

1 **INTERROGATORY NO. 20:**

2 State each and every fact that you rely on to support your claim that Zitting Brothers has  
3 failed to comply with the requirements of NRS 624 as asserted in your Eighteenth Affirmative  
4 Defense.

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

6 Objection. APCO objects to this Interrogatory on the grounds that this Interrogatory is  
7 overly broad, unduly burdensome and oppressive because it seeks to force APCO to identify  
8 "each and every fact" that APCO relied upon to support its position "that Zitting Brothers has  
9 failed to comply with the requirements of NRS 624 as asserted in your Eighteenth Affirmative  
10 Defense." Broad ranging written discovery is improper when it essentially subsumes every fact  
11 in the case. See Hiskett v. Wal-Mart Stores, Inc., 180 F.R.D. 403, 404 (D. Kan. 1998); Safeco of  
12 Am. V. Rawstron, 181 F.R.D. 441, 447048 (C.D. Cal. 1998); Lawrence v. First Kan. Bank &  
13 Trust Co., 169 F.R.D. 657, 660-63 (D. Kan. 1996)(same); Hilt v. SFC, Inc., 170 F.R.D. 182, 186-  
14 87 (D. Kan. 1997). APCO further objects to this Interrogatory on the grounds of attorney client  
15 privilege and/or attorney work product. APCO further objects that this Interrogatory is  
16 premature, as discovery has just commenced on this matter and APCO has not yet identified all  
17 facts that it intends to use relative the Zitting Brothers' action.

18 Subject to and without waiving any objections, See Response to Interrogatory No. 1, 6  
19 and 7 above, which are incorporated herein by this reference. Also, see documents identified by  
20 Bate Stamp No. APC000000001<sup>11</sup> through APC000078992 and APC0104200 through 104234,  
21 which APCO has deposited into a depository established by APCO for this litigation matter with  
22 Litigation Services and/or are hereby made available for review and copying (at requestor's  
23 expense) at a mutually agreeable time and place. Discovery is ongoing. APCO reserves the right  
24 to supplement or amend its Response to this Interrogatory as investigation, discovery, disclosure  
25 and analysis continues.

26 ...

27 \_\_\_\_\_  
28 <sup>11</sup> See Footnote No. 1.

1 **INTERROGATORY NO. 21:**

2 Identify, sufficiently to permit service of subpoena, each witness to this action known to  
3 you, your attorney, agent or any investigator or detective employed by you or your attorney or  
4 anyone acting on your behalf, which you intend to have testify at the time of trial relative the  
5 work, material, and/or equipment supplied by Zitting Brothers and provide a brief statement of  
6 their anticipated testimony.

7 **ANSWER TO INTERROGATORY NO. 21:**

8 Objection. APCO reiterates its General Objections and adds that as this action is in the  
9 initial stages of discovery, and APCO has not yet determined which witnesses APCO intends "to  
10 have testify at the time of trial relative the work, material, and/or equipment supplied by Zitting  
11 Brothers". APCO further objects that this Interrogatory is premature. APCO further objects as  
12 the Interrogatory seeks information which is protected from disclosure by the attorney's work  
13 product privilege. APCO further objects on the basis that the Interrogatory seeks disclosure of  
14 trial witnesses (other than experts) and is therefore violative of the attorney work product  
15 privilege. APCO further objects on the basis that the Interrogatory seeks to ascertain the  
16 anticipated testimony of witnesses who are not "experts" and as such violate the attorney work  
17 product privilege. APCO further objects on the basis that the question seeks to ascertain all facts  
18 and other data which APCO intends to offer at trial and, as such, is violative of the attorney work  
19 product privilege. APCO further objects on the grounds that this Interrogatory is vague,  
20 ambiguous, overly broad, unduly burdensome and oppressive because it seeks to force APCO to  
21 identify "each witness to this action known to you, your attorney, agent, or any investigator or  
22 detective employed by you or your attorney or anyone acting on your behalf, and provide a brief  
23 statement of their anticipated testimony." See also, Response to Interrogatory No. 1 above,  
24 which is incorporated herein by this reference.

25 Furthermore, APCO objects to this Interrogatory insofar as it purports to require APCO  
26 to describe the substance of each person's knowledge for the reason that such a requirement  
27 seeks to impose burdens on APCO beyond those permitted by the Nevada Rules of Civil  
28 Procedure, calls for APCO to speculate, is overly broad and unduly burdensome and seeks

1 information protected from disclosure by the attorney-client, work product, party  
2 communications, investigative, and consulting expert privileges. Subject to and without waiving  
3 any objections, APCO anticipates that the following individuals may be witnesses and/or have  
4 relevant information relative the claims asserted in this action:

- 5 1. Brian Benson  
6 APCO Construction  
7 Marquis Aurbach Coffing  
8 10001, Park Run Drive  
9 Las Vegas, Nevada 89145

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

- 15 2. Joe Pelan  
16 APCO Construction  
17 Marquis Aurbach Coffing  
18 10001, Park Run Drive  
19 Las Vegas, Nevada 89145

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

- 25 3. Lisa Lynn  
26 APCO Construction  
27 Marquis Aurbach Coffing  
28 10001, Park Run Drive  
Las Vegas, Nevada 89145

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

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- 1           4.     Mary Jo Allen  
2                 APCO Construction  
3                 Marquis Aurbach Coffing  
4                 10001 Park Run Drive  
5                 Las Vegas, Nevada 89145

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

- 9           5.     Person Most Knowledgeable - APCO  
10                 c/o Gwen Rutar Mullins, Esq.  
11                 Marquis Aurbach Coffing  
12                 10001, Park Run Drive  
13                 Las Vegas, Nevada 89145

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

- 18           6.     The Person Most Knowledgeable  
19                 Gemstone Development West, Inc.  
20                 c/o Alexander Edelstein, registered Agent  
21                 10170 W. Tropicana Ave., Suite 156-169  
22                 Las Vegas, Nevada 89147

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

- 25           7.     Alexander Edelstein  
26                 10170 W. Tropicana Ave., Suite 156-169  
27                 Las Vegas, Nevada 89147

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

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

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



1 9. Craig Colligan  
2 Address unknown

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

5 10. The Person Most Knowledgeable  
6 Scott Financial Services, Inc.  
7 c/o Kemp, Jones & Coulthard  
8 3800 Howard Hughes Pkwy., 17<sup>th</sup> Floor  
9 Las Vegas, Nevada 89169

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

12 11. Bradley J. Scott  
13 c/o Kemp, Jones & Coulthard  
14 3800 Howard Hughes Pkwy., 17<sup>th</sup> Floor  
15 Las Vegas, Nevada 89169

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

18 12. The Person Most Knowledgeable  
19 Bank of Oklahoma  
20 c/o Lewis and Roca, LLP  
21 3993 Howard Hughes Pkwy., Ste. 600  
22 Las Vegas, Nevada 89169

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

25 13. The Person Most Knowledgeable  
26 Club Vista Financial Services, LLC  
27 c/o Cooksey, Toolen, Gage, Duffy & Woog  
28 3930 Howard Hughes Pkwy., Ste. 200  
Las Vegas, Nevada 89169

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

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

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

3 15. Gary D. Tharaldson  
4 c/o Cooksey, Toolen, Gage, Duffy & Woog  
5 3930 Howard Hughes Pkwy., Ste. 200  
6 Las Vegas, Nevada 89169

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

9 16. Aaron Davis  
10 Insulpro Projects, Inc.  
11 c/o Eric Dobberstein, Esq.  
12 DOBBERSTEIN & ASSOCIATES  
13 8965 S. Eastern Avenue, Suite 280  
14 Las Vegas, Nevada 89123

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

17 17. Cheryl Johnson  
18 Insulpro Projects, Inc.  
19 c/o Eric Dobberstein, Esq.  
20 DOBBERSTEIN & ASSOCIATES  
21 8965 S. Eastern Avenue, Suite 280  
22 Las Vegas, Nevada 89123

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

25 18. Matthew Hashagen  
26 Insulpro Projects, Inc.  
27 c/o Eric Dobberstein, Esq.  
28 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.

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

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

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

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

14 21. Jim Thompson  
15 REI/Structural  
16 700 17th Street, Ste. 1900  
Denver, CO 80202  
(303)575-9510

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

22 22. Robert D. Redwine  
23 Civil Structural Engineer  
24 700 17th Street, Ste. 1900  
Denver, CO 80202  
(303)575-9510

25 Mr. Redwine is expected to testify regarding the circumstances of this matter including  
26 the improper workmanship of PGC on the Project which resulted in findings that some of the  
27 columns capitals on Buildings 8 and 9 needed to be demolished or reconstructed. Mr. Redwine  
28

1 is further expected to testify about the defective work performed by PGC on the Project.

2 23. The Person Most Knowledgeable  
3 Zitting Brothers Construction  
4 c/o Jorge Ramirez, Esq.  
5 WILSON, ELSER, MOSKOWITZ, EDLEMAN & DICKER LLP  
415 South Sixth Street, Ste. 300  
Las Vegas, Nevada 89101

6 The Person Most Knowledgeable for Zitting Brothers Construction, Inc. is expected to  
7 testify as to his/her understanding of the facts of this matter forming the basis Zitting Brothers'  
8 lawsuit against APCO.

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

14 **INTERROGATORY NO. 22:**

15 Identify all documents, records, writings, etc., that support your Answers to these  
16 Interrogatories and your responses to Requests for Admission.

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

18 Objection. APCO objects to this Interrogatory as being overly broad, unduly burdensome  
19 and oppressive because it seeks to force APCO to identify "all documents, records, writings, etc.,  
20 that support your Answers to these Interrogatories and your responses to Requests for  
21 Admission." Broad ranging written discovery is improper when it essentially subsumes every  
22 fact in the case. See Hiskett v. Wal-Mart Stores, Inc., 180 F.R.D. 403, 404 (D. Kan. 1998);  
23 Safeco of Am. V. Rawstron, 181 F.R.D. 441, 447048 (C.D. Cal. 1998); Lawrence v. First Kan.  
24 Bank & Trust Co., 169 F.R.D. 657, 660-63 (D. Kan. 1996)(same); Hilt v. SFC, Inc., 170 F.R.D.  
25 182, 186-87 (D. Kan. 1997). APCO further objects to this Interrogatory on the grounds of  
26 attorney client privilege and/or attorney work product. APCO further objects that this  
27 Interrogatory is premature, as discovery has just commenced on this matter and APCO has not  
28 yet identified all facts that it intends to use relative the Zitting Brothers' action.

1 Subject to and without waiving any objections, see documents identified by Bate Stamp  
2 No. APC000000001<sup>12</sup> through APC000078992 and APCO104200 through 104234, 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. 23:**

9 State the names, address and telephone number of each and every individual known to  
10 you who has knowledge of the facts involved in this matter including, but not limited to, Zitting  
11 Brothers' work, material, and/or equipment at the Project.

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

13 Objection. APCO objects to this Interrogatory on basis that it is overly broad, unduly  
14 burdensome and oppressive because it seeks to force APCO to identify "each and every  
15 individual known to you who has knowledge of the facts involved in this matter including, but  
16 not limited to, Zitting Brothers' work, material, and/or equipment at the Project." Broad ranging  
17 written discovery is improper when it essentially subsumes every fact in the case. See Hiskett v.  
18 Wal-Mart Stores, Inc., 180 F.R.D. 403, 404 (D. Kan. 1998); Safeco of Am. V. Rawstron, 181  
19 F.R.D. 441, 447048 (C.D. Cal. 1998); Lawrence v. First Kan. Bank & Trust Co., 169 F.R.D. 657,  
20 660-63 (D. Kan. 1996)(same); Hilt v. SFC, Inc., 170 F.R.D. 182, 186-87 (D. Kan. 1997). APCO  
21 further objects to this Interrogatory on the grounds of attorney client privilege and/or attorney  
22 work product. APCO further objects that this Interrogatory is premature, as discovery has just  
23 commenced on this matter and APCO has not yet identified all individuals that have facts  
24 relative this matter.

25 Subject to and without waiving any objections, see Response to Interrogatory No. 21  
26 above. Also, see APCO's disclosure of witnesses previously served on this matter. Discovery is  
27

28 <sup>12</sup> See Footnote No. 1.

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

3 **INTERROGATORY NO. 24:**

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

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

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

20 Subject to and without waiving any objections, See Responses to Interrogatory No. 1, 6,  
21 and 7 above, which are incorporated herein by this reference. Also, see documents identified by  
22 Bate Stamp No. APC000000001<sup>13</sup> through APC000078992 and APC0104200 through 104234,  
23 which APCO has deposited into a depository established by APCO for this litigation matter with  
24 Litigation Services and/or are hereby made available for review and copying (at requestor's  
25 expense) at a mutually agreeable time and place. Discovery is ongoing. APCO reserves the right  
26 to supplement or amend its Response to this Interrogatory as investigation, discovery, disclosure

27 <sup>13</sup> See Footnote No. 1.  
28

1 and analysis continues.

2 **INTERROGATORY NO. 25:**

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

5 a. the subject matter on which the expert is expected to testify, the substance of the facts  
6 and opinions to which each expert is expected to testify;

7 b. a summary of the grounds for each opinion;

8 c. whether written document was prepared by such expert;

9 d. the professional title, educational background, qualifications and work experience of  
10 each such expert.

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

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

16 **INTERROGATORY NO. 26:**

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

20 **ANSWER TO INTERROGATORY NO. 26:**

21 Objection. APCO objects to this Interrogatory on the grounds that it is premature. APCO  
22 has yet to determine the exhibits to be produced at trial. See also Response to Interrogatory No. 1  
23 above, which is incorporated herein by this reference. Subject to and without waiving any  
24 objections, see documents identified by Bate Stamp No. APC000000001<sup>14</sup> through  
25 APC000078992 and APC0104200 through 104234, which APCO has deposited into a  
26 depository established by APCO for this litigation matter with Litigation Services and/or are

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28 <sup>14</sup> See Footnote No. 1.

1 hereby made available for review and copying (at requestor's expense) at a mutually agreeable  
2 time and place. See also documents produced by other parties to this action, including any  
3 documents produced by Zitting Brothers in this action. Discovery is ongoing. APCO reserves the  
4 right to supplement or amend its Response to this Interrogatory as investigation, discovery,  
5 disclosure and analysis continues.

6 **INTERROGATORY NO. 27:**

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

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

11 Objection. APCO objects on the basis that the Interrogatory is overly broad, vague,  
12 ambiguous, indefinite as to time and without reasonable limitation in its scope. APCO further  
13 objects on the basis that the question is oppressive, harassing and burdensome; the information  
14 sought seeks APCO's counsel's legal analysis and theories regarding laws, ordinances, safety  
15 orders, etc., which are equally available to Zitting Brothers; the question also invades the  
16 attorney's work product privilege. APCO further objects on the basis that the question seeks to  
17 invade APCO's counsel's work product privilege in that it calls for him to provide an analysis of  
18 written data. APCO further objects on the basis that the question seeks to ascertain all facts and  
19 other data which APCO intends to offer at trial and, as such, is violative of the attorney work  
20 product privilege. APCO objects on the basis that the attorney-client privilege protects disclosure  
21 of the information sought.

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

28



**INTERROGATORY NO. 28:**

Please identify the first and last date Zitting Brothers performed work and describe in detail Zitting Brothers' scope of work for the Project.

**ANSWER TO INTERROGATORY NO. 28:**

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

Subject to and without waiving any objections, APCO responds as follows: Zitting Brothers commenced with its work on the Project sometime in November 2007. APCO does not know the last date that Zitting Brothers performed work on the Project. APCO understands that Zitting Brothers continued to perform work on the Project after APCO ceased its work and terminated the prime contract with Gemstone. 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. 29:**

For each of the Request for Admissions, which were served upon you concurrently with these Interrogatories that you denied, either in whole or in part, please state with particularity the reasons for each and every denial.

**ANSWER TO INTERROGATORY NO. 29:**

Objection. This Interrogatory calls for multiple responses as there were denials made by APCO to Zitting Brothers' Requests for Admissions. APCO objects to any attempt by Zitting Brothers 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 Zitting Brothers' Requests for Admissions. See also, Responses to Interrogatory No. 1, 6, and 7 above, which are incorporated herein by this reference. Also, see documents identified by Bate Stamp No.

1 APC000000001<sup>15</sup> through APC000078992 and APCO104200 through 104234, which APCO has  
2 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. 30:**

8 Identify all facts and circumstances leading up to your issuance of the stop work order to  
9 Zitting Brothers and describe any and all reasons you believe you were justified you in taking  
10 such action.

11 **ANSWER TO INTERROGATORY NO. 30:**

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

24 Subject to and without waiving any objections, APCO responds as follows: After APCO  
25 was not paid by Gemstone for work that was being performed by APCO and its subcontractors,  
26 APCO, pursuant to Nevada law, gave notice to Gemstone of its intent to stop work and terminate  
27

28 <sup>15</sup> See Footnote No. 1.

1 the prime contract unless payment was made. APCO provided a copy of such notice to its  
2 subcontractors, including Zitting Brothers, so that the subcontractors, including Zitting Brother,  
3 could take whatever action they deemed necessary to protect their respective rights under  
4 Nevada law. After payment from Gemstone was not made, APCO, as allowed under Nevada law,  
5 terminated its prime contract with Gemstone and further notified its subcontractors, including  
6 Zitting Brothers of such termination. See also, Responses to Interrogatory No. 1, 6, and 7 above,  
7 which are incorporated herein by this reference. Also, see documents identified by Bate Stamp  
8 No. APC000000001<sup>16</sup> through APC000078992 and APCO104200 through 104234, which APCO  
9 has deposited into a depository established by APCO for this litigation matter with Litigation  
10 Services and/or are hereby made available for review and copying (at requestor's expense) at a  
11 mutually agreeable time and place. Discovery is ongoing. APCO reserves the right to supplement  
12 or amend its Response to this Interrogatory as investigation, discovery, disclosure and analysis  
13 continues.

14 **INTERROGATORY NO. 31:**

15 If you or any officer, director, or employee of APCO has had any conversations with  
16 Zitting Brothers regarding the facts alleged in Zitting Brothers Complaint against APCO and  
17 Gemstone, please state the dates of each conversation, the parties, involved, the contents of the  
18 conversation, and what was said.

19 **ANSWER TO INTERROGATORY NO. 31:**

20 Objection. APCO objects on the grounds of relevance and further objects that this  
21 Interrogatory is vague, ambiguous, overly broad, unduly burdensome and oppressive because it  
22 seeks to force APCO to identify any conversations that APCO may have had with Zitting  
23 Brothers including the dates of each conversation, persons involved and the contents of the  
24 conversations. APCO further objects to this Interrogatory on the grounds that the burden of  
25 deriving or ascertaining the answer to this Interrogatory is substantially the same for Zitting  
26 Brothers as for APCO. See also Response to Interrogatory No. 2 above, which is incorporated

27 <sup>16</sup> See Footnote No. 1.  
28

1 herein by this reference.

2 Subject to and without waiving any objections, APCO, during the course of construction,  
3 had numerous conversations with Zitting Brothers relative Zitting Brothers' work and the Project  
4 in general. APCO is unable to recall each and every conversation and their contents. Discovery is  
5 ongoing. APCO reserves the right to supplement or amend its response to this Interrogatory as  
6 investigation, discovery, disclosure and analysis continues.

7 **INTERROGATORY NO. 32:**

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

12 **ANSWER TO INTERROGATORY NO. 32:**

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 Camco  
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, does not recall having any  
19 conversations with Camco regarding Zitting Brothers' work or otherwise. Discovery is ongoing.  
20 APCO reserves the right to supplement or amend its response to this Interrogatory as  
21 investigation, discovery, disclosure and analysis continues.

22 **INTERROGATORY NO. 33:**

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

27 ...

28 ...

1 **ANSWER TO INTERROGATORY NO. 33:**

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

7       Subject to and without waiving any objections, APCO, during the course of construction,  
8 undoubtedly had some conversations with Gemstone relative Zitting Brothers' work and the  
9 Project in general. APCO is unable to recall each and every conversation and their contents.  
10 Discovery is ongoing. APCO reserves the right to supplement or amend its response to this  
11 Interrogatory as investigation, discovery, disclosure and analysis continues.

12 **INTERROGATORY NO. 34:**

13       If you or any officer, director, or employee of APCO has had any conversations with any  
14 Third-Party regarding the facts alleged in Zitting Brothers' Complaint against APCO and  
15 Gemstone, please state the dates of each conversation, the parties, involved, the contents of the  
16 conversation, and what was said.

17 **ANSWER TO INTERROGATORY NO. 34:**

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

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

27 ...

28 ...

1 **INTERROGATORY NO. 35:**

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

4 **ANSWER TO INTERROGATORY NO. 35:**

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

10 Subject to and without waiving any objections, APCO responds as follows: APCO has  
11 asserted priority over the deeds of trust that are of record against the Manhattan West Project  
12 pursuant to NRS 108.225. Priority over the deeds of trusts is based on the fact that APCO first  
13 performed work under the Grading Agreement on or about May 2007. APCO first performed  
14 work under the ManhattanWest General Construction Agreement for GMP or about September  
15 5, 2007. The deeds of trust on the property attached after construction work commenced. APCO  
16 has further asked the Court to declare the rank of mechanic's liens pursuant to NRS 108.236. See  
17 also documents identified by Bate Stamp No. APC000000001<sup>17</sup> through APC000078992 and  
18 APC0104200 through 104234, which APCO has deposited into a depository established by  
19 APCO for this litigation matter with Litigation Services and/or are hereby made available for  
20 review and copying (at requestor's expense) at a mutually agreeable time and place. 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. 36:**

24 Identify the amount of your lien and state whether any of the amounts owed to the  
25 subcontractors in this matter, including Zitting Brothers, are included in said amount. If so,  
26 provide a breakdown of all amounts making up your lien on the Project.

27 <sup>17</sup> See Footnote No. 1.  
28

**ANSWER TO INTERROGATORY NO. 36:**

The current principal amount of APCO's lien, as set forth in the Amended and Restated Notice of Lien that APCO recorded on February 11, 2009 in Book 20090211 as Instrument No. 48031, is \$20,782,659.95. APCO's lien includes an amounts owed to the subcontractors and/or suppliers through the date of APCO's termination of prime contract with Gemstone. APCO's lien does not include any sums for any work that any subcontractor and/or supplier may have performed and/or furnished after termination directly to Gemstone or through Camco. The breakdown of APCO's lien is as follows:

Original Contract Amount	\$153,472,300.00
Change Orders	\$14,597,570.26
Revised Contract Amount	\$168,069,870.26
Contract Work Performed & Billed thur August 2008	\$60,325,901.89
Change Order Work Performed thur August 2008	\$9,168,116.32
Total Work Performed thur August 2008	\$69,494,018.21
Less Pervious Payments	(\$48,711,358.26)
Final Lien Amount	\$20,782,659.95

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. 37:**

Identify the date you started construction on the Project and describe the work that was performed during the first three months of the Project.

**ANSWER TO INTERROGATORY NO. 37:**

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 describe "the work that was performed during the first three months of the Project." APCO further objects on the grounds that it is vague and ambiguous in that

1 “construction”, “work” and “first three months of the Project” are not defined. See also Response  
2 to Interrogatory No. 2 above, which is incorporated herein by this reference. Subject to and  
3 without waiving any objections, APCO responds as follows: APCO first performed work under  
4 the Grading Agreement on or about May 2007. APCO first performed work under the Manhattan  
5 West General Construction Agreement for GMP or about September 5, 2007. See also  
6 documents identified by Bate Stamp No. APC000000001<sup>18</sup> through APC000078992 and  
7 APC0104200 through 104234, which APCO has deposited into a depository established by  
8 APCO for this litigation matter with Litigation Services and/or are hereby made available for  
9 review and copying (at requestor’s expense) at a mutually agreeable time and place. Discovery is  
10 ongoing; APCO reserves the right to supplement or amend its Response to this Interrogatory as  
11 investigation, discovery, disclosure and analysis continues.

12 **INTERROGATORY NO. 38:**

13 Identify all payments received by you for the work, material, and/or equipment furnished  
14 by Zitting Brothers at the Project for which Zitting has not been paid.

15 **ANSWER TO INTERROGATORY NO. 38:**

16 None. APCO has not received any payments for work, materials and/or equipment  
17 furnished by Zitting Brothers at the Project for which Zitting Brother has not been paid by  
18 APCO.

