

Steven D. Grierson

1 DECN

DISTRICT COURT

2 CLARK COUNTY, NEVADA

3
4 APCO CONSTRUCTION, a Nevada
corporation,

5 Plaintiff(s),

6 vs.

7
8 GEMSTONE DEVELOPMENT WEST, INC., a
Nevada corporation, et al.,

9 Defendant(s).

10 AND ALL RELATED CLAIMS.

) CASE NO. A571228

) DEPT. NO. XIII

) (Consolidated with A574391;

) A574792; A577623; A580889;

) A583289; A584730; A587168;

) A589195; A592826; A596924;

) A597089; A606730; A608717;

) A608718)

11
12 **DECISION**

13 THIS MATTER having come before the Court on November 16,
14 2017 for hearing on "Zitting Brothers Construction, Inc.'s Motion
15 for Partial Summary Judgment Against APCO Construction," with
16 appearances as noted in the Minutes and to be reflected in the
17 proposed order to be submitted as directed hereinbelow;

18 AND, the Court having heard the argument of counsel and
19 having then taken such items under advisement for further
20 consideration, and being now fully advised in the premises;

21 NOW, THEREFORE, the Court decides the submitted issues
22 as follows:

23
24 The subject Motion has been well briefed and argued with
25 the parties' contentions. In the interest of time, the Court will
26 make its ruling with instructions hereinbelow to counsel to submit
27 a proposed order consistent with the briefing and argument
28

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NOV 27 2017
CLERK OF THE COURT
MARK R. DENTON
DISTRICT JUDGE

DEPARTMENT THIRTEEN
LAS VEGAS, NV 89155

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supportive of the same.

The "pay-if-paid" aspect of Zitting's Motion has been the subject of another recent Decision of the Court. However, putting that aspect of the Motion aside, the Court still has before it the question of whether there are genuine issues going to breach of contract related to Zitting's performance of the same.

The Court is persuaded that, in what is one of the oldest cases pending in this Court, what APCO has provided is "too little too late." It is simply unfair to require Zitting to address supposed issues that have been drawn out at the last minute.

All things considered, the subject Motion is GRANTED in its entirety.

Counsel for Zitting is directed to submit a proposed order consistent with the foregoing and which sets forth the underpinnings of the same in accordance herewith and with the aspects of counsel's briefing and argument supportive of the same. Such proposed order should be submitted to opposing counsel for review and signification of approval/disapproval. Instead of seeking to clarify or litigate meaning or any disapproval through correspondence directed to the Court or to counsel with copies to the Court, any such clarification or disapproval should be the subject of appropriate motion practice.

This Decision sets forth the Court's intended disposition
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1 on the subject, but it anticipates further order of the Court to
2 make such disposition effective as an order or judgment.

3 DATED this 21st day of November, 2017.

4
5 
6 MARK R. DENTON
7 DISTRICT JUDGE

8 **CERTIFICATE**

9 I hereby certify that on or about the date filed, this
10 document was Electronically Served to the Counsel on Record on the
11 Clark County E-File Electronic Service List.

12
13 
14 LORRAINE TASHIRO
15 Judicial Executive Assistant
16 Dept. No. XIII
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**DISTRICT COURT
CLARK COUNTY, NEVADA**

Business Court**COURT MINUTES****December 05, 2017**

08A571228 Apco Construction, Plaintiff(s)
 vs.
 Gemstone Development West Inc, Defendant(s)

December 05, 2017 5:03 PM Minute Order

HEARD BY: Denton, Mark R. **COURTROOM:** RJC Courtroom 03D

COURT CLERK: Marwanda Knight

PARTIES No parties present. Minute Order only - no hearing held.
PRESENT:

JOURNAL ENTRIES

HAVING further reviewed "Zitting Brothers Construction, Inc.'s Motion in Limine to Limit the Defenses of Apco Construction to the Enforceability of Pay-if-Paid Provision" and the Opposition thereto, coming before the Court on November 16, 2017 and then taken under advisement, the Court GRANTS the Motion as it is persuaded by the same.

Counsel for the Zitting Brothers is directed to submit a proposed order consistent herewith and with its briefing/argument. Such proposed order should be submitted to opposing counsel for review and signification of approval/disapproval. Instead of seeking to clarify or litigate meaning or any disapproval through correspondence directed to the Court or to counsel with copies to the Court, any such clarification or disapproval should be the subject of appropriate motion practice.

IT IS SO ORDERED.

CLERK'S NOTE: The above minute order has been distributed via the E-Service Master List.

Steven D. Grierson

1 **FFCO**
2 JORGE A. RAMIREZ, ESQ.
3 Nevada Bar No. 6787
4 I-CHE LAI, ESQ.
5 Nevada Bar No. 12247
6 WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP
7 300 South 4th Street, 11th Floor
8 Las Vegas, NV 89101-6014
9 Telephone: (702) 727-1400
10 Facsimile: (702) 727-1401
11 Jorge.Ramirez@wilsonelser.com
12 I-Che.Lai@wilsonelser.com
13 Attorneys for Lien Clamant,
14 Zitting Brothers Construction, Inc.

9 **DISTRICT COURT**
10 **CLARK COUNTY, NEVADA**

11 APCO CONSTRUCTION, a Nevada
12 corporation,

13 Plaintiff,

14 vs.

15 GEMSTONE DEVELOPMENT WEST, INC.,
16 a Nevada corporation,

17 Defendant.

18 AND ALL RELATED MATTERS

CASE NO. A571228
DEPT. NO. XIII

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

Hearing Date: November 16, 2017
Hearing Time: 9:00 a.m.

19 **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER GRANTING ZITTING**

20 **BROTHERS CONSTRUCTION, INC.'S MOTION FOR PARTIAL SUMMARY**

21 **JUDGMENT AGAINST APCO CONSTRUCTION**

22 On November 16, 2017, this Court heard Zitting Brothers Construction, Inc.'s Motion for
23 Partial Summary Judgment Against APCO Construction. Jorge A. Ramirez and I-Che Lai of Wilson
Elser Moskowitz Edelman & Dicker, LLP appeared at the hearing for Zitting Brothers Construction,
Inc. ("ZBCI"). John Randall Jefferies of Spencer Fane LLP and Cody S. Mounteer of Marquis
Aurbach Coffing appeared for APCO Construction, Inc. ("APCO"). Having considered ZBCI's
motion, the pleadings and papers filed in this case, and oral arguments of counsel, this Court makes
the following findings of fact and conclusions of law.

//

1236578v.2

Case Number: 08A571228

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DISTRICT COURT DEPT#13

AA 003239

1 **FINDINGS OF FACT**

2 **A. APCO's Subcontract with ZBCI**

3 1. Around September 6, 2007, Gemstone Development West, Inc. ("Gemstone") and
4 APCO entered into the ManhattanWest – General Construction Agreement for GMP ("Prime
5 Contract"). Under the Prime Contract, APCO would serve as the general contractor for the
6 ManhattanWest mixed-use development project located at the following Assessor's Parcel Numbers
7 in Clark County, Nevada: 163-32-101-003, 163-32-101-004, 163-32-101-005, 163-32-101-010, and
8 162-32-101-014 (the "Project").

9 2. Around November 17, 2007, APCO and ZBCI entered into a Subcontract Agreement
10 ("Subcontract"). Under the Subcontract, ZBCI would provide framing materials and labor for the
11 Project.

12 3. The Subcontract requires APCO to pay ZBCI 100% of the value of the work
13 completed on a periodic basis—less 10% retention of the value (the "Retention")—only after APCO
14 receives actual payments from Gemstone.

15 4. The Subcontract requires APCO to pay ZBCI the Retention amount for each building
16 of the Project upon (a) the completion of each building; (b) Gemstone's approval of ZBCI's work on
17 the completed building; (c) APCO's receipt of final payment from Gemstone; (d) ZBCI's delivery to
18 APCO all "as-built drawings for [ZBCI]'s scope of work and other close out documents"; and (e)
19 ZBCI's delivery to APCO a release and waiver of claims from ZBCI's "labor, materials and
20 equipment suppliers, and subcontractors providing labor, materials[,] or services to the Project...."
21 The Subcontract deems work on a building to be "complete" as soon as "drywall is completed" for
22 the building.

23 5. Alternatively, if the Prime Contract is terminated, the Subcontract requires APCO to
24 pay ZBCI the amount due for ZBCI's completed work after receipt of payment from Gemstone.

25 6. The conditions precedent of the Subcontract requiring APCO's payment only upon
26 receipt of payment from Gemstone are colloquially known as "pay-if-paid provisions."

27 7. The Subcontract only allows APCO to terminate—with written notice to ZBCI and
28 with cause—the Subcontract for non-performance.

1 8. If any party to the Subcontract "institute[s] a lawsuit ... for any cause arising out of
2 the Subcontract..." the Subcontract expressly authorizes the prevailing party to recover "all costs,
3 attorney's fees[,] and any other reasonable expenses incurred" in connection with the lawsuit. The
4 Subcontract does not provide a rate of interest that would accrue on the amount owed under the
5 Subcontract.

6 9. If any term of the Subcontract is void under Nevada law, the Subcontract expressly
7 provides that the void term would not affect the enforceability of the remainder of the contract.

8 **B. ZBCI's Work under the Subcontract**

9 10. Around November 19, 2007, ZBCI began its scope of work under the Subcontract.

10 11. The Prime Contract was terminated in August 2008, and the Project had shut down on
11 December 15, 2008. APCO never provided ZBCI with a written notice of termination with cause for
12 non-performance.

13 12. Prior to the Project's shutdown, ZBCI submitted written requests to APCO for change
14 orders valued at \$423,654.85. APCO did not provide written disapproval of those change orders to
15 ZBCI within 30 days of each request.

16 13. Also prior to the Project's shutdown, ZBCI had completed its scope of work on
17 Buildings 8 and 9 of the Project, including work on the change orders, without any complaints on the
18 timing or quality of the work. ZBCI had submitted close-out documents for its work, including
19 release of claims for ZBCI's vendors. The value of ZBCI's completed work amounted to
20 \$4,033,654.85.

21 14. At the time of the Project's shutdown, the drywall was completed for Buildings 8 and
22 9.

23 15. To date, ZBCI had only received \$3,282,849.00 for its work on the Project. ZBCI had
24 completed work in the amount of \$347,441.67 on the change orders and \$403,365.49 of the
25 Retention—totaling \$750,807.16— which remains unpaid.

26 16. ZBCI demanded APCO pay the \$750,807.16 still owed on the contract. However,
27 APCO refused to do so, causing ZBCI to initiate proceedings to recover the requested amount.

28

1 **C. Procedural History**

2 17. On January 14, 2008, ZBCI served its Notice of Right to Lien to APCO and
3 Gemstone via certified mail.

4 18. On December 5, 2008, ZBCI served its Notice of Intent to Lien to APCO and
5 Gemstone via certified mail.

6 19. On December 23, 2008, ZBCI recorded its Notice of Lien on the Project with a lien
7 amount of \$788,405.41 and served this document on APCO and Gemstone via certified mail on
8 December 24, 2008.

9 20. On April 30, 2009, ZBCI filed a complaint against Gemstone and APCO and a Notice
10 of Lis Pendens. The complaint alleged 6 claims: (a) breach of contract, (b) breach of implied
11 covenant of good faith and fair dealing, (c) unjust enrichment, (d) violation of Chapter 108 of the
12 Nevada Revised Statutes, (e) claim for priority, and (f) violation of Chapter 624 of the Nevada
13 Revised Statutes.

14 21. On June 10, 2009, APCO answered ZBCI's complaint. APCO's answer alleged 20
15 affirmative defenses, including the tenth affirmative defense alleging that APCO's obligation to
16 ZBCI had been satisfied or excused and the twelfth affirmative defense alleging that ZBCI's failure
17 to satisfy conditions precedent barred ZBCI's breach of contract claim.

18 22. Around June 16, 2009, ZBCI provided a Notice of Foreclosure of Mechanic's Lien,
19 and this notice was published in accordance with Nev. Rev. Stat. 108.239.

20 23. On April 7, 2010, ZBCI recorded its Amended Notice of Lien with a lien amount of
21 \$750,807.16 and served this document on APCO and Gemstone via certified mail around the same
22 date.

23 24. APCO does not dispute that ZBCI complied with all requirements to create, perfect,
24 and foreclose on its lien under Chapter 108.

25 25. On April 29, 2010, APCO responded to ZBCI's interrogatories that requested, *inter*
26 *alia*, APCO's explanation for refusing payment to ZBCI and APCO's grounds for the tenth and
27 twelfth affirmative defenses. ZBCI had sent those interrogatories to obtain more details about
28 APCO's defenses against ZBCI's complaint and to narrow the issues for discovery and trial.

1 APCO's interrogatory responses indicated that APCO would rely solely on the enforceability of the
2 pay-if-paid provision in the Subcontract to excuse payment to ZBCI.

3 26. On April 23, 2013, this Court authorized the sale of the Project free and clear of all
4 liens, including liens arising under Chapter 108 of the Nevada Revised Statutes. The sale resulted in
5 the distribution of the entire net proceeds from the sale to Scott Financial Corporation (the "Lender")
6 upon the Nevada Supreme Court's determination that the Lender's claim to the net proceeds is
7 superior to the Chapter 108 lien claimants' claim.

8 27. On April 12, 2017, ZBCI served APCO with a set of interrogatories that are similar to
9 the ones served in 2010. This set of interrogatories again requested, *inter alia*, APCO's explanation
10 for refusing payment to ZBCI and APCO's grounds for the tenth and twelfth affirmative defenses.
11 ZBCI sent those interrogatories to confirm APCO's prior discovery responses on APCO's defenses
12 against ZBCI's complaint.

13 28. On May 12, 2017, APCO responded to ZBCI's interrogatories that again indicated
14 APCO's sole reliance on the enforceability of the pay-if-paid provision in the Subcontract to excuse
15 payment to ZBCI.

16 29. On June 5, 2017, ZBCI deposed APCO's Nev. R. Civ. P. 30(b)(6) witness regarding
17 APCO's affirmative defenses. At the deposition, APCO's Nev. R. Civ. P. 30(b)(6) witness declined
18 to update APCO's interrogatory responses and re-affirmed APCO's sole reliance on the
19 enforceability of the pay-if-paid provision to excuse payment.

20 30. On July 19, 2017, ZBCI deposed APCO's Nev. R. Civ. P. 30(b)(6) witness regarding
21 topics pertaining to APCO's accounting for the Project. At the deposition, APCO's Nev. R. Civ. P.
22 30(b)(6) witness again declined to update APCO's interrogatory responses.

23 31. APCO did not supplement its discovery responses prior to the June 30, 2017
24 discovery cutoff.

25 32. On July 31, 2017 and after the close of discovery, ZBCI moved for summary
26 judgment against APCO on ZBCI's breach of contract and Nev. Rev. Stat. 108 claim—setting forth
27 ZBCI's prima facie case for those claims and addressing the enforceability of the pay-if-paid
28 provision in the Subcontract.

33. On August 21, 2017, APCO filed its opposition to ZBCI's motion, arguing—for the first time—other grounds for refusing payment of the amount owed to ZBCI. ZBCI objected to the admissibility of the evidence in support of APCO's opposition.

34. APCO's refusal to pay ZBCI the amount owed under the Subcontract had compelled ZBCI to incur attorney's fees and costs to collect the amount owed.

CONCLUSIONS OF LAW

A. Burden of Proof

1. Summary judgment is appropriate “when the pleadings, depositions, answers to interrogatories, admissions, and affidavits, if any, that are properly before the court demonstrate that no genuine issue of material fact exists, and the moving party is entitled to judgment as a matter of law.” *Cuzze v. Univ. & Cmty. Coll. Sys. of Nevada*, 123 Nev. 598, 602, 172 P.3d 131, 134 (2007).

2. As the party moving for summary judgment, ZBCI bears the initial burden of production to show the absence of a genuine issue of material fact. *Id.* ZBCI also bears the burden of persuasion at trial on its breach of contract and Chapter 108 claims and therefore must present evidence that would entitle it to a judgment as a matter of law on those two claims in the absence of contrary evidence. *See id.*

B. APCO's Breach of the Subcontract

3. To establish a breach of contract under Nevada law, ZBCI must provide admissible evidence of (1) the existence of a valid contract, (2) a breach by APCO, and (3) damage as a result of the breach. *See Richardson v. Jones*, 1 Nev. 405, 408 (1865). In this case, this Court concludes that ZBCI has presented sufficient admissible evidence on all elements of a breach of contract.

4. The Subcontract between the respective parties is a valid contract. However, as discussed in this Court's separate decision regarding the enforceability of the Subcontract's "pay-if-paid provisions," the pay-if-paid provisions are against public policy and are void and unenforceable under Nev. Rev. Stat. 624.628(e). The remaining terms of the Subcontract remain enforceable.

5. Nev. Rev. Stat. 624.626(3) automatically approves written requests for change orders unless the higher-tiered contractor denies the requests in writing within 30 days after the lower-tiered contractor submits the requests. Here, this Court concludes that because ZBCI did not receive any

1 written denials of its change order requests within 30 days of request, ZBCI's change order requests
2 amounting to \$347,441.67 were approved by operation of law. ZBCI is therefore entitled to payment
3 in the amount of \$347,411.67 for all of the change orders submitted.

4 6. Under Nevada law, compliance with a valid condition precedent requires only
5 substantial performance. *See, e.g., Laughlin Recreational Enterprises, Inc. v. Zab Dev. Co., Inc.*, 98
6 Nev. 285, 287, 646 P.2d 555, 556–57 (1982). ZBCI proved at least substantial compliance with the
7 conditions precedent for payment of the Retention, entitling ZBCI to payment of \$403,365.49 for the
8 Retention.

9 7. Alternatively, by the very terms of the Subcontract itself, the termination of the Prime
10 Contract automatically entitles ZBCI to payment of \$403,365.49 for the Retention and \$347,441.67
11 for the completed work on the change orders. This Subcontract language—exclusive of the void pay-
12 if-paid provisions—coincides with a prime contractor's obligations to pay its subcontractors
13 pursuant to Nev. Rev. Stat. 624.626(6).

14 8. APCO breached the Subcontract by refusing to pay ZBCI all of the amount owed for
15 the Retention and the change orders, and as a result ZBCI is entitled to judgment on its Complaint as
16 a matter of law. This gives rise to \$750,807.16 in damages, exclusive of attorney's fees, costs, and
17 interest.

18 **C. ZBCI's Nev. Rev. Stat. 108 Claim**

19 9. There is no dispute that ZBCI complied with the requirements for enforcing its lien
20 rights under Chapter 108 of the Nevada Revised Statutes.

21 10. Nev. Rev. Stat. 108.239(12) entitles ZBCI to a "personal judgment for the residue
22 against" APCO.

23 11. Because ZBCI did not receive any of the proceeds from the Nev. Rev. Stat. 108 sale
24 of the Project, there is no genuine issue that ZBCI is entitled to a personal judgment under Nev. Rev.
25 Stat. 108.239 against APCO for \$750,807.16 as the lienable amount, plus any reasonable attorney's
26 fees, costs, and statutory interest that the Court may award.

1 **D. Preclusion of APCO's Defenses**

2 12. This Court has considered APCO's arguments in response to ZBCI's motion for
3 summary judgment and concluded that the arguments have no merit.

4 13. As discussed above, the pay-if-paid provisions in the Subcontract is unenforceable
5 and therefore cannot excuse APCO's payment of the amount owed to ZBCI.

6 14. If APCO wanted to assert other grounds for refusing payment to ZBCI, Nev. R. Civ.
7 P. 26(e)(2) required APCO to seasonably amend its prior interrogatory responses to include grounds
8 for refusal other than the enforceability of the pay-if-paid provision. Pursuant to Nev. Rev. Stat.
9 37(c)(1) and *Pizarro-Ortega v. Cervantes-Lopez*, 133 Nev. Adv. Op. 37, 396 P.3d 783, 787 (2017),
10 APCO's failure to seasonably amend precludes APCO from asserting any other defenses "at a trial,
11 at a hearing, or on a motion" unless APCO substantially justifies this failure or such failure is
12 harmless to ZBCI.

