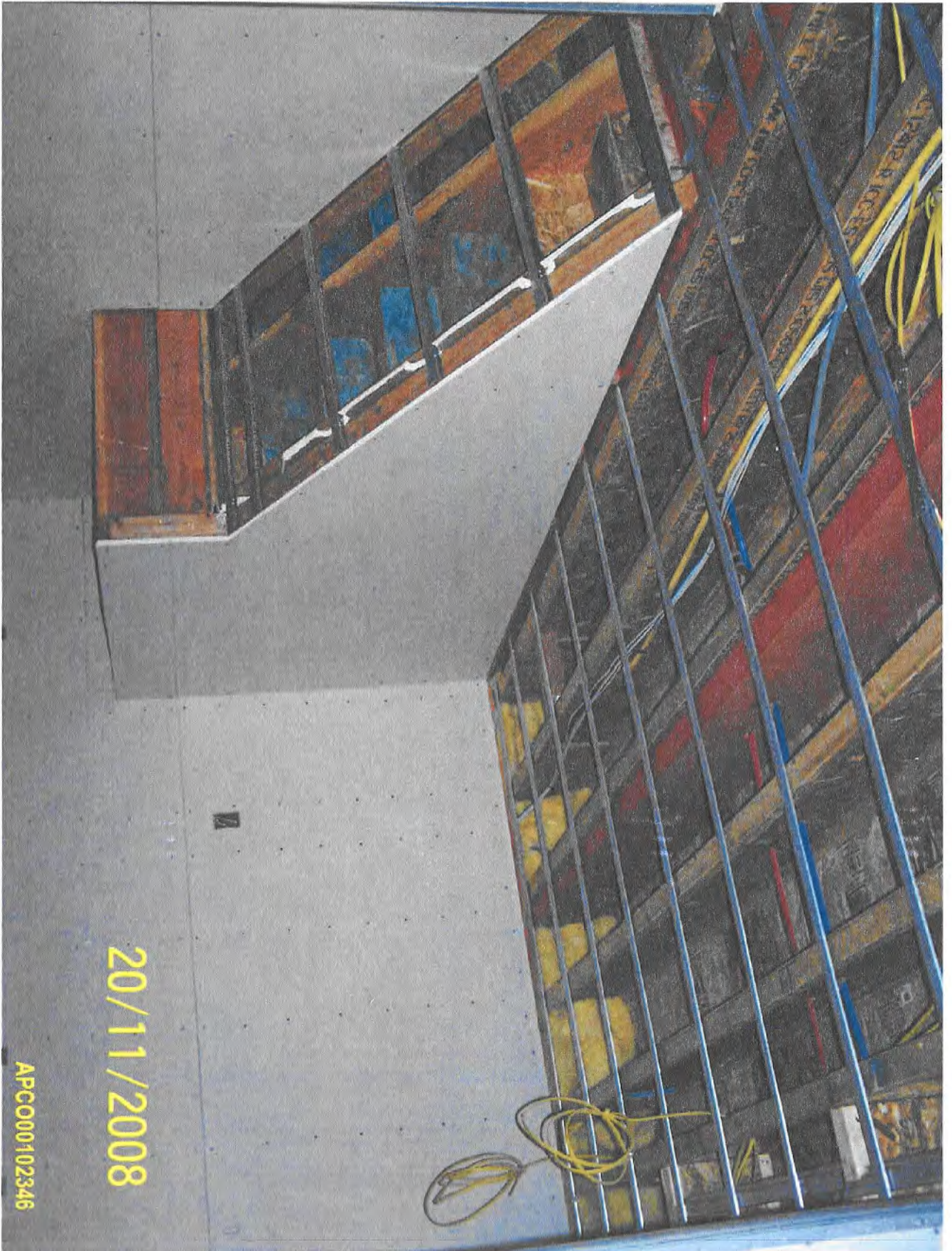
APC000102321





20/11/2008

APC000102345



20/11/2008

APC000102346



Exhibit 3

ZITTING BROTHERS CONSTRUCTION

P.O. BOX 178
HURRICANE, UT 84737
TEL: 435/635-4068
FAX: 435/635-4137

INVOICE

Invoice Date 06-30-08
Invoice # 73828

BILL TO:
APCO CONSTRUCTION

PROJECT:
MANHATTAN WEST

DESCRIPTION	AMOUNT
CHANGE ORDER # 1 - WOOD FRAMING CHANGES BLDG 8 & 9	154,346.06
CHANGE ORDER #2 - TYPE Q HEADS BLDG 8 & 9	10,134.00
CHANGE ORDER #3 - RFL # 226 SHEAR WALL PENETRATION	16,911.00
CHANGE ORDER #4 - OPTIONS BLDG 8 & 9	17,188.55 18,866.00

Please call Sam Zitting (435) 691-4068
with any questions.

Thank you !!

Amount Billed \$200,257.06

Retainage Held 20,025.71

BALANCE DUE \$180,231.35

APCO 104233

Exhibit 4

APPLICATION AND CERTIFICATE FOR PAYMENT

TO OWNER: APCO CONSTRUCTION PROJECT: MANHATTAN WEST
 APPLICATION NO: 509
 PERIOD TO: 6/30/2008 OWNER
 PROJECT NOS: F-01-07085 ARCHITECT
 CONTRACTOR
 CONTRACT DATE:

FROM CONTRACTOR: ZITTING BROTHERS CONSTRUCTION
 P.O. BOX 178
 HURRICANE, UT 84737

CONTRACTOR'S APPLICATION FOR PAYMENT

Application is made for payment, as shown below, in connection with the contract.
 Continuation Sheet is attached.

1-ORIGINAL CONTRACT SUM 14,461,000.00
 2-Net change by Change Orders 423,654.85
 3-CONTRACT SUM TO DATE (line 1 + line 2) 14,884,654.85
 4-TOTAL COMPLETED & STORED TO DATE 4,033,654.85

5-RETAINAGE:
 a. 10.00 % of Completed Work 403,365.49
 b. 10.00 % of Stored Material

Total Retainage 403,365.49
 6-TOTAL EARNED LESS 3,630,289.36
 RETAINAGE
 7-LESS PREVIOUS CERTIFICATES FOR PAYMENT 3,282,847.69
 8-CURRENT PAYMENT DUE 347,441.67

9-BALANCE TO FINISH, INCLUDING RETAINAGE
 (Line 3 less Line 6) 11,254,365.49

CHANGE ORDER SUMMARY	ADDITIONS	DEDUCTIONS
Total changes approved in previous months by Owner		
Total approved this Month		
TOTALS:		
NET CHANGES by Change Order		

The undersigned Contractor certifies that to the best of the Contractor's knowledge, information and belief the Work covered by this application for payment has been completed in accordance with the Contract Documents, that all amounts have been paid by the Contractor for Work for which previous Certificates for Payment were issued and payments received from the Owner, and that the current payment shown herein is now due.

CONTRACTOR: Zitting Brothers Construction

By:  Date: 01/30/09
 State of _____ County of _____
 Subscribed and sworn to before me this _____ day of _____

Notary Public:
 My Commission expires:

ARCHITECT'S CERTIFICATE FOR PAYMENT

In accordance with the Contract Documents, based on on-site observations and the data comprising this application, the Architect certifies to the Owner that to the best of the Architect's knowledge, information and belief the Work has progressed as indicated, the quality of the Work is in accordance with the Contract Documents, and the Contractor is entitled to payment of the AMOUNT CERTIFIED.

AMOUNT CERTIFIED: _____
 (Attach explanation if amount certified differs from the amount applied for. Initial all figures on this Application and on the Continuation Sheet that are changed to conform to the amount certified.)

ARCHITECT:

By: _____ Date: _____
 This Certificate is not negotiable. The AMOUNT CERTIFIED is payable only to the Contractor named herein. Issuance, payment and acceptance of payment are without prejudice to any rights of the Owner or Contractor under this Contract.

ZBC1002037

APPLICATION AND CERTIFICATE FOR PAYMENT

TO OWNER: APCO CONSTRUCTION PROJECT: MANHATTAN WEST
 APPLICATION NO: 509
 PERIOD TO: 11/30/2008 OWNER
 PROJECT NOS: F-01-07083 ARCHITECT
 CONTRACTOR
 CONTRACT DATE:

FROM CONTRACTOR: ZITTING BROTHERS CONSTRUCTION
 P.O. BOX 178
 HURRICANE, UT 84737

CONTRACTOR'S APPLICATION FOR PAYMENT

Application is made for payment, as shown below, in connection with the contract.
 Continuation Sheet is attached.

1-ORIGINAL CONTRACT SUM..... 14,461,000.00
 2-Net change by Change Orders 423,654.85
 3-CONTRACT SUM TO DATE (line 1 + line 2)..... 14,884,654.85
 4-TOTAL COMPLETED & STORED TO DATE..... 4,033,654.85

5-RETAINAGE:
 a. .00 % of Completed Work 0.00
 b. .00 % of Stored Material

Total Retainage 0.00
 6-TOTAL EARNED LESS
 RETAINAGE..... 4,033,654.85
 7-LESS PREVIOUS CERTIFICATES FOR PAYMENT..... 3,630,289.36
 8-CURRENT PAYMENT DUE..... 403,365.49


9-BALANCE TO FINISH, INCLUDING RETAINAGE
 (Line 3 less Line 6) 10,851,000.00

CHANGE ORDER SUMMARY	ADDITIONS	DEDUCTIONS
Total changes approved in previous months by Owner		
Total approved this Month		
TOTALS:		
NET CHANGES by Change Order		

The undersigned Contractor certifies that to the best of the Contractor's knowledge, information and belief the Work covered by this application for payment has been completed in accordance with the Contract Documents, that all amounts have been paid by the Contractor for Work for which previous Certificates for Payment were issued and payments received from the Owner, and that the current payment shown herein is now due.

CONTRACTOR: Zitting Brothers Construction

Date: 01/30/09

By: 
 State of _____ County of _____
 Subscribed and sworn to before me this _____ day of _____

Notary Public:
 My Commission expires:

ARCHITECT'S CERTIFICATE FOR PAYMENT

In accordance with the Contract Documents, based on on-site observations and the data comprising this application, the Architect certifies to the Owner that to the best of the Architect's knowledge, information and belief the Work has progressed as indicated, the quality of the Work is in accordance with the Contract Documents, and the Contractor is entitled to payment of the AMOUNT CERTIFIED.

AMOUNT CERTIFIED

(Attach explanation if amount certified differs from the amount applied for. Initial all figures on this Application and on the Continuation Sheet that are changed to conform to the amount certified.)

ARCHITECT:

By: _____ Date: _____

This Certificate is not negotiable. The AMOUNT CERTIFIED is payable only to the Contractor named herein. Insurance, payment and acceptance of payment are without prejudice to any rights of the Owner or Contractor under this Contract.

ZBC1002032

AA 002307

Exhibit 5

NOTICE

TO: ALL MANHATTEN WEST SUBCONTRACTORS
FROM: APCO CONSTRUCTION
JAMES BARKER, ESQ./CORPORATE COUNSEL

Attached hereto is APCO Construction's Notice of Stopping Work and Notice of Intent to Terminate Contract for nonpayment. As of 5:00 p.m., Thursday, August 21, 2008 all work in furtherance of the subcontracts you have with APCO CONSTRUCTION on the Manhattan West project is to stop until you are advised otherwise, in writing, by APCO CONSTRUCTION.

NRS 624.610(7) states:

If a prime contractor stops work pursuant to subsection 1, each lower tiered Subcontractor with whom the prime contractor has entered into an agreement and who has not fully performed under that agreement may also stop work on the work of improvement. If a prime contractor terminates an agreement pursuant to this section, all such lower tiered subcontractors may terminate their agreements with the prime contractor.

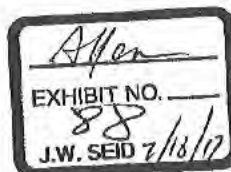
NOTE

Pursuant to statute, APCO CONSTRUCTION is only stopping work on this project. At this time it has not terminated its contract with Gemstone. As such, all subcontractors, until advised in writing by APCO CONSTRUCTION, remain under contract with APCO CONSTRUCTION.

If you have any questions regarding this matter we urge you to seek advice from your legal counsel.

Additionally, due to the work stoppage for non-payment, the subcontractor meeting previously set for Friday, August 22nd at 11 a.m. is cancelled.

James M. Barker, Esq.
Corporate General Counsel
APCO CONSTRUCTION
702.261.5800



APCO 106288



August 21, 2008

VIA FACSIMILE (702-614-0669)
AND U.S. MAIL

Mr. Alexander Edelstein, CEO
Gemstone Development
9121 W. Russell Road, Suite 117
Las Vegas, Nevada 89148

RE: MANHATTAN WEST MIXED USE DEVELOPMENT
APCO CONSTRUCTION - NOTICE OF STOPPING WORK & NOTICE OF INTENT TO
TERMINATE CONTRACT
DEADLINE: THURSDAY, AUGUST 21, 2008 - 5:00 PM

Dear Mr. Edelstein:

On August 11, 2008, APCO provided Gemstone with written notice that unless APCO was paid the full amount of \$6,183,445.24 by close of business on Thursday, August 21, 2008, that APCO would stop work on the Project. Gemstone has failed to make full payment as required by statute, despite having no good faith contractual or proper statutory basis for withholding the payment. As a result, APCO is stopping work on the Manhattan West Project effective immediately.

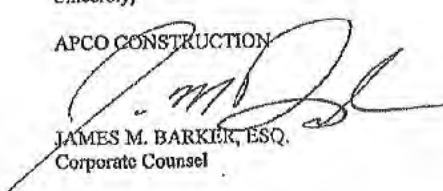
In addition to stopping work on the project, APCO hereby asserts its rights to terminate the contract pursuant to NRS 624.610(2). THIS LETTER SHALL SERVE AS APCO'S NOTICE OF INTENT TO TERMINATE THE MANHATTAN WEST GENERAL CONSTRUCTION AGREEMENT FOR GMP PURSUANT TO NRS 624.606 THROUGH NRS 624.630, INCLUSIVE. PURSUANT TO THE TERMS OF NRS 624.610, THE AGREEMENT SHALL BE TERMINATED AS OF SEPTEMBER 5, 2008.

Nothing herein shall be construed to limit or waive any other rights, claims or defenses that APCO may have under statutory or common law.

Thank you for your attention to this matter.

Sincerely,

APCO CONSTRUCTION



JAMES M. BARKER, ESQ.
Corporate Counsel

Cc: Peter Smith, Gemstone
Craig Colligan, Gemstone
All Subcontractors

APCO 106287

AA 002310

Exhibit 6

APPLICATION AND CERTIFICATE FOR PAYMENT

TO OWNER: Manhattan West
9121 W. Russell Rd.
Las Vegas, NV 89148

FROM CONTRACTOR: Canco Pacific Construction
2925 E. Patrick Lane, Suite G
Las Vegas, Nevada 89129

PROJECT: Manhattan West
Phase 1
VIA ARCHITECT: OZ Architects

PAGE 1 OF 2
OWNER DRAW NO. 12
APPLICATION NO. 12
PERIOD: 5/20/2008
PROJECT: 100
CONTRACT DATE: 10/15/08
CONTRACTOR: Pius Smith

CONTRACTOR'S APPLICATION FOR PAYMENT

Application is made for payment, as shown below, in connection with the Contract:
Contract No. 12-100-00

The undersigned contractor certifies that the work performed for the Contract is complete, and that the amount of the invoice is correct. The undersigned contractor certifies that the work performed for the Contract is complete, and that the amount of the invoice is correct. The undersigned contractor certifies that the work performed for the Contract is complete, and that the amount of the invoice is correct.

CONTRACTOR: Pius Smith
Date: 10/16/08

State of Nevada
County of Clark
Notary Public
My Commission Expires 10/16/11

OWNER: Manhattan West
Date: 10/16/08



ARCHITECT: OZ Architects
Date: 10/16/08

1. TOTAL EARNED LESS RETAINAGE \$ 2,677,059.22

2. LESS PREVIOUS CERTIFICATES FOR PAYMENT \$ 64,697,882.48

3. CURRENT PAYMENT DUE \$ 2,612,361.74

4. BALANCE TO FINISH, INCLUDING RETAINAGE \$ 2,612,361.74

CHARGE ORDER SUMMARY	ADDITIONS	DEDUCTIONS
TOTAL CHARGES APPROVED IN PREVIOUS MONTHS BY OWNER	2,677,059.22	
TOTAL CHARGES BY CHARGE ORDER	2,677,059.22	2,677,059.22

2,677,059.22

APPLICATION AND CERTIFICATE FOR PAYMENT

TO OWNER: Manhattan West
9421 W. Russell Rd.
Las Vegas, NV 89148

FROM CONTRACTOR: Campo Pacific Construction
2325 E. Patrick Lane, Suite G
Las Vegas, Nevada 89120

PROJECT: Manhattan West
Phase 1
VIA ARCHITECT: OZ Architects

OWNER/DRAW NO: 10
APPLICATION NO: 12
PERIOD: 8/31/2008
PROJECT: 186
CONTRACT DATE: 08/19/08
DISTRIBUTION TO:
☒ OWNER
☒ ARCHITECT
☒ CONTRACTOR
☒ MCS
Pete Smith

CONTRACT FOR: Manhattan West, Phase 1 CONTRACTOR'S APPLICATION FOR PAYMENT

Application is made for payment, as shown below, in connection with the Contract.
Certification shall be attached.

1. ORIGINAL CONTRACT SUM	\$ 78,598,150.00
2. Net change by Change Orders	\$ 2,577,059.22
3. CONTRACT SUM TO DATE (Line 1 + 2)	\$ 81,175,219.22
4. TOTAL COMPLETED & STORED TO DATE (Column G on G103)	\$ 66,524,586.16
5. RETAINAGE	\$ 8,104,044.05
a. 10 % of completed work (Buildings)	
b. 5 % of Site Work	\$ 274,212.23
Total Retainage (Line 5a + 5b)	\$ 8,378,256.28
6. TOTAL BILLED LESS RETAINAGE (Line 4 less Line 5 Total)	\$ 81,146,429.17
7. LESS PREVIOUS CERTIFICATES FOR PAYMENT (Line 6 from prior Certificate)	\$ 54,807,892.58
8. CURRENT PAYMENT DUE	\$ 5,538,537.59
9. BALANCE TO FINISH, INCLUDING RETAINAGE (Line 3 less Line 6)	\$ 21,468,789.45

CHANGE ORDER SUMMARY	
TOTAL CHARGES APPROVED IN PREVIOUS MONTHS BY OWNER	ADDITIONS, REDUCTIONS
2,577,059.22	
TOTAL: 3	2,577,059.22
NET CHARGES by change order	2,577,059.22

The undersigned contractor certifies that to the best of his knowledge, information and belief the Work covered by this Application for Payment has been completed in accordance with the Contract Documents, that all amounts have been paid by the Contractor for Work for which previous Certificates for Payment were issued and payments received from the Owner, and that no payment should be withheld.

CONTRACTOR
By: *[Signature]* Date: 10/10/08

State of: Nevada
County of: Clark
Signed and sworn to before me this 11th day of October, 2008.

Notary Public:

My Commission expires:

11-5-11



ARCHITECT

By: _____ Date: _____

OWNER

[Signature] Date: 10/16/08

2.577.059.22

00241

AA 002313

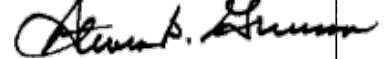
AA 002319

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Page 15 of 17

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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

9 APCO CONSTRUCTION, a Nevada
 10 corporation,

11 Plaintiff,

12 vs.

13 GEMSTONE DEVELOPMENT WEST, INC., A
 14 Nevada corporation,

15 Defendant.

16 AND ALL RELATED MATTERS

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

Hearing Date: September 5, 2017

Hearing Time: 9:00 a.m.

17 **APCO CONSTRUCTION'S OPPOSITION TO PEEL BRIMLEY LIEN CLAIMANTS'**
 18 **PARTIAL MOTION FOR SUMMARY JUDGMENT PRECLUDING DEFENSES BASED**
 19 **ON PAY-IF-PAID AGREEMENTS**

20 Plaintiff APCO Construction ("APCO"), by and through its counsel of record, Marquis
 21 Aurbach Coffing, hereby submits its Opposition to Peel Brimley Lien Claimant's Motion for
 22 Partial Summary Judgment.

23 ...

24 ...

25 ...

26 ...

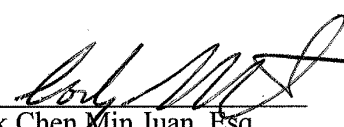
27 ...

28 ...

1 This Opposition is made and based on the papers and pleadings on file herein, the
2 attached Memorandum of Points and Authorities, and any oral argument the Court may choose
3 to entertain at the time of hearing.

4 Dated this 21st day of August, 2017.

5 MARQUIS AURBACH COFFING

6
7 By 
8 Jack Chen Min Juan, Esq.
9 Nevada Bar No. 6367
10 Cody S. Mounteer, Esq.
11 Nevada Bar No. 11220
12 10001 Park Run Drive
13 Las Vegas, Nevada 89145
14 Telephone: (702) 382-0711
15 Facsimile: (702) 382-5816
16 jjuan@maclaw.com
17 cmounteer@maclaw.com
18 Attorneys for APCO Construction

19 **MEMORANDUM OF POINTS AND AUTHORITIES**

20 **I. INTRODUCTION**

21 First and foremost, The Nevada Supreme Court has not declared that pay-if-paid
22 agreements are *per se* against public policy as Helix and the Peel Brimley Lien Claimants
23 suggest, and alternatively held that a case-by-case assessment is appropriate.¹ If any case were
24 to be weighed on a case-by-case basis as detailed by the Nevada Supreme Court, this case would
25 fall squarely within the exception where pay-if-paid clauses are not against public policy. With
26 that said, the entirety of Helix and the Peel Brimley Lien Claimants' Motion is procedurally
27 flawed and not ripe for the Court to consider for summary judgment, as under the standard for
28 summary judgment, documents provided to the Court for consideration must be authenticated
and there must not be any issues of material fact left for the Court to consider. Here, not only
has Helix and the Peel Brimley Lien Claimants failed to provide the Court with **any facts** or

¹ Lehrer II, 124 Nev. at 1116, 197 P.3d at 1041.

1 authenticated contract language,² Helix and the Peel Brimley Lien Claimants purposely admit
2 in their Motion that they do “not” even “concede that they entered into a ‘pay-if-paid agreement.
3 . . .” and that “[t]his issue is reserved for trial or later motion.”³ For this reason alone, Helix and
4 the Peel Brimley Lien Claimants’ Motion must be denied. Moreover, Helix and the Peel
5 Brimley Lien Claimants’ own admission and reservation of rights is nothing more than a request
6 from this Court to issue an advisory opinion, which is evidenced by Helix and the Peel Brimley
7 Lien Claimants’ Motion being completely void of any facts surrounding the underlying Project
8 for the Court to apply to the purported law asserted in the Motion.

9 An even more perplexing issue, besides Helix and the Peel Brimley Lien Claimants
10 asking the Court to rule on contractual language that they do not supply the Court with regard to
11 APCO or even admit is pay-if-paid language, is that Helix — with regard to APCO — is asking
12 the Court to rule on contact(s) where Helix admitted it was paid ever dollar it submitted payment
13 for under APCO’s tenure of the Project except the withheld retention.⁴ Likewise, the only issue
14 remaining between APCO and Helix is the retention Helix purports to be owed from APCO,
15 which is not only a factual impossibility on numerous fronts, but also has no mention in the
16 Motion how pay-if-paid language may apply to a separately agreed to retention on a project that
17 never was completed. In using Helix’s own words, this is an issue reserved for trial or later
18 motion.

19 Moreover, summary judgment is wholly inappropriate here for any of the Joining
20 Subcontractors⁵, as there are disputed facts and the issue presented is clearly not a strict issue of
21

22 ² It is undisputed that Helix conducted work at the Project under multiple and differing contracts. It is
23 also undisputed that the other Peel Brimley Lien Claimants conducted work under contracts that have
24 differing language.

25 ³ See Motion at FN 3 & 4.

26 ⁴ Deposition of Helix’s NRCP 30(b)(6) witness at 52:2–11, 54:3–8, attached collectively hereto as
27 **Exhibit A**.

28 ⁵ The following subcontractors joined Helix Motion: E&E Fire Protection, National Wood Product,
Buchelee, Cactus Rose, Fast Glass, Heinaman Contract Glazing, Helix Electric, SWPPP Compliance,
Cardno/WRG, Zitting Brothers, Steel Structures, Nevada Prefab Engineering, Unitah Investments,

1 law, because this Court must conduct a case-by-case analysis of the facts and law, and **not a**
2 **single Joining Subcontractor**, much like Helix and the Peel Brimley Lien Claimants, provided
3 the Court with **ANY** factual evidence to consider and weigh toward granting a motion for
4 summary judgment.⁶

5 Accordingly, as further detailed below, and with no presented or authenticated facts or
6 evidence for the Court to consider and weigh toward granting the Motion, the Court must deny
7 the Motion in its entirety.

8 **II. APCO'S STATEMENT OF CONTROVERTED FACTS AND DISPUTED**
9 **EVIDENCE**

10 The only factual basis Helix and the Peel Brimley Lien Claimants purport to provide is:
11 (1) that "pay-if-paid agreements have, since at least 2001, been void and unenforceable in
12 Nevada"⁷ – which is not a factual basis to support a motion for summary judgment, and is
13 nothing more than a self serving statement and interpretation of purported Nevada law; and (2)
14 Helix cites to contractual language in Exhibit 2 of its Motion that is not only unauthenticated
15 contract language, but is nothing more than Camco's responses to Helix's interrogatories
16 addressing language of a ratification agreement that has absolutely no bearing on APCO for the
17 purpose of this Motion other than to evidence that Camco took over the Project from APCO and
18 that Helix agreed to conduct work as a subcontractor for Camco after APCO had left the Project
19 for nonpayment.

20 Further, in direct opposition to the motion for summary judgment standard, Helix and the
21 Peel Brimley Lien Claimants defeat their own Motion by specifically stating under the "Relevant
22 Undisputed Facts" section of the Motion that they "do not by the present Motion concede that

23
24 Gerdau Reinforcing, United, Subcontractors, Interstate Plumbing & Air, and any late joining
subcontractors (hereinafter referenced as the "Joining Subcontractors").

25 ⁶ Furthermore, with each of the Joining Subcontractors having failed to provide a scintilla of facts and
26 evidence, APCO has no facts to respond to, and specifically reserves it right to brief and address any
arguments with regard to the pay-if-paid issue when properly presented to the Court.

27 ⁷ See Motion at 6:3.

1 they entered into any ‘pay-if-paid agreements’⁸ This reservation of rights is extreme telling, as
2 Helix and the Peel Brimley Lien Claimants have not only failed to provide any factual basis or
3 contractual language that applies to APCO for the Court to consider, but have also admitted they
4 do not even concede they entered into an agreement that contains pay-if-paid language. If
5 Helix and the Peel Brimley Lien Claimants do not even concede they entered into a contract that
6 contains pay-if-paid language, then what is this Court to even consider?

7 Consequently, by Helix and the Peel Brimley Lien Claimants’ own admission, there is a
8 factual dispute with regard to not only the contracts themselves, but even whether the language
9 contained within the contracts that were not provided to the Court actually contain pay-if-paid
10 language, i.e., there is no way for the Court to rule on whether contractual language is, in fact,
11 pay-if-paid language on a motion for summary judgment when the moving parties themselves do
12 not provide or even concede that they entered into any pay-if-paid agreements.⁹

13 Last, Helix and the Peel Brimley Lien Claimants lack of factual evidence in its Motion
14 cannot be remedied by simply providing documents and factual allegations in their reply that are
15 outside the scope of the original Motion that APCO has had no opportunity to respond to or
16 address and, thus, APCO specifically reserves its right forthwith to address any such purported
17 facts and arguments at the time they are properly presented to the Court — which appears at this
18 procedural stage to be at trial.

19 **III. LEGAL STANDARD.**

20 **A. ADVISORY ONIONS**

21 It has long been held that decisions may be rendered only where actual controversies
22 exist. Applebee v. Applebee, 97 Nev. 11, 12, 621 P.2d 1110, 1110 (1981). Likewise, “a
23 controversy must be present through all stages of the proceeding, and even though a case may
24 present a live controversy at its beginning, subsequent events may render the case moot.” Solid
25 v. Eighth Judicial Dist. Court of State in & for Cty. of Clark, 393 P.3d 666, 670 (Nev. 2017).

26 ⁸ See Motion at 6, fn 4.

27 ⁹ Id.

1 Moreover, the Nevada Supreme Court has always been reluctant to establish laws or give
2 advisory opinions, especially when unnecessary and broad in scope. Nat'l Union Fire Ins. Co. of
3 Pittsburgh, Pa. v. Pratt & Whitney Canada, Inc., 107 Nev. 535, 546, 815 P.2d 601, 608 (1991).

4 As detailed herein, Helix and the Peel Brimley Lien Claimants have failed to even
5 concede they entered into a contract with pay-if-paid language and, likewise, have moved this
6 Court for a finding / opinion as to the state of law in Nevada with regard to pay-if-paid clauses in
7 general with no regard to ANY underlying facts to support their position. Such a request is
8 nothing more than an advisory opinion, and not ripe for summary judgment. Thus, for this reason
9 alone the instant Motion must be denied in its entirety.

10 B. SUMMARY JUDGMENT

11 “Summary judgment procedure is properly regarded not as a disfavored procedural
12 shortcut, but rather as an integral part of the [] Rules as a whole, which are designed ‘to secure
13 the just, speedy and inexpensive determination of every action.’” Celotex Corp. v. Catrett, 477
14 U.S. 317, 327, 106 S. Ct. 2548, 2555 (1986) (quoting FRCP 1)); see also Dredge Corp. v. Husite
15 Co., 78 Nev. 69, 89 n.2, 369 P.2d 676, 687 n.2 (1962) (describing summary judgment as a
16 “salutary device” and reasoning that “[t]he very mission of the summary judgment procedure is
17 to pierce the pleadings and to assess the proof in order to see whether there is a genuine need for
18 trial.”).

19 Pursuant to NRCP 56(c), summary judgment is proper “if the pleadings, depositions,
20 answers to interrogatories, and admissions on file, together with the affidavits, if any, show that
21 there is no genuine issue as to any material fact and that the moving party is entitled to a
22 judgment as a matter of law.” “A material issue of fact is one that affects the outcome of the
23 litigation.” S.E.C. v. Seaboard Corp., 677 F.2d 1289, 1293 (9th Cir. 1982); see also Posadas v.
24 City of Reno, 109 Nev. 448, 452, 851 P.2d 438, 441 (1993).

25 The party moving for summary judgment has the initial burden of showing the absence of
26 a genuine issue of material fact. See, e.g., Cuzze v. Univ. & Cmty. Coll. Sys. of Nev., 123 Nev.
27 598, 602, 172 P.3d 131, 134 (2007). But, where, as here, “the nonmoving party will bear the

1 burden of persuasion at trial, the party moving for summary judgment may satisfy the burden of
2 production by either (1) submitting evidence that negates an essential element of the nonmoving
3 party's claim, or (2) "pointing out . . . that there is an absence of evidence to support the
4 nonmoving party's case." Id. at 602-03, 172 P.3d at 134 (quoting Celotex Corp., 477 U.S. at,
5 325, 106 S. Ct. at 2554).

6 Once the moving party has carried its initial burden, the party opposing summary
7 judgment must "transcend the pleadings and, by affidavit or other admissible evidence, introduce
8 specific facts that show a genuine issue of material fact." Cuzze. Indeed, "[w]hile the pleadings
9 and other proof must be construed in a light most favorable to the nonmoving party, that party
10 bears the burden to 'do more than simply show that there is some metaphysical doubt' as to the
11 operative facts in order to avoid summary judgment being entered in the moving party's favor.
12 Wood v. Safeway, Inc., 121 Nev. 724, 732, 121 P.3d 1026, 1031 (2005) (quoting Matsushita
13 Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586, 106 S. Ct. 1348, 1356 (1986)); see
14 also Collins v. Union Fed. Sav. & Loan Ass'n, 99 Nev. 284, 302, 662 P.2d 610, 621 (1983)
15 ("[T]he opposing party is not entitled to build a case on the gossamer threads of whimsy,
16 speculation and conjecture.") (internal quotation marks and citation omitted).

17 **C. LACK OF EVIDENCE AND UNAUTHENTICATED DOCUMENTS**

18 APCO must note that the instant Motion is procedurally defective on multiple grounds.
19 To begin with, Helix and Peel Brimley Lien Claimants failed to properly provide and
20 authenticate any contract or documents it asserts against APCO, which precludes the Court from
21 considering such exhibits in conjunction with their request for summary judgment. Orr v. Bank
22 of America, NT, 285 F.3d 764, 773 (2002) (courts have "repeatedly held that unauthenticated
23 documents cannot be considered in a motion for summary judgment.") (listing cases). In
24 addition, Helix and the Peel Brimley Lien Claimants did not provide the Court with a statement
25 of undisputed facts as required by NRCP 56 as against APCO. Where there is a rule requiring the
26 movant [for summary judgment] to supply the court with a list of uncontested facts with
27 supported specific citations to the record, a party's failure to comply is grounds for judgment
28

1 against that party. A.M. Capen's Co. v. Am. Trading and Prod. Corp., 202 F.3d 469, 472 n. 4
2 (1st Cir. 2000); see also Stepanischen v. Merchants Despatch Transp. Corp., 722 F.2d 922,
3 931-32 (1st Cir. 1983) (same). To be clear, Helix and the Peel Brimley Lien Claimants'
4 "Undisputed Material Facts" is nothing more than a list of conclusory statements about why
5 they believe their Motion should be granted. This list does not satisfy NRCP 56 requirements
6 and, likewise, the instant Motion must be denied in its entirety.

7 **IV. LEGAL ARGUMENT**

8 **A. NEVADA LAW DOES ALLOW FOR PAY-IF-PAID PROVISIONS 9 UNDER SOME CIRCUMSTANCES.**

10 Under NRS 624.626, subcontractors **may stop work** if a higher-tiered contractor fails to
11 make timely payments, "even if the higher-tiered contractor has not been paid and the agreement
12 contains a provision which requires the higher-tiered contractor to pay the lower-tiered
13 subcontractor only if or when the higher-tiered contractor is paid." The next statutory
14 subsection, NRS 624.628, provides additional guidance regarding pay-if-paid provisions. In
15 particular, it provides that:

16 3. A condition, stipulation or provision in an agreement which:

17 ...

18 c) Requires a lower-tiered subcontractor to waive, release or extinguish a claim
19 or right for damages or an extension of time that the lower-tiered subcontractor
20 may otherwise possess or acquire as a result of delay, acceleration, disruption or
21 an impact event that is **unreasonable under the circumstances**, that **was not**
within the contemplation of the parties at the time the agreement was entered
into, or for which **the lower-tiered subcontractor is not responsible**, is against
22 public policy and is void and unenforceable. (Emphasis added).

23 Thus, while both of these provisions provide certain limitations regarding payment of
24 subcontractors, Nevada's statutory law **does not** outright prohibit pay-if-paid clauses.

25 Unfortunately, the Supreme Court of Nevada's decisions in Lehrer McGovern Bovis, Inc.
26 v. Bullock Insulation, Inc., 124 Nev. ___, 185 P.3d 1055 (June 2008) ("Lehrer I"), and Lehrer
27 McGovern Bovis, Inc. v. Bullock Insulation, Inc., 124 Nev. 1102, 197 P.3d 1032 (Oct. 2008)
28 ("Lehrer II"), caused significant confusion over this otherwise straight-forward statute.

1 Both Lehrer cases centered on a subcontract between subcontractor Bullock Insulation
2 (“Bullock”) and general contractor Lehrer McGovern Bovis (“Bovis”) in which Bullock agreed
3 to provide firestopping work needed for the construction of the Venetian hotel and casino. See
4 Lehrer I, 185 P.3d at 1058; Lehrer II, 124 Nev. at 1107, 197 P.3d at 1035. The subcontract
5 incorporated several terms from the Construction Management Agreement, including a lien
6 waiver clause and pay-if-paid provision. Lehrer I, 185 P.3d at 1058; Lehrer II, 124 Nev. at 1107-
7 08, 197 P.3d at 1036. After much of the work on the project had been completed, an inspection
8 revealed that Bullock had not properly installed putty pads in accordance with the subcontract.
9 Lehrer I, 185 P.3d at 1059; Lehrer II, 124 Nev. at 1107, 197 P.3d at 1036. In order to correct the
10 mistake, Bullock had to complete significant retrofit work. Lehrer I, 185 P.3d at 1059; Lehrer II,
11 124 Nev. at 1108, 197 P.3d at 1036. When the retrofitting was complete Bullock recorded a
12 mechanic’s lien for the total value of the retrofit and initiated litigation. Lehrer I, 185 P.3d at
13 1059; Lehrer II, 124 Nev. at 1108, 197 P.3d at 1036.

14 The case proceeded to trial and a jury found in favor of Bullock. Lehrer I, 185 P.3d at
15 1057; Lehrer II, 124 Nev. at 1109, 197 P.3d at 1036-37. But, because the jury gave
16 contradictory responses to special interrogatories regarding the subcontract, Bovis moved for a
17 new trial. Lehrer I, 185 P.3d at 1060; Lehrer II, 124 Nev. at 1110, 197 P.3d at 1037. In both
18 cases, “the primary issue [was] whether a new trial [wa]s required when the district court creates
19 special interrogatories upon issues of fact and the jury’s answers to those interrogatories are
20 inconsistent.” Lehrer I, 185 P.3d at 1057; Lehrer II, 124 Nev. at 1105-06, 197 P.3d at 1034. As
21 secondary issues, Bovis questioned whether the district court erred by holding that the lien
22 waiver and pay-if-paid provisions which were incorporated into the subcontract were
23 unenforceable under Nevada law. Lehrer I, 185 P.3d at 1058; Lehrer II, 124 Nev. at 1106, 197
24 P.3d at 1035.

25 In both decisions, the Supreme Court held that remand was necessary because the general
26 verdict was irreconcilable with the interrogatory answers. Lehrer I, 185 P.3d at 1062; Lehrer II,
27
28

1 124 Nev. at 1113, 197 P.3d at 1039. *The Court's position with regard to pay-if-paid clauses*
2 *shifted, however, from the first decision to the second.*

3 In the first Lehrer decision, the Supreme Court noted that the parties entered into the
4 subcontract before the Legislature "proclaimed pay-if-paid provision unenforceable." Lehrer I,
5 185 P.3d at 1063. In a footnote, the Court further clarified that the Legislature amended NRS
6 Chapter 624 in 2001 to include "prompt payment provisions . . . which make pay-if-paid
7 provisions entered into subsequent to the Legislature's amendments unenforceable." Id. at 1063
8 n.33. Nevertheless, while new statutory language did not apply to parties' subcontract, the
9 Supreme Court determined that the pay-if-paid provision in the parties' subcontract was
10 unenforceable because "a pay-if-paid provision limits a subcontractor's ability to be paid for
11 work already performed," and effectively "impair[ed] the [Bullock's] statutory right to place a
12 mechanic's lien on the construction project." Id. at 1064.

13 The Supreme Court issued a second, amended opinion a few months later in order to
14 clarify a portion of its decision that "could be misconstrued as being contrary to this court's
15 precedent." Lehrer II, 124 Nev. at 1105, 197 P.3d at 1034. In the revised opinion, the Supreme
16 Court again noted that the parties entered into the subcontract before the Legislature "proclaimed
17 pay-if-paid provisions unenforceable." Id. at 1117, 197 P.3d at 1042. But, in the related
18 footnote, the Court altered its explanation of the statutory amendment by stating, "[p]ay-if-paid
19 provisions entered into subsequent to the Legislature's amendments are enforceable only in
20 limited circumstances and are subject to the restrictions laid out in [the statute]." Id. at 1117
21 n.50, 197 P.3d at 1042 n.50. Then, as in the previous decision, the Court held that the
22 subcontract between Bullock and Bovis was unenforceable because it effectively impaired
23 Bullock's right to place a mechanic's lien on the project. Id. at 1117, 197 P.3d at 1042.

24 In the aftermath of the Lehrer decisions, scholars and attorneys understandably expressed
25 confusion.¹⁰ In particular, confusion remains regarding the actual impact of the Supreme Court's
26

27 ¹⁰ See, e.g., Leon F. Mead II, Nevada Supreme Court Rules Pay-If-Paid Clause Unenforceable, June 2008,
28 *available at*: http://www.swlaw.com/assets/pdf/publications/2008/06/16/NevadaSupremeCourtRules_6.08_indd.pdf; Gregory S. Gilbert, Pay-if-Paid Clauses: Still Alive in Nevada, Mar. 2009, *available at*:

1 remarks regarding pay-if-paid clauses because the Court's decision turned on the issue of
2 inconsistent verdicts and all other matters were purely dictum.¹¹ In addition, it remains unclear
3 how the Court reached its decision, given that NRS 624 does not contain any direct references to
4 pay-of-paid clauses. And, by the same token, it is unclear why the Supreme Court revised its
5 dicta regarding pay-if-paid clauses when the supposed purpose of the amended opinion was to
6 clarify confusion regarding inconsistent verdicts.

7 Thus, to summarize, there remain many questions regarding Nevada's law on pay-if-paid
8 provisions. But, under existing law there is no reason to believe that such provisions are *per se*
9 unenforceable because Supreme Court of Nevada simply would not have revised its opinion in
10 Lehrer if its intent was disallow pay-if-paid clauses under all circumstances.¹² Further, the
11 Supreme Court would not have noted the value of case-by-case assessments if pay-if-paid
12 provisions were never permissible.¹³ So, for purposes of this litigation, this Court should
13 consider whether the pay-if-paid provisions are appropriate under the unique circumstances of
14 this case and reject any empty attempt by Helix, or the Joining Subcontractors, to impose a *per*
15 *se* limitation that simply does not exist — especially when no facts or authenticated contracts
16 have been presented to the Court for consideration.

17
18
19 <https://www.hollandhart.com/16931>; Greg Gledhill, Nevada Supreme Court Declares Pay-If-Paid Clauses
20 Unenforceable – Or Did It?, available at: http://www.gcila.org/publications/files/pub_en_97.pdf.

21 ¹¹ Argentena Consol. Min. Co. v. Jolley Urga Wirth Woodbury & Standish, 125 Nev. 527, 536, 216 P.3d
22 779, 785 (2009) (“A statement in a case is dictum when it is “unnecessary to a determination of the
23 questions involved.” (Quoting Stanley v. Levy & Zentner Co., 60 Nev. 432, 448, 112 P.2d 1047, 1054
24 (1941)).

25 ¹² See NRAP 40(c)(2) (providing that rehearing is only warranted “[w]hen it appears that [the Supreme
26 Court] has overlooked or misapprehended a material matter in the record or otherwise, or . . . in such
27 other circumstances as will promote substantial justice.”); Moore v. City of Las Vegas, 92 Nev. 402, 405,
28 551 P.2d 244, 246 (1976) (a rehearing is proper “[o]nly in very rare instances in which new issues of fact
or law are raised supporting a ruling contrary to the ruling already reached”).

¹³ Vegas Franchises, Ltd. v. Culinary Workers Union, Local No. 226, 83 Nev. 422, 424, 433 P.2d 263,
265 (1967) (stating the Supreme Court will not perpetuate error); Nevada-California Transp. Co. v. Pub.
Serv. Comm'n, 60 Nev. 310, 108 P.2d 850, 852 (1941) (holding that it is the Supreme Court's duty “to
correct rather than perpetuate [] errors.”).

1 **B. THE PAY-IF-PAID PROVISIONS ARE VALID AND ENFORCEABLE**
2 **UNDER THE FACTS AND CIRCUMSTANCES IN THIS CASE, BUT**
3 **WITH NO EVIDENCE BEING PROVIDED TO THE COURT BY THE**
4 **MOVING PARTIES, THE ISSUE IS NOT RIPE FOR SUMMARY**
5 **JUDGMENT.**

6 First and foremost, dicta is not controlling law, Kaldi v. Farmers Ins. Exch., 117 Nev.
7 273, 282, 21 P.3d 16, 22 (2001) and, as such, there is a fair argument that the Lehrer decisions
8 actually have no bearing on the instant matter. Nevertheless, even if this Court is inclined to
9 treat the Supreme Court's reasoning as persuasive,¹⁴ it is best to consider the pay-if-paid clause
10 under the unique facts and circumstances in this case. Indeed, while the Supreme Court has yet
11 to address how to assess the enforceability of a pay-if-paid clause, it has stated that a case-by-
12 case assessment is appropriate where a contract includes a lien waiver provision. Lehrer II, 124
13 Nev. at 1116, 197 P.3d at 1041 ("The enforceability of each lien waiver clause must be resolved
14 on a case-by-case basis"). And, while the applicable law regarding liens differs from the prompt
15 payment provisions in Chapter 624, the Supreme Court has indicated that its concerns regarding
16 pay-if-paid provisions stem from the same public policy concerns regarding secure payment for
17 contractors. Id. at 1116-18, 197 P.3d at 1041-42.

18 Here, none of the moving parties have provided the Court with any language applicable
19 to APCO for the Court to consider, so it is impossible for the Court to conduct ANY analysis on
20 a case-by-case basis and offer anything more than an advisory opinion. Moreover, to further
21 evidence this point, NRS 624.628 provides guidance regarding pay-if-paid provisions, wherein
22 subsection (c) directs the analysis to determine whether the clause is: (1) unreasonable under the
23 circumstances, (2) was not within the contemplation of the parties at the time the agreement was
24 entered into, or (3) for which the lower-tiered subcontractor is not responsible.¹⁵ No moving
25 party has provided any facts or evidence for the Court to consider the above factors.

26 ¹⁴ Humphrey's Ex'r v. United States, 295 U.S. 602, 627, 55 S. Ct. 869, 874 (1935) (holding that "dicta []
27 may be followed if sufficiently persuasive" even though it is "not controlling").

28 ¹⁵ See NRS 624.628(c).