19 **INTERROGATORY NO. 39:**

20 Identify all facts, opinions, or law not set forth in other responses, which you contend  
21 would excuse you from paying Zitting Brothers the owed and outstanding amounts for the work,  
22 material, and/or equipment furnished by Zitting Brothers at the Project.

23 **ANSWER TO INTERROGATORY NO. 39:**

24 Objection. APCO objects on the grounds of relevance and further objects that this  
25 Interrogatory is vague, ambiguous, overly broad, unduly burdensome and oppressive because it  
26 seeks to force APCO to identify “all facts, opinions, or law not set forth in other responses,  
27

28 <sup>18</sup> See Footnote No. 1.



1 which you contend would excuse you from paying Zitting Brothers the owed and outstanding  
2 amounts for the work, material, and/or equipment furnished by Zitting Brothers at the Project.”  
3 APCO further objects to this Request on the grounds of attorney client privilege and/or attorney  
4 work product. APCO further objects that this Interrogatory is premature, as discovery has just  
5 commenced on this matter and APCO has not yet identified all facts that it intends to use relative  
6 the Zitting Brothers’ action. APCO further objects on the basis that to answer this Interrogatory  
7 would result in annoyance, embarrassment, or oppression to APCO in that the question is overly  
8 broad, vague, ambiguous, indefinite as to time and without reasonable limitation in its scope.  
9 APCO further objects on the basis that the question is oppressive, harassing and burdensome; the  
10 information sought seeks APCO’s counsel’s legal analysis and theories regarding laws,  
11 ordinances, safety orders, etc., which are equally available to Zitting Brother; the question also  
12 invades the attorney’s work product privilege. APCO further objects on the basis that the  
13 question calls for information which is available to all parties equally, and is therefore oppressive  
14 and burdensome to APCO. APCO further objects on the basis that the question seeks information  
15 which is protected from disclosure by the attorney’s work product privilege. APCO further  
16 objects on the basis that the question seeks to invade APCO’s counsel’s work product privilege  
17 in that it calls for him to provide an analysis of written data and/or law.

18 APCO further objects to this Interrogatory on the ground that it calls for legal  
19 conclusions. See also Response to Interrogatory No. 2 above, which is incorporated herein by  
20 this reference. Subject to and without waiving any objections, APCO responds as follows:  
21 Gemstone has asserted various complaints about the quality of the work performed by APCO  
22 and its subcontractors. As of this time, Gemstone has not identified specific issues that Gemstone  
23 has with APCO’s or its subcontractor’s work, including that of Zitting Brothers. However, as a  
24 result of Gemstone’s assertions that there are issues with the quality of the work performed on  
25 the Project, Gemstone has failed to pay APCO for the work that APCO performed, including the  
26 work that was performed by Zitting Brothers. Pursuant to the terms of the Subcontract  
27 Agreement, any payments to Zitting Brothers were specifically conditioned upon APCO’s actual  
28 receipt of payment from Gemstone for Zitting Brothers’ work. Moreover, the Subcontract

1 specifically provided that Zitting Brothers was assuming the same risk that Gemstone may  
2 become insolvent and not be paid for its work as APCO assumed in entering into prime contract  
3 with Gemstone. Zitting Brothers further agreed that APCO had no obligation to pay Zitting  
4 Brothers for any work performed by Zitting Brothers until or unless APCO had actually been  
5 paid for such work by Gemstone. To date, APCO has not been paid for the work performed,  
6 including the work performed by Zitting Brothers. In fact, due to non-payment, APCO exercised  
7 its rights pursuant to NRS Chapter 624 and terminated the prime contract with Gemstone and  
8 further terminated the Subcontract with Zitting Brothers. After APCO ceased work on the  
9 Project, Zitting Brothers may have negotiated with Camco, the replacement general contractor,  
10 and/or Gemstone and may have entered into a ratification agreement, wherein APCO was  
11 replaced as the general contractor under the Subcontract and Camco and/or Gemstone became  
12 liable for any monies due Zitting Brothers on the Project. Discovery is ongoing. APCO reserves  
13 the right to supplement or amend its response to this Interrogatory as investigation, discovery,  
14 disclosure and analysis continues.

15 **INTERROGATORY NO. 40:**

16 Identify and explain what sections or provisions, if any, of your contractors license  
17 absolves you of your obligation to pay Zitting Brothers, your subcontractor, the owed and  
18 outstanding amounts for the work, material, and/or equipment furnished by Zitting Brothers at  
19 the Project irrespective of whether the owner has paid you.

20 **ANSWER TO INTERROGATORY NO. 40:**

21 Objection. APCO objects to this Interrogatory on the grounds that this Interrogatory is  
22 vague, ambiguous, overly broad, unduly burdensome and oppressive because it seeks to force  
23 APCO to identify "explain what sections or provisions, if any, of your "contractors license"  
24 absolves you of your obligation to pay Zitting Brothers, your subcontractor, the owed and  
25 outstanding amounts for the work, material, and/or equipment furnished by Zitting Brothers at  
26 the Project irrespective of whether the owner has paid you." Broad ranging interrogatories are  
27 improper when they essentially subsume every fact in the case or every person having  
28 knowledge. See Hiskett v. Wal-Mart Stores, Inc., 180 F.R.D. 403, 404 (D. Kan. 1998).

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. APC000000001<sup>19</sup> 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 2<sup>nd</sup> 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  
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*Attorneys for APCO Construction APCO*

<sup>19</sup> See Footnote No. 1.

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Construction

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VERIFICATION

STATE OF NEVADA        )  
                                  ) ss.  
COUNTY OF CLARK        )

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 May, 2017.

\_\_\_\_\_  
NOTARY PUBLIC in and for said  
County and State

**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing **APCO CONSTRUCTION'S ANSWERS TO ZITTING BROTHERS CONSTRUCTIONS FIRST SET OF REQUESTS FOR INTERROGATORIES** was submitted electronically for filing and/or service with the Eighth Judicial District Court on the 12<sup>th</sup> day of May, 2017. Electronic service of the foregoing document shall be made in accordance with the E-Service List as follows:<sup>20</sup>

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<sup>20</sup> 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 1

RESPONSE TO INTERROGATORY NO. 3

Date of Payment	Check No.	Amt. Paid	% Paid on Completion on Phase 1 Only
1/24/2008	12787	\$ 800,000.00	22.2%
2/6/2008	12878	\$ 388,786.00	32.4%
2/19/2008	12944	\$ 567,148.60	48.1%
3/13/2008	13184	\$ 408,226.70	59.4%
4/15/2008	13458	\$ 495,604.60	73.2%
5/19/2008	13847	\$ 424,688.70	84.8%
6/13/2008	13956	\$ 166,574.60	88.3%
7/28/2008	14382	\$ 27,973.80	90.0%
8/28/2008	NCS526386	\$ 33,847.55	89.6%
		\$ 3,282,848.55	

Zitting Bros. was paid 90% of their contract through payment #8 (07/28/08). Payment #9 (08/28/08) was a joint check issued by Nevada Construction Services for work performed on Owner approved change orders paid at 90%. The owner is holding 10% retention for all owner approved work performed by Zitting through August 2008.

# **EXHIBIT E**

# **EXHIBIT E**

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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.

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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

Las Vegas, Nevada

June W. Seid, CCR No. 485

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?

1 A. I believe so.

2 Q. Do you recall what the communication was  
3 about?

4 A. I believe it was between the attorneys, just  
5 discussing our actions against Gemstone.

6 Q. Other than the lawsuit -- sorry, scratch  
7 that.

8 With respect to the construction of the  
9 project itself and not about the lawsuit, were there  
10 any communications between APCO and Zitting Brothers  
11 after APCO left?

12 A. Not that I was personally aware.

13 Q. Did the project close around December 15,  
14 2008?

15 A. Yes, sir.

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

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

24 Q. Let me see if I can make it a little easier  
25 to say then. Is it fair to say that the only reason



1 that APCO claimed it did not need to pay Zitting  
2 Brothers was the fact that unless Gemstone pays APCO,  
3 Zitting Brothers would not get paid?

4 A. Yes.

5 Q. Does APCO have any bond or insurance that  
6 would cover payments for the unpaid balance allegedly  
7 owed to its subcontractors on the project?

8 A. I can't speak to that.

9 MR. LAI: I'll pass the witness.

10 (Whereupon, a recess was taken.)

11 EXAMINATION

12 BY MR. TAYLOR:

13 Q. All right, my name is John Taylor. I  
14 represent National Wood Products, Inc. They were a  
15 supplier to Cabinetec. First question would be  
16 relating to National Wood Products, have you ever had  
17 any dealings with National Wood Products?

18 A. No.

19 Q. Were you aware that National Wood Products  
20 was a supplier to Cabinetec?

21 A. No.

22 Q. With regard to Cabinetec, do you know how  
23 they were selected to be a subcontractor on this  
24 project?

25 A. I do not.



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JUNE W. SEID, CCR NO. 485

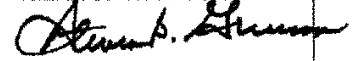


## **EXHIBIT F**

## **EXHIBIT F**

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12 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.: 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.

AND ALL RELATED MATTERS

**APCO CONSTRUCTION'S OPPOSITION TO ZITTING BROTHERS  
CONSTRUCTION INC.'S PARTIAL MOTION FOR SUMMARY JUDGMENT**

Plaintiff APCO Construction ("APCO"), by and through its counsel of record, Marquis Aurbach Coffing, hereby submits its Opposition to Zitting Brothers Construction Inc.'s ("Zitting") Motion for Partial Summary Judgment against APCO Construction.

...

...

...

...

...

...

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 21<sup>st</sup> 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.  
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17 cmounteer@maclaw.com  
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.<sup>1</sup> 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.<sup>2</sup>

## 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.<sup>3</sup> The following facts are in direct contravention to those presented by Zitting and, which, require denial of Zitting’s Motion.<sup>4</sup>

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, <b>not complete</b> . <b>Exhibit 1</b> at ¶ 3 & <b>Exhibit 2</b> (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. <u>See Exhibit 6</u> at 00250 and 00253. The photos and Application for Payment clearly

<sup>1</sup> 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.

<sup>2</sup> 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.

<sup>3</sup> Motion at 3:14.

<sup>4</sup> 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
	<p>* Continued *</p> <p>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.</p> <p>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.</p>
<p>"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).</p>	<p>Zitting did not invoice APCO after 6/30/2008. <b>Exhibit 1</b> 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, <b>not</b> the \$423,654.85 Zitting claims APCO owes it. <b>Exhibit 1</b> at ¶ 6, and <b>Exhibit 3</b>.</p> <p>Further, all approved change orders for Zitting were paid through August 2008 prior to APCO stopping work at the Project. <b>Exhibit 1</b> 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. <b>Exhibit 4</b>. APCO also never received the 6/30/2008 pay application as Zitting alleges. <b>Exhibit 1</b> 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."</p>

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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; (<u>Id.</u> 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; (<u>Id.</u> 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 <b>Exhibit 2</b> and Camco's Application for Payment dated 9/30/2008 attached as <b>Exhibit 6</b>, 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. <b>Exhibit 1</b> at ¶ 9 and <b>Exhibit 5</b>. 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).<sup>5</sup> 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 <sup>5</sup> 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,<sup>6</sup> (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 <sup>6</sup> 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).

1 contains a provision which requires the higher-tiered contractor to pay the lower-tiered  
2 subcontractor only if or when the higher-tiered contractor is paid.” The next statutory  
3 subsection, NRS 624.628, provides additional guidance regarding pay-if-paid provisions. In  
4 particular, it provides that:

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

6 . . .

7 c) Requires a lower-tiered subcontractor to waive, release or extinguish a claim  
8 or right for damages or an extension of time that the lower-tiered subcontractor  
9 may otherwise possess or acquire as a result of delay, acceleration, disruption or  
10 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).

11 Thus, while both of these provisions provide certain limitations regarding payment of  
12 subcontractors, Nevada’s statutory law does not outright prohibit pay-if-paid clauses.

13 Unfortunately, the Supreme Court of Nevada’s decisions in Lehrer McGovern Bovis, Inc.  
14 v. Bullock Insulation, Inc., 124 Nev. \_\_\_, 185 P.3d 1055 (June 2008) (“Lehrer I”), and Lehrer  
15 McGovern Bovis, Inc. v. Bullock Insulation, Inc., 124 Nev. 1102, 197 P.3d 1032 (Oct. 2008)  
16 (“Lehrer II”), caused significant confusion over this otherwise straight-forward statute.

17 Both Lehrer cases centered on a subcontract between subcontractor Bullock Insulation  
18 (“Bullock”) and general contractor Lehrer McGovern Bovis (“Bovis”) in which Bullock agreed  
19 to provide firestopping work needed for the construction of the Venetian hotel and casino. See  
20 Lehrer I, 185 P.3d at 1058; Lehrer II, 124 Nev. at 1107, 197 P.3d at 1035. The subcontract  
21 incorporated several terms from the Construction Management Agreement, including a lien  
22 waiver clause and pay-if-paid provision. Lehrer I, 185 P.3d at 1058; Lehrer II, 124 Nev. at 1107-  
23 08, 197 P.3d at 1036. After much of the work on the project had been completed, an inspection  
24 revealed that Bullock had not properly installed putty pads in accordance with the subcontract.  
25 Lehrer I, 185 P.3d at 1059; Lehrer II, 124 Nev. at 1107, 197 P.3d at 1036. In order to correct the  
26 mistake, Bullock had to complete significant retrofit work. Lehrer I, 185 P.3d at 1059; Lehrer II,  
27 124 Nev. at 1108, 197 P.3d at 1036. When the retrofitting was complete Bullock recorded a  
28

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.<sup>7</sup> 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.<sup>8</sup> 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 <sup>7</sup> 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\\_indd.pdf](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:  
25 <https://www.hollandhart.com/16931>; Greg Gledhill, Nevada Supreme Court Declares Pay-If-Paid Clauses  
Unenforceable – Or Did It?, available at: [http://www.gcila.org/publications/files/pub\\_en\\_97.pdf](http://www.gcila.org/publications/files/pub_en_97.pdf).

26 <sup>8</sup> Argentina Consol. Min. Co. v. Jolley Uрга Wirth Woodbury & Standish, 125 Nev. 527, 536, 216 P.3d  
27 779, 785 (2009) (“A statement in a case is dictum when it is “unnecessary to a determination of the  
28 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.<sup>9</sup> Further, the Supreme Court would not have noted the value of case-by-case assessments if pay-if-paid provisions were never permissible.<sup>10</sup> 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,<sup>11</sup> 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-

<sup>9</sup> 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").

<sup>10</sup> 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.").

<sup>11</sup> 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 provid 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.<sup>12</sup>  
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 <sup>12</sup> 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.<sup>13</sup>

10 **C. ZITTING IS NOT ENTITLED TO SUMMARY JUDGMENT UNDER**  
11 **CHAPTER 108 OF THE NRS.<sup>14</sup>**

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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19 <sup>13</sup> 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 intensions  
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.

<sup>14</sup> 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.<sup>15</sup>

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,"<sup>16</sup> 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  
Fed. Savings & Loan Assn., 230 Cal.App.3d 355, 360, 281 Cal.Rptr. 362 (1991)). The Nevada

24  
25 <sup>15</sup> 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  
Lien on file with the Court.

27 <sup>16</sup> Simmons Self-Storage v. Rib Roof, Inc., 130 Nev. Adv. Op. 57, 331 P.3d 850, 853 (2014), as modified  
28 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. IBEX 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 21<sup>st</sup> day of August, 2017.

5 MARQUIS AURBACH COFFING

6  
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## **EXHIBIT G**

## **EXHIBIT G**

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12 Attorneys for Plaintiff

13 Zitting Brothers Construction, Inc.

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. )

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**

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 NRCP 30 responds to  
27 Plaintiff's Interrogatories as follows:

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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 **RESPONSE:**

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

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

18 **INTERROGATORY NO. 2:**

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

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.

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, 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 responses 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 your 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 identified 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 identified 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

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

20 **INTERROGATORY NO. 13:**  
21

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

25 **RESPONSE:**  
26

27 Objection. This Interrogatory is vague, ambiguous, compound, overbroad, burdensome, and  
28 calls for a legal conclusion. Additionally, Zitting Brothers is not prepared, nor is it required, to  
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. 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 ///

28

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

18 **RESPONSE:**  
19

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

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

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

25 **INTERROGATORY NO. 24:**

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

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 See Response to Interrogatory No. 3.

9 **INTERROGATORY NO. 27:**

10  
11 Please state and identify each and every fact setting forth the alleged breach by Camco and/or  
12 Gemstone.

13 **RESPONSE:**

14 See Response to Interrogatory No. 3.

15 **INTERROGATORY NO. 28:**

16  
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 Objection. This Interrogatory is vague, ambiguous, compound, overbroad, confusing,  
23 burdensome, and calls for a legal conclusion. Additionally, Zitting Brothers is not prepared, nor is it  
24 required, to identify at this time each and every fact that it will rely on to support its claims in this  
25 matter. Discovery is on going and additional facts may be indentified that will support Zitting  
26 Brothers' claims. Subject to and without waiving the foregoing objections, Zitting Brothers  
27 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

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

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

23 **INTERROGATORY NO. 30:**  
24

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

27 ///

28 ///

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  
28

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:

27

28

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 **INTERROGATORY NO. 35:**

10  
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 **RESPONSE:**

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

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

21 **INTERROGATORY NO. 36:**

22  
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

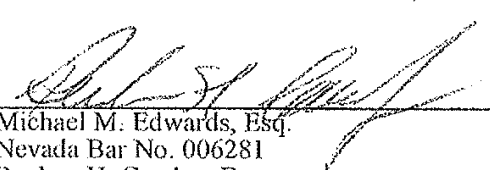
12 Please state each and every fact to support your claim that APCO failed to timely pay its  
13 subcontractors, including you, on this project, as required under NRS 624.606 to 624.630, et. seq.

14 **RESPONSE:**  
15

16 See Response to Interrogatory No. 3.

17 DATED this 7<sup>th</sup> 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  
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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.

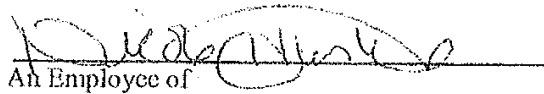
  
NOTARY PUBLIC in and for said  
County and State



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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 9<sup>th</sup> 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

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

APCO CONSTRUCTION, INC., A  
NEVADA CORPORATION,

Appellant,

vs.

ZITTING BROTHERS CONSTRUCTION,  
INC.,

Respondent.

Electronically Filed  
Case No.: 75197 Apr 15 2019 02:47 p.m.  
Elizabeth A. Brown  
Clerk of Supreme Court

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

**APPELLANT'S APPENDIX**  
**(Volume 11, Bates Nos. 2414–2627)**

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MAC:05161-019 3698575\_1

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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
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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

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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
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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
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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

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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
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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
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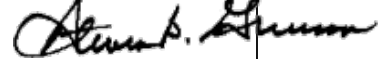
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01/09/2018	Peel Brimley Lien Claimants' Opposition to APCO Construction's Motion for Reconsideration of Order Granting Partial Summary Judgment Precluding Defenses Based on Pay-If-Paid Agreements	19	AA 4351–4359
01/10/2018	APCO's Reply in Support of 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
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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
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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
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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
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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
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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
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	Docket of District Court Case No. 08A571228	30	AA 6855–6941



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APCO CONSTRUCTION,  
Plaintiffs,

vs.

GEMSTONE DEVELOPMENT  
WEST, INC.,  
Defendants.

CASE NO. 08A571228

DEPT. XIII

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

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

(Appearances on Page 2)

RECORDED BY: JENNIFER GEROLD, COURT RECORDER

1 APPEARANCES:

2 For the Plaintiffs: CHEN MIN JACK JUAN, ESQ.  
3 CODY S. MOUNTEER, ESQ.  
4 MARY E. BACON, ESQ.  
JOHN H. MOWBRAY, ESQ.

5 For Camco Pacific Construction Co., Inc.: STEVEN L. MORRIS, ESQ.

6 For various Lien Claimants: ERIC B. ZIMBELMAN, ESQ.

7 For Zitting Brothers Construction, Inc.: I-CHE LAI, ESQ.

8 For various Counter Defendants: MICHAEL R. ERNST, ESQ.

9 For E&E Fire Protection, LLC: JAMES T. TRUMAN, ESQ.  
10

11 For United Subcontractors, Inc.: BENJAMIN JOHNSON, ESQ.

12 For the Intervenors: JOHN B. TAYLOR, ESQ.  
13 RICHARD L. TOBLER, ESQ.

14 For Chapter 7 Trustee: ELIZABETH E. STEPHENS, ESQ.  
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1 Las Vegas, Nevada; Thursday, October 5, 2017

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

5 [Bench conference - not transcribed]

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

12 MR. JUAN: Correct.

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

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

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

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

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

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

7 MR. JUAN: If possible.

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

9 MR. JUAN: Thank you, Judge.

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

12 THE COURT: Okay.

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

19 MR. JUAN: Your Honor, --

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

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



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

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

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

14 MR. JUAN: Thank you, Judge.

15 [Matter trailed]

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

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

22 THE COURT: No, not -- really?

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

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

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

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

6 THE COURT: November 28<sup>th</sup>.

7 MR. ZIMBELMAN: November 28.

8 THE COURT: That's pretty quick.

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

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

24 THE COURT: Okay.

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

1 THE COURT: Okay.

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

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

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

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

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

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

12 MR. MOWBRAY: It is a firm setting.

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

14 MR. MOWBRAY: Ah.

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

17 MR. ZIMBELMAN: Right.

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

22 MR. JUAN: Yes, Your Honor.

23 THE COURT: So how much time is expected?

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

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

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

16           THE COURT: Okay.

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

19           THE COURT: Okay.

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

1 That's how we were thinking about that.

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

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

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

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

16 MR. JUAN: If possible.

17 THE COURT: Right.

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

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

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

24 THE COURT: Okay.

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

1 THE COURT: That seems --

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

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

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

10 THE COURT: No, I understand.

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

13 THE COURT: Okay.

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

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

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

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

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

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

5 MR. JOHNSON: Sure.

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

11 MR. JUAN: Thank you, Judge.

12 THE COURT: Will that work?

13 MR. JUAN: Yes. Thanks, Judge.

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

19 THE COURT: Any objection to that?

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

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

23 MR. LAI: No objections from Zitting Brothers.

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

1 you're opening.

2 THE COURT: Okay. Any problem with that?

3 MR. JUAN: No, because I know they're referring to Joe Palin  
4 [phonetic]. I have no problem with that.

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

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

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

9 MR. JUAN: Please, Your Honor.

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

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

12 THE COURT: Would you run it by everybody?

13 MR. JUAN: Yes, Your Honor.

14 THE COURT: Okay.

15 MR. JUAN: Thank you, Judge.

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

19 MR. ZIMBELMAN: Thank you, Your Honor.

20 MR. JUAN: Thank you, Your Honor.

21 ALL COUNSEL: Thank you, Your Honor.

22 THE COURT: Hold on a sec.

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

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



1 THE JEA: The dispositive motion.

2 THE COURT: The what?

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

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

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

9 THE COURT: And when will the depositions close?

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

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

14 [Counsel confer]

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

17 MS. BACON: That would be helpful.

18 THE COURT: Would that work?

19 MR. MOUNTEER: Yeah the 16<sup>th</sup> would be fine with us.

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

23 MR. JUAN: Yes, Judge.

24 THE COURT: Right?

25 MR. MOUNTEER: Yes, Your Honor.

1 ALL COUNSEL: Yes, Your Honor.

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

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

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

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

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

15 MR. MOUNTEER: Okay.

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

17 MR. JUAN: Thank you, Judge.

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

20 MR. JUAN: November 16.

21 MR. ZIMBELMAN: Oh, filed by the 16<sup>th</sup>.

22 ALL COUNSEL: No. Heard.

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

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

1 MR. MOWBRAY: I would suggest a few days after the deposition  
2 period closes so that would be what, November --  
3 MS. BACON: I suggest at least a week after that.  
4 MR. MOUNTEER: Today's the 5<sup>th</sup>, it would be November 5<sup>th</sup>.  
5 THE COURT: Are you saying November 5<sup>th</sup> is the deadline by which  
6 to file the motions in limine; is that what I just heard?  
7 MR. MOUNTEER: I was saying 30 days out that's when the  
8 depositions are supposed to be closed.  
9 MR. MOWBRAY: That's fair, Your Honor.  
10 THE COURT: Okay. All right. Got it?  
11 MR. ZIMBELMAN: Let's do that.  
12 MR. MORRIS: Your Honor --  
13 MR. JUAN: Yes, Your Honor. I have it all and I'll submit -- I'll submit  
14 it to everybody.  
15 THE COURT: Okay. Very well.  
16 MR. MORRIS: Your Honor, if I may just --  
17 THE COURT: I still have a question from my JEA.  
18 [Court confers with JEA]  
19 THE COURT: I thought the depo cutoff was before the 5<sup>th</sup>. The  
20 motion in -- the motions deadline is the 5<sup>th</sup>; right?  
21 MR. JUAN: Yes, Your Honor.  
22 THE COURT: So you're going to get those depositions done before that.  
23 MR. JUAN: Yes, Your Honor.  
24 THE COURT: Okay. Right?  
25 MR. JUAN: Yes, Your Honor.