13 15. The facts of this case are clear and uncontested. APCO was aware of its alleged
14 grounds for refusing payment of the \$750,807.16 owed to ZBCI before ZBCI filed its complaint
15 against APCO. APCO could have asserted its other defenses, other than its belief in the
16 enforceability of the pay-if-paid provision, at the time it served its April 29, 2010 responses to
17 ZBCI's interrogatories. In any event, several extensions to discovery were granted in this case even
18 up to a few weeks before dispositive motions were filed. APCO had ample opportunities to
19 seasonably amend or supplement its discovery responses to assert additional defenses against paying
20 ZBCI the amount owed under the Subcontract.

21 16. Yet, APCO failed to explain why during the seven years of litigation between APCO
22 and ZBCI, it did not disclose any defenses other than its belief in the enforceability of the pay-if-paid
23 provision. For example, APCO did not explain its decision to omit the other defenses in its April 29,
24 2010 responses to ZBCI's interrogatories and May 12, 2017 responses to ZBCI's interrogatories.
25 APCO also did not explain why it did not amend or supplement its discovery responses with the
26 other defenses during discovery.

27 17. ZBCI reasonably relied on APCO's interrogatory responses to formulate its litigation
28 plan, which included decisions to avoid certain discovery. For example, ZBCI limited its discovery

1 to taking APCO's Nev. R. Civ. P. 30(b)(6) depositions with truncated questioning. ZBCI also filed
2 its motion for summary judgment that focused on the enforceability of the pay-if-paid provisions.

3 18. By raising defenses other than the enforceability of the pay-if-paid provisions for the
4 first time in its opposition to ZBCI's motion for summary judgment, APCO has prejudiced ZBCI.
5 The late defenses have prevented ZBCI from conducting discovery at a time when relevant
6 information is available and fresh in witnesses' mind. APCO's prejudicial actions also forced ZBCI
7 to incur time and costs to conduct discovery based on incomplete information.

8 19. APCO's late defenses are not justified and are extremely prejudicial to ZBCI. Those
9 defenses are now too little, too late. Under Nev. R. Civ. P. 37(c)(1), APCO cannot introduce any
10 evidence to support any defenses against ZBCI's claims because its prejudicial discovery responses
11 only claimed that it relied on the void pay-if-paid provisions.

12 20. Due to the preclusion of the other defenses, ZBCI's evidentiary objections regarding
13 those defenses are moot.

14 21. ZBCI is entitled to judgment on its breach of contract claim and its Nev. Rev. Stat.
15 108 claims as a matter of law.

16 **E. Attorney's Fees, Costs, and Interest**

17 22. ZBCI is the prevailing party under the Subcontract and the prevailing lien claimant
18 under Nev. Rev. Stat. 108.237(1).

19 23. Under the Subcontract, ZBCI is entitled to an award of interest, reasonable attorney's
20 fees, and costs incurred to collect the amount owed to ZBCI.

21 24. Under Nev. Rev. Stat. 108.237(1), ZBCI is also entitled to the cost of preparing and
22 recording the notice of lien, the costs of the proceedings, the costs for representation of the lien
23 claimant in the proceedings, and any other costs related to ZBCI's efforts to collect the amount owed
24 against APCO. This includes, without limitation, attorney's fees and interest.

25 25. Nev. Rev. Stat. 108.237(2)(b) provides the calculation of the interest that accrues
26 under the amount awarded under Nev. Rev. Stat. 108.237(1). This interest is equal to the prime rate
27 at the largest bank in Nevada, as ascertained by the Commissioner of Financial Institutions, on
28 January 1 or July 1, as the case may be, immediately preceding the date of judgment, plus 4 percent,

1 on the amount of the lien found payable. The rate of interest must be adjusted accordingly on each
2 January 1 and July 1 thereafter until the amount of the lien is paid.

3 26. Interest is payable from the date on which the payment is found to have been due,
4 which would be December 15, 2008 in this case. Interest will accrue on the lienable amount,
5 attorney's fees, and costs until the entire amount is paid.

6 **ORDER**

7 **THEREFORE, IT IS HEREBY ORDERED** that ZBCI's Motion for Partial Summary
8 Judgment Against APCO Construction is **GRANTED** in its entirety.

9 **IT IS FURTHER ORDERED** that ZBCI is awarded \$750,807.16 (the "Award") on its First
10 Cause of Action (Breach of Contract) and Fourth Cause of Action (Foreclosure of Mechanic's Lien).

11 **IT IS FURTHER ORDERED** that ZBCI's remaining claims—Second Cause of Action
12 (Breach of Implied Covenant of Good Faith & Fair Dealing), Third Cause of Action (Unjust
13 Enrichment or in the Alternative Quantum Meruit), and Seventh Cause of Action (Violation of NRS
14 624)—are moot.

15 **IT IS FURTHER ORDERED** that ZBCI is awarded attorneys' fees and costs incurred in
16 connection with this litigation.

17 **IT IS FURTHER ORDERED** that interest shall accrue on the unpaid amount of the Award
18 from ZBCI's complaint was filed, which was April 30, 2009, to the date the entire amount is paid.

19 **IT IS FURTHER ORDERED** that ZBCI has 30 days from the date of this order to submit a
20 memorandum setting forth its attorney's fees and costs.

21 **IT IS FURTHER ORDERED** that APCO has 30 days after service of the memorandum to
22 submit a response.

23 **IT IS FURTHER ORDERED** that ZBCI has 10 days after APCO's response to submit a
24 reply to the response.

25 **IT IS FURTHER ORDERED** that this Court will address the sole issue of whether ZBCI is
26 entitled to attorney's fees and costs set forth in the memorandum at a hearing before this Court on

27 January 18, 2018 at 9:00 a.m.
28

1 **IT IS FURTHER ORDERED** that this Court will enter final judgment on ZBCI claims
2 upon a decision on the fees and costs—consistent with this Findings of Fact, Conclusions of Law,
3 and Order


4 **IT IS FURTHER ORDERED** that the trial on ZBCI's complaint and all pending hearings
5 associated with ZBCI's complaint are vacated.

6 **IT IS SO ORDERED.**

7 Dated this 26th day of December, 2017.

8 
9
10 DISTRICT COURT JUDGE

11 Respectfully submitted by:

12 
13
14 Jorge A. Ramirez, Esq.
15 I-Che Lai, Esq.
16 **WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP**
17 300 South Fourth Street, 11th Floor
Las Vegas, Nevada 89101
Attorneys for Lien Clamant,
Zitting Brothers Construction, Inc.

18 Approved as to form and content by:

19 declined to sign
20 John H. Mowbray, Esq.
21 John Randall Jefferies, Esq.
22 Mary E. Bacon, Esq.
23 **SPENCER FANE LLP**
300 South Fourth Street, Suite 700
Las Vegas, Nevada 89101

24 and

25 Cody S. Mounteer, Esq.
26 **MARQUIS AURBACH COFFING**
10001 Park Run Drive
Las Vegas, Nevada 89145
27 Attorneys for APCO Construction, Inc.
28

ORIGINAL

Steven D. Grierson

ORDR

ERIC B. ZIMBELMAN, ESQ.

Nevada Bar No. 9407

RICHARD L. PEEL, ESQ.

Nevada Bar No. 4359

PEEL BRIMLEY LLP

3333 E. Serene Avenue, Suite 200

Henderson, NV 89074-6571

Telephone: (702) 990-7272

Fax: (702) 990-7273

ezimbelman@peelbrimley.com

rpeel@peelbrimley.com

Attorneys for Various Lien Claimants

DISTRICT COURT

CLARK COUNTY, NEVADA

APCO CONSTRUCTION, a Nevada
corporation,

Plaintiff,

vs.

GEMSTONE DEVELOPMENT WEST, INC.,
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.

CASE NO.: A571228

DEPT. NO.: XIII

Consolidated with:

A571792, A574391, A577623, A580889,
A583289, A584730, and A587168

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

AND ALL RELATED MATTERS.

This matter came on for hearing November 16, 2017, before the Honorable Mark Denton in Dept. 13 on the Peel Brimley Lien Claimants' ("PB Lien Claimants")¹ Motion for Partial Summary Judgment Precluding Defenses Based on Pay-if-Paid Agreements ("the Motion"). Joinders were filed by Zitting Brothers, Construction, Inc., William A. Leonard/Interstate Plumbing and Air Conditioning LLC, National Wood Products, Inc., E&E Fire Protection LLC, and United Subcontractors, Inc. (collectively, "the Joining

¹ The Peel Brimley Lien Claimants are: Cactus Rose Construction, Fast Glass Inc., Heinaman Contract Glazing, Helix Electric of Nevada, LLC, SWPPP Compliance Solutions, LLC, and Buchele, Inc. The Peel Brimley law firm has since withdrawn from representation of Buchele, Inc.

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

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DISTRICT COURT DEPT# 13

1 Subcontractors”) APCO Construction (“APCO”) and Camco Pacific Construction, Inc.
2 (“Camco”) opposed the Motion. The issues having been well-briefed and argued and the Court
3 being fully advised in the premises, the Court is persuaded that the Motion has merit and should
4 be granted.

5 **A. Findings of Fact.**

6 Specifically, but without limitation, there are no genuine issues of material fact as
7 follows:

8 1. This action arises out of a construction project in Las Vegas, Nevada known as
9 the Manhattan West Condominiums Project (“the Project”) located at West Russell Road and
10 Rocky Hill Street in Clark County Nevada, APNs 163-32-101-003 through 163-32-101-005,
11 163-32-101-010 and 163-32-101-014 (the “Property” and/or “Project”), owned by Gemstone
12 Development West, Inc. (“Gemstone” or the “Owner”).

13 2. The Owner hired APCO and, subsequently, Camco as its general contractors,
14 who in turn entered into subcontract agreements with various subcontractors including the PB
15 Lien Claimants and the Joining Subcontractors. In December 2008 the Owner suspended the
16 Project and advised the various contractors that the Owner’s lender did not expect to disburse
17 further funds for construction. Numerous contractors, including the PB Lien Claimants, the
18 Joining Subcontractors, APCO and Camco recorded mechanic’s liens against the Property.

19 3. After several years of litigation and a Writ Action to determine the priority of the
20 various lienors (during which the Property was sold, the proceeds of the same held in a blocked
21 account and this action was stayed), the Nevada Supreme Court ruled that the Owner’s lenders
22 had priority over the proceeds of the sale of the Property, holding that the NRS Ch. 108
23 mechanic’s liens were junior to the lenders’ deeds of trust. The Court subsequently ordered the
24 proceeds be released to the lender. Thereafter, the stay was lifted and the PB Lien Claimants,
25 Joining Subcontractors and others continued to pursue claims for non-payment from APCO and
26 Camco.

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1 4. APCO and Camco assert defenses to the various subcontractor claims based on
2 so-called "pay-if-paid agreements" (hereinafter referred to generally as "Pay-if-Paid").
3 Specifically but without limitation, APCO and Camco rely on language in the APCO
4 Subcontract Agreement that was adopted by way of a Ratification Agreement between Camco
5 and some of the subcontractors, that APCO and Camco have no obligation to pay the
6 subcontractors for the work materials and equipment they furnished to the Project ("the Work")
7 unless and until the Owner pays APCO and Camco for the Work. APCO and Camco claim that
8 they have not been paid, in whole or in part, for the Work and/or that the Owner by-passed them
9 by making or intending to make payments to subcontractors through a voucher control
10 company, Nevada Construction Services ("NCS"). Among other provisions, APCO and Camco
11 rely upon the following:

12 *3.4 Any payments to Subcontractor shall be conditioned upon receipt of the*
13 *actual payments by Contractor from Owner. Subcontractor herein agrees to*
14 *assume the same risk that the Owner may become insolvent that Contractor*
 has assumed by entering into the Prime Contract with the Owner.

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

19 *3.8 The 10 percent withheld retention shall be payable to Subcontractor upon,*
20 *and only upon the occurrence of all the following events, each of which is a*
21 *condition precedent to Subcontractor's right to receive final payment*
 hereunder and payment of such retention: ... (c) Receipt of final payment by
 Contractor from Owner.

22 *3.9 Subcontractor agrees that Contractor shall have no obligation to pay*
23 *Subcontractor for any changed or extra work performed by Subcontractor*
24 *until or unless Contractor has actually been paid for such Work by the owner.*

25 *4.2 The Owner's payment to Contractor of extra compensation for any such*
26 *suspension, delay, or acceleration shall be a condition precedent to*
27 *Subcontractor's right, if any, to receive such extra compensation from*
 Contractor.

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1 5. Each of these provisions represents or contains Pay-if-Paid such that, if enforced,
2 may allow APCO and Camco to deny payment to their subcontractors for work performed on
3 the grounds that APCO and Camco have not been paid.

4 6. Any finding of fact herein that is more appropriately deemed a conclusion of law
5 shall be treated as such.

6 **B. Conclusions of Law.**

7 As discussed below, Pay-if-Paid is void and unenforceable in Nevada and, as a result,
8 the Motion to Preclude Defenses based on Pay-if-Paid Agreements is GRANTED.

9 1. In 2008 the Nevada Supreme Court declared Pay-if-Paid void and unenforceable
10 as against Nevada's public policy because "Nevada's public policy favors securing payment for
11 labor and material contractors." *Lehrer McGovern Bovis, Inc. v. Bullock Insulation, Inc.*, 124
12 Nev. 1102, 1117-18, 197 P.3d 1032, 1042 (Nev. 2008). The *Bullock* Court noted that "because
13 a pay-if-paid provision limits a subcontractor's ability to be paid for work already performed,
14 such a provision impairs the subcontractor's statutory right to place a mechanic's lien on the
15 construction project." 124 Nev. at 1117 n. 51 (citing *Wm. R. Clarke Corp. v. Safeco Ins. Co.*, 15
16 Cal. 4th 882, 64 Cal. Rptr. 2d 578, 938 P.2d 372, 376 (Cal. 1997))

17 2. Nevada's statutory schemes designed to secure payment to contractors and
18 subcontractors in the construction industry as a whole are remedial. See *Hardy Companies, Inc.*
19 *v. W.E. O'Neil Const. Co.*, 245 P.3d 1149, 1155 (Nev. 2010) (citing *Las Vegas Plywood v. D &*
20 *D Enterprises*, 98 Nev. 378, 380, 649 P.2d 1367, 1368 (1982)). As stated in *Bullock*:

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

28 *Bullock*, 124 Nev. at 1116 (emphasis added).

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1 3. Despite the fact that the *Bullock* decision involved mechanic's liens, the Court
2 rejects as without merit the argument that the public policy rationale of *Bullock* is limited to the
3 concept of security or does not apply when there is no security such as in the present case, where the
4 Property has been sold and the proceeds have been released to senior lienors. Among other things,
5 the term "secured payment" utilized by *Bullock*, at 1116, uses "secured" as an adjective and
6 "payment" as a noun.

7 4. By way of a footnote, the *Bullock* Court noted that the Nevada Legislature
8 "amended NRS Chapter 624 to include the prompt payment provisions contained in NRS 624.624
9 through 624.626. Pay-if-paid provisions entered into subsequent to the Legislature's amendments
10 are enforceable only in limited circumstances and are subject to the restrictions laid out in these
11 sections." 124 Nev. at 1117 n. 50. No such "limited circumstances" exist in this case.

12 5. NRS 624.624(1) provides for the obligation of prompt payment by a higher-tiered
13 contractor (such as APCO and Camco) to a lower-tiered subcontractor (such as the PB Lien
14 Claimants), as follows:

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

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

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

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

22 ↳ whichever is earlier.

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

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

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

↳ whichever is earlier.

NRS 624.624(1) (emphasis added).

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

6. Stated simply, if there is a “schedule of payments” in an otherwise enforceable written agreement, the higher-tiered contractor must pay the lower-tiered subcontractor – at the latest – on the date payment is due. If there is no enforceable written agreement containing a schedule of payments, the payment is due to the lower-tiered subcontractor – at the latest - within 30 days of its request for payment. Under either circumstance it has been approximately nine years since payments on the Project ceased to be made.

6. The Court also rejects the argument that the “schedule of payments” delays the obligation of payment until “within 15 days after Contractor actually receives payment for Subcontractor’s work from Owner.” Because the expiration of 15 days is itself dependent upon payment being received from the Owner, this is not a “schedule of payments” but rather simply another form of Pay-if-Paid.

7. Any conclusion of law herein that is more appropriately deemed a question of fact shall be treated as such.

IT IS THEREFORE ORDERED as follows:

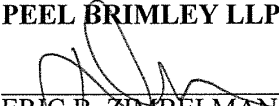
1. The Peel Brimley Lien Claimants’ Motion for Partial Summary Judgment Precluding Defenses Based on Pay-if-Paid Agreements GRANTED; and
2. APCO and Camco may not assert or rely upon any defense to their payment obligations, if any, to the PB Lien Claimants and the Joining Subcontractors that is based on a pay-if-paid agreement.

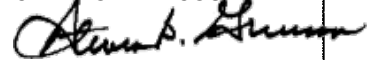
IT IS SO ORDERED this 29th day of December, 2017.


DISTRICT COURT JUDGE

Submitted by:

PEEL BRIMLEY LLP


ERIC B. ZIMBELMAN, ESQ. (9407)
RICHARD L. PEEL, ESQ. (4359)
3333 E. Serene Avenue, Suite 200
Henderson, NV 89074-6571
Attorneys for Various Lien Claimants.



1 **NEO**
2 JORGE A. RAMIREZ, ESQ.
3 Nevada Bar No. 6787
4 I-CHE LAI, ESQ.
5 Nevada Bar No. 12247
6 WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP
7 300 South 4th Street, 11th Floor
8 Las Vegas, NV 89101-6014
9 Telephone: (702) 727-1400
10 Facsimile: (702) 727-1401
11 Jorge.Ramirez@wilsonelser.com
12 I-Che.Lai@wilsonelser.com
13 *Attorneys for Lien Clamant,*
14 *Zitting Brothers Construction, Inc.*

9 **DISTRICT COURT**
10 **CLARK COUNTY, NEVADA**

11 APCO CONSTRUCTION, a Nevada
12 corporation,

13 Plaintiff,

14 vs.

15 GEMSTONE DEVELOPMENT WEST, INC.,
16 a Nevada corporation,

17 Defendant.

18 AND ALL RELATED MATTERS

CASE NO. A571228
DEPT. NO. XIII

Consolidated with:

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


Hearing Date: November 16, 2017
Hearing Time: 9:00 a.m.

19 **NOTICE OF ENTRY OF FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER**
20 **GRANTING ZITTING BROTHERS CONSTRUCTION, INC.'S MOTION FOR PARTIAL**
21 **SUMMARY JUDGMENT AGAINST APCO CONSTRUCTION**

22 PLEASE TAKE NOTICE that an Order was entered in the above entitled action on the 29th
23 day of December, 2017, a true and correct copy of which is attached hereto.

24 Dated this 2nd day of January, 2018.

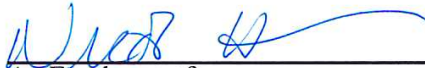
25 **WILSON, ELSER, MOSKOWITZ,**
26 **EDELMAN & DICKER LLP**

27 
28 Jorge A. Ramirez, Esq.
I-Che Lai, Esq.
300 South Fourth Street, 11th Floor
Las Vegas, Nevada 89101
Attorneys for Lien Clamant,
Zitting Brothers Construction, Inc.

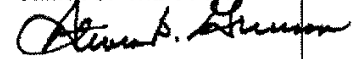
CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of WILSON ELSEER MOSKOWITZ
EDELMAN & DICKER LLP, and that on this 2nd day of January, 2017, I served a true
and correct copy of the foregoing 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; and pursuant to Rule 9 of the N.E.F.C.R.
- ☐ 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.



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



1 **FFCO**
2 JORGE A. RAMIREZ, ESQ.
3 Nevada Bar No. 6787
4 I-CHE LAI, ESQ.
5 Nevada Bar No. 12247
6 WILSON, ELSE, MOSKOWITZ, EDELMAN & DICKER LLP
7 300 South 4th Street, 11th Floor
8 Las Vegas, NV 89101-6014
9 Telephone: (702) 727-1400
10 Facsimile: (702) 727-1401
11 Jorge.Ramirez@wilsonelser.com
12 I-Che.Lai@wilsonelser.com
13 Attorneys for Lien Clamant,
14 Zitting Brothers Construction, Inc.