1 Further, public policy concerns weigh in favor of APCO rather than Helix. As the
2 Supreme Court stated in Lehrer, public policy favors secure payment for contractors. The
3 rationale for this public policy is easy to understand, as “contractors are generally in a vulnerable
4 position because they extend large blocks of credit; invest significant time, labor, and materials
5 into a project; and have any number of workers vitally depend upon them for eventual payment.”
6 Lehrer II, 124 Nev. at 1116, 197 P.3d at 1041. Here, following Helix and the Peel Brimley Lien
7 Claimants’ rationale would do nothing more than turn APCO into a *de facto* lender to the Owner
8 in the event the project goes under and there becomes a situation of non-payment or insolvency –
9 – which is exactly what occurred in this case, but while the Project was under the control of
10 Camco, not APCO.

11 Nonetheless, the moving parties have failed to provide any evidence for the Court to
12 conduct its analysis and, therefore, must deny the Motion in its entirety.

13
14 **C. IN THE ALTERNATIVE, AND WHEN PROPERLY BEFORE THE**
15 **COURT, SHOULD THE COURT RULE THAT THE SUBJECT**
16 **CONTRACT LANGUAGE IS IN FACT PAY-IF-PAID LANGUAGE**
17 **AGAINST PUBLIC POLICY, THE COURT SHOULD STILL ALLOW**
18 **EVIDENCE OF THE CONTRACT LANGUAGE TO SUPPORT THE**
19 **INTENT AND INTERACTIONS BETWEEN THE PARTIES.**

20 The moving parties have asserted a borage of claims sounding in NRS 108, contract law,
21 breach of the covenant of good faith and fair dealing, and unjust enrichment, to name a few. If
22 the Court, when the pay-if-paid issue is properly before it, were to consider the contractual
23 language to be a pay-if-paid provision against public policy — which we believe it will not when
24 the Court conducts the case-by-case analysis — then alternatively the Court must still allow
25 testimony and evidence at trial with regard to the contract language as it relates to the intensions
26 and interactions between the Parties.

27 Here, the instant case is set for a bench trial. Likewise, there is no threat of confusing or
28 contaminating a jury with regard to the ultimate determination by the Court on the application of
pay-if-paid language, as the Court can rightfully discern the application of the language and how
it affected the interactions of the Parties.

1 **V. CONCLUSION**

2 Accordingly, based on the foregoing, APCO respectfully request that this Court Deny
3 Helix and the Peel Brimley Lien Claimants' Motion for Summary Judgment, along with all
4 joinders thereto, in their entirety.

5 Dated this 21st day of August, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing **APCO CONSTRUCTION'S OPPOSITION TO PEEL BRIMLEY LIEN CLAIMANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT** was submitted electronically for filing and/or service with the Eighth Judicial District Court on the 21st day of August, 2017. Electronic service of the foregoing document shall be made in accordance with the E-Service List as follows:¹⁶

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¹⁶ 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).

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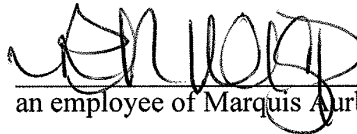
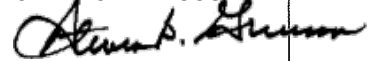
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16 an employee of Marquis Aurbach Coffing

Exhibit A

<p style="text-align: right;">Page 49</p> <p>1 A. Correct.</p> <p>2 Q. Is there any particular reason why Helix is</p> <p>3 saying APCO is responsible for the entire contract</p> <p>4 amount, and then going on and stating that Gemstone and</p> <p>5 CAMCO and other people are responsible for additional</p> <p>6 amounts?</p> <p>7 A. Again, I don't know how they were exactly</p> <p>8 calculated, so I do not know.</p> <p>9 (Exhibit 95 marked</p> <p>10 for identification.)</p> <p>11 BY MR. MOUNTEER:</p> <p>12 Q. All right. Andy, you've been handed what has</p> <p>13 been marked as Exhibit 95, with a beginning Bates stamp</p> <p>14 of Helix 00378. Do you recognize this document?</p> <p>15 A. Yes.</p> <p>16 Q. What is this document?</p> <p>17 A. Progress billing.</p> <p>18 Q. Does it appear to be a true and accurate</p> <p>19 representation of Helix's progress billing?</p> <p>20 A. Yes.</p> <p>21 Q. What is it for the period to?</p> <p>22 A. One second. Need to fix them again.</p> <p>23 MR. ZIMBELMAN: This is not in order again?</p> <p>24 MR. MOUNTEER: Yes.</p> <p>25 A. Through August 31 of 2008.</p>	<p style="text-align: right;">Page 51</p> <p>1 change orders either did not start or pertained to</p> <p>2 other buildings that did not start on the lien amount</p> <p>3 versus the billing form.</p> <p>4 Q. Just so I'm clear, what I believe you're</p> <p>5 saying is there's change orders that were approved for</p> <p>6 work to be done, but the work was not completed by</p> <p>7 August 31 of 2008?</p> <p>8 A. I would think that the change orders were</p> <p>9 issued for future buildings, or the change orders --</p> <p>10 I'm sorry, on the lien form that there were going to be</p> <p>11 changes on future buildings that were incorporated into</p> <p>12 the buildings performed under contract.</p> <p>13 The ones on the billing form were for the</p> <p>14 buildings that were currently being constructed.</p> <p>15 Q. Okay. So if we look at -- looks like someone</p> <p>16 had wrote some type of circle around it on number 4,</p> <p>17 total completed and stored to date. What does it mean,</p> <p>18 "and stored to date"?</p> <p>19 A. There were fixtures on site, fixtures,</p> <p>20 distribution, materials that were sent to the site to</p> <p>21 be installed that for whatever reason weren't</p> <p>22 installed, but we were allowed to bill for --</p> <p>23 Q. You were allowed to bill for having that</p> <p>24 material stored, correct?</p> <p>25 A. -- having that materials stored, that's</p>
<p style="text-align: right;">Page 50</p> <p>1 BY MR. MOUNTEER:</p> <p>2 Q. Okay. Going back, you had said earlier you</p> <p>3 think that APCO had control of the progress through</p> <p>4 August of 2008. Does this document or any other</p> <p>5 document you've been shown today refresh your</p> <p>6 recollection of a more sure date of that time period?</p> <p>7 A. I would believe end of August of 2008.</p> <p>8 Q. So this would be the last application,</p> <p>9 certificate for payment that would have gone to APCO;</p> <p>10 is that correct?</p> <p>11 A. I believe so, yes.</p> <p>12 Q. All right. Let's look at this just for a</p> <p>13 moment. I'm just looking at the numbers on the front</p> <p>14 here. We have the starting on line 1, 13 million</p> <p>15 number that matches up with the lien; is that correct?</p> <p>16 A. Correct.</p> <p>17 Q. And then we have net change by change orders.</p> <p>18 Do you see that, 341,000?</p> <p>19 A. Yes.</p> <p>20 Q. Why is that number different than the number</p> <p>21 on the lien amount, if you want to reference back to</p> <p>22 Exhibit 94? You may want to keep 94 open for just a</p> <p>23 short time here to Exhibit A on 94; do you know why</p> <p>24 that amount is different?</p> <p>25 A. Change order 738257. It's possible that some</p>	<p style="text-align: right;">Page 52</p> <p>1 correct.</p> <p>2 Q. So it looks like we have a 5,100,000 and</p> <p>3 change on that number. On number 5, we have the</p> <p>4 infamous word retainage. Do you see that?</p> <p>5 A. Yes.</p> <p>6 Q. Under there we have 500,000 and change. Is</p> <p>7 that the number that you're saying that Helix is</p> <p>8 seeking from APCO?</p> <p>9 A. Yes.</p> <p>10 Q. So just so we are clear, that is \$513,120.71?</p> <p>11 A. Correct.</p> <p>12 Q. Going down to number 6, we have total earned</p> <p>13 less retainage. We subtract that retainage out, that</p> <p>14 brings the total completed work to that 4,618,000 and</p> <p>15 change?</p> <p>16 A. Correct.</p> <p>17 Q. And then under number 8, we have current</p> <p>18 payment due. So under this particular pay app, with</p> <p>19 all the above numbers and whatnot, Helix is saying</p> <p>20 APCO, here's the application for 326,610 dollars; am I</p> <p>21 right on that?</p> <p>22 A. Correct.</p> <p>23 Q. Was APCO ever paid the 326,610 dollars?</p> <p>24 A. I do not know.</p> <p>25 Q. You're not aware of whether they were paid or</p>

<p>Page 53</p> <p>1 not?</p> <p>2 A. APCO?</p> <p>3 Q. I mean, I'm sorry, Helix. Was Helix ever</p> <p>4 paid that amount?</p> <p>5 A. Yes.</p> <p>6 Q. So you're not claiming that APCO owed you for</p> <p>7 that amount?</p> <p>8 A. Correct.</p> <p>9 Q. With this being the last payment application</p> <p>10 that was to APCO, who did the next payment application</p> <p>11 go to?</p> <p>12 A. I believe CAMCO.</p> <p>13 Q. So are you faulting APCO for any payments</p> <p>14 that weren't made under CAMCO?</p> <p>15 A. I do not know. If that's a legal -- I'm not</p> <p>16 sure.</p> <p>17 Q. I mean, you could ask your counsel. I don't</p> <p>18 think it's legal. I guess what I'm curious for is --</p> <p>19 stated better -- is Helix claiming that APCO is</p> <p>20 responsible for any amounts, retainage, payment</p> <p>21 certificates, whatever, that went to CAMCO and not</p> <p>22 APCO?</p> <p>23 A. I do not believe so.</p> <p>24 Q. So as of August 31, 2008, you can't -- Helix</p> <p>25 doesn't fault APCO for any payments that would have</p>	<p>Page 55</p> <p>1 BY MR. MOUNTEER:</p> <p>2 Q. Let me see. Yeah, 247.</p> <p>3 A. Okay. That's not what I heard.</p> <p>4 Q. I'll start from the beginning. NVPE000247,</p> <p>5 appears to be an e-mail from Craig Colligan. Do you</p> <p>6 know who Craig Colligan is?</p> <p>7 A. Do not recall.</p> <p>8 Q. It appears Craig has an e-mail address from</p> <p>9 Gemstone. Does that refresh your recollection at all</p> <p>10 of who Craig may be?</p> <p>11 A. Obviously with Gemstone in some capacity.</p> <p>12 Q. Okay. And then the first name on that e-mail</p> <p>13 list, is that you?</p> <p>14 A. That is correct.</p> <p>15 Q. So do you recall receiving this e-mail?</p> <p>16 A. Oh, boy. No.</p> <p>17 Q. Okay. I understand. This was a long time</p> <p>18 ago in 2008. Believe me, I've got e-mails in my e-mail</p> <p>19 account going back a long ways.</p> <p>20 Do you believe, though, based upon the fact</p> <p>21 that your name is cited to this too, that you would</p> <p>22 have received this e-mail?</p> <p>23 A. Yes.</p> <p>24 Q. Do you recognize any of the handwriting</p> <p>25 that's up in the right-hand corner? It appears there</p>
<p>Page 54</p> <p>1 been submitted to someone else after that date?</p> <p>2 A. I believe so.</p> <p>3 Q. So then is it Helix's position that Helix was</p> <p>4 paid 100 percent in full for everything -- when I say</p> <p>5 everything, I mean work completed and stored to date</p> <p>6 that APCO was responsible for on this project, except</p> <p>7 for the \$513,120.71?</p> <p>8 A. Correct.</p> <p>9 MR. MOUNTEER: Let's take a five-minute break</p> <p>10 if that's all right.</p> <p>11 (Whereupon, a recess was taken.)</p> <p>12 BY MR. MOUNTEER:</p> <p>13 Q. All right, so Andy, let's talk quickly about</p> <p>14 once APCO left the project, or around the time that</p> <p>15 APCO was leaving the project. Helix had some notice</p> <p>16 that APCO was going to leave; is that correct?</p> <p>17 A. I believe so.</p> <p>18 (Exhibit 96 marked</p> <p>19 for identification.)</p> <p>20 BY MR. MOUNTEER:</p> <p>21 Q. All right, I'm showing you a document that is</p> <p>22 Bates stamped NVPE002240. It appears to be --</p> <p>23 A. No, I don't have that number. 000247.</p> <p>24 MR. ZIMBELMAN: That's what I'm looking at as</p> <p>25 well.</p>	<p>Page 56</p> <p>1 are two sets of initials. Do you have any idea whose</p> <p>2 initials those may be?</p> <p>3 A. Negative.</p> <p>4 Q. This e-mail appears to be sent on August 12,</p> <p>5 2008, during that last month of APCO's control of the</p> <p>6 project; would you agree with me?</p> <p>7 A. Correct.</p> <p>8 Q. In the body of the e-mail, could you read</p> <p>9 along with me, I'm going to start just at the very</p> <p>10 beginning, it says, "In light of recent work stoppage</p> <p>11 at ManhattanWest site." Were you aware of a work</p> <p>12 stoppage?</p> <p>13 A. I believe so, yes.</p> <p>14 Q. Do you know why the work was stopped?</p> <p>15 A. The assumption would be payment.</p> <p>16 Q. Are you aware it's because APCO had asserted</p> <p>17 from Gemstone that they were not getting paid?</p> <p>18 A. I would assume so.</p> <p>19 Q. Going back to the last sentence of that first</p> <p>20 paragraph, it says, "in contract, the recent work</p> <p>21 stoppage was actually a result of an ongoing dispute</p> <p>22 between Gemstone and its general contractor and had</p> <p>23 nothing do with Gemstone's financing for the project."</p> <p>24 Do you know if that dispute between Gemstone,</p> <p>25 and I'm assuming, I'll represent to you the contractor</p>



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7 **DISTRICT COURT**

8 **CLARK COUNTY, NEVADA**

9 APCO CONSTRUCTION, a Nevada
corporation,

10 Plaintiff,

11 vs

12 GEMSTONE DEVELOPMENT WEST, INC.,
13 Nevada corporation; NEVADA
CONSTRUCTION SERVICES, a Nevada
14 corporation; SCOTT FINANCIAL
CORPORATION, a North Dakota corporation;
15 COMMONWEALTH LAND TITLE
INSURANCE COMPANY; FIRST
16 AMERICAN TITLE INSURANCE
COMPANY and DOES I through X,

17 Defendants.

18 **AND ALL RELATED MATTERS.**

LEAD CASE NO.: A571228
DEPT. NO.: XIII

Consolidated with:
A571792, A574391, A577623, A580889,
A583289, A584730, and A587168

**PEEL BRIMLEY LIEN CLAIMANTS'
REPLY TO OPPOSITIONS TO MOTION
FOR PARTIAL SUMMARY JUDGMENT
PRECLUDING DEFENSES BASED ON
PAY-IF-PAID AGREEMENTS**

19 COME NOW the Lien Claimants represented by the undersigned counsel of the law firm
20 of PEEL BRIMLEY LLP ("the Peel Brimley Lien Claimants")¹ and do hereby submit the
21 following Reply to the Oppositions of Plaintiff/Cross-Claim Defendant APCO Construction
22 ("APCO") and Defendant Camco Pacific Construction Co., Inc. ("Camco") to the Peel Brimley
23 Lien Claimants' Motion for Partial Summary Judgment Precluding Defenses Based on Pay-if-
24 Paid Agreements ("the Motion"). This Reply is based on the following Reply Memorandum of

25 ///

26 ///

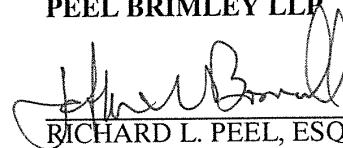
27 _____
28 ¹ The Peel Brimley Lien Claimants are: Buchele Inc.; Cactus Rose Construction; Fast Glass Inc.;
Heinaman Contract Glazing; Helix Electric of Nevada, LLC; and SWPPP Compliance Solutions, LLC.

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1 Points and Authorities, the pleadings and papers on file, and such matters as may be considered
2 by the Court.

3 DATED this 28th day of September 2017.

4 **PEEL BRIMLEY LLP**

5  # 11226 for

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17 **REPLY MEMORANDUM OF POINTS AND AUTHORITIES**

18 APCO and Camco expressly or impliedly acknowledge that they intend to defend against
19 the claims of the Peel Brimley Lien Claimants based upon purported “pay-if-paid” agreements.
20 APCO’s Opposition attempts to distract the Court as to matters not presented in the Motion while
21 Camco’s Opposition seems to argue that the various lien claimants’ knowledge of and purported
22 assent to the unlawful pay-if-paid agreements somehow alters their illegality.

23 Neither APCO nor Camco can, however, dispute the fact that (i) the Nevada Supreme
24 Court declared “pay if paid” provisions in construction contracts void and unenforceable as
25 against Nevada’s public policy because “Nevada’s public policy favors securing payment for
26 labor and material contractors,” *see Lehrer McGovern Bovis, Inc. v. Bullock Insulation, Inc.*, 124
27 Nev. 1102, 1117-18, 197 P.3d 1032, 1042 (Nev. 2008); or (ii) NRS 624.624(1), which cannot be
28 waived (see NRS 624.628(3))²

² NRS 624.628(3) (with emphasis added) provides:

A condition, stipulation or provision in an agreement which:

- (a) Requires a lower-tiered subcontractor to waive any rights provided in NRS 624.624 to 624.630, inclusive, or which limits those rights

1 It is simply folly to argue, as Camco does (*see* Camco Opposition 6:19), that the “Lien
2 Claimants agreed to assume the risk of Gemstone’s insolvency” because that is just another way
3 of saying “pay-if-paid.” It is similarly incorrect to argue that the Nevada Supreme Court’s
4 prohibition on pay-if-paid agreements only applies if they might impair liens (see Camco
5 Opposition 7:28-8:1). Far from “reckless,” the Peel Brimley Lien Claimants’ reliance on *Bullock*
6 is entirely consistent with that decision (holding pay-if-paid agreements to be “void and
7 unenforceable.”). Finally, Camco’s argument that “pay-if-paid provisions were entirely
8 consistent with [NRS Chapter 624]” absurdly ignores the actual provisions and plain language of
9 the statute. Specifically, but without limitation, NRS 624.624 (applicable to contacts between
10 higher-tiered contactors and lower-tiered subcontractors and thus at issue here) provides in part:

11 1. Except as otherwise provided in this section, if a higher-tiered contractor enters into:

12 (a) A written agreement with a lower-tiered subcontractor that includes a schedule for
13 payments, the higher-tiered contractor shall pay the lower-tiered subcontractor:

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

15 (2) Within 10 days after the date the higher-tiered contractor receives
16 payment for all or a portion of the work, materials or equipment described in a
17 request for payment submitted by the lower-tiered subcontractor,
18 ↪ whichever is earlier.

19 (b) A written agreement with a lower-tiered subcontractor that does not contain a
20 schedule for payments, or an agreement that is oral, the higher-tiered contractor shall
21 pay the lower-tiered subcontractor:

22 (1) Within 30 days after the date the lower-tiered subcontractor submits a
23 request for payment; or

24 (2) Within 10 days after the date the higher-tiered contractor receives
25 payment for all or a portion of the work, labor, materials, equipment or services
26 described in a request for payment submitted by the lower-tiered subcontractor,
27 ↪ whichever is earlier.

28 NRS 624.624(1).

(b) Relieves a higher-tiered contractor of any obligation or liability imposed pursuant
to NRS 624.624 to 624.630, inclusive; or

(c) Requires a lower-tiered subcontractor to waive, release or extinguish a claim or
right for damages or an extension of time that the lower-tiered subcontractor may
otherwise possess or acquire as a result of delay, acceleration, disruption or an impact
event that is unreasonable under the circumstances, that was not within the contemplation
of the parties at the time the agreement was entered into, or for which the lower-tiered
subcontractor is not responsible,

□ is against public policy and is void and unenforceable.

1 In other words, and at the risk of reiterating the Peel Brimley Lien Claimants' opening brief,
2 if there is a "schedule of payments" in an otherwise enforceable written agreement between the
3 higher-tiered contractor (e.g., APCO or Camco) and the lower-tiered subcontractor (e.g., the Peel
4 Brimley Lien Claimants), the higher-tiered contractor must pay the lower-tiered subcontractor – at
5 the latest – on the date payment is due. If there is no enforceable written agreement containing a
6 schedule of payments, the payment is due to the lower-tiered subcontractor – at the latest - within 30
7 days of its request for payment. The statutory language referencing payment received by the higher-
8 tiered contractor exists only to hasten the time within which payment must be made and does not
9 extend the time, much less indefinitely. Here, all of the Peel Brimley Lien Claimants have been
10 waiting for almost nine years without payment.

11 NRS 624.624(2) does allow a higher-tiered contractor to withhold payment for (i) retention
12 and (ii) work not performed, costs necessary to repair or remedy defective work, trust fund benefits
13 subject to a notice form a state agency and other reasons not presented here. However, NRS
14 624.624(3) also requires the higher-tiered contractor – "on or before the date the payment is due" - to
15 issue a written notice of withholding giving a "reasonably detailed explanation of the condition or
16 reason for the withholding. Even if monies were withheld for a permissible reason rather than
17 because of a pay-if-paid provision (as APCO and Camco acknowledge is the case), neither APCO
18 nor Camco has identified or presented any such timely and valid notice of withholding.

19 Importantly, and as set forth in NRS 624.624(5), "Except as otherwise allowed in
20 subsections 2, 3 and 4, a higher-tiered contractor shall not withhold from a payment to be made to
21 a lower-tiered subcontractor more than the retention amount. Finally, no contractual "condition
22 stipulation or provision" can require a lower-tiered subcontractor to waive any rights afforded by the
23 statute nor can any such condition, stipulation or provision relieve a higher-tiered contractor from
24 "any obligation or liability imposed" by the statute (e.g., the obligation to promptly pay). See NRS
25 624.628(3) (rendering such conditions, stipulations or provisions "void and unenforceable").

26 Neither Camco nor APCO deny that they seek to defend the various lower-tiered claims
27 against them on the basis of various pay-if-paid provisions. There is therefore no genuine issue of
28 fact and the law of the State of Nevada is clear and unambiguous that such provisions are void and

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1 unenforceable after – at a maximum – 30 days after the date the lower-tiered subcontractor presented
2 request for payment. APCO and Camco did not pay more than 9 years ago when presented requests
3 for payment in the ordinary course of business, did not pay when Complaints against them were filed
4 in the court beginning as early as 2008, did not pay once the Supreme Court awarded the lender
5 priority over the proceeds of the sale of the property, and have not paid in response to the present
6 motion.

7 While the Peel Brimley Lien Claimants expect to prove up their claims against Camco and
8 APCO, the Court not waste the Court's valuable time receiving evidence and argument relating to
9 pay-if-paid provisions of any kind. The law is clear that such provisions violate public policy, are
10 void and unenforceable and strictly contrary to the prompt pay provisions of NRS 624.624. A partial
11 summary judgment deeming any such provisions void and unenforceable is appropriate and should
12 be entered.

12 CONCLUSION

13 Based on the foregoing, the Peel Brimley Lien Claimants respectfully request that the
14 Court grant the foregoing Motion for Summary Judgment and rule that no pay-if-paid
15 agreements may be used as a defense to claims against APCO and Camco for non-payment.

16
17 DATED this 28th day of September 2017.

18 **PEEL BRIMLEY LLP**

19
20  #11776
21 **RICHARD L. PEEL, ESQ.**

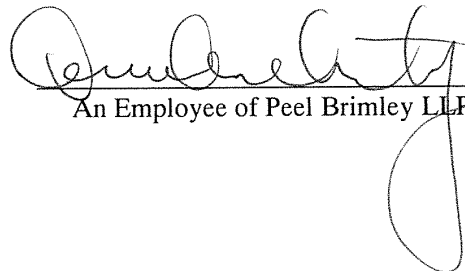
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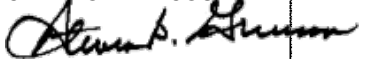
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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of PEEL BRIMLEY LLP and that on this 28th day of September 2017, I caused the above and foregoing document entitled **PEEL BRIMLEY LIEN CLAIMANTS' REPLY TO OPPOSITIONS TO MOTION FOR PARTIAL SUMMARY JUDGMENT PRECLUDING DEFENSES BASED ON PAY-IF-PAID AGREEMENTS** to be served as follows:

- ☐ by placing same to be deposited for mailing in the United States Mail, in a sealed envelope upon which first class postage was prepaid in Las Vegas, Nevada to the party(ies) and/or attorney(s) listed below; and/or
- ☒ to registered parties via Wiznet, the Court's electronic filing system;
- ☐ pursuant to EDCR 7.26, to be sent **via facsimile**;
- ☐ to be hand-delivered; and/or
- ☐ other _____


An Employee of Peel Brimley LLP



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8 **DISTRICT COURT**

9 **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.

17 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: October 5, 2017

Hearing Time: 9:00 a.m.

18
19 **ZITTING BROTHERS CONSTRUCTION, INC.'S REPLY IN SUPPORT OF MOTION FOR**
20 **PARTIAL SUMMARY JUDGMENT AGAINST APCO CONSTRUCTION**

21 Zitting Brothers Construction, Inc. ("Zitting"), a lien claimant, submits this reply in support
22 of its motion for partial summary judgment against APCO Construction ("APCO"). The
23 accompanying memorandum of points and authorities provides the basis for Zitting's reply and is
24 further supported by the attached exhibit, the record of this case and any oral argument that this
25 Court may entertain at the hearing on Zitting's motion.

26 ...

27 ...

28 ...

1 DATED this 28th day of September, 2017

2 WILSON ELSEER MOSKOWITZ EDELMAN &
3 DICKER LLP

4 

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15 **MEMORANDUM OF POINTS AND AUTHORITIES**

16 **I. INTRODUCTION**

17 APCO's opposition attempts to confuse this Court by couching immaterial facts and twisting
18 undisputed facts to make them seem like disputed material facts. In doing so, it raises defenses for
19 the first time in this seven-year-old litigation that contravenes the Nevada Rules of Civil Procedure.
20 Even if this Court considers the improper defenses to Zitting's breach of contract claim, which it
21 should not do, the improper defenses cannot raise a triable issue of fact.

22 Zitting's case against APCO arises solely from APCO's refusal to pay Zitting for work
23 approved and completed on Buildings 8 and 9 of the Project *prior* to APCO's departure from the
24 Project. Zitting's other work on the Project is irrelevant. *APCO's opposition confirms that it has no*
25 *admissible evidence to dispute the approved and completed work.* The unpaid change order work
26 was approved by operation of law. APCO's departure from the Project months before the Project
27 ended means that it cannot have any personal knowledge of whether a third party completed drywall
28 on Buildings 8 and 9 by the time the Project ended, which would necessitate the payment of the
retention amount under APCO's subcontract with Zitting. The alleged pay-if-paid provision of
APCO's subcontract with Zitting is void and therefore cannot justify any refusal to pay. Absent
admissible evidence to raise a triable issue of fact, this Court should grant Zitting's motion for
partial summary judgment.

II. EVIDENTIARY OBJECTIONS TO APCO CONSTRUCTION'S EXHIBITS

Zitting objects to, and moves to strike, the following exhibits submitted in support of APCO's opposition to Zitting's motion for partial summary judgment:

Exhibit	Description of Document	Objection(s)
1 at ¶ 3	Declaration of Mary Jo Allen: "Attached as Exhibit 2 to the Opposition are photographs of buildings 8 and 9 at the Project, and that were taken by APCO during its ordinary course of business."	Zitting objects to paragraph 3 of Mary Jo Allen's declaration to authenticate the photographs of Buildings 8 and 9 of the Project. Statements from lay witnesses lacking personal knowledge are inadmissible. Nev. Rev. Stat. 50.025. APCO's Rule 30(b)(6) witnesses—Brian Benson and Ms. Allen—have testified that Ms. Allen would not have any personal knowledge of the Project's construction. Ms. Allen is APCO's "accounts payable clerk." (Ex. A 33:9-13.) She has testified that her job duties have nothing to do with the construction at the Project. (Ex. B 127:23-128:13.) She has also testified that APCO left the Project on August 21, 2008. (<i>Id.</i> 127:14:18.) Mr. Benson has confirmed in deposition that APCO has no personal knowledge of the work on the Project after APCO left. (<i>See</i> Ex. A 39:18-23.) Ms. Allen's declaration cannot contradict her and Mr. Benson's deposition testimony. <i>See Aldabe v. Adams</i> , 81, Nev. 280, 402 P.2d 34 (1965) (refusing to credit sworn statement made in opposition to summary judgment that was in direct conflict with an earlier statement of the same party); <i>Nutton v. Sunset Station, Inc.</i> , 131 Nev. Adv. Op. 34, 357 P.3d 966, 976–77 (Nev. App. 2015) (citing <i>Aldabe</i> and acknowledging the general rule "that a party cannot defeat summary judgment by contradicting itself in response to an already-pending NRCP 56 motion."); <i>see, also, Kennedy v. Allied Mut. Ins. Co.</i> , 952 F.2d 262, 266 (9th Cir. 1991) (recognizing that under the sham affidavit rule, "a party cannot create an issue of fact by an affidavit contradicting his prior testimony.") There is therefore no foundation for Ms. Allen's statement that APCO took the photographs in Exhibit 2. Paragraph 3 of Mary Jo Allen's declaration is inadmissible.
1 at ¶ 5	Declaration of Mary Jo Allen: "All of Zitting's approved change orders that APCO was responsible for were paid through August 2008."	Zitting objects to Ms. Allen's statement regarding the responsibility of approved change orders because it calls for improper opinion testimony on a legal issue. <i>See Evangelista v. Inlandboatmen's Union of Pac.</i> , 777 F.2d 1390, 1398 n.3 (9th Cir.1985) (holding that an affidavit is "inadmissible because the content of the affidavit contained inadmissible legal conclusions that violated" the federal counterpart to Nev. Rev. Stat. 50.265). APCO's subcontract with Zitting governs the responsibility of the change orders. (<i>See</i> MSJ, Ex. D at APCO00044597.) Interpretation of contract is a question of law. <i>Am. First Fed. Credit Union v. Soro</i> , 131 Nev. Adv. Op. 73, 359 P.3d 105, 106 (2015). This conclusion holds true even if the conclusion is attached

Exhibit	Description of Document	Objection(s)
		to operative facts. <i>See Taddeo v. Am. Invsco Corp.</i> , No. 2:08-CV-01463-KJD, 2011 WL 3957392, at *2 (D. Nev. Sept. 7, 2011) (citing <i>Disability Rights Council v. Wash. Metro. Area</i> , 234 F.R.D. 1, 3 (D.C. Cir. 2006)); <i>Sommerfield v. City of Chicago</i> , 251 F.R.D. 353, 355 (N.D. Ill. 2008) (same); <i>Smith v. Emery</i> , 109 Nev. 737, 742, 856 P.2d 1386, 1389 (1993).
		Zitting further objects to paragraph 5 because there is no foundation for Ms. Allen's statement regarding the approval of the change orders. As discussed above, Ms. Allen does not have any personal knowledge of the Project's construction. Specifically, she has testified that she had nothing to do with "change orders or the processing of the change orders." (Ex. B 183:6-23.) Again, Ms. Allen's declaration cannot contradict her deposition testimony. Therefore, paragraph 5 of Ms. Allen's declaration is inadmissible.
1 at ¶ 7	Declaration of Mary Jo Allen: "APCO was never provided or received Zitting's alleged pay applications dated 6/30/2008 and 11/30/2008 that are collectively attached to the Opposition as Exhibit 4."	Zitting objects to paragraph 7 because there is no foundation for Ms. Allen's statement regarding the APCO's receipt of the pay applications. She has testified in deposition that she "can't say" whether she has ever received those pay applications. (<i>See, e.g.</i> , Ex. B 182:6-21.) Again, Ms. Allen's declaration cannot contradict her deposition testimony. Therefore, paragraph 7 of Ms. Allen's declaration is inadmissible.
1 at ¶ 8	Declaration of Mary Jo Allen: "Zitting still had a remaining part of its scope of work to complete at the Project when APCO stopped work and turned the Project over to Camco in August 2008."	Zitting objects to paragraph 8 because there is no foundation for Ms. Allen's statement regarding Zitting's scope of work at the Project. As discussed above, Ms. Allen does not have any personal knowledge of the Project's construction, including Zitting's work at the Project. Again, Ms. Allen's declaration cannot contradict her deposition testimony. Therefore, paragraph 8 of Ms. Allen's declaration is inadmissible.
2	Photographs of Buildings 8 and 9	Zitting objects to APCO's use of Exhibit 2, (<i>see</i> Opp'n 3:9-4:4:11, 6:6-11, Ex. 2), because there is no evidence sufficient to support a finding that Exhibit 2's contents are what they claim to be. Admissibility of documents requires "authentication or identification ... by evidence or other showing sufficient to support a finding that the matter in question is what its proponent claims." Nev. Rev. Stat. 52.015(1). Such evidence or other showing involves "testimony of a witness [with] personal knowledge that a matter is what it is claimed to be." <i>Id.</i> 52.025. Here, APCO fails to include testimony or a declaration from someone qualified to authenticate Exhibit 2. As discussed above, APCO's Rule 30(b)(6) witnesses have testified that Ms. Allen would not have personal knowledge of the photographs. APCO has also left the Project prior to November 20, 2008 and does not have personal knowledge of the Project's construction since its departure. Exhibit 2 is unauthenticated and therefore

Exhibit	Description of Document	Objection(s)
6	CAMCO's Payment Application	<p>inadmissible.</p> <p>Zitting objects to APCO's use of Exhibit 6, (<i>see</i> Opp'n 3:9-4:4:11, Ex. 6), because there is no evidence sufficient to support a finding that Exhibit 6 and its contents are what they claim to be. Admissibility of documents requires "authentication or identification ... by evidence or other showing sufficient to support a finding that the matter in question is what its proponent claims." Nev. Rev. Stat. 52.015(1). Such evidence or other showing involves "testimony of a witness [with] personal knowledge that a matter is what it is claimed to be." <i>Id.</i> 52.025. Here, APCO fails to include testimony or a declaration authenticating Exhibit 6. For example, there is no identification of who prepared the document in Exhibit 6, where the document was created, when the document was created, how APCO obtained the document, or that the information contained within the document is accurate and true. Exhibit 6 is unauthenticated and therefore inadmissible.</p> <p>Zitting further objects to the use of Exhibit 6 to the extent APCO seeks to establish the truth of the matter asserted in that document, particularly statements concerning Buildings 8 and 9s' drywall completion, (Opp'n 3:9-4:4:11), because such use relies on inadmissible hearsay. The hearsay rule precludes consideration of inadmissible hearsay. <i>See</i> Nev. Rev. Stat. 51.065. And APCO cannot establish any exception to this rule.</p>

III. ARGUMENT

A. APCO's discovery conduct precludes APCO from opposing Zitting's motion on any basis other than arguing the enforceability of the pay-if-paid provision in APCO's subcontract with Zitting.

For the first time in this seven-year long litigation, APCO has raised defenses against payment of the amount owed to Zitting other than the pay-if-paid provision in its subcontract with Zitting. (*See* Opp'n¹ 3:5-6:20, 8:2-21.) Instead, during discovery, APCO swore that the only reason it was not paying Zitting was because of the void pay-if-paid provision in its contract. These new defenses raised in opposition to summary judgment are therefore improper.

Since the outset of the case, Zitting provided APCO with notices of a mechanic's lien with an amount of at least \$750,807.16. (MSJ,² Ex. R at ZBCI001977.) The notice described the lien amount as "progress payment with a retention." (*Id.*) Zitting served two sets of interrogatories—each with a

¹ Zitting cites APCO's opposition to Zitting's motion for partial summary judgment as "Opp'n."

² Zitting cites its motion for partial summary judgment as "MSJ."

1 contention interrogatory requesting all bases for not paying the lien amount:

2 INTERROGATORY NO. 6:

3 State with specificity the reasons that you have not paid Zitting
4 Brothers the sums for the work, material, and/or equipment that Zitting
5 Brothers provided for the Project.

6 (MSJ, Ex. T at 10:14-16.)

7 In its April 29, 2010 verified response to this contention interrogatory, APCO identified the
8 pay-if-paid provision as the only ground for refusing payment to Zitting:

9 RESPONSE TO INTERROGATORY NO. 6:

10 Pursuant to the terms of the Subcontract any payment to Zitting
11 Brothers were specifically conditioned upon APCO's actual receipt of
12 payment from Gemstone for Zitting Brothers' work. Moreover, the
13 Subcontract specifically provides that Zitting Brothers was assuming
14 the same risk that Gemstone may become insolvent and not be paid for
15 its work as APCO assumed in entering into prime contract with
16 Gemstone. Zitting Brothers further agreed that APCO had no
17 obligation to pay Zitting Brothers for any work performed by Zitting
18 Brothers until or unless APCO had actually been paid for such work
19 by Gemstone. To date, APCO had not been paid for the work
20 performed, including the work performed by Zitting Brothers. In fact,
21 due to non-payment, APCO exercised its rights pursuant to NRS
22 Chapter 624 and terminated the prime contract with Gemstone and
23 further terminated the Subcontract with Zitting Brothers. Discovery is
24 ongoing; APCO reserves the right to supplement or amend its response
25 to this Interrogatory as investigation, discovery, disclosure and
26 analysis continues.

27 (Id. at 10:17-11:5.) About seven years later, APCO provided the same verified response to the same
28 contention interrogatory:

ANSWER TO INTERROGATORY NO. 6:

Pursuant to the terms of the Subcontract any payment to Zitting Brothers were specifically conditioned upon APCO's actual receipt of payment from Gemstone for Zitting Brothers' work. Moreover, the Subcontract specifically provides that Zitting Brothers was assuming the same risk that Gemstone may become insolvent and not be paid for its work as APCO assumed in entering into prime contract with Gemstone. Zitting Brothers further agreed that APCO had no obligation to pay Zitting Brothers for any work performed by Zitting Brothers until or unless APCO had actually been paid for such work by Gemstone. To date, APCO had not been paid for the work performed, including the work performed by Zitting Brothers. In fact, due to non-payment, APCO exercised its rights pursuant to NRS Chapter 624 and terminated the prime contract with Gemstone and further terminated the Subcontract with Zitting Brothers. Discovery is ongoing; APCO reserves the right to supplement or amend its response to this Interrogatory as investigation, discovery, disclosure and analysis continues.

1 (Ex. C 9:4-16.) APCO's Rule 30(b)(6) witness subsequently confirmed through deposition testimony
2 that this was the sole ground for refusing payment to Zitting:

3 Q. Let's talk about the lawsuit between APCO and Zitting
4 Brothers. What is APCO's position that it did not need to pay
5 any of the unpaid balance owed to Zitting Brothers under the
6 subcontract?

7 A. Throughout our contract it's stated that if the owners were to
8 fail or go defunct, that as a group we would all -- for lack of a
9 better word, suffer, I guess. Probably not a good word.

10 Q. Let me see if I can make it a little easier to say then. Is it fair to
11 say that the only reason that APCO claimed that it did not need
12 to pay Zitting Brothers was the fact that unless Gemstone pays
13 APCO, Zitting Brothers would not get paid?

14 A. Yes.

15 (MSJ, Ex. B at 40:16-41:4.)

16 If APCO wants to assert other grounds for refusing payment to Zitting, Nev. R. Civ. P.
17 26(e)(2) requires APCO to amend its prior interrogatory responses to include those additional
18 grounds. Failure to do so precludes APCO from asserting any other defenses "at a trial, at a hearing,
19 or on a motion..." Nev. R. Civ. P. 37(c)(1). APCO never amended its prior discovery responses
20 prior to the close of discovery nor explained why it did not do so. During the seven years of
21 litigation, APCO has consistently refused payment based solely on the void pay-if-paid provision.

22 Zitting reasonably relied on APCO's discovery responses to form its litigation plan. For
23 example, Zitting did not depose CAMCO for its knowledge on the status of Buildings 8 and 9's
24 drywall. Zitting also did not depose the subcontractors who completed the drywall. It would be
25 highly prejudicial to Zitting for APCO to now argue other grounds for refusing payment to Zitting.
26 Based on nearly identical facts, a federal court in *Inamed Corp. v. Kuzmak*, 275 F. Supp. 2d 1100
27 (C.D. Cal. 2002), *aff'd*, 64 Fed. Appx. 241 (Fed. Cir. 2003) has precluded this late defense.

28 In *Inamed Corp. v. Kuzmak*, the defendants argued that their agreement with the plaintiff was
unenforceable because an individual lacked authority to enter into the agreement on the defendants'
behalf. *Id.* at 1117. "[A plaintiff] apparently contends that [the] defendants failed seasonably to
amend their prior contention interrogatory responses to reflect the fact that they intended to rely on
[the individual]'s lack of authority, and thus that [the plaintiff] learned of the defense only during

1 [the individual]'s deposition on the day defendants' opposition to this motion was filed." *Id.* at 1117-
2 18. The court applied the federal counterpart to Nev. R. Civ. P. 37 to bar the defendants' late
3 defense:

4 Rule 37(c)(1) provides that a preclusion sanction shall be imposed
5 unless the party failing to disclose the information acted with
6 substantial justification or the failure to disclose was harmless. Here,
7 [the] defendants offer no justification for their belated disclosure of the
8 lack of authority defense, and it is difficult to conceive how they
9 could. There is no suggestion that the [defendants] only recently
10 realized that [the individual] acted without authority, nor, given the
11 nature of the defense, could there be. This is the type of a defense that
12 must have been known to the [defendants] from the moment [the
13 plaintiffs] asserted that the ... agreement gave rise to enforceable
14 rights. Yet only in the last several months have they seen fit to assert it
15 in this proceeding.

16 *Id.* at 1118.

17 Similarly, there can have been no misapprehension that [the]
18 defendants' prior interrogatory answers were incomplete, as they did
19 not apprise [the plaintiffs] that [the defendants] contended [the
20 individual] lacked authority to enter into the ... agreement on [the
21 defendants'] behalf. [The d]efendants knew that [the plaintiff] was
22 unaware they intended to rely on this defense in opposing summary
23 judgment or defending at trial. Yet they took no steps to advise [the
24 plaintiff] of the defense or to supplement their earlier interrogatory
25 answers. Learning of the defense only after it had filed its motion for
26 summary judgment placed [the plaintiff] at a distinct disadvantage and
27 constituted unfair surprise. It was required to digest [the individual's]
28 deposition hurriedly and to respond to the argument only in reply.
Thus, there is no substantial justification and an affirmative showing
of prejudice. Together, they warrant imposing the preclusion sanction
contemplated by Rule 37(c)(1). [citations omitted]

Id. Based on this reasoning, this Court should reject APCO's prejudicial tactic and bar any defenses
other than the defense arising under the pay-if-paid provision. More important to the instant motion,
this Court should ignore any of the red herring arguments and documents presented supporting these
new defenses.

**B. APCO's opposition fails to show how the pay-if-paid provision in its contract with
Zitting is enforceable.**

As Zitting anticipated in its motion, APCO argues the denial of Zitting's motion based on the
pay-if-paid provision. (Opp'n 8:22-14:9, 14:19-24.) Specifically, APCO argues that Zitting did not
provide any analysis "as to what language is purported to be pay-if-paid and how said language is

1 applicable to the cited law and factual relationship between Zitting and APCO.” (*Id.* 13:3-9.)
2 Somehow this makes it “impossible for the Court to conduct ANY analysis on a case-by-case
3 basis....” (*Id.* 13:13-14.) APCO’s argument fails on multiple grounds.

4 First, APCO creates a straw man by arguing that Nevada law does not outright prohibit pay-
5 if-paid provisions. (*See id.* 9:11-12.) Zitting never disputes this. Zitting, in its motion, explains that
6 the “‘pay-if-paid’ provision are valid and ‘enforceable only in [the] limited circumstances’ set forth
7 in Nev. Rev. Stat. 624.624 through 624.626.” (MSJ 8:26-27.) But Zitting further explains in its
8 motion, and below, that the pay-if-paid provision in APCO’s subcontract with Zitting does not meet
9 those limited circumstances. Therefore, APCO’s discussion of the limited enforceability of pay-if-
10 paid provisions does not support the denial of Zitting’s motion.

11 Second, APCO falsely claims that Zitting did not analyze the invalidity of the pay-if-paid
12 provision in its motion. (*See* Opp’n 13:3-20.) Zitting has identified in its motion the pay-if-paid
13 provision from its subcontract with APCO, complete with a pin cite to that provision: “This
14 provision conditions APCO’s payments to Zitting only ‘upon receipt of the actual payments by
15 [APCO] from [Gemstone].’” (MSJ 8:23-24 (citing Ex. D at APCO00044594).) Further, Zitting has
16 joined the other lien claimants’ motion for summary judgment where they also set forth nearly
17 identical pay-if-paid provisions. (Peel Brimley MSJ³ 6:23-7:14.) Zitting has explained in its motion
18 that this specific provision exceeds the permissible limits of pay-if-pay provision allowed under Nev.
19 Rev. Stat. 624.626 because it does not require APCO’s payment within 30 days after a request for
20 payment. (MSJ 9:6-20) The provision illegally limits Zitting’s rights under Chapter 624 of the
21 Nevada Revised Statutes.

22 Nevada law voids APCO’s pay-if-paid provision. Under Nev. Rev. Stat. 624.628(3)(a), any

23 condition, stipulation or provision in an agreement which ... [r]equires
24 a lower-tiered subcontractor to waive any rights provided in [Nev.
25 Rev. Stat.] 624.624 to 624.630, inclusive, or which limits those rights
... is against public policy and is void and unenforceable.

26 Without any explanation, APCO ignores this particular argument raised in Zitting’s motion and
27 therefore concedes that the pay-if-paid is unenforceable. *See* EDCR 2.20(e); *see also* *Whetzel v.*

28 ³ Zitting cites the other lien claimants’ motion for partial summary judgment as “Peel Brimley MSJ.”

1 *Mineta*, 364 F.Supp.2d 1077, 1083 (D. Alaska 2005) (granting summary judgment as to claims
2 within motion which plaintiff did not oppose).

3 Third, APCO's reliance on Nev. Rev. Stat. 624.628(3)(c) does not change this outcome.
4 APCO argues that the parties' intent and interactions somehow rescues the void pay-if-paid
5 provision. (*See* Opp'n 14:19-25.) APCO cites Nev. Rev. Stat. 624.628(3)(c) as support. (*See id.*
6 13:13-20.) However, APCO's reliance is misplaced.