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

3 MR. JUAN: October 31<sup>st</sup>?

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

5 MR. ZIMBELMAN: No. October 30<sup>th</sup>.

6 MR. JUAN: October 30<sup>th</sup>?

7 THE COURT: What's that?

8 MR. JUAN: October 30<sup>th</sup>?

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

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

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

21 THE COURT: Right.

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

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

1 motions; right? So.

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

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

4 MR. MORRIS: It is.

5 THE COURT: -- addressed though.

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

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

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

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

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

23 THE COURT: Okay.

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

1 that's going to be the end of it for them. They can't weather that. They're on life  
2 support and they have been for all these years and so I think, out of fairness for  
3 them and for my client, if we could have a determination on that and it sounds  
4 like we will in part with pay-if-paid, pay-when-paid, but conclusively if it is the  
5 Court's order that, you know, there is the possibility of that liability being imposed  
6 at the time of trial, that's really outcome determinative for my client. They --

7 THE COURT: All right.

8 MR. MORRIS: -- they will not be able to survive that, so.

9 THE COURT: All right. Thank you and that will be -- that's among  
10 the things that will be determined by the Court.

11 MR. LAI: Your Honor, just real quick about the deposition cutoff date.  
12 Our PMK for Zitting Brothers may have a trial going forward in October in  
13 Minnesota so we're trying to make sure that we can get him in for a depo by the  
14 cutoff, but if somehow we can't work it out, would the Court be all right with us  
15 reaching out to Apco's counsel to reach an alternative date for his deposition?

16 THE COURT: Sure. Whatever you can agree on.

17 MR. JUAN: I think they're trying to tell me that I have to rely on their  
18 word; is that correct, counsel, I have to rely on your word?

19 MR. MOWBRAY: That's a cheap shot. That's a cheap shot.

20 MR. JUAN: Yes. I can do that.

21 THE COURT: All right. I'll see you then. What was the date again,  
22 the 16<sup>th</sup>? Okay, Mr. Juan prepare and circulate that order that reflects what's  
23 been done today and so we can get everything lined up.

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MR. JUAN: Thank you, Judge.

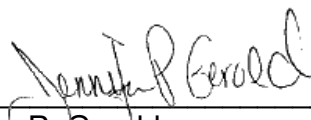
ALL COUNSEL: Thank you, Your Honor.

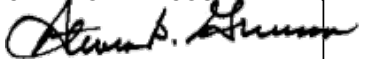
THE COURT: Okay.

[Hearing concluded at 9:55 a.m.]

\* \* \* \* \*

ATTEST: I do hereby certify that I have truly and correctly transcribed the audio/video proceedings in the above-entitled case to the best of my ability.

  
\_\_\_\_\_  
Jennifer P. Gerold  
Court Recorder/Transcriber



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13 *Attorneys for Lien Claimant,*  
14 *Zitting Brothers Construction, Inc.*

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

**ZITTING BROTHERS CONSTRUCTION, INC.'S MOTION IN LIMINE TO LIMIT  
THE DEFENSES OF APCO CONSTRUCTION TO  
THE ENFORCEABILITY OF PAY-IF-PAID PROVISION**

Pursuant to EDCR 2.47, Zitting Brothers Construction, Inc. ("Zitting"), a lien claimant,  
submits its Motion in Limine to Limit the Defenses of APCO Construction ("APCO") to the  
Enforceability of Pay-if-Paid Provision. Zitting explains the basis for this motion in the  
accompanying memorandum of points and authorities, which is supported by the attached exhibits,

...

...



1 the records of this Court, and any oral arguments that this Court may entertain at the hearing on this  
2 motion.

3 DATED this 6th day of November, 2017

4 WILSON ELSEER MOSKOWITZ EDELMAN &  
5 DICKER LLP

6 

7 Jorge Ramirez, Esq.  
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15 *Attorneys for Lien Claimant,*  
16 *Zitting Brothers Construction, Inc.*

17  
18 **NOTICE OF HEARING ON MOTION**

19 Please take notice that Zitting will bring its Motion in Limine to Limit the Defenses of APCO  
20 Construction to the Enforceability of Pay-if-Paid Provision for hearing in Department 13 of the  
21 above-captioned court on November 16, 2017, at 9:00 a.m., or as soon thereafter as this matter may  
22 be heard.

23 DATED this 6th day of November, 2017

24 WILSON ELSEER MOSKOWITZ EDELMAN &  
25 DICKER LLP

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Since the beginning of this case and for more than seven years, APCO remained steadfast to  
4 its sole defense against Zitting's claims—the enforceability of the pay-if-paid provision ("Pay-If-  
5 Paid Provision") in APCO's subcontract with Zitting about the Manhattan West Condominiums  
6 ("Project"). Notably, APCO repeatedly disclosed this sole defense in its verified responses to  
7 Zitting's interrogatories and confirmed this in its Rule 30(b)(6) deposition testimony. Zitting  
8 reasonably relied on APCO's disclosures in formulating its litigation plan, which included decisions  
9 to avoid or limit written discovery, subpoena, and depositions of certain parties.

10 Seven years later and with discovery closed, APCO now plans to assert additional defenses at  
11 trial, which include the alleged lack of APCO's or the Project owner's approval of the unpaid change  
12 orders, Zitting's alleged performance of certain work outside of Zitting's contract with APCO, and  
13 Zitting's allegedly unripe claim for the retention amount. There is no explanation for the late  
14 defenses. Allowing the late defenses unfairly prejudices Zitting's trial preparation. With the  
15 substantial passage of time, the new defenses become harder to rebut as memories fade, witnesses  
16 become unavailable, and documents become lost. Therefore, this Court must restrict APCO's  
17 defense at trial to the enforceability of the Pay-If-Paid Provision.

18 **II. EVIDENCE AND ARGUMENTS SOUGHT TO BE PRECLUDED**

19 Zitting seeks to preclude APCO from offering any evidence or arguments challenging  
20 Zitting's recovery from APCO other than evidence and arguments pertaining to the enforceability of  
21 the Pay-If-Paid Provision.

22 **III. RELEVANT BACKGROUND**

23 Around December 23, 2008, Zitting mailed APCO its recorded Notice of Lien because of  
24 APCO's failure to pay Zitting the amount owed for its work on the Project. (Ex. A.) About five  
25 months later, Zitting filed its complaint against APCO, seeking recovery of the amount owed. (Ex.  
26 B.)

27 On April 9, 2010, Zitting disclosed to APCO in verified interrogatory responses that it seeks  
28 payment of \$750,807.16, comprising of \$347,441.67 in unpaid change orders and \$403,365.49 in

1 unpaid retention amount, exclusive of interest and attorney's fees. (E.g., Ex. G 5:17-22, 25:10-9.)  
2 Zitting also served contention interrogatory to APCO requesting all of APCO's grounds for not  
3 paying that amount:

4 INTERROGATORY NO. 6:

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

7 (Ex. C 10:14-16.) In its April 29, 2010 verified response to this contention interrogatory, APCO  
8 identified the 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  
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.

19 (*Id.* 10:17-11:5.)

20 To confirm that APCO is not planning to assert additional defenses, Zitting served the same  
21 interrogatory about seven years later:

22 INTERROGATORY NO. 6:

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

25 (Ex. D 9:1-3.) APCO confirmed by providing the same interrogatory response near the end of  
26 discovery:

27 ...

28 ...

1 ANSWER TO INTERROGATORY NO. 6:

2 Pursuant to the terms of the Subcontract any payment to Zitting  
3 Brothers were specifically conditioned upon APCO's actual receipt of  
4 payment from Gemstone for Zitting Brothers' work. Moreover, the  
5 Subcontract specifically provides that Zitting Brothers was assuming  
6 the same risk that Gemstone may become insolvent and not be paid for  
7 its work as APCO assumed in entering into prime contract with  
8 Gemstone. Zitting Brothers further agreed that APCO had no  
9 obligation to pay Zitting Brothers for any work performed by Zitting  
10 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.

11 (*Id.* 9:4-16.) On June 5, 2017—less than 30 days from the close of discovery—APCO, through its  
12 Rule 30(b)(6) deposition testimony, again confirmed that this was the sole ground for refusing  
13 payment to Zitting:

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

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

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

21 A. Yes.

22 (Ex. E at 40:16-41:4.)

23 Despite limiting its defense against Zitting's claims to the enforceability of the Pay-If-Paid  
24 Provision for more than seven years and through the entire discovery, APCO now plans to raise new  
25 defenses for the first time, such as lack of approval for the unpaid change orders, non-contractual  
26 work, and unripe claim for the retention amount. (*See* Ex. F 3:5-6:20, 8:2-21.)

27 ...

28 ...

1 **IV. LEGAL STANDARD FOR MOTION IN LIMINE**

2 The Nevada Supreme Court has approved the use of motions in limine in many cases by  
3 recognizing the legitimacy of such pre-trial motion practices and the district court's authority to rule  
4 on these motions. *See, e.g., State ex. Rel Dep't of Highways v. Nevada Aggregates & Asphalt Co.*, 92  
5 Nev. 370, 551, P.2d 1095 (1996); *Bull v. McCuskey*, 96 Nev. 706, 615 P.2d 957 (1980). The decision  
6 to admit or exclude evidence is within the sound discretion of the trial court. *Petrocelli v. State*, 110  
7 Nev. 46, 52, 692 P.2d 503, 508 (1985). Additionally, Nev. R. Civ. P. 16(c)(3) grants Nevada courts  
8 authority to rule on motions in limine by allowing for advance rulings on admissibility of evidence.

9 **V. ARGUMENT**

10 **A. APCO's discovery conduct restricts APCO's defense to the enforceability of the**  
11 **Pay-If-Paid Provision.**

12 Since 2010, APCO has repeatedly sworn that the only reason it refused payment of the  
13 amount owed to Zitting was because of the void Pay-If-Paid Provision. Seven years later and after  
14 the close of discovery, APCO has raised additional grounds for refusing payment, such as lack of  
15 approval for the unpaid change orders, non-contractual work, and unripe claim for the retention  
16 amount. (*See* Ex. F 3:5-6:20, 8:2-21.) These new defenses are improper and subject to exclusion.

17 APCO's incomplete discovery responses regarding its defenses preclude APCO from raising  
18 any defenses at trial other than the defense arising from the enforceability of the Pay-If-Paid  
19 Provision. Nev. R. Civ. P. 33(c) allows a plaintiff to serve contention interrogatories to a defendant,  
20 which are interrogatories requiring answers "involv[ing] an opinion or contention that relates to fact  
21 or the application of law to fact...." *See also Nat'l Acad. of Recording Arts & Scis., Inc. v. On Point*  
22 *Events, LP*, 256 F.R.D. 678, 682 (C.D. Cal. 2009) (addressing the federal counterpart to Nev. R. Civ.  
23 P. 33(c)).<sup>1</sup> Contention interrogatories—such as those asking a "defendant to identify its affirmative  
24 defenses and state the facts supporting these defenses"—are "consistent with Rule 11 of the Federal  
25 Rules of Civil Procedure, which requires parties have some factual basis for their claims and  
26 allegations." *Id.* (addressing the federal counterpart to Nev. R. Civ. P. 11) (internal quotation marks

27  
28 <sup>1</sup> "Federal cases interpreting the Federal Rules of Civil Procedure are strong persuasive authority, because the Nevada Rules of Civil Procedure are based in large part upon their federal counterparts." *McClendon v. Collins*, 132 Nev. Adv. Op. 28, 372 P.3d 492, 494 (2016) (internal quotation marks omitted).

1 omitted). “[S]uch interrogatories are helpful in that they may narrow and define the issues for trial  
2 and enable the propounding party to determine the proof required to rebut the responding party's  
3 claim or defense.” *Moses v. Halstead*, 236 F.R.D. 667, 674 (D. Kan. 2006); *see also Kyoei Fire &*  
4 *Marine Ins. Co., Ltd. v. M/V Mar. Antalya*, 248 F.R.D. 126, 157 (S.D.N.Y. 2007). To that end,  
5 Zitting has repeatedly served contention interrogatories to APCO so that it can tailor its discovery  
6 plan and narrow the issues for trial.

7 Since beginning of this case, Zitting has disclosed that it seeks recovery of \$750,807.16,  
8 comprising of \$347,441.67 in unpaid change orders and \$403,365.49 in unpaid retention amount,  
9 exclusive of interests and attorney’s fees. (*E.g.*, Ex. B ¶ 11; Ex. G 5:17-22, 25:10-9.) At the outset of  
10 discovery in 2010, Zitting served contention interrogatory requesting all of APCO’s grounds for not  
11 paying that amount:

12 INTERROGATORY NO. 6:

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

15 (Ex. C 10:14-16.) In its April 29, 2010 verified response to this contention interrogatory, APCO  
16 identified the Pay-If-Paid Provision as the only ground for refusing payment to Zitting:

17 RESPONSE TO INTERROGATORY NO. 6:

18 Pursuant to the terms of the Subcontract any payment to Zitting  
19 Brothers were specifically conditioned upon APCO’s actual receipt of  
20 payment from Gemstone for Zitting Brothers’ work. Moreover, the  
21 Subcontract specifically provides that Zitting Brothers was assuming  
22 the same risk that Gemstone may become insolvent and not be paid for  
23 its work as APCO assumed in entering into prime contract with  
24 Gemstone. Zitting Brothers further agreed that APCO had no  
25 obligation to pay Zitting Brothers for any work performed by Zitting  
26 Brothers until or unless APCO had actually been paid for such work  
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ongoing; APCO reserves the right to supplement or amend its response  
to this Interrogatory as investigation, discovery, disclosure and  
analysis continues.

27 (*Id.* 10:17-11:5.)  
28

1 To confirm that APCO is not planning to assert additional defenses, Zitting served the same  
2 interrogatory about seven years later:

3 INTERROGATORY NO. 6:

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

6 (Ex. D 9:1-3.) APCO confirmed by providing the same interrogatory response near the end of  
7 discovery:

8 ANSWER TO INTERROGATORY NO. 6:

9 Pursuant to the terms of the Subcontract any payment to Zitting  
10 Brothers were specifically conditioned upon APCO's actual receipt of  
11 payment from Gemstone for Zitting Brothers' work. Moreover, the  
12 Subcontract specifically provides that Zitting Brothers was assuming  
13 the same risk that Gemstone may become insolvent and not be paid for  
14 its work as APCO assumed in entering into prime contract with  
15 Gemstone. Zitting Brothers further agreed that APCO had no  
16 obligation to pay Zitting Brothers for any work performed by Zitting  
17 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.

18 (*Id.* 9:4-16.) On June 5, 2017—less than 30 days from the close of discovery—APCO, through its  
19 Rule 30(b)(6) deposition testimony, again confirmed that this was the sole ground for refusing  
20 payment to Zitting:

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

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

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

28 A. Yes.



1 (Ex. E 40:16-41:4.)

2 If APCO wants to assert other defenses for refusing payment to Zitting, Nev. R. Civ. P.  
3 26(e)(2) requires APCO to amend its prior discovery responses to include those additional defenses.  
4 But APCO has never amended its prior discovery responses nor explained why it did not do so.  
5 During seven years of litigation and the entire discovery, APCO has consistently refused payment  
6 based solely on the Pay-If-Paid Provision.

7 APCO's failure to disclose additional defenses precludes APCO from asserting those  
8 defenses at trial unless there is "substantial justification" for the failure and "such failure is  
9 harmless...." Nev. R. Civ. P. 37(c)(1). The party facing preclusion sanctions bears the burden to  
10 prove that its failure to disclose was substantially justified and did not prejudice the party seeking  
11 sanctions. *E.g., Torres v. City of Los Angeles*, 548 F.3d 1197, 1213 (9th Cir. 2008). Here, APCO, as  
12 the party facing preclusion sanctions, cannot meet this burden.

13 First, there is no justification for deviating from defenses discussed in interrogatory  
14 responses and deposition. APCO has never taken any steps to explain the late disclosure of  
15 additional defenses. There is no suggestion that APCO only recently realized that there were other  
16 potential defenses to Zitting's claim for payment of the unpaid change order and the retention  
17 amount. Nor can there be. Zitting has made it clear since the beginning of this case that it is seeking  
18 such payment. (Ex. B ¶ 11; Ex. G 5:17-22, 25:10-9.) Yet only after the close of discovery does  
19 APCO see fit to disclose its plans to pursue those additional defenses. (*See* Ex. F 3:5-6:20, 8:2-21.)

20 Second, it would be highly prejudicial to Zitting for APCO to now argue other grounds for  
21 refusing payment to Zitting. Zitting reasonably relied on APCO's discovery responses to form its  
22 litigation plan. For example, Zitting did not depose CAMCO and the drywaller for their knowledge  
23 on the progress of the drywall construction for Buildings 8 and 9 of the Project. It also streamlined  
24 APCO's Rule 30(b)(6) depositions by formulating questions based on APCO's limited defense.  
25 Learning of the defense only after Zitting had filed its motion for summary judgment placed Zitting  
26 at a distinct disadvantage and constituted unfair surprise.

27 Had APCO timely identified other grounds besides the enforceability of the Pay-If-Paid  
28 Provision, Zitting would have prepared for APCO's Rule 30(b)(6) depositions differently, which

1 would have included additional questions on Zitting's unpaid change orders and the retention  
2 amount to APCO's Rule 30(b)(6) designee for construction-related topics. Zitting would have also  
3 served discovery requests to the drywaller. It would have deposed the owner of the Project, the  
4 drywaller, CAMCO, and specific APCO employees. All of this would have occurred years ago when  
5 witnesses' memories would have been fresh. "With the passage of time, those facts become harder to  
6 prove [for Zitting] as memories fade and witnesses become unavailable." See *N.L.R.B. v. Serv-All*  
7 *Co., Inc.*, 491 F.2d 1273, 1275 (10th Cir. 1974). Based on nearly identical facts, a federal court in  
8 *Inamed Corp. v. Kuzmak*, 275 F. Supp. 2d 1100 (C.D. Cal. 2002), *aff'd*, 64 Fed. Appx. 241 (Fed. Cir.  
9 2003) has precluded defenses not properly disclosed during discovery.

10 In that case, the defendants argued that their agreement with the plaintiff was unenforceable  
11 because an individual lacked authority to enter into the agreement on the defendants' behalf. *Id.* at  
12 1117. "[The plaintiff] apparently contends that [the] defendants failed seasonably to amend their  
13 prior contention interrogatory responses to reflect the fact that they intended to rely on [the  
14 individual]'s lack of authority, and thus that [the plaintiff] learned of the defense only during [the  
15 individual]'s deposition on the day defendants' opposition to this motion was filed." *Id.* at 1117-18.  
16 The court applied the federal counterpart to Nev. R. Civ. P. 37 to bar the defendants' undisclosed  
17 defense:

18 Rule 37(c)(1) provides that a preclusion sanction shall be imposed  
19 unless the party failing to disclose the information acted with  
20 substantial justification or the failure to disclose was harmless. Here,  
21 [the] defendants offer no justification for their belated disclosure of the  
22 lack of authority defense, and it is difficult to conceive how they  
23 could. There is no suggestion that the [defendants] only recently  
24 realized that [the individual] acted without authority, nor, given the  
25 nature of the defense, could there be. This is the type of a defense that  
26 must have been known to the [defendants] from the moment [the  
27 plaintiffs] asserted that the ... agreement gave rise to enforceable  
28 rights. Yet only in the last several months have they seen fit to assert it  
in this proceeding.

24 *Id.* at 1118.

25 Similarly, there can have been no misapprehension that [the]  
26 defendants' prior interrogatory answers were incomplete, as they did  
27 not apprise [the plaintiffs] that [the defendants] contended [the  
28 individual] lacked authority to enter into the ... agreement on [the  
defendants'] behalf. [The d]efendants knew that [the plaintiff] was  
unaware they intended to rely on this defense in opposing summary  
judgment or defending at trial. Yet they took no steps to advise [the

1 plaintiff] of the defense or to supplement their earlier interrogatory  
2 answers. Learning of the defense only after it had filed its motion for  
3 summary judgment placed [the plaintiff] at a distinct disadvantage and  
4 constituted unfair surprise. It was required to digest [the individual's]  
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]

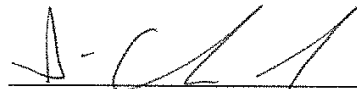
5 *Id.* As *Inamed Corp.* correctly shows, APCO's unjustified and prejudicial tactic warrants a  
6 preclusion sanction that bars APCO from raising any defenses at trial other than the defenses  
7 pertaining to the enforceability of the Pay-If-Paid Provision.

8 **VI. CONCLUSION**

9 For the foregoing reasons, this Court should preclude APCO from introducing any evidence  
10 or argument challenging Zitting Brothers' recovery other than the evidence and arguments pertaining  
11 to the enforceability of the pay-if-paid provision of APCO's subcontract with Zitting Brothers for the  
12 Project.

13 DATED this 6th day of November, 2017

14 WILSON ELSER MOSKOWITZ EDELMAN &  
15 DICKER LLP

16 

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27  
28

**CERTIFICATE OF SERVICE**

Pursuant to NRCP 5(b), I certify that I am an employee of Wilson Elser Moskowitz Edelman & Dicker LLP, and that on this 6th day of November, 2017, I served a true and correct copy of the foregoing **ZITTING BROTHERS CONSTRUCTION, INC.'S MOTION IN LIMINE TO LIMIT THE DEFENSES OF APCO CONSTRUCTION TO THE ENFORCEABILITY OF PAY-IF-PAID PROVISION** document as follows:

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

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BY



An Employee of WILSON ELSEER MOSKOWITZ  
EDELMAN & DICKER LLP

# **EXHIBIT A**

# **EXHIBIT A**

Recorded at the Request of and Return  
Recorded Document to:

Ryan B. Simpson  
File No.: 12462  
2115 South Dallen Street  
Salt Lake City, Utah 84109  
163-32-101-019

20081223-0003690  
Fee: \$17.00 RPTT: \$0.00  
N/C Fee: \$25.00  
12/23/2008 13:29:43  
T20080319140  
Requestor:  
PREMIUM TITLE  
Debbie Conway ADF  
Clark County Recorder Pgs: 4

### NOTICE OF LIEN

The undersigned claims a lien upon the property described in this notice for work, materials or equipment furnished or to be furnished for the improvement of the property:

1. The amount of the original contract is: \$14,461,000.00
2. The total amount of all additional or changed work, materials and equipment, if any, is: \$423,644.55
3. The total amount of all payments received to date is: \$3,647,608.55
4. The amount of the lien, after deducting all just credits and offsets, is: \$788,405.41
5. The name of the owner, if known, of the property is: Gemstone Development West, Inc., a Nevada corporation, of 9121 West Russell Road #117, Las Vegas, Nevada 89148.
6. The name of the person by whom the lien claimant was employed or to whom the lien claimant furnished or agreed to furnish work, materials or equipment is: APCO of 3432 North Fifth Street, Las Vegas, Nevada 89032.
7. A brief statement of the terms of payment of the lien claimant's contract is: progress payment with a retention.
8. A description of the property to be charged with the lien is: See Exhibit "A"

Dated this 23 day of December, 2008.



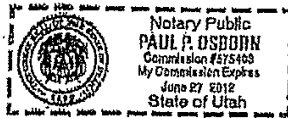
Ryan B. Simpson  
Agent for Zitting Brothers Construction

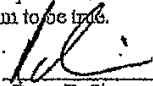
ZBCI001965

AA 002453

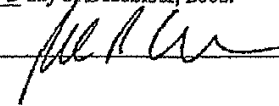
STATE OF UTAH                    )  
                                          )ss  
COUNTY OF SALT LAKE        )

Ryan E. Simpson, being first duly sworn on oath according to law deposes and says: I have read the foregoing Notice of Intent to Lien, know the contents thereof and state that the same is true of my own personal knowledge, except those matters stated upon the information and belief, and, as to those matters, I believe them to be true.