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11 APCO CONSTRUCTION, a Nevada
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18 AND ALL RELATED MATTERS

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A596924; A584960; A608717; A608718; and
A590319

Hearing Date: November 16, 2017
Hearing Time: 9:00 a.m.

19 **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER GRANTING ZITTING**

20 **BROTHERS CONSTRUCTION, INC.'S MOTION FOR PARTIAL SUMMARY**

21 **JUDGMENT AGAINST APCO CONSTRUCTION**

22 On November 16, 2017, this Court heard Zitting Brothers Construction, Inc.'s Motion for
23 Partial Summary Judgment Against APCO Construction. Jorge A. Ramirez and I-Che Lai of Wilson
Elser Moskowitz Edelman & Dicker, LLP appeared at the hearing for Zitting Brothers Construction,
Inc. ("ZBCI"). John Randall Jefferies of Spencer Fane LLP and Cody S. Munteer of Marquis
Aurbach Coffing appeared for APCO Construction, Inc. ("APCO"). Having considered ZBCI's
motion, the pleadings and papers filed in this case, and oral arguments of counsel, this Court makes
the following findings of fact and conclusions of law.

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1236578v.2

Case Number: 08A571228

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DISTRICT COURT DEPT XIII

AA 003258

1 **FINDINGS OF FACT**

2 **A. APCO's Subcontract with ZBCI**

3 1. Around September 6, 2007, Gemstone Development West, Inc. ("Gemstone") and
4 APCO entered into the ManhattanWest – General Construction Agreement for GMP ("Prime
5 Contract"). Under the Prime Contract, APCO would serve as the general contractor for the
6 ManhattanWest mixed-use development project located at the following Assessor's Parcel Numbers
7 in Clark County, Nevada: 163-32-101-003, 163-32-101-004, 163-32-101-005, 163-32-101-010, and
8 162-32-101-014 (the "Project").

9 2. Around November 17, 2007, APCO and ZBCI entered into a Subcontract Agreement
10 ("Subcontract"). Under the Subcontract, ZBCI would provide framing materials and labor for the
11 Project.

12 3. The Subcontract requires APCO to pay ZBCI 100% of the value of the work
13 completed on a periodic basis—less 10% retention of the value (the "Retention")—only after APCO
14 receives actual payments from Gemstone.

15 4. The Subcontract requires APCO to pay ZBCI the Retention amount for each building
16 of the Project upon (a) the completion of each building; (b) Gemstone's approval of ZBCI's work on
17 the completed building; (c) APCO's receipt of final payment from Gemstone; (d) ZBCI's delivery to
18 APCO all "as-built drawings for [ZBCI]'s scope of work and other close out documents"; and (e)
19 ZBCI's delivery to APCO a release and waiver of claims from ZBCI's "labor, materials and
20 equipment suppliers, and subcontractors providing labor, materials[,] or services to the Project..."
21 The Subcontract deems work on a building to be "complete" as soon as "drywall is completed" for
22 the building.

23 5. Alternatively, if the Prime Contract is terminated, the Subcontract requires APCO to
24 pay ZBCI the amount due for ZBCI's completed work after receipt of payment from Gemstone.

25 6. The conditions precedent of the Subcontract requiring APCO's payment only upon
26 receipt of payment from Gemstone are colloquially known as "pay-if-paid provisions."

27 7. The Subcontract only allows APCO to terminate—with written notice to ZBCI and
28 with cause—the Subcontract for non-performance.

1 8. If any party to the Subcontract "institute[s] a lawsuit ... for any cause arising out of
2 the Subcontract..." the Subcontract expressly authorizes the prevailing party to recover "all costs,
3 attorney's fees[,] and any other reasonable expenses incurred" in connection with the lawsuit. The
4 Subcontract does not provide a rate of interest that would accrue on the amount owed under the
5 Subcontract.

6 9. If any term of the Subcontract is void under Nevada law, the Subcontract expressly
7 provides that the void term would not affect the enforceability of the remainder of the contract.

8 **B. ZBCI's Work under the Subcontract**

9 10. Around November 19, 2007, ZBCI began its scope of work under the Subcontract.

10 11. The Prime Contract was terminated in August 2008, and the Project had shut down on
11 December 15, 2008. APCO never provided ZBCI with a written notice of termination with cause for
12 non-performance.

13 12. Prior to the Project's shutdown, ZBCI submitted written requests to APCO for change
14 orders valued at \$423,654.85. APCO did not provide written disapproval of those change orders to
15 ZBCI within 30 days of each request.

16 13. Also prior to the Project's shutdown, ZBCI had completed its scope of work on
17 Buildings 8 and 9 of the Project, including work on the change orders, without any complaints on the
18 timing or quality of the work. ZBCI had submitted close-out documents for its work, including
19 release of claims for ZBCI's vendors. The value of ZBCI's completed work amounted to
20 \$4,033,654.85.

21 14. At the time of the Project's shutdown, the drywall was completed for Buildings 8 and
22 9.

23 15. To date, ZBCI had only received \$3,282,849.00 for its work on the Project. ZBCI had
24 completed work in the amount of \$347,441.67 on the change orders and \$403,365.49 of the
25 Retention—totaling \$750,807.16— which remains unpaid.

26 16. ZBCI demanded APCO pay the \$750,807.16 still owed on the contract. However,
27 APCO refused to do so, causing ZBCI to initiate proceedings to recover the requested amount.

1 **C. Procedural History**

2 17. On January 14, 2008, ZBCI served its Notice of Right to Lien to APCO and
3 Gemstone via certified mail.

4 18. On December 5, 2008, ZBCI served its Notice of Intent to Lien to APCO and
5 Gemstone via certified mail.

6 19. On December 23, 2008, ZBCI recorded its Notice of Lien on the Project with a lien
7 amount of \$788,405.41 and served this document on APCO and Gemstone via certified mail on
8 December 24, 2008.

9 20. On April 30, 2009, ZBCI filed a complaint against Gemstone and APCO and a Notice
10 of Lis Pendens. The complaint alleged 6 claims: (a) breach of contract, (b) breach of implied
11 covenant of good faith and fair dealing, (c) unjust enrichment, (d) violation of Chapter 108 of the
12 Nevada Revised Statutes, (e) claim for priority, and (f) violation of Chapter 624 of the Nevada
13 Revised Statutes.

14 21. On June 10, 2009, APCO answered ZBCI's complaint. APCO's answer alleged 20
15 affirmative defenses, including the tenth affirmative defense alleging that APCO's obligation to
16 ZBCI had been satisfied or excused and the twelfth affirmative defense alleging that ZBCI's failure
17 to satisfy conditions precedent barred ZBCI's breach of contract claim.

18 22. Around June 16, 2009, ZBCI provided a Notice of Foreclosure of Mechanic's Lien,
19 and this notice was published in accordance with Nev. Rev. Stat. 108.239.

20 23. On April 7, 2010, ZBCI recorded its Amended Notice of Lien with a lien amount of
21 \$750,807.16 and served this document on APCO and Gemstone via certified mail around the same
22 date.

23 24. APCO does not dispute that ZBCI complied with all requirements to create, perfect,
24 and foreclose on its lien under Chapter 108.

25 25. On April 29, 2010, APCO responded to ZBCI's interrogatories that requested, *inter*
26 *alia*, APCO's explanation for refusing payment to ZBCI and APCO's grounds for the tenth and
27 twelfth affirmative defenses. ZBCI had sent those interrogatories to obtain more details about
28 APCO's defenses against ZBCI's complaint and to narrow the issues for discovery and trial.

1 APCO's interrogatory responses indicated that APCO would rely solely on the enforceability of the
2 pay-if-paid provision in the Subcontract to excuse payment to ZBCI.

3 26. On April 23, 2013, this Court authorized the sale of the Project free and clear of all
4 liens, including liens arising under Chapter 108 of the Nevada Revised Statutes. The sale resulted in
5 the distribution of the entire net proceeds from the sale to Scott Financial Corporation (the "Lender")
6 upon the Nevada Supreme Court's determination that the Lender's claim to the net proceeds is
7 superior to the Chapter 108 lien claimants' claim.

8 27. On April 12, 2017, ZBCI served APCO with a set of interrogatories that are similar to
9 the ones served in 2010. This set of interrogatories again requested, *inter alia*, APCO's explanation
10 for refusing payment to ZBCI and APCO's grounds for the tenth and twelfth affirmative defenses.
11 ZBCI sent those interrogatories to confirm APCO's prior discovery responses on APCO's defenses
12 against ZBCI's complaint.

13 28. On May 12, 2017, APCO responded to ZBCI's interrogatories that again indicated
14 APCO's sole reliance on the enforceability of the pay-if-paid provision in the Subcontract to excuse
15 payment to ZBCI.

16 29. On June 5, 2017, ZBCI deposed APCO's Nev. R. Civ. P. 30(b)(6) witness regarding
17 APCO's affirmative defenses. At the deposition, APCO's Nev. R. Civ. P. 30(b)(6) witness declined
18 to update APCO's interrogatory responses and re-affirmed APCO's sole reliance on the
19 enforceability of the pay-if-paid provision to excuse payment.

20 30. On July 19, 2017, ZBCI deposed APCO's Nev. R. Civ. P. 30(b)(6) witness regarding
21 topics pertaining to APCO's accounting for the Project. At the deposition, APCO's Nev. R. Civ. P.
22 30(b)(6) witness again declined to update APCO's interrogatory responses.

23 31. APCO did not supplement its discovery responses prior to the June 30, 2017
24 discovery cutoff.

25 32. On July 31, 2017 and after the close of discovery, ZBCI moved for summary
26 judgment against APCO on ZBCI's breach of contract and Nev. Rev. Stat. 108 claim—setting forth
27 ZBCI's prima facie case for those claims and addressing the enforceability of the pay-if-paid
28 provision in the Subcontract.

33. On August 21, 2017, APCO filed its opposition to ZBCI's motion, arguing—for the first time—other grounds for refusing payment of the amount owed to ZBCI. ZBCI objected to the admissibility of the evidence in support of APCO's opposition.

34. APCO's refusal to pay ZBCI the amount owed under the Subcontract had compelled ZBCI to incur attorney's fees and costs to collect the amount owed.

CONCLUSIONS OF LAW

A. Burden of Proof

1. Summary judgment is appropriate “when the pleadings, depositions, answers to interrogatories, admissions, and affidavits, if any, that are properly before the court demonstrate that no genuine issue of material fact exists, and the moving party is entitled to judgment as a matter of law.” *Cuzze v. Univ. & Cmty. Coll. Sys. of Nevada*, 123 Nev. 598, 602, 172 P.3d 131, 134 (2007).

2. As the party moving for summary judgment, ZBCI bears the initial burden of production to show the absence of a genuine issue of material fact. *Id.* ZBCI also bears the burden of persuasion at trial on its breach of contract and Chapter 108 claims and therefore must present evidence that would entitle it to a judgment as a matter of law on those two claims in the absence of contrary evidence. *See id.*

B. APCO's Breach of the Subcontract

3. To establish a breach of contract under Nevada law, ZBCI must provide admissible evidence of (1) the existence of a valid contract, (2) a breach by APCO, and (3) damage as a result of the breach. See *Richardson v. Jones*, 1 Nev. 405, 408 (1865). In this case, this Court concludes that ZBCI has presented sufficient admissible evidence on all elements of a breach of contract.

4. The Subcontract between the respective parties is a valid contract. However, as discussed in this Court's separate decision regarding the enforceability of the Subcontract's "pay-if-paid provisions," the pay-if-paid provisions are against public policy and are void and unenforceable under Nev. Rev. Stat. 624.628(e). The remaining terms of the Subcontract remain enforceable.

5. Nev. Rev. Stat. 624.626(3) automatically approves written requests for change orders unless the higher-tiered contractor denies the requests in writing within 30 days after the lower-tiered contractor submits the requests. Here, this Court concludes that because ZBCI did not receive any

1 written denials of its change order requests within 30 days of request, ZBCI's change order requests
2 amounting to \$347,441.67 were approved by operation of law. ZBCI is therefore entitled to payment
3 in the amount of \$347,411.67 for all of the change orders submitted.

4 6. Under Nevada law, compliance with a valid condition precedent requires only
5 substantial performance. *See, e.g., Laughlin Recreational Enterprises, Inc. v. Zab Dev. Co., Inc.*, 98
6 Nev. 285, 287, 646 P.2d 555, 556–57 (1982). ZBCI proved at least substantial compliance with the
7 conditions precedent for payment of the Retention, entitling ZBCI to payment of \$403,365.49 for the
8 Retention.

9 7. Alternatively, by the very terms of the Subcontract itself, the termination of the Prime
10 Contract automatically entitles ZBCI to payment of \$403,365.49 for the Retention and \$347,441.67
11 for the completed work on the change orders. This Subcontract language—exclusive of the void pay-
12 if-paid provisions—coincides with a prime contractor's obligations to pay its subcontractors
13 pursuant to Nev. Rev. Stat. 624.626(6).

14 8. APCO breached the Subcontract by refusing to pay ZBCI all of the amount owed for
15 the Retention and the change orders, and as a result ZBCI is entitled to judgment on its Complaint as
16 a matter of law. This gives rise to \$750,807.16 in damages, exclusive of attorney's fees, costs, and
17 interest.

18 **C. ZBCI's Nev. Rev. Stat. 108 Claim**

19 9. There is no dispute that ZBCI complied with the requirements for enforcing its lien
20 rights under Chapter 108 of the Nevada Revised Statutes.

21 10. Nev. Rev. Stat. 108.239(12) entitles ZBCI to a "personal judgment for the residue
22 against" APCO.

23 11. Because ZBCI did not receive any of the proceeds from the Nev. Rev. Stat. 108 sale
24 of the Project, there is no genuine issue that ZBCI is entitled to a personal judgment under Nev. Rev.
25 Stat. 108.239 against APCO for \$750,807.16 as the lienable amount, plus any reasonable attorney's
26 fees, costs, and statutory interest that the Court may award.

1 **D. Preclusion of APCO's Defenses**

2 12. This Court has considered APCO's arguments in response to ZBCI's motion for
3 summary judgment and concluded that the arguments have no merit.

4 13. As discussed above, the pay-if-paid provisions in the Subcontract is unenforceable
5 and therefore cannot excuse APCO's payment of the amount owed to ZBCI.

6 14. If APCO wanted to assert other grounds for refusing payment to ZBCI, Nev. R. Civ.
7 P. 26(e)(2) required APCO to seasonably amend its prior interrogatory responses to include grounds
8 for refusal other than the enforceability of the pay-if-paid provision. Pursuant to Nev. Rev. Stat.
9 37(c)(1) and *Pizarro-Ortega v. Cervantes-Lopez*, 133 Nev. Adv. Op. 37, 396 P.3d 783, 787 (2017),
10 APCO's failure to seasonably amend precludes APCO from asserting any other defenses "at a trial,
11 at a hearing, or on a motion" unless APCO substantially justifies this failure or such failure is
12 harmless to ZBCI.

13 15. The facts of this case are clear and uncontested. APCO was aware of its alleged
14 grounds for refusing payment of the \$750,807.16 owed to ZBCI before ZBCI filed its complaint
15 against APCO. APCO could have asserted its other defenses, other than its belief in the
16 enforceability of the pay-if-paid provision, at the time it served its April 29, 2010 responses to
17 ZBCI's interrogatories. In any event, several extensions to discovery were granted in this case even
18 up to a few weeks before dispositive motions were filed. APCO had ample opportunities to
19 seasonably amend or supplement its discovery responses to assert additional defenses against paying
20 ZBCI the amount owed under the Subcontract.

21 16. Yet, APCO failed to explain why during the seven years of litigation between APCO
22 and ZBCI, it did not disclose any defenses other than its belief in the enforceability of the pay-if-paid
23 provision. For example, APCO did not explain its decision to omit the other defenses in its April 29,
24 2010 responses to ZBCI's interrogatories and May 12, 2017 responses to ZBCI's interrogatories.
25 APCO also did not explain why it did not amend or supplement its discovery responses with the
26 other defenses during discovery.

27 17. ZBCI reasonably relied on APCO's interrogatory responses to formulate its litigation
28 plan, which included decisions to avoid certain discovery. For example, ZBCI limited its discovery

1 to taking APCO's Nev. R. Civ. P. 30(b)(6) depositions with truncated questioning. ZBCI also filed
2 its motion for summary judgment that focused on the enforceability of the pay-if-paid provisions.

3 18. By raising defenses other than the enforceability of the pay-if-paid provisions for the
4 first time in its opposition to ZBCI's motion for summary judgment, APCO has prejudiced ZBCI.
5 The late defenses have prevented ZBCI from conducting discovery at a time when relevant
6 information is available and fresh in witnesses' mind. APCO's prejudicial actions also forced ZBCI
7 to incur time and costs to conduct discovery based on incomplete information.

8 19. APCO's late defenses are not justified and are extremely prejudicial to ZBCI. Those
9 defenses are now too little, too late. Under Nev. R. Civ. P. 37(c)(1), APCO cannot introduce any
10 evidence to support any defenses against ZBCI's claims because its prejudicial discovery responses
11 only claimed that it relied on the void pay-if-paid provisions.

12 20. Due to the preclusion of the other defenses, ZBCI's evidentiary objections regarding
13 those defenses are moot.

14 21. ZBCI is entitled to judgment on its breach of contract claim and its Nev. Rev. Stat.
15 108 claims as a matter of law.

16 **E. Attorney's Fees, Costs, and Interest**

17 22. ZBCI is the prevailing party under the Subcontract and the prevailing lien claimant
18 under Nev. Rev. Stat. 108.237(1).

19 23. Under the Subcontract, ZBCI is entitled to an award of interest, reasonable attorney's
20 fees, and costs incurred to collect the amount owed to ZBCI.

21 24. Under Nev. Rev. Stat. 108.237(1), ZBCI is also entitled to the cost of preparing and
22 recording the notice of lien, the costs of the proceedings, the costs for representation of the lien
23 claimant in the proceedings, and any other costs related to ZBCI's efforts to collect the amount owed
24 against APCO. This includes, without limitation, attorney's fees and interest.

25 25. Nev. Rev. Stat. 108.237(2)(b) provides the calculation of the interest that accrues
26 under the amount awarded under Nev. Rev. Stat. 108.237(1). This interest is equal to the prime rate
27 at the largest bank in Nevada, as ascertained by the Commissioner of Financial Institutions, on
28 January 1 or July 1, as the case may be, immediately preceding the date of judgment, plus 4 percent,

1 on the amount of the lien found payable. The rate of interest must be adjusted accordingly on each
2 January 1 and July 1 thereafter until the amount of the lien is paid.

3 26. Interest is payable from the date on which the payment is found to have been due,
4 which would be December 15, 2008 in this case. Interest will accrue on the lienable amount,
5 attorney's fees, and costs until the entire amount is paid.

6 **ORDER**

7 **THEREFORE, IT IS HEREBY ORDERED** that ZBCI's Motion for Partial Summary
8 Judgment Against APCO Construction is **GRANTED** in its entirety.

9 **IT IS FURTHER ORDERED** that ZBCI is awarded \$750,807.16 (the "Award") on its First
10 Cause of Action (Breach of Contract) and Fourth Cause of Action (Foreclosure of Mechanic's Lien).

11 **IT IS FURTHER ORDERED** that ZBCI's remaining claims—Second Cause of Action
12 (Breach of Implied Covenant of Good Faith & Fair Dealing), Third Cause of Action (Unjust
13 Enrichment or in the Alternative Quantum Meruit), and Seventh Cause of Action (Violation of NRS
14 624)—are moot.

15 **IT IS FURTHER ORDERED** that ZBCI is awarded attorneys' fees and costs incurred in
16 connection with this litigation.

17 **IT IS FURTHER ORDERED** that interest shall accrue on the unpaid amount of the Award
18 from ZBCI's complaint was filed, which was April 30, 2009, to the date the entire amount is paid.