7 It is true that under Nev. Rev. Stat. 624.628(3)(c),

8 [a] condition, stipulation or provision in an agreement which ...
9 [r]equires a lower-tiered subcontractor to waive, release or extinguish
10 a claim or right for damages or an extension of time that the lower-
11 tiered subcontractor may otherwise possess or acquire as a result of
12 delay, acceleration, disruption or an impact event that is unreasonable
under the circumstances, that was not within the contemplation of the
parties at the time the agreement was entered into, or for which the
lower-tiered subcontractor is not responsible, is against public policy
and is void and unenforceable.

13 APCO, however, overlooks the fact that Nev. Rev. Stat. 624.628(3) provides three independent
14 grounds to void a contractual provision between a general contractor and a sub-contractor. Zitting
15 can properly rely on other subsections of Nev. Rev. Stat. 624.628(3)—like subsection (a)—to avoid
16 the pay-if-paid provision. Any inquiry into the parties' intent and interactions are therefore
17 irrelevant.

18 Lastly, contrary to APCO's argument, (Opp'n 13:21-14:7), public policy cannot save a void
19 contractual provision. It is well-settled that when a statute is clear and unambiguous, this court gives
20 effect to the plain and ordinary meaning of the words and does not resort to the rules of construction.
21 *Orion Portfolio Servs. 2 LLC v. Cnty. of Clark*, 126 Nev. ___, ___, 245 P.3d 527, 531 (2010)
22 (citations omitted). In other words, public policy is irrelevant when the statute is clear and
23 unambiguous. *See id.* APCO does not dispute that Nev. Rev. Stat. 624.626(1)(b) is clear and
24 unambiguous on the limitations for a pay-if-paid provision. Nev. Rev. Stat. 624.628(3)(a) is also
25 clear and unambiguous on the invalidity of any pay-if-paid provision that goes beyond the
26 limitations of Nev. Rev. Stat. 624.626(1)(b). Therefore, this Court only needs to apply the statutes as
27 plainly written and void the pay-if-paid provision in APCO's subcontract with Zitting.
28

1 Nevertheless, public policy expressly favors the sub-contractors like Zitting over general
2 contractors like APCO. The invalidation of pay-if-paid provision in a general contractor's contract
3 with its subcontractor arises from a strong public policy favoring "securing payment for labor and
4 material contractors," even at the expense of the general contractors. *See Lehrer McGovern Bovis v.*
5 *Bullock Insulation, Inc.*, 124 Nev. 1102, 1117, 197 P.3d 1032, 1042 (2008). APCO ignores the
6 reality that the Nevada legislature wanted to have general contractor bear the burden of paying its
7 subcontractors if the construction project's owner is unable to pay. Otherwise, the legislature would
8 not have enacted Nev. Rev. Stat. 624.626 and 624.628 to limit pay-if-paid provisions and would
9 have instead had general contractors and subcontractors sue project owners for the amount owed. In
10 fact, general contractors such as APCO that are not required to have a surety bond attest to the
11 Nevada State Contractors Board ("NSCB") that they can pay their obligations up to the limits of the
12 amount imposed by the NSCB. APCO's bond requirement is unlimited.

13 **C. APCO's opposition confirms that it has no admissible evidence to dispute APCO's**
14 **breach of its subcontract with Zitting.**

15 APCO argues that it did not breach its contract with Zitting on four grounds. These grounds
16 are: (1) CAMCO's responsibility over the amount owed to Zitting, (2) Zitting's failure to submit the
17 pay applications at issue, (3) non-approval of the change orders at issue, and (4) completion of the
18 drywall for Buildings 8 and 9. (*See* Opp'n 3:9-6:20, 8:18-21.) Each of those arguments lack
19 evidentiary support and fail as a matter of law.

20 First, CAMCO never had any relationship with Zitting with respect to the Project. In
21 CAMCO's verified responses to Zitting's interrogatories, CAMCO swore that it never entered into a
22 contract with Zitting in connection with the Project and never made any payments to Zitting. (Ex. D
23 2:14-19, 3:16-26.) APCO has not produced any evidence to the contrary.

24 APCO only argues that Zitting worked on the Project after APCO's departure but, as
25 discussed above, has no admissible evidence to substantiate this argument. The only admissible
26 evidence in this case shows that Zitting seeks payment only for work on Buildings 8 and 9—
27 approved and completed before APCO left the Project. (MSJ, Ex. A at ¶ 7.) There is therefore no
28 evidence to show that anyone other than APCO was responsible for payment for those approved and

1 completed work.

2 Second, there is no admissible evidence showing that APCO never received the pay
3 applications at issue at any point in time. As discussed above, APCO's Rule 30(b)(6) witness has
4 testified that she cannot even say that APCO did not receive those applications. (*See, e.g.*, Ex. B
5 182:6-21.) Nevertheless, there is no time limit on when Zitting can submit those pay applications.
6 Zitting has certainly shown that it submitted those applications.

7 APCO's arguments also obviate the need for receipt of payment application. APCO claims
8 that it terminated its contract with the Project owner and the subcontract with Zitting under Chapter
9 624. (*See* Opp'n 6:16-19.) Assuming *arguendo* that the contracts are terminated, ***both the***
10 ***subcontract and Nevada law requires APCO to pay the amount owed for the work completed by***
11 ***Zitting on the Project.*** As discussed in Zitting's motion, section 9.4 of the subcontract expressly
12 requires such payment. (MSJ 9:7-12.) Further, Nev. Rev. Stat. 624.626(6) requires payment of the
13 following:

- 14 (a) [t]he cost of all work, labor, materials, equipment and services
15 furnished by and through [Zitting], including any overhead [Zitting]
16 and [its] lower-tiered subcontractors and suppliers incurred and profit
17 [Zitting] and [its] lower-tiered subcontractors and suppliers earned
18 through the date of termination;
19 (b) [t]he balance of the profit that [Zitting] and [its] lower-tiered
20 subcontractors and suppliers would have received if the agreement had
21 been performed in full;
22 (c) [i]nterest determined pursuant to Nev. Rev. Stat. 624.630; and
23 (d) [t]he reasonable costs, including court costs and arbitration costs,
24 incurred by [Zitting] and [its] lower-tiered subcontractors in collecting
25 the amount due.

26 Third, APCO does not dispute and therefore concedes that it has no admissible evidence
27 showing a denial of Zitting's request for approval of certain change orders. (*See* Opp'n 3:9-6:20,
28 8:18-21.) As discussed in Zitting's motion, Nev. Rev. Stat. 624.626 approves those change orders
after 30 days of the request. (MSJ 7:10-19.) With the statutory approval, Zitting is entitled to
payment for work on those change orders, completed prior to APCO's departure from the Project.
Moreover, the subcontract agreement itself and Nev. Rev. Stat. 624.626(6) makes this point
irrelevant because APCO is required to pay for any work completed once it terminates the contract.

Lastly, there is no admissible evidence that the third party did not complete the drywall on

1 Buildings 8 and 9 by the time the Project ended. As discussed above, APCO has no personal
2 knowledge regarding the completion of the drywalls after it left the Project. It can only rely on
3 argument of counsel and inadmissible hearsay from an unauthenticated pay application. This cannot
4 defeat summary judgment.

5 Absent admissible evidence to the contrary, there is no triable issue of APCO's breach of the
6 subcontract and Zitting's entitlement to the amount owed for the unpaid change orders and the
7 retention amount.

8 **D. APCO failed to provide any admissible evidence to challenge Zitting's damages.**

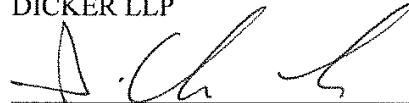
9 APCO has failed to present any admissible evidence to challenge Zitting's damages claim.
10 APCO's opposition only raises questions about the "value" of Zitting's work, and those questions
11 rely on red herring arguments about Zitting's work on the Project. (*E.g.*, Opp'n 5:21-25, 6:12-16.)
12 APCO submits no evidence to rebut Zitting's calculation of damages nor explain why the
13 calculations are incorrect. (*See id.*) Arguments of counsel based on conjecture are not enough to
14 raise a triable issue regarding damages. *See Posadas v. City of Reno*, 109 Nev. 448, 452, 851 P.2d
15 438, 441-42 (1993).

16 **IV. CONCLUSION**

17 For the foregoing reasons, this Court should grant Zitting's motion for summary judgment.

18 DATED this 28th day of September, 2017.

19 WILSON ELSEER MOSKOWITZ EDELMAN &
20 DICKER LLP

21 

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Zitting Brothers Construction, Inc.

1 **CERTIFICATE OF SERVICE**

2 Pursuant to NRCP 5(b), I certify that I am an employee of Wilson Elser Moskowitz Edelman
3 & Dicker LLP, and that on this 28th day of September, 2017, I served a true and correct copy of the
4 foregoing **ZITTING BROTHERS CONSTRUCTION, INC.'S REPLY IN SUPPORT OF**
5 **MOTION FOR PARTIAL SUMMARY JUDGMENT AGAINST APCO CONSTRUCTION**
6 document as follows:

- 7 ☐ by placing same to be deposited for mailing in the United States Mail, in a sealed
8 envelope upon which first class postage was prepaid in Las Vegas, Nevada;
- 9 ☒ via electronic means by operation of the Court's electronic filing system, upon each
10 party in this case who is registered as an electronic case filing user with the Clerk;
- 11 ☐ via hand-delivery to the addressees listed below;
- 12 ☐ via facsimile;
- 13 ☐ by transmitting via email the document listed above to the email address set forth
14 below on this date before 5:00 p.m.

15 **Bennett Tueller Johnson & Deere**

16 **Contact**

Benjamin D. Johnson
Chalise Walsh

17 **Email**

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EXHIBIT A

COPY

In the Matter Of:

APCO CONSTRUCTION vs GEMSTONE DEVELOPMENT WEST

A571228

BRIAN BENSON

June 05, 2017



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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
BRIAN DAVID BENSON
PMK on behalf of APCO Construction
Monday, June 5, 2017
9:07 a.m.
2300 West Sahara Avenue, Suite 770
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June W. Seid, CCR No. 485

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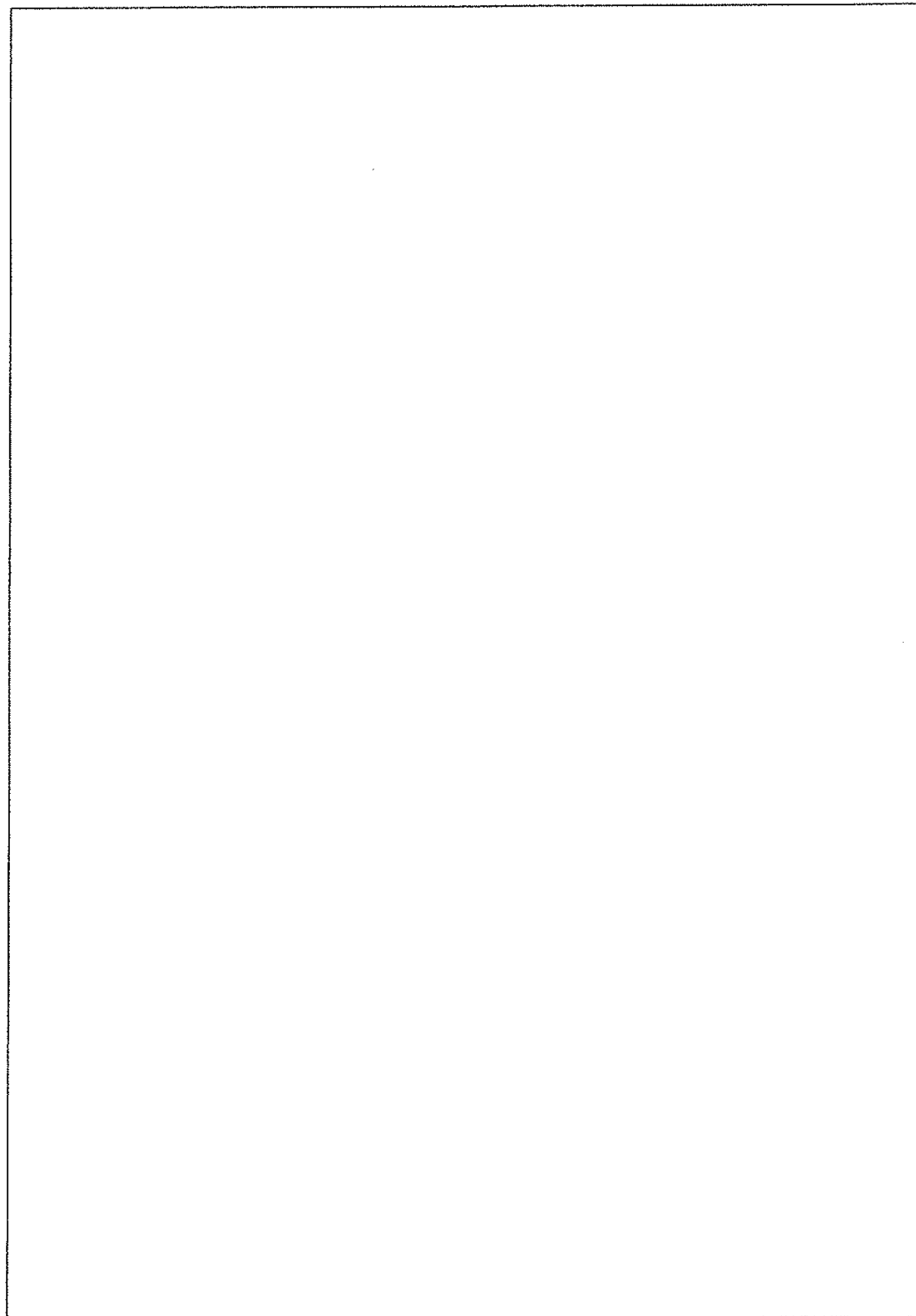
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* * * * *

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Deposition of BRIAN DAVID BENSON

June 5, 2017

(Prior to the commencement of the deposition, all of the parties present agreed to waive the statements by the court reporter pursuant to Rule 30(b)(4) of the Nevada Rules of Civil Procedure.)

Thereupon--

BRIAN DAVID BENSON,
was called as a witness, and having been first duly sworn, was examined and testified as follows:

EXAMINATION

BY MR. LAI:

Q. Good morning. Is it Mr. Benson?

A. Yes, sir.

Q. My name is I-Che Lai, and I'm one the attorneys for Zitting Brothers Construction. For shorthand I'll refer to them as Zitting; is that okay?

A. Sure.

Q. Can you state your name for the record.

A. Brian Daniel Benson.

Q. Is that B-e-n-s-o-n?

A. Yes.

Q. Have you ever had your deposition taken before?



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1 in the 2 line which is Natalie Hammond; do you see
2 that?

3 A. Yes, sir.

4 Q. Who is Natalie Hammond?

5 A. I don't know.

6 Q. Next e-mail below that there's a "From" and
7 the name is Mary Jo Allen; do you see that?

8 A. Yes.

9 Q. Earlier before the deposition started we
10 talked about how Ms. Mary Jo Allen would be the PMK2.
11 Who is Ms. Mary Jo Allen?

12 A. Mary Jo is our accounts payable clerk for our
13 company.

14 Q. So let's talk specifically about Mary Jo
15 Allen's e-mail. Do you see where it says it's sent
16 August 18, 2008?

17 A. Yes, sir.

18 Q. Do you believe this was sent on that date?

19 A. I have no reason not to.

20 Q. Do you see where Mary indicated that the
21 owner is ready to fund the June draw; do you see that?

22 A. Yes, sir.

23 Q. Was this what you were saying earlier about
24 how the owner was ready to make due on the back due
25 payments?

1 A. There was a page 8 with a ratification
2 agreement that was in there.

3 Q. That's a ratification agreement with CAMCO?

4 A. Yes, sir.

5 Q. Do you have any knowledge on whether or not
6 APCO's subcontract with Zitting Brothers regarding the
7 project was assigned to anyone at any time?

8 A. Restate the question.

9 Q. Sure. So earlier you testified that you saw
10 language in the ratification agreement between Zitting
11 Brothers and CAMCO, correct?

12 A. Yes, sir.

13 Q. Now, did you see any documents indicating
14 that APCO's specific contract was assigned to anyone
15 else other than the ratification language that you saw
16 earlier?

17 A. No, sir.

18 Q. Do you have any knowledge whether or not
19 Zitting Brothers continued to work on the project after
20 APCO left?

21 A. Just by the change orders that they had in
22 the binder that they give for deposition that went well
23 into December that were directed to CAMCO.

24 Q. Did APCO communicate with anyone from Zitting
25 Brothers about the project after APCO left the project?



CERTIFICATE OF REPORTER

STATE OF NEVADA)
) ss:
COUNTY OF CLARK)

I, June W. Seid, a Certified Court Reporter
licensed by the State of Nevada, certify: That I
reported the deposition of BRIAN DAVID BENSON, on
Monday, June 5, 2017, at 9:07 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
15th day of June, 2017.

June W. Seid

JUNE W. SEID, CCR NO. 485



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EXHIBIT B

In the Matter Of:

APCO CONSTRUCTION vs GEMSTONE DEVELOPMENT

A571228

MARY JO ALLEN

July 19, 2017

Volume II



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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.

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Las Vegas, Nevada

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Deposition of MARY JO ALLEN

July 19, 2017

(Prior to the commencement of the deposition, all of the parties present agreed to waive the statements by the court reporter pursuant to Rule 30(b)(4) of the Nevada Rules of Civil Procedure.)

Thereupon--

MARY JO ALLEN,
was called as a witness, and having been previously
duly sworn, was examined and testified as follows:

(Exhibit 69 marked
for identification.)

EXAMINATION

BY MR. LAI:

Q. Good morning, my name is I-Che Lai. I'm an attorney with the law firm of Wilson Elser. My firm represents Zitting Brothers in this case.

Could you state your full name for the record.

A. Mary Jo Allen, M-a-r-y J-o A-l-l-e-n.

Q. Ms. Allen, you had your deposition taken yesterday; is that correct?

A. Yes, sir.

Q. Have you consumed any drugs, medication or



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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 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



CERTIFICATE OF REPORTER

STATE OF NEVADA)
) ss:
COUNTY OF CLARK)

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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EXHIBIT C

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Attorneys for APCO Construction

DISTRICT COURT

CLARK COUNTY, NEVADA

APCO CONSTRUCTION, a Nevada
corporation,

Plaintiff,

vs.

GEMSTONE DEVELOPMENT WEST INC.,
A Nevada corporation,

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

AND ALL RELATED MATTERS

**APCO CONSTRUCTION'S ANSWERS TO ZITTING BROTHERS CONSTRUCTION
INC.'S FIRST REQUEST FOR INTERROGATORIES**

In accordance with NRCP 33, APCO Construction (hereinafter referred to as "APCO" or "Plaintiff"), by and through its attorneys, Marquis Aurbach Coffing, hereby answers Zitting Brothers Construction, Inc.'s (hereinafter referred to as "Defendant" or "Zitting Brothers") Request for Interrogatories as follows:

GENERAL RESPONSES AND OBJECTIONS

1. Plaintiff objects to Defendant's First Set of Interrogatories to the extent that they attempt to impose burdens greater than those imposed by Rules 26 and 33 of the Nevada Rules of Civil Procedure and/or to the extent they infringe upon the attorney-client privilege and/or the attorney work-product doctrine.

1 2. Answers will be made on the basis of information and writings available to and
2 located by the Plaintiff upon reasonable investigation of its records. There may be other and
3 further information respecting the Interrogatories propounded by Defendant of which the
4 Plaintiff, despite its reasonable investigation and inquiry, are presently unaware. Thus, the
5 Plaintiff reserves the right to modify or enlarge any answer with such pertinent additional
6 information as it may subsequently discover.

7 3. Many of the Interrogatories set forth herein are extremely, indeed unreasonably,
8 broad; therefore, responding to all generally requested information and the production of all
9 possible documents responsive to the Interrogatory would be an unreasonable burden upon the
10 Plaintiff. Likewise, many of the Interrogatories are compound, cumulative, vague, ambiguous,
11 lack proper foundation and/or seek information that is protected by the attorney-client privilege
12 and/or attorney-work product doctrine or other privileges or exemptions.

13 4. The Plaintiff objects to these Interrogatories to the extent that they impose upon
14 the Plaintiff greater duties than are contemplated under the Nevada Rules of Civil Procedure.

15 5. No incidental or implied admissions will be made nor shall be construed by the
16 answers. The fact that the Plaintiff may respond or object to any Interrogatory, or any part
17 thereof, shall not be deemed an admission that the Plaintiff accepts or admit the existence of any
18 fact set forth therein or assumed by such Interrogatory, or that such answer constitutes
19 admissible evidence. The fact that the Plaintiff responds to part of any Interrogatory is not to be
20 deemed a waiver by the Plaintiff of its objections, including privilege, to any other part of such
21 an Interrogatory.

22 6. Each Response to the Interrogatories will be subject to all objections as to the
23 competence, relevance, materiality, propriety and admissibility, and to any and all other
24 objections on any ground which would require the exclusion from evidence of any statement
25 herein as if any such statements were made by a witness present and testifying at a hearing or
26 trial in this matter, all of which objections and grounds are expressly reserved and may by
27 interposed at such hearings and trial as necessary.

1 7. The Plaintiff hereby adopts, by reference, the above General Objections and
2 incorporate each such objection as if it were fully set forth in each of the responses below.

3 8. Pursuant to Nevada law the Plaintiff reserves the right to amend/supplement its
4 answers herein as additional information becomes known to the Plaintiff through the discovery
5 process, including expert witness reports/opinions.

6 9. Further, the Plaintiffs specifically reserve the right to amend/supplement their
7 Responses herein as additional information becomes known to them through the discovery
8 process, including but not limited to, expert witness reports/opinions. Hence, no answer should
9 be construed to contain all responsive documents available to the Parties that could be utilized at
10 trial, or the current absence of a document should not be construed as any form of admission or
11 fodder for a motion to dismiss or for summary judgment. Last, as additional information
12 becomes available to the Parties, the nature and meaning of various documents previously
13 disclosed by Plaintiffs may further become responsive to any given Interrogatory, and as such,
14 the Plaintiffs reserves the right to amend their answers accordingly.

15 **ANSWER TO INTERROGATORIES**

16 **INTERROGATORY NO. 1:**

17 Identify and state with specificity the facts that you intend to rely upon to refute each
18 cause of action in Zitting Brothers' Complaint.

19 **ANSWER TO INTERROGATORY NO. 1:**

20 Objection. APCO objects to this Interrogatory on the grounds that this Interrogatory is
21 vague, ambiguous, overly broad, unduly burdensome and oppressive because it seeks to force
22 APCO to "Identify and state with specificity the facts that you intend to rely upon to refute each
23 cause of action in Zitting Brothers' Complaint." Broad ranging interrogatories are improper
24 when they essentially subsume every fact in the case or every person having knowledge. See
25 Hiskett v. Wal-Mart Stores, Inc., 180 F.R.D. 403, 404 (D. Kan. 1998). ("Interrogatories should
26 not require the answering party to provide a narrative account of its case."). Parties can hardly
27 know when they have identified "all" facts, persons, and documents with respect to anything –
28 particularly before the close of discovery. "How can the court make enforceable orders with

INTERROGATORY NO. 6:

State with specificity the reasons why you have not paid Zitting Brothers the sums for the work, material, and/or equipment that Zitting Brothers provided for the Project.

ANSWER TO INTERROGATORY NO. 6:

Pursuant to the terms of the Subcontract any payments to Zitting Brothers were specifically conditioned upon APCO's actual receipt of payment from Gemstone for Zitting Brothers' work. Moreover, the Subcontract specifically provides that Zitting Brothers was assuming the same risk that Gemstone may become insolvent and not be paid for its work as APCO assumed in entering into prime contract with Gemstone. Zitting Brothers further agreed that APCO had no obligation to pay Zitting Brothers for any work performed by Zitting Brothers until or unless APCO had actually been paid for such work by Gemstone. To date, APCO has not been paid for the work performed, including the work performed by Zitting Brothers. In fact, due to non-payment, APCO exercised its rights pursuant to NRS Chapter 624 and terminated the prime contract with Gemstone and further terminated the Subcontract with Zitting Brothers. Discovery is ongoing; APCO reserves the right to supplement or amend its response to this Interrogatory as investigation, discovery, disclosure and analysis continues.

INTERROGATORY NO. 7:

State each and every fact that you rely on to support your position that any claim for unjust enrichment against you is invalid.

ANSWER TO INTERROGATORY NO. 7:

Objection. APCO objects to this Interrogatory on the grounds that this Interrogatory is overly broad, unduly burdensome and oppressive because it seeks to force APCO to identify "each and every fact" that APCO relied upon to support its position that any claim for "unjust enrichment against you is invalid." Broad ranging written discovery is improper when it essentially subsumes every fact in the case. See Hiskett v. Wal-Mart Stores, Inc., 180 F.R.D. 403, 404 (D. Kan. 1998); Safeco of Am. V. Rawstron, 181 F.R.D. 441, 447048 (C.D. Cal. 1998); Lawrence v. First Kan. Bank & Trust Co., 169 F.R.D. 657, 660-63 (D. Kan. 1996)(same); Hilt v. SFC, Inc., 170 F.R.D. 182, 186-87 (D. Kan. 1997). APCO further objects to this Interrogatory on

MARQUIS AURBACH COFFING

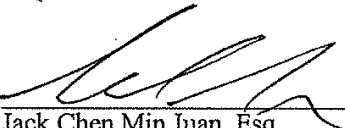
10001 Park Run Drive
Las Vegas, Nevada 89145
(702) 382-0711 FAX: (702) 382-5816

1 (“Interrogatories should not require the answering party to provide a narrative account of its
2 case.”). Parties can hardly know when they have identified “all” facts, persons, and documents
3 with respect to anything — particularly before the close of discovery. “How can the court make
4 enforceable orders with reference to ‘all’ of anything?” Often, the relevance of a particular fact
5 to a particular issue is not known until clarified and put into context by testimony at deposition
6 or trial. Such a question places the responding party in an impossible position. See id.; Safeco of
7 Am. V. Rawstron, 181 F.R.D. 441, 447048 (C.D. Cal. 1998)(finding unreasonable an
8 interrogatory calling for all facts supporting denial of a request for admission); Lawrence v. First
9 Kan. Bank & Trust Co., 169 F.R.D. 657, 660-63 (D. Kan. 1996)(same); Hilt v. SFC, Inc., 170
10 F.R.D. 182, 186-87 (D. Kan. 1997)(finding unduly burdensome an interrogatory seeking to
11 require plaintiff to state ‘each and every fact’ supporting allegations of a complaint).

12 Subject to and without waiving any objections, See Response to Interrogatory No. 1, 6
13 and 7 above, which are incorporated herein by this reference. Also, see documents identified by
14 Bate Stamp No. APC000000001¹⁹ through APC000078992 and APC0104200 through 104234,
15 which APCO has deposited into a depository established by APCO for this litigation matter with
16 Litigation Services and/or are hereby made available for review and copying (at requestor’s
17 expense) at a mutually agreeable time and place. Discovery is ongoing. APCO reserves the right
18 to supplement or amend its Response to this Interrogatory as investigation, discovery, disclosure
19 and analysis continues.

20 Dated this 12th day of May, 2017.

21 MARQUIS AURBACH COFFING

22
23 By 
24 Jack Chen Min Juan, Esq.
25 Nevada Bar No. 6367
26 Cody S. Mounteer, Esq.
27 Nevada Bar No. 11220
28 10001 Park Run Drive
Las Vegas, Nevada 89145
Attorneys for APCO ConstructionAPCO

¹⁹ See Footnote No. 1.

EXHIBIT D

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701 N. Green Valley Parkway, Suite 110
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04/30/2010 03:01:56 PM

1 RSPN
2 Steven L. Morris, Esq.
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11 (702) 933-0777
12 Attorneys for
13 Camco Pacific Construction Company, Inc. and
14 Fidelity and Deposit Company of Maryland

DISTRICT COURT
CLARK COUNTY, NEVADA

15 In re:	Case No: A571228
16 Manhattan West Mechanics' Lien Litigation	Dept. No: XXV
17 And All Consolidated Cases	

**CAMCO'S RESPONSES TO ZITTING BROTHERS CONSTRUCTION, INC.'S
INTERROGATORIES**

18 CAMCO PACIFIC CONSTRUCTION COMPANY, INC. (hereinafter "Camco") by and
19 through its attorneys, Steven L. Morris, Esq. Zachariah B., Parry, Esq. of the law firm of
20 Woodbury, Morris & Brown responds to ZITTING BROTHERS CONSTRUCTION, INC.'S
21 INTERROGATORIES as follows:

GENERAL OBJECTIONS

22 Camco generally objects to Defendant's Interrogatories on the grounds that the Requests
23 are burdensome, oppressive, compound, vague, and ambiguous. To the extent that any
24 Interrogatory seeks information which is protected by the attorney-client privilege and/or
25 attorney work-product doctrine, Camco declines to provide such information. To the extent that
26 any Interrogatory seeks constitutionally or statutorily protected, proprietary or confidential
27 information, Camco also declines to provide such information. To the extent that any
28 Interrogatory seeks information that may constitute an invasion of a right of privacy based upon
any statutory or common-law right of privacy, Camco declines to produce any such information
without an appropriate protective order.

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1 Camco has not fully completed its investigation of the facts relating to this case, has not
2 completed discovery in this action, and has not completed preparation for trial. Therefore,
3 Camco's responses are based on Camco's knowledge, information and belief at this time. It is
4 anticipated that further discovery, independent investigation, legal research and analysis will
5 supply additional facts and documents, add meaning to known facts or documents, as well as
6 establish entirely new factual conclusion and legal contentions, all of which may lead to
7 substantial additions to, changes in, and variations from the facts herein set forth. The
8 responses contained herein are made in a good faith effort to supply as much factual
9 information, and as much specification of legal contentions as are presently known, but should
10 in no way be to the prejudice of Camco in relation to further discovery, research or analysis.

11 INTERROGATORY NO. 1: Describe in detail what your role was for the Project.

12 RESPONSE:

13 Please see letter dated April 28, 2009, which is labeled CAMCO-MW 00029-00037.

14 INTERROGATORY NO. 2: State the amount of any payments you or Gemstone made
15 to Zitting Brothers, the date and manner in which each payment was made, and at what stage of
16 completion the Project was in at the time of each payment.

17 RESPONSE:

18 Camco did not make any payments to Zitting Brothers. For information on payments
19 made by Gemstone, please see CAMCO-MW 00045 - 01288.

20 INTERROGATORY NO. 3: State the amount of any payments to you by Gemstone,
21 the date and manner in which each payment was made, and at what stage of completion the
22 Project was in at the time of each payment.

23 RESPONSE:

24 Please see CAMCO-MW 00045 - 01288.

25 INTERROGATORY NO. 4: State whether any amounts paid to you by Gemstone
26 included amounts for work completed by Zitting Brothers.

1 **RESPONSE:**

2 No payments made to Camco by Gemstone included amounts for work completed by
3 Zitting Brothers or any other subcontractor.

4 **INTERROGATORY NO. 5:** Do you contend that the value of the unpaid work,
5 material, and/or equipment furnished or supplied by Zitting Brother is less than the amount set
6 forth in Zitting Borthers' mechanic's lien? If so, please state:

- 7 a) the basis for your contention including all facts, witness, or documents you rely
8 on in support of your contention;
9 b) how much you contend the work and equipment provided by Zitting Brothers is
10 actually valued at;
11 c) the manner in which you calculated the value of the work, materials, and/or
12 equipment provided by Zitting Brothers;

13 **RESPONSE:**

14 Camco is without sufficient knowledge or information to respond to this request.
15 Discovery is ongoing, and Camco reserves the right to supplement this response.

16 **INTERROGATORY NO. 6:** Describe in detail your involvement with Zitting Brothers
17 at the Project.

18 **RESPONSE:**

19 To the extent that Camco was involved with Zitting Brothers at all at the Project, it
20 would have been limited to coordinating the scheduling of the subcontractors.

21 **INTERROGATORY NO. 7:** If you contend that a legally enforcement agreement was
22 created between Zitting Brother and Camco Pacific Construction Company, Inc ("Camco"),
23 please identify the nature and scope of the agreement, and list each and every fact you rely on to
24 support your conclusion.

25 **RESPONSE:**

26 Camco did not have an agreement with Zitting Brothers.

27 **INTERROGATORY NO. 8:** If you contend that the legal agreement identified in
28

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1 Contractor.

2 INTERROGATORY NO. 25: Identify the date you started work, the time frame during
3 which you provided work, and describe the work that you performed at the Project.

4 RESPONSE:

5 August 15, 2008 - December 15, 2008. For a description of Camco's work, please see
6 documents labeled CAMCO-MW 00029 - 00037.

7 VERIFICATION

8 DATED this 30th day of April 2010.

9
10 DAVID E. PARRY

11 Submitted by:

12 WOODBURY, MORRIS & BROWN

13 /s/ Zachariah B. Parry

14 Steven L. Morris, Esq.

15 Nevada Bar No. 7454

16 Zachariah B. Parry, Esq.

17 Nevada Bar No. 11677

18 701 N. Green Valley Parkway, Suite 110

19 Henderson, Nevada 89074

20 (702) 933-0777

21 CERTIFICATE OF MAILING

22 I hereby certify that on the 30th day of April 2010, I served a true and correct copy of
23 Camco's Responses to Zitting Brothers' Interrogatories on all parties registered to receive
24 electronic service for the above-captioned case by serving the same via Wiznet.

25 /s/ Zachariah B. Parry

26 Employee of WOODBURY, MORRIS & BROWN

IN THE SUPREME COURT OF THE STATE OF NEVADA

APCO CONSTRUCTION, INC., A
NEVADA CORPORATION,

Appellant,

vs.

ZITTING BROTHERS CONSTRUCTION,
INC.,

Respondent.

Electronically Filed
Apr 15 2019 02:46 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

Case No.: 75197
Appeal from the Eighth Judicial
District Court, the Honorable Mark
Denton Presiding

APPELLANT'S APPENDIX
(Volume 10, Bates Nos. 2167–2413)

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Attorneys for Appellant, APCO Construction, Inc.

MAC:05161-019 3698575_1

INDEX TO APPELLANT'S APPENDIX

<u>Date</u>	<u>DOCUMENT DESCRIPTION</u>	<u>Vol.</u>	<u>Bates Nos.</u>
10/24/2008	Atlas Construction Supply, Inc.'s Complaint	1	AA 1–16
10/30/2008	Ahern Rentals, Inc.'s Complaint	1	AA 17–30
11/19/2008	Platte River Insurance Company's Answer and Crossclaim	1	AA 31–45
12/08/2008	APCO Construction's First Amended Complaint	1	AA 46–63
02/06/2009	Cabinetec's Statement and Complaint	1	AA 64–73
02/23/2009	Uintah's Complaint	1	AA 74–80
02/24/2009	Tri-City Drywall, Inc.'s Statement and Complaint	1	AA 81–88
03/02/2009	Noorda Sheet Metal Company's Statement and Complaint	1	AA 89–165
03/06/2009	Camco Pacific Construction Company's Answer and Counterclaim	1	AA 166–172
03/10/2009	The Masonry Group Nevada's Complaint	1	AA 173–189
03/11/2009	PCI Group, LLC Complaint	1	AA 190–196
03/12/2009	APCO Construction's Answer to Steel Structures, Inc, and Nevada Prefab Engineers, Inc.'s Amended Statement and Crossclaim	1	AA 197–216
03/12/2009	Cell-Crete Fireproofing of Nevada, Inc.'s Statement and Complaint	1	AA 217–233
03/20/2009	Steel Structures, Inc. and Nevada Prefab Engineers, Inc.'s Second Amended Statement and Complaint	1	AA 234–243
03/24/2009	Insulpro Projects, Inc.'s Statement	2	AA 244–264
03/26/2009	APCO Construction's Statement and Complaint	2	AA 265–278

<u>Date</u>	<u>DOCUMENT DESCRIPTION</u>	<u>Vol.</u>	<u>Bates Nos.</u>
03/27/2009	Dave Peterson Framing, Inc.'s Statement, Complaint, and Third-Party Complaint	2	AA 279–327
03/27/2009	E&E Fire Protection, LLC's Statement, Complaint, and Third-Party Complaint	2	AA 328–371
03/27/2009	Professional Doors and Millworks, LLC's Statement, Complaint, and Third-Party Complaint	2	AA 372–483
04/03/2009	Hydropressure Cleaning, Inc.'s Statement and Complaint	3	AA 484–498
04/03/2009	Ready Mix, Inc.'s Statement and First Amended Complaint	3	AA 499–510
04/06/2009	EZA P.C. dba Oz Architecture of Nevada, Inc.'s Statement	3	AA 511–514
04/07/2012	Accuracy Glass & Mirror Company, Inc.'s Complaint	3	AA 515–550
04/08/2009	John Deere Landscapes, Inc.'s Statement, Complaint, and Third-Party Complaint	3	AA 551–558
04/14/2009	Helix Electric of Nevada, LLC's Statement and Third-Party Complaint	3	AA 559–595
04/17/2009	Republic Crane Service, LLC's Complaint	3	AA 596–607
04/24/2019	Bruin Painting's Statement and Third-Party Complaint	3	AA 608–641
04/24/2009	HD Supply Waterworks, LP's Statement and Third-Party Complaint	3	AA 642–680
04/24/2009	The Pressure Grout Company's Statement and Complaint	3	AA 681–689
04/27/2009	Heinaman Contract Glazing's Complaint	3	AA 690–724
04/28/2009	WRG Design, Inc.'s Statement and Third-Party Complaint	4	AA 725–761

<u>Date</u>	<u>DOCUMENT DESCRIPTION</u>	<u>Vol.</u>	<u>Bates Nos.</u>
04/29/2009	APCO Construction's Answer to Cell-Crete Fireproofing of Nevada, Inc.'s Statement and Complaint and Crossclaim	4	AA 762–784
04/29/2009	Executive Plastering, Inc.'s Statement	4	AA 785–792
04/30/2009	Zitting Brothers Construction, Inc.'s Complaint Re: Foreclosure	4	AA 793–810
05/05/2009	Camco Pacific Construction Company, Inc. and Fidelity and Deposit Company of Maryland's Answer to Noorda Sheet Metal Company's Third-Party Complaint and Camco Pacific Construction's Counterclaim	4	AA 811–828
05/05/2009	Camco Pacific Construction Company, Inc. and Fidelity and Deposit Company of Maryland's Answer to Professional Doors and Millworks, LLC's Third-Party Complaint and Camco Pacific Construction's Counterclaim	4	AA 829–846
05/05/2009	Camco Pacific Construction Company, Inc. and Fidelity and Deposit Company of Maryland's Answer to E&E Fire Protection, LLC's Third-Party Complaint and Camco Pacific Construction's Counterclaim	4	AA 847–864
05/05/2009	Camco Pacific Construction Company, Inc. and Fidelity and Deposit Company of Maryland's Answer to The Masonry Group Nevada, Inc.'s Complaint and Camco Pacific Construction's Counterclaim	4	AA 865–882

<u>Date</u>	<u>DOCUMENT DESCRIPTION</u>	<u>Vol.</u>	<u>Bates Nos.</u>
05/05/2009	Camco Pacific Construction Company, Inc. and Fidelity and Deposit Company of Maryland's Answer to Cabinetec, Inc.'s Complaint and Camco Pacific Construction's Counterclaim	4	AA 883–899
05/05/2009	Graybar Electric Company, Inc.'s Complaint	4	AA 900–905
05/05/2009	Olson Precast Company's Complaint	4	AA 906–911
05/13/2009	Fast Glass, Inc.'s Statement	4	AA 912–957
05/14/2009	HD Supply Construction Supply, LP dba White Cap Construction Supply, Inc.'s Complaint	5	AA 958–981
05/15/2009	Camco Pacific Construction Company, Inc. and Fidelity and Deposit Company of Maryland's Answer to Insulpro Projects, Inc.'s Complaint and Camco Pacific Construction's Counterclaim	5	AA 982–999
05/19/2009	Terra South Corporation dba Mad Dog Heavy Equipment's Statement and Third-Party Complaint	5	AA 1000–1008
05/20/2009	Ahern Rental, Inc.'s Statement and Complaint	5	AA 1009–1018
05/20/2009	Southwest Air Conditioning, Inc.'s Statement	5	AA 1019–1024
05/27/2009	Ferguson Fire & Fabrication, Inc.'s Statement and Complaint	5	AA 1025–1033
05/27/2009	Republic Crane Service, LLC's Amended Statement	5	AA 1034–1044
05/29/2009	Pape Material Handling dba Pape Rents' Statement and Complaint	5	AA 1045–1057
05/29/2009	Selectbuild Nevada, Inc.'s Statement	5	AA 1058–1070

<u>Date</u>	<u>DOCUMENT DESCRIPTION</u>	<u>Vol.</u>	<u>Bates Nos.</u>
06/01/2009	Buchele, Inc.'s Statement	5	AA 1071–1082
06/01/2009	Renaissance Pools & Spas, Inc.'s Statement	5	AA 1083–1094
06/03/2009	Executive Plastering, Inc.'s First Amended Complaint	5	AA 1095–1105
06/10/2009	APCO Construction's Answer to Zitting Brothers Construction, Inc.'s Complaint	5	AA 1106–1117
06/12/2009	Supply Network dba Viking Supplynet's Statement and Complaint	5	AA 1118–1123
06/15/2009	Las Vegas Pipeline, LLC's Statement and Complaint	5	AA 1124–1130
06/16/2009	Creative Home Theatre, LLC's Statement	5	AA 1131–1138
06/23/2009	Inquipco's Statement and Complaint	5	AA 1139–1146
06/24/2009	Accuracy Glass & Mirror's First Amended Complaint	5	AA 1147–1161
06/24/2009	Bruin Painting's Amended Statement and Third-Party Complaint	5	AA 1162–1173
06/24/2009	HD Supply Waterworks' Amended Statement and Third-Party Complaint	5	AA 1174–1190
06/24/2009	Heinaman Contract Glazing's Amended Statement and Third-Party Complaint	5	AA 1191–1202
06/24/2009	Helix Electric of Nevada, LLC dba Helix Electric's Amended Statement and Third-Party Complaint	6	AA 1203–1217
06/24/2009	WRG Design, Inc.'s Amended Statement and Third-Party Complaint	6	AA 1218–1233
06/23/2009	Ahern Rentals, Inc.'s First Amended Statement and Complaint	6	AA 1234–1255
07/07/2009	The Masonry Group Nevada, Inc.'s Statement and Complaint	6	AA 1256–1273

<u>Date</u>	<u>DOCUMENT DESCRIPTION</u>	<u>Vol.</u>	<u>Bates Nos.</u>
07/09/2009	Northstar Concrete, Inc.'s Statement and Complaint	6	AA 1274–1288
07/10/2009	Camco Pacific Construction Company, Inc.'s Statement and Complaint	6	AA 1289–1310
7/22/2009	Granite Construction Company's Statement and Complaint	6	AA 1311–1318
08/10/2009	HA Fabricators, Inc.'s Complaint	6	AA 1319–1327
08/18/2009	Club Vista Financial Services, LLC and Tharaldson Motels II, Inc.'s Answer to Camco Pacific Construction Company, Inc.'s Statement and Complaint and Counterclaim	6	AA 1328–1416
08/28/2009	Custom Select Billing, Inc.'s Statement and Complaint	6	AA 1417–1443
09/09/2009	Camco Pacific Construction Company, Inc.'s Answer to Las Vegas Pipeline, LLC's Statement and Complaint and Camco Pacific Construction Company, Inc.'s Counterclaim	7	AA 1444–1460
09/10/2009	Camco Pacific Construction Company, Inc. and Fidelity and Deposit Company of Maryland's Answer to Dave Peterson Framing, Inc.'s Statement and Complaint and Camco Pacific Construction Company, Inc.'s Counterclaim	7	AA 1461–1484
09/10/2009	Camco Pacific Construction Company, Inc. and Fidelity and Deposit Company of Maryland's Answer to Northstar Concrete, Inc.'s Statement and Complaint and Camco Pacific Construction Company, Inc.'s Counterclaim	7	AA 1485–1505

<u>Date</u>	<u>DOCUMENT DESCRIPTION</u>	<u>Vol.</u>	<u>Bates Nos.</u>
09/10/2009	Camco Pacific Construction Company, Inc. and Fidelity and Deposit Company of Maryland's Answer to Tri-City Drywall, Inc.'s Statement and Complaint and Camco Pacific Construction Company, Inc.'s Counterclaim	7	AA 1506–1526
09/11/2009	Camco Pacific Construction Company, Inc. and Fidelity and Deposit Company of Maryland's Answer to Accuracy Glass & Mirror Company, Inc.'s Complaint and Camco Pacific Construction Company, Inc.'s Counterclaim	7	AA 1527–1545
09/11/2009	Camco Pacific Construction Company, Inc.'s Answer to Bruin Painting Corporation's Statement and Third-Party Complaint and Camco Pacific Construction Company, Inc.'s Counterclaim	7	AA 1546–1564
09/11/2009	Camco Pacific Construction Company, Inc. and Fidelity and Deposit Company of Maryland's Answer to Heinaman Contract Glazing's Statement and Third-Party Complaint and Camco Pacific Construction Company, Inc.'s Counterclaim	7	AA 1565–1584
09/11/2009	Camco Pacific Construction Company, Inc. and Fidelity and Deposit Company of Maryland's Answer to WRG Design, Inc.'s Statement and Third-Party Complaint and Camco Pacific Construction Company, Inc.'s Counterclaim	7	AA 1585–1604

<u>Date</u>	<u>DOCUMENT DESCRIPTION</u>	<u>Vol.</u>	<u>Bates Nos.</u>
09/25/2009	Camco Pacific Construction Company, Inc. and Fidelity and Deposit Company of Maryland's Answer to Nevada Prefab Engineers, Inc.'s Statement and Complaint and Camco Pacific Construction Company, Inc.'s Counterclaim	7	AA 1605–1622
09/25/2009	Camco Pacific Construction Company, Inc. and Fidelity and Deposit Company of Maryland's Answer to Steel Structures, Inc.'s Second Amended Statement and Complaint and Camco Pacific Construction Company, Inc.'s Counterclaim	7	AA 1623–1642
09/30/2009	Camco Pacific Construction Company, Inc. Answer to Executive Plastering, Inc.'s First Amended Complaint and Camco Pacific Construction Company, Inc.'s Counterclaim	7	AA 1643–1650
10/19/2009	APCO Construction's Answer to HA Fabricators, Inc.'s Answer, Counterclaim, and Third-Party Complaint	7	AA 1651–1673
11/13/2009	Stipulation and Order for Dismissal of Steel Structures, Inc.'s Complaint Against Camco Pacific Construction, and Camco's Counterclaim Against Steel Structures, Inc.	7	AA 1674–1675
12/23/2009	Harsco Corporation's Second Amended Complaint	7	AA 1676–1684
01/22/2010	United Subcontractors, Inc. dba Skyline Insulation's Complaint	7	AA 1685–1690
04/05/2010	Interstate Plumbing & Air Conditioning, LLC's Statement and Complaint	8	AA 1691–1721