  
\_\_\_\_\_  
Ryan E. Simpson  
Agent for Zitting Brothers Construction

Subscribed and sworn to before me this 23 day of December, 2008.

  
\_\_\_\_\_

**EXHIBIT A  
LEGAL DESCRIPTION**

All that certain real property situated in the County of Clark, State of Nevada, described as follows:

**PARCEL 1:**

The West Half (W1/2) of the Northeast Quarter (NE1/4) of the Northwest Quarter (NW1/4) of the Northwest Quarter (NW1/4) of Section 32, Township 21 South, Range 60 East, M.D.B. & M.

EXCEPTING THEREFROM that property conveyed to Clark County by Grant Deed recorded September 22, 1972 in Book 265 as Document No. 224982 of the Official Records.

AND EXCEPTING THEREFROM that property conveyed to the County of Clark by Grant, Bargain, Sale and Dedication Deed recorded August 23, 2007 in Book 20070823 as Document No. 0004782 of Official Records.

TOGETHER WITH that property shown in Order of Vacation recorded August 23, 2007 in Book 20070823 as Document No. 0004781 and re-recorded August 28, 2007 in Book 20070828 as Document No. 0004280 of Official Records.

**PARCEL 2:**

The East Half (E1/2) of the Northeast Quarter (NE1/4) of the Northwest Quarter (NW1/4) of the Northwest Quarter (NW1/4) of Section 32, Township 21 South, Range 60 East, M.D.B. & M.

EXCEPTING THEREFROM the Southerly 396 feet thereof.

AND EXCEPTING THEREFROM that property conveyed to Clark County by Grant Deed recorded September 22, 1972 in Book 265 as Document No. 224981 of Official Records.

TOGETHER WITH that property shown in Order of Vacation recorded August 23, 2007 in Book 20070823 as Document No. 0004781 and re-recorded August 28, 2007 in Book 20070828 as Document No. 0004280 of Official Records.

**PARCEL 3:**

The Southerly 396 feet of the East Half (E1/2) of the Northeast Quarter (NE1/4) of the Northwest Quarter (NW1/4) of the Northwest Quarter (NW1/4) of Section 32, Township 21 South, Range 60 East, M.D.B. & M.

**PARCEL 4:**

The West Half (W1/2) of the Northwest Quarter (NW1/4) of the Northeast Quarter (NE1/4) of the Northwest Quarter (NW1/4) of Section 32, Township 21 South, Range 60 East, M.D.B. & M.

EXCEPTING THEREFROM that property conveyed to Clark County by Grant Deed recorded September 22, 1972 in Book 265 as Document No. 224994 of Official Records.

FURTHER EXCEPTING THEREFROM that property shown in the Final Order of Condemnation recorded November 20, 1998 in Book 981120 as Document No. 00763 of Official Records.

**PARCEL 5:**

The East Half (E1/2) of the Southeast Quarter (SE1/4) of the Northwest Quarter (NW1/4) of the Northwest Quarter (NW1/4) of Section 32, Township 21 South, Range 60 East, M.D.B. & M.

EXCEPTING THEREFROM that property conveyed to the County of Clark by Grant, Bargain, Sale and Dedication Deed recorded August 23, 2007 in Book 20070823 as Document No. 0004783 of Official Records.

PARCEL NO. FOR ALL OF THE ABOVE IS 163-32-101-019

**SENDER: COMPLETE THIS SECTION**

Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.

Print your name and address on the reverse so that we can return the card to you.

Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:  
APCO  
4420 Oceanview Blvd  
LU, NV 89103

2. Article Number  
(transfer from service label) 7008 3340 0003 6596 4275

PS Form 3811, February 2004 Domestic Return Receipt

**COMPLETE THIS SECTION ON DELIVERY**

A. Signature ☒ Agent ☐ Addressee

B. Received by (Printed Name) C. Date of Delivery

D. Is delivery address different from item 1? ☐ Yes ☐ No  
If YES, enter delivery address below:

3. Service Type ☒ Certified Mail ☐ Express Mail  
☐ Registered ☒ Return Receipt for Merchandise  
☐ Insured Mail ☐ C.O.D.

4. Restricted Delivery? (Extra Fee) ☐ Yes

**SENDER: COMPLETE THIS SECTION**

Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.

Print your name and address on the reverse so that we can return the card to you.

Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:  
APCO  
3432 N. Fifth St  
LU, NV 89072

2. Article Number  
(transfer from service label) 7008 3340 0003 6596 4268

PS Form 3811, February 2004 Domestic Return Receipt

**COMPLETE THIS SECTION ON DELIVERY**

A. Signature ☒ Agent ☐ Addressee

B. Received by (Printed Name) C. Date of Delivery

D. Is delivery address different from item 1? ☐ Yes ☐ No  
If YES, enter delivery address below:

3. Service Type ☒ Certified Mail ☐ Express Mail  
☐ Registered ☒ Return Receipt for Merchandise  
☐ Insured Mail ☐ C.O.D.

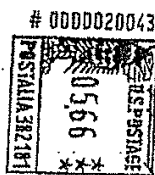
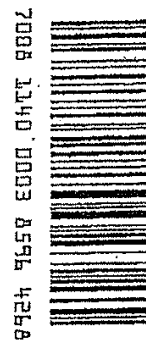
4. Restricted Delivery? (Extra Fee) ☐ Yes

ZBCI001969

AA 002457

2115 SOUTH DALLIN STREET, SALT LAKE CITY, UTAH 84109

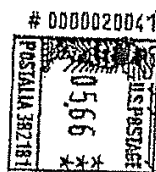
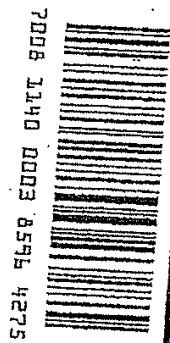
TURNER & SIMPSON  
ATTORNEYS AT LAW



APCO  
3432 North Fifth Street  
Las Vegas, Nevada 89032

2115 SOUTH DALLIN STREET, SALT LAKE CITY, UTAH 84109

TURNER & SIMPSON  
ATTORNEYS AT LAW



APCO  
4420 Decatur Blvd  
Las Vegas, Nevada 89103

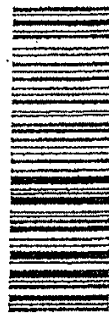
ZBC1001970

AA 002458

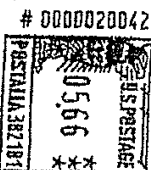


2115 SOUTH DALLIN STREET, SALT LAKE CITY, UTAH 84109

TURNER & SIMPSON  
ATTORNEYS AT LAW



7008 1140 0003 8595 4282



Gemstone Development West, Inc.  
9121 West Russell Road #117  
Las Vegas, Nevada 89148

ZBCI001971

AA 002459

SENDER: COMPLETE THIS SECTION		COMPLETE THIS SECTION ON DELIVERY	
<ul style="list-style-type: none"> <li>Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.</li> <li>Print your name and address on the reverse so that we can return the card to you.</li> <li>Attach this card to the back of the mailpiece, or on the front if space permits.</li> </ul>		<p>A. Signature X</p> <p>B. Received by (Printed Name) C. Date of Delivery</p>	
<p>1. Article Addressed to:</p> <p>Genetone Development West Inc. 9121 W. Russell Road #117 LV, NV 89148</p>		<p>D. Is delivery address different from item 1? <input type="checkbox"/> Yes <input type="checkbox"/> No If YES, enter delivery address below:</p>	
<p>2. Article Number (Transfer from service label) PS Form 3811, February 2004</p>		<p>3. Service Type  <input checked="" type="checkbox"/> Certified Mail <input type="checkbox"/> Express Mail  <input type="checkbox"/> Registered <input checked="" type="checkbox"/> Return Receipt for Merchandise  <input type="checkbox"/> Insured Mail <input type="checkbox"/> C.O.D.  </p>	
<p>7008 1140 0003 8576 4282</p>		<p>4. Restricted Delivery? (Extra Fee) <input type="checkbox"/> Yes <input type="checkbox"/> No</p>	
<p>Domestic Return Receipt</p>		<p>10295-02-44-1540</p>	

ZBCI001972

## **EXHIBIT B**

## **EXHIBIT B**

ORIGINAL

FILED

APR 30 2 03 PM '09

*Ed [Signature]*  
CLERK OF THE COURT

15  
1 COMP  
2 MICHAEL M. EDWARDS  
3 Nevada Bar No. 006281  
4 REUBEN H. CAWLEY  
5 Nevada Bar No. 009384  
6 LEWIS BRISBOIS BISGAARD & SMITH LLP  
7 400 South Fourth Street, Suite 500  
8 Las Vegas, Nevada 89101  
9 (702) 893-3383  
10 FAX: (702) 893-3789  
11 E-Mail: [m Edwards@lbbbslaw.com](mailto:m Edwards@lbbbslaw.com)  
12 E-Mail: [cawley@lbbbslaw.com](mailto:cawley@lbbbslaw.com)  
13 Attorneys for Plaintiff  
14 Zitting Brothers Construction, Inc.

DISTRICT COURT  
CLARK COUNTY, NEVADA

A-09-589195-C  
79348



12 ZITTING BROTHERS CONSTRUCTION, INC.,  
13 a Utah corporation,

14 Plaintiff,

15 v.

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

22 Defendants.

Case No. *A-09-589195-C*  
Dept. No. *V*

ZITTING BROTHERS  
CONSTRUCTION, INC.'S COMPLAINT  
RE: FORECLOSURE

(Exemption from Arbitration - Concerns  
Title to Real Estate)

21 Plaintiff Zitting Brothers Construction (hereinafter "Zitting Brothers"), by and through its  
22 attorneys Lewis Brisbois Bisgaard & Smith LLP, as for its Complaint against the above-named  
23 Defendants complains, avers and alleges as follows:

24 THE PARTIES

25 1. Zitting Brothers is and was at all times relevant to this action a Utah corporation, duly  
26 authorized and qualified to do business in Clark County, Nevada.

27 2. Zitting Brothers is informed and believes and therefore alleges that Defendant Gemstone  
28 Development West, Inc. ("Gemstone"), and Doe/Roe Defendants are and were at all times relevant to

LEWIS  
BRISBOIS  
BISGAARD  
& SMITH LLP  
ATTORNEYS AT LAW

4813-0009-7539.1

-1-

17  
AA 002462

1 this action, the owners, reputed owners, or the persons, individuals and/or entities who claim an  
2 ownership interest in that certain real property commonly referred to as Manhattan West mixed use  
3 development project and generally located at 9205 W. Russell Road, Clark County, Nevada, and more  
4 particularly described as set forth in the Legal Description of the Notice of Lien attached hereto as  
5 **Exhibit 1**; and further more particularly described as Clark County Assessor Parcel Number 163-32-  
6 101-019, and including all easements, rights-of-way, common areas and appurtenances thereto, and  
7 surrounding space which may be required for the convenient use and occupation thereof, upon which  
8 Owner caused or allowed to be constructed certain improvements (the "Property").

9 3. The whole of the Property are reasonably necessary for the convenient use and  
10 occupation of the improvements.

11 4. Zitting Brothers is informed and believes and therefore alleges that Defendant APCO  
12 Construction ("APCO") and Doe/Roe Defendants, are and were at all times relevant to this action,  
13 doing business as licensed contractors authorized to conduct business in Clark County, Nevada.

14 5. Zitting Brothers does not know the true names of the individuals, corporations,  
15 partnerships and entities sued and identified in fictitious names as Does I through X, Roe Corporations  
16 I though X, Boe Bonding Companies I through X, and Loe Lenders I through X, Zitting Brothers alleges  
17 that such Defendants claim an interest in or to the Project and/or are responsible for damages suffered  
18 by Zitting Brothers as more full discussed under the claims for relief set forth below. Zitting Brothers  
19 will request leave of this Honorable Court to amend this Complaint to show the true names and  
20 capacities of each such fictitious Defendant when Zitting Brothers discovers such information.

21 **FIRST CAUSE OF ACTION**  
22 **(Breach of Contract - Against All Defendants)**

23 6. Zitting Brothers repeats and realleges each and every allegation contained in the  
24 preceding paragraphs of this Complaint, incorporates them by reference, and further alleges as follows:

25 7. Zitting Brothers entered into an Agreement with APCO Construction and/or Gemstone  
26 (the "Agreement") to provide certain construction services and other related work, materials, and  
27 equipment for a project located in Clark County, Nevada (the "Work").  
28 . . .

1           8.     Zitting Brothers furnished the Work for the benefit of and at the specific instance and  
2 request of APCO.

3           9.     Pursuant to the Agreement, Zitting Brothers was to be paid an amount in excess of Ten  
4 Thousand Dollars (\$10,000) (hereinafter "Outstanding Balance") for the Work.

5           10.    Zitting Brothers furnished the Work and has otherwise performed its duties and  
6 obligations as required by the Agreement.

7           11.    APCO and/or Gemstone as well as Doe/Roe Defendants, have breached the Agreement  
8 by, among other things:

- 9           a.     failing and/or refusing to pay the monies owed to Zitting Brothers for the Work.
- 10          b.     failing to adjust the Agreement price to account for extra work and/or changed  
11 work, as well as suspensions, delays of Work caused or ordered by APCO,  
12 Gemstone, and/or their representatives.
- 13          c.     failing and/or refusing to comply with the Agreement; and
- 14          d.     negligently or intentionally preventing, obstructing, hindering, or interfering  
15 with Zitting Brothers performance of the Work.

16          12.    Zitting Brothers is owed an amount in excess of Ten Thousand Dollars (\$10,000) for the  
17 Work.

18          13.    Zitting Brothers has been required to engage the services of an attorney to collect the  
19 Outstanding Balance, and Zitting Brothers is entitled to recover its reasonable costs, attorney's fees and  
20 interest therefore.

21                               SECOND CAUSE OF ACTION  
22           (Breach of Implied Covenant of Good Faith & Fair Dealing - Against All Defendants)

23          14.    Zitting Brothers repeats and realleges each and every allegation contained in the  
24 preceding paragraphs of this Complaint, incorporates them by reference, and further alleges as follows:

25          15.    There is a covenant of good faith and fair dealing implied in every agreement, including  
26 the Agreement between Zitting Brothers and APCO and/or Gemstone.

27          ...

28          ...

1 16. APCO and/or Gemstone breached their duty to act in good faith by performing the  
2 Agreement in a manner that was unfaithful to the purpose of the Agreement, thereby denying Zitting  
3 Brothers's justified expectations.

4 17. Due to the actions of APCO and/or Gemstone, Zitting Brothers suffered damages in an  
5 amount to be determined at trial for which Zitting Brothers is entitled to judgment plus interest.

6 18. Zitting Brothers has been required to engage the services of an attorney to collect the  
7 Outstanding Balance, and Zitting Brothers is entitled to recover its reasonable costs, attorney's fees and  
8 interest therefore.

9 **THIRD CAUSE OF ACTION**  
10 **(Unjust Enrichment or in the Alternative Quantum Meruit - Against All Defendants)**

11 19. Zitting Brothers repeats and realleges each and every allegation contained in the  
12 preceding paragraphs of this Complaint, incorporates them by reference, and further alleges as  
13 follows:

14 20. Zitting Brothers furnished the Work for the benefit of and at the specific instance  
15 requested of the Defendants.

16 21. As to APCO and/or Gemstone, this cause of action is being pled in the alternative.

17 22. APCO and/or Gemstone accepted, used and enjoyed the benefit of Zitting Brothers's  
18 Work.

19 23. APCO and/or Gemstone knew or should have known that Zitting Brothers expected  
20 to be paid for the Work.

21 24. Zitting Brothers has demanded payment of the Outstanding Balance.

22 25. To date, the Defendants have failed, neglected, and/or refused to pay the Outstanding  
23 Balance.

24 26. The Defendants have been unjustly enriched, to the detriment of Zitting Brothers.

25 27. Zitting Brothers has been required to engage the services of an attorney to collect the  
26 Outstanding Balance, and Zitting Brothers is entitled to recover its reasonable costs, attorney's fees and  
27 interest therefore.

28 . . .

1 **FOURTH CAUSE OF ACTION**  
2 (Foreclosure of Mechanic's Lien - Against All Defendants)

3 28. Zitting Brothers repeats and realleges each and every allegation contained in the  
4 preceding paragraphs of this Complaint, incorporates them by reference, and further alleges as follows:

5 29. The provision of the Work was at the special instance and request of APCO and/or  
6 Gemstone for the improvement of the Property.

7 30. As provided by NRS 108.245, APCO and/or Gemstone had actual knowledge of Zitting  
8 Brothers's delivery of the Work to the Property or Zitting Brothers provided a Notice of Right to Lien,  
9 as prescribed by Nevada law.

10 31. Zitting Brothers demanded payment of an amount in excess of Ten Thousand and no/100  
11 Dollars (\$10,000), which amount remains past due and owing.

12 32. On or about December 23, 2008, Zitting Brothers timely recorded a Notice of Lien in  
13 Book 20081223 of the Official Records of Clark County, Nevada, as Instrument No. 0003690 (the "  
14 Lien"), attached hereto as Exhibit 1.

15 33. The Lien was in writing and was timely recorded against the Property for the outstanding  
16 balance due to Zitting Brothers in the amount of Seven Hundred Eighty Eight Thousand Four Hundred  
17 and Five Dollars and Forty-One Cents (\$788,405.41), with payment to be made upon Project progress.

18 34. The Lien was served upon the record Owners and/or their authorized agents, as required  
19 by law.

20 35. Zitting Brothers is entitle to an award of reasonable attorney's fees, costs and interest  
21 on the Outstanding Balance, as provided in Chapter 108 of the Nevada Revised Statutes.

22 **FIFTH CAUSE OF ACTION**  
23 (Claim for Priority - Against LOE LENDER Defendants)

24 36. Zitting Brothers repeats and realleges each and every allegation contained in the  
25 preceding paragraphs of this Complaint, incorporates them by reference, and further alleges as follows:

26 37. Zitting Brothers is informed and believes and therefore alleges that physical work of the  
27 improvement to the Property commenced before the recording of Defendant Loe Lenders' Deed(s) of  
28 Trust and/or other interest(s) in the Property and/or any leasehold estates.



1 38. Zitting Brothers's claims against the Property and/or any leasehold estates are superior  
2 to the claim(s) of Loc Lenders and/or any other Defendant.

3 39. Zitting Brothers has been required to engage the services of an attorney to collect the  
4 Outstanding Balance due and owing for the Work, and Zitting Brothers is entitled to recover its  
5 reasonable costs, attorney's fees and interest therefore.

6 **SEVENTH CAUSE OF ACTION**  
7 **(Violation of NRS 624)**

8 40. Zitting Brothers repeats and realleges each and every allegation contained in the  
9 preceding paragraphs of this Complaint, incorporates them by reference, and further alleges as follows:

10 41. NRS 624.606 to 624.630, et. seq. (the "Statute") requires contractors (such as APCO),  
11 to, among other things, timely pay their subcontractors (such as Zitting Brothers), as provided in the  
12 Statute.

13 42. In violation of the Statute, APCO has failed and/or refused to timely pay Zitting Brothers  
14 monies due and owing.

15 43. APCO's violation of the Statute constitutes negligence per se.

16 44. By reason foregoing, Zitting Brothers is entitled to a judgment against APCO in the  
17 amount of the Outstanding Balance.

18 45. Zitting Brothers has been required to engage the services of an attorney to collect the  
19 outstanding Balance and Zitting Brothers is entitled to recover its reasonable costs, attorney's fees and  
20 interests therefore.

21 **WHEREFORE**, Zitting Brothers prays that this Honorable Court:

- 22 1. Enters judgment against the Defendants, and each of them, jointly and severally, for  
23 Zitting Brothers's reasonable costs and attorney's fees incurred in the collection of the  
24 Outstanding Balance;
- 25 2. Enters a judgment against Defendants, and each of them, jointly and severally, for  
26 Zitting Brothers's reasonable costs and attorney's fees incurred in the collection of the  
27 Outstanding Balance, as well as an award of interest thereon;
- 28

- 1 3. Enters a judgment declaring that Zitting Brothers has a valid and enforceable mechanic's  
2 lien against the Property, with priority over all Defendants, in an amount of the  
3 Outstanding Balance;  
4 4. Adjudge a lien upon the Property for the Outstanding Balance, plus reasonable  
5 attorney's fees, costs and interest thereon, and that this Honorable Court enter an Order  
6 that the Property, and improvements, such as may be necessary, be sold pursuant to the  
7 laws of the State of Nevada, and that the proceeds of said sale be applied to the payment  
8 of sums due Zitting Brothers herein; and  
9 5. For such other and further relief as this Honorable Court deems just and proper in the  
10 premises.

11 Dated this 32<sup>nd</sup> day of April, 2009.

12 LEWIS BRISBOIS BISGAARD & SMITH LLP

13  
14 By 

15 Michael M. Edwards, Esq.  
16 Nevada Bar No. 006281  
17 Reuben H. Cawley, Esq.  
18 Nevada Bar No. 009384  
19 400 South Fourth Street, Suite 500  
20 Las Vegas, Nevada 89101  
21 Attorneys for Plaintiff  
22 Zitting Brothers Construction, Inc.  
23  
24  
25  
26  
27  
28

## **EXHIBIT C**

## **EXHIBIT C**

HOWARD & HOWARD ATTORNEYS PLLC  
3800 Howard Hughes Pkwy., Suite 1400  
Las Vegas, NV 89169  
(702) 257-1483

1 **RSPN**  
2 Gwen Rutar Mullins, Esq.  
3 Nevada Bar No. 3146  
4 Wade B. Gochmour, Esq.  
5 Nevada Bar No. 6314  
6 **Howard & Howard Attorneys PLLC**  
7 3800 Howard Hughes Parkway  
8 Suite 1400  
9 Las Vegas, NV 89169  
10 Telephone (702) 257-1483  
11 Facsimile (702) 567-1568  
12 E-Mail: grm@h2law.com  
13 wbg@h2law.com

14 *Attorneys for APCO Construction*

15 **DISTRICT COURT**  
16 **CLARK COUNTY, NEVADA**

17 APCO CONSTRUCTION, a Nevada  
18 corporation,

19 Plaintiff,

20 vs.

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

Defendants.

AND ALL RELATED CASES AND  
MATTERS

CASE NO.: A571228  
DEPT. NO.: XXV

Consolidated with: 08A574391,  
08A574792, 08A577623, 09A580889,  
09A583289, 09A584730, 09A584960,  
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

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

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

APCO Construction ("APCO"), by and through its attorneys of record, Gwen Rutar Mullins, Esq. and Wade B. Gochmour, Esq., of the law firm of HOWARD & HOWARD ATTORNEYS PLLC, pursuant to NRCP Rule 33, hereby responds to the First Set of Interrogatories propounded by Plaintiff Zitting Brothers Construction, Inc. ("Zitting Brothers") upon APCO as follows:

**DEFINITIONS**

A. "Nondiscoverable/Irrelevant" - The Interrogatory in question concerns a matter which is not relevant to the subject matter of this litigation and is not reasonably calculated to lead to the discovery of admissible evidence.

B. "Unduly burdensome" - The Interrogatory in question seeks discovery which is unduly burdensome or expensive, taking into account the needs of the case, limitations on the parties' resources, and the importance of the issues at stake in the litigation.

C. "Vague" - The Interrogatory in question contains a word or phrase which is not adequately defined, or the overall request is confusing, and APCO is unable to reasonably ascertain what information or documents Zitting Brothers seeks in the request.

D. "Overly broad" - The Interrogatory seeks information or documents beyond the scope of, or beyond the time period relevant to, the subject matter of this litigation and, accordingly, seeks information or documents which are nondiscoverable/irrelevant and unduly burdensome.

**GENERAL OBJECTIONS**

I. APCO will make reasonable efforts to respond to each Interrogatory, to the extent that it has not been objected to, as APCO understands and interprets the Interrogatory. If Zitting Brothers subsequently asserts an interpretation of any Interrogatory which differs from that of APCO, APCO reserves the right to supplement its responses accordingly.

///

1 APCO objects to each and every Interrogatory to the extent that, and insofar as, Zitting  
2 Brothers attempts to purport to impose requirements or obligations beyond those imposed by the  
3 Nevada Rules of Civil Procedure.

4 2. APCO objects to each of Zitting Brothers' Interrogatories to the extent that the  
5 Interrogatory requests any information that is protected by any absolute or qualified privilege or  
6 exception, including, but not limited to, the attorney-client privilege, the attorney work-product  
7 exemption, and the consulting-expert exemption.