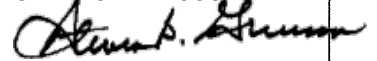
19 **IT IS FURTHER ORDERED** that ZBCI has 30 days from the date of this order to submit a
20 memorandum setting forth its attorney's fees and costs.

21 **IT IS FURTHER ORDERED** that APCO has 30 days after service of the memorandum to
22 submit a response.

23 **IT IS FURTHER ORDERED** that ZBCI has 10 days after APCO's response to submit a
24 reply to the response.

25 **IT IS FURTHER ORDERED** that this Court will address the sole issue of whether ZBCI is
26 entitled to attorney's fees and costs set forth in the memorandum at a hearing before this Court on

27 January 18, 2018 at 9:00 a.m.



1 **NEOJ**
ERIC B. ZIMBELMAN, ESQ.
2 Nevada Bar No. 9407
RICHARD L. PEEL, ESQ.
3 Nevada Bar No. 4359
PEEL BRIMLEY LLP
4 3333 E. Serene Avenue, Suite 200
Henderson, NV 89074-6571
5 Telephone: (702) 990-7272
Fax: (702) 990-7273
6 ezimbelman@peelbrimley.com
rpeel@peelbrimley.com
7 *Attorneys for Various Lien Claimants*

8 **DISTRICT COURT**

9 **CLARK COUNTY, NEVADA**

10 APCO CONSTRUCTION, a Nevada
11 corporation,

12 Plaintiff,

13 vs.

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

19 Defendants.

20 AND ALL RELATED MATTERS.

CASE NO.: A571228

DEPT. NO.: XIII

Consolidated with:

A571792, A574391, A577623, A580889,
A583289, A584730, and A587168

NOTICE OF ENTRY OF ORDER

21 ///

22 ///

23 ///


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

NOTICE OF ENTRY OF ORDER

PLEASE TAKE NOTICE that an Order Granting Peel Brimley Lien Claimants' Motion for Partial Summary Judgment Precluding Defenses Based on Pay-If-Paid Agreements was filed on January 2, 2018, a copy of which is attached as Exhibit A.

Dated this 3rd day of January, 2018.

PEEL BRIMLEY LLP



ERIC B. ZIMBELMAN, ESQ.
Nevada Bar No. 9407
RICHARD L. PEEL, ESQ.
Nevada Bar No. 4359
3333 E. Serene Avenue, Suite 200
Henderson, NV 89074-6571
Attorneys for Various Lien Claimants

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

CERTIFICATE OF SERVICE

Pursuant to Nev. R. Civ. P. 5(b), I certify that I am an employee of PEEL BRIMLEY LLP and that on this 3rd day of January, 2018, I caused the above and foregoing document entitled **NOTICE OF ENTRY OF ORDER** to be served as follows:

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

APCO Construction:

Rosie Wesp (rwesp@maclaw.com)

Camco Pacific Construction Co Inc:

Steven Morris (steve@gmdlegal.com)

Camco Pacific Construction Co Inc:

Steven Morris (steve@gmdlegal.com)

Fidelity & Deposit Company Of Maryland:

Steven Morris (steve@gmdlegal.com)

E & E Fire Protection LLC:

Tracy Truman (DISTRICT@TRUMANLEGAL.COM)

Interstate Plumbing & Air Conditioning Inc:

Jonathan Dabbieri (dabbieri@sullivanhill.com)

Cactus Rose Construction Inc:

Eric Zimbelman (ezimbelman@peelbrimley.com)

National Wood Products, Inc.'s:

Richard Tobler (rltldck@hotmail.com)

Tammy Cortez (tcortez@caddenfuller.com)

S. Judy Hirahara (jhirahara@caddenfuller.com)

Dana Kim (dkim@caddenfuller.com)

Richard Reincke (rreincke@caddenfuller.com)

Chapter 7 Trustee:

Jonathan Dabbieri (dabbieri@sullivanhill.com)
Jennifer Saurer (Saurer@sullivanhill.com)
Gianna Garcia (ggarcia@sullivanhill.com)
Elizabeth Stephens (stephens@sullivanhill.com)

Other Service Contacts not associated with a party on the case:

Caleb Langsdale, Esq. (caleb@langsdalelaw.com)
Cody Mounteer, Esq. (cmounteer@marquisaurbach.com)
Cori Mandy, Legal Secretary (cori.mandy@procopio.com)
Donald H. Williams, Esq. (dwilliams@dhwlawlv.com)
Marisa L. Maskas, Esq. (mmaskas@pezzillolloyd.com)
Martin A. Little, Esq. (mal@juww.com)
Aaron D. Lancaster (alancaster@gerrard-cox.com)
Agnes Wong (aw@juww.com)
Andrew J. Kessler (andrew.kessler@procopio.com)
Becky Pintar (bpintar@gglt.com)
Benjamin D. Johnson (ben.johnson@btjd.com)
Beverly Roberts (broberts@trumanlegal.com)
Brad Slighting (bslighting@djplaw.com)
Caleb Langsdale (Caleb@Langsdalelaw.com)
Calendar (calendar@litigationervices.com)
Cheri Vandermeulen (cvandermeulen@dickinsonwright.com)
Christine Spencer (cspencer@dickinsonwright.com)
Christine Taradash (CTaradash@maazlaw.com)
Cindy Simmons (csimmons@djplaw.com)
Courtney Peterson (cpeterson@maclaw.com)
Cynthia Kelley (ckelley@nevadafirm.com)
David J. Merrill (david@djmerillpc.com)
David R. Johnson (djohnson@watttieder.com)
Debbie Holloman (dholloman@jamsadr.com)
Debbie Rosewall (dr@juww.com)
Debra Hitchens (dhitchens@maazlaw.com)
Depository (Depository@litigationervices.com)
District filings (district@trumanlegal.com)
Donna Wolfbrandt (dwolfbrandt@dickinsonwright.com)
Douglas D. Gerrard (dgerrard@gerrard-cox.com)
E-File Desk (EfileLasVegas@wilsonelser.com)
Eric Dobberstein (edobberstein@dickinsonwright.com)
Erica Bennett (e.bennett@kempjones.com)
Floyd Hale (fhale@floydhale.com)
George Robinson (grobinson@pezzillolloyd.com)
Gwen Rutar Mullins (grm@h2law.com)
Hrustyk Nicole (Nicole.Hrustyk@wilsonelser.com)
I-Che Lai (I-Che.Lai@wilsonelser.com)
Jack Juan (jjuan@marquisaurbach.com)
Jennifer Case (jcase@maclaw.com)
Jennifer MacDonald (jmacdonald@watttieder.com)

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

1 Jennifer R. Lloyd (Jlloyd@pezzillolloyd.com)
2 Jineen DeAngelis (jdeangelis@foxrothschild.com)
3 Jorge Ramirez (Jorge.Ramirez@wilsonelser.com)
4 Kathleen Morris (kmorris@mcdonaldcarano.com)
5 Kaytlyn Bassett (kbassett@gerrard-cox.com)
6 Kelly McGee (kom@juww.com)
7 Kenzie Dunn (kdunn@btjd.com)
8 Lani Maile (Lani.Maile@wilsonelser.com)
9 Legal Assistant (rlegalassistant@rookerlaw.com)
10 Linda Compton (lcompton@gglts.com)
11 Marie Ogella (mogella@gordonrees.com)
12 Michael R. Ernst (mre@juww.com)
13 Michael Rawlins (mrawlins@rookerlaw.com)
14 Pamela Montgomery (pym@kempjones.com)
15 Phillip Aurbach (paurbach@maclaw.com)
16 Rachel E. Donn (rdonn@nevadafirm.com)
17 Rebecca Chapman (rebecca.chapman@procopio.com)
18 Receptionist (Reception@nvbusinesslawyers.com)
19 Renee Hoban (rhoban@nevadafirm.com)
20 Richard I. Dreitzer (rdreitzer@foxrothschild.com)
21 Ryan Bellows (rbellows@mcdonaldcarano.com)
22 Sarah A. Mead (sam@juww.com)
23 Taylor Fong (tfong@marquisaurbach.com)
24 Timother E. Salter (tim.salter@procopio.com)
25 Wade B. Gochmour (wbg@h2law.com)
26 Elizabeth Martin (em@juww.com)
27 Mary Bacon (mbacon@spencerfane.com)
28 John Jefferies (rjefferies@spencerfane.com)
Adam Miller (amiller@spencerfane.com)
John Mowbray (jmowbray@spencerfane.com)

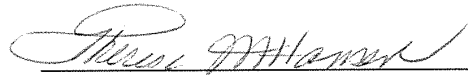

An Employee of Peel Brimley LLP

EXHIBIT A

ORIGINAL

Steven D. Grierson

1 **ORDR**
2 ERIC B. ZIMBELMAN, ESQ.
3 Nevada Bar No. 9407
4 RICHARD L. PEEL, ESQ.
5 Nevada Bar No. 4359
6 **PEEL BRIMLEY LLP**
7 3333 E. Serene Avenue, Suite 200
8 Henderson, NV 89074-6571
9 Telephone: (702) 990-7272
10 Fax: (702) 990-7273
11 ezimbelman@peelbrimley.com
12 rpeel@peelbrimley.com
13 *Attorneys for Various Lien Claimants*

8 **DISTRICT COURT**

9 **CLARK COUNTY, NEVADA**

10 APCO CONSTRUCTION, a Nevada
11 corporation,

12 Plaintiff,

13 vs.

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

23 Defendants.

24 AND ALL RELATED MATTERS.

CASE NO.: A571228

DEPT. NO.: XIII

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

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

25 This matter came on for hearing November 16, 2017, before the Honorable Mark
26 Denton in Dept. 13 on the Peel Brimley Lien Claimants' ("PB Lien Claimants")¹ Motion for
27 Partial Summary Judgment Precluding Defenses Based on Pay-if-Paid Agreements ("the
28 Motion"). Joinders were filed by Zitting Brothers, Construction, Inc., William A.
Leonard/Interstate Plumbing and Air Conditioning LLC, National Wood Products, Inc., E&E
Fire Protection LLC, and United Subcontractors, Inc. (collectively, "the Joining

¹ The Peel Brimley Lien Claimants are: Cactus Rose Construction, Fast Glass Inc., Heinaman Contract Glazing, Helix Electric of Nevada, LLC, SWPPP Compliance Solutions, LLC, and Buchele, Inc. The Peel Brimley law firm has since withdrawn from representation of Buchele, Inc.

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

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DISTRICT COURT DEPT# 13

1 Subcontractors”) APCO Construction (“APCO”) and Camco Pacific Construction, Inc.
2 (“Camco”) opposed the Motion. The issues having been well-briefed and argued and the Court
3 being fully advised in the premises, the Court is persuaded that the Motion has merit and should
4 be granted.

5 **A. Findings of Fact.**

6 Specifically, but without limitation, there are no genuine issues of material fact as
7 follows:

8 1. This action arises out of a construction project in Las Vegas, Nevada known as
9 the Manhattan West Condominiums Project (“the Project”) located at West Russell Road and
10 Rocky Hill Street in Clark County Nevada, APNs 163-32-101-003 through 163-32-101-005,
11 163-32-101-010 and 163-32-101-014 (the “Property” and/or “Project”), owned by Gemstone
12 Development West, Inc. (“Gemstone” or the “Owner”).

13 2. The Owner hired APCO and, subsequently, Camco as its general contractors,
14 who in turn entered into subcontract agreements with various subcontractors including the PB
15 Lien Claimants and the Joining Subcontractors. In December 2008 the Owner suspended the
16 Project and advised the various contractors that the Owner’s lender did not expect to disburse
17 further funds for construction. Numerous contractors, including the PB Lien Claimants, the
18 Joining Subcontractors, APCO and Camco recorded mechanic’s liens against the Property.

19 3. After several years of litigation and a Writ Action to determine the priority of the
20 various lienors (during which the Property was sold, the proceeds of the same held in a blocked
21 account and this action was stayed), the Nevada Supreme Court ruled that the Owner’s lenders
22 had priority over the proceeds of the sale of the Property, holding that the NRS Ch. 108
23 mechanic’s liens were junior to the lenders’ deeds of trust. The Court subsequently ordered the
24 proceeds be released to the lender. Thereafter, the stay was lifted and the PB Lien Claimants,
25 Joining Subcontractors and others continued to pursue claims for non-payment from APCO and
26 Camco.

27 ///

28 ///

1 4. APCO and Camco assert defenses to the various subcontractor claims based on
2 so-called "pay-if-paid agreements" (hereinafter referred to generally as "Pay-if-Paid").
3 Specifically but without limitation, APCO and Camco rely on language in the APCO
4 Subcontract Agreement that was adopted by way of a Ratification Agreement between Camco
5 and some of the subcontractors, that APCO and Camco have no obligation to pay the
6 subcontractors for the work materials and equipment they furnished to the Project ("the Work")
7 unless and until the Owner pays APCO and Camco for the Work. APCO and Camco claim that
8 they have not been paid, in whole or in part, for the Work and/or that the Owner by-passed them
9 by making or intending to make payments to subcontractors through a voucher control
10 company, Nevada Construction Services ("NCS"). Among other provisions, APCO and Camco
11 rely upon the following:

12 *3.4 Any payments to Subcontractor shall be conditioned upon receipt of the*
13 *actual payments by Contractor from Owner. Subcontractor herein agrees to*
14 *assume the same risk that the Owner may become insolvent that Contractor*
 has assumed by entering into the Prime Contract with the Owner.

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

19 *3.8 The 10 percent withheld retention shall be payable to Subcontractor upon,*
20 *and only upon the occurrence of all the following events, each of which is a*
21 *condition precedent to Subcontractor's right to receive final payment*
22 *hereunder and payment of such retention: ... (c) Receipt of final payment by*
 Contractor from Owner.

23 *3.9 Subcontractor agrees that Contractor shall have no obligation to pay*
24 *Subcontractor for any changed or extra work performed by Subcontractor*
 until or unless Contractor has actually been paid for such Work by the owner.

25 *4.2 The Owner's payment to Contractor of extra compensation for any such*
26 *suspension, delay, or acceleration shall be a condition precedent to*
27 *Subcontractor's right, if any, to receive such extra compensation from*
28 *Contractor.*

///

1 5. Each of these provisions represents or contains Pay-if-Paid such that, if enforced,
2 may allow APCO and Camco to deny payment to their subcontractors for work performed on
3 the grounds that APCO and Camco have not been paid.

4 6. Any finding of fact herein that is more appropriately deemed a conclusion of law
5 shall be treated as such.

6 **B. Conclusions of Law.**

7 As discussed below, Pay-if-Paid is void and unenforceable in Nevada and, as a result,
8 the Motion to Preclude Defenses based on Pay-if-Paid Agreements in GRANTED.

9 1. In 2008 the Nevada Supreme Court declared Pay-if-Paid void and unenforceable
10 as against Nevada's public policy because "Nevada's public policy favors securing payment for
11 labor and material contractors." *Lehrer McGovern Bovis, Inc. v. Bullock Insulation, Inc.*, 124
12 Nev. 1102, 1117-18, 197 P.3d 1032, 1042 (Nev. 2008). The *Bullock* Court noted that "because
13 a pay-if-paid provision limits a subcontractor's ability to be paid for work already performed,
14 such a provision impairs the subcontractor's statutory right to place a mechanic's lien on the
15 construction project." 124 Nev. at 1117 n. 51 (citing *Wm. R. Clarke Corp. v. Safeco Ins. Co.*, 15
16 Cal. 4th 882, 64 Cal. Rptr. 2d 578, 938 P.2d 372, 376 (Cal. 1997)

17 2. Nevada's statutory schemes designed to secure payment to contractors and
18 subcontractors in the construction industry as a whole are remedial. *See Hardy Companies, Inc.*
19 *v. W.E. O'Neil Const. Co.*, 245 P.3d 1149, 1155 (Nev. 2010) (citing *Las Vegas Plywood v. D &*
20 *D Enterprises*, 98 Nev. 378, 380, 649 P.2d 1367, 1368 (1982)). As stated in *Bullock*:

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

26 *Bullock*, 124 Nev. at 1116 (emphasis added).

27 ///

28 ///

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1 3. Despite the fact that the *Bullock* decision involved mechanic's liens, the Court
2 rejects as without merit the argument that the public policy rationale of *Bullock* is limited to the
3 concept of security or does not apply when there is no security such as in the present case, where the
4 Property has been sold and the proceeds have been released to senior lienors. Among other things,
5 the term "secured payment" utilized by *Bullock*, at 1116, uses "secured" as an adjective and
6 "payment" as a noun.

7 4. By way of a footnote, the *Bullock* Court noted that the Nevada Legislature
8 "amended NRS Chapter 624 to include the prompt payment provisions contained in NRS 624.624
9 through 624.626. Pay-if-paid provisions entered into subsequent to the Legislature's amendments
10 are enforceable only in limited circumstances and are subject to the restrictions laid out in these
11 sections." 124 Nev. at 1117 n. 50. No such "limited circumstances" exist in this case.

12 5. NRS 624.624(1) provides for the obligation of prompt payment by a higher-tiered
13 contractor (such as APCO and Camco) to a lower-tiered subcontractor (such as the PB Lien
14 Claimants), as follows:

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

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

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

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

22 ↪ whichever is earlier.

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

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

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

↪ whichever is earlier.

NRS 624.624(1) (emphasis added).

///

///

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

6. Stated simply, if there is a "schedule of payments" in an otherwise enforceable written agreement, the higher-tiered contractor must pay the lower-tiered subcontractor – at the latest – on the date payment is due. If there is no enforceable written agreement containing a schedule of payments, the payment is due to the lower-tiered subcontractor – at the latest - within 30 days of its request for payment. Under either circumstance it has been approximately nine years since payments on the Project ceased to be made.

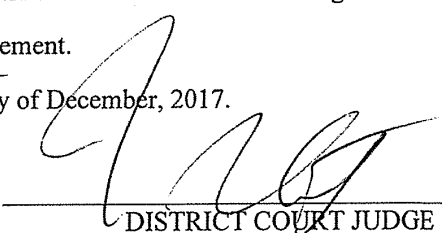
6. The Court also rejects the argument that the "schedule of payments" delays the obligation of payment until "within 15 days after Contractor actually receives payment for Subcontractor's work from Owner." Because the expiration of 15 days is itself dependent upon payment being received from the Owner, this is not a "schedule of payments" but rather simply another form of Pay-if-Paid.

7. Any conclusion of law herein that is more appropriately deemed a question of fact shall be treated as such.

IT IS THEREFORE ORDERED as follows:

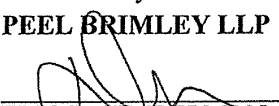
1. The Peel Brimley Lien Claimants' Motion for Partial Summary Judgment Precluding Defenses Based on Pay-if-Paid Agreements GRANTED; and
2. APCO and Camco may not assert or rely upon any defense to their payment obligations, if any, to the PB Lien Claimants and the Joining Subcontractors that is based on a pay-if-paid agreement.

IT IS SO ORDERED this 29th day of December, 2017.


DISTRICT COURT JUDGE

Submitted by:

PEEL BRIMLEY LLP


ERIC B. ZIMBELMAN, ESQ. (9407)
RICHARD L. PEEL, ESQ. (4359)
3333 E. Serene Avenue, Suite 200
Henderson, NV 89074-6571
Attorneys for Various Lien Claimants.

**ARTICLE XIII
MISCELLANEOUS PROVISIONS**

13.01 Access to the Project Site. Developer shall have access to the Project Site, subject to any restrictions required by insurance policies and reasonable rules or regulations promulgated by General Contractor. Developer may expel any Third-Party Service Providers and any other third-party from the Project Site with reasonable cause.

13.02 Notice. Any notice required or permitted by this Agreement shall be in writing and shall be delivered as follows with notice deemed given as indicated: (a) by personal delivery, when delivered personally; (b) by overnight courier, upon written verification of receipt; (c) by electronic mail or facsimile, upon transmission; or (d) by certified or registered mail, return receipt requested, upon verification of receipt. Notice shall be sent to the addresses set forth on the attached signature page or such other address as either party may specify in writing.