<u>Date</u>	<u>DOCUMENT DESCRIPTION</u>	<u>Vol.</u>	<u>Bates Nos.</u>
04/13/2010	Camco Pacific Construction Company, Inc. and Fidelity and Deposit Company of Maryland Answer to Cactus Rose's Statement and Complaint and Camco Pacific Construction Company, Inc.'s Counterclaim	8	AA 1722–1738
07/01/2010	Stipulation and Order for Dismissal with Prejudice of Claims Asserted by Select Build Nevada, Inc. Against APCO Construction	8	AA 1739–1741
05/23/2013	Notice of Entry of Order Approving Sale of Property	8	AA 1742–1808
04/14/2016	Notice of Entry of Order Releasing Sale Proceeds from Court-Controlled Escrow Account	8	AA 1809–1818
10/07/2016	Special Master Report Regarding Remaining Parties to the Litigation, Special Master Recommendation and District Court Order Amending Case Agenda	8	AA 1819–1822
05/27/2017	Notice of Entry of Order	8	AA 1823–1830
07/31/2017	Zitting Brothers Construction, Inc.'s Motion for Partial Summary Judgment Against APCO Construction	8 9 10	AA 1831–1916 AA 1917–2166 AA 2167–2198
08/02/2017	Peel Brimley Lien Claimants' Motion for Partial Summary Judgment Precluding Defenses Based on Pay-If-Paid Agreements and Ex Pate Application for Order Shortening Time	10	AA 2199–2263
08/21/2017	APCO Construction's Opposition to Zitting Brothers Construction Inc.'s Partial Motion for Summary Judgment	10	AA 2264–2329

<u>Date</u>	<u>DOCUMENT DESCRIPTION</u>	<u>Vol.</u>	<u>Bates Nos.</u>
08/21/2017	APCO's opposition to Peel Brimley MSJ	10	AA 2330–2349
09/20/2017	Order Granting Plaintiff's Motion to Dismiss	10	AA 2350–2351
09/28/2017	Peel Brimley Lien Claimants' Reply to Oppositions to Motion for Partial Summary Judgment Precluding Defenses Based On Pay-If-Paid Agreements	10	AA 2352–2357
09/29/2017	Zitting Brothers Construction, Inc.'s Reply In Support of Motion for Partial Summary Judgment Against APCO Construction	10	AA 2358–2413
10/05/2017	Recorder's Transcript of Hearing RE: All Pending Motions	11	AA 2414–2433
11/06/2017	Zitting Brothers Construction, Inc.'s Motion in Limine to Limit the Defenses of APCO Construction to the Enforceability of Pay-If-Paid Provision	11	AA 2434–2627
11/06/2017	APCO's Supplemental Briefing in Opposition to Zitting Brothers Construction, Inc.'s Motion for Partial Summary Judgment Against APCO Construction. Inc.	12	AA 2628–2789
11/14/2017	APCO Construction's Opposition to Zitting Brothers Construction, Inc.'s Motion in Limine to Limit the Defenses of APCO Construction to the Enforceability of a Pay-If-Paid Provision	12 13 14	AA 2790–2851 AA 2852–3053 AA 3054–3108
11/16/2017	Zitting Brothers Construction, Inc.'s Reply in Support of Motion in Limine to Limit the Defenses of APCO Construction ("APCO") to the Enforceability of Pay-If-Pay Provision	14	AA 3109–3160

<u>Date</u>	<u>DOCUMENT DESCRIPTION</u>	<u>Vol.</u>	<u>Bates Nos.</u>
11/16/2017	Recorder's Transcript of Hearing RE: All Pending Motions	14	AA 3161–3176
11/16/2017	Zitting Brothers Construction, Inc.'s Response to APCO Construction's Supplemental Opposition to Zitting Brothers Construction, Inc.'s Motion for Partial Summary Judgment	14	AA 3177–3234
11/27/2017	Decision	14	AA 3235–3237
12/05/2017	Court Minutes Granting Zitting MIL	14	AA 3238
12/29/2017	Findings of Fact Conclusions of Law, and Granting Zitting Brothers Construction, Inc.'s Motion for Partial Summary Judgment Against APCO Construction	14	AA 3239–3249
01/02/2018	Order Granting Peel Brimley Lien Claimants' Motion for Partial Summary Judgment Precluding Defenses Based on Pay-If-Paid Agreements	14	AA 3250–3255
01/02/2018	Notice of Entry of Order Granting Zitting Brothers Construction, Inc.'s MSJ	14	AA 3256–3268
01/03/2018	Notice of Entry of Order Granting Peel Brimley MSJ	14	AA 3269–3280
01/04/2018	Motion for Reconsideration of Court's Order Granting Peel Brimley Lien Claimants' Partial Motion for Summary Judgment to Preclude Defenses Based on Pay If Paid Provisions on an Order Shortening Time	15	AA 3281–3517
		16	AA 3518–3633

<u>Date</u>	<u>DOCUMENT DESCRIPTION</u>	<u>Vol.</u>	<u>Bates Nos.</u>
01/08/2018	Motion for Reconsideration of Court's Order Granting Zitting Brothers Construction, Inc.'s Partial Motion for Summary Judgment and Ex Parte Application for Order Shortening Time and to Exceed Page Limit	16 17 18 19	AA 3634–3763 AA 3764–4013 AA 4014–4253 AA 4254–4344
01/09/2018	Plaintiff in Intervention, National Wood Products, Inc.'s Opposition to APCO Construction's Motion for Reconsideration of the Court's Order Granting Peel Brimley Lien Claimants' Motion for Partial Summary Judgment to Preclude Defenses of Pay if Paid Provisions	19	AA 4345–4350
01/09/2018	Peel Brimley Lien Claimants' Opposition to APCO Construction's Motion for Reconsideration of Order Granting Partial Summary Judgment Precluding Defenses Based on Pay-If-Paid Agreements	19	AA 4351–4359
01/10/2018	APCO's Reply in Support of Motion for Reconsideration of Court's Order Granting Peel Brimley Lien Claimants' Partial Motion for Summary Judgment to Preclude Defenses Based on Pay-If-Paid Provisions on an Order Shortening Time	19	AA 4360–4372
01/10/2018	Zitting Brothers Construction, Inc. Opposition to APCO Construction, Inc.'s Motion for Reconsideration of Court's Order Granting Zitting Brothers Construction's Partial Motion for Summary Judgment	19	AA 4373–4445
01/11/2018	Recorder's Transcript of Hearing RE: All Pending Motions	19	AA 4446–4466

<u>Date</u>	<u>DOCUMENT DESCRIPTION</u>	<u>Vol.</u>	<u>Bates Nos.</u>
01/19/2018	Order Denying APCO Construction's Motion for Reconsideration of Court's Order Granting Partial Summary Judgment Precluding Defenses Based on Pay-If-Paid Agreements	19	AA 4467–4468
01/19/2018	Notice of Entry of Order Denying APCO's motion for reconsideration of Peel Brimley Order	19	AA 4469–4473
01/25/2018	Order Denying APCO Construction's Motion for Reconsideration of Order Granting Zitting Brothers Construction, Inc.'s Partial Motion for Summary Judgment	19	AA 4474–4475
01/29/2018	Memorandum in Support of APCO Construction, Inc.'s Payment of Attorney's Fees, Costs, and Interest to Zitting Brothers Construction, Inc.	19 20	AA 4476–4487 AA 4488–4689
01/31/2018	Notice of Entry of Order Denying APCO Construction, Inc.'s Motion for Reconsideration of Court's Order Granting Zitting Brothers Construction, Inc.'s Partial Summary Judgment	20	AA 4690–4693
02/05/2018	2018 Stipulation and Order to Dismiss Third Party Complaint of Interstate Plumbing & Air Conditioning, LLC Against APCO Construction, Inc. with Prejudice	20	AA 4694–4695
02/16/2018	Notice of Appeal	20	AA 4696–4714

<u>Date</u>	<u>DOCUMENT DESCRIPTION</u>	<u>Vol.</u>	<u>Bates Nos.</u>
02/16/2018	APCO Construction, Inc.'s Opposition to Zitting Brothers, Inc.'s Memorandum in Support of APCO Construction Inc.'s Payment of Attorneys' Fees, Costs and Interest to Zitting Construction Brothers, Inc.	20 21	AA 4715–4726 4740
02/26/2018	Zitting Brothers Construction Inc.'s Reply in Support of its Memorandum in Support of APCO Construction, Inc.'s Payment of Attorneys' Fees, Costs, and Interest	21	AA 4741–4751
02/27/2018	Notice of Appeal	21 22 23	AA 4752–4976 AA 4977–5226 AA 5227–5288
05/04/2018	Order Regarding Plaintiff's Motion to Stay Pending Entry of Final Judgment Pursuant to NRCP 62(B) and 62(H) on Order Shortening Time	23	AA 5289–5290
05/08/2018	Order Determining Amount of Zitting Brothers Construction, Inc.'s Attorney's Fees, Costs, and Prejudgment Interests	23	AA 5291–5293
05/11/2018	Notice of Entry of Order Determining Amount of Zitting Brothers Construction, Inc.'s Attorney's Fees, Costs, and Prejudgment Interest	23	AA 5294–5298
05/23/2018	Judgment in Favor of Zitting Brothers Construction, Inc.	23	AA 5299–5300
05/24/2018	Notice of Entry of Judgment in Favor of Zitting Brothers Construction, Inc.	23	AA 5301–5304
06/08/2018	Amended Notice of Appeal	23 24 25	AA 5305–5476 AA 5477–5724 AA 5725–5871

<u>Date</u>	<u>DOCUMENT DESCRIPTION</u>	<u>Vol.</u>	<u>Bates Nos.</u>
06/08/2018	Plaintiff's Motion for 54(b) Certification and for Stay Pending Appeal on Order Shortening Time	25 26	AA 5872–5973 AA 5974–6038
06/19/2018	Zitting Brothers' Construction, Inc.'s Limited Opposition to APCO Construction, Inc.'s Motion for 54(b) Certification and for Stay Pending Appeal on Order Shortening Time	26	AA 6039–6046
06/26/2018	Recorder's Transcript of Hearing RE: Plaintiff's Motion for 54(b) Certification and for Stay Pending Appeal on Order Shortening Time	26	AA 6047–6051
07/30/2018	Order Granting Motion for 54(b) Certification and for Stay Pending Appeal	26	AA 6052–6054
07/31/2018	Notice of Entry of Order	26	AA 6055–6063
08/08/2018	Second Amended Notice of Appeal	26 27 28 29	AA 6064–6180 AA 6181–6430 AA 6431–6679 AA 6680–6854
	Docket of District Court Case No. 08A571228	30	AA 6855–6941

EXHIBIT U

ORIGINAL

1 RESP

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12 Attorneys for Plaintiff

13 Zitting Brothers Construction, Inc.

ELECTRONICALLY SERVED

04/09/2010 03:45:36 PM

8 DISTRICT COURT

9 CLARK COUNTY, NEVADA

10 ZITTING BROTHERS CONSTRUCTION, INC., a)
11 Utah corporation,)

12 Plaintiff,)

13 v.)

14 GEMSTONE DEVELOPMENT WEST, INC., a)
15 Nevada Corporation, APCO CONSTRUCTION, a)
16 Nevada corporation; and DOES I through X; ROE)
17 CORPORATIONS I through X; BOE BONDING)
18 COMPANIES I through X and LOE LENDERS I)
19 through X, inclusive,)

20 Defendants.)

21 AND ALL RELATED MATTERS.)

22 TO: APCO CONSTRUCTION; and

23 TO: Gwen Rutar Mullins, Esq. of Howard & Howard Attorneys PLLC, its attorney of record

24 COMES NOW Plaintiff Zitting Brothers Construction, Inc., ("Zitting Brothers"), by and
25 through its counsel of record, Michael M. Edwards, Esq., and Reuben H. Cawley, Esq., of the law
26 firm of Wilson, Elser, Moskowitz, Edelman & Dicker, LLP, pursuant to NRC 30 responds to
27 Plaintiff's Interrogatories as follows:

28 ///

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CASE NO. A571228

DEPT NO. XIIV

Consolidate with:

A571792, A574391, A577623, A580889

A583289, A584730, A587168, A589195

A589195, A589677, A597089

ZITTING BROTHERS
CONSTRUCTION, INC.'S RESPONSES
TO APCO CONSTRUCTIONS
INTERROGATORIES

1 **RESP**

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Attorneys for Plaintiff

7 Zitting Brothers Construction, Inc.

8
9 **DISTRICT COURT**

CLARK COUNTY, NEVADA

10 ZITTING BROTHERS CONSTRUCTION, INC., a)
11 Utah corporation,)

12 Plaintiff,)

13 v.)

14 GEMSTONE DEVELOPMENT WEST, INC., a)
15 Nevada Corporation, APCO CONSTRUCTION, a)
16 Nevada corporation; and DOES I through X; ROE)
17 CORPORATIONS I through X; BOE BONDING)
18 COMPANIES I through X and LOE LENDERS I)
19 through X, inclusive,)

20 Defendants.)

21 AND ALL RELATED MATTERS.)
22)
23)

24 TO: APCO CONSTRUCTION; and

25 TO: Gwen Rutar Mullins, Esq. of Howard & Howard Attorneys PLLC, its attorney of record

26 COMES NOW Plaintiff Zitting Brothers Construction, Inc., ("Zitting Brothers"), by and
27 through its counsel of record, Michael M. Edwards, Esq., and Reuben H. Cawley, Esq., of the law
28 firm of Wilson, Elser, Moskowitz, Edelman & Dicker, LLP, pursuant to NRCP 30 responds to
Plaintiff's Interrogatories as follows:

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CASE NO. A571228

DEPT NO. XIIV

Consolidate with:

A571792, A574391, A577623, A580889

A583289, A584730, A587168, A589195

A589195, A589677, A597089

**ZITTING BROTHERS
CONSTRUCTION, INC.'S RESPONSES
TO APCO CONSTRUCTIONS
INTERROGATORIES**

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GENERAL OBJECTIONS

Each Response provided herein is subject to the general objections set forth below (the "General Objections") and any specific objection made to the particular request. These General Objections are set forth in this fashion in order to avoid undue repetition through these responses. The failure to specifically incorporate a General Objection, however, should not be construed as a waiver of the General Objections.

1. Zitting Brothers objects to each Interrogatory to the extent the Interrogatory calls for information protected by the attorney-client privilege and/or work product doctrine.

2. Zitting Brothers objects and refuses to respond to these Interrogatories and the definitions and instructions to the extent they seek to impose obligations that go beyond those imposed by the Nevada Rules of Civil Procedure and Local Rules of the Eight Judicial District Court.

3. Zitting Brothers Objects to the Interrogatories to the extent that the same seek to require Zitting Brothers to search for or produce documents which are not currently in their possession, custody, or control, or to identify or describe persons, entities, or events that are not known to their employees on the grounds that such Interrogatories would seek to require more of Zitting Brothers than any obligation imposed by law, to unreasonable and undue annoyance, oppression, burden and expense, and would seek to impose upon Zitting Brothers an obligation to investigate or discover information or materials from third-parties or sources that are equally accessible to Scott Financial Corporation.

4. Nothing herein shall be construed as an admission or waiver by Zitting Brothers of: (a) Zitting Brothers' rights respecting admissibility, competency, relevance, privilege, materiality, and authenticity of any information provided in the Responses, any documents identified therein, or the subject matter thereof; (b) Zitting Brothers' objection due to vagueness, ambiguity, or undue burden; and (c) Zitting Brothers' rights to object to the use of any information provided in the Responses, any documents identified therein, or the subject matter contained in the Response during

1 a subject matter contained in the Responses during a subsequent proceeding, including the trial of
2 this or any other action.

3 5. The Responses are made solely for the purposes of, and in relation to, this litigation.

4 6. Zitting Brothers objects to the Interrogatories to the extent that they call for
5 production of documents that have been previously produced to or by Zitting Brothers. Such
6 documents will not be produced or identified except as otherwise noted herein. The responses
7 incorporate all documents previously produced to the Nevada Rules of Civil Procedure, and all
8 pleadings and documents on file herein.

9 7. Zitting Brothers objects to the Interrogatories to the extent they seek "all," "each" or
10 "any" information concerning various subjects or events, or pertaining to them "in any way" or "any
11 manner whatsoever" on the grounds that such Interrogatories are vague, overly broad, unduly
12 burdensome, onerous, and requests information that is not relevant or which is not likely to lead to
13 the discovery of admissible evidence.

14 8. Zitting Brothers objects to the Interrogatories to the extent that they call for the
15 creation of lists or summaries not already in existence.

16 9. Zitting Brothers objects to the Interrogatories on the grounds that they consist of
17 multiple, separate and distinct requests and fail to be properly numbered as such. Therefore, Zitting
18 Brothers objects to the Interrogatories to the extent that they do not comply with the requirements of
19 Nevada Rule of Civil Procedure 33.

20 10. Zitting Brothers has not completed: (a) its investigation of facts, witnesses, or
21 documents relating to this case; (b) discovery in this action; (c) its analysis of available data; and (d)
22 its preparations for trial. Thus, although a good faith effort has been made to supply pertinent
23 information where the same has been requested in order to comply with Zitting Brothers' discovery
24 obligations, it is not possible in some instances for unqualified Responses to be made to the
25 Interrogatories. Further, the Responses are necessarily made without prejudice to Zitting Brothers'
26 right to produce evidence of subsequently discovered facts, witnesses, or documents omitted by the
27 Responses to the following Interrogatories are based on the information available at the current time
28

1 and to the best of Zitting Brothers' knowledge to date. The Responses made include hearsay and
2 other forms of evidence that may be neither reliable nor admissible. Zitting Brothers reserves the
3 right to supplement such responses at a later date.

4 Without waiving its General Objections, Zitting Brothers responds to the Interrogatories as
5 follows:

6 **INTERROGATORIES**

7 **INTERROGATORY NO. 1:**

8 Please identify the name, title and address of each person(s) you anticipate calling as a
9 witness at the time of trial.
10

11 **RESPONSE:**

12 Objection. Zitting Brothers is not prepared, nor is it required, to state at this time each and
13 every witness that will be called at the time of trial in this matter. Discovery is on going and
14 additional witnesses may be indentified that will be called at the time of trial. Subject to and without
15 waiving the foregoing objections, Zitting Brothers responds as follows:

16 See Plaintiff Zitting Brothers Construction, Inc.'s Initial Early Case Conference List of
17 Witnesses and Identification of Documents. Discovery is continuing and Zitting Brothers reserves
18 its right to supplement this Response as necessary.

19 **INTERROGATORY NO. 2:**

20 Please identify and state with specificity facts that you intend to rely upon to support your
21 allegations that Zitting Brothers fulfilled its contractual obligations relative the Project in a
22 competent and timely manner.
23

24 **RESPONSE:**

25 Objection. This Interrogatory is vague, ambiguous, compound, overbroad, burdensome, and
26 calls for a legal conclusion. Additionally, Zitting Brothers is not prepared, nor is it required, to
27 identify at this time each and every fact that it will rely on to support its claims in this matter.
28

1 Discovery is on going and additional facts may be indentified that will support Zitting Brothers'
2 claims. Subject to and without waiving the foregoing objections, Zitting Brothers responds as
3 follows:

4 On or about April 17, 2007, Zitting Brothers entered into a subcontract with APCO
5 Construction to provide framing labor and materials for the Manhattan West project. Pursuant to the
6 subcontract, Zitting Brothers began performing its work on or about November 19, 2007, and
7 continued doing so until approximately December 15, 2008, when Zitting Brothers was advised that
8 the project was shutting down. All work was performed in a timely and competent manner, and both
9 APCO Construction and Gemstone received value for Zitting Brothers services. If any complaints
10 were raised by APCO Construction or Gemstone as to the adequacy or the quality of Zitting
11 Brothers' work during the course of the project, Zitting Brothers took all necessary steps to timely
12 resolve the same. Zitting Brothers has not received any notice or communication from APCO
13 Construction or Gemstone that there are outstanding complaints relative to Zitting Brothers' work at
14 the project.

15 Discovery is ongoing and Zitting Brothers reserves the right to supplement this Response as
16 necessary.

17 **INTERROGATORY NO. 3:**

18
19 Please identify and state with specificity facts that you intend to rely upon to support your
20 allegations that APCO breached the terms of the Subcontract Agreement or any other agreement
21 with you relative to the Project.

22 **RESPONSE:**

23 Objection. This Interrogatory is vague, ambiguous, compound, overbroad, burdensome, and
24 calls for a legal conclusion. Additionally, Zitting Brothers is not prepared, nor is it required, to
25 identify at this time each and every fact that it will rely on to support its claims in this matter.
26 Discovery is on going and additional facts may be indentified that will support Zitting Brothers'
27

1 claims. Subject to and without waiving the foregoing objections, Zitting Brothers responds as
2 follows:

3 On or about April 17, 2007, Zitting Brothers entered into a subcontract with APCO
4 Construction to provide framing labor and materials for the Manhattan West project. Pursuant to the
5 subcontract, Zitting Brothers performed all work in a timely and competent manner up to and
6 including the date APCO Construction left the project on or about September 11, 2009. Zitting
7 Brothers continued to perform its duties under the subcontract in a timely and competent manner
8 thereafter until the project was formally closed down on or about December 15, 2009. Despite the
9 fact that Zitting Brothers performed its work in a timely and professional manner, APCO
10 Construction and/or Gemstone failed to comply with its contractual obligations to pay Zitting
11 Brothers for its work. APCO Construction and/or Gemstone received value for the work performed
12 by Zitting Brothers and knew or should have known that Zitting Brothers expected to be paid for its
13 work at the project.

14 The following amounts remain outstanding and owed by APCO Construction and/or
15 Gemstone for work performed by Zitting Brothers at the project:

16 Unpaid Retention	\$403,365.49
17 Unpaid Change Orders	\$347,441.67
18 Total due to Zitting Brothers	\$750,807.16

19 Documents supporting these amounts were previously produced by Zitting Brothers and can
20 be found at ZBC1112 -- 1166 and ZBC1177 -- 1229. Discovery is continuing and Zitting Brothers
21 reserves the right to supplement this Response as necessary.

22 **INTERROGATORY NO. 4:**

23
24 State the amount of any payments made to you by APCO, the date each payment was made,
25 and the work that the payment covered.

26 ///

27 ///

28 ///

1 **RESPONSE:**

2 Objection. This Interrogatory is vague, ambiguous, overbroad, and burdensome in that it
3 seeks to have Zitting Brothers identify to an unreasonable detail the work it performed on the
4 Manhattan West project. Subject to and without waiving the foregoing objections, Zitting Brothers'
5 responds as follows:

6 Pursuant to the subcontract, Zitting Brothers was to provide and did provide framing labor
7 and materials for the Manhattan West project for the duration of the project until it was shut down on
8 or about December 15, 2009. Under the terms of the subcontract, payments made by APCO
9 Construction to Zitting Brothers were progress payments and Zitting Brothers is unable to provide a
10 detailed statement of the work applicable to each payment.

11 The following payments were made by APCO Construction to Zitting Brothers during the
12 course of the project:

<u>Date</u>	<u>Amount</u>
1/30/08	\$800,000.00
2/11/08	\$368,785.00
3/5/08	\$567,148.14
3/20/08	\$408,225.33
5/9/08	\$495,604.60
5/22/08	\$424,688.70
7/2/08	\$156,574.24
8/13/08	\$27,971.12
11/20/08	\$33,847.55

19 Please also see documents bates labeled ZBC1112 - 1166. Discovery is continuing and
20 Zitting Brothers reserves the right to supplement this Response as necessary.

21 **INTERROGATORY NO. 5:**

22
23 State the amount of any payments made to you by CAMCO PACIFIC CONSTRUCTION
24 COMPANY, INC. ("Camco Pacific"), the date each payment was made, and the work that the
25 payment covered.

26 ///

27 ///

28 **RESPONSE:**

Objection. This Interrogatory is vague, ambiguous, overbroad, and burdensome, in that it seeks to have Zitting Brothers identify to an unreasonable detail the work it performed on the Manhattan West project. Subject to and without waiving the foregoing objections, Zitting Brothers' responds as follows:

None. Discovery is continuing and Zitting Brothers reserves the right to supplement this Response as necessary.

INTERROGATORY NO. 6:

State the amount of any payments made to you by Gemstone, the date each payment was made, and the work that the payment covered.

RESPONSE:

Objection. This Interrogatory is vague, ambiguous, overbroad, and burdensome, in that it seeks to have Zitting Brothers identify to an unreasonable detail the work it performed on the Manhattan West project. Subject to and without waiving the foregoing objections,¹ Zitting Brothers' responds as follows:

None. Discovery is continuing and Zitting Brothers reserves the right to supplement this Response as necessary.

INTERROGATORY NO. 7:

Please identify and state with specificity facts that you intend to rely upon to support your allegation that you have complied with the provisions of Chapter 108 of the Nevada Revised Statutes relative a lien that you recorded against the Project.

RESPONSE:

Objection. This Interrogatory is overbroad, compound, burdensome, and calls for a legal conclusion. Additionally, this Interrogatory seeks proof of the entire case on paper, which is improper. Subject to and without waiving the foregoing objections, Zitting Brothers responds as follows:

1 On or about April 17, 2007, Zitting Brothers entered into a subcontract with APCO
2 Construction to provide framing labor and materials for the Manhattan West project. Pursuant to the
3 subcontract, Zitting Brothers began performing its work on or about November 19, 2007, and
4 continued doing so until approximately December 15, 2008, when Zitting Brothers was advised that
5 the project was shutting down. All work was performed properly and APCO Construction and/or
6 Gemstone received value for Zitting Brothers' services. At that time the project closed down, there
7 was an outstanding balance of \$750,807.16 for work performed by Zitting Brothers that had not been
8 paid by APCO Construction and/or Gemstone. Due to the unpaid balance, Zitting Brothers took
9 steps to record a mechanic's lien against the Manhattan West project and complied with the
10 requirements of NRS 108 as follows:

11 1) In compliance with NRS 108.245, Zitting Brothers provided its Notice of Right to
12 Lien via certified mail to Gemstone and APCO Construction on January 14, 2008.

13 2) On December 4, 2008, Zitting Brothers sent its Notice of Intent to Lien to Gemstone
14 and APCO Construction via certified mail in accordance with 108.226(6).

15 2) In compliance with NRS 108.226, Zitting Brothers recorded its Notice of Lien on
16 December 23, 2008, and provided a copy of the same to Gemstone and APCO Construction via
17 certified mail on December 24, 2008.

18 4) On April 7, 2010, Zitting Brothers recorded its Amended Notice of Lien and served it
19 on APCO Construction and/or Gemstone via certified mail the same day.

20 5) Zitting Brothers filed its Complaint Re: Foreclosure on April 30, 2009.

21 6) Zitting Brothers provided a Notice of Foreclosure on or about June 16, 2009, and
22 caused the same to be published in accordance with NRS 108.239. The Affidavit of Publication was
23 filed on June 30, 2009; and

24 7) Zitting Brothers provided its Notice of Lis Pendens on April 30, 2009.

25 Discovery is continuing and Zitting Brothers reserves the right to supplement this Response
26 as necessary.

27 ///

1 **INTERROGATORY NO. 8:**

2 Please identify and state with specificity facts that you intend to rely upon to support your
3 allegation that you have fully performed your obligations under your subcontract with APCO
4 including all conditions precedent except as have been excused by the respective breaches by APCO.
5

6 **RESPONSE:**

7 Objection. This Interrogatory is vague, ambiguous, compound, overbroad, burdensome, and
8 calls for a legal conclusion. Additionally, Zitting Brothers is not prepared, nor is it required, to
9 identify at this time each and every fact that it will rely on to support its claims in this matter.
10 Discovery is on going and additional facts may be indentified that will support Zitting Brothers'
11 claims. Subject to and without waiving the foregoing objections, Zitting Brothers responds as
12 follows:

13 See Response to Interrogatory No. 3. Discovery is continuing and Zitting Brothers reserves
14 the right to supplement this Response as necessary.

15 **INTERROGATORY NO. 9:**

16 Please identify and state with specificity facts that you intend to rely upon to support your
17 allegation that you have fully performed your obligations under any contract with Camco Pacific
18 relative the Project, including all conditions precedent except as have been excused by the respective
19 breaches of Camco Pacific.
20

21 **RESPONSE:**

22 Objection. This Interrogatory is vague, ambiguous, compound, overbroad, burdensome, and
23 calls for a legal conclusion. Additionally, Zitting Brothers is not prepared, nor is it required, to
24 identify at this time each and every fact that it will rely on to support its claims in this matter.
25 Discovery is on going and additional facts may be indentified that will support Zitting Brothers'
26 claims. Subject to and without waiving the foregoing objections, Zitting Brothers responds as
27 follows:
28

1 Zitting Brothers never entered into a written contract with Camco Pacific. Discovery is
2 continuing and Zitting Brothers reserves the right to supplement this Response as necessary.

3 **INTERROGATORY NO. 10:**
4

5 Please identify and state with specificity facts that you intend to rely upon to support your
6 allegations that you have fully performed you obligations under any contract with Gemstone on the
7 Project, including all conditions precedent except as have been excused by the respective breaches
8 by Gemstone.

9 **RESPONSE:**
10

11 Objection. This Interrogatory is vague, ambiguous, compound, overbroad, burdensome, and
12 calls for a legal conclusion. Additionally, Zitting Brothers is not prepared, nor is it required, to
13 identify at this time each and every fact that it will rely on to support its claims in this matter.
14 Discovery is on going and additional facts may be indentified that will support Zitting Brothers'
15 claims. Subject to and without waiving the foregoing objections, Zitting Brothers responds as
16 follows:

17 Zitting Brothers never executed a written contract with Gemstone. Discovery is continuing
18 and Zitting Brothers reserves the right to supplement this Response as necessary.

19 **INTERROGATORY NO. 11:**
20

21 Please identify and state with specificity facts that you intend to rely upon to support your
22 allegation that APCO has failed to fully pay for materials and services provided by you on the
23 Project.

24 **RESPONSE:**
25

26 Objection. This Interrogatory is vague, ambiguous, compound, overbroad, burdensome, and
27 calls for a legal conclusion. Additionally, Zitting Brothers is not prepared, nor is it required, to
28 identify at this time each and every fact that it will rely on to support its claims in this matter.
Discovery is on going and additional facts may be indentified that will support Zitting Brothers'

1 claims. Subject to and without waiving the foregoing objections, Zitting Brothers responds as
2 follows:

3 See Response to Interrogatory No. 3. Discovery is continuing and Zitting Brothers reserves
4 the right to supplement this Response as necessary.

5 **INTERROGATORY NO. 12:**

6
7 Please identify and state with specificity facts that you intend to rely upon to support your
8 allegation that Camco Pacific has failed to fully pay for the materials and services provided by you
9 on the Project.

10 **RESPONSE:**

11 Objection. This Interrogatory is vague, ambiguous, compound, overbroad, burdensome, and
12 calls for a legal conclusion. Additionally, Zitting Brothers is not prepared, nor is it required, to
13 identify at this time each and every fact that it will rely on to support its claims in this matter.
14 Discovery is on going and additional facts may be identified that will support Zitting Brothers'
15 claims. Subject to and without waiving the foregoing objections, Zitting Brothers responds as
16 follows:

17 See Response to Interrogatory No. 9. Discovery is continuing and Zitting Brothers reserves
18 the right to supplement this Response as necessary.

19 **INTERROGATORY NO. 13:**

20
21 Please identify and state with Specificity facts that you intend to rely upon to support your
22 allegation that Gemstone has failed to fully pay for the materials and services provided by you on the
23 Project.

24 **RESPONSE:**

25 Objection. This Interrogatory is vague, ambiguous, compound, overbroad, burdensome, and
26 calls for a legal conclusion. Additionally, Zitting Brothers is not prepared, nor is it required, to
27 identify at this time each and every fact that it will rely on to support its claims in this matter.
28

1 Discovery is on going and additional facts may be indentified that will support Zitting Brothers'
2 claims. Subject to and without waiving the foregoing objections, Zitting Brothers responds as
3 follows:

4 See Response to Interrogatory No. 3. Discovery is continuing and Zitting Brothers reserves
5 the right to supplement this Response as necessary.

6 **INTERROGATORY NO. 14:**

7
8 Please identify and state with specificity facts that you intend to rely upon to support your
9 allegation that APCO has been unjustly enriched.

10 **RESPONSE:**

11 Objection. This Interrogatory is vague, ambiguous, compound, overbroad, burdensome, and
12 calls for a legal conclusion. Additionally, Zitting Brothers is not prepared, nor is it required, to
13 identify at this time each and every fact that it will rely on to support its claims in this matter.
14 Discovery is on going and additional facts may be indentified that will support Zitting Brothers'
15 claims. Subject to and without waiving the foregoing objections, Zitting Brothers responds as
16 follows:

17 See Response to Interrogatory No. 3. Discovery is continuing and Zitting Brothers reserves
18 the right to supplement this Response as necessary.

19 **INTERROGATORY NO. 15:**

20
21 Please identify and state with specificity facts that you intend to rely upon to support your
22 allegation that APCO breached the implied covenant of good faith and fair dealing by failing to pay
23 for work provided by you on the Project.

24 **RESPONSE:**

25 Objection. This Interrogatory is vague, ambiguous, compound, overbroad, burdensome, and
26 calls for a legal conclusion. Additionally, Zitting Brothers is not prepared, nor is it required, to
27 identify at this time each and every fact that it will rely on to support its claims in this matter.

1 Discovery is on going and additional facts may be indentified that will support Zitting Brothers'
2 claims. Subject to and without waiving the foregoing objections, Zitting Brothers responds as
3 follows:

4 See Response to Interrogatory No. 3. Discovery is continuing and Zitting Brothers reserves
5 the right to supplement this Response as necessary.

6 **INTERROGATORY NO. 16:**

7
8 Please identify and state with specificity facts that you intend to rely upon to support your
9 allegation that APCO negligently or intentionally prevented, obstructed, hindered or interfered with
10 your performance of the work on the Project.

11 **RESPONSE:**

12 Objection. This Interrogatory is vague, ambiguous, compound, overbroad, burdensome, and
13 calls for a legal conclusion. Additionally, Zitting Brothers is not prepared, nor is it required, to
14 identify at this time each and every fact that it will rely on to support its claims in this matter.
15 Discovery is on going and additional facts may be indentified that will support Zitting Brothers'
16 claims. Subject to and without waiving the foregoing objections, Zitting Brothers responds as
17 follows:

18 In addition to its failure to pay Zitting Brothers for its work at the project, APCO
19 Construction continually delayed the formal approval of change orders to Zitting Brothers work.
20 This directly resulted in Zitting Brothers being unable to obtain payment for change orders that were
21 completed at the direction of APCO Construction and/or Gemstone. Discovery is continuing and
22 Zitting Brothers reserves the right to supplement this Response as necessary.

23 **INTERROGATORY NO. 17:**

24 Please identify and state with specificity facts that you intend to rely upon to support your
25 allegation that Camco and/or Gemstone breached the implied covenant of good faith and fair dealing
26 by failing to pay for work provided by you on the Project.

1 **RESPONSE:**

2 Objection. This Interrogatory is vague, ambiguous, compound, overbroad, burdensome, and
3 calls for a legal conclusion. Additionally, Zitting Brothers is not prepared, nor is it required, to
4 identify at this time each and every fact that it will rely on to support its claims in this matter.
5 Discovery is on going and additional facts may be indentified that will support Zitting Brothers'
6 claims. Subject to and without waiving the foregoing objections, Zitting Brothers responds as
7 follows:

8 See Response to Interrogatory No. 3. Discovery is continuing and Zitting Brothers reserves
9 the right to supplement this Response as necessary.

10 **INTERROGATORY NO. 18:**

11 Identify, sufficiently to permit service of subpoena, each witness to this action known to you,
12 your attorney, agent, or any investigator or detective employed by you or your attorney or anyone
13 acting on your behalf, which you intend to have testify relative the work supplied by you and
14 provide a brief statement of their anticipated testimony.

15 **RESPONSE:**

16 See Response to Interrogatory No. 1.

17 **INTERROGATORY NO. 19:**

18 Identify all documents, records, writings, etc., that support your Answers to these
19 Interrogatories and your responses to Requests for Admissions.
20

21 **RESPONSE:**

22 See documents bates labeled ZBC0001 – 1223 produced in connection with Plaintiff Zitting
23 Brothers Construction, Inc.'s Initial Early Case Conference List of Witnesses and Identification of
24 Documents. Discovery is continuing and Zitting Brothers reserves the right to supplement this
25 Response as necessary.

26 ///

27 ///

1 **INTERROGATORY NO. 20:**

2 If you or any officer, director, or employee of Zitting Brothers has had any conversations
3 with APCO regarding the facts alleged to be the basis of your complaint against APCO, please state
4 the dates of each conversation, the parties involved, the contents of the conversation and what was
5 said.
6

7 **RESPONSE:**

8 Objection. This Interrogatory is vague, ambiguous, compound, overbroad, and burdensome.
9 Subject to and without waiving the foregoing objections, Zitting Brothers responds as follows:

10 During the course of the project, Zitting Brothers worked with APCO Construction on a daily
11 basis and presumably had numerous conversations regarding Zitting Brothers' work, APCO
12 Constructions payments to Zitting Brothers, and other factual issues underlying the claims in this
13 case. Most, if not all, of all of these conversations were verbal and it is not reasonable to expect
14 Zitting Brothers to recall and describe each conversation. If any conversations have occurred
15 between Zitting Brothers and APCO Construction after the filing of Zitting Brothers' Complaint,
16 they were brief and conversational in nature, and did not address Zitting Brothers' Complaint or the
17 facts underlying its claims in any meaningful manner. Discovery is continuing and Zitting Brothers
18 reserves the right to supplement this Response as necessary.

19 **INTERROGATORY NO. 21:**

20 If you or any officer, director, or employee of Zitting Brothers has had any conversations
21 with Camco Pacific regarding the facts alleged to be the basis of your complaint, please state the
22 dates of each conversation, the parties involved, the contents of the conversation and what was said.
23

24 **RESPONSE:**

25 Objection. This Interrogatory is vague, ambiguous, compound, overbroad, and burdensome.
26 Subject to and without waiving the foregoing objections, Zitting Brothers responds as follows:
27
28

1 None. Discovery is continuing and Zitting Brothers reserves the right to supplement this
2 Response as necessary.

3 **INTERROGATORY NO. 22:**
4

5 If you or any officer, director, or employee of Zitting Brothers has had any conversations
6 with Gemstone regarding the facts alleged to be the basis of your complaint, please state the dates of
7 each conversation, the parties involved, the contents of the conversation and what was said.

8 **RESPONSE:**
9

10 Objection. This Interrogatory is vague, ambiguous, compound, overbroad, and burdensome.
11 Subject to and without waiving the foregoing objections, Zitting Brothers responds as follows:

12 None. Discovery is continuing and Zitting Brothers reserves the right to supplement this
13 Response as necessary.

14 **INTERROGATORY NO. 23:**
15

16 If you or any officer, director, or employee of Zitting Brothers has had any conversations
17 with any third person regarding the facts alleged to be the basis of your complaint, please state the
18 dates of each conversation, the parties involved, the contents of the conversation and what was said.

19 **RESPONSE:**
20

21 Objection. This Interrogatory is vague, ambiguous, compound, overbroad, burdensome, and
22 seeks information protected by the attorney-client and/or the attorney work product privilege.

23 Subject to and without waiving the foregoing objections, Zitting Brothers responds as follows:

24 None. Discovery is continuing and Zitting Brothers reserves the right to supplement this
25 Response as necessary.

26 **INTERROGATORY NO. 24:**
27

28 Please identify each person you expect to call as an expert witness at the time of trial in this
action. With respect to each person to call as an expert witness, please state the subject matter on

1 which each expert is expected to testify, a summary of the grounds for each opinion; whether written
2 document was prepared by such expert and if so, identify it; and the professional title, educational
3 background, qualifications and work experience of each such expert.
4

5 **RESPONSE:**

6 Objection. This Interrogatory is vague, ambiguous, compound, overbroad, and seeks
7 information protected by the attorney-client and/or the attorney work product privilege. Subject to
8 and without waiving the foregoing objections, Zitting Brothers responds as follows:

9 The time for designating experts in this matter has not yet passed. At this time, Zitting
10 Brothers has not designated any experts and is unable to accurately determine whether expert
11 testimony will be necessary at trial. Discovery is continuing and Zitting Brothers reserves the right
12 to supplement this Response as necessary.

13 **INTERROGATORY NO. 25:**

14 Please identify any exhibits which you intend to produce at the time of trial in this matter as
15 it relates to the claims brought against APCO and the work furnished by you on the Project and as to
16 each such exhibit, please state:

- 17 i. The origin of the exhibit;
18 ii. Location of the original exhibit; and
19 iii. If the exhibit is a copy, whether or not the exhibit has been authenticated and
20 by whom.
21

22 **RESPONSE:**

23 Objection. This Interrogatory is vague, ambiguous, compound, overbroad, and burdensome.
24 Additionally, Zitting Brothers is not prepared, nor is it required, to identify at this time each and
25 every exhibit that may or may not be used at trial in this matter. Discovery is on going and
26 additional facts may be indentified that will support Zitting Brothers' claims. Subject to and without
27 waiving the foregoing objections, Zitting Brothers responds as follows:
28

1 Please see all documents produced in connection with Plaintiff Zitting Brothers Construction,
2 Inc.'s Initial Early Case Conference List of Witnesses and Identification of Documents. Discovery is
3 continuing and Zitting Brothers reserves the right to supplement this Response as necessary.

4 **INTERROGATORY NO. 26:**
5

6 Please state and identify each and every fact setting forth the alleged breach by APCO.

7 **RESPONSE:**
8

9 See Response to Interrogatory No. 3.

10 **INTERROGATORY NO. 27:**

11 Please state and identify each and every fact setting forth the alleged breach by Camco and/or
12 Gemstone.

13 **RESPONSE:**
14

15 See Response to Interrogatory No. 3.

16 **INTERROGATORY NO. 28:**

17 Please identify each and every fact that you intend to rely upon to support your allegations as
18 to what amount APCO owes you for the work furnished by you on the Project through the date of
19 APCO's termination of its contract with Gemstone, which amount your content remains unpaid and
20 due from APCO.

21 **RESPONSE:**
22

23 Objection. This Interrogatory is vague, ambiguous, compound, overbroad, confusing,
24 burdensome, and calls for a legal conclusion. Additionally, Zitting Brothers is not prepared, nor is it
25 required, to identify at this time each and every fact that it will rely on to support its claims in this
26 matter. Discovery is on going and additional facts may be indentified that will support Zitting
27 Brothers' claims. Subject to and without waiving the foregoing objections, Zitting Brothers
28 responds as follows:

1 See Response to Interrogatory No. 3. Additionally, all work performed by Zitting Brothers
2 was done in connection with its subcontract with APCO Construction and, as such, all amounts
3 owed to Zitting Brothers are attributed to APCO Construction even if certain tasks were not fully
4 completed until APCO Construction left the project. Discovery is continuing and Zitting Brothers
5 reserves the right to supplement this Response as necessary.

6 **INTERROGATORY NO. 29:**

7
8 Please identify each and every fact that you intend to rely upon to support your allegations as
9 to what amount Cameco and/or Gemstone owes you for the work furnished by you on the Project
10 through the date of APCO's termination of its contract with Gemstone including for any work that
11 you may have performed after APCO's termination of its contract with Gemstone, which amount
12 you contend remains unpaid and due.

13 **RESPONSE:**

14 Objection. This Interrogatory is vague, ambiguous, compound, overbroad, confusing,
15 burdensome, and calls for a legal conclusion. Additionally, Zitting Brothers is not prepared, nor is it
16 required, to identify at this time each and every fact that it will rely on to support its claims in this
17 matter. Discovery is on going and additional facts may be identified that will support Zitting
18 Brothers' claims. Subject to and without waiving the foregoing objections, Zitting Brothers
19 responds as follows:

20 See Response to Interrogatory No. 28. Discovery is continuing and Zitting Brothers reserves
21 the right to supplement this Response as necessary.

22 **INTERROGATORY NO. 30:**

23
24 Please describe in detail the contract terms that you agreed to with APCO regarding the work
25 furnished by you on the Project.

26 ///

27 ///

1 **RESPONSE:**

2 Objection. This Interrogatory is vague, ambiguous, compound, overbroad, burdensome, and
3 calls for a legal conclusion. Additionally, this information is readily available to APCO
4 Construction and it is improper and unnecessary for Zitting Brothers to recite each and every term of
5 the subcontract as the document speaks for itself. Discovery is continuing and Zitting Brothers
6 reserves the right to supplement this Response as necessary.

7 **INTERROGATORY NO. 31:**

8 Please describe in detail the contract terms that you agreed to with Camco and/or Gemstone
9 regarding the work furnished by you on the Project.

10
11 **RESPONSE:**

12 Objection. This Interrogatory is vague, ambiguous, compound, overbroad, burdensome, and
13 calls for a legal conclusion. Subject to and without waiving the foregoing objections, Zitting
14 Brothers responds as follows:

15 Zitting Brothers did not enter into a written subcontract with either Camco Pacific or
16 Gemstone for its work at the project. Discovery is continuing and Zitting Brothers reserves the right
17 to supplement this Response as necessary.

18 **INTERROGATORY NO. 32:**

19 Please state each and every fact to support your claim of priority as set forth in the Seventh
20 Cause of Action of your Complaint.