8 3. APCO objects to any attempt by Zitting Brothers to evade any numerical  
9 limitations set on interrogatories by asking multiple independent questions within single  
10 individual questions and subparts.

11 4. To the extent applicable to any specific Interrogatory, APCO asserts the  
12 following objections: attorney-client privilege and/or work product privilege; proprietary  
13 and/or confidential business or personal information; irrelevant and not reasonably calculated to  
14 lead to admissible evidence; vague and ambiguous; overbroad and burdensome and/or the  
15 burden outweighs the benefit of the requested production; and cumulative and duplicative.  
16 Each of these objections is hereby incorporated by this reference as to each and every one of the  
17 following Responses to Zitting Brothers' Interrogatories. It is unfair and inappropriate to require  
18 a complete, comprehensive factual exposition on the matters covered by the interrogatories at  
19 the very outset of the discovery phase of the case. Accordingly, APCO reserves the right to  
20 supplement their interrogatory answers later in these proceedings as required by Rule 26(e) of  
21 the Nevada Rules of Civil Procedure.

22 5. All answers and responses will be made solely for the purpose of this action.

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

1 7. APCO adopts by reference the above objections and incorporates each objection  
2 as if it were fully set forth below in each of APCO's responses below.

3 8. The following Objections, Answers and Responses are based upon the  
4 information and documents presently available to and known by APCO and disclose only those  
5 contentions which are presently asserted based upon facts now known. It is anticipated that  
6 further discovery, independent investigation, legal research and analysis will supply additional  
7 facts, add meaning to known facts, as well as establish entirely new factual conclusions and  
8 legal contentions, all of which may lead to substantial addition to, change in, and variations  
9 from these contentions and responses. APCO herein reserves the right to change any of these  
10 Objections, Answers and Responses as additional facts are recalled or ascertained, analyses are  
11 made, legal research is completed and contentions are made. These Answers and Responses are  
12 made in good faith to supply as much information and specification as is presently known.

13 9. Additionally, APCO reserves the right to amend, revise, correct, supplement or  
14 clarify any of the responses contained herein pursuant to any facts or information gathered at  
15 any time subsequent to the date of this response. By responding to these requests, APCO does  
16 not adopt or agree with any of Zitting Brothers' allegations or definitions in the discovery  
17 requests, but rather, is a good faith attempt to respond to the discovery requests. APCO's  
18 responses are not admissions on any matter in this case.

19 10. APCO further objects to the instructions and definitions contained in Zitting  
20 Brothers' Interrogatories because, as applied to specific discovery requests, they cause the  
21 requests to be overly broad and global, vague and ambiguous, unduly burdensome, and to seek  
22 information, in part, protected from disclosure by the attorney-client, work product, party  
23 communications, investigative, and consulting expert privileges.

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1 Subject to the general objections made above, and without waiving them, APCO  
2 responds to Zitting Brothers' Interrogatories propounded against APCO as follows:

3 **INTERROGATORIES**

4 **INTERROGATORY NO. 1:**

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

7 **RESPONSE TO INTERROGATORY NO. 1:**

8 Objection. APCO objects to this Interrogatory on the grounds that this Interrogatory is  
9 vague, ambiguous, overly broad, unduly burdensome and oppressive because it seeks to force  
10 APCO to "Identify and state with specificity the facts that you intend to rely upon to refute each  
11 cause of action in Zitting Brothers' Complaint." Broad ranging interrogatories are improper  
12 when they essentially subsume every fact in the case or every person having knowledge. See  
13 Hiskett v. Wal-Mart Stores, Inc., 180 F.R.D. 403, 404 (D. Kan. 1998). ("Interrogatories should  
14 not require the answering party to provide a narrative account of its case."). Parties can hardly  
15 know when they have identified "all" facts, persons, and documents with respect to anything –  
16 particularly before the close of discovery. "How can the court make enforceable orders with  
17 reference to 'all' of anything?" Often, the relevance of a particular fact to a particular issue is  
18 not known until clarified and put into context by testimony at deposition or trial. Such a  
19 question places the responding party in an impossible position. See Id.; Safeco of Am. V.  
20 Rawstron, 181 F.R.D. 441, 447048 (C.D. Cal. 1998)(finding unreasonable an interrogatory  
21 calling for all facts supporting denial of a request for admission); Lawrence v. First Kan. Bank  
22 & Trust Co., 169 F.R.D. 657, 660-63 (D. Kan. 1996)(same); Hilt v. SFC, Inc., 170 F.R.D. 182,  
23 186-87 (D. Kan. 1997)(finding unduly burdensome an interrogatory seeking to require plaintiff  
24 to state 'each and every fact' supporting allegations of a complaint). APCO further objects on  
25 the grounds that to answer this Interrogatory would result in annoyance, embarrassment, or  
26 oppression to APCO in that the question is overly broad, vague, ambiguous, indefinite as to  
27 time and without reasonable limitation in its scope. APCO further objects on the basis that the  
28 question is oppressive, harassing and burdensome; the information sought seeks APCO's



1 counsel's legal analysis and theories regarding laws, ordinances, safety orders, etc., which are  
2 equally available to Zitting Brothers; the question also invades the attorney's work product  
3 privilege. APCO further objects on the basis that the question calls for information which is  
4 available to all parties equally, and is therefore oppressive and burdensome to APCO. APCO  
5 further objects on the basis that the question seeks information which is protected from  
6 disclosure by the attorney's work product privilege. APCO further objects on the basis that the  
7 question seeks to invade APCO's counsel's work product privilege in that it calls for him to  
8 provide an analysis of written data. APCO further objects on the basis that the question seeks to  
9 ascertain all facts and other data which APCO intends to offer at trial and, as such, is violative  
10 of the attorney work product privilege. APCO objects on the basis that the attorney-client  
11 privilege protects disclosure of the information sought. APCO further objects to this  
12 Interrogatory on the grounds that it calls for legal conclusions, and that the contract documents  
13 at issue speak for themselves.

14 Subject to and without waiving any objections, APCO responds as follows: Gemstone  
15 Development West, Inc. ("Gemstone") has asserted various complaints about the quality of the  
16 work performed by APCO and its subcontractors. As of this time, Gemstone has not identified  
17 specific issues that Gemstone has with APCO's or its subcontractor's work, including that of  
18 Zitting Brothers. However, as a result of Gemstone's assertions that there are issues with the  
19 quality of the work performed on the Project, Gemstone has failed to pay APCO for the work  
20 that APCO performed including the work that was performed by Zitting Brothers. Pursuant to  
21 the terms of the Subcontract Agreement, any payments to Zitting Brothers were specifically  
22 conditioned upon APCO's actual receipt of payment from Gemstone for Zitting Brothers' work.  
23 Moreover, the Subcontract specifically provided that Zitting Brothers was assuming the same  
24 risk that Gemstone may become insolvent and not be paid for its work as APCO assumed in  
25 entering into prime contract with Gemstone. Zitting Brothers further agreed that APCO had no  
26 obligation to pay Zitting Brothers for any work performed by Zitting Brothers until or unless  
27 APCO had actually been paid for such work by Gemstone. To date, APCO has not been paid  
28 for the work performed, including the work performed by Zitting Brothers. In fact, due to non-

1 payment, APCO exercised its rights pursuant to NRS Chapter 624 and terminated the prime  
2 contract with Gemstone and further terminated the Subcontract with Zitting Brothers. After  
3 APCO ceased work on the Project, Zitting Brothers may have negotiated with Camco Pacific  
4 Construction Company ("Camco"), the replacement general contractor, and/or Gemstone and  
5 may have entered into a ratification agreement, wherein APCO was replaced as the general  
6 contractor under the Subcontract and Camco and/or Gemstone became liable for any monies  
7 due Zitting Brothers on the Project. Discovery is ongoing; APCO reserves the right to  
8 supplement or amend its response to this Interrogatory as investigation, discovery, disclosure  
9 and analysis continues.

10 **INTERROGATORY NO. 2:**

11 State the procedure by which you and/or Gemstone paid Zitting Brothers for its work,  
12 material, and/or equipment furnished at the Project.

13 **RESPONSE TO INTERROGATORY NO. 2:**

14 APCO paid Zitting Brothers pursuant to the terms of the Subcontract. More specifically,  
15 see Section 3 of the Subcontract. Basically the procedure for payment was as follows: Pursuant  
16 to the terms of the Subcontract, Zitting Brothers submitted to APCO its monthly billing, no later  
17 than the 25th of each month, showing quantities of subcontract work that has been satisfactorily  
18 completed in the preceding month, as well as backup material. In the event that Zitting Brothers  
19 failed to timely submit its monthly billing with the necessary backup material that resulted in  
20 that monthly payment application being rolled over to the following month. In turn, APCO  
21 submitted its Application for Payment, which included the subcontractor's monthly billing and  
22 backup documentation to Gemstone for payment. Upon actual receipt of payment by APCO  
23 from Gemstone, APCO then paid the amount that APCO received for Zitting Brothers work to  
24 Zitting Brothers as required under the Subcontract. Discovery is ongoing. APCO reserves the  
25 right to supplement or amend its response to this Interrogatory as investigation, discovery,  
26 disclosure and analysis continues.

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1 **INTERROGATORY NO. 3:**

2 State the amount of any payments you or Gemstone made to Zitting Brothers, the date  
3 and manner in which each payment was made, and at what stage of completion the Project was  
4 in at the time of each payment.

5 **RESPONSE TO INTERROGATORY NO. 3:**

6 To date, APCO has paid Zitting Brothers the sum of \$3,282,848.55. More specifically,  
7 APCO paid Zitting Brothers as follows: See **Exhibit 1** attached hereto for the breakdown. See  
8 also documents identified by Bate Stamp No. APCO00044563 through APCO00044784 which  
9 APCO deposited into a depository established by APCO for this litigation matter with Litigation  
10 Services located at 1640 W. Alta Drive, Suite 4, Las Vegas, NV 89106 and/or are hereby made  
11 available for review and copying (at requestor's expense) at a mutually agreeable time and  
12 place. APCO does not have any information as to what payments may have been made by  
13 Gemstone directly to Zitting Brother after APCO terminated its prime contract with Gemstone.  
14 However, from the information obtained through Zitting Brothers discovery requests  
15 propounded upon APCO, it appears that Gemstone may have paid Zitting Brothers at least  
16 \$364,760.00. Discovery is ongoing. APCO reserves the right to supplement or amend its  
17 response to this Interrogatory as investigation, discovery, disclosure and analysis continues.

18 **INTERROGATORY NO. 4:**

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

22 **RESPONSE TO INTERROGATORY NO. 4:**

23 Objection. APCO objects to this Interrogatory on the grounds that this Interrogatory is  
24 vague, ambiguous, overly broad, unduly burdensome and/or oppressive. Subject to, and  
25 without waiving any objections, APCO responds as follows: See documents identified by Bate  
26 1640 W. Alta Drive, Suite 4, Las Vegas, NV 89106 and/or are hereby made available for  
27 review and copying (at requestor's expense) at a mutually agreeable time and place. More  
28 specifically, see documents identified by Bate Stamp No. APCO00033494 through  
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#1565415-v4

1 APCO00035651. Discovery is ongoing. APCO reserves the right to supplement or amend its  
2 response to this Interrogatory as investigation, discovery, disclosure and analysis continues.

3 **INTERROGATORY NO. 5:**

4 Do you contend that the value of the unpaid work, material, and/or equipment furnished  
5 or supplied by Zitting Brothers is less than the amount set forth in Zitting Brothers' mechanic's  
6 lien? If so, please state:

7 a) the basis for your contention including all facts, witnesses, or documents you  
8 rely 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 TO INTERROGATORY NO. 5:**

14 Objection. APCO objects to this Interrogatory on the grounds that this Interrogatory is  
15 vague, ambiguous, overly broad, unduly burdensome and oppressive. More specifically APCO  
16 objects on the grounds that it is vague and ambiguous in that "value of the unpaid work,  
17 material and/or equipment furnished or supplied by Zitting Brothers" and "the amount set forth  
18 in Zitting Brothers' mechanic's lien" are not defined. APCO further reiterates its General  
19 Objections and adds that as this action is in the initial stages of discovery and APCO has not yet  
20 determined which witnesses will testify or what evidence will be used in support of APCO's  
21 assertions or denials; therefore, this Interrogatory is premature. APCO further objects as the  
22 Interrogatory seeks information which is protected from disclosure by the attorney's work  
23 product privilege. APCO further objects on the basis that the Interrogatory seeks disclosure of  
24 trial witnesses (other than experts) and is therefore violative of the attorney work product  
25 privilege. APCO further objects on the basis that the Interrogatory seeks to ascertain the  
26 anticipated testimony of witnesses who are not "experts" and as such violate the attorney work  
27 product privilege. APCO further objects on the basis that the question seeks to ascertain all  
28 facts and other data which APCO intends to offer at trial and, as such, is violative of the

1 attorney work product privilege. Furthermore, APCO objects to this Interrogatory insofar as it  
2 purports to require APCO to describe the substance of each person's knowledge for the reason  
3 that such a requirement seeks to impose burdens on APCO beyond those permitted by the  
4 Nevada Rules of Civil Procedure, calls for APCO to speculate, is overly broad and unduly  
5 burdensome and seeks information protected from disclosure by the attorney-client, work  
6 product, party communications, investigative, and consulting expert privileges.

7 Subject to and without waiving any objections, APCO responds as follows: See  
8 documents identified by Bate Stamp No. APCO00000001<sup>1</sup> through APCO00078992 which  
9 APCO has deposited into a depository established by APCO for this litigation matter with  
10 Litigation Services located at 1640 W. Alta Drive, Suite 4, Las Vegas, NV 89106 and/or are  
11 hereby made available for review and copying (at requestor's expense) at a mutually agreeable  
12 time and place. Discovery is ongoing; APCO reserves the right to supplement or amend its  
13 response to this Interrogatory as investigation, discovery, disclosure and analysis continues.

14 **INTERROGATORY NO. 6:**

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

17 **RESPONSE TO INTERROGATORY NO. 6:**

18 Pursuant to the terms of the Subcontract any payments to Zitting Brothers were  
19 specifically conditioned upon APCO's actual receipt of payment from Gemstone for Zitting  
20 Brothers' work. Moreover, the Subcontract specifically provides that Zitting Brothers was  
21 assuming the same risk that Gemstone may become insolvent and not be paid for its work as  
22 APCO assumed in entering into prime contract with Gemstone. Zitting Brothers further agreed  
23 that APCO had no obligation to pay Zitting Brothers for any work performed by Zitting  
24 Brothers until or unless APCO had actually been paid for such work by Gemstone. To date,

25  
26 <sup>1</sup> Please note that documents bated stamped APCO00000001 through APCO00001557 are not being produced by  
27 APCO as those documents were delivered by APCO to Gemstone Development West ("Gemstone") on September  
28 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, APCO00005841,  
APCO000024165 and APCO00033296 and are thus not being produced..

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.

**RESPONSE 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 the grounds of attorney client privilege and/or attorney work product. APCO further objects that this Interrogatory is premature, as discovery has just commenced on this matter and APCO has not yet identified what documents it may decide to utilize or offer as exhibits against Zitting Brothers at the time of trial.

Subject to and without waiving any objections, See Response to Interrogatory No. 1 and 6 above, which are incorporated herein by this reference. Also, see documents identified by Bate Stamp No. APCO00000001<sup>2</sup> through APCO00078992 which APCO has deposited into a depository established by APCO for this litigation matter with Litigation Services located at 1640 W. Alta Drive, Suite 4, Las Vegas, NV 89106 and/or are hereby made available for

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<sup>2</sup> See Footnote No. 1.

1 review and copying (at requestor's expense) at a mutually agreeable time and place. Discovery  
2 is ongoing; APCO reserves the right to supplement or amend its Response to this Interrogatory  
3 as investigation, discovery, disclosure and analysis continues.

4 **INTERROGATORY NO. 8:**

5 State each and every fact that you rely on to support your position that Zitting Brothers  
6 failed to mitigate and/or contributed to its damages as asserted in your Sixth Affirmative  
7 Defense.

8 **RESPONSE TO INTERROGATORY NO. 8:**

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

21 Subject to and without waiving any objections, See Response to Interrogatory No. 1, 6,  
22 and 7 above, which are incorporated herein by this reference. Moreover, it is APCO's  
23 understanding that after APCO terminated its prime contract with Gemstone for nonpayment,  
24 Gemstone requested all subcontractors, including Zitting Brothers, to continue their work on the  
25 Project. Further, it is APCO's understanding that Zitting Brothers elected not to complete its  
26 work and insure that their work was accepted by the inspectors and Gemstone. As such, Zitting  
27 Brothers failed to put themselves in the position to receive payment for the work that allegedly  
28 remains unpaid at this time. Also, see documents identified by Bate Stamp No.

1 APCO00000001<sup>3</sup> through APCO00078992 which APCO has deposited into a depository  
2 established by APCO for this litigation matter with Litigation Services located at 1640 W. Alta  
3 Drive, Suite 4, Las Vegas, NV 89106 and/or are hereby made available for review and copying  
4 (at requestor's expense) at a mutually agreeable time and place. 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. 9:**

8 State each and every fact that you rely on to support your claim that Zitting Brothers had  
9 full knowledge and assumed the risk of any circumstance, condition, or result pertaining to or  
10 arising from the Project as asserted in your Fifth and Eighth Affirmative Defenses.

11 **RESPONSE TO INTERROGATORY NO. 9:**

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 APCO relied upon to support its position that "Zitting Brothers had  
15 full knowledge and assumed the risk of any circumstance, condition, or result pertaining to or  
16 arising from the Project as asserted in your Fifth and Eighth Affirmative Defenses." Broad  
17 ranging written discovery is improper when it essentially subsumes every fact in the case. See  
18 Hiskett v. Wal-Mart Stores, Inc., 180 F.R.D. 403, 404 (D. Kan. 1998); Safeco of Am. V.  
19 Rawstron, 181 F.R.D. 441, 447048 (C.D. Cal. 1998); Lawrence v. First Kan. Bank & Trust Co.,  
20 169 F.R.D. 657, 660-63 (D. Kan. 1996)(same); Hilt v. SFC, Inc., 170 F.R.D. 182, 186-87 (D.  
21 Kan. 1997). APCO further objects to this Interrogatory on the grounds of attorney client  
22 privilege and/or attorney work product. APCO further objects that this Interrogatory is  
23 premature, as discovery has just commenced on this matter and APCO has not yet identified all  
24 facts that it intends to use relative the Zitting Brothers' action.

25 Subject to and without waiving any objections, See Response to Interrogatory No. 1, 6, 7  
26 and 8 above, which are incorporated herein by this reference. Also, see documents identified by  
27

28 <sup>3</sup> See Footnote No. 1.



1 Bate Stamp No. APCO00000001<sup>4</sup> through APCO00078992 which APCO has deposited into a  
2 depository established by APCO for this litigation matter with Litigation Services located at  
3 1640 W. Alta Drive, Suite 4, Las Vegas, NV 89106 and/or are hereby made available for  
4 review and copying (at requestor's expense) at a mutually agreeable time and place. Discovery  
5 is ongoing. APCO reserves the right to supplement or amend its Response to this Interrogatory  
6 as investigation, discovery, disclosure and analysis continues.

7 **INTERROGATORY NO. 10:**

8 State each and every fact that you rely on to support your position that any obligation or  
9 duty, contractual or otherwise that Zitting Brothers' claims to be owed by APCO Construction  
10 has been fully performed, satisfied, excused, and/or discharged as asserted in your Tenth  
11 Affirmative Defense.

12 **RESPONSE TO INTERROGATORY NO. 10:**

13 Objection. APCO objects to this Interrogatory on the grounds that this Interrogatory is  
14 overly broad, unduly burdensome and oppressive because it seeks to force APCO to identify  
15 "each and every fact" that APCO relied upon to support its position that "Zitting Brothers'  
16 claims to be owed by APCO Construction has been fully performed, satisfied, excused, and/or  
17 discharged as asserted in your Tenth Affirmative Defense." Broad ranging written discovery is  
18 improper when it essentially subsumes every fact in the case. See Hiskett v. Wal-Mart Stores,  
19 Inc., 180 F.R.D. 403, 404 (D. Kan. 1998); Safeco of Am. V. Rawstron, 181 F.R.D. 441, 447048  
20 (C.D. Cal. 1998); Lawrence v. First Kan. Bank & Trust Co., 169 F.R.D. 657, 660-63 (D. Kan.  
21 1996)(same); Hilt v. SFC, Inc., 170 F.R.D. 182, 186-87 (D. Kan. 1997). APCO further objects  
22 to this Interrogatory on the grounds of attorney client privilege and/or attorney work product.  
23 APCO further objects that this Interrogatory is premature, as discovery has just commenced on  
24 this matter and APCO has not yet identified all facts that it intends to use relative the Zitting  
25 Brothers' action.

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28 <sup>4</sup> See Footnote No. 1.

1 Subject to and without waiving any objections, See Response to Interrogatory No. 1, 6  
2 and 7 above, which are incorporated herein by this reference. Discovery is ongoing. APCO  
3 reserves the right to supplement or amend its Response to this Interrogatory as investigation,  
4 discovery, disclosure and analysis continues.

5 **INTERROGATORY NO. 11:**

6 State each and every fact that you intend to rely upon to support your position that any  
7 obligation or duty, contractual or otherwise that Zitting Brothers' claims to be owed by APCO  
8 has been replaced, terminated, voided, cancelled or otherwise released as asserted in your  
9 Sixteenth Affirmative Defense.

10 **RESPONSE TO INTERROGATORY NO. 11:**

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

24 Subject to and without waiving any objections, See Response to Interrogatory No. 1, 6  
25 and 7 above, which are incorporated herein by this reference. Also, see documents identified by  
26 Bate Stamp No. APCO00000001<sup>5</sup> through APCO00078992 which APCO has deposited into a  
27 \_\_\_\_\_

28 <sup>5</sup> See Footnote No. 1.

1 depository established by APCO for this litigation matter with Litigation Services located at  
2 1640 W. Alta Drive, Suite 4, Las Vegas, NV 89106 and/or are hereby made available for  
3 review and copying (at requestor's expense) at a mutually agreeable time and place. Discovery  
4 is ongoing. APCO reserves the right to supplement or amend its Response to this Interrogatory  
5 as investigation, discovery, disclosure and analysis continues.

6 **INTERROGATORY NO. 12:**

7 If you contend that Zitting Brothers entered into any independent agreement or  
8 ratification with Camco Pacific or Gemstone, state each and every fact that you rely on to  
9 support your position and on what basis any such agreement relieves APCO of its contractual  
10 duties to Zitting Brothers.

11 **RESPONSE TO INTERROGATORY NO. 12:**

12 It is APCO's understanding that after APCO's termination of the prime contract with  
13 Gemstone for non-payment, Gemstone, through Camco Pacific Construction Company  
14 ("Camco"), its replacement contractor, entered into independent and/or ratification agreements.  
15 APCO is aware that several of its subcontractors have entered into such independent and/or  
16 ratification agreement. APCO does not have personal knowledge of which subcontractors have  
17 entered into such agreements. APCO objects that this Interrogatory is premature, as discovery  
18 has just commenced on this matter and APCO has not yet identified all subcontractors who may  
19 have entered into such agreements and whether or not Zitting Brothers was one of such  
20 subcontractors. Discovery is ongoing. APCO reserves the right to supplement or amend its  
21 Response to this Interrogatory as investigation, discovery, disclosure and analysis continues.

22 **INTERROGATORY NO. 13:**

23 State each and every fact that you rely on to support your position that the damages  
24 sustained by Zitting Brothers are the result of the acts, omission to act, or negligence of Zitting  
25 Brothers or third party(ies) over whom APCO has no control as asserted in your Fourth  
26 Affirmative Defense.

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**RESPONSE TO INTERROGATORY NO. 13:**

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 the damages sustained by Zitting Brothers are the result of the acts, omission to act, or negligence of Zitting Brothers or third party(ies) over whom APCO has no control as asserted in your Fourth Affirmative Defense". 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 work product. APCO further objects that this Interrogatory is premature, as discovery has just commenced on this matter and APCO has not yet identified all facts that it intends to use relative the Zitting Brothers' action.

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 Bate Stamp No. APCO00000001<sup>6</sup> through APCO00078992 which APCO has deposited into a depository established by APCO for this litigation matter with Litigation Services located at 1640 W. Alta Drive, Suite 4, Las Vegas, NV 89106 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. 14:**

State each and every fact that you rely on to support your position that damages sustained by Zitting Brothers were caused solely by a breach of contract, breach of warranty,

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<sup>6</sup> See Footnote No. 1.

expressed and implied, and acts or omissions of Zitting Brothers or some third party(ies) over whom APCO had no control as asserted in your Fourth Affirmative Defense.