13.03 Merger Clause. This Agreement represents the entire and integrated agreement between Developer and General Contractor related to the subject matter hereof and supersedes all prior negotiations, representations or agreements, either written or oral.

13.04 Amendment and Termination. Subject to Article XI, this Agreement may be amended or terminated only by written instrument executed by both Developer and General Contractor.

13.05 Assignment of this Agreement. Developer may freely assign this Agreement but shall provide written notice of any assignment to General Contractor. Except as set forth in this Agreement, General Contractor may not subcontract, assign, or otherwise delegate its obligations under this Agreement without Developer's prior written consent. Subject to the foregoing, this Agreement will be for the benefit of General Contractor's and Developer's successors and assigns, and will be binding on any assignees.

13.06 Governing Law; Venue. This Agreement shall be governed in all respects by the laws of the State of Nevada, as such laws are applied to agreements entered into and to be performed entirely within Nevada between Nevada residents and without regard to any conflict of law provisions. Subject to Article XI, any action or proceeding arising from or relating to this Agreement may only be brought in the applicable court in Las Vegas, Nevada, and each party hereby irrevocably submits to the jurisdiction and venue of such courts.

13.07 Attorney's Fees: In the event that any negotiation, suit, action, arbitration, or mediation is instituted to enforce or interpret any provision in this Agreement or to resolve any dispute arising from or related to the Work, the

prevailing party in such negotiation, suit, action, arbitration, or mediation shall be entitled to recover, in addition to any other relief to which it is entitled, from the losing party all fees, costs and expenses of enforcing any right of such prevailing party under or with respect to this Agreement, including, without limitation, such reasonable fees and expenses of attorneys and accountants, which shall include, without limitation, all fees, costs and expenses of appeals.

13.08 Unenforceability. If one or more provisions of this Agreement are held to be unenforceable under applicable law, the parties agree to renegotiate such provision in good faith. In the event that the parties cannot reach a mutually agreeable and enforceable replacement for such provision, then (a) such provision shall be excluded from this Agreement, (b) the balance of the Agreement shall be interpreted as if such provision were so excluded and (c) the balance of the Agreement shall be enforceable in accordance with its terms.

13.09 Waivers and Non-Waiver of Remedies. No waiver by either party of any provision hereof shall be deemed a waiver of any other provision hereof or of any subsequent breach by the other party of the same or any other provision. A party's consent to or approval of any act shall not be deemed to render unnecessary the obtaining of that party's consent to or approval of any subsequent act by the other party. A party's failure to declare a breach of this Agreement for a particular default by the other party shall not be a waiver of any preceding or subsequent breach by the other party. Unless expressly stated otherwise in this Agreement, nothing in this Agreement shall limit the rights and remedies available to any party for any breach of this Agreement by the other party.

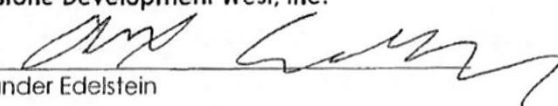
13.10 Counterparts. This Agreement may be executed in counterparts, all of which together shall constitute one and the same agreement. Signatures to this Agreement may be transmitted via facsimile or PDF, and such signatures shall be deemed to be originals.

[Signature Page Attached]

This Agreement is entered into as of the Effective Date.

DEVELOPER:

Gemstone Development West, Inc.

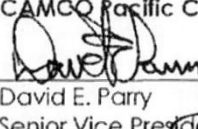


Alexander Edelstein

9121 W. Russell Rd., Suite 117
Las Vegas, NV 89148
Attention: Peter Smith
Phone: (702) 614-3193
Email: pete@gemstonedev.com

GENERAL CONTRACTOR:

CAMCO Pacific Construction Company, Inc.



David E. Parry
Senior Vice President

2925 E. Patrick Lane, Suite G
Las Vegas, NV 89120
Attention: David E. Parry
Phone: (702) 798-6611
Email: dparry@camcopacific.com

[CAMCO Agreement Signature Page]

Exhibit A
Glossary of Defined Terms

Defined Terms:

1. "Building" means any building within the Project.
2. "Certificate of Occupancy" means the permission from Clark County and any other applicable regulatory agency necessary for Developer to conduct the close of escrow for the sale of the individual units in the Project.
3. "Cost of the Work" means the aggregate cost to perform the Work pursuant to the Schedule of Values.
4. "APCO Third-Party Service Agreement" means the contracts, purchases orders, and other agreements between Asphalt Products Corporation, (dba APCO Construction) and any Third-Party Service Providers in effect as of the Effective Date.
5. "Schedule of Values" means a list delivered by General Contractor to Developer that sets forth (a) each component of the Work and (b) the corresponding budgeted cost for each component of the Work.
6. "Work" means the construction and services required by the Contract Documents, whether completed or partially completed, and including all labor, materials, equipment and services. The Work may constitute the whole or a part of the Project.

Additional Terms. Each of the following terms is defined in the section or reference set forth opposite such term below.

Term	Section
Agreement	Preamble
Application for Payment	Section 7.01 (b)
Building Liquidated Damages	9.03(b)
Final Completion	Section 4.01
Change Order	Section 10.01 (a)
Claim	Section 12.01
Contract Documents	Section 1.01
Cover Claim	Section 5.03
Developer	Preamble
Draw Application	Section 7.01 (c)
Effective Date	Preamble
Exclusions	Article III
Express Warranty	Section 5.01
Final Payment	Section 7.02(a)

General Contractor	Preamble
General Contractor Fee	Section 6.01
General Contractor Expenses	Section 6.02
Original Agreement	Recitals
Percentage Completion	Section 7.01
Previously Completed Work	Section 5.02
Progress Payment	Section 7.01(c)
Project	Recitals
Project Documents	Section 8.01
Project Schedule	4.02
Project Site	Recitals
Required Completion Date	9.03(a)
Services	Article II Preamble
Standard Retainage	Section 7.03(a)
Third-Party Agreements	Section 2.02
Third-Party Service Providers	Section 2.01

Exhibit B
Schedule of Values



Exhibit C
Existing Third-Party Service Providers

Accuracy Glass & Mirror, Inc
CabineTec
Carpets N More
Cell Crete Corporation
Concrete Visions
Creative Home Theaters, Inc.
Dependable Glass & Mirror
Distinctive Marble
Executive Plastering
Gilbert & Associates
Granite Construction
Granite Plus
Helix Electric
Hi Tech Fabrication
Isulpro Projects
Interstate Plumbing & Air
Jeff Heitt Plumbing & Fire, LLC
Larry Methvin Installation
Las Vegas Pipeline
The Masonry Group Nevada, Inc
Nevada Gypsum
Nevada Pre Fab Engineers
OTIS Technologies
PDM Glass & Mirror
Pools by Grube
PR Construction
Sierra Reinforcing
Sierra Waterproofing
Storm Water Programs
Sunset Steel Erectors
H.A. Fabrications
California Drafting
Silver State Fireplaces
Sliding Door Company
The Painting Company
ThyssenKrupp Elevator
Tri-City Drywall
WRG Design, Inc.
Whirlpool Corporation
Zitting Construction
Wholesale Door & Window
Steel Engineers Incorporated

Purchase Orders
Calico Construction Supply



H.D. Supply Waterworks
Ready Mix, Inc.

Vendors

Advance Office Supply
Alternative Office Systems
Design Space Modular Buildings
Holman's of Nevada, Inc.
JSS Jackpot Sanitation Services
Las Vegas Reprographics
Mercury LDO Reprographics
National Construction Rentals
National Construction Rentals
Republic Services
Sunstate Equipment
Temp Power Systems
Wireless Telecorp, Inc.



Exhibit D
Onsite Personnel Employed by General Contractor

**General Contractor staffing
to be paid at Developer's
Expense:**

<i>Position</i>	<i>Monthly Rate</i>	<i>% Allocated to Project</i>	<i>Monthly Rate to be Paid on Project</i>
Project Executive	Included	As reasonably required	
General Superintendent	\$15,600.00	100%	\$15,600.00
Project Superintendents	Base Salary Plus 35% Burden, plus Benefits	100%	Varies
Project Administrator/Accountant	\$8,493.00	60%	\$5,095.80
Safety Officer: 2.15 inspections per month		-	
	2.15 inspections x \$ 947.00 per month	-	\$2,036.00

1 . All Benefits and the entire Burden are included in Monthly Rate for the General Superintendent and Project Administrator/Account.

2 . For each Project Superintendent, the Benefits will include all benefits given to such Project Superintendent pursuant to such Project Superintendent's offer letter which may include, without limitation, vacation, holidays, vehicle allowance, cell phones, personal days, vehicle fuel, and insurance. Furthermore, such benefits shall be limited by the terms of such offer letter.

Exhibit E
Previously Completed Work*

Building 2

Concrete podium structure is complete
Rough electric is complete
Rough plumbing is complete
Rough HVAC is complete
Roof is 100% complete
Fire Sprinkler is 100%
Windows are 100%
Drywall is 70%
Lath is 95% complete
Stucco is 50% complete
Elevator is 10% complete
Stairs are 45% complete
Insulation is complete

Interior doors and jambs are 10% complete
Ramp to garage is complete
Pony walls in court yard are 90%
Switchgear is in place

Building 3

Concrete podium structure is complete
Roof is 75%
Fire sprinkles are 70% complete
Windows are 95%
Dens glass is 95% complete
Elevator is 5% complete
Stairs are 45% complete
Interior doors and jambs have not started
Switchgear is in place
Ramp to garage is not complete
Garage for 2 & 3 is complete but concrete is unacceptable

Building 7

Concrete podium structure is complete
Garage is 95% complete but concrete is unacceptable
Generator is in place but not installed
1st through 7th framing complete
1st through 6th fire sprinklers rough are complete
1st through 5th HVAC rough is complete
1st through 5th plumbing rough is complete
1st through 3rd electrical rough is complete
Roof decking is not complete
9th floor deck is not complete
9th floor pools are not complete
Curtain wall clips are not complete

Curtain wall installation has not started
Drywall ribs are 15% complete
Shafts are 45% complete
Elevator is not installed and I have not seen it onsite
Stairs are 55%
None of the patio pour backs have been poured

Building 8

Concrete podium structure is complete
Framing is complete
Windows are complete
Hollow metal door frames are installed
Lath is 60% complete
Brown coat is 50 % complete
Stairs are 95% complete
Tubs have been installed
Shower pans are at 50%
1st through 3rd drywall is complete on walls and lids but not the soffits
4th drywall (walls only) are 55% complete
1st floor drywall taping is 70% complete
1st through 3rd rough electric is complete
1st through 3rd rough plumbing is complete
1st through 3rd rough HVAC is complete
1st through 3rd rough low volt is complete
4th floor soffits have not been installed
Elevators have not started
Corridors drywall has not started
Shafts are 75% complete
HVAC compressors are in place on the roof
Curb wall on podium has been poured water proofing is not complete
Post for balcony rails have been installed
Flashing for patio deck pour has been installed
Switchgear is in place

Building 9

Framing is complete
Windows are complete
Hollow metal door frames are installed
Lath is 90% complete
Stucco is 60 % complete
Stairs are 95% complete
Tubs have been installed
Shower pans are at 50%
1st through 3rd drywall is complete on walls and lids but not the soffits
4th drywall (walls only) are 55% complete
1st floor drywall taping is 65% complete
1st through 3rd rough electric is complete
1st through 3rd rough plumbing is complete

1st through 3rd rough HVAC is complete
1st through 3rd rough low volt is complete
4th floor soffits have not been installed
Elevators have not started
Corridors drywall has not started
1st floor Corridor lid framing is 70% complete
HVAC compressors are in place on the roof
Curb wall on podium has been poured water proofing is not complete
Post for balcony rails have been installed
Flashing for patio deck pour has been installed
Switchgear is in place

Other

Podium fix in buildings 8 & 9 is 60% complete
Civil infrastructure is 95% complete

***This Exhibit E is subject to modification within 24 hours of General Contractor's inspection of the Project Site which must take place within 72 hours of the Effective Date.**

Exhibit F
Insurance Policies Provided by Developer

Exhibit “B”

Exhibit “B”

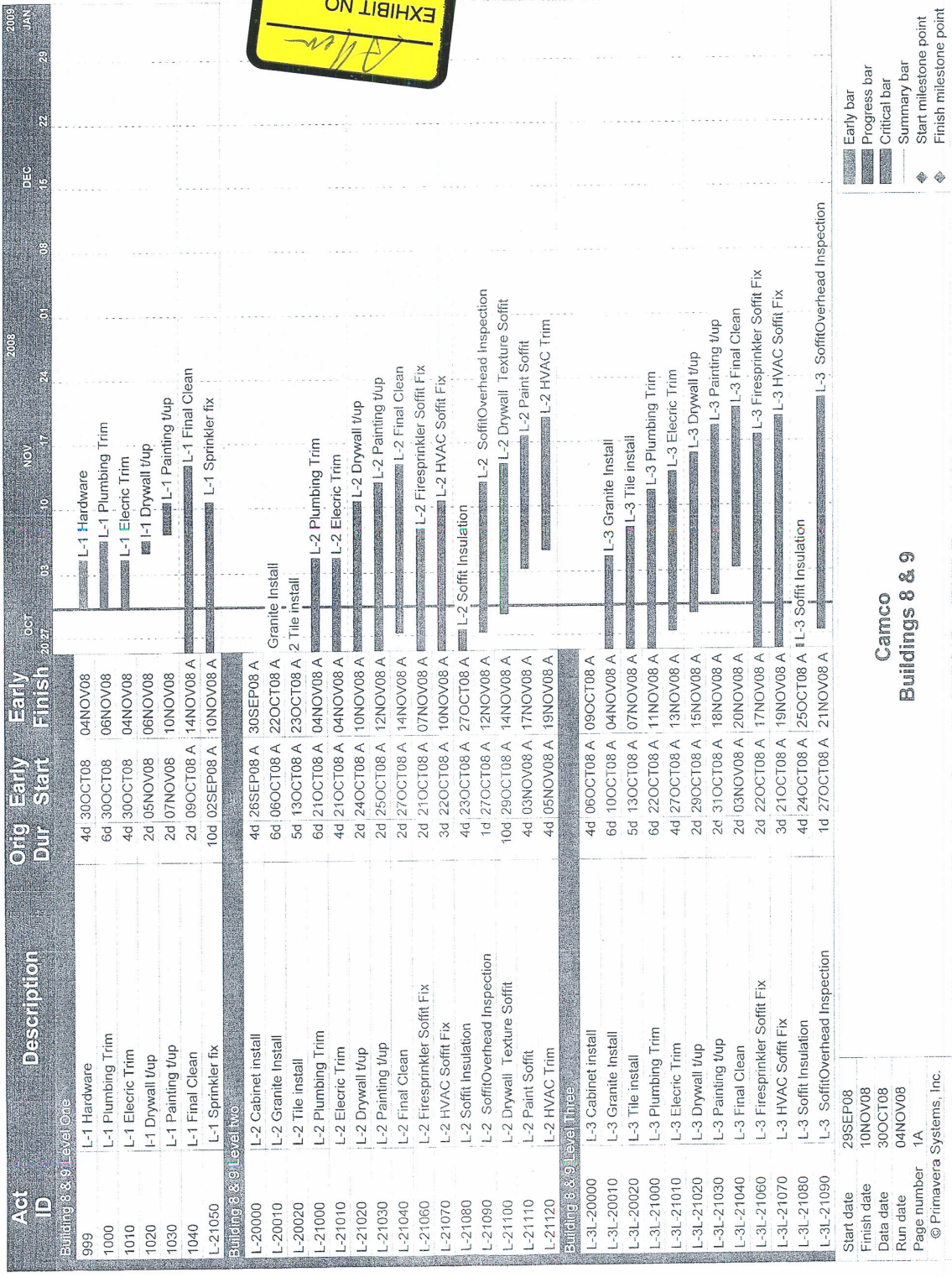
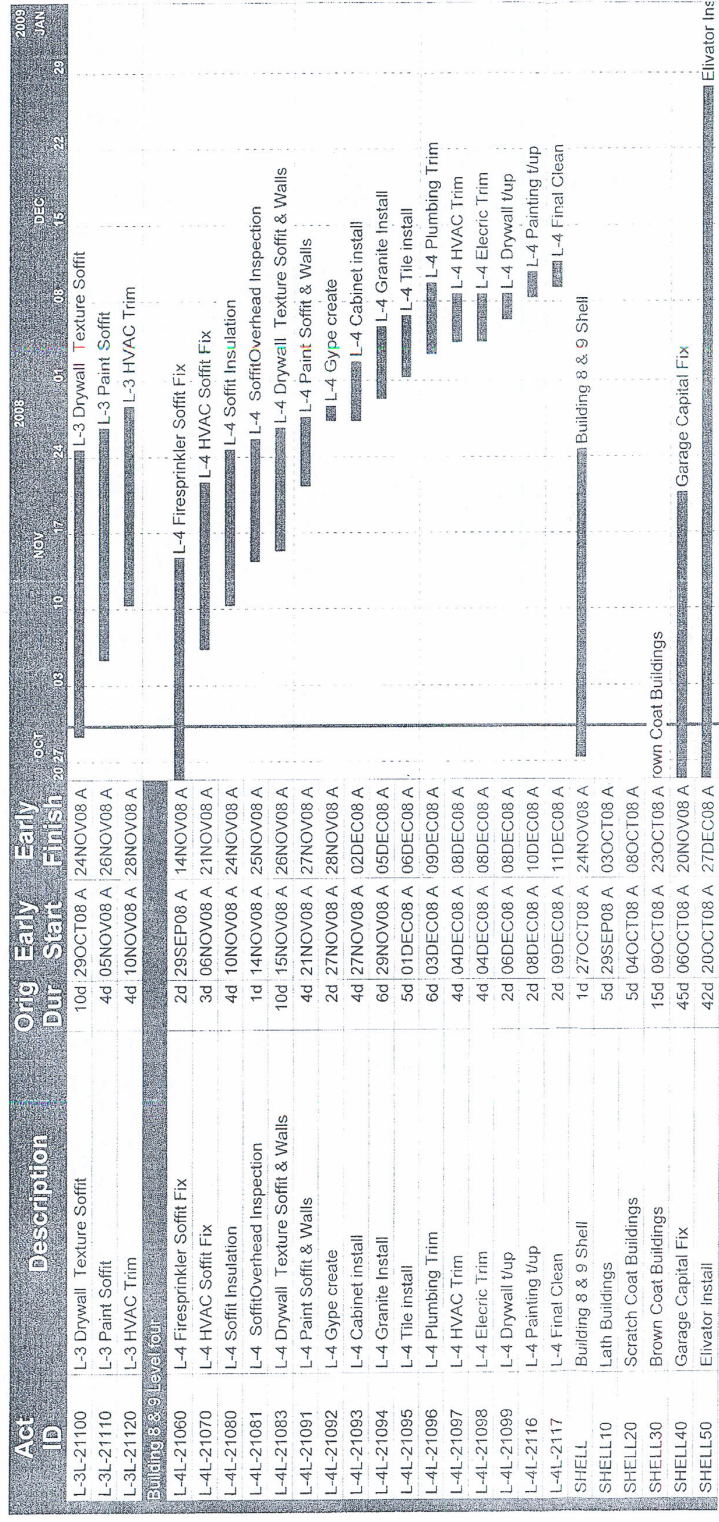


EXHIBIT NO. 87
J.W. SEID 7/10/17

APCO 104561



Start date 29SEP08
Finish date 10NOV08
Data date 30OCT08
Run date 04NOV08
Page number 2A
© Primavera Systems, Inc.