21
22 **RESPONSE:**

23 Objection. This Interrogatory is vague, ambiguous, compound, overbroad, burdensome, and
24 calls for a legal conclusion. Subject to and without waiving the foregoing objections, Zitting
25 Brothers responds as follows:

26 Please see Response to Interrogatory Nos. 2 & 3. Additionally, APCO Construction has
27 informed Zitting Brothers that work on the project began prior to Zitting Brothers starting its work at

1 the site and prior to the applicable Deeds of Trust that were recorded against the project. Discovery
2 is continuing and Zitting Brothers reserves the right to supplement this Response as necessary.

3 **INTERROGATORY NO. 33:**
4

5 For each of the Request for Admissions, which were served upon you concurrently with
6 these Interrogatories, and which you denied, either in whole or in part, please state with particularity
7 all facts upon which you relied in asserting this denial and identify the sources of your information
8 upon which you rely in asserting this denial, including the names of persons who have knowledge of
9 such facts, and further identify all documents which evidence, refer or relate in any way to such
10 facts.

11 **RESPONSE:**
12

13 Objection. This Interrogatory is vague, ambiguous, compound, overbroad, and burdensome.
14 Subject to and without waiving the foregoing objections, Zitting Brothers responds as follows:

15 Request No. 3: This Request was denied because it is likely that the contractual provisions
16 cited to are void under Nevada law and Nevada public policy as stated in NRS 624.628(3) and
17 624.624.

18 Request No. 4: This Request was denied because it is likely that the contractual provisions
19 cited to are void under Nevada law and Nevada public policy as stated in NRS 624.628(3) and
20 624.624. Moreover, this Request fails to reflect the changes to the relevant contractual provisions
21 that were agreed to by Zitting Brothers and APCO Construction.

22 Request No. 5: This Request was denied because it is likely that the contractual provisions
23 cited to are void under Nevada law and Nevada public policy as stated in NRS 624.628(3) and
24 624.624.

25 Request No. 6: This Request was denied because it is likely that the contractual provisions
26 cited to are void under Nevada law and Nevada public policy as stated in NRS 624.628(3) and
27 624.624. Moreover, this Request fails to reflect the changes to the relevant contractual provisions
28 that were agreed to by Zitting Brothers and APCO Construction.

1 Request No. 7: This Request was denied because under the subcontract APCO Construction
2 is liable to Zitting Brothers for all unpaid amounts.

3 Request No. 8: This Request was denied because Zitting Brothers cannot affirmatively state
4 that APCO Construction was not paid by Gemstone for amounts owed to Zitting Brothers.

5 Request No. 9: This Request was denied because Zitting Brothers is informed that APCO
6 Construction received significant payments from Gemstone for its work and work performed by
7 Zitting Brothers on the project.

8 Request No. 10: This Request was denied because Zitting Brothers cannot identify each and
9 every reason why APCO Construction terminated its contract with Gemstone.

10 Request No. 11: This Request was denied because, although Zitting Brothers was aware that
11 APCO Construction left the project, Zitting Brothers cannot conclusively identify the manner in
12 which it came to this knowledge.

13 Request No. 12: This Request was denied because Subsection 9 of the subcontract does not
14 allow termination of the subcontract in the manner utilized by APCO Construction.

15 Request No. 13: This Request was denied because Zitting Brothers did not enter into a
16 Ratification and Amendment of the Subcontract Agreement with Camco Pacific.

17 Request No. 14: This Request was denied because Zitting Brothers did not enter into a
18 Ratification and Amendment of the Subcontract Agreement with Camco Pacific.

19 Request No. 15: This Request was denied because Zitting Brothers did not enter into a
20 Ratification and Amendment of the Subcontract Agreement with Camco Pacific.

21 Request No. 16: This Request was denied because Zitting Brothers did not enter into a
22 Ratification and Amendment of the Subcontract Agreement with Camco Pacific.

23 Request No. 17: This Request was denied because Zitting Brothers did not enter into a
24 Ratification and Amendment of the Subcontract Agreement with Camco Pacific.

25 Request No. 18: This Request was denied because Zitting Brothers did not enter into a
26 Ratification and Amendment of the Subcontract Agreement with Camco Pacific.

1 Request No. 19: This Request was denied because Zitting Brothers did not enter into a
2 Ratification and Amendment of the Subcontract Agreement with Camco Pacific.

3 Request No. 20: This Request was denied because Zitting Brothers did not enter into a
4 Ratification and Amendment of the Subcontract Agreement with Camco Pacific.

5 Request No. 21: This Request was denied because under the subcontract APCO
6 Construction is liable to Zitting Brothers for all unpaid amounts.

7 Request No. 22: This Request was denied because under the subcontract APCO
8 Construction is liable to Zitting Brothers for all unpaid amounts.

9 Request No. 23: This Request was denied because under the subcontract APCO
10 Construction is liable to Zitting Brothers for all unpaid amounts.

11 Request No. 24: This Request was denied because Zitting Brothers did not enter into a
12 Ratification and Amendment of the Subcontract Agreement with Camco Pacific.

13 Request No. 26: This Request was denied because under the subcontract APCO
14 Construction is liable to Zitting Brothers for all unpaid amounts.

15 Request No. 27: This Request was denied because APCO Construction received value for
16 Zitting Brothers' work at the project and because under the subcontract APCO Construction is liable
17 to Zitting Brothers for all unpaid amounts.

18 Request No. 28: This Request was denied because APCO Construction received value for
19 Zitting Brothers' work at the project and because under the subcontract APCO Construction is liable
20 to Zitting Brothers for all unpaid amounts.

21 Request No. 29: This Request was denied because Zitting Brothers is unaware of any claims
22 by Gemstone that its work at the project was not done in a good and workmanlike manner.

23 Request No. 30: This Request was denied because all of Zitting Brothers work at the project
24 was completed in a good and workmanlike manner in compliance with all the pertinent plans,
25 specifications, codes, and industry standards.

26 Request No. 31: This Request was denied because under the subcontract APCO
27 Construction is liable to Zitting Brothers for all unpaid amounts.

1 Request No. 33: This Request was denied because under the subcontract APCO
2 Construction is liable to Zitting Brothers for all unpaid amounts.

3 Request No. 34: This Request was denied because under the subcontract APCO
4 Construction is liable to Zitting Brothers for all unpaid amounts.

5 Request No. 36: This Request was denied because Zitting Brothers is informed that APCO
6 Construction received significant payments from Gemstone for its work and work performed by
7 Zitting Brothers on the project.

8 Discovery is continuing and Zitting Brothers reserves the right to supplement this Response
9 as necessary.

10 **INTERROGATORY NO. 34:**

11 With respect to the Complaint you asserted against APCO, state:

- 12 (a) What is the dollar amount of damages, if any, that you are seeking?
- 13 (b) If the dollar amount set forth in answer (a) is a composite of several different
14 elements of damages, set forth each of those elements and every fact or document that
15 form the basis for the amount of damages attributable to said damages or each
16 element thereof.
- 17 (c) State precisely how you calculated the amounts set forth in (a) and (b) above.
- 18 (d) Precisely what did APCO do which gives rise to this claim for damages?
- 19 (e) Identify the documents that you intend to rely upon in making this claim for damages.
- 20 (f) Identify the witness who you expect to testify with respect to such damages, and set
21 forth a summary of their expected testimony.

22
23 **RESPONSE:**

24 Objection. This Interrogatory is vague, ambiguous, compound, overbroad, burdensome, and
25 calls for a legal conclusion. Subject to and without waiving the foregoing objections, Zitting
26 Brothers responds as follows:

1 Zitting Brothers' damages are comprised of the \$750,807.16 stated in Zitting Brothers'
2 amended lien plus any and all statutory and/or contractual fees, costs, and interest. Zitting Brothers'
3 lien amount is generally comprised of unpaid retention of \$403,365.49 and unpaid change orders of
4 \$347,441.67. Documents supporting these amounts were previously produced by Zitting Brothers
5 and can be found at ZBC1112 -- 1166 and ZBC1177 -- 1229. The witnesses that may provide
6 testimony relative to these amounts can be found in Plaintiff Zitting Brothers Construction, Inc.'s
7 Initial Early Case Conference List of Witnesses and Identification of Documents. Discovery is
8 continuing and Zitting Brothers reserves the right to supplement this Response as necessary.

9
10 **INTERROGATORY NO. 35:**

11 Please provide a breakdown of the sum of \$788,405.41, which you claim remains due you for
12 the work furnishes on the Project, including, but not limited to, the date when each portion of the
13 work was performed.

14
15 **RESPONSE:**

16 Objection. This Interrogatory is vague, ambiguous, overbroad, and burdensome, in that it
17 seeks to have Zitting Brothers identify to an unreasonable detail the work it performed on the
18 Manhattan West project. Subject to and without waiving such objections, Zitting Brothers' responds
19 as follows:

20 See Response to Interrogatory No. 34. Discovery is continuing and Zitting Brothers reserves
21 the right to supplement this Response as necessary.

22 **INTERROGATORY NO. 36:**

23 Please identify each and every fact that you intend to rely to refute that Zitting Brothers
24 should indemnify APCO for any and all losses, damages or expenses that APCO sustains as a result
25 of any claims by Gemstone for damages that Gemstone allegedly sustained due to Zitting Brothers'
26 improper workmanship on the Project, including, but not limited to, any damage amount and the
27 attorney's fees and costs incurred by APCO relative thereto.

1
2 **RESPONSE:**

3 Objection. This Interrogatory is vague, ambiguous, overbroad, burdensome, and calls for a
4 legal conclusion. Additionally, Zitting Brothers is not prepared, nor is it required, to identify at this
5 time each and every fact that it will rely on to support its claims or refute the claims of other parties
6 in this matter. Subject to and without waiving such objections, Zitting Brothers' responds as
7 follows:

8 Zitting Brothers is unable to meaningfully respond to this Interrogatory as it is currently
9 unaware of any claims being asserted by Gemstone that could require Zitting Brothers to indemnify
10 APCO Construction. Discovery is continuing and Zitting Brothers reserves the right to supplement
11 this Response as necessary.

12 **INTERROGATORY NO. 37:**

13 Please identify each and every fact that you intend to rely to refute that any obligations or
14 responsibilities of APCO under Subcontract Agreement with Zitting Brothers has been replaced,
15 terminated, voided, cancelled or otherwise released by the ratification entered into between Zitting
16 Brothers and Camco Pacific and that as a result therefore, APCO no longer bears any liability under
17 the Subcontract Agreement.
18

19 **RESPONSE:**

20 Objection. This Interrogatory is vague, ambiguous, overbroad, burdensome, and calls for a
21 legal conclusion. Additionally, Zitting Brothers is not prepared, nor is it required, to identify at this
22 time each and every fact that it will rely on to support its claims or refute the claims of other parties
23 in this matter. Subject to and without waiving such objections, Zitting Brothers' responds as
24 follows:

25 APCO Construction has not been released from any of its contractual duties to Zitting
26 Brothers. Zitting Brothers and Camco Pacific never entered into any contractual agreements relative
27
28

1 to Zitting Brothers work at the Manhattan West project. Discovery is continuing and Zitting
2 Brothers reserves the right to supplement this Response as necessary.

3 **INTERROGATORY NO. 38:**
4

5 Please state each and every fact to support your claim that APCO violated Chapter NRS 624
6 in administration of the Project.

7 **RESPONSE:**
8

9 See Response to Interrogatory No. 3.

10 **INTERROGATORY NO. 39:**
11

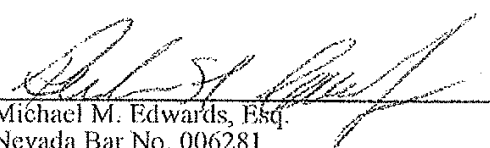
12 Please state each and every fact to support your claim that APCO failed to timely pay its
13 subcontractors, including you, on this project, as required under NRS 624.606 to 624.630, et. seq.

14 **RESPONSE:**
15

16 See Response to Interrogatory No. 3.

17 DATED this 7th day of April, 2010.

18 **WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP**

19 
20 Michael M. Edwards, Esq.
21 Nevada Bar No. 006281
22 Reuben H. Cawley, Esq.
23 Nevada Bar No. 009384
24 415 South Sixth Street, Suite No. 300
25 Las Vegas, Nevada 89101
26 Attorneys for Zitting Brothers Construction, Inc.
27
28


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VERIFICATION


STATE OF Utah }
COUNTY OF Wasatch } ss:

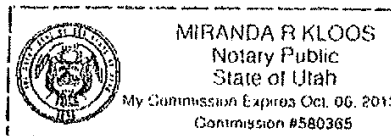
Sam Zitting being first duly sworn, deposes and says:

That I am the President of ZITTING BROTHERS CONSTRUCTION, INC. Plaintiff in the above-entitled action; that I am a representative of ZITTING BROTHERS CONSTRUCTION, INC. duly authorized to execute this Verification to Defendant's Interrogatories; and that I have read the foregoing **RESPONSES TO APCO CONSTRUCTION'S INTERROGATORIES** and know the contents thereof, and that the same is true of my own knowledge except for those matters therein stated on information and belief, and as for those matters I believe them to be true.


Representative of SAM ZITTING

SUBSCRIBED AND SWORN to before me
this 9 day of April, 20010.

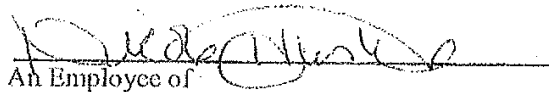

NOTARY PUBLIC in and for said
County and State



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CERTIFICATE OF ELECTRONIC SERVICE

I certify that I am an employee of Wilson, Elser, Moskowitz, Edelman & Dicker LLP, and that on this 9th day of April, 2010, I did cause a true copy of the foregoing Responses to Interrogatories through the EFP Vendor System to all registered parties pursuant to the Order for Electronic Filing and Service.



An Employee of
WILSON, ELSE, MOSKOWITZ, EDELMAN & DICKER LLP

ORIGINAL

Electronically Filed
8/2/2017 8:29 AM
Steven D. Grierson
CLERK OF THE COURT

Steven D. Grierson

1 **MPSJ**
2 RICHARD L. PEEL, ESQ.
3 Nevada Bar No. 4359
4 ERIC B. ZIMBELMAN,
5 Nevada Bar No. 9407
6 **PEEL BRIMLEY LLP**
7 3333 E. Serene Avenue, Suite 200
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9 Telephone: (702) 990-7272
10 Fax: (702) 990-7273
11 ezimbelman@peelbrimley.com
12 rpeel@peelbrimley.com
13 Attorneys for Various Lien Claimants

DISTRICT COURT

CLARK COUNTY, NEVADA

DEPARTMENT XIII
NOTICE OF HEARING
DATE 8/24/17 TIME 9:00 AM
APPROVED BY *KA*

14 APCO CONSTRUCTION, a Nevada
15 corporation,

16 Plaintiff,

17 vs

18 GEMSTONE DEVELOPMENT WEST, INC.,
19 Nevada corporation; NEVADA
20 CONSTRUCTION SERVICES, a Nevada
21 corporation; SCOTT FINANCIAL
22 CORPORATION, a North Dakota corporation;
23 COMMONWEALTH LAND TITLE
24 INSURANCE COMPANY; FIRST
25 AMERICAN TITLE INSURANCE
26 COMPANY and DOES I through X,

27 Defendants.

28 AND ALL RELATED MATTERS.

LEAD CASE NO.: A571228
DEPT. NO.: XIII

Consolidated with:
A571792, A574391, A577623, A580889,
A583289, A584730, and A587168

**PEEL BRIMLEY LIEN CLAIMANTS'
MOTION FOR PARTIAL SUMMARY
JUDGMENT PRECLUDING DEFENSES
BASED ON PAY-IF-PAID
AGREEMENTS**

**AND EX PARTE APPLICATION FOR
ORDER SHORTENING TIME**

29 COME NOW the Lien Claimants represented by the undersigned counsel of the law firm
30 of PEEL BRIMLEY LLP ("the Peel Brimley Lien Claimants")¹ and do hereby submit the
31 following Motion for Partial Summary Judgment Precluding Defenses Based on Pay-if-Paid
32 Agreements ("the Motion") as against Plaintiff/Cross-Claim Defendant APCO Construction
33 ("APCO") and Defendant Camco Pacific Construction Co., Inc. ("Camco"). This Motion is based
34 on and supported by the Declaration of Eric. B. Zimbelman, included below, the Memorandum of
35 Points and Authorities in Support of this Motion that follows, the pleadings and papers on file,
36

¹ The Peel Brimley Lien Claimants are: Buchele Inc.; Cactus Rose Construction; Fast Glass Inc.;
Heinaman Contract Glazing; Helix Electric of Nevada, LLC; SWPPP Compliance Solutions, LLC; and
Cardno WRG, Inc. fka WRG Design Inc.

PEEL BRIMLEY LLP
3333 E. SERENE AVENUE, STE. 200
HENDERSON, NEVADA 89074
(702) 990-7272 ♦ FAX (702) 990-7273

RECEIVED
JUL 31 2017

DISTRICT COURT DEPT#13

PEEL BRIMLEY LLP
3333 E. SERENE AVENUE, STE. 200
HENDERSON, NEVADA 89074
(702) 990-7272 ♦ FAX (702) 990-7273

1 and such matters as may be considered by the Court.

2 DATED this 31st day of July 2017.

3 **PEEL BRIMLEY LLP**

4 

5 RICHARD L. PEEL, ESQ.
6 Nevada Bar No. 4359
7 ERIC B. ZIMBELMAN,
8 Nevada Bar No. 9407
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13 ezimbelman@peelbrimley.com
14 rpeel@peelbrimley.com
15 Attorneys for Various Lien Claimants

16 **ORDER SHORTENING TIME**

17 The Court having reviewed the underlying Motion for Partial Summary Judgment and the
18 *Ex-Parte* Application for Order Shortening Time and good cause appearing:

19 It is HEREBY ORDERED that the time may be shortened and the Motion for Partial
20 Summary Judgment shall be set for hearing on the 24th day of August 2017, at 9:00
21 a.m., in Department No. XIII.

22 DATED this 1st day of August, 2017

23 
24 DISTRICT COURT JUDGE
25
26
27
28

**DECLARATION OF RICHARD L. PEEL, ESQ. IN SUPPORT
OF AN ORDER SHORTENING TIME TO HEAR MOTION FOR PARTIAL
SUMMARY JUDGMENT**

RICHARD L. PEEL, ESQ., hereby declares under penalty of perjury under the laws of the State of Nevada that the foregoing is true and correct and if called upon to testify, would do so.

1. I am the managing partner in the law firm of Peel Brimley LLP, counsel of record for the Peel Brimley Lien Claimants (as defined above). I am duly licensed to practice law within the State of Nevada. I have personal knowledge of the information contained in this Declaration and could qualify as a competent witness if called upon to testify in connection with this matter.

2. I am making this Declaration in support of an Order Shortening Time to hear the Peel Brimley Lien Claimants' Motion for Partial Summary Judgment Regarding Pay-if-Paid Agreements.

3. By agreement of the parties and under the auspices of the Special Master, the depositions of the persons most knowledgeable for APCO, Camco and some of the lien claimants were conducted over multiple days in June and July 2017.² As discussed more fully herein, Camco and APCO both contend they have no obligation to pay the Peel Brimley Lien Claimants (and others) based on contract language purporting to make their receipt of payment from the now-insolvent project owner, Gemstone Development West, Inc. ("Gemstone") a condition precedent to their obligation to pay their subcontractors. Such a provision, known in the construction industry as a "pay-if-paid" agreement, violates the public policy of the State of Nevada and is void and unenforceable pursuant to *Lehrer McGovern Bovis, Inc. v. Bullock Insulation, Inc.*, 197 P.3d 1032 (Nev. 2008) and the provisions of NRS Chapter 624.

///

///

///

² The Camco deposition was conducted on June 5 and 6, 2017 while the APCO deposition was conducted on June 20 and 22, 2017 (Part I) as well July 18-19, 2017 (Part II). The PMK deposition of Helix Electric of Nevada, LLC ("Helix") was taken on July 20, 2017. The transcripts of these depositions have either only recently been received or are still in production.

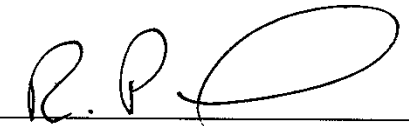
1 4. Based on APCO's and Camco's recently-produced discovery responses and the
2 confirming deposition testimony, it is now clear that APCO and Camco intend to seek dismissal
3 of the subcontractors' claims based on the "pay-if-paid" agreements.³

4 5. This case is set for trial on the September 12, 2017 stack with a Calendar Call
5 scheduled for September 5, 2017. The Parties must meet and confer and present a joint pretrial
6 statement and/or file separate pretrial statements no later than August 28, 2017. Resolution of
7 this important and purely legal issue on shortened time will assist the parties in preparing for trial,
8 may substantially reduce the time needed for trial and could be a catalyst for settlement.

9 6. Shortened time is therefore respectfully requested to hear this motion no later than
10 August 28, 2017

11 7. I declare under penalty of perjury as provided under the laws of the State of
12 Nevada that the foregoing is true and correct and if called upon to testify, would do so.

13 DATED this 21st day of July 2017.

14 
15 _____
16 Richard L. Peel, Esq.

17 **INTRODUCTION/SUMMARY OF ARGUMENT**

18 The Nevada Supreme Court and the Nevada Legislature have declared that "pay-if-paid"
19 agreements - like those APCO and Camco rely upon here as a defense to their non-payment of
20 monies owed to their subcontractors - are against public policy and void and unenforceable.
21 Notwithstanding the clear prohibition of such agreements, APCO and Camco assert the right to
22 rely on such agreements as a defense to their failure to pay millions of dollars owed to the Peel
23 Brimley Lien Claimants and other subcontractors who furnished work, material and equipment to
24

25 ³ Although APCO and Camco make the assumption that all of the subcontractors entered into
26 written agreements containing "pay-if-paid" language, this assertion is not conceded by way of
27 the present Motion, which asks the court only to rule that the "pay-if-paid" agreements (to the
28 extent they exist and are otherwise applicable to the Peel Brimley Lien Claimants) are void and
unenforceable under Nevada law. At least some of the Peel Brimley Lien Claimants, including
Helix and Heinaman, contend that they never entered into any pay-if-paid agreements. This issue
is reserved for trial or later motion.

1 the Project and have been waiting since 2008 to be paid as agreed. As more fully discussed
2 below, this Court can and should dispense with APCO's and Camco's continued reliance on pay-
3 if-paid agreements as a defense to their continuing failure to pay their subcontractors.

4 **MEMORANDUM OF POINTS AND AUTHORITIES**

5 **I. SUMMARY JUDGMENT STANDARD.**

6 A motion for summary judgment must be granted when "there is no genuine issue as to
7 any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R.
8 Civ. P. 56(c). The movant is entitled to summary judgment if the non-moving party, who bears
9 the burden of persuasion, fails to designate "specific facts showing that there is a genuine issue
10 for trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986)
11 (quoting Fed. R. Civ. P. 56(e)).

12 In order to preclude a grant of summary judgment, the non-moving party must do more
13 than show that there is some "metaphysical doubt" as to the material facts. *See Matsushita Elec.*
14 *Indus. Co. v. Zenith Radio*, 475 U.S. 574, 586, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986). Rather,
15 the non-moving party must set forth "specific facts showing that there is a genuine issue for
16 trial." *Id.* at 587 (quoting Fed. R. Civ. P. 56(e)). *See also Wood v. Safeway, Inc.*, 121 Nev. 724,
17 730-731 (Nev. 2005) (rejecting the "slightest doubt" standard because "the nonmoving party may
18 not defeat a motion for summary judgment by relying 'on the gossamer threads of whimsy,
19 speculation and conjecture.'").

20 Rule 56 should not be regarded as a "disfavored procedural shortcut" but instead "as an
21 integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and
22 inexpensive determination of every action.'" *Celotex*, 477 U.S. at 327. Where the record taken as
23 a whole could not lead a rational trier of fact to find for the nonmoving party, there is no "genuine
24 issue for trial." *Matsushita*, 475 U.S. at 586.

25 As set forth below, the present Motion presents no genuine issues of material fact. Rather,
26 the Motion presents a discrete legal question that is ripe for summary judgment: can APCO and
27 Camco refuse to pay their subcontractors in reliance on "pay-if-paid" clauses contained in (some
28 of) the parties' agreements? Pursuant to *Lehrer McGovern Bovis, Inc. v. Bullock Insulation, Inc.*,

1 197 P.3d 1032 (Nev. 2008) and the provisions of NRS Chapter 624 the answer is plainly “no.”

2 **II. RELEVANT UNDISPUTED FACTS**

3 Despite the fact that pay-if-paid agreements have, since at least 2001, been void and
4 unenforceable in Nevada, APCO and Camco continue to assert such agreements as a defense to
5 their obligations to pay their subcontractors. For instance, by way of its substantially identical
6 objections and responses to discovery requests from some of the subcontractors, including Helix,
7 APCO emphasized its reliance on the “pay-if-paid” language of its subcontract agreement (“the
8 APCO Subcontract Agreement”), as follows:

9 Pursuant to the terms of the Subcontract Agreement, any payments to Helix were
10 specifically conditioned upon APCO’s actual receipt of payment from Gemstone
11 for Helix’s work. Moreover, the Subcontract specifically provided that Helix was
12 assuming the same risk that Gemstone may become insolvent and not be paid for
13 its work as APCO assumed in entering into [the] prime contract with Gemstone.
14 Helix further agreed that APCO had no obligation to pay [the subcontractor] for
15 any work performed by Helix until or unless APCO had actually been paid for
16 such work performed by Helix.

17 [See **Exhibit 1**].⁴

18 Camco asserts an essentially identical defense, relying on language in the APCO
19 Subcontract Agreement that was adopted by way of a Ratification Agreement between Camco
20 and some of the subcontractors. By way of its substantially identical objections and responses to
21 substantially identical discovery requests from some of the Peel Brimley Lien Claimants, Camco
22 replied that it intends to rely upon certain sections of the APCO Subcontract Agreement (as
23 adopted by the Ratification Agreements⁵), which provisions also form the basis of APCO’s pay-
24 if-paid defense. Specifically, those provisions state:

25 3.4 Any payments to Subcontractor shall be conditioned upon receipt of the
26 actual payments by Contractor from Owner. Subcontractor herein agrees to assume
27 the same risk that the Owner may become insolvent that Contractor has assumed
28 by entering into the Prime Contract with the Owner.

29 ⁴ As noted above, the Peel Brimley Lien Claimants do not by the present Motion concede that
30 they entered into any “pay-if-paid agreements.”

31 ⁵ The Peel Brimley Lien Claimants do not by the present Motion concede that they entered into
32 the Ratification Agreements.

1
2 3.5 Progress payments will be made by Contractor to Subcontractor within 15
3 days after Contractor actually receives payment for Subcontractor's work from
4 Owner. Any payments to Subcontractor shall be conditioned upon receipt of the
5 actual payments by Contractor from Owner. Subcontractor herein agrees to assume
6 the same risk that the Owner may become insolvent that Contractor has assumed
7 by entering into the Prime Contract with the Owner.

8 3.8 The 10 percent withheld retention shall be payable to Subcontractor upon,
9 and only upon the occurrence of all the following events, each of which is a
10 condition precedent to Subcontractor's right to receive final payment hereunder
11 and payment of such retention: ... (c) Receipt of final payment by Contractor from
12 Owner.

13 3.9 Subcontractor agrees that Contractor shall have no obligation to pay
14 Subcontractor for any changed or extra work performed by Subcontractor until or
15 unless Contractor has actually been paid for such Work by the owner.

16 4.2 The Owner's payment to Contractor of extra compensation for any such
17 suspension, delay, or acceleration shall be a condition precedent to Subcontractor's
18 right, if any, to receive such extra compensation from Contractor.

19 [See **Exhibit 2**]. Each of these provisions represents or contains a classic "pay-if-paid" agreement
20 such that, if enforced, may allow APCO and Camco to deny payment to their subcontractors for
21 work performed solely on the grounds that APCO and Camco have not been paid. As discussed
22 below, such provisions are void and unenforceable in Nevada.

23 **III. DISCUSSION**

24 **A. Pay-if-Paid is Against Public Policy, Void and Unenforceable.**

25 In 2008 the Nevada Supreme Court declared "pay if paid" provisions in construction contracts
26 void and unenforceable as against Nevada's public policy because "Nevada's public policy favors
27 securing payment for labor and material contractors." *Lehrer McGovern Bovis, Inc. v. Bullock*
28 *Insulation, Inc.*, 124 Nev. 1102, 1117-18, 197 P.3d 1032, 1042 (Nev. 2008). Moreover, and while the
policy impetus for the judicial ban on pay-if-paid provisions is deeply rooted in the long Nevada
tradition of protecting lien claimants, the Nevada Legislature has in fact also barred these odious
provisions in all Nevada construction agreements (i.e., irrespective of lien rights) except in very
limited circumstances not present here. As the *Bullock* Court discussed:

1 [I]n 2001, the Legislature amended NRS Chapter 624 to include the prompt payment
2 provisions contained in NRS 624.624 through 624.626. Pay-if-paid provisions entered
3 into subsequent to the Legislature's amendments are enforceable only in limited
4 circumstances and are subject to the restrictions laid out in these sections. 2001 Nev.
5 Stat., ch. 341, §§ 5–6, at 1615–18.

6 *Bullock*, 124 Nev. at 1117 n. 50. As explained below, the “limited circumstances” referenced by the
7 *Bullock* Court have no application here.

8 **B. Pay-if-Paid Provisions Improperly Impair Mechanic’s Lien Rights.**

9 The Nevada Supreme Court has repeatedly and consistently held that Nevada’s statutory
10 schemes designed to secure payment to contractors and subcontractors in the construction industry as
11 a whole are remedial. *See Hardy Companies, Inc. v. W.E. O’Neil Const. Co.*, 245 P.3d 1149, 1155
12 (Nev. 2010) (citing *Las Vegas Plywood v. D & D Enterprises*, 98 Nev. 378, 380, 649 P.2d 1367, 1368
13 (1982)). The *Bullock* Court reiterated and bolstered these holdings and held as follows:

14 Underlying the policy in favor of preserving laws that provide contractors secured
15 payment for their work and materials is the notion that contractors are generally in a
16 vulnerable position because they extend large blocks of credit; invest significant time,
17 labor, and materials into a project; and have any number of workers vitally depend
18 upon them for eventual payment. *We determine that this reasoning is persuasive as it
19 accords with Nevada’s policy favoring contractors’ rights to secured payment for
20 labor, materials, and equipment furnished.*

21 *Bullock*, 124 Nev. at 1116.

22 Importantly, the *Bullock* Court noted that “because a pay-if-paid provision limits a
23 subcontractor’s ability to be paid for work already performed, such a provision impairs the
24 subcontractor’s statutory right to place a mechanic’s lien on the construction project.” 124 Nev. at
25 1117 n. 51 (citing *Wm. R. Clarke Corp. v. Safeco Ins. Co.*, 15 Cal. 4th 882, 64 Cal. Rptr. 2d 578, 938
26 P.2d 372, 376 (Cal. 1997) (hereinafter “*Clarke*”) (concluding that a pay-if-paid provision “has the
27 same practical effect as an express waiver of [mechanic’s lien] rights”)).

28 **C. The 2001 Amendments to NRS Chapter 624 Ban Pay-if-Paid Agreements.**

As *Bullock* noted, the Nevada Legislature amended NRS Chapter 624 in 2001 (“the 2001
Amendments”) to, among other things, (i) add prompt pay provisions and (ii) bar contractual terms
that purport to waive, release, extinguish or limit any of the rights provided by NRS 624.624 to
624.630, inclusive. As noted by the Nevada Supreme Court in *Bullock*, and as more fully discussed
below, the 2001 Amendments render pay-if-paid agreements enforceable only in very limited
circumstances not relevant here while otherwise making them void as against public policy and
unenforceable.

1. Prompt payment is required by NRS 624.624.

NRS 624.624 is explicit and unambiguous⁶ in requiring payment to be made promptly, as follows:

1. Except as otherwise provided in this section, if a higher-tiered contractor enters into:

(a) A written agreement with a lower-tiered subcontractor that includes a schedule for payments, the higher-tiered contractor shall pay the lower-tiered subcontractor:

(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.

(b) A written agreement with a lower-tiered subcontractor that does not contain a schedule for payments, or an agreement that is oral, the higher-tiered contractor shall pay the lower-tiered subcontractor:

(1) Within 30 days after the date the lower-tiered subcontractor submits a request for payment; or

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

NRS 624.624(1).

In other words, if there is a “schedule of payments” in an otherwise enforceable written agreement between the higher-tiered contractor (e.g., APCO or Camco) and the lower-tiered subcontractor (e.g., the Peel Brimley Lien Claimants), the higher-tiered contractor must pay the lower-tiered subcontractor – at the latest – on the date payment is due. If there is no enforceable written agreement containing a schedule of payments, the payment is due to the lower-tiered subcontractor – at the latest - within 30 days of its request for payment. The statutory language referencing payment received by the higher-tiered contractor exists only to hasten the time within which payment must be made and does not extend the time, much less indefinitely. Here, all of the Peel Brimley Lien Claimants have been waiting for almost nine years without payment.

APCO and Camco may argue that the “schedule of payments” in Section 3.5 of the APCO Subcontract Agreement is “within 15 days after Contractor actually receives payment for Subcontractor's work from Owner.” See Ex. 1. However, were this argument to prevail, any construction contract could effectively vitiate the express requirements and intent of the 2001 Amendments by (as here) making the “schedule of payments” a pay-if-paid agreement. In other

⁶ If a statute's language is clear and unambiguous, courts must enforce the statute as written. *Hobbs v. Nevada*, 127 Nev 234, 237, 251 P.3d 177, 179 (2011).

words, the “date payment is due” would never arise unless and until payment is received from the owner. That is not a “schedule of payments” but rather a pay-if-paid agreement. As such, there is no schedule of payments in the APCO Subcontract Agreement and payment was due to the Peel Brimley Lien Claimants within 30 days of their requests for payment. Neither APCO nor Camco has alleged or is expected to assert that the Peel Brimley Lien Claimants failed to request payment. As such, and pursuant to NRS 6245.624(1)(b), the payments are now nearly nine years past due.

2. The rights afforded by NRS 624.24 to 624.630 may not be waived.

Even if Section 3.5 or some other provision of the APCO Subcontract Agreement or other agreement could be interpreted to avoid the unambiguous language and clear intent of the 2001 Amendments to require prompt payment, the Legislature made such provisions void and enforceable. Specifically, NRS 624.628(3) (with emphasis added) provides:

A condition, stipulation or provision in an agreement which:

- (a) **Requires a lower-tiered subcontractor to waive any rights provided in NRS 624.624 to 624.630, inclusive, or which limits those rights**
 - (b) Relieves a higher-tiered contractor of any obligation or liability imposed pursuant to NRS 624.624 to 624.630, inclusive; or
 - (c) Requires a lower-tiered subcontractor to waive, release or extinguish a claim or right for damages or an extension of time that the lower-tiered subcontractor may otherwise possess or acquire as a result of delay, acceleration, disruption or an impact event that is unreasonable under the circumstances, that was not within the contemplation of the parties at the time the agreement was entered into, or for which the lower-tiered subcontractor is not responsible,
- ↪ is against public policy and is void and unenforceable.**

Here, to the extent Section 3.5 of the APCO Subcontract Agreement attempts to circumvent the clear obligation to promptly pay the subcontractors, it is just such a prohibited “condition, stipulation or provision.” Indeed, any condition stipulation or provision that purports to delay a higher-tiered contractor’s obligation to pay a lower-tiered subcontractor more than 30 days after a request for payment is made is “against public policy and is void and unenforceable.” NRS 624.638(3).

D. The NRS 624.626 “Exception” Is Inapplicable And Limited To Stop Work Remedies.

In reliance on Footnote 50 of the *Bullock* decision (“Footnote 50”), APCO and Camco may argue that there is some statutory exception to their obligation to pay the subcontractors – at the latest – within 30 days of their requests for payment.⁷ Specifically, while acknowledging the prompt payment provisions of the 2001 Amendments, Footnote 50 states that “[p]ay-if-paid provisions

⁷ It is worth noting that Footnote 50 is mere dicta since the footnote itself acknowledges that the 2001 Amendments were not retroactive and, therefore “[do] not affect our analysis here.” 124 Nev. at 1117 n. 50.

1 entered into subsequent to the Legislature's amendments are enforceable only in limited
2 circumstances and are subject to the restrictions laid out in those sections. 2001 Nev. Stat., ch. 341,
3 §§5-6, at 1615-18." *Bullock*, 124 Nev. At 1118 n.50 (emphasis added). As discussed below, these
4 "limited circumstances ... subject to ... restrictions" in no way permit APCO and Camco to avoid
5 their prompt pay obligations.

6 At the risk of the obvious, these "limited circumstances" plainly cannot include the blanket
7 circumvention of the rule against pay-if-paid agreements as set forth in section 3.5 (i.e., declaring the
8 pay-if-paid condition to be the "schedule of payments") because, of course, such an exception
9 swallows the rule, renders the intent of the statute entirely meaningless⁸ and produces an absurd
10 result.⁹ Instead, and as noted above, NRS 624.624 does take the receipt of payment by the higher-
11 tiered contractor into account when determining the date by which payment must be made to the
12 lower-tiered subcontractor but only to hasten the time within which payment must be made. For
13 example, pursuant to NRS 624.624(1)(b), if there is no enforceable written agreement containing a
14 schedule of payments, the payment is due to the lower-tiered subcontractor the earlier of 30 days
15 after request for payment is made or 10 days after the date the higher-tiered contractor receives
16 payment.

17 The only other provision in NRS 624.624 through 624.630 inclusive that even takes the
18 higher-tiered contractor's receipt of payment into consideration is NRS 624.626(1)(b). However that
19 provision relates not to the statutory obligation to make prompt payment (provided for in NRS
20 624.624(1) as discussed above) but rather to the subcontractor's right to stop work in the event of
21 non-payment. Specifically, NRS 624.626(1)(b) gives the lower-tiered subcontractor the right to stop
22 work if:

23 [a] higher-tiered contractor fails to pay the lower-tiered subcontractor within 45 days
24 after the 25th day of the month in which the lower-tiered subcontractor submits a
25 request for payment, even if the higher-tiered contractor has not been paid and the
26 agreement contains a provision which requires the higher-tiered contractor to pay the
27 lower-tiered subcontractor only if or when the higher-tiered contractor is paid.

28 In other words, NRS 624.626(1)(b) allows an unpaid subcontractor to stop work even if there is a pay-
if-paid clause but extends the time before the subcontractor may exercise the right to stop work to 45

⁸ The Court's objective in construing a statute is to give effect to the Legislature's intent. *Hobbs v. State*, 127 Nev. at 237 citing *State v. Catanio*, 120 Nev. 1030, 1033, 102 P.3d 588, 590 (2004).

⁹ The Court must consider "the policy and spirit of the law and ... seek to avoid an interpretation that leads to an absurd result." *Washoe Med. Ctr. v. Second Judicial Dist. Court of State of Nev. ex rel. Cty. of Washoe*, 122 Nev. 1298, 1302, 148 P.3d 790, 793 (2006).

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1 days after the 25th day of the month in which a request for payment is made.

2 Thus, assuming there is a pay-if-paid agreement and a request for payment is made on the first
3 day of the month, the maximum days that can pass before the subcontractor is allowed to exercise its
4 right to stop work is 60 days (25 days plus 45 days). Notably, this statutory provision does not alter
5 the higher-tiered contractor's prompt pay obligations set forth in NRS 624.624 or otherwise extend
6 the time to pay to 60 days. Rather, NRS 624.626(1)(b) simply forces the lower-tiered subcontractor to
7 wait additional time before exercising its right to stop work of there is a pay-if-paid clause.

8 Far from granting an exception to the broad prohibition against pay if paid clauses, NRS
9 624.626(1)(b), which must be read in conjunction with statute as a whole, merely (i) recognizes the
10 reality that such pay-if-paid provisions frequently appear in construction agreements, even though
11 they are deemed unenforceable in Nevada and many other states, and (ii) where rarely applicable,
12 merely provides additional time before an unpaid lower-tiered subcontractor may exercise its statutory
13 right to stop work.

14 CONCLUSION

15 Based on the foregoing, the Peel Brimley Lien Claimants respectfully request that the
16 Court grant the foregoing Motion for Summary Judgment and rule that no pay-if-paid agreements
17 may be used as a defense to claims against APCO and Camco for non-payment.

18 DATED this 31st day of July 2017.

19 **PEEL BRIMLEY LLP**



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CERTIFICATE OF SERVICE

Pursuant to Nev. R. Civ. P. 5(b), I certify that I am an employee of PEEL BRIMLEY LLP and that on this August 2, 2017 ~~31st day of July 2017~~, I caused the above and foregoing document entitled **PEEL BRIMLEY LIEN CLAIMANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT PRECLUDING DEFENSES BASED ON PAY-IF-PAID AGREEMENTS AND EX PARTE APPLICATION FOR ORDER SHORTENING TIME** to be served as follows:

- ☐ by placing same to be deposited for mailing in the United States Mail, in a sealed envelope upon which first class postage was prepaid in Las Vegas, Nevada to the party(ies) and/or attorney(s) listed below; and/or
- ☒ to registered parties via Wiznet, the Court's electronic filing system;
- ☐ pursuant to EDCR 7.26, to be sent **via facsimile**;
- ☐ to be hand-delivered; and/or
- ☐ other _____

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Exhibit 1

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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

**APCO CONSTRUCTION'S ANSWERS TO HELIX ELECTRIC OF NEVADA LLC'S
FIRST REQUESTS FOR INTERROGATORIES**

In accordance with NRCP 33, APCO Construction (hereinafter referred to as "APCO" or "Plaintiff"), by and through its attorneys, Marquis Aurbach Coffing, hereby answers Helix Electric of Nevada, LLC's (hereinafter referred to as "Defendant" or "Helix") Request for Interrogatories as follows:

GENERAL RESPONSES AND OBJECTIONS

1. Plaintiff objects to Defendant's First Set of Interrogatories to the extent that they attempt to impose burdens greater than those imposed by Rules 26 and 33 of the Nevada Rules of Civil Procedure and/or to the extent they infringe upon the attorney-client privilege and/or the attorney work-product doctrine.

1 2. Answers will be made on the basis of information and writings available to and
2 located by the Plaintiff upon reasonable investigation of its records. There may be other and
3 further information respecting the Interrogatories propounded by Defendant of which the
4 Plaintiff, despite its reasonable investigation and inquiry, are presently unaware. Thus, the
5 Plaintiff reserves the right to modify or enlarge any answer with such pertinent additional
6 information as it may subsequently discover.

7 3. Many of the Interrogatories set forth herein are extremely, indeed unreasonably,
8 broad; therefore, responding to all generally requested information and the production of all
9 possible documents responsive to the Interrogatory would be an unreasonable burden upon the
10 Plaintiff. Likewise, many of the Interrogatories are compound, cumulative, vague, ambiguous,
11 lack proper foundation and/or seek information that is protected by the attorney-client privilege
12 and/or attorney-work product doctrine or other privileges or exemptions.

13 4. The Plaintiff objects to these Interrogatories to the extent that they impose upon
14 the Plaintiff greater duties than are contemplated under the Nevada Rules of Civil Procedure.

15 5. No incidental or implied admissions will be made nor shall be construed by the
16 answers. The fact that the Plaintiff may respond or object to any Interrogatory, or any part
17 thereof, shall not be deemed an admission that the Plaintiff accepts or admit the existence of any
18 fact set forth therein or assumed by such Interrogatory, or that such answer constitutes
19 admissible evidence. The fact that the Plaintiff responds to part of any Interrogatory is not to be
20 deemed a waiver by the Plaintiff of its objections, including privilege, to any other part of such
21 an Interrogatory.

22 6. Each Response to the Interrogatories will be subject to all objections as to the
23 competence, relevance, materiality, propriety and admissibility, and to any and all other
24 objections on any ground which would require the exclusion from evidence of any statement
25 herein as if any such statements were made by a witness present and testifying at a hearing or
26 trial in this matter, all of which objections and grounds are expressly reserved and may by
27 interposed at such hearings and trial as necessary.
28

1 7. The Plaintiff hereby adopts, by reference, the above General Objections and
2 incorporate each such objection as if it were fully set forth in each of the responses below.

3 8. Pursuant to Nevada law the Plaintiff reserves the right to amend/supplement its
4 answers herein as additional information becomes known to the Plaintiff through the discovery
5 process, including expert witness reports/opinions.

6 9. Further, the Plaintiffs specifically reserve the right to amend/supplement their
7 Responses herein as additional information becomes known to them through the discovery
8 process, including but not limited to, expert witness reports/opinions. Hence, no answer should
9 be construed to contain all responsive documents available to the Parties that could be utilized at
10 trial, or the current absence of a document should not be construed as any form of admission or
11 fodder for a motion to dismiss or for summary judgment. Last, as additional information
12 becomes available to the Parties, the nature and meaning of various documents previously
13 disclosed by Plaintiffs may further become responsive to any given Interrogatory, and as such,
14 the Plaintiffs reserves the right to amend their answers accordingly.

15 **ANSWER TO INTERROGATORIES**

16 **INTERROGATORY NO. 1:**

17 Identify and state with specificity the facts that you intend to rely upon to refute each
18 cause of action in Helix's Complaint.