**RESPONSE TO INTERROGATORY NO. 14:**

Objection. APCO objects to this Interrogatory on the grounds that 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 damages sustained by Zitting Brothers were caused solely by a breach of contract, breach of warranty, expressed and implied, and acts or omissions of Zitting Brothers or some third party(ies) over whom APCO had no control as asserted in your Fourth Affirmative Defense". 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 work product. APCO further objects that this Interrogatory is premature, as discovery has just commenced on this matter and APCO has not yet identified all facts that it intends to use relative the Zitting Brothers' action.

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 Bate Stamp No. APCO00000001<sup>7</sup> through APCO00078992 which APCO has deposited into a depository established by APCO for this litigation matter with Litigation Services located at 1640 W. Alta Drive, Suite 4, Las Vegas, NV 89106 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.

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<sup>7</sup> See Footnote No. 1.

1 **INTERROGATORY NO. 15:**

2 State each and every fact that you rely on to support your position that Zitting Brothers  
3 claims have been waived as a result of Zitting Brothers' respective acts and conduct as asserted  
4 in your Second Affirmative Defense.

5 **RESPONSE TO INTERROGATORY NO. 15:**

6 Objection. APCO objects to this Interrogatory on the grounds that this Interrogatory is  
7 overly broad, unduly burdensome and oppressive because it seeks to force APCO to identify  
8 "each and every fact" that APCO relied upon to support its position "that Zitting Brothers  
9 claims have been waived as a result of Zitting Brothers' respective acts and conduct as asserted  
10 in your Second Affirmative Defense." Broad ranging written discovery is improper when it  
11 essentially subsumes every fact in the case. See Hiskett v. Wal-Mart Stores, Inc., 180 F.R.D.  
12 403, 404 (D. Kan. 1998); Safeco of Am. V. Rawstron, 181 F.R.D. 441, 447048 (C.D. Cal.  
13 1998); Lawrence v. First Kan. Bank & Trust Co., 169 F.R.D. 657, 660-63 (D. Kan.  
14 1996)(same); Hilt v. SFC, Inc., 170 F.R.D. 182, 186-87 (D. Kan. 1997). APCO further objects  
15 to this Interrogatory on the grounds of attorney client privilege and/or attorney work product.  
16 APCO further objects that this Interrogatory is premature, as discovery has just commenced on  
17 this matter and APCO has not yet identified all facts that it intends to use relative the Zitting  
18 Brothers' action.

19 Subject to and without waiving any objections, See Response to Interrogatory No. 1, 6  
20 and 7 above, which are incorporated herein by this reference. Also, see documents identified by  
21 Bate Stamp No. APCO00000001<sup>8</sup> through APCO00078992 which APCO has deposited into a  
22 depository established by APCO for this litigation matter with Litigation Services located at  
23 1640 W. Alta Drive, Suite 4, Las Vegas, NV 89106 and/or are hereby made available for  
24 review and copying (at requestor's expense) at a mutually agreeable time and place. Discovery  
25 is ongoing. APCO reserves the right to supplement or amend its Response to this Interrogatory  
26 as investigation, discovery, disclosure and analysis continues.

27  
28 <sup>8</sup> See Footnote No. 1.

1 **INTERROGATORY NO. 16:**

2 State each and every fact that you rely on to support your position that Zitting Brothers'  
3 claims are premature as asserted in your Thirteenth Affirmative Defense.

4 **RESPONSE TO INTERROGATORY NO. 16:**

5 Objection. APCO objects to this Interrogatory on the grounds that this Interrogatory is  
6 overly broad, unduly burdensome and oppressive because it seeks to force APCO to identify  
7 "each and every fact" that APCO relied upon to support its position "Zitting Brothers' claims  
8 are premature as asserted in your Thirteenth Affirmative Defense." Broad ranging written  
9 discovery is improper when it essentially subsumes every fact in the case. See Hiskett v. Wal-  
10 Mart Stores, Inc., 180 F.R.D. 403, 404 (D. Kan. 1998); Safeco of Am. V. Rawstron, 181 F.R.D.  
11 441, 447048 (C.D. Cal. 1998); Lawrence v. First Kan. Bank & Trust Co., 169 F.R.D. 657, 660-  
12 63 (D. Kan. 1996)(same); Hilt v. SFC, Inc., 170 F.R.D. 182, 186-87 (D. Kan. 1997). APCO  
13 further objects to this Interrogatory on the grounds of attorney client privilege and/or attorney  
14 work product. APCO further objects that this Interrogatory is premature, as discovery has just  
15 commenced on this matter and APCO has not yet identified all facts that it intends to use  
16 relative the Zitting Brothers' action.

17 Subject to and without waiving any objections, See Response to Interrogatory No. 1, 6,  
18 and 7 above, which are incorporated herein by this reference. Also, see documents identified by  
19 Bate Stamp No. APCO00000001<sup>9</sup> through APCO00078992 which APCO has deposited into a  
20 depository established by APCO for this litigation matter with Litigation Services located at  
21 1640 W. Alta Drive, Suite 4, Las Vegas, NV 89106 and/or are hereby made available for review  
22 and copying (at requestor's expense) at a mutually agreeable time and place. Discovery is  
23 ongoing. APCO reserves the right to supplement or amend its Response to this Interrogatory as  
24 investigation, discovery, disclosure and analysis continues.

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28 <sup>9</sup> See Footnote No. 1.

1 **INTERROGATORY NO. 17:**

2 State each and every fact that you rely on to support your position that Zitting Brothers'  
3 claims for relief against Gemstone are barred by Zitting Brothers' prior breach of contract  
4 including the failure to perform any conditions precedent or conditions subsequent as asserted  
5 in your Twelfth Affirmative Defense.

6 **RESPONSE TO INTERROGATORY NO. 17:**

7 Objection. APCO objects to this Interrogatory on the grounds that this Interrogatory is  
8 overly broad, unduly burdensome and oppressive because it seeks to force APCO to identify  
9 "each and every fact" that APCO relied upon to support its position "that Zitting Brothers'  
10 claims for relief against Gemstone are barred by Zitting Brothers' prior breach of contract  
11 including the failure to perform any conditions precedent or conditions subsequent as asserted  
12 in your Twelfth Affirmative Defense." Broad ranging written discovery is improper when it  
13 essentially subsumes every fact in the case. See Hiskett v. Wal-Mart Stores, Inc., 180 F.R.D.  
14 403, 404 (D. Kan. 1998); Safeco of Am. V. Rawstron, 181 F.R.D. 441, 447048 (C.D. Cal.  
15 1998); Lawrence v. First Kan. Bank & Trust Co., 169 F.R.D. 657, 660-63 (D. Kan.  
16 1996)(same); Hilt v. SFC, Inc., 170 F.R.D. 182, 186-87 (D. Kan. 1997). APCO further objects  
17 to this Interrogatory on the grounds of attorney client privilege and/or attorney work product.  
18 APCO further objects that this Interrogatory is premature, as discovery has just commenced on  
19 this matter and APCO has not yet identified all facts that it intends to use relative the Zitting  
20 Brothers' action.

21 Subject to and without waiving any objections, See Response to Interrogatory No. 1, 6  
22 and 7 above, which are incorporated herein by this reference. Also, see documents identified by  
23 Bate Stamp No. APCO00000001<sup>10</sup> through APCO00078992 which APCO has deposited into a  
24 depository established by APCO for this litigation matter with Litigation Services located at  
25 1640 W. Alta Drive, Suite 4, Las Vegas, NV 89106 and/or are hereby made available for  
26 review and copying (at requestor's expense) at a mutually agreeable time and place. Discovery  
27

28 <sup>10</sup> See Footnote No. 1.



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

3 **INTERROGATORY NO. 19:**

4 State each and every fact that you rely on to support your claim that Zitting Brothers  
5 failed to comply with the requirements contained in NRS Chapter 108 and thus does not have a  
6 valid and enforceable lien against the property at issue as asserted in your Nineteenth  
7 Affirmative Defense.

8 **RESPONSE TO INTERROGATORY NO. 19:**

9 Objection. APCO objects to this Interrogatory on the grounds that this Interrogatory is  
10 overly broad, unduly burdensome and oppressive because it seeks to force APCO to identify  
11 "each and every fact" that APCO relied upon to support its position "that Zitting Brothers failed  
12 to comply with the requirements contained in NRS Chapter 108 and thus does not have a valid  
13 and enforceable lien against the property at issue as asserted in your Nineteenth Affirmative  
14 Defense." Broad ranging written discovery is improper when it essentially subsumes every fact  
15 in the case. See Hiskett v. Wal-Mart Stores, Inc., 180 F.R.D. 403, 404 (D. Kan. 1998); Safeco  
16 of Am. V. Rawstron, 181 F.R.D. 441, 447048 (C.D. Cal. 1998); Lawrence v. First Kan. Bank &  
17 Trust Co., 169 F.R.D. 657, 660-63 (D. Kan. 1996)(same); Hilt v. SFC, Inc., 170 F.R.D. 182,  
18 186-87 (D. Kan. 1997). APCO further objects to this Interrogatory on the grounds of attorney  
19 client privilege and/or attorney work product. APCO further objects that this Interrogatory is  
20 premature, as discovery has just commenced on this matter.

21 Subject to and without waiving any objections, APCO responds as follows: Discovery is  
22 ongoing. APCO reserves the right to supplement or amend its Response to this Interrogatory as  
23 investigation, discovery, disclosure and analysis continues.

24 **INTERROGATORY NO. 20:**

25 Identify and describe any and all complaints you have regarding the quality of work,  
26 materials, and/or equipment furnished by Zitting Brothers at the Project.

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**RESPONSE TO INTERROGATORY NO. 20:**

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 "all complaints you have regarding the quality of work materials, and/or equipment furnished by Zitting Brothers at the Project." 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 the foregoing objections, Gemstone has asserted various complaints about the quality of the work performed by APCO and its subcontractors. As of this time, Gemstone has not identified specific issues that Gemstone has with APCO's or its subcontractor's work, including that of Zitting Brothers. However, as a result of Gemstone's assertions that there are issues with the quality of the work performed on the Project, Gemstone has failed to pay APCO for the work that APCO performed including the work that was performed by 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.

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1 **INTERROGATORY NO. 21:**

2 State each and every fact that you rely on to support your claim that Zitting Brothers has  
3 failed to comply with the requirements of NRS 624 as asserted in your Eighteenth Affirmative  
4 Defense.

5 **RESPONSE TO INTERROGATORY NO. 21:**

6 Objection. APCO objects to this Interrogatory on the grounds that this Interrogatory is  
7 overly broad, unduly burdensome and oppressive because it seeks to force APCO to identify  
8 "each and every fact" that APCO relied upon to support its position "that Zitting Brothers has  
9 failed to comply with the requirements of NRS 624 as asserted in your Eighteenth Affirmative  
10 Defense." Broad ranging written discovery is improper when it essentially subsumes every fact  
11 in the case. See Hiskett v. Wal-Mart Stores, Inc., 180 F.R.D. 403, 404 (D. Kan. 1998); Safeco  
12 of Am. V. Rawstron, 181 F.R.D. 441, 447048 (C.D. Cal. 1998); Lawrence v. First Kan. Bank &  
13 Trust Co., 169 F.R.D. 657, 660-63 (D. Kan. 1996)(same); Hilt v. SFC, Inc., 170 F.R.D. 182,  
14 186-87 (D. Kan. 1997). APCO further objects to this Interrogatory on the grounds of attorney  
15 client privilege and/or attorney work product. APCO further objects that this Interrogatory is  
16 premature, as discovery has just commenced on this matter and APCO has not yet identified all  
17 facts that it intends to use relative the Zitting Brothers' action.

18 Subject to and without waiving any objections, See Response to Interrogatory No. 1, 6  
19 and 7 above, which are incorporated herein by this reference. Also, see documents identified by  
20 Bate Stamp No. APCO00000001<sup>11</sup> through APCO00078992 which APCO has deposited into a  
21 depository established by APCO for this litigation matter with Litigation Services located at  
22 1640 W. Alta Drive, Suite 4, Las Vegas, NV 89106 and/or are hereby made available for  
23 review and copying (at requestor's expense) at a mutually agreeable time and place. Discovery  
24 is ongoing. APCO reserves the right to supplement or amend its Response to this Interrogatory  
25 as investigation, discovery, disclosure and analysis continues.

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28 <sup>11</sup> See Footnote No. 1.

1 **INTERROGATORY NO. 22:**

2 Identify, sufficiently to permit service of subpoena, each witness to this action known to  
3 you, your attorney, agent or any investigator or detective employed by you or your attorney or  
4 anyone acting on your behalf, which you intend to have testify at the time of trial relative the  
5 work, material, and/or equipment supplied by Zitting Brothers and provide a brief statement of  
6 their anticipated testimony.

7 **RESPONSE TO INTERROGATORY NO. 22:**

8 Objection. APCO reiterates its General Objections and adds that as this action is in the  
9 initial stages of discovery, and APCO has not yet determined which witnesses APCO intends  
10 "to have testify at the time of trial relative the work, material, and/or equipment supplied by  
11 Zitting Brothers". APCO further objects that this Interrogatory is premature. APCO further  
12 objects as the Interrogatory seeks information which is protected from disclosure by the  
13 attorney's work product privilege. APCO further objects on the basis that the Interrogatory seeks  
14 disclosure of trial witnesses (other than experts) and is therefore violative of the attorney work  
15 product privilege. APCO further objects on the basis that the Interrogatory seeks to ascertain  
16 the anticipated testimony of witnesses who are not "experts" and as such violate the attorney  
17 work product privilege. APCO further objects on the basis that the question seeks to ascertain  
18 all facts and other data which APCO intends to offer at trial and, as such, is violative of the  
19 attorney work product privilege. APCO further objects on the grounds that this Interrogatory is  
20 vague, ambiguous, overly broad, unduly burdensome and oppressive because it seeks to force  
21 APCO to identify "each witness to this action known to you, your attorney, agent, or any  
22 investigator or detective employed by you or your attorney or anyone acting on your behalf, and  
23 provide a brief statement of their anticipated testimony." See also, Response to Interrogatory  
24 No. 1 above, which is incorporated herein by this reference.

25 Furthermore, APCO objects to this Interrogatory insofar as it purports to require APCO  
26 to describe the substance of each person's knowledge for the reason that such a requirement  
27 seeks to impose burdens on APCO beyond those permitted by the Nevada Rules of Civil  
28 Procedure, calls for APCO to speculate, is overly broad and unduly burdensome and seeks

1 information protected from disclosure by the attorney-client, work product, party  
2 communications, investigative, and consulting expert privileges. Subject to and without  
3 waiving any objections, APCO anticipates that the following individuals may be witnesses  
4 and/or have relevant information relative the claims asserted in this action:

- 5 1. Randy Nickerl  
6 APCO Construction  
7 c/o Gwen Rutar Mullins, Esq.  
8 Howard & Howard Attorneys PLLC  
3800 Howard Hughes Pkwy, Ste. 1400  
Las Vegas, Nevada 89169

9 Mr. Nickerl will testify regarding the facts and circumstances surrounding this action  
10 and provide other testimony to support the allegations of APCO's Complaint against Gemstone  
11 and all other claims that APCO has asserted against various subcontractors, including Zitting  
12 Brothers. Mr. Nickerl will further provide testimony to refute the allegations of Gemstone's  
13 Counterclaim and various Complaints in Intervention filed by various subcontractors, including  
14 Zitting Brothers.

- 15 2. Joe Pelan  
16 APCO Construction  
17 c/o Gwen Rutar Mullins, Esq.  
18 Howard & Howard Attorneys PLLC  
3800 Howard Hughes Pkwy, Ste. 1400  
Las Vegas, Nevada 89169

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

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1           3.       Lisa Lynn  
2                   APCO Construction  
3                   c/o Gwen Rutar Mullins, Esq.  
4                   Howard & Howard Attorneys PLLC  
5                   3800 Howard Hughes Pkwy, Ste. 1400  
6                   Las Vegas, Nevada 89169

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

8           4.       Mary Jo Allen  
9                   APCO Construction  
10                  c/o Gwen Rutar Mullins, Esq.  
11                  Howard & Howard Attorneys PLLC  
12                  3800 Howard Hughes Pkwy, Ste. 1400  
13                  Las Vegas, Nevada 89169

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

17           5.       Person Most Knowledgeable - APCO  
18                   c/o Gwen Rutar Mullins, Esq.  
19                   Howard & Howard Attorneys PLLC  
20                   3800 Howard Hughes Pkwy, Ste. 1400  
21                   Las Vegas, Nevada 89169

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

26           6.       The Person Most Knowledgeable  
27                   Gemstone Development West, Inc.  
28                   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.

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

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

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

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

- 11          9.     Craig Colligan  
12                  Address unknown

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

- 15          10.    The Person Most Knowledgeable  
16                  Scott Financial Services, Inc.  
17                  c/o Kemp, Jones & Coulthard  
18                  3800 Howard Hughes Pkwy., 17<sup>th</sup> Floor  
19                  Las Vegas, Nevada 89169

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

- 22          11.    Bradley J. Scott  
23                  c/o Kemp, Jones & Coulthard  
24                  3800 Howard Hughes Pkwy., 17<sup>th</sup> Floor  
25                  Las Vegas, Nevada 89169

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

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HOWARD & HOWARD ATTORNEYS PLLC  
3800 Howard Hughes Pkwy., Suite 1400  
Las Vegas, NV 89169  
(702) 257-1483

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

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

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

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

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

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

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

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

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1           16.    Person Most Knowledgeable  
2                    Zitting Brothers Construction  
3                    c/o Michael M. Edwards, Esq.  
4                    WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP  
                    415 South Sixth Street, Ste. 300  
                    Las Vegas, Nevada 89101

5           The Person Most Knowledgeable of Zitting Brothers Construction, Inc. is expected to  
6   testify as to his/her understanding of the facts of this matter forming the basis of Zitting  
7   Brothers' lawsuit against APCO.

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

13   **INTERROGATORY NO. 23:**

14           Identify all documents, records, writings, etc., that support your Answers to these  
15   Interrogatories and your responses to Requests for Admission.

16   **RESPONSE TO INTERROGATORY NO. 23:**

17           Objection. APCO objects to this Interrogatory as being overly broad, unduly  
18   burdensome and oppressive because it seeks to force APCO to identify "all documents, records,  
19   writings, etc., that support your Answers to these Interrogatories and your responses to Requests  
20   for Admission." Broad ranging written discovery is improper when it essentially subsumes  
21   every fact in the case. See Hiskett v. Wal-Mart Stores, Inc., 180 F.R.D. 403, 404 (D. Kan.  
22   1998); Safeco of Am. V. Rawstron, 181 F.R.D. 441, 447048 (C.D. Cal. 1998); Lawrence v.  
23   First Kan. Bank & Trust Co., 169 F.R.D. 657, 660-63 (D. Kan. 1996)(same); Hilt v. SFC, Inc.,  
24   170 F.R.D. 182, 186-87 (D. Kan. 1997). APCO further objects to this Interrogatory on the  
25   grounds of attorney client privilege and/or attorney work product. APCO further objects that  
26   this Interrogatory is premature, as discovery has just commenced on this matter and APCO has  
27   not yet identified all facts that it intends to use relative the Zitting Brothers' action.

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1 Subject to and without waiving any objections, see documents identified by Bate Stamp  
2 No. APCO00000001<sup>12</sup> through APCO00078992 which APCO has deposited into a depository  
3 established by APCO for this litigation matter with Litigation Services located at 1640 W. Alta  
4 Drive, Suite 4, Las Vegas, NV 89106 and/or are hereby made available for review and copying  
5 (at requestor's expense) at a mutually agreeable time and place. Discovery is ongoing. APCO  
6 reserves the right to supplement or amend its Response to this Interrogatory as investigation,  
7 discovery, disclosure and analysis continues.

8 **INTERROGATORY NO. 24:**

9 State the names, address and telephone number of each and every individual known to  
10 you who has knowledge of the facts involved in this matter including, but not limited to, Zitting  
11 Brothers' work, material, and/or equipment at the Project.

12 **RESPONSE TO INTERROGATORY NO. 24:**

13 Objection. APCO objects to this Interrogatory on basis that it is overly broad, unduly  
14 burdensome and oppressive because it seeks to force APCO to identify "each and every  
15 individual known to you who has knowledge of the facts involved in this matter including, but  
16 not limited to, Zitting Brothers' work, material, and/or equipment at the Project." Broad ranging  
17 written discovery is improper when it essentially subsumes every fact in the case. *See Hiskett v.*  
18 *Wal-Mart Stores, Inc.*, 180 F.R.D. 403, 404 (D. Kan. 1998); *Safeco of Am. V. Rawstron*, 181  
19 F.R.D. 441, 447048 (C.D. Cal. 1998); *Lawrence v. First Kan. Bank & Trust Co.*, 169 F.R.D.  
20 657, 660-63 (D. Kan. 1996)(same); *Hilt v. SFC, Inc.*, 170 F.R.D. 182, 186-87 (D. Kan. 1997).  
21 APCO further objects to this Interrogatory on the grounds of attorney client privilege and/or  
22 attorney work product. APCO further objects that this Interrogatory is premature, as discovery  
23 has just commenced on this matter and APCO has not yet identified all individuals that have  
24 facts relative this matter.

25 Subject to and without waiving any objections, see Response to Interrogatory No. 22  
26 above. Also, see APCO's disclosure of witnesses previously served on this matter. Discovery  
27

28 <sup>12</sup> See Footnote No. 1.

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

3 **INTERROGATORY NO. 25:**

4 State the reasons why you failed to Zitting Brothers for the work, material, and/or  
5 equipment it furnished on the Project.

6 **RESPONSE TO INTERROGATORY NO. 25:**

7 Objection. This Interrogatory is overly broad, vague and incomplete and APCO is  
8 unable to determine what inquiry is being made by Zitting Brothers.

9 **INTERROGATORY NO. 26:**

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

13 **RESPONSE TO INTERROGATORY NO. 26:**

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

26 Subject to and without waiving any objections, See Responses to Interrogatory No. 1, 6  
27 and 7 above, which are incorporated herein by this reference. Also, see documents identified by  
28

1 Bate Stamp No. APCO00000001<sup>13</sup> through APCO00078992 which APCO has deposited into a  
2 depository established by APCO for this litigation matter with Litigation Services located at  
3 1640 W. Alta Drive, Suite 4, Las Vegas, NV 89106 and/or are hereby made available for  
4 review and copying (at requestor's expense) at a mutually agreeable time and place. Discovery  
5 is ongoing. APCO reserves the right to supplement or amend its Response to this Interrogatory  
6 as investigation, discovery, disclosure and analysis continues.

7 **INTERROGATORY NO. 27:**

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

- 10 1) the subject matter on which the expert is expected to testify, the substance of the  
11 facts and opinions to which each expert is expected to testify;  
12 2) a summary of the grounds for each opinion;  
13 3) whether written document was prepared by such expert;  
14 4) the professional title, educational background, qualifications and work  
15 experience of each such expert.

16 **RESPONSE TO INTERROGATORY NO. 27:**

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

22 **INTERROGATORY NO. 28:**

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

26 ///

27  
28 <sup>13</sup> See Footnote No. 1.

**RESPONSE TO INTERROGATORY NO. 28:**

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. APCO00000001<sup>14</sup> through APCO00078992 which APCO has deposited into a depository established by APCO for this litigation matter with Litigation Services located at 1640 W. Alta Drive, Suite 4, Las Vegas, NV 89106 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 Zitting Brothers 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. 29:**

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

**RESPONSE TO INTERROGATORY NO. 29:**

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 Zitting Brothers; the question also invades the attorney's work product privilege. APCO further objects on the basis that the question seeks to invade APCO's counsel's work product privilege in that it calls for him to provide an analysis of written data. 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

<sup>14</sup> See Footnote No. 1.

1 product privilege. APCO objects on the basis that the attorney-client privilege protects  
2 disclosure of the information sought.

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

9 **INTERROGATORY NO. 30:**

10 Please identify the first and last date Zitting Brothers performed work and describe in  
11 detail Zitting Brothers' scope of work for the Project.