Camco
Buildings 8 & 9

Early bar
Progress bar
Critical bar
Summary bar
Start milestone point
Finish milestone point

APCO 104562

AA 003232

Exhibit “C”

Exhibit “C”



BUILDING DEPARTMENT

4701 W. RUSSELL ROAD • LAS VEGAS, NV 89118 • (702) 455-3000

CERTIFICATE OF OCCUPANCY

Permit #: 07-25627 Zone: U-V
Site Address: 9265 W RUSSELL RD
Prop. Description: PT NE4 NW4 SEC 32 21 60

Project Name: MANHATTAN WEST
Tenant Name: MANHATTAN WEST Tenant #: BLD 8
Owner Name: NEW RUSSELL ONE LLC
Contractor Name: MARTIN HARRIS CONSTRUCTION State Lic. #: 0013982
Contractor Addr.: 3030 SOUTH HIGHLAND DRIVE
SUITE E, LAS VEGAS NV 89109

Ctr. Phone: (702) 385-5257 Parcel #: 163-32-101-019 # Of Units: 76
Code Year: 2006
Construction Type: I/V-1 HOUR Occupancy: S3/R1 Occupant Load: 730
Sq. Ft.: 146132 Building Final: 4/24/15 Issue Date: 4/27/15
Application Type: CONDOMINIUM-NEW (PHASED)
Description of Work:

NOTICE TO APPLICANT

This structure is deemed to be in substantial compliance with fire, life safety and structural provisions of the adopted codes of construction. Records concerning the construction of this building are on file with the building department in compliance with the appropriate records procedures.

This Certificate must be posted and maintained within any non-single family building or structure referenced above. Any construction to be done beyond the final building inspection date, above, requires a new building permit.

KDS
4/27/15

DATE APPROVED

Ronald L. Lynn
RONALD L. LYNN, DIRECTOR/BUILDING OFFICIAL

This certificate of Occupancy provides no warranty or guarantee either expressed or implied.

e. The conditions purportedly regarding “executed and approved change orders” and releases do not preclude payment to Zitting.

In challenging Zitting’s right to payment for the change orders at issue, APCO argues that Zitting did not comply with the condition requiring “executed and approved change orders” and disclosure of potential claims in progress releases. (Supp. Opp’n 7:10-9:24.) This argument finds no basis in Nevada law.

For example, Zitting can waive the condition purportedly requiring “executed and approved change orders.” Under Nevada law, a party may waive a condition in a contract if the condition was included in the contract for his or her benefit. *See Mayfield v. Koroghli*, 124 Nev. 343, 352, 184 P.3d 362, 368 (2008). Here, Zitting’s Rule 30(b)(6) witness has testified that he included the condition about “executed and approved change orders” solely to allow Zitting another mean of collecting payment for change orders:

Q. Okay. Tell me -- so that our record is clear, what did you add to that paragraph 3.9?

A. Unless a contractor has executed and approved change order directing subcontractor to pull – perform certain changes in writing and certain changes have been completed by subcontractor.

Q. What was your intention in adding that language?

A. Intention was to state that, if I'm directed to do a change by APCO, then I'm going to get paid for that change, regardless of whether the owner pays them for it or not.

(Ex. A 37:6-16.) APCO has presented no evidence to the contrary. “Because the parties included the condition at the time of the contract solely for [Zitting]’s benefit, [Zitting] could unilaterally waive it. “ *See Mayfield*, 124 Nev. at 352–53, 184 P.3d at 368. Compliance with this condition is therefore unnecessary.

Nevertheless, Chapter 624 of the Nevada Revised Statutes supersedes the contractual conditions for payment. As discussed in Zitting’s original briefing in support of its motion for partial summary judgment, all requests for change orders not rejected in writing within 30 days are approved by operation of law. Nev. Rev. Stat. 624.626(1)(e), (3). Subcontractors can receive payment for these statutorily approved change orders by submitting “a bill or invoice for the labor,

1 material, equipment[,] or services.” *Id.* 624.626(3)(c). Any agreement to waive this is void as a
2 matter of public policy. *See id.* 624.628(3)(a). Here, APCO has submitted no rebuttal evidence
3 showing that the Owner or APCO rejected the change order request in writing within 30 days of
4 them being submitted. Therefore, the change order requests are approved by statute, and Zitting can
5 recover payment for those change orders without the need to do anything else other than submitting
6 a bill or invoice to APCO.

7 APCO’s reliance on *Padilla Constr. Co. of Nevada v. Big-D Constr. Corp.*, 386 P.3d 982
8 (Nev. 2016) does not lead to a different outcome. As an initial matter, this case is not controlling
9 because it is an unpublished decision. Nevertheless, *Big-D Constr. Corp.* involves a materially
10 different issue—a subcontractor’s right to payment for work that was expressly rejected as defective.
11 *Id.* at *1. In contrast, the Owner has approved all of Zitting’s work, as discussed above. There is
12 certainly no evidence of any rejection of Zitting’s work. Therefore, summary judgment in Zitting’s
13 favor on the breach of contract claim is appropriate.

14 **III. CONCLUSION**

15 For the foregoing reasons and the reasons set forth in Zitting’s briefing in support of its
16 motion for partial summary judgment, this Court should grant Zitting’s motion and enter summary
17 judgment on Zitting’s breach of contract claim.

18 Dated: November 15, 2017

19 WILSON ELSER MOSKOWITZ EDELMAN &
20 DICKER LLP

21 /s/ I-Che Lai
22 Jorge Ramirez, Esq.
23 Nevada Bar No. 6787
24 I-Che Lai, Esq.
25 Nevada Bar No. 12247
26 300 South 4th Street, 11th Floor
27 Las Vegas, NV 89101
28 Telephone: (702) 727-1400
Facsimile: (702) 727-1401
Attorneys for Lien Claimant,
Zitting Brothers Construction, Inc.

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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 15th day of November, 2017, I served a true and correct copy of the foregoing **ZITTING BROTHERS CONSTRUCTION, INC.'S RESPONSE TO APCO CONSTRUCTION'S SUPPLEMENTAL OPPOSITION TO ZITTING BROTHERS CONSTRUCTION, INC.'S MOTION FOR PARTIAL SUMMARY JUDGMENT** 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;
- ☐ by transmitting via email the document listed above to the email address set forth below on this date before 5:00 p.m.

BY /s/ De'Awna Crews
An Employee of WILSON ELSER MOSKOWITZ
EDELMAN & DICKER LLP

Exhibit “A”

Exhibit “A”

1 DISTRICT COURT
2 CLARK COUNTY, NEVADA
3
4 APCO CONSTRUCTION, a Nevada)
corporation,)
5)
Plaintiff,)
6) CASE NO: A571228
vs.) DEPT NO: 13
7)
GEMSTONE DEVELOPMENT WEST, INC., A)
8 Nevada corporation,)
9)
Defendant.)
10)
AND ALL RELATED MATTERS)
11)
12)
13)
14)
15)
16)
17)
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19)
20)
21)
22)
23)
24)
25)

14 DEPOSITION OF SAMUEL ZITTING
15 PERSON MOST KNOWLEDGEABLE OF
16 ZITTING BROTHERS CONSTRUCTION COMPANY
17 LAS VEGAS, NEVADA
18 FRIDAY, OCTOBER 27, 2017
19
20
21
22
23
24 REPORTED BY: VANESSA LOPEZ, CCR NO. 902
25 JOB NO.: 427127

1 DEPOSITION OF SAMUEL ZITTING, PERSON MOST
2 KNOWLEDGEABLE OF ZITTING BROTHERS CONSTRUCTION COMPANY, held
3 at Litigation Services & Technologies, located at 3770
4 Howard Hughes Parkway, Suite 300, Las Vegas, Nevada, on
5 Friday, October 27, 2017, at 9:00 a.m., before Vanessa
6 Lopez, Certified Court Reporter, in and for the State of
7 Nevada.

8
9

10 APPEARANCES:

11 For APCO Construction:

12 SPENCER FANE
13 BY: JOHN R. JEFFERIES, ESQ.
14 300 South Fourth Street, Suite 700
15 Las Vegas, Nevada 89101
16 (702)408-3400
17 rjefferies@spencerfane.com

18 For Zitting:

19 WILSON ELSEER MOSKOWITZ EDELMAN & DICKER, LLP
20 BY: RICHARD DREITZER, ESQ.
21 300 South Fourth Street, 11th Floor
22 Las Vegas, Nevada 89101
23 (702)727-1400
24 richard.dreitzer@wilsonelser.com

25 Also Present: Lisa Lynn, APCO
Joe Pelan

1	I N D E X		Page 3
2	WITNESS: SAMUEL ZITTING		
3	EXAMINATION		PAGE
4	By Mr. Jefferies		5, 112
5	By Mr. Dreitzer		109, 115
6			
7			
8			
9			
10	E X H I B I T S		
11	NUMBER		PAGE
12	Exhibit 1	ZBCI000131-ZBCI000147	13
13	Exhibit 2	Second Amended Notice of Taking Deposition	30
14	Exhibit 3	ZBC1178	41
15	Exhibit 4	ZBCI002082, ZBCI002085, ZBCI002078, ZBCI002079, ZBCI002089, and ZBCI002086	41
16			
17	Exhibit 5	Exhibit C to the Ratification and Bid Forms	61
18			
19	Exhibit 6	Ratification and Amendment of Subcontract Agreement Buchele	61
20			
21	Exhibit 7	E-mail	67
22	Exhibit 8	ZBCI000117-ZBCI000121	77
23	Exhibit 9	ZBCI002098	88
24	Exhibit 10	APCO00044771	88
25	Exhibit 11	Stack of Documents	88

1	Exhibit 12	APCO00044651	Page 4 89
2	Exhibit 13	APCO00044636	90
3	Exhibit 14	NVPE000247-NVPE000248	90
4	Exhibit 15	Amended and Restated Manhattan West General Construction Agreement	92
5	Exhibit 16	APCO00044625-APCO00044627	95
6	Exhibit 17	E-mail from Randy Nickerl	111
7	Exhibit 18	E-mails	113
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1 LAS VEGAS, NEVADA; FRIDAY, OCTOBER 27, 2017

2 9:00 A.M.

3 -oOo-

4 (The Reporter was relieved of her duties
5 under NRCP 30(b)(4).)

6 Whereupon,

7 SAMUEL ZITTING,

8 having been first duly sworn by the court reporter to
9 testify to the truth, the whole truth, and nothing but the
10 truth, was examined and testified under oath as follows:

11

12 EXAMINATION

13 BY MR. JEFFERIES:

14 Q. Sir, will you state your full name for the record
15 please.

16 A. Samuel Zitting.

17 Q. Have you had your deposition taken before?

18 A. Yes.

19 Q. How many times?

20 A. I don't recall.

21 Q. More than five?

22 A. Possibly.

23 Q. Okay. So you're familiar with the process?

24 A. Yes.

25 Q. I'm not going to waste time going through all of

1 Q. Are you able to testify today -- well, strike
2 that.

3 Your addition F to paragraph 3.8, tell me what
4 that was intended to mean.

5 A. That was intended to mean that we -- we were
6 entitled to being paid our retention when drywall was
7 substantially complete, not when the entire project,
8 including landscaping and furniture, was complete, like this
9 contract originally stated.

10 So we were clarifying that, really, the rough
11 carpentry retention didn't have any right to be held after
12 it was all covered up. And if it's covered up, it's
13 accepted.

14 Q. Okay. And that's your language in subparagraph F,
15 Building is considered complete as soon as drywall is
16 completed. Right?

17 A. Yes.

18 Q. Okay. Doesn't say "substantially complete," does
19 it?

20 A. No, it doesn't.

21 Q. Okay. So as you sit here today, are you able to
22 testify as to whether the drywall was complete prior to the
23 time you stopped working for APCO on the project?

24 A. I can testify that the first layer, if you will,
25 of drywall was complete and the only thing that was, to my

1 Sitting here as the corporate designee, would you
2 agree that Zitting accepted that payment schedule for change
3 orders?

4 A. With some changes and modifications, it appears
5 that I did.

6 Q. Okay. Tell me -- so that our record is clear,
7 what did you add to that paragraph 3.9?

8 A. Unless a contractor has executed and approved
9 change order directing subcontractor to pull -- perform
10 certain changes in writing and certain changes have been
11 completed by subcontractor.

12 Q. What was your intention in adding that language?

13 A. Intention was to state that, if I'm directed to do
14 a change by APCO, then I'm going to get paid for that
15 change, regardless of whether the owner pays them for it or
16 not.

17 Q. I don't see the reference to owner payment in
18 there, in that language.

19 A. But it was a continuation of the first sentence
20 in 3.9. So it was finishing that thought that was expressed
21 in 3.9.

22 Q. Oh, I see. So you're saying it's a continuation
23 of the sentence before or is it -- and I'm not trying to be
24 argumentative. I want to make sure I understand what your
25 intent was.

1 know why I want to say that. Strike that.

2 Does that refresh your recollection as to any
3 discussions you may have had with Gemstone and/or CAMCO in
4 August 2008 about continuing on after APCO?

5 A. Does not.

6 Q. Okay. If you go to page 6 of the agreement,
7 Exhibit 15, paragraph 5.02, you'll see a completed work
8 reference. And the document says, Set forth on Exhibit E
9 hereto is an update of the status of the work as of the
10 effective date. Then if you would, sir, go to Exhibit E.
11 It's found on page 26 of Exhibit 15.

12 A. Which building did we decide I was working on?

13 Q. Well, that's what I was going to ask you. I think
14 we --

15 MR. JEFFERIES: Yeah, but . . .

16 Q. (By Mr. Jefferies) I believe it's 8 and 9.

17 A. Okay.

18 Q. My question was: Did you do any work on
19 Buildings 2, 3, or 7?

20 A. There's a potential that I installed some windows
21 in one of the other buildings. I just don't know right now.

22 Q. Okay. Go to page 27. And, again, I've got a head
23 start on you. Mine's highlighted, but if you look under
24 Buildings 8 and 9, you'll see references to drywall.

25 A. Okay.

1 Q. And there's some percentages complete for the
2 various floors in those two buildings, 8 and 9.

3 A. Okay.

4 Q. Continuing on to the next page, 28, under
5 Building 9, it says, Corridors, drywall has not started.
6 First floor corridor lid framing is 70 percent complete and
7 then the drywall itself is shown as being 55 to 70 percent
8 complete depending upon the building.

9 My question to you is: Sitting here as the
10 corporate designee for Zitting, do you have any facts,
11 documents, or information to rebut these purported
12 percentages of completion for the drywall on Buildings 8
13 and 9?

14 A. I don't. I can't help but notice that it shows
15 framing complete on both Buildings 8 and 9 too.

16 Q. Did you have -- did you do any of the soffits --
17 framing for the soffits?

18 A. I don't recall. That could have been done by the
19 drywaller, light gauge steel.

20 Q. Then how about the shafts? Did you do any framing
21 for the shafts?

22 A. That could have been drywall, light gauge steel.
23 It typically is.

24 Q. If I asked you this, I apologize. How about first
25 floor lid framing? Is that something you would do?

1 STATE OF NEVADA)
) SS:
2 COUNTY OF CLARK)

3 CERTIFICATE OF REPORTER

4 I, Vanessa Lopez, a duly commissioned and licensed
5 court reporter, Clark County, State of Nevada, do hereby
6 certify: That I reported the taking of the deposition of
7 SAMUEL ZITTING, commencing on Friday, October 27, 2017, at
8 the hour of 9:00 a.m.;

9 That the witness was, by me, duly sworn to testify
10 to the truth and that I thereafter transcribed my said
11 shorthand notes into typewriting, and that the typewritten
12 transcript of said deposition is a complete, true, and
13 accurate transcription of said shorthand notes;

14 I further certify that I am not a relative or
15 employee of any of the parties involved in said action, nor
16 a relative or employee of an attorney involved in said
17 action, nor a person financially interested in said action;

18 That the reading and signing of the transcript was
19 requested.

20 IN WITNESS WHEREOF, I have hereunto set my hand in
21 my office in the County of Clark, State of Nevada, this 30th
22 day of October, 2017.

23 

24 VANESSA LOPEZ, CCR NO. 902
25

**Amended and Restated
ManhattanWest
General Construction Agreement**

This Amended and Restated General Construction Agreement (the "Agreement") is made as of August 25, 2008 (the "Effective Date") between Gemstone Development West, Inc. ("Developer") and Camco Pacific Construction Company, Inc. ("General Contractor") with the following Nevada General Contractor License Number: 37507 Unlimited.

Recitals

Developer and General Contractor entered into the ManhattanWest General Construction Agreement, dated August 15, 2008 (the "Original Agreement") for the completion of Buildings 2, 3, 7, 8, and 9 of the ManhattanWest mixed-use development project described in the Contract Documents (the "Project") and located at the following Assessors Parcel Numbers: 163-32-101-003, 163-32-101-004, 163-32-101-005, 163-32-101-010, and 163-32-101-014 (the "Project Site").

Developer and General Contractor wish to amend and restate the Original Agreement as set forth in this Agreement.

Agreement

For good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, Developer and General Contractor hereby agree that the Original Agreement is hereby amended and restated as set forth below.

**ARTICLE I
GENERAL PROVISIONS**

1.01 Contract Documents. General Contractor has received the drawings and specifications for the Project set forth on the Planwell PDS site located at https://order.e-arc.com/arcEOC/PWELL_Project_main.asp?pvt=70-1-11863 as of the Effective Date (the "Contract Documents"). The intent of the Contract Documents is to include all items necessary for the proper execution and completion of the Project by General Contractor. Upon delivery to, and consent by, General Contractor of any updates to the Contract Documents, such updates shall be automatically incorporated into this Agreement.

1.02 Defined Terms. Unless otherwise defined in this Agreement, all capitalized terms contained in this Agreement are defined in the Glossary of Defined Terms attached to this Agreement as Exhibit A.

1.03 Schedule of Values. Attached to this Agreement as Exhibit B is the Schedule of Values.

ARTICLE II

EXHIBIT 15

GENERAL CONTRACTOR RESPONSIBILITIES

In exchange for the consideration to be provided to General Contractor pursuant to Article VI, General Contractor shall provide the services set forth below (the "Services"):

2.01 Third-Party Service Providers. General Contractor shall engage licensed and insured contractors, subcontractors, sub-subcontractors, vendors and suppliers (the "Third-Party Service Providers") to perform the Work; provided however, that General Contractor shall not be required to source or negotiate with the Third-Party Service Providers. General Contractor may not replace any Third-Party Service Provider without the prior written consent of Developer. Developer may require the replacement of any Third-Party Service Provider at anytime with or without cause; provided, however, that if Developer is terminating a Third-Party Service Provider without cause, Developer must first obtain General Contractor's consent, which will not be unreasonably withheld. General Contractor shall engage the Third-Party Service Providers listed on Exhibit C (the "Existing Third-Party Service Providers"). All other Third-Party Service Providers engaged by General Contractor are referred to as "New Third-Party Service Providers".

2.02 Third-Party Agreements. General Contractor shall incorporate the relevant terms and obligations of this Agreement into its contracts, purchase orders, and other agreements with any New Third-Party Service Providers (the "Third-Party Agreements"); Developer intends to assign the contracts for the Existing Third-Party Service Providers to General Contractor; provided however, that Developer may elect to terminate the existing contracts with some Existing Third-Party Service Providers, and in such event, new Third-Party Agreements will be executed. Within 10 days of the execution of any Third-Party Agreement, General Contractor shall furnish to Developer copies of such Third-Party Agreement. The terms of each Third-Party Agreement shall expressly set forth that Developer is a third-party beneficiary of such Third-Party Agreement, including, without limitation, any indemnity, warranty, insurance, or liquidated damage provisions obtained by General Contractor from any Third-Party Service Provider.

2.03 General Contractor Staffing. Except as set forth in the next sentence, General Contractor shall employ at its own expense any staff that is not primarily located on the Project Site. General Contractor shall employ at Developer's expense the personnel identified on Exhibit D at the rates stated therein. Upon receipt of written notice from Developer, General Contractor shall (a) employ additional personnel at Developer's expense and (b) remove from the Project any employee; provided however, that, in such notice, Developer must provide reasonable grounds for such removal request.

2.04 Payment Processing. General Contractor shall review and approve the Payment Applications pursuant to the terms of Article VII. Upon receipt of

each Progress Payment, General Contractor shall distribute such funds to the Third-Party Service Providers pursuant to Article VII.