19 **ANSWER TO INTERROGATORY NO. 1:**

20 Objection. APCO objects to this Interrogatory on the grounds that this Interrogatory is
21 vague, ambiguous, overly broad, unduly burdensome and oppressive because it seeks to force
22 APCO to "Identify and state with specificity the facts that you intend to rely upon to refute each
23 cause of action in Helix's Complaint." Broad ranging interrogatories are improper when they
24 essentially subsume every fact in the case or every person having knowledge. See Hiskett v.
25 Wal-Mart Stores, Inc., 180 F.R.D. 403, 404 (D. Kan. 1998). ("Interrogatories should not require
26 the answering party to provide a narrative account of its case."). Parties can hardly know when
27 they have identified "all" facts, persons, and documents with respect to anything – particularly
28 before the close of discovery. "How can the court make enforceable orders with reference to 'all'

1 of anything?" Often, the relevance of a particular fact to a particular issue is not known until
2 clarified and put into context by testimony at deposition or trial. Such a question places the
3 responding party in an impossible position. See id.; Safeco of Am. V. Rawstron, 181 F.R.D. 441,
4 447048 (C.D. Cal. 1998)(finding unreasonable an interrogatory calling for all facts supporting
5 denial of a request for admission); Lawrence v. First Kan. Bank & Trust Co., 169 F.R.D. 657,
6 660-63 (D. Kan. 1996)(same); Hilt v. SFC, Inc., 170 F.R.D. 182, 186-87 (D. Kan. 1997)(finding
7 unduly burdensome an interrogatory seeking to require plaintiff to state 'each and every fact'
8 supporting allegations of a complaint). APCO further objects on the grounds that to answer this
9 Interrogatory would result in annoyance, embarrassment, or oppression to APCO in that the
10 question is overly broad, vague, ambiguous, indefinite as to time and without reasonable
11 limitation in its scope. APCO further objects on the basis that the question is oppressive,
12 harassing and burdensome; the information sought seeks APCO's counsel's legal analysis and
13 theories regarding laws, ordinances, safety orders, etc., which are equally available to Helix; the
14 question also invades the attorney's work product privilege. APCO further objects on the basis
15 that the question calls for information which is available to all parties equally, and is therefore
16 oppressive and burdensome to APCO. APCO further objects on the basis that the question seeks
17 information which is protected from disclosure by the attorney's work product privilege. APCO
18 further objects on the basis that the question seeks to invade APCO's counsel's work product
19 privilege in that it calls for him to provide an analysis of written data. APCO further objects on
20 the basis that the question seeks to ascertain all facts and other data which APCO intends to offer
21 at trial and, as such, is violative of the attorney work product privilege. APCO objects on the
22 basis that the attorney-client privilege protects disclosure of the information sought. APCO
23 further objects to this Interrogatory on the grounds that it calls for legal conclusions, and that the
24 contract documents at issue speak for themselves.

25 Subject to and without waiving any objections, APCO responds as follows: Gemstone
26 Development West, Inc. ("Gemstone") has asserted various complaints about the quality of the
27 work performed by APCO and its subcontractors. As of this time, Gemstone has not identified
28 specific issues that Gemstone has with APCO's or its subcontractor's work, including that of

1 Helix. However, as a result of Gemstone's assertions that there are issues with the quality of the
2 work performed on the Project, Gemstone has failed to pay APCO for the work that APCO
3 performed including the work that was performed by Helix. Pursuant to the terms of the
4 Subcontract Agreement, any payments to Helix were specifically conditioned upon APCO's
5 actual receipt of payment from Gemstone for Helix's work. Moreover, the Subcontract
6 specifically provided that Helix was assuming the same risk that Gemstone may become
7 insolvent and not be paid for its work as APCO assumed in entering into prime contract with
8 Gemstone. Helix further agreed that APCO had no obligation to pay Helix for any work
9 performed by Helix until or unless APCO had actually been paid for such work by Gemstone. To
10 date, APCO has not been paid for the work performed, including the work performed by Helix.
11 In fact, due to non- payment, APCO exercised its rights pursuant to NRS Chapter 624 and
12 terminated the prime contract with Gemstone and further terminated the Subcontract with Helix.
13 After APCO ceased work on the Project, Helix may have negotiated with Camco Pacific
14 Construction Company ("Camco"), the replacement general contractor, and/or Gemstone and
15 may have entered into a ratification agreement, wherein APCO was replaced as the general
16 contractor under the Subcontract and Camco and/or Gemstone became liable for any monies due
17 Helix on the Project. Discovery is ongoing; APCO reserves the right to supplement or amend its
18 response to this Interrogatory as investigation, discovery, disclosure and analysis continues.

19 **INTERROGATORY NO. 2:**

20 State the procedure by which you and/or Gemstone Development West, Inc.
21 ("Gemstone") paid Helix for its work, material, and/or equipment furnished at the Project.

22 **ANSWER TO INTERROGATORY NO. 2:**

23 Subject to, and without waiving any objection identified above, APCO responds as
24 follows: APCO paid Helix pursuant to the terms of the Subcontract. More specifically, see
25 Section 3 of the Subcontract. Basically the procedure for payment was as follows: Pursuant to
26 the terms of the Subcontract, Helix submitted to APCO its monthly billing, no later than the 25th
27 of each month, showing quantities of subcontract work that has been satisfactorily completed in
28 the preceding month, as well as backup material. In the event that Helix failed to timely submit

1 its monthly billing with the necessary backup material that resulted in that monthly payment
2 application being rolled over to the following month. In turn, APCO submitted its Application
3 for Payment, which included the subcontractor's monthly billing and backup documentation to
4 Gemstone for payment. Upon actual receipt of payment by APCO from Gemstone, APCO then
5 paid the amount that APCO received for Helix work to Helix as required under the Subcontract.
6 Discovery is ongoing. APCO reserves the right to supplement or amend its response to this
7 Interrogatory as investigation, discovery, disclosure and analysis continues.

8 **INTERROGATORY NO. 3:**

9 State the amount of any payments you or Gemstone made to Helix, the date and manner
10 in which each payment was made, and at what stage of completion the Project was in at the time
11 of each payment.

12 **ANSWER TO INTERROGATORY NO. 3:**

13 Subject to, and without waiving any objection identified above, APCO responds as
14 follows: To date, APCO has approved/paid Helix the sum of \$4,626,186.11 See documents
15 identified by Bate Stamp No. APC0003415 – 339519, 39548 – 39785, and 103577 – 103586
16 which APCO deposited into a depository established by APCO for this litigation matter with
17 Litigation Services located at 3770 Howard Hughes Pkwy, Ste 300, Las Vegas, NV 89169-0935
18 and/or are hereby made available for review and copying (at requestor's expense) at a mutually
19 agreeable time and place. APCO does not have any information as to what payments may have
20 been made by Gemstone directly to Helix after APCO terminated its prime contract with
21 Gemstone. However, from the information obtained through Helix discovery requests
22 propounded upon APCO, it appears that Gemstone may have paid Helix at least \$364,760.00.
23 Discovery is ongoing. APCO reserves the right to supplement or amend its response to this
24 Interrogatory as investigation, discovery, disclosure and analysis continues.

25 **INTERROGATORY NO. 4:**

26 State the amount of any payments to you by Gemstone, the date and manner in which
27 each payment was made, and at what stage of completion the Project was in at the time of each
28 payment.

ANSWER TO INTERROGATORY NO. 4:

Objection. APCO objects to this Interrogatory on the grounds that this Interrogatory is vague, ambiguous, overly broad, unduly burdensome and/or oppressive. Subject to, and without waiving any objections, APCO responds as follows: See documents located at Litigation Services that are made available for review and copying (at requestor's expense). More specifically, see documents identified by Bate Stamp No. APC000033494 through APC000035651. Discovery is ongoing. APCO reserves the right to supplement or amend its response to this Interrogatory as investigation, discovery, disclosure and analysis continues.

INTERROGATORY NO. 5:

Do you contend that the value of the unpaid work, material, and/or equipment furnished or supplied by Helix is less than the amount set forth in Helix's Initial Disclosures?

If so, please state:

a. the basis for your contention including all facts, witnesses, or documents you rely on in support of your contention;

b. how much you contend the work and equipment provided by Helix is actually valued at; and

c. the manner in which you calculated the value of the work, materials, and/or equipment provided by Helix.

ANSWER TO INTERROGATORY NO. 5:

Objection. APCO objects to this Interrogatory on the grounds that this Interrogatory is vague, ambiguous, overly broad, unduly burdensome and oppressive. More specifically APCO objects on the grounds that it is vague and ambiguous in that "value of the unpaid work, material and/or equipment furnished or supplied by Helix" is not defined. APCO further reiterates its General Objections and adds that as this action is in the initial stages of discovery and APCO has not yet determined which witnesses will testify or what evidence will be used in support of APCO's assertions or denials; therefore, this Interrogatory is premature. APCO further objects as the Interrogatory seeks information which is protected from disclosure by the attorney's work product privilege. APCO further objects on the basis that the Interrogatory seeks disclosure of

trial witnesses (other than experts) and is therefore violative of the attorney work product privilege. APCO further objects on the basis that the Interrogatory seeks to ascertain the anticipated testimony of witnesses who are not "experts" and as such violate the attorney work product privilege. APCO further objects on the basis that the question seeks to ascertain all facts and other data which APCO intends to offer at trial and, as such, is violative of the attorney work product privilege. Furthermore, APCO objects to this Interrogatory insofar as it purports to require APCO to describe the substance of each person's knowledge for the reason that such a requirement seeks to impose burdens on APCO beyond those permitted by the Nevada Rules of Civil Procedure, calls for APCO to speculate, is overly broad and unduly burdensome and seeks information protected from disclosure by the attorney-client, work product, party communications, investigative, and consulting expert privileges.

Subject to and without waiving any objections, APCO responds as follows: See documents identified by Bate Stamp No. APC000000001¹ through APC000078992, APCO104200 through 104234, and more specific APC0003415 – 339519, 39548 – 39785, and 103577 – 103586, which APCO has deposited into a depository established by APCO for this litigation matter with Litigation Services and/or are hereby made available for review and copying (at requestor's expense) at a mutually agreeable time and place. Discovery is ongoing; APCO reserves the right to supplement or amend its response to this Interrogatory as investigation, discovery, disclosure and analysis continues.

INTERROGATORY NO. 6:

State with specificity the reasons why you have not paid Helix the sums for the work, material, and/or equipment that Helix provided for the Project.

ANSWER TO INTERROGATORY NO. 6:

Subject to, and without waiving any objection identified above, APCO responds as

¹ Please note that documents bate stamped APC000000001 through APC000001557 are not being produced by APCO as those documents were delivered by APCO to Gemstone Development West ("Gemstone") on September 3 2008, around the time of termination of APCO's prime contract so that Gemstone could continue with the construction of the Project. APCO does not have a copy of these documents as they remain in Gemstone's possession. Furthermore, due to clerical error, the following Bate Stamp Nos. were not used, APC000005841, APC000024165 and APC000033296 and are thus not being produced.

1 follows: Pursuant to the terms of the Subcontract any payments to Helix were specifically
2 conditioned upon APCO's actual receipt of payment from Gemstone for Helix's work.

3 Moreover, the Subcontract specifically provides that Helix was assuming the same risk that
4 Gemstone may become insolvent and not be paid for its work as APCO assumed in entering into
5 prime contract with Gemstone. Helix further agreed that APCO had no obligation to pay Helix
6 for any work performed by Helix until or unless APCO had actually been paid for such work by
7 Gemstone. To date, APCO has not been paid for the work performed, including the work
8 performed by Helix. In fact, due to non-payment, APCO exercised its rights pursuant to NRS
9 Chapter 624 and terminated the prime contract with Gemstone and further terminated the
10 Subcontract with Helix. Discovery is ongoing; APCO reserves the right to supplement or amend
11 its response to this Interrogatory as investigation, discovery, disclosure and analysis continues.

12 **INTERROGATORY NO. 7:**

13 State each and every fact that you rely on to support your position that any claim for
14 unjust enrichment against you is invalid.

15 **ANSWER TO INTERROGATORY NO. 7:**

16 Objection. APCO objects to this Interrogatory on the grounds that this Interrogatory is
17 overly broad, unduly burdensome and oppressive because it seeks to force APCO to identify
18 "each and every fact" that APCO relied upon to support its position that any claim for "unjust
19 enrichment against you is invalid." Broad ranging written discovery is improper when it
20 essentially subsumes every fact in the case. See Hiskett v. Wal-Mart Stores, Inc., 180 F.R.D.
21 403, 404 (D. Kan. 1998); Safeco of Am. V. Rawstron, 181 F.R.D. 441, 447048 (C.D. Cal. 1998);
22 Lawrence v. First Kan. Bank & Trust Co., 169 F.R.D. 657, 660-63 (D. Kan. 1996)(same); Hilt v.
23 SFC, Inc., 170 F.R.D. 182, 186-87 (D. Kan. 1997). APCO further objects to this Interrogatory on
24 the grounds of attorney client privilege and/or attorney work product. APCO further objects that
25 this Interrogatory is premature, as discovery has just commenced on this matter and APCO has
26 not yet identified what documents it may decide to utilize or offer as exhibits against Helix at the
27 time of trial.

28 Subject to and without waiving any objections, See Response to Interrogatory No. 1, 2,

1 and 6 above, which are incorporated herein by this reference. Also, see documents identified by
2 Bate Stamp No APC0003415 – 339519, 39548 – 39785, and 103577 – 103586², which APCO
3 has deposited into a depository established by APCO for this litigation matter with Litigation
4 Services and/or are hereby made available for review and copying (at requestor's expense) at a
5 mutually agreeable time and place. Discovery is ongoing; APCO reserves the right to supplement
6 or amend its Response to this Interrogatory as investigation, discovery, disclosure and analysis
7 continues.

8 **INTERROGATORY NO. 8:**

9 Separately state each and every fact that you rely on to support each of your affirmative
10 defenses.

11 **ANSWER TO INTERROGATORY NO. 8:**

12 Objection. APCO objects to this Interrogatory on the grounds that this Interrogatory is
13 overly broad, unduly burdensome and oppressive because it seeks to force APCO to identify
14 "each and every fact that you rely on to support each of your affirmative defenses." Broad
15 ranging written discovery is improper when it essentially subsumes every fact in the case. See
16 Hiskett v. Wal-Mart Stores, Inc., 180 F.R.D. 403, 404 (D. Kan. 1998); Safeco of Am. V.
17 Rawstron, 181 F.R.D. 441, 447048 (C.D. Cal. 1998); Lawrence v. First Kan. Bank & Trust Co.,
18 169 F.R.D. 657, 660-63 (D. Kan. 1996)(same); Hilt v. SFC, Inc., 170 F.R.D. 182, 186-87 (D.
19 Kan. 1997). APCO further objects to this Interrogatory on the grounds of attorney client
20 privilege and/or attorney work product. APCO further objects that this Interrogatory is
21 premature, as discovery has just commenced on this matter and APCO has not yet identified all
22 facts that it intends to use relative to Helix's action.

23 Subject to and without waiving any objections, See Response to Interrogatory No. 1, 6, 7,
24 and 8 above, which are incorporated herein by this reference. Also, see documents identified by
25 Bate Stamp No. APC000000001³ through APC000078992 and APCO104200 through 104234,
26

27 ² See Footnote No. 1.

28 ³ See Footnote No. 1.

1 and more specific APC0003415 – 339519, 39548 – 39785, and 103577 – 103586⁴, which APCO
2 has deposited into a depository established by APCO for this litigation matter with Litigation
3 Services and/or are hereby made available for review and copying (at requestor's expense) at a
4 mutually agreeable time and place. Discovery is ongoing. APCO reserves the right to supplement
5 or amend its Response to this Interrogatory as investigation, discovery, disclosure and analysis
6 continues.

7 **INTERROGATORY NO. 9:**

8 If you contend that Helix entered into any independent agreement or ratification with
9 CAMCO Pacific Construction Company, Inc. ("CAMCO") or Gemstone, state each and every
10 fact that you rely on to support your position and on what basis any such agreement relieves
11 APCO of its contractual duties to Helix.

12 **ANSWER TO INTERROGATORY NO. 9:**

13 Subject to, and without waiving any objection identified above, APCO responds as
14 follows: It is APCO's understanding that after APCO's termination of the prime contract with
15 Gemstone for non-payment, Gemstone, through Camco Pacific Construction Company
16 ("Camco"), its replacement contractor, entered into independent and/or ratification agreements.
17 APCO is aware that several of its subcontractors have entered into such independent and/or
18 ratification agreement. APCO does not have personal knowledge of which subcontractors have
19 entered into such agreements. APCO objects that this Interrogatory is premature, as discovery
20 has just commenced on this matter and APCO has not yet identified all subcontractors who may
21 have entered into such agreements and whether or not Helix was one of such subcontractors.
22 Discovery is ongoing. APCO reserves the right to supplement or amend its Response to this
23 Interrogatory as investigation, discovery, disclosure and analysis continues.

24 **INTERROGATORY NO. 10:**

25 Identify all facts, witnesses (names, employers, addresses and telephone number) and
26 documents, records that support your Answers to these Interrogatories and your responses to
27 Requests for Admission.

28 ⁴ See Footnote No. 1.

1 **ANSWER TO INTERROGATORY NO. 10:**

2 Objection. APCO objects to this Interrogatory as being overly broad, unduly burdensome
3 and oppressive because it seeks to force APCO to identify "all facts, witnesses (names,
4 employers, addresses and telephone number) and documents, records, that support your Answers
5 to these Interrogatories and your responses to Requests for Admission" Broad ranging written
6 discovery is improper when it essentially subsumes every fact in the case. See Hiskett v. Wal-
7 Mart Stores, Inc., 180 F.R.D. 403, 404 (D. Kan. 1998); Safeco of Am. V. Rawstron, 181 F.R.D.
8 441, 447048 (C.D. Cal. 1998); Lawrence v. First Kan. Bank & Trust Co., 169 F.R.D. 657, 660-
9 63 (D. Kan. 1996)(same); Hilt v. SFC, Inc., 170 F.R.D. 182, 186-87 (D. Kan. 1997). APCO
10 further objects to this Interrogatory on the grounds of attorney client privilege and/or attorney
11 work product. APCO further objects that this Interrogatory is premature, as discovery has just
12 commenced on this matter and APCO has not yet identified all facts that it intends to use relative
13 to Helix's action.

14 Subject to and without waiving any objections, see documents identified by Bate Stamp
15 No. APC000000001⁵ through APC000078992 and APC0104200 through 104234, and more
16 specific APC0003415 – 339519, 39548 – 39785, and 103577 – 103586⁶, which APCO has
17 deposited into a depository established by APCO for this litigation matter with Litigation
18 Services and/or are hereby made available for review and copying (at requestor's expense) at a
19 mutually agreeable time and place. Discovery is ongoing. APCO reserves the right to supplement
20 or amend its Response to this Interrogatory as investigation, discovery, disclosure and analysis
21 continues.

22 With respect to the potential witnesses sought in Interrogatory No. 10, APCO objects to
23 this Interrogatory as well. APCO reiterates its General Objections and adds that as this action is
24 in the initial stages of discovery, and APCO has not yet determined which witnesses support its
25 Answers to these Interrogatories and its responses to the propounded Requests for Admission.
26 APCO further objects that this Interrogatory is premature. APCO further objects as the

27 ⁵ See Footnote No. 1.

28 ⁶ See Footnote No. 1.

1 Interrogatory seeks information which is protected from disclosure by the attorney's work
2 product privilege. APCO further objects on the basis that the Interrogatory seeks disclosure of
3 trial witnesses (other than experts) and is therefore violative of the attorney work product
4 privilege. APCO further objects on the grounds that this Interrogatory is vague, ambiguous,
5 overly broad, unduly burdensome and oppressive because it seeks to force APCO to identify "all
6 witnesses (names, employers, addresses and telephone number) and...that support your Answers
7 to these Interrogatories and your responses to Requests for Admission." Furthermore, APCO
8 objects to this Interrogatory insofar as it purports to require APCO to describe the substance of
9 each person's knowledge for the reason that such a requirement seeks to impose burdens on
10 APCO beyond those permitted by the Nevada Rules of Civil Procedure, calls for APCO to
11 speculate, is overly broad and unduly burdensome and seeks information protected from
12 disclosure by the attorney-client, work product, party communications, investigative, and
13 consulting expert privileges.

14 Subject to and without waiving any objections, APCO anticipates that the following
15 individuals may be witnesses and/or have relevant information relative the claims asserted in this
16 action:

- 17 1. Brian Benson
18 APCO Construction
19 Marquis Aurbach Coffing
10001, Park Run Drive
Las Vegas, Nevada 89145

20 Mr. Nickerl will testify regarding the facts and circumstances surrounding this action
21 and provide other testimony to support the allegations of APCO's Complaint against Gemstone
22 and all other claims that APCO has asserted against various subcontractors. Mr. Nickerl will
23 further provide testimony to refute the allegations of Gemstone's Counterclaim and various
24 Complaints in Intervention filed by various subcontractors.

- 25 2. Joe Pelan
26 APCO Construction
27 Marquis Aurbach Coffing
10001, Park Run Drive
28 Las Vegas, Nevada 89145

1 Mr. Pelan will testify regarding the facts and circumstances surrounding this action and
2 provide other testimony to support the allegations of APCO's Complaint against Gemstone and
3 all other claims that APCO has asserted against various subcontractors. Mr. Pelan will further
4 provide testimony to refute the allegations of Gemstone's Counterclaim and various Complaints
5 in Intervention filed by various subcontractors.

6 3. Lisa Lynn
7 APCO Construction
8 Marquis Aurbach Coffing
9 10001, Park Run Drive
10 Las Vegas, Nevada 89145

11 Ms. Lynn will testify regarding the facts and circumstances surrounding this action.

12 4. Mary Jo Allen
13 APCO Construction
14 Marquis Aurbach Coffing
15 10001 Park Run Drive
16 Las Vegas, Nevada 89145

17 Ms. Allen is expected to testify regarding the amounts due to APCO on the Manhattan
18 West Project and shall further provide other testimony in support of the allegations of APCO's
19 Complaint.

20 5. Person Most Knowledgeable - APCO
21 c/o Gwen Rutar Mullins, Esq.
22 Marquis Aurbach Coffing
23 10001, Park Run Drive
24 Las Vegas, Nevada 89145

25 Person Most Knowledgeable of APCO will testify regarding the facts and circumstances
26 surrounding this action, will support the allegations of APCO's Complaints and will refute the
27 allegations of the Counterclaim and/or various Complaints in Intervention as they are asserted
28 against APCO.

6. The Person Most Knowledgeable
Gemstone Development West, Inc.
c/o Alexander Edelstein, registered Agent
10170 W. Tropicana Ave., Suite 156-169
Las Vegas, Nevada 89147

The Person Most Knowledgeable of Gemstone Development West, Inc. is expected to
testify regarding the facts and circumstances related to the claims made in this action.

1 7. Alexander Edelstein
2 10170 W. Tropicana Ave., Suite 156-169
Las Vegas, Nevada 89147

3 Mr. Edelstein is expected to testify regarding the facts and circumstances related to the
4 claims made in this action.

5 8. Pete Smith
6 Gemstone Development West, Inc.
Address unknown

7 Mr. Smith is expected to testify regarding the facts and circumstances related to the
8 claims made in this action.

9 9. Craig Colligan
10 Address unknown

11 Mr. Colligan is expected to testify regarding the facts and circumstances related to the
12 claims made in this action.

13 10. The Person Most Knowledgeable
14 Scott Financial Services, Inc.
15 c/o Kemp, Jones & Coulthard
3800 Howard Hughes Pkwy., 17th Floor
Las Vegas, Nevada 89169

16 The Person Most Knowledgeable of Scott Financial Services, Inc. is expected to testify
17 regarding the facts and circumstances related to the claims made by in this action.

18 11. Bradley J. Scott
19 c/o Kemp, Jones & Coulthard
20 3800 Howard Hughes Pkwy., 17th Floor
Las Vegas, Nevada 89169

21 Mr. Scott is expected to testify regarding the facts and circumstances related to the
22 claims made by in this action.

23 12. The Person Most Knowledgeable
24 Bank of Oklahoma
25 c/o Lewis and Roca, LLP
3993 Howard Hughes Pkwy., Ste. 600
Las Vegas, Nevada 89169

26 The Person Most Knowledgeable of Bank of Oklahoma is expected to testify regarding
27 the facts and circumstances related to the claims made in this action.
28

1 13. The Person Most Knowledgeable
2 Club Vista Financial Services, LLC
3 c/o Cooksey, Toolen, Gage, Duffy & Woog
4 3930 Howard Hughes Pkwy., Ste. 200
5 Las Vegas, Nevada 89169

6 The Person Most Knowledgeable of Club Vista Financial Services, LLC is expected to
7 testify regarding the facts and circumstances related to the claims made in this action.

8 14. The Person Most Knowledgeable
9 Tharaldson Motels II, Inc.
10 c/o Cooksey, Toolen, Gage, Duffy & Woog
11 3930 Howard Hughes Pkwy., Ste. 200
12 Las Vegas, Nevada 89169

13 The Person Most Knowledgeable of Tharaldson Motels II, Inc. is expected to testify
14 regarding the facts and circumstances related to the claims made in this action.

15 15. Gary D. Tharaldson
16 c/o Cooksey, Toolen, Gage, Duffy & Woog
17 3930 Howard Hughes Pkwy., Ste. 200
18 Las Vegas, Nevada 89169

19 Mr. Tharaldson is expected to testify regarding the facts and circumstances related to the
20 claims made in this action.

21 16. Aaron Davis
22 Insulpro Projects, Inc.
23 c/o Eric Dobberstein, Esq.
24 DOBBERSTEIN & ASSOCIATES
25 8965 S. Eastern Avenue, Suite 280
26 Las Vegas, Nevada 89123

27 Mr. Davis is expected to testify as to his understanding of the facts of this matter forming
28 the basis of Insulpro's lawsuit against APCO.

17. Cheryl Johnson
Insulpro Projects, Inc.
c/o Eric Dobberstein, Esq.
DOBBERSTEIN & ASSOCIATES
8965 S. Eastern Avenue, Suite 280
Las Vegas, Nevada 89123

Ms. Johnson is expected to testify as to her understanding of the facts of this matter
forming the basis of Insulpro's lawsuit against APCO.

18. Matthew Hashagen
Insulpro Projects, Inc.
c/o Eric Dobberstein, Esq.
DOBBERSTEIN & ASSOCIATES
8965 S. Eastern Avenue, Suite 280
Las Vegas, Nevada 89123

Mr. Hashagen is expected to testify as to his understanding of the facts of this matter forming the basis of Insulpro's lawsuit against APCO.

19. The Person Most Knowledgeable
Pressure Grout Company, Inc.
c/o T. James Truman, Esq.
T. James Truman & Associates
3654 North Rancho Drive
Las Vegas, Nevada 89130

The Person Most Knowledgeable for PGC is expected to testify as regarding the circumstances of this matter forming the basis of PGC's claims against APCO.

20. H.R. Alalusi
Pressure Grout Company, Inc.
c/o T. James Truman, Esq.
T. James Truman & Associates
3654 North Rancho Drive
Las Vegas, Nevada 89130

H.R. Alalusi is expected to testify as regarding the circumstances of this matter forming the basis of PGC's claims against APCO and regarding the PGC's work on the Projects and issues relating thereto.

21. Jim Thompson
REI/Structural
700 17th Street, Ste. 1900
Denver, CO 80202
(303)575-9510

Mr. Thompson is expected to testify regarding the circumstances of this matter including the improper workmanship of PGC on the Project which resulted in findings that some of the columns capitals on Buildings 8 and 9 needed to be demolished or reconstructed. Mr. Thompson is further expected to testify about the defective work performed by PGC on the Project.

...

22. Robert D. Redwine
Civil Structural Engineer
700 17th Street, Ste. 1900
Denver, CO 80202
(303)575-9510

Mr. Redwine is expected to testify regarding the circumstances of this matter including the improper workmanship of PGC on the Project which resulted in findings that some of the columns capitals on Buildings 8 and 9 needed to be demolished or reconstructed. Mr. Redwine is further expected to testify about the defective work performed by PGC on the Project.

23. The Person Most Knowledgeable
Helix Electric of Nevada, LLC
c/o Eric B. Zimbelman, Esq.
c/o Richard L. Peel, Esq.
PEEL BRIMLEY LLP
3333 E. Serene Ave., Ste. 200
Henderson, Nevada 89074

The Person Most Knowledgeable for Helix Electric of Nevada, LLC is expected to testify as to his/her understanding of the facts of this matter forming the basis Helix's lawsuit against APCO.

APCO further expects that each of the subcontractors who are participating in this action will also testify as to his/her understanding of the facts on this matter and to support their claims that were asserted in this action. Also, see APCO's disclosure of witnesses previously served on this matter. Discovery is ongoing. APCO reserves the right to supplement or amend its response to this Interrogatory as investigation, discovery, disclosure and analysis continues.

INTERROGATORY NO. 11:

For every response to Helix's Requests for Admission that is anything other than an unequivocal admission, identify all facts, witnesses (names, employers, addresses and telephone number) and documents, records, that support such responses.

ANSWER TO INTERROGATORY NO. 11:

Objection. This Interrogatory calls for multiple responses as there were denials made by APCO to Helix's Requests for Admissions. APCO objects to any attempt by Helix to evade any numerical limitations set on interrogatories by asking multiple independent questions within

single individual questions and subparts. APCO further objects on the grounds of relevance and that this Interrogatory is vague, ambiguous, overly broad, unduly burdensome and oppressive because it seeks to force APCO to identify "each and every denial." See also Response to Interrogatory No. 1 above, which is incorporated herein by this reference. Subject to and without waiving any objections, see APCO's Responses to Helix's Requests for Admissions. See also, Responses to Interrogatory No. 1, 2, 6, and 10 above, which are incorporated herein by this reference. Also, see documents identified by Bate Stamp No. APC000000001⁷ through APC000078992 and APC0104200 through 104234, and more specific APC0003415 – 339519, 39548 – 39785, and 103577 – 103586⁸, which APCO has deposited into a depository established by APCO for this litigation matter with Litigation Services and/or are hereby made available for review and copying (at requestor's expense) at a mutually agreeable time and place. Discovery is ongoing. APCO reserves the right to supplement or amend its Response to this Interrogatory as investigation, discovery, disclosure and analysis continues.

INTERROGATORY NO. 12:

State each and every fact that supports your position that you are not legally liable for payment to Helix for the work, material, and/or equipment that it furnished on the Project.

ANSWER TO INTERROGATORY NO. 12:

Objection. APCO objects to this Interrogatory on the grounds that this Interrogatory is overly broad, unduly burdensome and oppressive because it seeks to force APCO to identify "each and every fact that supports your position that you are not legally liable for payment to Helix for the work, material, and/or equipment that it furnished on the Project." Broad ranging written discovery is improper when it essentially subsumes every fact in the case. See Hiskett v. Wal-Mart Stores, Inc., 180 F.R.D. 403, 404 (D. Kan. 1998); Safeco of Am. V. Rawstron, 181 F.R.D. 441, 447048 (C.D. Cal. 1998); Lawrence v. First Kan. Bank & Trust Co., 169 F.R.D. 657, 660-63 (D. Kan. 1996)(same); Hilt v. SFC, Inc., 170 F.R.D. 182, 186-87 (D. Kan. 1997). APCO further objects to this Interrogatory on the grounds of attorney client privilege and/or attorney

⁷ See Footnote No. 1.

⁸ See Footnote No. 1.

1 work product. APCO further objects that this Interrogatory is premature, as discovery has just
2 commenced on this matter and APCO has not yet identified all facts that it intends to use relative
3 Helix's action.

4 Subject to and without waiving any objections, See Responses to Interrogatory No. 1, 6,
5 and 7 above, which are incorporated herein by this reference. Also, see documents identified by
6 Bate Stamp No. APC000000001⁹ through APC000078992 and APCO104200 through
7 104234, and more specific APC0003415 – 339519, 39548 – 39785, and 103577 – 103586¹⁰,
8 which APCO has deposited into a depository established by APCO for this litigation matter with
9 Litigation Services and/or are hereby made available for review and copying (at requestor's
10 expense) at a mutually agreeable time and place. Discovery is ongoing. APCO reserves the right
11 to supplement or amend its Response to this Interrogatory as investigation, discovery, disclosure
12 and analysis continues.

13 **INTERROGATORY NO. 13:**

14 Identify each person you expect to call as an expert witness at the time of trial in this
15 action. With respect to each, please state:

- 16 a. the subject matter on which the expert is expected to testify, the substance of the facts
17 and opinions to which each expert is expected to testify;
- 18 b. a summary of the grounds for each opinion;
- 19 c. whether written document was prepared by such expert;
- 20 d. the professional title, educational background, qualifications and work experience of
21 each such expert.

22 **ANSWER TO INTERROGATORY NO. 13:**

23 Objection. APCO objects to this Interrogatory on the grounds that it is premature. APCO
24 has not yet decided on which, if any, expert witnesses might be called at trial. In fact, APCO has
25 not yet retained any expert witness on this matter. Discovery is ongoing. APCO reserves the
26 right to supplement this Response when APCO has retained an expert witness on this matter.

27 ⁹ See Footnote No. 1.

28 ¹⁰ See Footnote No. 1.

INTERROGATORY NO. 14:

Identify any and all exhibits which you intend to produce at the time of trial in this matter as it relates to the claims brought by Helix and the work, material, and/or equipment furnished by Helix on the Project.

ANSWER TO INTERROGATORY NO. 14:

Objection. APCO objects to this Interrogatory on the grounds that it is premature. APCO has yet to determine the exhibits to be produced at trial. See also Response to Interrogatory No. 1 above, which is incorporated herein by this reference. Subject to and without waiving any objections, see documents identified by Bate Stamp No. APC000000001¹¹ through APC000078992 and APCO104200 through 104234, and more specific APC0003415 – 339519, 39548 – 39785, and 103577 – 103586¹², which APCO has deposited into a depository established by APCO for this litigation matter with Litigation Services and/or are hereby made available for review and copying (at requestor's expense) at a mutually agreeable time and place. See also documents produced by other parties to this action, including any documents produced by Helix in this action. Discovery is ongoing. APCO reserves the right to supplement or amend its Response to this Interrogatory as investigation, discovery, disclosure and analysis continues.

INTERROGATORY NO. 15:

If you have asserted or intend to assert any causes of action, counter-claims, cross-claims, or any other similar claim against Helix in this matter, identify each and state all facts you rely on to support each claim.

ANSWER TO INTERROGATORY NO. 15:

Objection. APCO objects on the basis that the Interrogatory is overly broad, vague, ambiguous, indefinite as to time and without reasonable limitation in its scope. APCO further objects on the basis that the question is oppressive, harassing and burdensome; the information sought seeks APCO's counsel's legal analysis and theories regarding laws, ordinances, safety orders, etc., which are equally available to Helix; the question also invades the attorney's work

¹¹ See Footnote No. 1.

¹² See Footnote No. 1.

1 product privilege. APCO further objects on the basis that the question seeks to invade APCO's
2 counsel's work product privilege in that it calls for him to provide an analysis of written data.

3 APCO further objects on the basis that the question seeks to ascertain all facts and other data
4 which APCO intends to offer at trial and, as such, is violative of the attorney work product
5 privilege. APCO objects on the basis that the attorney-client privilege protects disclosure of the
6 information sought.

7 Subject to and without waiving any objections, APCO, in view of the claims that have
8 been asserted by Gemstone, APCO is evaluating all of its options, including asserting claims
9 against Helix, including, but not limited to, breach of contract, unjust enrichment, indemnity, set
10 off, and contribution. Discovery is ongoing. APCO reserves the right to supplement or amend its
11 response to this Interrogatory as investigation, discovery, disclosure and analysis continues.

12 **INTERROGATORY NO. 16:**

13 Please identify the first and last date Helix performed work and describe in detail Helix's
14 scope of work for the Project.

15 **ANSWER TO INTERROGATORY NO. 16:**

16 Objection. APCO objects on the basis that the Interrogatory is oppressive, harassing and
17 burdensome as the information sought information that is equally available to Helix.

18 Subject to and without waiving any objections, APCO responds as follows: Helix
19 commenced with its work on the Project sometime in April 2007. APCO does not know the last
20 date that Helix performed work on the Project. APCO understands that Helix continued to
21 perform work on the Project after APCO ceased its work and terminated the prime contract with
22 Gemstone. Discovery is ongoing. APCO reserves the right to supplement or amend its response
23 to this Interrogatory as investigation, discovery, disclosure and analysis continues.

24 **INTERROGATORY NO. 17:**

25 Identify all facts and circumstances leading up to your issuance of the stop work order to
26 Helix and describe any and all reasons you believe you were justified you in taking such action.

27 **ANSWER TO INTERROGATORY NO. 17:**

28 Objection. APCO objects to this request for Interrogatory is overly broad, unduly

1 burdensome and oppressive because it seeks to force APCO to identify "all facts and
2 circumstances leading up to your issuance of the stop work order to Helix and describe any and
3 all reasons you believe you were justified you in taking such action." Broad ranging written
4 discovery is improper when it essentially subsumes every fact in the case. See Hiskett v. Wal-
5 Mart Stores, Inc., 180 F.R.D. 403, 404 (D. Kan. 1998); Safeco of Am. V. Rawstron, 181 F.R.D.
6 441, 447048 (C.D. Cal. 1998); Lawrence v. First Kan. Bank & Trust Co., 169 F.R.D. 657, 660-
7 63 (D. Kan. 1996)(same); Hilt v. SFC, Inc., 170 F.R.D. 182, 186-87 (D. Kan. 1997). APCO
8 further objects to this Interrogatory on the grounds of attorney client privilege and/or attorney
9 work product. APCO further objects that this Interrogatory is premature, as discovery has just
10 commenced on this matter and APCO has not yet identified all facts that it intends to use relative
11 to Helix's action.

12 Subject to and without waiving any objections, APCO responds as follows: After APCO
13 was not paid by Gemstone for work that was being performed by APCO and its subcontractors,
14 APCO, pursuant to Nevada law, gave notice to Gemstone of its intent to stop work and terminate
15 the prime contract unless payment was made. APCO provided a copy of such notice to its
16 subcontractors, including Helix, so that the subcontractors, including Helix, could take whatever
17 action they deemed necessary to protect their respective rights under Nevada law. After payment
18 from Gemstone was not made, APCO, as allowed under Nevada law, terminated its prime
19 contract with Gemstone and further notified its subcontractors, including Helix of such
20 termination. See also, Responses to Interrogatory No. 1, 6, and 7 above, which are incorporated
21 herein by this reference. Also, see documents identified by Bate Stamp No. APC000000001¹³
22 through APC000078992 and APC0104200 through 104234, and more specific APC0003415 -
23 339519, 39548 - 39785, and 103577 - 103586¹⁴, which APCO has deposited into a depository
24 established by APCO for this litigation matter with Litigation Services and/or are hereby made
25 available for review and copying (at requestor's expense) at a mutually agreeable time and place.
26 Discovery is ongoing. APCO reserves the right to supplement or amend its Response to this

27 ¹³ See Footnote No. 1.

28 ¹⁴ See Footnote No. 1.

1 Interrogatory as investigation, discovery, disclosure and analysis continues.

2 **INTERROGATORY NO. 18:**

3 If you or any officer, director, or employee of APCO has had any conversations with
4 Helix regarding the facts alleged in Helix Complaint against APCO and Gemstone, please state
5 the dates of each conversation, the parties, involved, the contents of the conversation, and what
6 was said.

7 **ANSWER TO INTERROGATORY NO. 18:**

8 Objection. APCO objects on the grounds of relevance and further objects that this
9 Interrogatory is vague, ambiguous, overly broad, unduly burdensome and oppressive because it
10 seeks to force APCO to identify any conversations that APCO may have had with Helix
11 including the dates of each conversation, persons involved and the contents of the conversations.
12 APCO further objects to this Interrogatory on the grounds that the burden of deriving or
13 ascertaining the answer to this Interrogatory is substantially the same for Helix as for APCO. See
14 also Response to Interrogatory No. 2 above, which is incorporated herein by this reference.

15 Subject to and without waiving any objections, APCO, during the course of construction,
16 had numerous conversations with Helix relative Helix's work and the Project in general. APCO
17 is unable to recall each and every conversation and their contents. Discovery is ongoing. APCO
18 reserves the right to supplement or amend its response to this Interrogatory as investigation,
19 discovery, disclosure and analysis continues.

20 **INTERROGATORY NO. 19:**

21 If you or any officer, director, or employee of APCO has had any conversations with
22 CAMCO regarding the facts alleged in Helix's Complaint against APCO and Gemstone, please
23 state the dates of each conversation, the parties, involved, the contents of the conversation, and
24 what was said.

25 **ANSWER TO INTERROGATORY NO. 19:**

26 Objection. APCO objects on the grounds of relevance and further objects that this
27 Interrogatory is vague, ambiguous, overly broad, unduly burdensome and oppressive because it
28 seeks to force APCO to identify any conversations that APCO may have had with Camco

1 including the dates of each conversation, persons involved and the contents of the conversations.

2 See also Response to Interrogatory No. 2 above, which is incorporated herein by this reference.

3 Subject to and without waiving any objections, APCO, does not recall having any
4 conversations with Camco regarding Helix's work or otherwise. Discovery is ongoing. APCO
5 reserves the right to supplement or amend its response to this Interrogatory as investigation,
6 discovery, disclosure and analysis continues.

7 **INTERROGATORY NO. 20:**

8 If you or any officer, director, or employee of APCO has had any conversations with
9 Gemstone regarding the facts alleged in Helix's Complaint against APCO and Gemstone, please
10 state the dates of each conversation, the parties, involved, the contents of the conversation, and
11 what was said.

12 **ANSWER TO INTERROGATORY NO. 20:**

13 Objection. APCO objects on the grounds of relevance and further objects that this
14 Interrogatory is vague, ambiguous, overly broad, unduly burdensome and oppressive because it
15 seeks to force APCO to identify any conversations that APCO may have had with Gemstone
16 including the dates of each conversation, persons involved and the contents of the conversations.
17 See also Response to Interrogatory No. 2 above, which is incorporated herein by this reference.

18 Subject to and without waiving any objections, APCO, during the course of construction,
19 undoubtedly had some conversations with Gemstone relative Helix's work and the Project in
20 general. APCO is unable to recall each and every conversation and their contents. Discovery is
21 ongoing. APCO reserves the right to supplement or amend its response to this Interrogatory as
22 investigation, discovery, disclosure and analysis continues.

23 **INTERROGATORY NO. 21:**

24 If you or any officer, director, or employee of APCO has had any conversations with any
25 Third-Party regarding the facts alleged in Helix's Complaint against APCO and Gemstone,
26 please state the dates of each conversation, the parties, involved, the contents of the conversation,
27 and what was said.

ANSWER TO INTERROGATORY NO. 21:

Objection. APCO objects on the grounds of relevance and further objects that this Interrogatory is vague, ambiguous, overly broad, unduly burdensome and oppressive because it seeks to force APCO to identify any conversations that APCO may have had with a Third Party including the dates of each conversation, persons involved and the contents of the conversations. See also Response to Interrogatory No. 2 above, which is incorporated herein by this reference.

Subject to and without waiving any objections, APCO does not recall having any conversations with a "Third-Party" regarding Helix's work or otherwise. Discovery is ongoing. APCO reserves the right to supplement or amend its response to this Interrogatory as investigation, discovery, disclosure and analysis continues.

INTERROGATORY NO. 22:

If you contend that your lien has priority over any other party in this matter, including Helix, please state each and every fact supporting your claim.

ANSWER TO INTERROGATORY NO. 22:

Objection. APCO objects on the grounds of relevance and further objects that this Interrogatory is vague, ambiguous, overly broad, unduly burdensome and oppressive because it seeks to force APCO to identify "each and every fact supporting" "that your lien has priority over any other party in this matter." See also Response to Interrogatory No. 2 above, which is incorporated herein by this reference.

Subject to and without waiving any objections, APCO responds as follows: APCO has asserted priority over the deeds of trust that are of record against the Manhattan West Project pursuant to NRS 108.225. Priority over the deeds of trusts is based on the fact that APCO first performed work under the Grading Agreement on or about May 2007. APCO first performed work under the ManhattanWest General Construction Agreement for GMP or about September 5, 2007. The deeds of trust on the property attached after construction work commenced. APCO has further asked the Court to declare the rank of mechanic's liens pursuant to NRS 108.236. See

1 also documents identified by Bate Stamp No. APC000000001¹⁵ through APC000078992 and
2 APCO104200 through 104234, and more specific APC0003415 – 339519, 39548 – 39785, and
3 103577 – 103586¹⁶, which APCO has deposited into a depository established by APCO for this
4 litigation matter with Litigation Services and/or are hereby made available for review and
5 copying (at requestor's expense) at a mutually agreeable time and place. Discovery is ongoing;
6 APCO reserves the right to supplement or amend its Response to this Interrogatory as
7 investigation, discovery, disclosure and analysis continues.

8 **INTERROGATORY NO. 23:**

9 Identify the dates you started and ceased construction on the Project and describe the
10 work that was performed while you were the general contractor for the Project.

11 **ANSWER TO INTERROGATORY NO. 23:**

12 Objection. APCO objects on the grounds of relevance and further objects that this
13 Interrogatory is vague, ambiguous, overly broad, unduly burdensome and oppressive because it
14 seeks to force APCO to describe "the work that was performed." APCO further objects on the
15 grounds that it is vague and ambiguous in that "construction" and "work" are not defined. See
16 also Response to Interrogatory No. 2 above, which is incorporated herein by this reference.
17 Subject to and without waiving any objections, APCO responds as follows: APCO first
18 performed work under the Grading Agreement on or about May 2007. APCO first performed
19 work under the Manhattan West General Construction Agreement for GMP or about September
20 5, 2007. See also documents identified by Bate Stamp No. APC000000001¹⁷ through
21 APC000078992 and APCO104200 through 104234, and more specific APC0003415 – 339519,
22 39548 – 39785, and 103577 – 103586¹⁸, which APCO has deposited into a depository
23 established by APCO for this litigation matter with Litigation Services and/or are hereby made
24 available for review and copying (at requestor's expense) at a mutually agreeable time and place.

25 ¹⁵ See Footnote No. 1.

26 ¹⁶ See Footnote No. 1.

27 ¹⁷ See Footnote No. 1.

28 ¹⁸ See Footnote No. 1.

1 Discovery is ongoing; APCO reserves the right to supplement or amend its Response to this
2 Interrogatory as investigation, discovery, disclosure and analysis continues.

3 **INTERROGATORY NO. 24:**

4 Identify all payments received by you for the work, material, and/or equipment furnished
5 by Helix at the Project for which Helix has not been paid.

6 **ANSWER TO INTERROGATORY NO. 24:**

7 Subject to, and without waiving any objection identified above, APCO responds as
8 follows: None. APCO has not received any payments for work, materials and/or equipment
9 furnished by Helix at the Project for which Helix has not been paid by APCO.

10 **INTERROGATORY NO. 25:**

11 Identify all facts, opinions, or law not set forth in other responses, which you contend
12 would excuse you from paying Helix the owed and outstanding amounts for the work, material,
13 and/or equipment furnished by Helix at the Project.