12 **RESPONSE TO INTERROGATORY NO. 30:**

13 Objection. APCO objects on the basis that the Interrogatory is oppressive, harassing and  
14 burdensome as the information sought information that is equally available to Zitting Brothers.  
15 Subject to and without waiving any objections, APCO responds as follows: Zitting Brothers  
16 commenced with its work on the Project sometime in November 2007. APCO does not know  
17 the last date that Zitting Brothers performed work on the Project. APCO understands that  
18 Zitting Brothers continued to perform work on the Project after APCO ceased its work and  
19 terminated the prime contract with Gemstone. Discovery is ongoing. APCO reserves the right  
20 to supplement or amend its response to this Interrogatory as investigation, discovery, disclosure  
21 and analysis continues.

22 **INTERROGATORY NO. 31:**

23 For each of the Request for Admissions, which were served upon you concurrently with  
24 these Interrogatories, that you denied, either in whole or in part, please state with particularity  
25 the reasons for each and every denial.

26 **RESPONSE TO INTERROGATORY NO. 31:**

27 Objection. This Interrogatory calls for multiple responses as there were denials made by  
28 APCO to Zitting Brothers' Requests for Admissions. APCO objects to any attempt by Zitting

1 Brothers to evade any numerical limitations set on interrogatories by asking multiple  
2 independent questions within single individual questions and subparts. APCO further objects  
3 on the grounds of relevance and that this Interrogatory is vague, ambiguous, overly broad,  
4 unduly burdensome and oppressive because it seeks to force APCO to identify "each and every  
5 denial." See also Response to Interrogatory No. 1 above, which is incorporated herein by this  
6 reference.

7 Subject to and without waiving any objections, see APCO's Responses to Zitting  
8 Brothers' Requests for Admissions. See also, Responses to Interrogatory No. 1, 6 and 7 above,  
9 which are incorporated herein by this reference. Also, see documents identified by Bate Stamp  
10 No. APCO00000001<sup>15</sup> through APCO00078992 which APCO has deposited into a depository  
11 established by APCO for this litigation matter with Litigation Services located at 1640 W. Alta  
12 Drive, Suite 4, Las Vegas, NV 89106 and/or are hereby made available for review and copying  
13 (at requestor's expense) at a mutually agreeable time and place. Discovery is ongoing. APCO  
14 reserves the right to supplement or amend its Response to this Interrogatory as investigation,  
15 discovery, disclosure and analysis continues.

16 **INTERROGATORY NO. 32:**

17 Identify all facts and circumstances leading up to your issuance of the stop work order to  
18 Zitting Brothers and describe any and all reasons you believe you were justified you in taking  
19 such action.

20 **RESPONSE TO INTERROGATORY NO. 32:**

21 Objection. APCO objects to this request for Interrogatory is overly broad, unduly  
22 burdensome and oppressive because it seeks to force APCO to identify "all facts and  
23 circumstances leading up to your issuance of the stop work order to Zitting Brothers and  
24 describe any and all reasons you believe you were justified you in taking such action." Broad  
25 ranging written discovery is improper when it essentially subsumes every fact in the case. See  
26 Hiskett v. Wal-Mart Stores, Inc., 180 F.R.D. 403, 404 (D. Kan. 1998); Safeco of Am. V.  
27 Rawstron, 181 F.R.D. 441, 447048 (C.D. Cal. 1998); Lawrence v. First Kan. Bank & Trust Co.,

28 <sup>15</sup> See Footnote No. 1.

1 169 F.R.D. 657, 660-63 (D. Kan. 1996)(same); Hilt v. SFC, Inc., 170 F.R.D. 182, 186-87 (D.  
2 Kan. 1997). APCO further objects to this Interrogatory on the grounds of attorney client  
3 privilege and/or attorney work product. APCO further objects that this Interrogatory is  
4 premature, as discovery has just commenced on this matter and APCO has not yet identified all  
5 facts that it intends to use relative the Zitting Brothers' action.

6 Subject to and without waiving any objections, APCO responds as follows: After  
7 APCO was not paid by Gemstone for work that was being performed by APCO and its  
8 subcontractors, APCO, pursuant to Nevada law, gave notice to Gemstone of its intent to stop  
9 work and terminate the prime contract unless payment was made. APCO provided a copy of  
10 such notice to its subcontractors, including Zitting Brothers, so that the subcontractors,  
11 including Zitting Brother, could take whatever action they deemed necessary to protect their  
12 respective rights under Nevada law. After payment from Gemstone was not made, APCO, as  
13 allowed under Nevada law, terminated its prime contract with Gemstone and further notified its  
14 subcontractors, including Zitting Brothers of such termination. See also, Responses to  
15 Interrogatory No. 1, 6 and 7 above, which are incorporated herein by this reference. Also, see  
16 documents identified by Bate Stamp No. APCO00000001<sup>16</sup> through APCO00078992 which  
17 APCO has deposited into a depository established by APCO for this litigation matter with  
18 Litigation Services located at 1640 W. Alta Drive, Suite 4, Las Vegas, NV 89106 and/or are  
19 hereby made available for review and copying (at requestor's expense) at a mutually agreeable  
20 time and place. Discovery is ongoing. APCO reserves the right to supplement or amend its  
21 Response to this Interrogatory as investigation, discovery, disclosure and analysis continues.

22 **INTERROGATORY NO. 33:**

23 If you or any officer, director, or employee of APCO has had any conversations with  
24 Zitting Brothers regarding the facts alleged in Zitting Brothers Complaint against APCO and  
25 Gemstone, please state the dates of each conversation, the parties, involved, the contents of the  
26 conversation, and what was said.

27 ///

28 <sup>16</sup> See Footnote No. 1.



1                   **RESPONSE TO INTERROGATORY NO. 33:**

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

10           Subject to and without waiving any objections, APCO, during the course of  
11 construction, had numerous conversations with Zitting Brothers relative Zitting Brothers' work  
12 and the Project in general. APCO is unable to recall each and every conversation and their  
13 contents. Discovery is ongoing. APCO reserves the right to supplement or amend its response  
14 to this Interrogatory as investigation, discovery, disclosure and analysis continues.

15                   **INTERROGATORY NO. 34:**

16           If you or any officer, director, or employee of APCO has had any conversations with  
17 Camco Pacific regarding the facts alleged in Zitting Brothers Complaint against APCO and  
18 Gemstone, please state the dates of each conversation, the parties, involved, the contents of the  
19 conversation, and what was said.

20                   **RESPONSE TO INTERROGATORY NO. 34:**

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

27           Subject to and without waiving any objections, APCO, does not recall having any  
28 conversations with Camco regarding Zitting Brothers' work or otherwise. Discovery is

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

3 **INTERROGATORY NO. 35:**

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

8 **RESPONSE TO INTERROGATORY NO. 35:**

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

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

20 **INTERROGATORY NO. 36:**

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

25 **RESPONSE TO INTERROGATORY NO. 36:**

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 a Third Party

1 including the dates of each conversation, persons involved and the contents of the  
2 conversations. See also Response to Interrogatory No. 2 above, which is incorporated herein by  
3 this reference.

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

8 **INTERROGATORY NO. 37:**

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

11 **RESPONSE TO INTERROGATORY NO. 37:**

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 identify "each and every fact supporting" "that your lien has priority  
15 over any other party in this matter." See also Response to Interrogatory No. 2 above, which is  
16 incorporated herein by this reference.

17 Subject to and without waiving any objections, APCO responds as follows: APCO has  
18 asserted priority over the deeds of trust that are of record against the Manhattan West Project  
19 pursuant to NRS 108.225. Priority over the deeds of trusts is based on the fact that APCO first  
20 performed work under the Grading Agreement on or about May 2007. APCO first performed  
21 work under the ManhattanWest General Construction Agreement for GMP or about September  
22 5, 2007. The deeds of trust on the property attached after construction work commenced.  
23 APCO has further asked the Court to declare the rank of mechanic's liens pursuant to NRS  
24 108.236. See also documents identified by Bate Stamp No. APCO00000001<sup>17</sup> through  
25 APCO00078992 which APCO has deposited into a depository established by APCO for this  
26 litigation matter with Litigation Services located at 1640 W. Alta Drive, Suite 4, Las Vegas,

27  
28 <sup>17</sup> See Footnote No. 1.

NV 89106 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. 37:**

Identify the amount of your lien and state whether any of the amounts owed to the subcontractors in this matter, including Zitting Brothers, are included in said amount. If so, provide a break down of all amounts making up your lien on the Project.

**RESPONSE TO INTERROGATORY NO. 37:**

The current principal amount of APCO's lien, as set forth in the Amended and Restated Notice of Lien that APCO recorded on February 11, 2009 in Book 20090211 as Instrument No. 48031, is \$20,782,659.95. APCO's lien includes an amounts owed to the subcontractors and/or suppliers through the date of APCO's termination of prime contract with Gemstone. APCO's lien does not include any sums for any work that any subcontractor and/or supplier may have performed and/or furnished after termination directly to Gemstone or through Camco. The breakdown of APCO's lien is as follows:

Original Contract Amount	\$ 153,472,300.00
Change Orders	\$ <u>14,597,570.26</u>
Revised Contract Amount	\$ 168,069,870.26
Contract Work Performed & Billed Thru August 2008	\$ 60,325,901.89
Change Order Work Performed Thru Aug 2008	\$ <u>9,168,116.32</u>
Total Work Performed Thru August 2008	\$ 69,494,018.21
Less Previous Payments	\$ (48,711,358.26)
Final Lien Amount	\$ 20,782,659.95

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

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1 **INTERROGATORY NO. 38:**

2 Identify the date you started construction and describe the work that was performed  
3 during the first three months of the Project.

4 **RESPONSE TO INTERROGATORY NO. 38:**

5 Objection. APCO objects on the grounds of relevance and further objects that this  
6 Interrogatory is vague, ambiguous, overly broad, unduly burdensome and oppressive because it  
7 seeks to force APCO to describe "the work that was performed during the first three months of  
8 the Project." APCO further objects on the grounds that it is vague and ambiguous in that  
9 "construction", "work" and "first three months of the Project" are not defined. See also  
10 Response to Interrogatory No. 2 above, which is incorporated herein by this reference.

11 Subject to and without waiving any objections, APCO responds as follows: APCO first  
12 performed work under the Grading Agreement on or about May 2007. APCO first performed  
13 work under the ManhattanWest General Construction Agreement for GMP or about September  
14 5, 2007. See also documents identified by Bate Stamp No. APCO00000001<sup>18</sup> through  
15 APCO00078992 which APCO has deposited into a depository established by APCO for this  
16 litigation matter with Litigation Services located at 1640 W. Alta Drive, Suite 4, Las Vegas,  
17 NV 89106 and/or are hereby made available for review and copying (at requestor's expense) at  
18 a mutually agreeable time and place. Discovery is ongoing; APCO reserves the right to  
19 supplement or amend its Response to this Interrogatory as investigation, discovery, disclosure  
20 and analysis continues.

21 **INTERROGATORY NO. 39:**

22 Identify all payments received by you for the work, material, and/or equipment furnished  
23 by Zitting Brothers at the Project for which Zitting has not been paid.

24 ///

25 ///

26  
27  
28 <sup>18</sup> See Footnote No. 1.

1                   **RESPONSE TO INTERROGATORY NO. 39:**

2                   None. APCO has not received any payments for work, materials and/or equipment  
3 furnished by Zitting Brothers at the Project for which Zitting Brother has not been paid by  
4 APCO.

5                   **INTERROGATORY NO. 40:**

6                   Identify all facts, opinions, or law not set forth in other responses, which you contend  
7 would excuse you from paying Zitting Brothers the owed and outstanding amounts for the  
8 work, material, and/or equipment furnished by Zitting Brothers at the Project.

9                   **RESPONSE TO INTERROGATORY NO. 40:**

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

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1 work product privilege in that it calls for him to provide an analysis of written data and/or law.  
2 APCO further objects to this Interrogatory on the ground that it calls for legal conclusions. See  
3 also Response to Interrogatory No. 2 above, which is incorporated herein by this reference.

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

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27 ///

28 ///

HOWARD & HOWARD ATTORNEYS PLLC  
3800 Howard Hughes Pkwy., Suite 1400  
Las Vegas, NV 89169  
(702) 257-1483

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 DATED this 29<sup>th</sup> day of April 2010.

4 HOWARD & HOWARD ATTORNEYS PLLC

5  
6 /s/ Gwen Rutar Mullins

Gwen Rutar Mullins, Esq.

7 Nevada Bar No. 3146

8 Wade B. Gochnour, Esq.

Nevada Bar No. 6314

9 3800 Howard Hughes Pkwy., Ste. 1400

10 Las Vegas, Nevada 89169-5914

11 Attorneys for APCO CONSTRUCTION  
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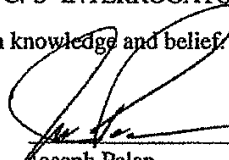
HOWARD & HOWARD ATTORNEYS PLLC  
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VERIFICATION

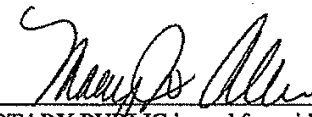
STATE OF NEVADA )  
 ) ss.  
COUNTY OF CLARK )

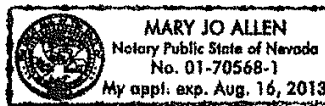
Joseph Pelan, being first duly sworn according to law, deposes and says:

That he is the Senior Project Manager of APCO CONSTRUCTION, and that he executed the foregoing instrument on behalf of APCO CONSTRUCTION in the capacity set forth above; that he has read the foregoing APCO CONSTRUCTION'S RESPONSES TO ZITTING BROTHERS CONSTRUCTION, INC.'S INTERROGATORIES and knows the contents thereof; that the same are true of his own knowledge and belief.

  
Joseph Pelan

SUBSCRIBED AND SWORN to before me  
this 27th day of April, 2010.

  
NOTARY PUBLIC in and for said  
County and State.



HOWARD & HOWARD ATTORNEYS PLLC  
3800 Howard Hughes Pkwy., Suite 1400  
Las Vegas, NV 89169  
(702) 257-1483

CERTIFICATE OF SERVICE

On the 29<sup>th</sup> day of April 2010, the undersigned served a true and correct copy of the foregoing APCO CONSTRUCTION'S RESPONSES TO ZITTING BROTHERS CONSTRUCTION INC.'s INTERROGATORIES by U.S. Mail, postage prepaid, upon the following:

Gemstone Development West, Inc.  
c/o Alexander Edelstein  
10170 W. Tropicana Ave.  
Suite 156-169  
Las Vegas, NV 89147

and by e-serving a copy on all parties listed in the Master Service List in accordance with the Electronic Filing Order entered in this matter.

/s/ Kellie Piet  
An employee of Howard and Howard Attorneys PLLC

# EXHIBIT '1'

RESPONSE TO INTERROGATORY NO. 3

Date of Payment	Check No.	Amt. Paid	% Paid on Completion on Phase 1 Only
1/24/2008	12787	\$ 800,000.00	22.2%
2/6/2008	12878	\$ 388,785.00	32.4%
2/19/2008	12944	\$ 567,148.60	48.1%
3/13/2008	13184	\$ 408,225.70	59.4%
4/15/2008	13458	\$ 495,804.80	73.2%
5/19/2008	13847	\$ 424,688.70	84.8%
6/13/2008	13958	\$ 168,674.60	88.3%
7/28/2008	14392	\$ 27,973.80	90.0%
8/28/2008	NCS628388	\$ 33,847.55	89.5%
		\$ 3,282,848.55	

Zitting Bros. was paid 90% of their contract through payment #8 (07/28/08). Payment #9 (08/28/08) was a joint check issued by Nevada Construction Services for work performed on Owner approved change orders paid at 90%. The owner is holding 10% retention for all owner approved work performed by Zitting through August 2008.

## **EXHIBIT D**

## **EXHIBIT D**

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

1 **Marquis Aurbach Coffing**  
2 Jack Chen Min Juan, Esq.  
3 Nevada Bar No. 6367  
4 Cody S. Mounteer, Esq.  
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11 cmounteer@maclaw.com  
12 Attorneys for APCO Construction

DISTRICT COURT

CLARK COUNTY, NEVADA

10 APCO CONSTRUCTION, a Nevada  
11 corporation,

12 Plaintiff,

13 vs.

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

16 Defendant.

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

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

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

24 **GENERAL RESPONSES AND OBJECTIONS**

25 1. Plaintiff objects to Defendant's First Set of Interrogatories to the extent that they  
26 attempt to impose burdens greater than those imposed by Rules 26 and 33 of the Nevada Rules  
27 of Civil Procedure and/or to the extent they infringe upon the attorney-client privilege and/or the  
28 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 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



1 reference to 'all' of anything?" Often, the relevance of a particular fact to a particular issue is not  
2 known until clarified and put into context by testimony at deposition or trial. Such a question  
3 places the responding party in an impossible position. See id.; Safeco of Am. V. Rawstron, 181  
4 F.R.D. 441, 447048 (C.D. Cal. 1998)(finding unreasonable an interrogatory calling for all facts  
5 supporting denial of a request for admission); Lawrence v. First Kan. Bank & Trust Co., 169  
6 F.R.D. 657, 660-63 (D. Kan. 1996)(same); Hilt v. SFC, Inc., 170 F.R.D. 182, 186-87 (D. Kan.  
7 1997)(finding unduly burdensome an interrogatory seeking to require plaintiff to state 'each and  
8 every fact' supporting allegations of a complaint). APCO further objects on the grounds that to  
9 answer this Interrogatory would result in annoyance, embarrassment, or oppression to APCO in  
10 that the 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 Zitting  
14 Brothers; the question also invades the attorney's work product privilege. APCO further objects  
15 on the basis that the question calls for information which is available to all parties equally, and is  
16 therefore oppressive and burdensome to APCO. APCO further objects on the basis that the  
17 question seeks information which is protected from disclosure by the attorney's work product  
18 privilege. APCO further objects on the basis that the question seeks to invade APCO's counsel's  
19 work product privilege in that it calls for him to provide an analysis of written data. APCO  
20 further objects on the basis that the question seeks to ascertain all facts and other data which  
21 APCO intends to offer at trial and, as such, is violative of the attorney work product privilege.  
22 APCO objects on the basis that the attorney-client privilege protects disclosure of the  
23 information sought. APCO further objects to this Interrogatory on the grounds that it calls for  
24 legal conclusions, and that the 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 Zitting Brothers. However, as a result of Gemstone's assertions that there are issues with the  
2 quality of the work performed on the Project, Gemstone has failed to pay APCO for the work  
3 that APCO performed including the work that was performed by Zitting Brothers. Pursuant to  
4 the terms of the Subcontract Agreement, any payments to Zitting Brothers were specifically  
5 conditioned upon APCO's actual receipt of payment from Gemstone for Zitting Brothers' work.  
6 Moreover, the Subcontract specifically provided that Zitting Brothers was assuming the same  
7 risk that Gemstone may become insolvent and not be paid for its work as APCO assumed in  
8 entering into prime contract with Gemstone. Zitting Brothers further agreed that APCO had no  
9 obligation to pay Zitting Brothers for any work performed by Zitting Brothers until or unless  
10 APCO had actually been paid for such work by Gemstone. To date, APCO has not been paid for  
11 the work performed, including the work performed by Zitting Brothers. In fact, due to non-  
12 payment, APCO exercised its rights pursuant to NRS Chapter 624 and terminated the prime  
13 contract with Gemstone and further terminated the Subcontract with Zitting Brothers. After  
14 APCO ceased work on the Project, Zitting Brothers may have negotiated with Camco Pacific  
15 Construction Company ("Camco"), the replacement general contractor, and/or Gemstone and  
16 may have entered into a ratification agreement, wherein APCO was replaced as the general  
17 contractor under the Subcontract and Camco and/or Gemstone became liable for any monies due  
18 Zitting Brothers on the Project. Discovery is ongoing; APCO reserves the right to supplement or  
19 amend its response to this Interrogatory as investigation, discovery, disclosure and analysis  
20 continues.

21 **INTERROGATORY NO. 2:**

22 State the procedure by which you and/or Gemstone Development West, Inc.  
23 ("Gemstone") paid Zitting Brothers for its work, material, and/or equipment furnished at the  
24 Project.

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

26 APCO paid Zitting Brothers pursuant to the terms of the Subcontract. More specifically,  
27 see Section 3 of the Subcontract. Basically the procedure for payment was as follows: Pursuant  
28 to the terms of the Subcontract, Zitting Brothers submitted to APCO its monthly billing, no later

1 than the 25th of each month, showing quantities of subcontract work that has been satisfactorily  
2 completed in the preceding month, as well as backup material. In the event that Zitting Brothers  
3 failed to timely submit its monthly billing with the necessary backup material that resulted in that  
4 monthly payment application being rolled over to the following month. In turn, APCO submitted  
5 its Application for Payment, which included the subcontractor's monthly billing and backup  
6 documentation to Gemstone for payment. Upon actual receipt of payment by APCO from  
7 Gemstone, APCO then paid the amount that APCO received for Zitting Brothers work to Zitting  
8 Brothers as required under the Subcontract. Discovery is ongoing. APCO reserves the right to  
9 supplement or amend its response to this Interrogatory as investigation, discovery, disclosure and  
10 analysis continues.

11 **INTERROGATORY NO. 3:**

12 State the amount of any payments you or Gemstone made to Zitting Brothers, the date  
13 and manner in which each payment was made, and at what stage of completion the Project was  
14 in at the time of each payment.

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

16 To date, APCO has paid Zitting Brothers the sum of \$3,282,848.55. More specifically,  
17 APCO paid Zitting Brothers as follows: See Exhibit 1 attached hereto for the breakdown. See  
18 also documents identified by Bate Stamp No. APC000044563 through APC000044784, which  
19 APCO deposited into a depository established by APCO for this litigation matter with Litigation  
20 Services located at 3770 Howard Hughes Pkwy, Ste 300, Las Vegas, NV 89169-0935 and/or are  
21 hereby made available for review and copying (at requestor's expense) at a mutually agreeable  
22 time and place. APCO does not have any information as to what payments may have been made  
23 by Gemstone directly to Zitting Brother after APCO terminated its prime contract with  
24 Gemstone. However, from the information obtained through Zitting Brothers discovery requests  
25 propounded upon APCO, it appears that Gemstone may have paid Zitting Brothers at least  
26 \$364,760.00. Discovery is ongoing. APCO reserves the right to supplement or amend its  
27 response to this Interrogatory as investigation, discovery, disclosure and analysis continues.

28

1 **INTERROGATORY NO. 4:**

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

5 **ANSWER TO INTERROGATORY NO. 4:**

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

13 **INTERROGATORY NO. 5:**

14 Do you contend that the value of the unpaid work, material, and/or equipment furnished  
15 or supplied by Zitting Brothers is less than the amount set forth in Zitting Brothers' Amended  
16 Notice of Lien, Bates stamped ZBC1001976 and produced as part of Zitting Brothers' initial  
17 disclosures? If so, please state:

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

20 b. how much you contend the work and equipment provided by Zitting Brothers is  
21 actually valued at; and

22 e. the manner in which you calculated the value of the work, materials, and/or equipment  
23 provided by Zitting Brothers.

24 **ANSWER TO INTERROGATORY NO. 5:**

25 Objection. APCO objects to this Interrogatory on the grounds that this Interrogatory is  
26 vague, ambiguous, overly broad, unduly burdensome and oppressive. More specifically APCO  
27 objects on the grounds that it is vague and ambiguous in that "value of the unpaid work, material  
28 and/or equipment furnished or supplied by Zitting Brothers" and "the amount set forth in Zitting

1 Brothers' mechanic's lien" are not defined. APCO further reiterates its General Objections and  
2 adds that as this action is in the initial stages of discovery and APCO has not yet determined  
3 which witnesses will testify or what evidence will be used in support of APCO's assertions or  
4 denials; therefore, this Interrogatory is premature. APCO further objects as the Interrogatory  
5 seeks information which is protected from disclosure by the attorney's work product privilege.  
6 APCO further objects on the basis that the Interrogatory seeks disclosure of trial witnesses (other  
7 than experts) and is therefore violative of the attorney work product privilege. APCO further  
8 objects on the basis that the Interrogatory seeks to ascertain the anticipated testimony of  
9 witnesses who are not "experts" and as such violate the attorney work product privilege. APCO  
10 further objects on the basis that the question seeks to ascertain all facts and other data which  
11 APCO intends to offer at trial and, as such, is violative of the attorney work product privilege.  
12 Furthermore, APCO objects to this Interrogatory insofar as it purports to require APCO to  
13 describe the substance of each person's knowledge for the reason that such a requirement seeks  
14 to impose burdens on APCO beyond those permitted by the Nevada Rules of Civil Procedure,  
15 calls for APCO to speculate, is overly broad and unduly burdensome and seeks information  
16 protected from disclosure by the attorney-client, work product, party communications,  
17 investigative, and consulting expert privileges.