2.05 Lien Releases. General Contractor shall be responsible for obtaining partial conditional and unconditional lien waivers from all Third-Party Service Providers in connection with each Progress Payment; conditional lien waivers will be provided for the current payment application and unconditional lien waivers will be provided for the prior progress payment. After Final Completion, General Contractor shall be responsible for obtaining final conditional and unconditional lien waivers from all Third-Party Service Providers and from all other persons or entities that could possibly have any right to make a lien against the Project or the Project Site; final conditional lien waivers will be provided with the final payment application and final unconditional lien waivers will be provided after Final Payment.

2.06 Risk Management Inspections. General Contractor shall conduct periodic safety inspections of the Project Site at Developer's expense.

2.07 Permits. General Contractor shall accept and retain all permits necessary for the performance of the Work; provided however, that General Contractor shall assign all permits to Developer or its designee upon receipt of written notice from Developer.

2.08 Meetings. Notwithstanding any provision of this Agreement, upon receipt of a written request from Developer to meet with any Third-Party Service Provider, General Contractor will immediately schedule, hold, and attend such meeting or meetings with Developer and such Third-Party Service Provider. Notwithstanding any provision of this Agreement, Developer may meet independently with any Third-Party Service Provider at anytime, and each Third-Party Agreement shall require the corresponding Third-Party Service Provider to attend such meetings.

2.09 Correspondence. General Contractor shall, within 24 hours, provide Developer a copy of any correspondence or agreements with any Third-Party Service Provider or government or regulatory agency.

ARTICLE III EXPRESS EXCLUSIONS FROM THE SERVICES

Any items not set forth in Article II are not considered part of the Services, including, without limitation, the items set forth below (the "Exclusions");

3.01 Developer Responsibilities. The following items shall be the sole responsibility of Developer, and Developer is required to perform these responsibilities in accordance with all applicable federal, state, and local laws, statutes, codes, ordinances, building codes, rules and regulations, and are not, therefore, part of the Services:

(a) Developer shall be responsible for and shall coordinate all construction means, methods, techniques, sequences and procedures necessary for or related to the Work.

(b) Developer shall provide, or cause to be provided, and shall pay for engineering, labor, materials, equipment, tools, cartage, construction services and Work, construction equipment and machinery, water, heat, utilities, transportation, safety precautions and programs, and other facilities and services necessary for proper construction, execution and completion of the Work.

(c) Developer shall keep full and detailed accounts and exercise such controls as may be necessary for proper financial management under this Agreement. General Contractor and General Contractor's accountants shall be afforded access to, and shall be permitted to audit and copy, Developer's records, books, correspondence, instructions, drawings, receipts, subcontracts, purchase orders, vouchers, memoranda and other data relating to the Work. General Contractor shall treat as confidential all records obtained from Developer pursuant to this Section 3.01(c), subject to any legal requirements to disclose such information (e.g., subpoenas, audits, etc.).

(d) Developer shall be responsible for all shop drawings, product data, samples and similar submittals required by the Project.

(e) Developer shall provide an onsite trailer which shall be shared by General Contractor and Developer.

(f) Developer shall provide any required security to the Project Site, all field measurements, assessments of field conditions, and as-built drawings.

(g) Developer shall be solely responsible for (i) insuring that the Contract Drawings are consistent with each other and adequately describe the Work; (ii) distributing current and coordinated Contract Documents to all of the Third-Party Service Providers; and (iii) maintaining at the Project Site any required copies of the Contract Drawings.

(h) Developer shall be solely responsible for obtaining any and all approvals, permits, fees, bonds, licenses, and inspections of the various government agencies, utility providers, or any other third-parties including, without limitation, the Certificate of Occupancy or Certificate of Completion for each Building.

(i) Developer shall be solely responsible for performing and coordinating all of the services required to obtain any utility services required by the Project.

(j) Developer shall be solely responsible for maintaining safety precautions and programs in connection with the Work.

(k) Developer shall be liable for damage or loss to the property at the Project Site.

(l) Developer shall be responsible for all costs relating to or arising out of the termination of any Third-Party Service Provider.

3.02 Express Exclusions. The following items are expressly excluded from the Services, but this list is not intended to be exhaustive or complete, and the fact that an item is not listed below shall not imply that such item is included in the Services; only those items expressly identified in this Agreement as General Contractor's responsibility are included in the Services.

(a) General Contractor shall not be responsible for any of the costs, fees, or expenses related to the Work.

(b) General Contractor shall not be required to deliver any daily reports.

(c) General Contractor shall not be responsible to Developer for acts, errors and omissions of Developer or any Third-Party Service Provider.

(d) General Contractor shall not be responsible for the design of the Project.

(e) General Contractor shall not be responsible for the performance of the Third-Party Service Providers.

(f) General Contractor shall not be responsible for any cost overruns by Third-Party Service Providers.

(g) General Contractor shall not be responsible for delays by any Third-Party Service Provider.

ARTICLE IV SCHEDULE AND COMPLETION

4.01 Completion. The Work within or related to each Building shall be deemed completed upon the (a) completion of the Work in such Building and the corresponding common area around such Building to the satisfaction of Developer and (b) issuance of the Certificate of Occupancy or Certificate of Completion for such Building (collectively, a "Building Completion"). The Work for the entire Project shall be completed upon Building Completion for Buildings 2, 3, 7, 8, and 9 (the "Final Completion").

4.02 Project Schedule. The Work will be performed pursuant to the ManhattanWest Camco Pacific Construction Schedule, dated August 22, 2008, previously compiled by Developer and delivered to General Contractor. Preparation and amendment of the construction schedule shall be Developer's responsibility. Except for the Building Liquidated Damages that may be assessed and payable strictly pursuant to Section 9.03, General Contractor shall not be held responsible or be required to pay any form of damages or compensation if any Building Completion or the Final Completion is not attained pursuant to any schedule or timeframe; provided however, that General Contractor shall perform the Services pursuant to any reasonable timeframe established by Developer.

ARTICLE V WARRANTY AND INDEMNITY

5.01 Warranty. The Third-Party Agreements shall (a) require each Third-Party Service Provider to issue a two year warranty pursuant to the terms to be provided by Developer (the "Express Warranty") and (b) Developer is a third-party beneficiary of the Express Warranty. General Contractor (i) hereby expressly disclaims any express or implied warranty of any kind in connection with the Work and (ii) shall have no duty to repair any of the Work in connection with or pursuant to the Express Warranty or any such express or implied warranty.

5.02 Completed Work Release. Set forth on Exhibit E hereto is an update of the status of the Work as of the Effective Date (the "Previously Completed Work"). It is expressly understood that General Contractor did not perform and shall bear no responsibility for the Previously Completed Work.

5.03 Indemnification.

(a) To the fullest extent permitted by law, Developer agrees to defend (with counsel reasonably acceptable to General Contractor), indemnify and hold harmless General Contractor and General Contractor's agents and employees from any claims, demands, losses and liabilities to or by any and all persons or entities (including without limitation, Developer, the architect, engineers, governmental agencies, and any Third-Party Service Provider and their respective employees, agents, licenses, or representatives) arising out of or from the (i) any breach of this Agreement by Developer; (ii) the negligence or willful misconduct of Developer or any Third-Party Service Provider or any of their agents or employees; and (iii) the Work, including, without limitation, any claims for design, product or construction defects arising from or related to the Work or the Project (collectively, the "Covered Claim").

(b) In the event that General Contractor receives written notice of a Covered Claim, General Contractor shall immediately provide written notice of such Covered Claim to Developer.

(c) Upon receipt of any notice of a Covered Claim from General Contractor, Developer shall, at its cost and expense, assume and control the defense of such Covered Claim for General Contractor. General Contractor may only engage its own legal counsel to defend a Covered Claim at General Contractor's own expense; provided however, that in the event that Developer fails to provide a legal defense pursuant to this Section 5.03 and General Contractor must engage its own legal counsel to provide such legal defense, Developer shall be responsible for the cost of such legal counsel. General Contractor may not settle any Covered Claim without the express written consent of Developer.

(d) In connection with the defense of any Covered Claim by Developer, General Contractor shall do both of the following:

(i) Cooperate with Developer's efforts to defend any Covered Claim, including, without limitation, providing documents and uncompensated access to General Contractor's employees and agents for purposes of gathering evidence and providing testimony related to the Covered Claim; provided however, that Developer will compensate General Contractor for time spent by General Contractor's senior management in coordination meetings related to such defense; and

(ii) Accept any settlement of a Covered Claim that (A) is presented to General Contractor by Developer; (B) does not require the payment of any damages or fees by General Contractor; and (C) does not admit liability of, allow a judgment to be entered against, or result in imposition of governmental penalties or sanctions against, General Contractor or its contractor's license.

(e) Notwithstanding this Section 5.03, each Third-Party Agreement shall provide that (i) the corresponding Third-Party Service Provider will indemnify General Contractor and Developer for the Work being performed by such Third-Party Service Provider pursuant to such agreement and (ii) Developer is a third-party beneficiary of such indemnity.

(f) The provisions of this Section 5.03 shall survive the expiration or termination of this Agreement.

ARTICLE VI COMPENSATION FOR THE SERVICES

6.01 Fees. In exchange for the Services, Developer shall pay to General Contractor an amount equal to \$100,000.00 per month (the "General Contractor Fee"); provided however, that, upon the issuance of the Certificate of Occupancy or Certificate of Completion for four of the five Buildings, the General Contractor Fee shall be reduced to \$30,000.00 per month until Final Completion. For the month in which such adjustment to the General Contractor

Fee takes place, such adjustment shall be calculated pro rata based on the number of days in such month that each of the two levels of General Contractor Fee applied.

6.02 Expenses. In addition to the General Contractor Fee, General Contractor may charge additional fees for the following (the "General Contractor Expenses"):

(a) All costs and expenses associated with the employment of onsite personal pursuant to Section 2.03.

(b) All costs and expenses associated with the inspections to be conducted pursuant to Section 2.06.

6.03 Discounts, Rebates, and Refunds. Discounts obtained on payments made by General Contractor shall accrue 100% to Developer. In addition, trade discounts, rebates, refunds and amounts received from sales of surplus materials and equipment shall accrue 100% to Developer. Developer shall be entitled to all savings derived from value engineering.

6.04 Taxes. General Contractor shall be solely responsible for the taxes to be paid on the General Contractor Fee. Developer shall pay all sales, consumer, use and similar taxes levied in connection with the Work.

ARTICLE VII PAYMENT FOR THE WORK

7.01 Progress Payments.

(a) Pursuant to the Third-Party Agreements, Third-Party Service Providers shall deliver their individual payment applications to General Contractor. Developer may, for any reason, refuse to approve all or a portion of any application for payment received from a Third-Party Service Provider.

(b) On approximately the first business day of each month, General Contractor shall prepare applications for payment for the previous month on forms similar to AIA G702 and G703 including separate SOV and AIA G703 pages for each Building as well as the corresponding common areas (the "Application for Payment").

(i) Each Application for Payment shall be based on the most recent Schedule of Values. The Schedule of Values shall allocate the Cost of the Work among the various portions of the Work, and will be periodically updated by General Contractor (subject to approval by Developer) to reflect buy-out and changed conditions. The General Contractor's Fee and General Contractor Expenses shall be shown as separate items.

(ii) Applications for Payment shall show the Percentage of Completion of each portion of the Work as of the end of the period covered by the Application for Payment. The "Percentage of Completion" shall be the percentage of that portion of the Work which has actually been completed.

(c) Upon delivery of an executed Application for Payment, Developer may refuse to approve all or a portion of such Application for Payment; provided however, that any such refusal must be reasonable, in good faith, and accompanied by a written explanation of such refusal. Upon receipt of a refusal or partial refusal, General Contractor will revise the Application for Payment accordingly and resubmit it to Developer for approval and continue this revision process until such Application for Payment is approved by Developer. Upon approving such Application for Payment, Developer shall submit, to Developer's lender or such lender's authorized designee, the corresponding draw application for the undisputed amount to be paid pursuant to such Application for Payment (the "Draw Application"). Thereafter, the amount requested in a Draw Application shall be paid within 40 days of the submission of such Draw Application (the "Progress Payment").

(d) The amount of each Progress Payment shall be computed as follows:

(i) take that portion of the Cost of the Work properly allocable to completed Work as determined by multiplying the Percentage of Completion of each portion of the Work by the share of the Cost of the Work allocated to that portion of the Work in the most recent Schedule of Values;

(ii) add that portion of the Cost of the Work properly allocable to materials and equipment delivered and suitably stored at the Project Site for subsequent incorporation into the Work, or if approved in advance by Developer, suitably stored off of the Project Site at a location agreed upon in writing;

(iii) subtract the aggregate of previous Progress Payments made by Developer;

(iv) subtract the applicable Standard Retainage;

(v) add the General Contractor Fee and payment for any General Contractor Expenses;

(vi) subtract the shortfall, if any, resulting from errors in previous Progress Payments subsequently discovered by Developer's accountant; and

(vii) subtract amounts, if any, that are disputed by Developer.

(e) Upon receipt of the Progress Payment, General Contractor shall promptly pay each Third-Party Service Provider the amount represented by the portion of the Percentage of the Work Completed that was completed by such Third-Party Service Provider during the period covered by the corresponding Progress Payment. General Contractor shall, by appropriate agreement with each New Third-Party Service Provider, require each New Third-Party Service Provider to make payment to sub-contractors in a similar manner.

7.02 Final Payment.

(a) A final payment, constituting the entire unpaid balance of the Cost of the Work (the "Final Payment"), shall be made by Developer to General Contractor when the following conditions have been met:

- (i) Final Completion is obtained;
- (ii) the General Contractor has fully performed the Services; and
- (iii) a written statement that General Contractor knows or has no reason to suspect that any additional costs or indebtedness exists in connection with the Work.

(b) Notwithstanding and without limiting any other provision in the Contract Documents, the Final Payment is conditioned upon satisfaction of all conditions applicable to such payment imposed by any funding construction draws as well as Developer's reasonable approval.

(c) Payment and acceptance of Final Payment by Developer and General Contractor, respectively, shall constitute a waiver of all claims by Developer and General Contractor except such claims as are previously made in writing and identified as unsettled at the time of the final Application for Payment.

7.03 Retainage.

(a) No retention shall be withheld from the General Contractor Fee or the General Contractor Expenses. General Contractor shall withhold the maximum legal retainage amount set forth in each APCO Third-Party Agreement. Each New Third-Party Agreement will provide for the withholding of retainage from the corresponding New Third-Party Service Provider in the amount of 10% of each Progress Payment.

(b) Any remaining retention for Third-Party Service Providers shall be released for payment to the Third-Party Service Providers (i) on the date that (A) Final Completion is attained and (B) all outstanding disputes between

Developer and General Contractor and Developer and any Third-Party Service Providers have been resolved, and any liens against the Project related to such disputes have been removed or (ii) upon the express written approval of such release, or a partial release to certain Third-Party Service Providers, executed by Developer and General Contractor.

ARTICLE VIII OWNERSHIP AND USE OF DOCUMENTS

8.01 Ownership. All documents related to the Work and the Project including documents that are furnished or obtained by General Contractor, including, without limitation, any drawings, specifications, or designs (the "Project Documents") are the sole property of Developer and may be used by Developer for any purpose.

8.02 Subsequent Use. To the extent that any Project Documents are used by Developer for a subsequent project that does not involve General Contractor, General Contractor shall not be professionally liable for the use of such Project Documents on such subsequent project.

8.03 Non-Publication. Submission or distribution of any Project Documents to meet official regulatory requirements or for other purposes in connection with the Project is not to be construed as publication in derogation of common law copyrights or other reserved rights.

ARTICLE IX INSURANCE, BONDS, AND LIQUIDATED DAMAGES

9.01 Insurance. Developer shall obtain and maintain, at its sole cost, the types and amounts of insurance coverage set forth in the insurance binder attached hereto as Exhibit F. General Contractor shall not be (a) responsible for any insurance deductibles, self-insured retention, or related insurance expenses related to such policies or (b) required to obtain any additional insurance pursuant to such policies. Notwithstanding this Section 9.01, each Third-Party Agreement shall provide insurance provisions as are delivered to General Contractor by Developer prior to the execution of the corresponding Third-Party Agreement.

9.02 Bonds. General Contractor will not be required to furnish any performance bonds or payment bonds for the Project.

9.03 Liquidated Damages.

(a) The "Required Completion Date" is the date that a given Building Completion must be attained. The corresponding Required Completion Dates for the Buildings are set forth below:

Building	Required Completion Date
Building 2	October 31, 2008
Building 3	October 31, 2008
Building 7	December 31, 2008
Building 8	November 30, 2008
Building 9	November 30, 2008

(b) Building Completion must be attained on or prior to the applicable Required Completion Date (as adjusted only by Change Orders approved by Developer). If the Building Completion for any Building is not attained on or prior to the corresponding Required Completion Date, Developer may retain and keep as liquidated damages (and not as a penalty) an amount equal to \$15,000 for each and every calendar day after the Required Completion Date that Building Completion is delayed for such Building (the "Building Liquidated Damages").

(c) Developer and General Contractor acknowledge and agree that any liquidated damages assessed under Section 9.03(b) are (i) due to the difficulty or impossibility of calculating actual costs and damages of delays, (ii) a reasonable approximation of the costs and damages that would be incurred by Developer for delays, and (iii) not a penalty. Developer's planning and costs for completing its entire construction process and marketing its condominiums include hiring of employees, purchase and lease of equipment, advertising, accepting deposits and reservations for the sales of units, and addressing closing costs all of which are adversely impacted by delays in any Building Completion. In addition, delays in any Building Completion may cause additional expenses for contract and construction administration, accounting, and cost of capital. Nothing in Section 9.03(b) shall limit in any manner the remedies and/or damages that may be obtainable by Developer upon any other breach of this Agreement by General Contractor.

(d) Each Third-Party Agreement shall provide a liquidated damages provision that is similar to this Section 9.03 and places the Third-Party Service Providers on notice that they are responsible to the Developer and General Contractor for liquidated damages. The Building Liquidated Damages shall be strictly assessed by Developer against General Contractor pursuant to the terms of this Section 9.03. General Contractor shall similarly strictly assess Building Liquidated Damages against its Third-Party Service Providers pursuant to this Section 9.03 and the corresponding Third-Party Agreement. Notwithstanding the previous sentence of this Section 9.03(d) and any other provision of this Agreement, General Contractor's obligation to pay Developer any assessed Building Liquidated Damages will not be triggered until such time and will be limited to the extent that General Contractor actually collects from the corresponding Third-Party Service Providers such amounts owed for liquidated damages by such Third-Party Service Providers (i.e., General Contractor will not be required to pay any Building Liquidated Damages out of its own funds, but will



only pay the amount that General Contractor actually collects from Third-Party Service Providers). General Contractor shall use its best efforts to recover all such liquidated damage amounts from the applicable Third-Party Service Providers as quickly as possible, including any costs, fees, or expenses incurred by General Contractor in the collection of the Building Liquidated Damages from the Third Party Service Provider. Developer shall reimburse General Contractor, within 15 days of receipt of an invoice, for the reasonable expert and legal fees and costs, if any, incurred by General Contractor in connection with collecting such liquidated damage amounts from such Third-Party Service Providers provided that such expert and legal fees and costs are not first recovered from the applicable Third-Party Service Providers.

ARTICLE X CHANGES IN THE WORK

10.01 Change Orders.

(a) A "Change Order" is a written order signed by Developer and General Contractor, authorizing a change in the Work.

(b) Developer, without invalidating this Agreement, may initiate changes in the Work by executing and delivering to General Contractor a Change Order setting forth the work to be performed, the Third-Party Service Provider to perform such work, and any other terms of such engagement. Upon receiving a Change Order, General Contractor will execute such Change Order and execute or amend any Third-Party Agreements as are necessary to perform the Work set forth in such Change Order; provided that the Third-Party Service Provider has agreed to the terms of the Change Order. General Contractor shall receive no additional compensation in connection with any Change Order.

(c) Notwithstanding any provision of this Agreement, Developer may unilaterally terminate any Change Order prior to the completion of the Work set forth in such Change Order; provided that the Third-Party Service Provider consents thereto. Upon such termination, a deductive change order for the amount of the uncompleted Work set forth in the terminated Change Order shall be issued by General Contractor.