14 **ANSWER TO INTERROGATORY NO. 25:**

15 Objection. APCO objects on the grounds of relevance and further objects that this
16 Interrogatory is vague, ambiguous, overly broad, unduly burdensome and oppressive because it
17 seeks to force APCO to identify "all facts, opinions, or law not set forth in other responses,
18 which you contend would excuse you from paying Helix the owed and outstanding amounts for
19 the work, material, and/or equipment furnished by Helix at the Project." APCO further objects to
20 this Request on the grounds of attorney client privilege and/or attorney work product. APCO
21 further objects that this Interrogatory is premature, as discovery has just commenced on this
22 matter and APCO has not yet identified all facts that it intends to use relative to Helix's action.
23 APCO further objects on the basis that to answer this Interrogatory would result in annoyance,
24 embarrassment, or oppression to APCO in that the question is overly broad, vague, ambiguous,
25 indefinite as to time and without reasonable limitation in its scope. APCO further objects on the
26 basis that the question is oppressive, harassing and burdensome; the information sought seeks
27 APCO's counsel's legal analysis and theories regarding laws, ordinances, safety orders, etc.,
28 which are equally available to Helix; the question also invades the attorney's work product

1 privilege. APCO further objects on the basis that the question calls for information which is
2 available to all parties equally, and is therefore oppressive and burdensome to APCO. APCO
3 further objects on the basis that the question seeks information which is protected from
4 disclosure by the attorney's work product privilege. APCO further objects on the basis that the
5 question seeks to invade APCO's counsel's work product privilege in that it calls for him to
6 provide an analysis of written data and/or law.

7 APCO further objects to this Interrogatory on the ground that it calls for legal
8 conclusions. See also Response to Interrogatory No. 2 above, which is incorporated herein by
9 this reference. Subject to and without waiving any objections, APCO responds as follows:
10 Gemstone has asserted various complaints about the quality of the work performed by APCO
11 and its subcontractors. As of this time, Gemstone has not identified specific issues that Gemstone
12 has with APCO's or its subcontractor's work, including that of Helix. However, as a result of
13 Gemstone's assertions that there are issues with the quality of the work performed on the Project,
14 Gemstone has failed to pay APCO for the work that APCO performed, including the work that
15 was performed by Helix. Pursuant to the terms of the Subcontract Agreement, any payments to
16 Helix were specifically conditioned upon APCO's actual receipt of payment from Gemstone for
17 Helix's work. Moreover, the Subcontract specifically provided that Helix was assuming the same
18 risk that Gemstone may become insolvent and not be paid for its work as APCO assumed in
19 entering into prime contract with Gemstone. Helix further agreed that APCO had no obligation
20 to pay Helix for any work performed by Helix until or unless APCO had actually been paid for
21 such work by Gemstone. To date, APCO has not been paid for the work performed, including the
22 work performed by Helix. In fact, due to non-payment, APCO exercised its rights pursuant to
23 NRS Chapter 624 and terminated the prime contract with Gemstone and further terminated the
24 Subcontract with Helix. After APCO ceased work on the Project, Helix may have negotiated
25 with Camco, the replacement general contractor, and/or Gemstone and may have entered into a
26 ratification agreement, wherein APCO was replaced as the general contractor under the
27 Subcontract and Camco and/or Gemstone became liable for any monies due Helix on the Project.
28 Discovery is ongoing. APCO reserves the right to supplement or amend its response to this

Interrogatory as investigation, discovery, disclosure and analysis continues.

INTERROGATORY NO. 26:

Identify and explain, what sections or provisions, if any, of your contractor's license absolves you of your obligation to pay Helix, your subcontractor, the owed and outstanding amounts for the work, material and/or equipment furnished by Helix at the Project irrespective of whether the owner has paid you.

ANSWER TO INTERROGATORY NO. 26:

Objection. APCO objects to this Interrogatory on the grounds that this Interrogatory is vague, ambiguous, overly broad, unduly burdensome and oppressive because it seeks to force APCO to identify "explain what sections or provisions, if any, of your "contractors license" absolves you of your obligation to pay Helix, your subcontractor, the owed and outstanding amounts for the work, material, and/or equipment furnished by Helix at the Project irrespective of whether the owner has paid you." Broad ranging interrogatories are improper when they essentially subsume every fact in the case or every person having knowledge. See Hiskett v. Wal-Mart Stores, Inc., 180 F.R.D. 403, 404 (D. Kan. 1998). ("Interrogatories should not require the answering party to provide a narrative account of its case."). Parties can hardly know when they have identified "all" facts, persons, and documents with respect to anything — particularly before the close of discovery. "How can the court make enforceable orders with reference to 'all' of anything?" Often, the relevance of a particular fact to a particular issue is not known until clarified and put into context by testimony at deposition or trial. Such a question places the responding party in an impossible position. See id.; Safeco of Am. V. Rawstron, 181 F.R.D. 441, 447048 (C.D. Cal. 1998)(finding unreasonable an interrogatory calling for all facts supporting denial of a request for admission); Lawrence v. First Kan. Bank & Trust Co., 169 F.R.D. 657, 660-63 (D. Kan. 1996)(same); Hilt v. SFC, Inc., 170 F.R.D. 182, 186-87 (D. Kan. 1997)(finding unduly burdensome an interrogatory seeking to require plaintiff to state 'each and every fact' supporting allegations of a complaint).

Subject to and without waiving any objections, See Response to Interrogatory No. 1, 6 and 7 above, which are incorporated herein by this reference. Also, see documents identified by

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1 Bate Stamp No. APC000000001¹⁹ through APC000078992 and APC0104200 through 104234,
2 and more specific APC0003415 – 339519, 39548 – 39785, and 103577 – 103586²⁰, which
3 APCO has deposited into a depository established by APCO for this litigation matter with
4 Litigation Services and/or are hereby made available for review and copying (at requestor's
5 expense) at a mutually agreeable time and place. Discovery is ongoing. APCO reserves the right
6 to supplement or amend its Response to this Interrogatory as investigation, discovery, disclosure
7 and analysis continues.

8 Dated this 15th day of May, 2017.

9
10 MARQUIS AURBACH COFFING

11
12 By 

13 Jack Chen Min Juan, Esq.
14 Nevada Bar No. 6367
15 Cody S. Munteer, Esq.
16 Nevada Bar No. 11220
17 10001 Park Run Drive
18 Las Vegas, Nevada 89145
19 Attorneys for APCO Construction APCO
20 Construction

21
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25
26
27 ¹⁹ See Footnote No. 1.

28 ²⁰ See Footnote No. 1.

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VERIFICATION

STATE OF NEVADA)
COUNTY OF CLARK) ss.

CLICK HERE AND TYPE, being first duly sworn, deposes and says:

That I am the Click Here and Type for Click Here and Type, the named Click Here and Type in the above-entitled action; that I have read the foregoing document and know the contents thereof; the same is true based upon my review of the documents and information relevant to the inquiries therein, except as to those matters therein stated on information and belief and, as to those matters, I believe them to be true based upon my review of the documents and information relevant to the inquiries therein.

Click Here and Type

SUBSCRIBED AND SWORN to before
me this _____ day of Click Here and Type, 20Click Here and Type.

NOTARY PUBLIC in and for said
County and State

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **APCO CONSTRUCTION'S ANSWERS TO HELIX ELECTRIC OF NEVADA LLC'S FIRST SET OF REQUESTS FOR INTERROGATORIES** was submitted electronically for service with the Eighth Judicial District Court on the 15 day of May, 2017. Electronic service of the foregoing document shall be made in accordance with the E-Service List as follows:²¹

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"Donald H. Williams, Esq." .	dwilliams@dhwlawlv.com
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²¹ 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).

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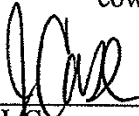

J. Case, an employee of
Marquis Aurbach Coffing

Exhibit 2

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(702) 938-2244 ♦ Fax (702) 938-2246

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5 Henderson, Nevada 89074
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7 (702) 938-2244
8 Attorneys for
9 Camco Pacific Construction Company, Inc. and
10 Fidelity and Deposit Company of Maryland

DISTRICT COURT

CLARK COUNTY, NEVADA

11 In re: MANHATTAN WEST MECHANIC'S
12 LIEN LITIGATION,

Case No: A571228
Dept. No: XII

Consolidated with:
08A574391, 08A574792, 08A577623,
09A580889, 09A583289, 09A584730,
09A587168, A-09-589195-C, A-09-
589677-C, A-09-590319-C, A-09-592826-C,
A-09-596924-C, and A-09-597089-C

**CAMCO PACIFIC CONSTRUCTION
COMPANY, INC.'S RESPONSES TO
HELIX ELECTRIC OF NEVADA,
LLC'S INTERROGATORIES**

13
14
15
16 AND ALL RELATED MATTERS.

17
18 PROPOUNDING PARTY: HELIX ELECTRIC OF NEVADA, LLC

19 RESPONDING PARTY: CAMCO PACIFIC CONSTRUCTION COMPANY, INC.

20
21 Defendant CAMCO PACIFIC CONSTRUCTION COMPANY, INC. ("Camco") by and
22 through its counsel of record, hereby responds to HELIX ELECTRIC OF NEVADA, LLC's
23 ("Helix") Interrogatories as follows:

GENERAL OBJECTIONS

24
25 Camco generally objects to Helix's Interrogatories on the grounds that the Requests are
26 burdensome, oppressive, compound, vague, and ambiguous. To the extent that any Interrogatory
27 seeks information which is protected by the attorney-client privilege and/or attorney
28 work-product doctrine, Camco declines to provide such information. To the extent that any
Interrogatory seeks constitutionally or statutorily protected, proprietary or confidential
information, Camco also declines to provide such information. To the extent that any

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1 Interrogatory seeks information that may constitute an invasion of a right of privacy based upon
2 any statutory or common-law right of privacy, Camco hereby declines to produce any such
3 information without an appropriate protective order.

4 Camco has not fully completed its investigation of the facts relating to this case, has not
5 completed discovery in this action, and has not completed preparation for trial. Therefore,
6 Camco's responses are based on Camco's knowledge, information and belief at this time. It is
7 anticipated that further discovery, independent investigation, legal research and analysis will
8 supply additional facts and documents, add meaning to known facts or documents, as well as
9 establish entirely new factual conclusion and legal contentions, all of which may lead to
10 substantial additions to, changes in, and variations from the facts herein set forth. The
11 responses contained herein are made in a good faith effort to supply as much factual
12 information, and as much specification of legal contentions as are presently known, but should
13 in no way be to the prejudice of Camco in relation to further discovery, research or analysis.

14 **INTERROGATORY NO. 1:** Identify and state with specificity the facts that you intend to rely
15 upon to refute each cause of action in Helix's Complaint.

16 **RESPONSE:** On or about December 22, 2008, Camco received the following email from
17 Gemstone:

18 To all Manhattan West subcontractors and vendors:

19 Effective immediately, construction of the Manhattan West project is suspended.
20 Over the weekend, Gemstone determined that its construction lenders do not
21 expect to disperse further funds for construction. As a result, Gemstone does not
22 have funds sufficient to pay out the October draw or other obligations.

22 We apologize earnestly to all the companies to whom we currently owe money.
23 Gemstone procured sufficient funding to finish the Project, but was surprised by
24 the revelation that APCO had generated approximately seventeen million dollars
25 in cost overruns and defect remediation costs. In the current economic chaos, we
26 were unable to find a solution for generating the extra money, and as a result
27 funding has stopped.

25 Gemstone is currently working to secure new financing, but has no visibility as
26 to when and how this will be accomplished.

27 I am available to speak directly with you, face to face, if you so desire. Thank
28 you for your cooperation during this process.

Respectfully

GRANT MORRIS DODDS
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Alex Edelstein
CEO
Group Gemstone
702.614.3193
www.groupgemstone.com

Camco forwarded the notice from Gemstone to all subcontractors and vendors, on or about December 22, 2008. In addition to sending the Notice provided by Gemstone, Camco provided its notice of termination of the various subcontract agreements and further reminded the subcontractors they each had contractually acknowledged and agreed that all remedies for payment resided in Gemstone and the Project pursuant to NRS 108, the Nevada Mechanic's Lien Statute.

The Camco ratified subcontract agreements include the following relevant language:

3.4 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. . . 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.

3.8 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: . . . (c) Receipt of final payment by Contractor from Owner.

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.

4.2 . . . 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.

4.6 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.

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

1 amount due from the Owner to the Contractor for the Subcontractor's completed
2 work, as provided in the Contract Documents, after payment by the Owner to the
Contractor.

3 As both sections 3.4 and 3.5 plainly state, all subcontractors agreed to assume the same
4 risk as Camco that Gemstone may become insolvent. The language of the contract contemplated
5 the exact scenario that the subcontractors and Camco now find themselves in: Gemstone is
6 insolvent, and neither the subcontractors nor Camco has been paid. The subcontractors must
7 now face the consequences of the contract they voluntarily entered into—they must, as Camco
8 has done, rely on their mechanic's lien claims against the Project for payment. However, with
9 the ruling of the Nevada Supreme Court regarding the priority of the mechanic's liens, the sale
10 of the Project free and clear of those liens, which essentially rendered the mechanic's liens
11 ineffective, and with the insolvency of Gemstone, there is no viable remedy or source for
12 payment under contract or Nevada law.

13 Moreover, throughout the duration of the Project, all of the subcontractors were content
14 receiving payments from Gemstone through Nevada Construction Services with full knowledge
15 that Camco never possessed or handled any funds to be paid to the subcontractors.

16 Sections 3.4 and 3.5 of the Contract contemplated the very scenario that is now playing
17 out: Gemstone is insolvent, has not and cannot make payments to both Camco and the
18 subcontractors (the parties to the Contract), and now the agreement of the parties dictates that
19 the subcontractors and Camco stand in the same position, having assumed the same risk.
20 Instead, the subcontractors now seek to make Camco the de facto lender/insurer of the Project
21 by seeking to have Camco bear the burden of the risk of nonpayment that was assumed by the
22 subcontractors.

23 Helix agreed to assume the risk of Gemstone's insolvency, and has therefore waived any
24 right to seek payment from Camco in the instance that Gemstone should become insolvent and
25 the property did not provide sufficient security to satisfy the lien claims—which are the exact set
26 of circumstances at present. The Property has been sold free and clear of all liens and all parties
27 who worked on the Project and have not been paid, which includes Camco, are without remedy
28 or recompense, contractually and statutorily.

1 **INTERROGATORY NO. 2:** State the procedure by which you and/or Gemstone Development
2 West, Inc. ("Gemstone") and/or Nevada Construction Services paid Helix for its work,
3 ,material, and/or equipment furnished at the Project.

4 **RESPONSE:** Camco was not responsible for the direction and/or the payment of the work,
5 material, and/or equipment furnished at the Project by the subcontractors and/or suppliers.
6 Camco was never paid for any of the work, material, and/or equipment furnished at the Project
7 by the subcontractors and/or suppliers. Once Gemstone approved the invoices submitted by a
8 subcontractor and/or supplier Gemstone directed Nevada Construction Services to pay the
9 subcontractor and/or supplier directly.

10 **INTERROGATORY NO. 3:** State the amount of any payments made to Helix by or on behalf
11 of you, Nevada Construction Services or Gemstone, the date and manner in which each
12 payment was made, and at what stage of completion the Project was in at the time of each
13 payment.

14 **RESPONSE:** Camco did not make any payment directly to Helix nor did Camco receive any
15 payment on behalf of Helix. Camco is unaware of the date, manner in which each payment was
16 made, and at what stage of completion the Project was in at the time of each payment made by
17 Nevada Construction Services or Gemstone.

18 **INTERROGATORY NO. 4:** State the amount of any payments to you by or on behalf of
19 Gemstone or Nevada Construction Services, the date and manner in which each payment was
20 made, and at what stage of completion the Project was in at the time of each payment.

21 **RESPONSE:** Camco did not make any payment directly to Helix nor did Camco receive any
22 payment on behalf of Helix. Camco is unaware of the date, manner in which each payment was
23 made, and at what stage of completion the Project was in at the time of each payment made by
24 Nevada Construction Services or Gemstone.

25 **INTERROGATORY NO. 5:** Do you contend that the value of the unpaid work, material,
26 and/or equipment furnished or supplied by Helix is less than the amount set forth in Helix's
27 Initial Disclosures? If so, please state:

28 a. the basis for your contention including all facts, witnesses, or documents you

1 rely on in support of your contention;

2 b. how much you contend the work and equipment provided by Helix is actually
3 valued at; and

4 c. the manner in which you calculated the value of the work, materials, and/or
5 equipment provided by Helix.

6 **RESPONSE:** The value of Helix's unpaid work is irrelevant because Camco is not responsible
7 for the payment of Helix's work on the Project. See response to Interrogatory No. 1.

8 **INTERROGATORY NO. 6:** State with specificity the reasons why you have not paid Helix
9 the sums for the work, material, and/or equipment that Helix provided for the Project.

10 **RESPONSE:** Camco is not responsible for the payment of Helix, nor has Camco received any
11 payment on behalf of Helix. See response to Interrogatory No. 1.

12 **INTERROGATORY NO. 7:** State each and every fact that you rely on to support your position
13 that any claim for unjust enrichment against you is invalid.

14 **RESPONSE:** Camco did not receive a benefit from the work or materials that were furnished
15 to the Project by Helix. Furthermore, Camco did not unjustly retain the money or property of
16 Helix against the fundamental principles of justice or equity and good conscience. Helix cannot
17 prove the elements necessary for a claim for unjust enrichment based on the undisputed facts
18 and circumstances in this action.

19 **INTERROGATORY NO. 8:** Separately state each and every fact that you rely on to support
20 each of your affirmative defenses.

21 **RESPONSE:** See response to these Interrogatories and specifically Interrogatory No. 1.

22 **INTERROGATORY NO. 9:** Identify all facts, witnesses (names, employers, addresses and
23 telephone number) and documents, records, that support your Answers to these Interrogatories
24 and your responses to Requests for Admission.

25 **RESPONSE:** See response to these Interrogatories and Camco's 16.1 Disclosures.

26 **INTERROGATORY NO. 10:** For every response to Helix's Requests for Admission that is
27 anything other than an unequivocal admission, identify all facts, witnesses (names, employers,
28 addresses and telephone number) and documents, records, that support such responses.

1 **RESPONSE:** See response to these Interrogatories and Camco's 16.1 Disclosures.

2 **INTERROGATORY NO. 11:** State each and every fact that supports your position that you
3 are not legally liable for payment to Helix for the work, material, and/or equipment that it
4 furnished on the Project.

5 **RESPONSE:** See responses to these Interrogatories and Camco's 16.1 Disclosures.

6 **INTERROGATORY NO. 12:** Identify each person you expect to call as an expert witness at
7 the time of trial in this action. With respect to each, please state:

- 8 a. the subject matter on which the expert is expected to testify, the substance of the
9 facts and opinions to which each expert is expected to testify;
10 b. a summary of the grounds for each opinion;
11 c. whether written document was prepared by such expert;
12 d. the professional title, educational background, qualifications and work
13 experience of each such expert.

14 **RESPONSE:** Camco does not intend to call an expert witness.

15 **INTERROGATORY NO.13:** Identify any and all exhibits which you intend to produce at the
16 time of trial in this matter as it relates to the claims brought by Helix and the work, material,
17 and/or equipment furnished by Helix on the Project.

18 **RESPONSE:** See Camco's 16.1 Disclosures and all supplements thereto.

19 **INTERROGATORY NO.14:** If you have asserted or intend to assert any causes of action,
20 counter-claims, cross-claims, or any other similar claim against Helix in this matter, identify
21 each and state all facts you rely on to support each claim.

22 **RESPONSE:** Helix breached its agreement with Camco by seeking to hold Camco liable for
23 Gemstone's and/or the Project's failure to pay and/or secure payment for the work, materials,
24 and/or equipment allegedly furnished by Helix to the Project. Helix assumed the same risk for
25 non-payment as did Camco and the other contractors and/or suppliers to the Project.

26 **INTERROGATORY NO.15:** Please identify the first and last date Helix performed work and
27 describe in detail Helix's scope of work for the Project.

28 **RESPONSE:** Camco objects to this Interrogatory on the grounds that it is vague, unduly

1 burdensome, and irrelevant. Camco was only on the Project from approximately August 25,
2 2008 to December 22, 2008, and this request is asking for information that occurred during that
3 time period over 8 years ago. Furthermore, Camco did not direct Helix's work was not involved
4 in the payment of subcontractors nor did it receive any payment from Gemstone and/or Nevada
5 Construction Services on behalf of any subcontractor. Notwithstanding the foregoing, and
6 without waiving any objection hereto, see Camco's 16.1 Disclosures.

7 **INTERROGATORY NO. 16:** Identify all facts and circumstances leading up to you ceasing to
8 perform work on the project.

9 **RESPONSE:** Camco objects to this Interrogatory on the grounds that it is vague, unduly
10 burdensome, and irrelevant. Notwithstanding the foregoing objection and without waiving the
11 same Camco responds by stating the email from Alex Edelstein of Gemstone on or about
12 December 22, 2008 was the principal fact and circumstance that lead up to the ceasing of work
13 on the project.

14 **INTERROGATORY NO. 17:** If you or any officer, director, or employee of Camco has had
15 any conversations with Helix regarding the facts alleged in Helix's Complaint against Camco
16 and Gemstone, please state the dates of each conversation, the parties, involved, the contents of
17 the conversation, and what was said.

18 **RESPONSE:** Camco objects to this Interrogatory on the grounds that it is vague, unduly
19 burdensome, and irrelevant. Camco is not aware of any conversations with Helix regarding the
20 facts alleged in Helix's Complaint against Camco and Gemstone.

21 **INTERROGATORY NO. 18:** If you or any officer, director, or employee of Camco has had
22 any conversations with APCO regarding the facts alleged in Helix's Complaint against Camco
23 and Gemstone, please state the dates of each conversation, the parties, involved, the contents of
24 the conversation, and what was said.

25 **RESPONSE:** Camco objects to this Interrogatory on the grounds that it is vague, unduly
26 burdensome, and irrelevant. Camco is not aware of any conversations with APCO regarding the
27 facts alleged in Helix's Complaint against Camco and Gemstone.

28 **INTERROGATORY NO. 19:** If you or any officer, director, or employee of Camco has had

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1 any conversations with Gemstone regarding the facts alleged in Helix Complaint against Camco
2 and Gemstone, please state the dates of each conversation, the parties, involved, the contents of
3 the conversation, and what was said.

4 **RESPONSE:** Camco objects to this Interrogatory on the grounds that it is vague, unduly
5 burdensome, and irrelevant. Camco is not aware of any conversations with Gemstone regarding
6 the facts alleged in Helix's Complaint against Camco and Gemstone.

7 **INTERROGATORY NO. 20:** If you or any officer, director, or employee of Camco has had
8 any conversations with any Third-Party regarding the facts alleged in Helix Complaint against
9 Camco and Gemstone, please state the dates of each conversation, the parties, involved, the
10 contents of the conversation, and what was said.

11 **RESPONSE** Camco objects to this Interrogatory on the grounds that it is vague, unduly
12 burdensome, and irrelevant. Camco is not aware of any conversations with any Third-Party
13 regarding the facts alleged in Helix's Complaint against Camco and Gemstone.

14 **INTERROGATORY NO. 21:** If you contend that your lien has priority over any other party in
15 this matter, including Helix, please state each and every fact supporting your claim.

16 **RESPONSE:** Camco objects to this Interrogatory on the grounds that it is vague, unduly
17 burdensome, and irrelevant. Helix agreed to assume the risk of Gemstone's insolvency, and has
18 therefore waived any right to seek payment from Camco in the instance that Gemstone should
19 become insolvent and the property did not provide sufficient security to satisfy the lien
20 claims—which are the exact set of circumstances at present. The Property has been sold free and
21 clear of all liens and all parties who worked on the Project and have not been paid, which
22 includes Camco, are without remedy or recompense, contractually and statutorily.

23 **INTERROGATORY NO. 22:** Identify the dates you started and ceased construction on the
24 Project and describe the work that was performed while you were the general contractor for the
25 Project.

26 **RESPONSE:** Camco objects to this Interrogatory on the grounds that it is vague, unduly
27 burdensome, and irrelevant. Camco was only on the Project from approximately August 25,
28 2008 to December 22, 2008, and this request is asking for information that occurred during that

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1 time period over 8 years ago. Notwithstanding the foregoing, and without waiving any
2 objection hereto, see Camco's 16.1 Disclosures.

3 **INTERROGATORY NO. 23:** Identify all payments received by you for the work, material,
4 and/or equipment furnished by Helix at the Project for which Helix has not been paid.

5 **RESPONSE:** Camco objects to this Interrogatory on the grounds that it is vague, unduly
6 burdensome, and irrelevant. Camco was only on the Project from approximately August 25,
7 2008 to December 22, 2008, and this request is asking for information that occurred during that
8 time period over 8 years ago. Furthermore, Camco was not involved in the payment of
9 subcontractors nor did it receive any payment from Gemstone and/or Nevada Construction
10 Services on behalf of any subcontractor.

11 **INTERROGATORY NO. 24:** Identify all facts, opinions, or law not set forth in other
12 responses, which you contend would excuse you from paying Helix the owed and outstanding
13 amounts for the work, material, and/or equipment furnished by Helix at the Project.

14 **RESPONSE:** Camco objects to this Interrogatory on the grounds that it is vague, unduly
15 burdensome, and irrelevant. Camco was not involved in the payment of subcontractors nor did
16 it receive any payment from Gemstone and/or Nevada Construction Services on behalf of any
17 subcontractor. Helix assumed the risk of non-payment and waived any claims it may have
18 against Camco.

19 **INTERROGATORY NO. 25:** Identify and explain, what sections or provisions, if any, of
20 your contractor's license absolves you of your obligation to pay Helix, your subcontractor, the
21 owed and outstanding amounts for the work, material and/or equipment furnished by Helix at
22 the Project irrespective of whether the owner has paid you.

23 **RESPONSE:** Camco objects to this Interrogatory on the grounds that it is vague and irrelevant.
24 Camco was not involved in the payment of subcontractors nor did it receive any payment from
25 Gemstone and/or Nevada Construction Services on behalf of any subcontractor. Helix assumed
26 the risk of non-payment and waived any claims it may have against Camco.

27 ///

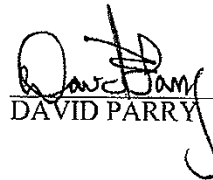
28 ///

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VERIFICATION

I David Parry, under penalty of perjury of the laws of the State of Nevada, deposes and says that I have read the above and foregoing, **CAMCO PACIFIC CONSTRUCTION COMPANY, INC.'S REPLY TO HELIX ELECTRIC OF NEVADA, LLC'S INTERROGATORIES**, that I know the contents thereof and that the same are true to the best of my knowledge, except as to the matters therein set forth upon information and belief, and as to those matters, I believe them to be true.

DATED this 9 day of June 2017.



DAVID PARRY

Submitted by:

GRANT MORRIS DODDS

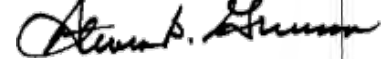
/s/ Steven L. Morris
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CERTIFICATE OF MAILING

I hereby certify that on the 9th day of June 2017, I served a true and correct copy of
**CAMCO PACIFIC CONSTRUCTION COMPANY, INC.'S RESPONSES TO HELIX
ELECTRIC OF NEVADA, LLC's INTERROGATORIES** on all parties registered to
receive electronic service for the above-captioned case by serving the same via Wiznet.

/s/ Steven L. Morris
GRANT MORRIS DODDS



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13 **DISTRICT COURT**

14 **CLARK COUNTY, NEVADA**

15 APCO CONSTRUCTION, a Nevada
16 corporation,

17 Plaintiff,

18 vs.

19 GEMSTONE DEVELOPMENT WEST, INC., A
20 Nevada corporation,

21 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

Hearing Date: September 5, 2017

Hearing Time: 9:00 a.m.

22 AND ALL RELATED MATTERS

23 **APCO CONSTRUCTION'S OPPOSITION TO ZITTING BROTHERS**
24 **CONSTRUCTION INC.'S PARTIAL MOTION FOR SUMMARY JUDGMENT**

25 Plaintiff APCO Construction ("APCO"), by and through its counsel of record, Marquis
26 Aurbach Coffing, hereby submits its Opposition to Zitting Brothers Construction Inc.'s
27 ("Zitting") Motion for Partial Summary Judgment against APCO Construction.

28 ...

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...

1 This Opposition is made and based on the papers and pleadings on file herein, the
2 attached Memorandum of Points and Authorities, and any oral argument the Court may choose
3 to entertain at the time of hearing.

4 Dated this 21st day of August, 2017.

5 MARQUIS AURBACH COFFING

6
7 By 
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18 Attorneys for APCO Construction

19 **MEMORANDUM OF POINTS AND AUTHORITIES**

20 **I. INTRODUCTION**

21 Zitting asserts it is entitled to summary judgment on (1) its breach of contract cause of
22 action, and (2) its NRS 108 claim. It has been a long standing policy of Nevada courts to hear
23 cases on the merits, and not to grant summary judgment where there are clear issues of
24 materially disputed facts. Here, Zitting's purported statement of undisputed material facts is not
25 only riddled with disputed facts, but is also full of nothing more than misdirection and smoke
26 and mirror tactics in an effort to try to get the Court to grant its Motion prior to trial. As detailed
27 herein, when the smoke clears the Court will see that denying Zitting's Motion in its entirety and
28 hearing the case on the merits — weighing the creditability of Zitting's witnesses and document
— is really the only option.

Furthermore, the Court recently conducted a lengthy hearing on August 10, 2017
regarding the Lien Claimants' — including Zitting — NRS 108 claims as it relates to the Project,
whereat the Court determined that "there are some genuine issues that need to be further

developed . . .” and denied APCO’s motion to dismiss or for summary judgment without prejudice.¹ Consequently, for this reason alone, the Court should deny Zitting’s Motion with regard to its request for summary judgment on Zitting’s NRS 108 claims.²

II. APCO’S CONTROVERTED FACTS

Zitting’s assertion that “there is no triable issue of APCO’s breach of contract . . .” cannot be farther from the truth and is quite disingenuous, as there are numerous material issues of fact that must be presented at trial.³ The following facts are in direct contravention to those presented by Zitting and, which, require denial of Zitting’s Motion:⁴

Zitting’s Purported Undisputed Material Fact	Controverted Material Fact
“APCO would pay Zitting the retention amount for work on a building once the building is “complete.” Motion at 3:24-25; (Ex. D to Motion at APC000044595). “The subcontract deemed Zitting’s work on a building to be “complete” as soon as “drywall [for the building] is completed.” Motion at 3:25-27; (<i>Id.</i>)	By Zitting’s own admission a “building” is considered to be “complete” pursuant to the subcontract as soon as “drywall [for the building] is completed.” Thus, Zitting’s admission in and of itself defeats its own Motion, as the drywall in the buildings were, in fact, <i>not complete</i> . Exhibit 1 at ¶ 3 & Exhibit 2 (photographs of the Project taken on 8/20/2008 & 11/20/08). Moreover, Camco’s Application for Payment dated 9/30/2008, at line 478 for building #8, only evidences a 77% completion of the drywall in building #8, and at line 632 only an 84% completion of the drywall for building #9. See Exhibit 6 at 00250 and 00253. The photos and Application for Payment clearly

¹ See Court’s Minute Order from hearing conducted on 08/10/2017 regarding APCO’s Motion to Dismiss or for Summary Judgment on Lien Claimants’ NRS 108 Claims for Foreclosure of Mechanic’s Lien on file with the Court.

² Due to the Court having recently denied APCO’s motion for summary judgment regarding NRS 108 issues related to the Parties in the instant action without prejudice, and the same having been asserted by Zitting through its instant Motion that was filed prior to the 08/10/2017 hearing, APCO, out of an abundance of caution, only provides a brief summation of the argument and reserves the right to fully brief and present the issue to the Court during trial pursuant to this Court’s holding at the 08/10/2017 hearing regarding NRS 108 issues.

³ Motion at 3:14.

⁴ For judicial efficiency, the following list addresses the primary purported undisputed facts to evidence that there are a vast number of triable issues of material fact and, likewise, the absence of any mention of asserted purported facts or contravening evidence is not to be considered as waiver of any provided statement from Zitting, and APCO specifically reserves the right to address such facts at hearing or trial on the issues.

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Zitting's Purported Undisputed Material Fact

Controverted Material Fact

* Continued *

evidences that the drywall was not complete at the subject buildings on any of the aforementioned dates, or at a minimum, there is an issue of material fact as to the percent of the completion and Zitting's scope of work when APCO stopped work for nonpayment and Camco assumed responsibility for the Project.

Thus, if the "drywall" was not "complete" — which the pictures and pay application evidence it was not — Zitting is not owed its retention pursuant to the language of the subcontract that Zitting specifically cited to in its Motion. This is yet another reason that stands alone to substantiate denying Zitting's Motion in its entirety.

"Nevertheless, in the event that APCO's contract with Gemstone is terminated, APCO would pay Zitting the entire amount owed for the work completed." Motion at 3:27–28; (Id. at APC000044601).

Zitting did not invoice APCO after 6/30/2008. **Exhibit 1** at ¶ 4. Zitting's invoices and payment applications contradict each other and were prepared and executed long after APCO was no longer in control of the Project and Zitting was conducting work under Camco. Specifically, Zitting's invoice dated "6-30-08" evidences the balance due Zitting on 6-30-08 was \$180,231.35, **not** the \$423,654.85 Zitting claims APCO owes it. **Exhibit 1** at ¶ 6, and **Exhibit 3**.

Further, all approved change orders for Zitting were paid through August 2008 prior to APCO stopping work at the Project. **Exhibit 1** at ¶ 5. Zitting's purported pay application (from Zitting's own production in the instant case) for the period to "6/30/2008" also claims the current payment due is \$347,441.67 – contradicting the prior invoice provided to APCO, **Exhibit 4**. APCO also never received the 6/30/2008 pay application as Zitting alleges. **Exhibit 1** at ¶ 7. This is evidenced by the pay application being executed on "01/30/09" — a significant time subsequent to APCO stopping work and turning the Project over to Camco. If that were not enough, Zitting is similarly trying to pass off the "11/30/2008" pay application in the same disingenuous fashion as the prior June pay app, which was also not executed until "01/30/09."

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Zitting's Purported Undisputed Material Fact	Controverted Material Fact
	<p>* Continued *</p> <p>Given the above contradicting dates and values of Zitting's invoices and pay applications, the authenticity and credibility of the amount Zitting claims to be owed is called into question, and clearly creates an issue of disputed material fact defeating Zitting's Motion.</p>
<p>"Zitting began its work under the subcontract around November 19, 2007, and continued its work until approximately December 15, 2008, when Zitting received notice that the Project was shutting down." Motion at 4:3-5; (Ex. A (Zitting Decl.) at ¶ 6).</p>	<p>Zitting admits it conducted work at the Project "until approximately December 15, 2008." Zitting also admits that APCO was off the Project "in August 2008." Motion at 4:15. It is undisputed that Camco took over the Project from APCO in August 2008. Consequently, it is further undisputed that Zitting conducted work under Camco's control of the Project and, likewise, if Zitting was owed anything – which it is not – it would be owed from its time and work conducted under Camco's supervision, not APCO's tenure. Hence, should Zitting deny it is owed any amount from the time Camco controlled the Project, and that everything is owed from APCO, then Zitting's own denial to the assertion raises an issue of material fact between the Parties defeating its Motion.</p> <p>Of particular note, while Zitting clearly conducted work under Camco, it fails to make any mention of the value of its work or claim for retention under the work it conducted under Camco's control of the Project. Thus, due to Zitting's own admission of the scope of time it conducted work at the Project, the issue of the value of work conducted under Camco's tenure is a whole separate set of issues of material fact, that by themselves, defeat Zitting's Motion.</p>
<p>"By the time the Project shut down, Zitting completed its contracted work that cost \$4,033,654.85, including \$423,654.85 in owner-requested change orders that was approved by operation of law." Motion at 4:5-7; (Id. at 11 10.)</p>	<p>The value of Zitting's work is clearly in dispute as address above. Moreover, the application of law toward the approval of purported change orders is a disputed fact, as there is a dispute as to who Zitting provided the change orders to, e.g., APCO, Camco or the Owner, and whether they were ever approved by the Owner.</p>
<p>"The completed work included Zitting's entire scope of work for Buildings 8 and 9 of the Project." Motion at 4:7-8; (Id. at 117.)</p>	<p>This assertion by Zitting is clearly disputed, as when APCO left the Project in August 2008 Zitting had remaining issues with its work to be completed, otherwise Zitting would not have continued to work for Camco.</p>

Zitting's Purported Undisputed Material Fact	Controverted Material Fact
	<p>* Continued *</p> <p>Moreover, any purported payment Zitting claims to be owed is clearly in dispute as addressed above. It is also in dispute whether Zitting is owed anything according to its own admissions, as the buildings were not "complete" pursuant to the contract language Zitting itself added to the subcontract.</p>
<p>"The drywall was completed in those two buildings, and Zitting had submitted close-out documents for its work, including as-built drawings." Motion at 4:8-10; (<i>Id.</i> at ¶¶ 7-8.)</p>	<p>As clearly evidenced by the photographs attached as Exhibit 2 and Camco's Application for Payment dated 9/30/2008 attached as Exhibit 6, this assertion by Zitting is completely fabricated, utterly false, and calls into the question the credibility of Zitting and its other sworn statements. Further, if the drywall were complete, where are the inspection certificates stating the buildings passed their respective inspections evidencing their stage of completion?</p>
<p>"APCO refused to pay Zitting \$750,807.16 of the amount remaining owed for Zitting's work completed prior to APCO's departure from the Project, including \$347,441.67 in unpaid change orders and \$403,365.49 in unpaid retention amount." Motion at 4:11-14; (<i>Id.</i> ¶¶ 12-13, 15; Ex. F at ZBC1002037; Ex. G at ZBC1002032).</p>	<p>As detailed above, due to the inconsistent dates and values in Zitting's invoices and pay applications, it makes the entirety of any value claimed by Zitting questionable and an issue of disputable material fact between the Parties.</p>
<p>"Zitting never received a written notice of termination for cause from APCO." Motion at 4:16-17; (Ex. A at ¶ 16.)</p>	<p>Zitting was served with APCO's notice of stop work and associated correspondence dated August 21, 2008. Exhibit 1 at ¶ 9 and Exhibit 5. Further, Zitting admitted it knew APCO was off the Project and had turned control of the Project over to Camco. Motion at 4:15.</p>

III. LEGAL STANDARDS.

"Summary judgment ... is properly regarded not as a disfavored procedural shortcut, but rather an integral part of the [procedural] rules as a whole, which are designed to 'secure the just, speedy and inexpensive determination of every action.'" Wood v. Safeway, Inc., 121 Nev. 724 121 P.3d 1026 (2005). Summary judgment is appropriate when the pleadings, depositions, answer to interrogatories, admissions, and affidavits that are before the court demonstrates that

1 no genuine issue of material fact exists, and the moving party is entitled to judgment as a matter
2 of law. Wood, 121 Nev. 724, 121 P.3d 1026.

3 NRCP 56 outlines Nevada's procedural mechanism of summary judgment. NRCP 56. A
4 genuine issue of material fact exists when "a reasonable jury could return a verdict for the non-
5 moving party." Posadas v. City of Reno, 109 Nev. 448, 452, 851 P.2d 438, 441-43 (1993). A
6 fact is material only if "might affect the outcome of the suit under the governing law," Anderson
7 v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 2510 (1986).⁵ Once the moving party
8 has met its burden, by demonstrating to the court that there is an absence of evidence to support
9 the non-moving party's case, the burden shifts to the respondent to set forth specific facts
10 demonstrating that there is a genuine issue of material fact for trial. Celotex Corp. v. Catrett, 477
11 U.S. 317, 330, 106 S. Ct. 2548, 2556 (1986).

12 While the pleadings and other proof must be construed in a light most favorable to the
13 non-moving party, the non-moving party bears the burden to "do more than simply show that
14 there is some metaphysical doubt" as to the operative facts in order to avoid summary judgment
15 being entered in the moving party's favor. Wood, 121 Nev. at 732, 121 P.3d at 1031 (quoting
16 Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986)). The non-
17 moving party must, by affidavit or otherwise, set forth specific facts demonstrating the existence
18 of a genuine issue for trial or have summary judgment entered against him. Collins v. Union Fed.
19 Savings & Loan, 99 Nev. 284, 294, 662 P.2d 610, 618-19 (1983). Accordingly, the non-moving
20 party's documentation must be admissible evidence; the non-moving party "is not entitled to
21 build a case on the gossamer threads of whimsy, speculation and conjecture." Id. at 302 (quoting
22 Hahn v. Sargent, 523 F.2d 461, 467 (1st Cir.1975), cert. denied, 425 U.S. 904, 96 S.Ct. 1495
23 (1976)).

24 ...

25 ...

26 ⁵ See Vanguard Piping v. Eighth Jud. Dist. Ct., 129 Nev. Adv. Op. 63, 309 P.3d 1017 (2013) ("Federal
27 cases interpreting a rule of civil procedure that contains similar language to an analogous Nevada rule are
28 strong persuasive authority in the interpretation of the Nevada rule.").

1 **IV. LEGAL ARGUMENT**

2 **A. APCO DID NOT BREACH ITS CONTRACT WITH ZITTING.**

3 In order to maintain a breach of contract action in Nevada, a plaintiff must prove (1) the
4 existence of a valid contract,⁶ (2) an unexcused breach by the defendant, and (3) damage as a
5 result of the breach.” See Brown v. Kinross Gold U.S.A., Inc., 531 F. Supp. 2d 1234, 1240 (D.
6 Nev. 2008). When interpreting the provision of a contract, courts are required to give effect to
7 the intent of the parties, determined in the light of the surrounding circumstances when the intent
8 of the parties is not clear from the contract itself. NGA #2 Liab. Co. v. Rains, 113 Nev. 1151,
9 1158, 946 P.2d 163, 167 (1997).

10 Here, the evidence clearly demonstrates triable, genuine issues of material fact exist that
11 must be weighed by this Court at trial with respect to Zitting’s breach of contract claim. While
12 Zitting cogently outlines the principles of Nevada contract theory relevant to this matter, Zitting
13 not only predictably characterizes the facts in a manner most favorable to Zitting, but also
14 completely, and in an uncreditable manner, makes sworn statements to the Court that are
15 contradicted by the provided evidence attached to APCO’s Opposition. Consequently, Zitting’s
16 characterization of said facts is questionable at best, misguided, and incomplete in many
17 instances.

18 Specifically, and as more fully addressed above, (1) Zitting’s invoicing is inconsistent
19 and questionable at best, (2) the Project was not “complete” pursuant to the Subcontract as
20 Zitting represents, and (3) significant and material questions of fact remain with regard to the
21 timeline of events and who Zitting conducted work under, e.g. APCO or Camco.

22 **B. NEVADA LAW DOES ALLOW FOR PAY-IF-PAID PROVISIONS**
23 **UNDER SOME CIRCUMSTANCES.**

24 Under NRS 624.626, subcontractors may stop work if a higher-tiered contractor fails to
25 make timely payments, “even if the higher-tiered contractor has not been paid and the agreement

26 ⁶ A valid contract requires offer, acceptance, meeting of the minds, and consideration. Certified Fire
27 Protection, Inc. v. Precision Constr., Inc., 128 Nev. Adv. Op. 35, 283 P.3d 250, 255 (2012).

contains a provision which requires the higher-tiered contractor to pay the lower-tiered subcontractor only if or when the higher-tiered contractor is paid.” The next statutory subsection, NRS 624.628, provides additional guidance regarding pay-if-paid provisions. In particular, it provides that:

3. A condition, stipulation or provision in an agreement which:

...

c) Requires a lower-tiered subcontractor to waive, release or extinguish a claim or right for damages or an extension of time that the lower-tiered subcontractor may otherwise possess or acquire as a result of delay, acceleration, disruption or an impact event that is **unreasonable under the circumstances**, that **was not within the contemplation of the parties at the time the agreement was entered into**, or for which **the lower-tiered subcontractor is not responsible**, is against public policy and is void and unenforceable. (Emphasis added).

Thus, while both of these provisions provide certain limitations regarding payment of subcontractors, Nevada’s statutory law **does not** outright prohibit pay-if-paid clauses.

Unfortunately, the Supreme Court of Nevada’s decisions in Lehrer McGovern Bovis, Inc. v. Bullock Insulation, Inc., 124 Nev. ___, 185 P.3d 1055 (June 2008) (“Lehrer I”), and Lehrer McGovern Bovis, Inc. v. Bullock Insulation, Inc., 124 Nev. 1102, 197 P.3d 1032 (Oct. 2008) (“Lehrer II”), caused significant confusion over this otherwise straight-forward statute.

Both Lehrer cases centered on a subcontract between subcontractor Bullock Insulation (“Bullock”) and general contractor Lehrer McGovern Bovis (“Bovis”) in which Bullock agreed to provide firestopping work needed for the construction of the Venetian hotel and casino. See Lehrer I, 185 P.3d at 1058; Lehrer II, 124 Nev. at 1107, 197 P.3d at 1035. The subcontract incorporated several terms from the Construction Management Agreement, including a lien waiver clause and pay-if-paid provision. Lehrer I, 185 P.3d at 1058; Lehrer II, 124 Nev. at 1107-08, 197 P.3d at 1036. After much of the work on the project had been completed, an inspection revealed that Bullock had not properly installed putty pads in accordance with the subcontract. Lehrer I, 185 P.3d at 1059; Lehrer II, 124 Nev. at 1107, 197 P.3d at 1036. In order to correct the mistake, Bullock had to complete significant retrofit work. Lehrer I, 185 P.3d at 1059; Lehrer II, 124 Nev. at 1108, 197 P.3d at 1036. When the retrofitting was complete Bullock recorded a

1 mechanic's lien for the total value of the retrofit and initiated litigation. Lehrer I, 185 P.3d at
2 1059; Lehrer II, 124 Nev. at 1108, 197 P.3d at 1036.