18 Subject to and without waiving any objections, APCO responds as follows: See  
19 documents identified by Bate Stamp No. APC000000001<sup>1</sup> through APC000078992 and  
20 APCO104200 through 104234, which APCO has deposited into a depository established by  
21 APCO for this litigation matter with Litigation Services and/or are hereby made available for  
22 review and copying (at requestor's expense) at a mutually agreeable time and place. Discovery is  
23 ongoing; APCO reserves the right to supplement or amend its response to this Interrogatory as  
24 investigation, discovery, disclosure and analysis continues.

25 <sup>1</sup> Please note that documents bated stamped APC000000001 through APC000001557 are not being  
26 produced by APCO as those documents were delivered by APCO to Gemstone Development West  
27 ("Gemstone") on September 3 2008, around the time of termination of APCO's prime contract so that  
28 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.

**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

1 the grounds of attorney client privilege and/or attorney work product. APCO further objects that  
2 this Interrogatory is premature, as discovery has just commenced on this matter and APCO has  
3 not yet identified what documents it may decide to utilize or offer as exhibits against Zitting  
4 Brothers at the time of trial.

5 Subject to and without waiving any objections, See Response to Interrogatory No. 1 and  
6 6 above, which are incorporated herein by this reference. Also, see documents identified by Bate  
7 Stamp No. APC000000001<sup>2</sup> through APC000078992 and APCO104200 through 104234, which  
8 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. 8:**

14 State each and every fact that you rely on to support your position that Zitting Brothers  
15 failed to mitigate and/or contributed to its damages as asserted in your Sixth Affirmative  
16 Defense.

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

18 Objection. APCO objects to Interrogatory on the grounds that this Interrogatory is overly  
19 broad, unduly burdensome and oppressive because it seeks to force APCO to identify "each and  
20 every fact" that APCO relied upon to support its position that "Zitting Brothers failed to mitigate  
21 and/or contributed to its damages as asserted in your Sixth Affirmative Defense." Broad ranging  
22 written discovery is improper when it essentially subsumes every fact in the case. See Hiskett v.  
23 Wal-Mart Stores, Inc., 180 F.R.D. 403, 404 (D. Kan. 1998); Safeco of Am. V. Rawstron, 181  
24 F.R.D. 441, 447048 (C.D. Cal. 1998); Lawrence v. First Kan. Bank & Trust Co., 169 F.R.D. 657,  
25 660-63 (D. Kan. 1996)(same); Hilt v. SFC, Inc., 170 F.R.D. 182, 186-87 (D. Kan. 1997). APCO  
26 further objects to this Interrogatory on the grounds of attorney client privilege and/or attorney  
27 work product. APCO further objects that this Interrogatory is premature, as discovery has just

28 <sup>2</sup> See Footnote No. 1.

1 commenced on this matter and APCO has not yet identified all facts that it intends to use relative  
2 the Zitting Brothers' action.

3 Subject to and without waiving any objections, See Response to Interrogatory No. 1, 6,  
4 and 7 above, which are incorporated herein by this reference. Moreover, it is APCO's  
5 understanding that after APCO terminated its prime contract with Gemstone for nonpayment,  
6 Gemstone requested all subcontractors, including Zitting Brothers, to continue their work on the  
7 Project. Further, it is APCO's understanding that Zitting Brothers elected not to complete its  
8 work and insure that their work was accepted by the inspectors and Gemstone. As such, Zitting  
9 Brothers failed to put themselves in the position to receive payment for the work that allegedly  
10 remains unpaid at this time. Also, see documents identified by Bate Stamp No. APC000000001<sup>3</sup>  
11 through APC000078992 and APCO104200 through 104234, which APCO has deposited into a  
12 depository established by APCO for this litigation matter with Litigation Services and/or are  
13 hereby made available for review and copying (at requestor's expense) at a mutually agreeable  
14 time and place. Discovery is ongoing; APCO reserves the right to supplement or amend its  
15 Response to this Interrogatory as investigation, discovery, disclosure and analysis continues.

16 **INTERROGATORY NO. 9:**

17 State each and every fact that you rely on to support your claim that Zitting Brothers had  
18 full knowledge and assumed the risk of any circumstance, condition, or result pertaining to or  
19 arising from the Project as asserted in your Fifth and Eighth Affirmative Defenses.

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

21 Objection. APCO objects to this Interrogatory on the grounds that this Interrogatory is  
22 overly broad, unduly burdensome and oppressive because it seeks to force APCO to identify  
23 "each and every fact" that APCO relied upon to support its position that "Zitting Brothers had  
24 full knowledge and assumed the risk of any circumstance, condition, or result pertaining to or  
25 arising from the Project as asserted in your Fifth and Eighth Affirmative Defenses." Broad  
26 ranging written discovery is improper when it essentially subsumes every fact in the case. See

27  
28 <sup>3</sup> See Footnote No. 1.



1 Hiskett v. Wal-Mart Stores, Inc., 180 F.R.D. 403, 404 (D. Kan. 1998); Safeco of Am. V.  
2 Rawstron, 181 F.R.D. 441, 447048 (C.D. Cal. 1998); Lawrence v. First Kan. Bank & Trust Co.,  
3 169 F.R.D. 657, 660-63 (D. Kan. 1996)(same); Hilt v. SFC, Inc., 170 F.R.D. 182, 186-87 (D.  
4 Kan. 1997). APCO further objects to this Interrogatory on the grounds of attorney client  
5 privilege and/or attorney work product. APCO further objects that this Interrogatory is  
6 premature, as discovery has just commenced on this matter and APCO has not yet identified all  
7 facts that it intends to use relative the Zitting Brothers' action.

8 Subject to and without waiving any objections, See Response to Interrogatory No. 1, 6, 7,  
9 and 8 above, which are incorporated herein by this reference. Also, see documents identified by  
10 Bate Stamp No. APC000000001<sup>4</sup> through APC000078992 and APC0104200 through 104234,  
11 which APCO has deposited into a depository established by APCO for this litigation matter with  
12 Litigation Services and/or are hereby made available for review and copying (at requestor's  
13 expense) at a mutually agreeable time and place. Discovery is ongoing. APCO reserves the right  
14 to supplement or amend its Response to this Interrogatory as investigation, discovery, disclosure  
15 and analysis continues.

16 **INTERROGATORY NO. 10:**

17 State each and every fact that you rely on to support your position that any obligation or  
18 duty, contractual or otherwise that Zitting Brothers' claims to be owed by APCO has been fully  
19 performed, satisfied, excused, and/or discharged as asserted in your Tenth Affirmative Defense.

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

21 Objection. APCO objects to this Interrogatory on the grounds that this Interrogatory is  
22 overly broad, unduly burdensome and oppressive because it seeks to force APCO to identify  
23 "each and every fact" that APCO relied upon to support its position that "Zitting Brothers'  
24 claims to be owed by APCO Construction has been fully performed, satisfied, excused, and/or  
25 discharged as asserted in your Tenth Affirmative Defense." Broad ranging written discovery is  
26 improper when it essentially subsumes every fact in the case. See Hiskett v. Wal-Mart Stores,

27 <sup>4</sup> See Footnote No. 1.  
28

1 Inc., 180 F.R.D. 403, 404 (D. Kan. 1998); Safeco of Am. V. Rawstron, 181 F.R.D. 441, 447048  
2 (C.D. Cal. 1998); Lawrence v. First Kan. Bank & Trust Co., 169 F.R.D. 657, 660-63 (D. Kan.  
3 1996)(same); Hilt v. SFC, Inc., 170 F.R.D. 182, 186-87 (D. Kan. 1997). APCO further objects to  
4 this Interrogatory on the grounds of attorney client privilege and/or attorney work product.  
5 APCO further objects that this Interrogatory is premature, as discovery has just commenced on  
6 this matter and APCO has not yet identified all facts that it intends to use relative the Zitting  
7 Brothers' action.

8 Subject to and without waiving any objections, See Response to Interrogatory No. 1, 6,  
9 and 7 above, which are incorporated herein by this reference. Discovery is ongoing. APCO  
10 reserves the right to supplement or amend its Response to this Interrogatory as investigation,  
11 discovery, disclosure and analysis continues.

12 **INTERROGATORY NO. 11:**

13 State each and every fact that you intend to rely upon to support your position that any  
14 obligation or duty, contractual or otherwise that Zitting Brothers' claims to be owed by APCO  
15 has been replaced, terminated, voided, cancelled or otherwise released as asserted in your  
16 Sixteenth Affirmative Defense.

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

18 Objection. APCO objects to this Interrogatory on the grounds that this Interrogatory is  
19 overly broad, unduly burdensome and oppressive because it seeks to force APCO to identify  
20 "each and every fact" that APCO relied upon to support its position that "Zitting Brothers"  
21 claims to be owed by APCO has been replaced, terminated, voided, cancelled or otherwise  
22 released as asserted in your Sixteenth Affirmative Defense." Broad ranging written discovery is  
23 improper when it essentially subsumes every fact in the case. See Hiskett v. Wal-Mart Stores,  
24 Inc., 180 F.R.D. 403, 404 (D. Kan. 1998); Safeco of Am. V. Rawstron, 181 F.R.D. 441, 447048  
25 (C.D. Cal. 1998); Lawrence v. First Kan. Bank & Trust Co., 169 F.R.D. 657, 660-63 (D. Kan.  
26 1996)(same); Hilt v. SFC, Inc., 170 F.R.D. 182, 186-87 (D. Kan. 1997). APCO further objects to  
27 this Interrogatory on the grounds of attorney client privilege and/or attorney work product.  
28 APCO further objects that this Interrogatory is premature, as discovery has just commenced on

1 this matter and APCO has not yet identified all facts that it intends to use relative the Zitting  
2 Brothers' action.

3 Subject to and without waiving any objections, See Response to Interrogatory No. 1, 6,  
4 and 7 above, which are incorporated herein by this reference. Also, see documents identified by  
5 Bate Stamp No. APC000000001<sup>5</sup> through APC000078992 and APCO104200 through 104234,  
6 which APCO has deposited into a depository established by APCO for this litigation matter with  
7 Litigation Services and/or are hereby made available for review and copying (at requestor's  
8 expense) at a mutually agreeable time and place. Discovery is ongoing. APCO reserves the right  
9 to supplement or amend its Response to this Interrogatory as investigation, discovery, disclosure  
10 and analysis continues.

11 **INTERROGATORY NO. 12:**

12 If you contend that Zitting Brothers entered into any independent agreement or  
13 ratification with Cameo Pacific Construction Company, Inc. ("Cameo") or Gemstone, state each  
14 and every fact that you rely on to support your position and on what basis any such agreement  
15 relieves APCO of its contractual duties to Zitting Brothers.

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

17 It is APCO's understanding that after APCO's termination of the prime contract with  
18 Gemstone for non-payment, Gemstone, through Camco Pacific Construction Company  
19 ("Camco"), its replacement contractor, entered into independent and/or ratification agreements.  
20 APCO is aware that several of its subcontractors have entered into such independent and/or  
21 ratification agreement. APCO does not have personal knowledge of which subcontractors have  
22 entered into such agreements. APCO objects that this Interrogatory is premature, as discovery  
23 has just commenced on this matter and APCO has not yet identified all subcontractors who may  
24 have entered into such agreements and whether or not Zitting Brothers was one of such  
25 subcontractors. Discovery is ongoing. APCO reserves the right to supplement or amend its  
26 Response to this Interrogatory as investigation, discovery, disclosure and analysis continues.

27 \_\_\_\_\_  
28 <sup>5</sup> See Footnote No. 1.

## 1 INTERROGATORY NO. 13:

2 State each and every fact that you rely on to support your position that the damages  
3 sustained by Zitting Brothers are the result of the acts, omission to act, or negligence of Zitting  
4 Brothers or third party(ies) over whom APCO has no control as asserted in your Fourth  
5 Affirmative Defense.

## 6 ANSWER TO INTERROGATORY NO. 13:

7 Objection. APCO objects to this Interrogatory on the grounds that this Interrogatory is  
8 overly broad, unduly burdensome and oppressive because it seeks to force APCO to identify  
9 "each and every fact" that APCO relied upon to support its position "that the damages sustained  
10 by Zitting Brothers are the result of the acts, omission to act, or negligence of Zitting Brothers or  
11 third party(ies) over whom APCO has no control as asserted in your Fourth Affirmative  
12 Defense". Broad ranging written discovery is improper when it essentially subsumes every fact  
13 in the case. See Hiskett v. Wal-Mart Stores, Inc., 180 F.R.D. 403, 404 (D. Kan. 1998); Safeco of  
14 Am. V. Rawstron, 181 F.R.D. 441, 447048 (C.D. Cal. 1998); Lawrence v. First Kan. Bank &  
15 Trust Co., 169 F.R.D. 657, 660-63 (D. Kan. 1996)(same); Hilt v. SFC, Inc., 170 F.R.D. 182, 186-  
16 87 (D. Kan. 1997). APCO further objects to this Interrogatory on the grounds of attorney client  
17 privilege and/or attorney work product. APCO further objects that this Interrogatory is  
18 premature, as discovery has just commenced on this matter and APCO has not yet identified all  
19 facts that it intends to use relative the Zitting Brothers' action.

20 Subject to and without waiving any objections, See Response to Interrogatory No. 1, 6,  
21 and 7 above, which are incorporated herein by this reference. Also, see documents identified by  
22 Bate Stamp No. APC000000001<sup>6</sup> through APC000078992 and APCO104200 through 104234,  
23 which APCO has deposited into a depository established by APCO for this litigation matter with  
24 Litigation Services and/or are hereby made available for review and copying (at requestor's  
25 expense) at a mutually agreeable time and place. Discovery is ongoing. APCO reserves the right  
26 to supplement or amend its Response to this Interrogatory as investigation, discovery, disclosure

27 <sup>6</sup> See Footnote No. 1.  
28

1 and analysis continues.

2 **INTERROGATORY NO. 14:**

3 State each and every fact that you rely on to support your position that damages sustained  
4 by Zitting Brothers were caused solely by a breach of contract, breach of warranty, expressed  
5 and implied, and acts or omissions of Zitting Brothers or some third party(ies) over whom APCO  
6 had no control as asserted in your Fourth Affirmative Defense.

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

8 Objection. APCO objects to this Interrogatory on the grounds that Interrogatory is overly  
9 broad, unduly burdensome and oppressive because it seeks to force APCO to identify "each and  
10 every fact" that APCO relied upon to support its position "that damages sustained by Zitting  
11 Brothers were caused solely by a breach of contract, breach of warranty, expressed and implied,  
12 and acts or omissions of Zitting Brothers or some third party(ies) over whom APCO had no  
13 control as asserted in your Fourth Affirmative Defense". Broad ranging written discovery is  
14 improper when it essentially subsumes every fact in the case. See Hiskett v. Wal-Mart Stores,  
15 Inc., 180 F.R.D. 403, 404 (D. Kan. 1998); Safeco of Am. V. Rawstron, 181 F.R.D. 441, 447048  
16 (C.D. Cal. 1998); Lawrence v. First Kan. Bank & Trust Co., 169 F.R.D. 657, 660-63 (D. Kan.  
17 1996)(same); Hilt v. SFC, Inc., 170 F.R.D. 182, 186-87 (D. Kan. 1997). APCO further objects to  
18 this Interrogatory on the grounds of attorney client privilege and/or attorney work product.  
19 APCO further objects that this Interrogatory is premature, as discovery has just commenced on  
20 this matter and APCO has not yet identified all facts that it intends to use relative the Zitting  
21 Brothers' action.

22 Subject to and without waiving any objections, See Response to Interrogatory No. 1, 6,  
23 and 7 above, which are incorporated herein by this reference. Also, see documents identified by  
24 Bate Stamp No. APC000000001<sup>7</sup> through APC000078992 and APCO104200 through 104234,  
25 which APCO has deposited into a depository established by APCO for this litigation matter with  
26 Litigation Services and/or are hereby made available for review and copying (at requestor's

27 <sup>7</sup> See Footnote No. 1.  
28

1 expense) at a mutually agreeable time and place. Discovery is ongoing. APCO reserves the right  
2 to supplement or amend its Response to this Interrogatory as investigation, discovery, disclosure  
3 and analysis continues.

4 **INTERROGATORY NO. 15:**

5 State each and every fact that you rely on to support your position that Zitting Brothers  
6 claims have been waived as a result of Zitting Brothers' respective acts and conduct as asserted  
7 in your Second Affirmative Defense.

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

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

21 Subject to and without waiving any objections, See Response to Interrogatory No. 1, 6,  
22 and 7 above, which are incorporated herein by this reference. Also, see documents identified by  
23 Bate Stamp No. APC000000001<sup>8</sup> through APC000078992 and APCO104200 through 104234,  
24 which APCO has deposited into a depository established by APCO for this litigation matter with  
25 Litigation Services and/or are hereby made available for review and copying (at requestor's  
26 expense) at a mutually agreeable time and place. Discovery is ongoing. APCO reserves the right

27 <sup>8</sup> See Footnote No. 1.  
28

1 to supplement or amend its Response to this Interrogatory as investigation, discovery, disclosure  
2 and analysis continues.

3 **INTERROGATORY NO. 16:**

4 State each and every fact that you rely on to support your position that Zitting Brothers'  
5 claims are premature as asserted in your Thirteenth Affirmative Defense.

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

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

19 Subject to and without waiving any objections, See Response to Interrogatory No. 1, 6,  
20 and 7 above, which are incorporated herein by this reference. Also, see documents identified by  
21 Bate Stamp No. APC000000001<sup>9</sup> through APC000078992 and APCO104200 through 104234,  
22 which APCO has deposited into a depository established by APCO for this litigation matter with  
23 Litigation Services located at and/or are hereby made available for review and copying (at  
24 requestor's expense) at a mutually agreeable time and place. Discovery is ongoing. APCO  
25 reserves the right to supplement or amend its Response to this Interrogatory as investigation,  
26 discovery, disclosure and analysis continues.

27 <sup>9</sup> See Footnote No. 1.  
28

1 **INTERROGATORY NO. 17:**

2 State each and every fact that you rely on to support your position that Zitting Brothers'  
3 claims for relief against Gemstone are barred by Zitting Brothers' prior breach of contract  
4 including the failure to perform any conditions precedent or conditions subsequent as asserted in  
5 your Twelfth Affirmative Defense.

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

7 Objection. APCO objects to this Interrogatory on the grounds that this Interrogatory is  
8 overly broad, unduly burdensome and oppressive because it seeks to force APCO to identify  
9 "each and every fact" that APCO relied upon to support its position "that Zitting Brothers'  
10 claims for relief against Gemstone are barred by Zitting Brothers' prior breach of contract  
11 including the failure to perform any conditions precedent or conditions subsequent as asserted in  
12 your Twelfth Affirmative Defense." Broad ranging written discovery is improper when it  
13 essentially subsumes every fact in the case. See Hiskett v. Wal-Mart Stores, Inc., 180 F.R.D.  
14 403, 404 (D. Kan. 1998); Safeco of Am. V. Rawstron, 181 F.R.D. 441, 447048 (C.D. Cal. 1998);  
15 Lawrence v. First Kan. Bank & Trust Co., 169 F.R.D. 657, 660-63 (D. Kan. 1996)(same); Hilt v.  
16 SFC, Inc., 170 F.R.D. 182, 186-87 (D. Kan. 1997). APCO further objects to this Interrogatory on  
17 the grounds of attorney client privilege and/or attorney work product. APCO further objects that  
18 this Interrogatory is premature, as discovery has just commenced on this matter and APCO has  
19 not yet identified all facts that it intends to use relative the Zitting Brothers' action.

20 Subject to and without waiving any objections, See Response to Interrogatory No. 1, 6,  
21 and 7 above, which are incorporated herein by this reference. Also, see documents identified by  
22 Bate Stamp No. APC000000001<sup>10</sup> through APC000078992 and APCO104200 through 104234,  
23 which APCO has deposited into a depository established by APCO for this litigation matter with  
24 Litigation Services and/or are hereby made available for review and copying (at requestor's  
25 expense) at a mutually agreeable time and place. Discovery is ongoing. APCO reserves the right  
26 to supplement or amend its Response to this Interrogatory as investigation, discovery, disclosure

27 <sup>10</sup> See Footnote No. 1.  
28



1 and analysis continues.

2 **INTERROGATORY NO. 18:**

3 State each and every fact that you rely on to support your claim that Zitting Brothers  
4 failed to comply with the requirements contained in NRS Chapter 108 and thus does not have a  
5 valid and enforceable lien against the property at issue as asserted in your Nineteenth  
6 Affirmative Defense

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

8 Objection. APCO objects to this Interrogatory on the grounds that this Interrogatory is  
9 overly broad, unduly burdensome and oppressive because it seeks to force APCO to identify  
10 "each and every fact" that APCO relied upon to support its position "that Zitting Brothers failed  
11 to comply with the requirements contained in NRS Chapter 108 and thus does not have a valid  
12 and enforceable lien against the property at issue as asserted in your Nineteenth Affirmative  
13 Defense." Broad ranging written discovery is improper when it essentially subsumes every fact  
14 in the case. See Hiskett v. Wal-Mart Stores, Inc., 180 F.R.D. 403, 404 (D. Kan. 1998); Safeco of  
15 Am. V. Rawstron, 181 F.R.D. 441, 447048 (C.D. Cal. 1998); Lawrence v. First Kan. Bank &  
16 Trust Co., 169 F.R.D. 657, 660-63 (D. Kan. 1996)(same); Hilt v. SFC, Inc., 170 F.R.D. 182, 186-  
17 87 (D. Kan. 1997). APCO further objects to this Interrogatory on the grounds of attorney client  
18 privilege and/or attorney work product. APCO further objects that this Interrogatory is  
19 premature, as discovery has just commenced on this matter.

20 Subject to and without waiving any objections, APCO responds as follows: 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. 19:**

24 Identify and describe any and all complaints you made either verbally or in writing  
25 regarding the quality of work, materials, and/or equipment furnished by Zitting Brothers at the  
26 Project prior to the initiation of this lien action.

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

28 Objection. APCO objects to this Interrogatory on the grounds that this Interrogatory is

1 vague, ambiguous, overly broad, unduly burdensome and oppressive because it seeks to force  
2 APCO to identify "all complaints you have regarding the quality of work materials, and/or  
3 equipment furnished by Zitting Brothers at the Project." Broad ranging interrogatories are  
4 improper when they essentially subsume every fact in the case or every person having  
5 knowledge. See Hiskett v. Wal-Mart Stores, Inc., 180 F.R.D. 403, 404 (D. Kan. 1998).  
6 ("Interrogatories should not require the answering party to provide a narrative account of its  
7 case."). Parties can hardly know when they have identified "all" facts, persons, and documents  
8 with respect to anything — particularly before the close of discovery. "How can the court make  
9 enforceable orders with reference to 'all' of anything?" Often, the relevance of a particular fact  
10 to a particular issue is not known until clarified and put into context by testimony at deposition  
11 or trial. Such a question places the responding party in an impossible position. See id.; Safeco of  
12 Am. V. Rawstron, 181 F.R.D. 441, 447048 (C.D. Cal. 1998)(finding unreasonable an  
13 interrogatory calling for all facts supporting denial of a request for admission); Lawrence v. First  
14 Kan. Bank & Trust Co., 169 F.R.D. 657, 660-63 (D. Kan. 1996)(same); Hilt v. SFC, Inc., 170  
15 F.R.D. 182, 186-87 (D. Kan. 1997)(finding unduly burdensome an interrogatory seeking to  
16 require plaintiff to state 'each and every fact' supporting allegations of a complaint).

17 Subject to, and without waiving the foregoing objections, Gemstone has asserted various  
18 complaints about the quality of the work performed by APCO and its subcontractors. As of this  
19 time, Gemstone has not identified specific issues that Gemstone has with APCO's or its  
20 subcontractor's work, including that of Zitting Brothers. However, as a result of Gemstone's  
21 assertions that there are issues with the quality of the work performed on the Project, Gemstone  
22 has failed to pay APCO for the work that APCO performed including the work that was  
23 performed by Zitting Brothers. Discovery is ongoing. APCO reserves the right to supplement or  
24 amend its response to this Interrogatory as investigation, discovery, disclosure and analysis  
25 continues.

26 ...

27 ...

28 ...