3 The case proceeded to trial and a jury found in favor of Bullock. Lehrer I, 185 P.3d at
4 1057; Lehrer II, 124 Nev. at 1109, 197 P.3d at 1036-37. But, because the jury gave
5 contradictory responses to special interrogatories regarding the subcontract, Bovis moved for a
6 new trial. Lehrer I, 185 P.3d at 1060; Lehrer II, 124 Nev. at 1110, 197 P.3d at 1037. In both
7 cases, "the primary issue [was] whether a new trial [wa]s required when the district court creates
8 special interrogatories upon issues of fact and the jury's answers to those interrogatories are
9 inconsistent." Lehrer I, 185 P.3d at 1057; Lehrer II, 124 Nev. at 1105-06, 197 P.3d at 1034. As
10 secondary issues, Bovis questioned whether the district court erred by holding that the lien
11 waiver and pay-if-paid provisions which were incorporated into the subcontract were
12 unenforceable under Nevada law. Lehrer I, 185 P.3d at 1058; Lehrer II, 124 Nev. at 1106, 197
13 P.3d at 1035.

14 In both decisions, the Supreme Court held that remand was necessary because the general
15 verdict was irreconcilable with the interrogatory answers. Lehrer I, 185 P.3d at 1062; Lehrer II,
16 124 Nev. at 1113, 197 P.3d at 1039. *The Court's position with regard to pay-if-paid clauses*
17 *shifted, however, from the first decision to the second.*

18 In the first Lehrer decision, the Supreme Court noted that the parties entered into the
19 subcontract before the Legislature "proclaimed pay-if-paid provision unenforceable." Lehrer I,
20 185 P.3d at 1063. In a footnote, the Court further clarified that the Legislature amended NRS
21 Chapter 624 in 2001 to include "prompt payment provisions . . . which make pay-if-paid
22 provisions entered into subsequent to the Legislature's amendments unenforceable." Id. at 1063
23 n.33. Nevertheless, while new statutory language did not apply to parties' subcontract, the
24 Supreme Court determined that the pay-if-paid provision in the parties' subcontract was
25 unenforceable because "a pay-if-paid provision limits a subcontractor's ability to be paid for
26 work already performed," and effectively "impair[ed] the [Bullock's] statutory right to place a
27 mechanic's lien on the construction project." Id. at 1064.

1 The Supreme Court issued a second, amended opinion a few months later in order to
2 clarify a portion of its decision that “could be misconstrued as being contrary to this court’s
3 precedent.” Lehrer II, 124 Nev. at 1105, 197 P.3d at 1034. In the revised opinion, the Supreme
4 Court again noted that the parties entered into the subcontract before the Legislature “proclaimed
5 pay-if-paid provisions unenforceable.” Id. at 1117, 197 P.3d at 1042. But, in the related
6 footnote, the Court altered its explanation of the statutory amendment by stating, “[p]ay-if-paid
7 provisions entered into subsequent to the Legislature’s amendments are enforceable only in
8 limited circumstances and are subject to the restrictions laid out in [the statute.]” Id. at 1117
9 n.50, 197 P.3d at 1042 n.50. Then, as in the previous decision, the Court held that the
10 subcontract between Bullock and Bovis was unenforceable because it effectively impaired
11 Bullock’s right to place a mechanic’s lien on the project. Id. at 1117, 197 P.3d at 1042.

12 In the aftermath of the Lehrer decisions, scholars and attorneys understandably expressed
13 confusion.⁷ In particular, confusion remains regarding the actual impact of the Supreme Court’s
14 remarks regarding pay-if-paid clauses because the Court’s decision turned on the issue of
15 inconsistent verdicts and all other matters were purely dictum.⁸ In addition, it remains unclear
16 how the Court reached its decision, given that NRS 624 does not contain any direct references to
17 pay-of-paid clauses. And, by the same token, it is unclear why the Supreme Court revised its
18 dicta regarding pay-if-paid clauses when the supposed purpose of the amended opinion was to
19 clarify confusion regarding inconsistent verdicts.

20 Thus, to summarize, there remain many questions regarding Nevada’s law on pay-if-paid
21 provisions. But, under existing law there is no reason to believe that such provisions are *per se*

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23 ⁷ See, e.g., Leon F. Mead II, Nevada Supreme Court Rules Pay-If-Paid Clause Unenforceable, June 2008,
24 available at: [http://www.swlaw.com/assets/pdf/publications/2008/06/16/NevadaSupremeCourtRules_6.08](http://www.swlaw.com/assets/pdf/publications/2008/06/16/NevadaSupremeCourtRules_6.08indd.pdf)
25 [indd.pdf](http://www.hollandhart.com/16931); Gregory S. Gilbert, Pay-if-Paid Clauses: Still Alive in Nevada, Mar. 2009, available at:
26 [https://www.hollandhart.com/16931](http://www.hollandhart.com/16931); Greg Gledhill, Nevada Supreme Court Declares Pay-If-Paid Clauses
27 Unenforceable – Or Did It?, available at: http://www.gcila.org/publications/files/pub_en_97.pdf.

28 ⁸ Argentina Consol. Min. Co. v. Jolley Urga Wirth Woodbury & Standish, 125 Nev. 527, 536, 216 P.3d
779, 785 (2009) (“A statement in a case is dictum when it is “unnecessary to a determination of the
questions involved.”” (Quoting Stanley v. Levy & Zentner Co., 60 Nev. 432, 448, 112 P.2d 1047, 1054
(1941)).

unenforceable because Supreme Court of Nevada simply would not have revised its opinion in Lehrer if its intent was disallow pay-if-paid clauses under all circumstances.⁹ Further, the Supreme Court would not have noted the value of case-by-case assessments if pay-if-paid provisions were never permissible.¹⁰ So, for purposes of this litigation, this Court should consider whether the pay-if-paid provisions are appropriate under the unique circumstances of this case and reject any empty attempt by Helix, or the Joining Subcontractors, to impose a *per se* limitation that simply does not exist — especially when no facts or authenticated contracts have been presented to the Court for consideration.

1. **With there being clear issues of material fact, there is no way the Court could conduct the proper analysis required to determine the application of the pay-if-paid provisions in the contract.**

First, dicta is not controlling law, Kaldi v. Farmers Ins. Exch., 117 Nev. 273, 282, 21 P.3d 16, 22 (2001) and, as such, there is a fair argument that the Lehrer decisions actually have no bearing on the instant matter. Nevertheless, even if this Court is inclined to treat the Supreme Court's reasoning as persuasive,¹¹ it is best to consider the pay-if-paid clause under the unique facts and circumstances in this case. Indeed, while the Supreme Court has yet to address how to assess the enforceability of a pay-if-paid clause, it has stated that a case-by-case assessment is appropriate where a contract includes a lien waiver provision. Lehrer II, 124 Nev. at 1116, 197 P.3d at 1041 ("The enforceability of each lien waiver clause must be resolved on a case-by-case basis"). And, while the applicable law regarding liens differs from the prompt payment provisions in Chapter 624, the Supreme Court has indicated that its concerns regarding pay-if-

⁹ See NRAP 40(c)(2) (providing that rehearing is only warranted "[w]hen it appears that [the Supreme Court] has overlooked or misapprehended a material matter in the record or otherwise, or . . . in such other circumstances as will promote substantial justice."); Moore v. City of Las Vegas, 92 Nev. 402, 405, 551 P.2d 244, 246 (1976) (a rehearing is proper "[o]nly in very rare instances in which new issues of fact or law are raised supporting a ruling contrary to the ruling already reached").

¹⁰ Vegas Franchises, Ltd. v. Culinary Workers Union, Local No. 226, 83 Nev. 422, 424, 433 P.2d 263, 265 (1967) (stating the Supreme Court will not perpetuate error); Nevada-California Transp. Co. v. Pub. Serv. Comm'n, 60 Nev. 310, 108 P.2d 850, 852 (1941) (holding that it is the Supreme Court's duty "to correct rather than perpetuate [] errors").

¹¹ Humphrey's Ex'r v. United States, 295 U.S. 602, 627, 55 S. Ct. 869, 874 (1935) (holding that "dicta [] may be followed if sufficiently persuasive" even though it is "not controlling").

1 paid provisions stem from the same public policy concerns regarding secure payment for
2 contractors. Id. at 1116-18, 197 P.3d at 1041-42.

3 Here, Zitting, while providing its recitation of the purported current state of pay-if-paid
4 law in Nevada, has failed — in the same way it's joinder to Helix's motion for summary
5 judgment on the pay-if-paid issues — to provide the Court with any language or analysis toward
6 granting its Motion. Thus, while Zitting has attached a contract to its Motion, it has failed to
7 provide the Court with any specific language or analysis as to what language is purported to be
8 pay-if-paid and how said language is applicable to the cited law and factual relationship between
9 Zitting and APCO. Further, Zitting's failure to cite to contract language and provide the Court
10 with any analysis in its Motion cannot be rectified in its Reply, as it would be procedurally
11 improper to allow facts and analysis to be considered outside the scope of the original motion on
12 a dispositive motion such as this.

13 Consequently, it is impossible for the Court to conduct ANY analysis on a case-by-case
14 basis and offer anything more than an advisory opinion, which the Court should refrain from.¹²
15 Moreover, to further evidence this point, NRS 624.628 provides guidance regarding pay-if-paid
16 provisions, wherein subsection (c) directs the analysis to determine whether the clause is: (1)
17 unreasonable under the circumstances, (2) was not within the contemplation of the parties at the
18 time the agreement was entered into, or (3) for which the lower-tiered subcontractor is not
19 responsible. Zitting has failed to provide the Court with any analysis of facts for the Court to
20 consider the above factors in this case.

21 Further, public policy concerns weigh in favor of APCO rather than Zitting. As the
22 Supreme Court stated in Lehrer, public policy favors secure payment for contractors. The

23
24 ¹² It has long been held that decisions may be rendered only where actual controversies exist. Applebee v.
25 Applebee, 97 Nev. 11, 12, 621 P.2d 1110, 1110 (1981). Likewise, "a controversy must be present through
26 all stages of the proceeding, and even though a case may present a live controversy at its beginning,
27 subsequent events may render the case moot." Solid v. Eighth Judicial Dist. Court of State in & for Cty.
28 of Clark, 393 P.3d 666, 670 (Nev. 2017). Moreover, the Nevada Supreme Court has always been reluctant
to establish laws or give advisory opinions, especially when unnecessary and broad in scope. Nat'l Union
Fire Ins. Co. of Pittsburgh, Pa. v. Pratt & Whitney Canada, Inc., 107 Nev. 535, 546, 815 P.2d 601, 608
(1991).

1 rationale for this public policy is easy to understand, as “contractors are generally in a vulnerable
2 position because they extend large blocks of credit; invest significant time, labor, and materials
3 into a project; and have any number of workers vitally depend upon them for eventual payment.”
4 Lehrer II, 124 Nev. at 1116, 197 P.3d at 1041. Here, following Zitting’s rationale would do
5 nothing more than turn APCO into a *de facto* lender to the Owner in the event the project goes
6 under and there becomes a situation of non-payment or insolvency — which is exactly what
7 occurred in this case, but while the Project was under the control of Camco, not APCO.

8 Nonetheless, Zitting has failed to provide any evidence for the Court to conduct its
9 analysis and, therefore, must deny the Motion in its entirety.¹³

10 **C. ZITTING IS NOT ENTITLED TO SUMMARY JUDGMENT UNDER**
11 **CHAPTER 108 OF THE NRS.¹⁴**

12 Zitting is not entitled to summary judgment against APCO pursuant to Chapter 108 of the
13 Nevada Revised Statutes. First, the Court already ruled at the hearing conducted on August 10,
14 2017 regarding APCO’s Motion to Dismiss or for Summary Judgment on Lien Claimants’ NRS

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18
19 ¹³ In the alternative, and when properly before the court, should the Court rule that the subject contract
20 language is in fact pay-if-paid language against public policy, the Court should still allow evidence of the
21 contract language to support the intent and interactions between the Parties. Zitting has asserted a borage
22 of claims sounding in NRS 108, contract law, breach of the covenant of good faith and fair dealing, and
23 unjust enrichment, to name a few. If the Court, when the pay-if-paid issue is properly before it, were to
24 consider the contractual language to be a pay-if-paid provision against public policy — which we believe
25 it will not when the Court conducts the case-by-case analysis — then alternatively the Court must still
26 allow testimony and evidence at trial with regard to the contract language as it relates to the intentions
27 and interactions between the Parties. Here, the instant case is set for a bench trial. Likewise, there is no
28 threat of confusing or contaminating a jury with regard to the ultimate determination by the Court on the
application of pay-if-paid language, as the Court can rightfully discern the application of the language and
how it affected the interactions of the Parties.

¹⁴ As further detailed above, due to the Court’s finding on 08/10/2017 regarding APCO’s Motion to
Dismiss or for Summary Judgment on Lien Claimants’ NRS 108 Claims for Foreclosure of Mechanic’s
Lien, the following is merely a brief summation of APCO’s NRS 108 argument, APCO specifically
incorporates all facts and arguments heard by the Court at the aforementioned hearing, and specially
reserves its rights to argue and present the issue at trial or when otherwise properly before the Court.

1 108 Claims for Foreclosure of Mechanic's Lien that "there are some genuine issues that need to
2 be further developed . . ." and denied APCO's NRS 108 motion without prejudice.¹⁵

3 With that said, it is important to note that the purpose of Nevada's mechanics lien statute
4 is to provide contractors, laborers, and materialmen rights against an improved property (and, by
5 extension, the property owner) when the owner fails to ensure that the contractors, laborers, and
6 materialmen have been paid for their work on the improved property. Chapter 108 is not, and
7 never was, intended to give a subcontractor rights against a general contractor. Consequently,
8 any rights Zitting may have had against the Property (and/or the Property owner) pursuant to
9 Chapter 108 were extinguished at time of the foreclosure sale and when the Nevada Supreme
10 Court determined that lenders for Project had first priority over any of the parties who provided
11 work at the Project, including, but not limited to APCO and Zitting.

12 **1. The provisions of Chapter 108's are intended to provide rights and**
13 **claims against the owner of an improved property – not the general**
14 **contractor.**

15 The purpose of a mechanics' lien is to ensure that a contractor who performs work to
16 improve a parcel of real property has a legal avenue to seek compensation *even if the landowner*
17 *refuses to pay*. Southern Cross Const., In. v. Enclave Court, LLC, 2011 WL 13067632. As "a
18 mechanic's lien is directed at a specific property,"¹⁶ and represents a claim against said property
19 and not a general contractor. See Brewer Corp. v. Point Ctr. Fin., Inc., 223 Cal. App. 4th 831,
20 839, 167 Cal. Rptr. 3d 555, 560 (2014), as modified on denial of reh'g (Feb. 27, 2014). Again,
21 the purpose of a mechanics' lien is to prevent unjust enrichment of a property owner at the
22 expense of laborers or material suppliers. Basic Modular Facilities, Inc. v. Ehsanipour, 70 Cal.
23 App. 4th 1480, 1483, 83 Cal. Rptr. 2d 462, 464 (1999) (citing Abbett Electric Corp. v. California
24 Fed. Savings & Loan Assn., 230 Cal.App.3d 355, 360, 281 Cal.Rptr. 362 (1991)). The Nevada

25 ¹⁵ See Court's Minute Order from hearing conducted on 08/10/2017 regarding APCO's Motion to
26 Dismiss or for Summary Judgment on Lien Claimants' NRS 108 Claims for Foreclosure of Mechanic's
27 Lien on file with the Court.

28 ¹⁶ Simmons Self-Storage v. Rib Roof, Inc., 130 Nev. Adv. Op. 57, 331 P.3d 850, 853 (2014), as modified
on denial of reh'g (Nov. 24, 2014).

1 Supreme Court has even gone as far as characterizing a mechanic's lien as a "taking" in that the
2 property owner is deprived of a significant property interest. J.D. Constr. v. IBIX Int'l Grp., 126
3 Nev. 366, 376, 240 P.3d 1033, 1040 (2010).

4 While Chapter 108 alludes to a lien claimant's right to maintain a civil action to recover
5 that debt against the person liable (see NRS 108.238), this provision does not afford a lien-
6 claimant with the same remedies against a general contractor as they would have against the
7 property owner. This is the only reasoning that makes sense considering the general contractor
8 has no legal title to the property that could be subjected to foreclosure pursuant to the mechanics
9 lien. Similarly, while NRS 108.227(12) affords a party whose claim is not completely satisfied
10 at a foreclosure sale the right to a "personal judgment for the residue against the party legally
11 liable for the residue amount," NRS 108.227(12) does not provide the subcontractor with the
12 rights to attorneys fees, costs, and interests against a general contract.

13 2. Any perceived claims Zitting believes it has pursuant to Chapter 108
14 were extinguished at the foreclosure sale.

15 In Nevada, "any mechanics' liens that may arise out of the construction of the intended
16 improvements are junior and subordinate to the earlier recorded mortgage or deed of trust."
17 Erickson Const. Co. v. Nevada Nat. Bank, 89 Nev. 350, 353, 513 P.2d 1236, 1238 (1973).
18 Therefore, when a mechanic's lien is subject to a prior recorded deed of trust and said deed of
19 trust is foreclosed, the subordinate mechanic's lien is extinguished. Id. Here, while Zitting's filed
20 a complaint to foreclose on its mechanics' lien under NRS Chapter 108, any and all of Zitting's
21 claims, rights, and privileges under Chapter 108 were extinguished at the time that the subject
22 Property was foreclosed upon and when the Nevada Supreme Court determined that the lenders
23 for the Project had superior liens to the Property.

24 Thus, any protections, rights, or privileges afforded to Zitting by Chapter 108 no longer
25 apply.

26 ...

27 ...

28 ...

1 **V. CONCLUSION**

2 Accordingly, based on the foregoing, APCO respectfully request that this Court Deny
3 Zitting's Motion for Summary Judgment in its entirety.

4 Dated this 21st day of August, 2017.

5
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7
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CERTIFICATE OF SERVICE

I hereby certify that the foregoing **APCO CONSTRUCTION'S OPPOSITION TO
ZITTING BROTHERS CONSTRUCTION INC.'S MOTION FOR PARTIAL SUMMARY**

JUDGMENT was submitted electronically for filing and/or service with the Highth Judicial District Court on the 21 day of August, 2017. Electronic service of the foregoing document shall be made in accordance with the E-Service List as follows:¹⁷

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¹⁷ 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).

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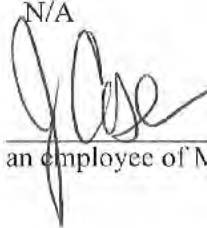
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11 I further certify that I served a copy of this document by mailing a true and correct copy
12 thereof, postage prepaid, addressed to:

13 N/A

14 
15

16 an employee of Marquis Aurbach Coffing
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Exhibit 1

1 **DECLARATION OF MARY JO ALLEN IN SUPPORT OF**
2 **APCO CONSTRUCTION'S OPPOSITION TO ZITTING'S PARTIAL MOTION FOR**
3 **SUMMARY JUDGMENT**

4 Mary Jo Allen, declares as follows:

5 1. I am over the age of 18 years and have personal knowledge of the facts stated
6 herein, except for those stated upon information and belief, and as to those, I believe them to be
7 true. I am competent to testify as to the facts stated herein in a court of law and will so testify if
8 called upon.

9 2. I am one of the two designated NRCP 30(b)(6) witness for APCO Construction in
10 lead case A571228 and associated consolidated actions, and I make this Declaration in support of
11 APCO Construction's Opposition to Zitting's Partial Motion for Summary Judgment
12 ("Opposition").

13 3. Attached as Exhibit 2 to the Opposition are photographs of buildings 8 and 9 at
14 the Project, and that were taken by APCO during its ordinary course of business.

15 4. Zitting did not provide APCO with any invoices after 6/30/2008.

16 5. All of Zitting's approved change orders that APCO was responsible for were paid
17 through August 2008.

18 6. Attached as Exhibit 3 to the Opposition is a true and correct copy of Invoice
19 73828 that APCO received from Zitting in APCO's regular course of business.

20 7. APCO was never provided or received Zitting's alleged pay applications dated
21 6/30/2008 and 11/30/2008 that are collectively attached to the Opposition as Exhibit 4.

22 8. Zitting still had a remaining part of its scope of work to complete at the Project
23 when APCO stopped work and turned the Project over to Camco in August 2008.

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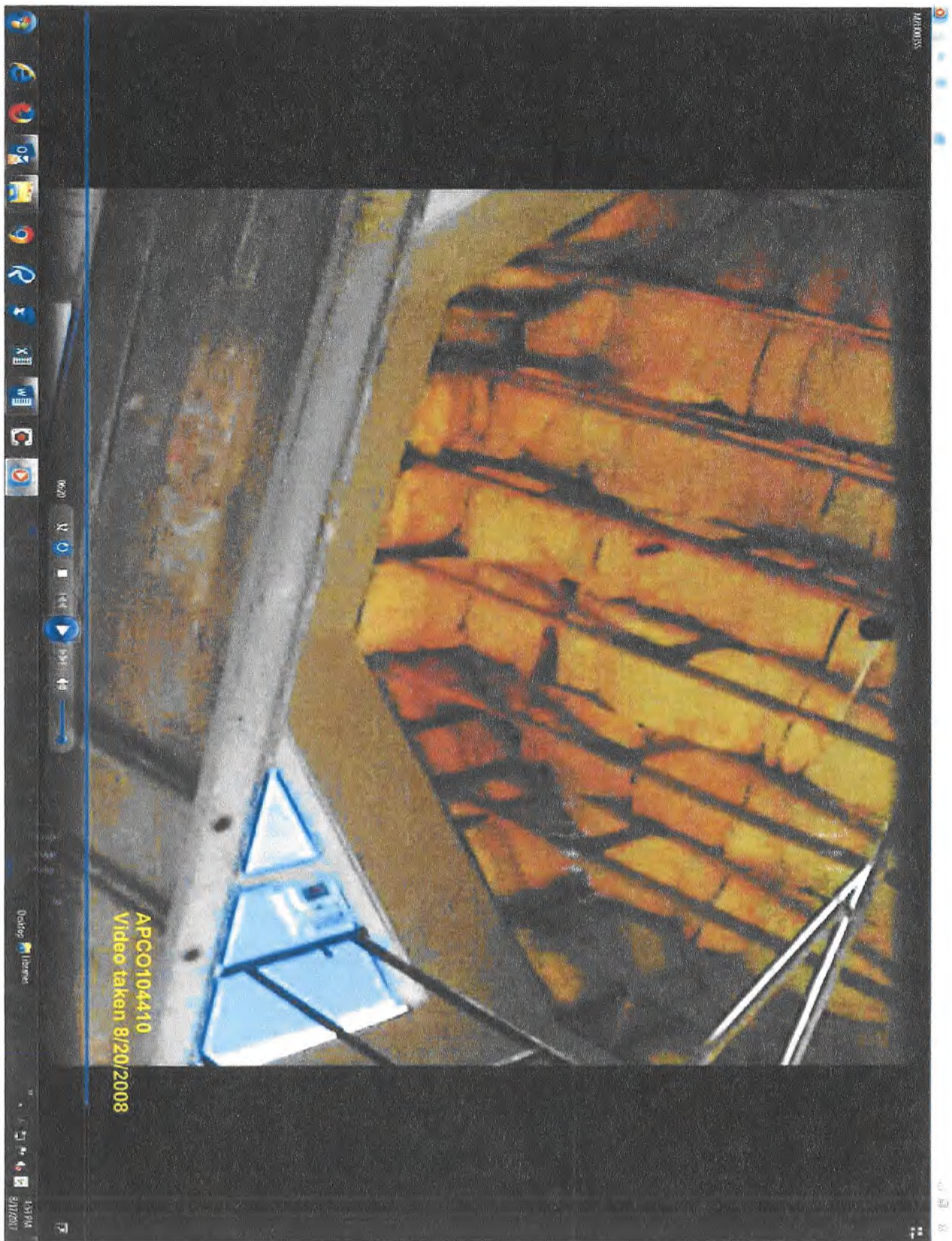
9. Attached as Exhibit 5 to the Opposition is a true and correct copy of APCO's notice of stop work and associated correspondence dated August 21, 2008, which Zitting was provided.

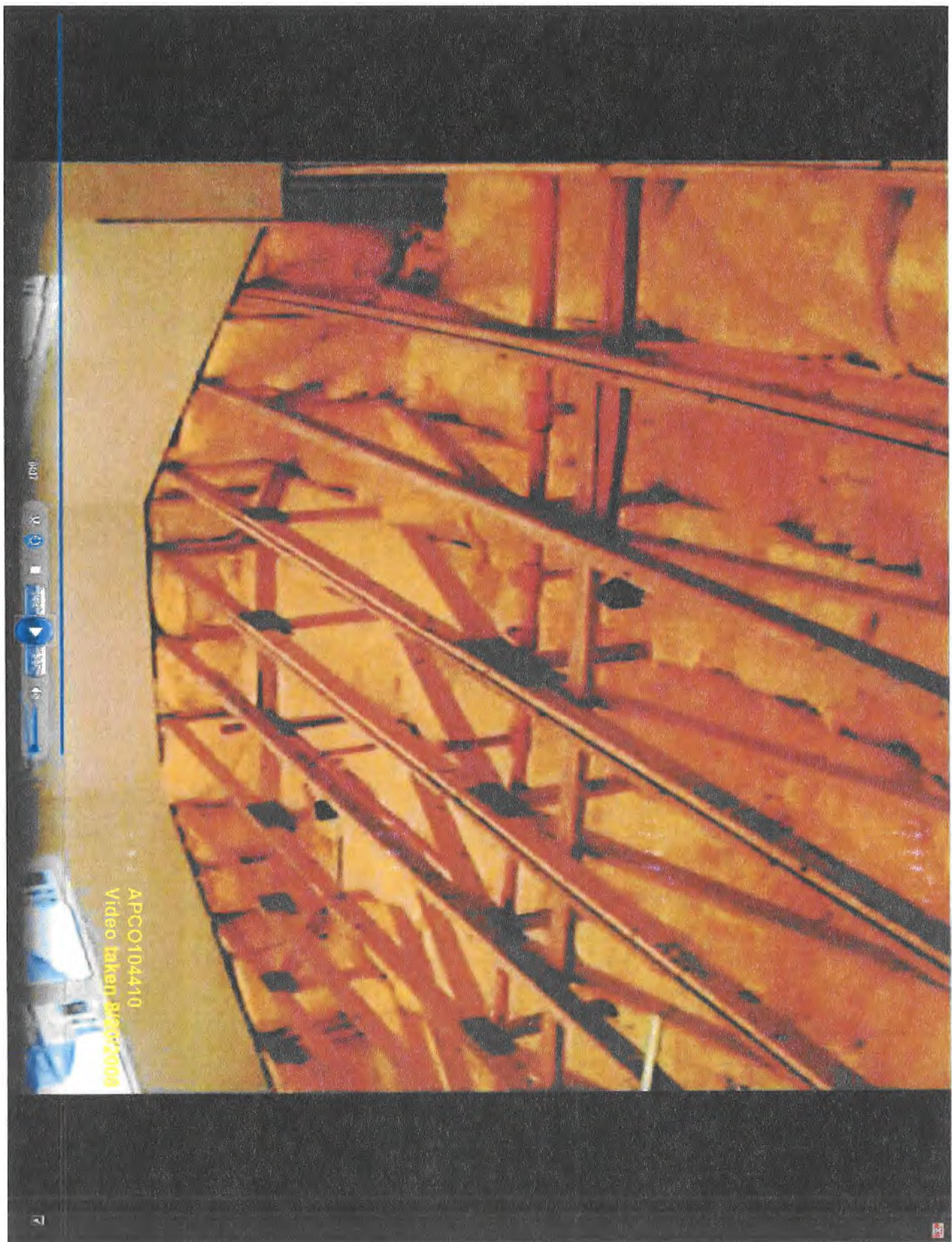
Pursuant to NRS § 53.045, I declare under penalty of perjury under the laws of the State of Nevada that the foregoing is true and correct.

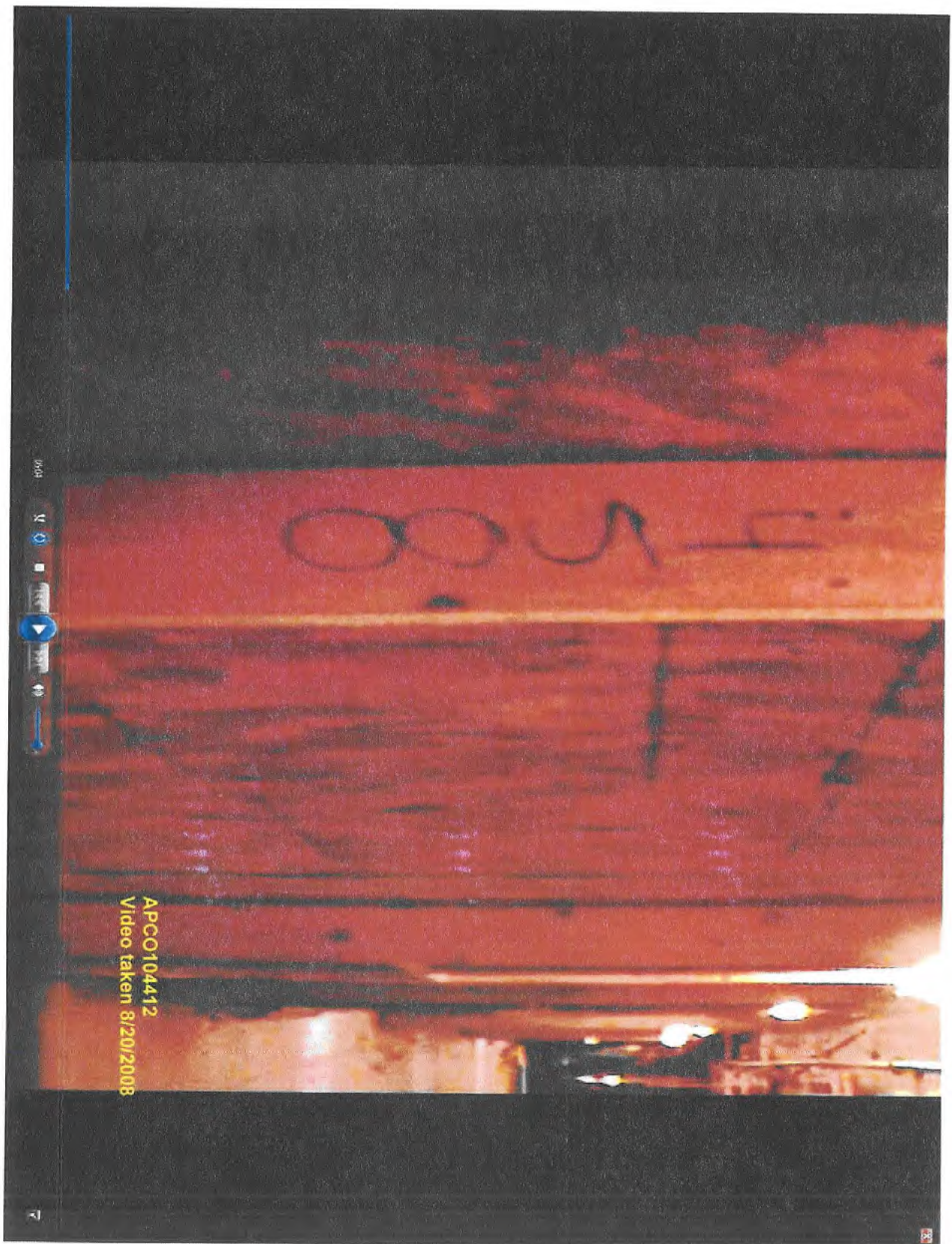
Dated this 21st day of August, 2017,

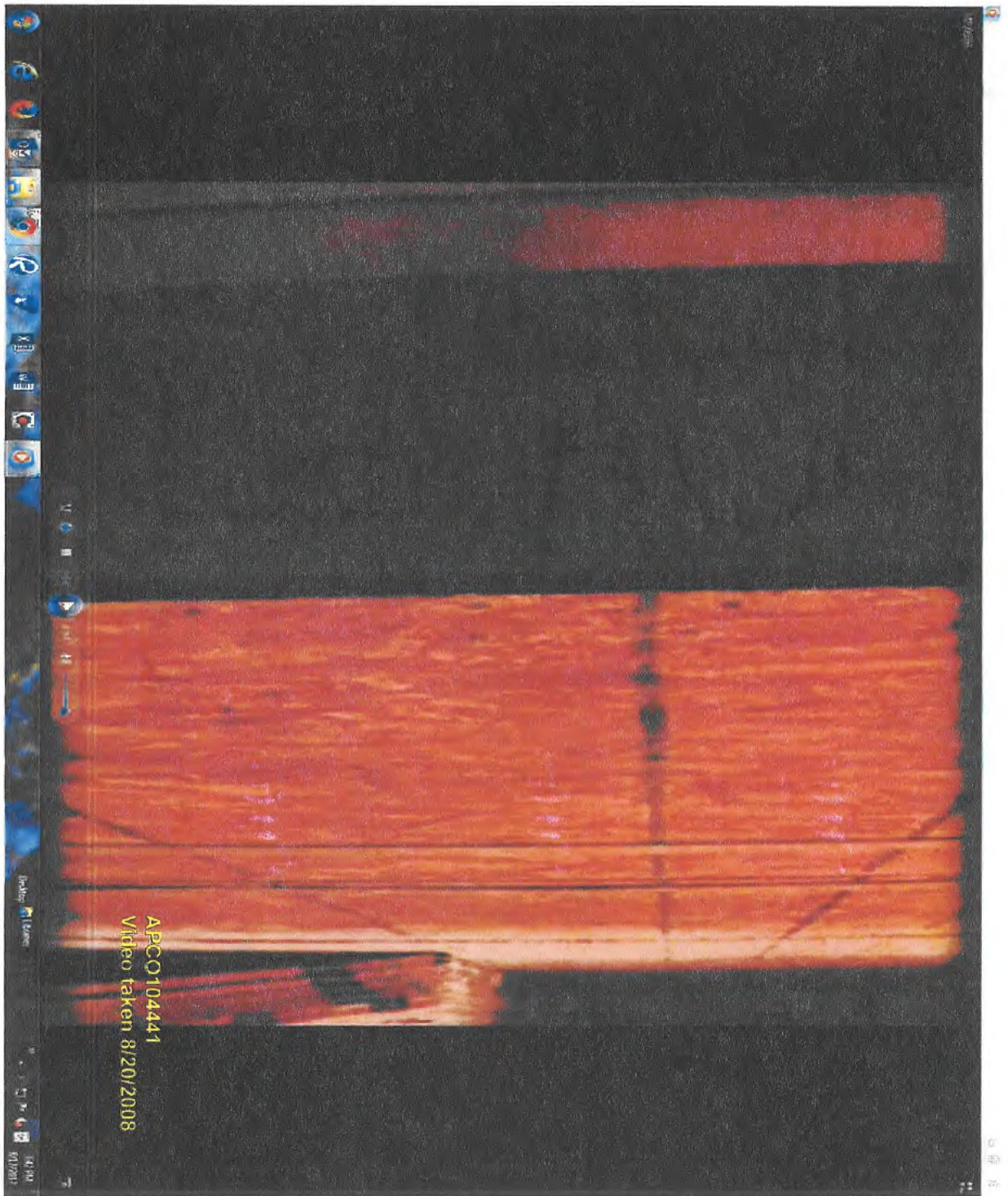
Mary Jo Allen

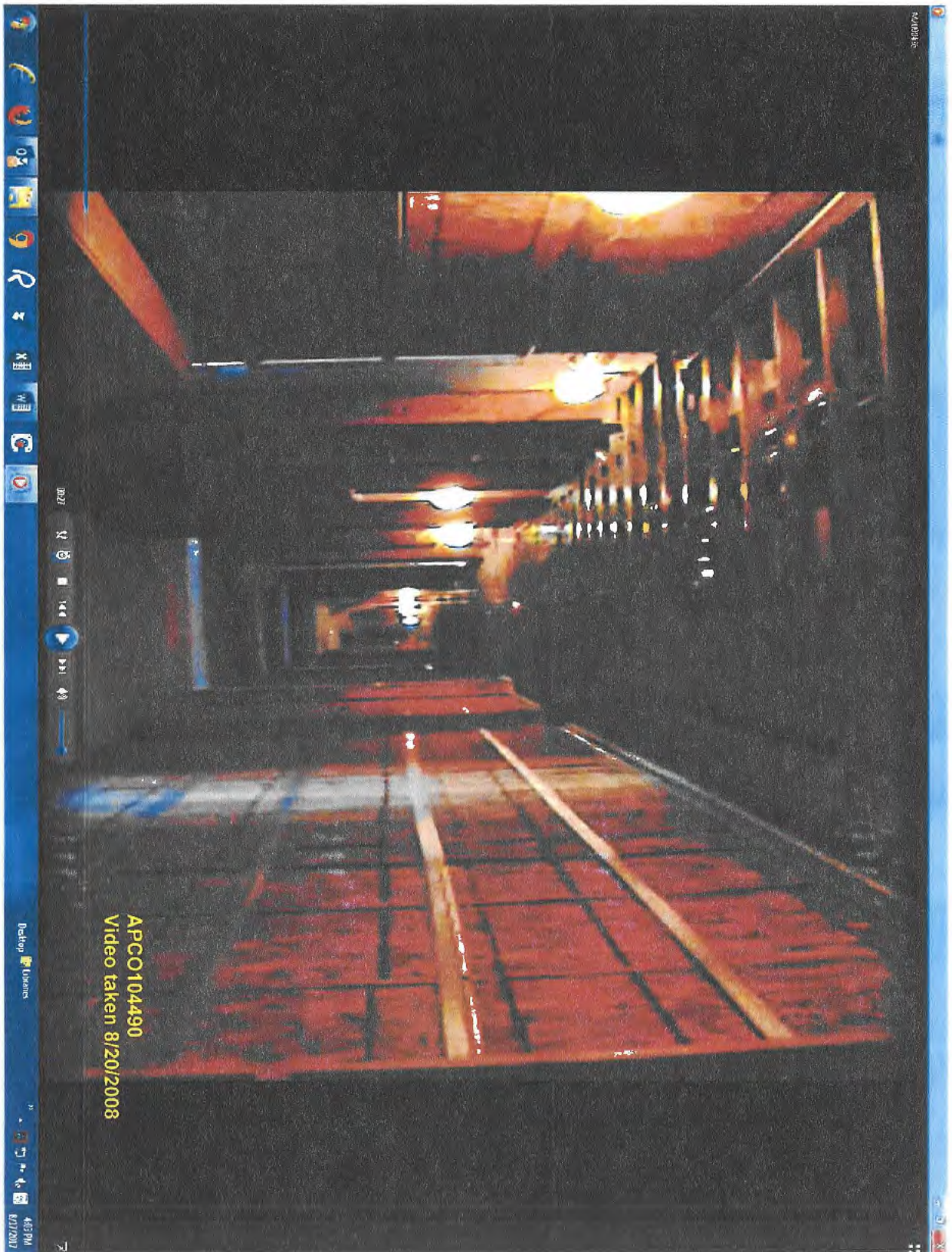
Exhibit 2

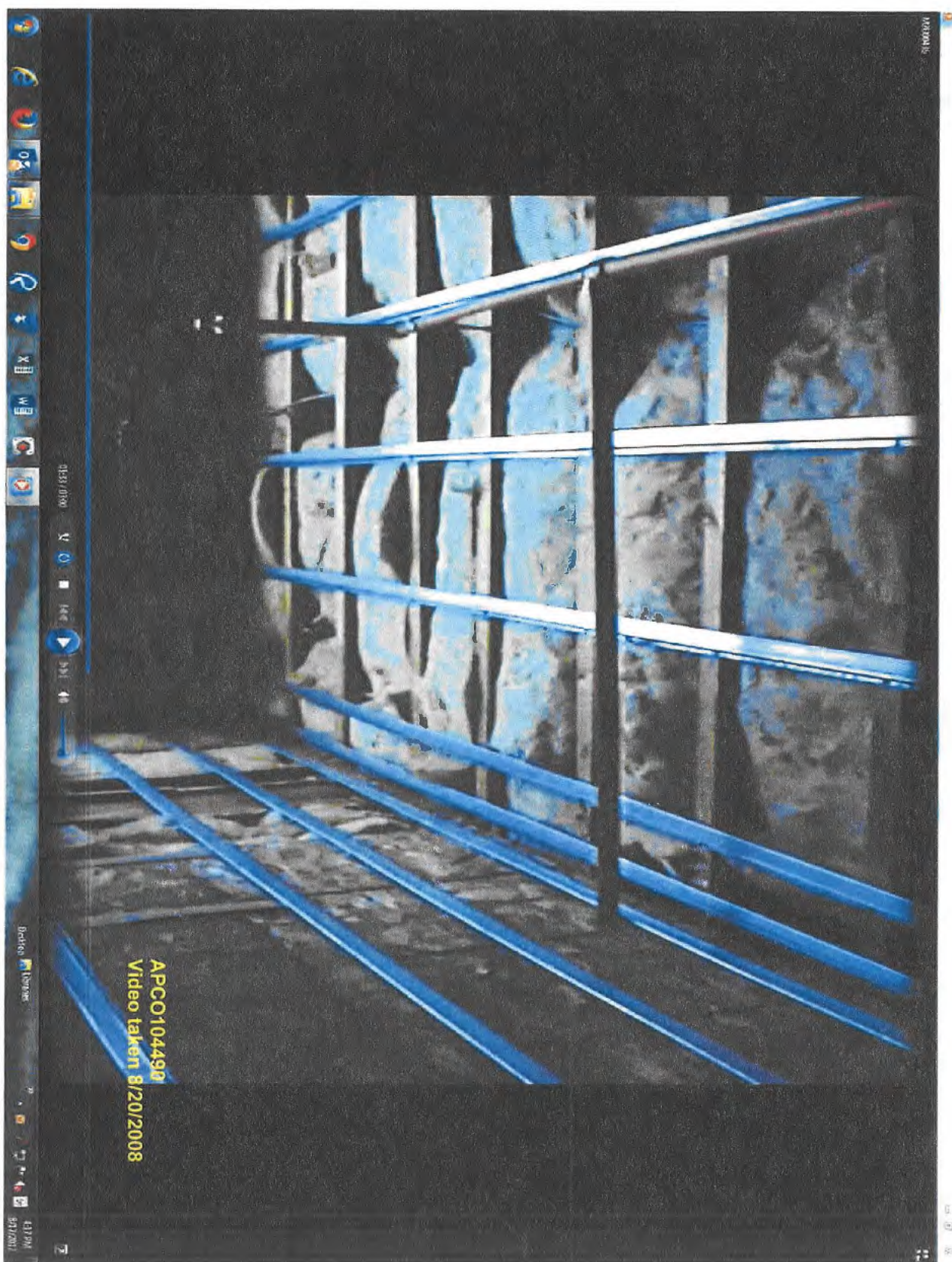


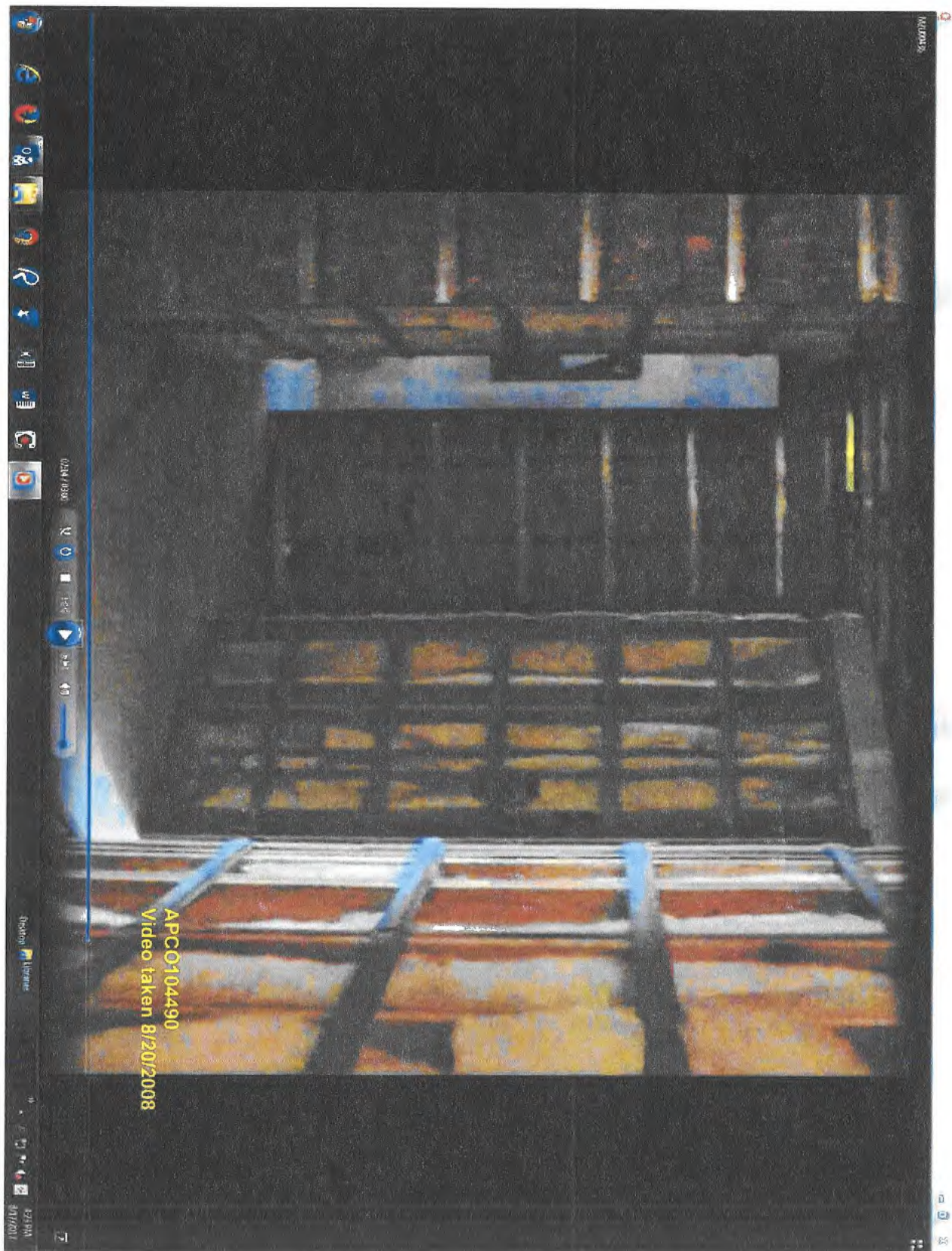












APCO104490
Video taken 8/20/2008