ARTICLE XI TERMINATION OF AGREEMENT

11.01 Term. The term of the Agreement commences on the Effective Date. Provided that this Agreement is not terminated pursuant to Section 11.02, the term of the Agreement ends on the date of Final Completion.

11.02 Termination by Developer With Cause.

(a) if General Contractor breaches any provision of this Agreement and fails to cure such breach within 48 hours of receiving written notice of such breach from Developer (or, if the breach cannot reasonably be cured within 48 hours, General Contractor does not initiate to cure within 48 hours and thereafter diligently pursue the cure to completion), Developer may terminate the Agreement without prejudice to any other rights or remedies available to Developer and after giving General Contractor three days' written notice (in addition to the 48 hours notice pursuant to the above cure period) and do the following:

(i) Take possession of the Project Site, and all materials, equipment, tools, and construction equipment and machinery thereon owned by General Contractor to the extent that such items are incorporated into the Buildings or the Project Site;

(ii) Accept assignment of any Third-Party Agreements pursuant to Section 11.03; and

(iii) Obtain the Services by whatever reasonable method that Developer deems expedient.

(b) In the event of a termination pursuant to Section 11.02(a), (i) General Contractor shall not be entitled to receive any further payment until the Work is finished and (ii) upon completion of the Work, General Contractor shall pay any costs and expenses incurred by Developer to perform or have a third-party perform the Services in excess of the unpaid portion of the General Contractor's Fee and General Contractor Expenses.

11.03 Assignment. Each Third-Party Agreement for a portion of the Work is hereby assigned by General Contractor to Developer provided that such assignment is effective only after termination of the Agreement by Developer for cause pursuant to Section 11.02 and only for those Third-Party Agreements which Developer accepts by notifying General Contractor and the applicable Third-Party Service Provider in writing. General Contractor shall execute and deliver all such documents and take all such steps as Developer may require for the purpose of fully vesting in Developer the rights and benefits of General Contractor under such documents. Upon the acceptance by Developer of any Third-Party Agreement, subject to the other terms of this Article XI, Developer shall pay to the corresponding Third-Party Service Provider any undisputed amounts owed for any Work completed by such Third-Party Service Provider, prior to the underlying termination for which Developer had not yet paid General Contractor prior to such underlying termination.

ARTICLE XII CLAIM AND DISPUTE RESOLUTION

12.01 Definition. The term "Claim" means a demand or assertion by one of the parties seeking, as a matter of right, adjustment or interpretation of any Agreement terms, payment of money, extension of time or other relief with respect to the terms of the Agreement. The term "Claim" also includes other disputes and matters in question between Developer and General Contractor arising out of or relating to the Agreement. Claims must be initiated by written notice. The responsibility to substantiate Claims shall rest with the party making the Claim.

12.02 Time Limits on Claims. A Claim may be brought by either party at anytime prior to Final Completion. For any Claim that may be brought by either party after Final Completion, such Claim must be initiated within a reasonable number of days after the claimant first recognizes the condition giving rise to the Claim; provided however, that the parties may mutually agree to postpone the resolution of any Claim. Claims must be initiated by written notice to the other party.

12.03 Mediation.

(a) Any Claim shall be subject to mediation as a condition precedent to arbitration or the institution of legal or equitable proceedings by either party; provided, however, that a party may initiate a lawsuit to prevent the statute of limitations from expiring so long as that party seeks to have the lawsuit stayed pending mediation and arbitration as provided in this Agreement.

(b) The parties shall endeavor to resolve their Claims by mediation which shall be in accordance with the Construction Industry Mediation Rules of the American Arbitration Association in effect as of the date that such Claim arises. Request for mediation shall be filed in writing with the other party to the Agreement and with the American Arbitration Association. The request may be made concurrently with the filing of a demand for arbitration or initiation of a lawsuit but, in such event, mediation shall proceed in advance of arbitration or legal or equitable proceedings, which shall be stayed pending mediation for a period of 60 days from the date of filing, unless stayed for a longer period by agreement of the parties or court order.

(c) The parties shall share the mediator's fee and any filing fees equally. The mediation shall be held in Las Vegas, Nevada. Agreements reached in mediation shall be enforceable as settlement agreements in any court having jurisdiction thereof.

12.04 Arbitration.

(a) Any Claim shall be subject to arbitration, except those claims that are required by statute to be litigated (e.g., foreclosure of a mechanic's lien). Prior to arbitration, the parties shall endeavor to resolve disputes by mediation in accordance with the provisions of Section 12.03.



(b) Claims not resolved by mediation shall be decided by arbitration which shall be in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association in effect as of the date that such Claim arises. The demand for arbitration shall be filed in writing with the other party to the Agreement and the American Arbitration Association.

(c) A demand for arbitration shall be made within a reasonable time after the Claim has arisen, and in no event shall it be made after the date when institution of legal or equitable proceedings based on such Claim would be barred by the applicable statute of limitations.

(d) The party filing a notice of demand for arbitration must assert in the demand all Claims then known to that party on which arbitration is permitted to be demanded.

(e) The award rendered by the arbitrator or arbitrators shall be final, and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction thereof.

12.05 Continued Performance. Notwithstanding any provision of this Agreement, in the event of any unresolved Claim, dispute, or controversy between Developer and General Contractor related to the Services or this Agreement, General Contractor shall diligently continue to perform the Services to the full extent practicable pending resolution of the unresolved Claim, dispute, or controversy and Developer shall continue to make payment required under this Agreement for all Work that is not directly implicated in the Claim, dispute, or controversy.

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 02:53 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 14, Bates Nos. 3054–3280)

Marquis Aurbach Coffing

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

Spencer Fane LLP

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

Attorneys for Appellant, APCO Construction, Inc.

MAC:05161-019 3698575_1

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

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

12 -and-

13 Spencer Fane, LLP
14 John H. Mowbray, Esq.
15 Nevada Bar No. 1140
16 John Randall Jefferies, Esq.
17 Nevada Bar No. 3512
18 Mary E. Bacon, Esq.
19 Nevada Bar No. 12686
20 300 S. Fourth Street, Suite 700
21 Las Vegas, NV 89101
22 JMowbray@spencerfane.com
23 RJefferies@spencerfane.com
24 MBacon@spencerfane.com

25 Attorneys for APCO Construction, Inc.

26 **DISTRICT COURT**
27 **CLARK COUNTY, NEVADA**

28 APCO CONSTRUCTION, a Nevada
corporation,

Plaintiff,

vs.

GEMSTONE DEVELOPMENT WEST INC.,
A Nevada corporation,

Defendant.

AND ALL RELATED MATTERS

Case No.: A571228
Dept. No.: XIII

Consolidated with:

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

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

1 In accordance with NRCP 33, and following additional discovery, APCO Construction
2 (hereinafter referred to as "APCO" or "Plaintiff"), by and through its attorneys, Marquis
3 Aurbach Coffing, and Spencer Fane, LLP, hereby supplement its answer to Zitting Brothers
4 Construction, Inc.'s (hereinafter referred to as "Defendant" or "Zitting Brothers") Request for
5 Interrogatories as follows: **(Supplements appear in bold type)**

6 **GENERAL RESPONSES AND OBJECTIONS**

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

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

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

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

25 5. No incidental or implied admissions will be made nor shall be construed by the
26 answers. The fact that the Plaintiff may respond or object to any Interrogatory, or any part
27 thereof, shall not be deemed an admission that the Plaintiff accepts or admit the existence of any
28 fact set forth therein or assumed by such Interrogatory, or that such answer constitutes

1 admissible evidence. The fact that the Plaintiff responds to part of any Interrogatory is not to be
2 deemed a waiver by the Plaintiff of its objections, including privilege, to any other part of such
3 an Interrogatory.

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

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

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

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

24 **ANSWER TO INTERROGATORIES**

25 **INTERROGATORY NO. 1:**

26 Identify and state with specificity the facts that you intend to rely upon to refute each
27 cause of action in Zitting Brothers' Complaint.
28

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

2 Objection. APCO objects to this Interrogatory on the grounds that this Interrogatory is
3 vague, ambiguous, overly broad, unduly burdensome and oppressive because it seeks to force
4 APCO to "Identify and state with specificity the facts that you intend to rely upon to refute each
5 cause of action in Zitting Brothers' Complaint." Broad ranging interrogatories are improper
6 when they essentially subsume every fact in the case or every person having knowledge. See
7 Hiskett v. Wal-Mart Stores, Inc., 180 F.R.D. 403, 404 (D. Kan. 1998). ("Interrogatories should
8 not require the answering party to provide a narrative account of its case."). Parties can hardly
9 know when they have identified "all" facts, persons, and documents with respect to anything –
10 particularly before the close of discovery. "How can the court make enforceable orders with
11 reference to 'all' of anything?" Often, the relevance of a particular fact to a particular issue is not
12 known until clarified and put into context by testimony at deposition or trial. Such a question
13 places the responding party in an impossible position. See id.; Safeco of Am. V. Rawstron, 181
14 F.R.D. 441, 447048 (C.D. Cal. 1998)(finding unreasonable an interrogatory calling for all facts
15 supporting denial of a request for admission); Lawrence v. First Kan. Bank & Trust Co., 169
16 F.R.D. 657, 660-63 (D. Kan. 1996)(same); Hilt v. SFC, Inc., 170 F.R.D. 182, 186-87 (D. Kan.
17 1997)(finding unduly burdensome an interrogatory seeking to require plaintiff to state 'each and
18 every fact' supporting allegations of a complaint). APCO further objects on the grounds that to
19 answer this Interrogatory would result in annoyance, embarrassment, or oppression to APCO in
20 that the 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 Brothers; 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 is
26 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

1 work product privilege in that it calls for him to provide an analysis of written data. APCO
2 further objects on the basis that the question seeks to ascertain all facts and other data which
3 APCO intends to offer at trial and, as such, is violative of the attorney work product privilege.
4 APCO objects on the basis that the attorney-client privilege protects disclosure of the
5 information sought. APCO further objects to this Interrogatory on the grounds that it calls for
6 legal conclusions, and that the contract documents at issue speak for themselves.

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

1 In further clarification of the above, but not specifically limited to the following, it
2 has been determined through additional discovery, and specifically, but not limited to the
3 deposition of Zitting's NRCP 30(b)(6) witness, that Zitting is seeking damages for its
4 retention and various change orders that Zitting purports are owed by APCO despite
5 Zitting having continued to conduct over \$200,000 in work for Camco following the
6 assignment of the project to Camco.¹ Project documentation confirms that Zitting's
7 retention was rolled over to into Camco's scope and billing as it was always a Project
8 Owner obligation. Zitting is not entitled to any further change orders that were not
9 approved by APCO or the Owner of the Project, were late in submission, were for work
10 not completed, were for work conducted after APCO left the Project, and/or which was
11 conducted with no written authorization, field change directives, or change orders, as
12 required by the Subcontract. Moreover, with each lien release, Zitting failed to comply
13 with the Subcontract and did not identify or reserve its claims for disputed and
14 unacknowledged purported change orders, as each payment was made by APCO. It has
15 further been determined that Zitting's change orders were properly rejected due to lack of
16 backup information being provide to support the entitlement to the requested amounts.
17 Not only did Zitting not provide the proper support, it failed to resubmit change order
18 requests after rejection. Zitting's own NRCP 30(B)(6) witness admitted during deposition
19 that the subcontract provisions were not complied with, *e.g.*, but not limited to, the
20 conditions precedent detailed in various subsections (3.1 – 3.10) of section 3 entitled
21 "Contract Price and Payments" of the subcontract between APCO and Zitting. With
22 specific regard to retention, which APCO never held or received, Zitting admittedly failed
23 to satisfy the preconditions to release of retention specified in paragraph 3.8 of the
24 subcontract. Specifically, clause 3.8(a) states in pertinent part:

25 The 10 percent withheld retention shall be payable to Subcontractor upon,
26 and only upon the occurrence of all the following events, each of which is
27 condition precedent to Subcontractor's right to receive final payment
28 hereunder and payment of such retention: (a) Completion of the entire

¹ See generally the deposition of Zitting's NRCP 30(b)(6) witness taken on October 27, 2017.

1 project Building described in the Contract Documents; (b) The approval and
2 final acceptance of the project Building Work by Owner; (c) Receipt of final
3 payment by Contractor from Owner; (d) Delivery to Contractor from
4 Subcontractor all as-built drawings for its scope of work and other close out
5 documents; (e) Delivery to Contractor from Subcontractor a Release and
Waiver of Claims from all Subcontractor's laborers, material and equipment
suppliers, and subcontractors providing labor, materials or services to the
Project (Forms Attached). . . (F) Building is considered complete as soon as
drywall is completed.

6 APCO has no record of receiving any billing from Zitting for the retention or disputed
7 change orders. Zitting also is not entitled to payment for disputed changes, because such
8 payments are not due under the Change Order payment schedule. There is also no factual
9 scenario where APCO could have been enriched, as it never received any value for
10 Zitting's purported retention and change orders. Further, Zitting admitted during
11 deposition that it has no knowledge as to whether it followed up on any request for
12 payment short of filing the lien against the Property. Moreover, due to Zitting's direct
13 assertions at deposition, and as determined throughout discovery, it has also been
14 discovered that Zitting has written off some, if not all, of the damages it currently asserts it
15 is purportedly owed by APCO².

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

18 **INTERROGATORY NO. 2:**

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

22
23 ² See generally the deposition of Zitting's NRCP 30(b)(6) witness taken on October 27, 2017; See
24 generally the deposition of APCO 30(b)(6) witness taken on June 5, 2017, more specific, but not
25 limited to, see pgs. 10, 20, 22-26, 29-30, 36-41, and 90-92; See generally APCO 30(b)(6) witness
26 taken on July 18, 2017, more specific, but not limited to, pgs. 106, 113, 117-121, 123-217, 133, 135-
27 140, 142-147, 149-153, 165-168, 171-172, 179-184, 186-189, and 191-193; See also APCO's Motion
28 to Dismiss or For Summary Judgment on Lien Claimants' NRS CH 108 Claims for Foreclosure on
Mechanic's lien filed June 26, 2017; See also APCO's Answer to Zitting's Complaint, specifically,
but not limited to, APCO's affirmative defenses asserted therein; APCO's prior 10th and 11th
Supplemental Discourse of Witnesses and Documents, and Zitting's Notice of Deposition to APCO's
NRCP 30(b)(6) Witness.

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

2 APCO paid Zitting Brothers pursuant to the terms of the Subcontract. More specifically,
3 see Section 3 of the Subcontract. Basically the procedure for payment was as follows: Pursuant
4 to the terms of the Subcontract, Zitting Brothers submitted to APCO its monthly billing, no later
5 than the 25th of each month, showing quantities of subcontract work that has been satisfactorily
6 completed in the preceding month, as well as backup material. In the event that Zitting Brothers
7 failed to timely submit its monthly billing with the necessary backup material that resulted in that
8 monthly payment application being rolled over to the following month. In turn, APCO submitted
9 its Application for Payment, which included the subcontractor's monthly billing and backup
10 documentation to Gemstone for payment. Upon actual receipt of payment by APCO from
11 Gemstone, APCO then paid the amount that APCO received for Zitting Brothers work to Zitting
12 Brothers as required under the Subcontract. Discovery is ongoing. APCO reserves the right to
13 supplement or amend its response to this Interrogatory as investigation, discovery, disclosure and
14 analysis continues. (See also further clarification supplement to APCO's Answer to
15 Interrogatory 1).

16 **INTERROGATORY NO. 3:**

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

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

21 To date, APCO has paid Zitting Brothers the sum of \$3,282,848.55. More specifically,
22 APCO paid Zitting Brothers as follows: See Exhibit 1 attached hereto for the breakdown. See
23 also documents identified by Bate Stamp No. APC000044563 through APC000044784, which
24 APCO deposited into a depository established by APCO for this litigation matter with Litigation
25 Services located at 3770 Howard Hughes Pkwy, Ste 300, Las Vegas, NV 89169-0935 and/or are
26 hereby made available for review and copying (at requestor's expense) at a mutually agreeable
27 time and place. APCO does not have any information as to what payments may have been made
28 by Gemstone directly to Zitting Brother after APCO terminated its prime contract with

1 Gemstone. However, from the information obtained through Zitting Brothers discovery requests
2 propounded upon APCO, it appears that Gemstone may have paid Zitting Brothers at least
3 \$364,760.00. Discovery is ongoing. APCO reserves the right to supplement or amend its
4 response to this Interrogatory as investigation, discovery, disclosure and analysis continues. (See
5 also further clarification supplement to APCO's Answer to Interrogatory 1).

6 **INTERROGATORY NO. 4:**

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

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

11 Objection. APCO objects to this Interrogatory on the grounds that this Interrogatory is
12 vague, ambiguous, overly broad, unduly burdensome and/or oppressive. Subject to, and without
13 waiving any objections, APCO responds as follows: See documents located at Litigation
14 Services that are made available for review and copying (at requestor's expense). More
15 specifically, see documents identified by Bate Stamp No. APC000033494 through
16 APC000035651. Discovery is ongoing. APCO reserves the right to supplement or amend its
17 response to this Interrogatory as investigation, discovery, disclosure and analysis continues. (See
18 also further clarification supplement to APCO's Answer to Interrogatory 1).

19 **INTERROGATORY NO. 5:**

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

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

26 b. how much you contend the work and equipment provided by Zitting Brothers is
27 actually valued at; and
28

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

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

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

25 Subject to and without waiving any objections, APCO responds as follows: See
26 documents identified by Bate Stamp No. APC000000001³ through APC000078992 and

27 ³ Please note that documents bate stamped APC000000001 through APC000001557 are not being
28 produced by APCO as those documents were delivered by APCO to Gemstone Development West

1 APCO104200 through 104234, which APCO has deposited into a depository established by
2 APCO for this litigation matter with Litigation Services and/or are hereby made available for
3 review and copying (at requestor's expense) at a mutually agreeable time and place. Discovery is
4 ongoing; APCO reserves the right to supplement or amend its response to this Interrogatory as
5 investigation, discovery, disclosure and analysis continues. **(See also further clarification**
6 **supplement to APCO's Answer to Interrogatory 1).**

7 **INTERROGATORY NO. 6:**

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

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

11 Pursuant to the terms of the Subcontract any payments to Zitting Brothers were
12 specifically conditioned upon APCO's actual receipt of payment from Gemstone for Zitting
13 Brothers' work. Moreover, the Subcontract specifically provides that Zitting Brothers was
14 assuming the same risk that Gemstone may become insolvent and not be paid for its work as
15 APCO assumed in entering into prime contract with Gemstone. Zitting Brothers further agreed
16 that APCO had no obligation to pay Zitting Brothers for any work performed by Zitting Brothers
17 until or unless APCO had actually been paid for such work by Gemstone. In fact, due to non-
18 payment, APCO exercised its rights pursuant to NRS Chapter 624 and terminated the prime
19 contract with Gemstone ~~and further terminated the Subcontract with Zitting Brothers~~. Discovery
20 is ongoing; APCO reserves the right to supplement or amend its response to this Interrogatory as
21 investigation, discovery, disclosure and analysis continues. **(See also further clarification**
22 **supplement to APCO's Answer to Interrogatory 1).**

23 **INTERROGATORY NO. 7:**

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

26 ("Gemstone") on September 3 2008, around the time of termination of APCO's prime contract so that
27 Gemstone could continue with the construction of the Project. APCO does not have a copy of these
28 documents as they remain in Gemstone's possession. Furthermore, due to clerical error, the following
Bate Stamp Nos. were not used, APC000005841, APC000024165 and APC000033296 and are thus not
being produced.

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

2 Objection. APCO objects to this Interrogatory on the grounds that this Interrogatory is
3 overly broad, unduly burdensome and oppressive because it seeks to force APCO to identify
4 “each and every fact” that APCO relied upon to support its position that any claim for “unjust
5 enrichment against you is invalid.” Broad ranging written discovery is improper when it
6 essentially subsumes every fact in the case. See Hiskett v. Wal-Mart Stores, Inc., 180 F.R.D.
7 403, 404 (D. Kan. 1998); Safeco of Am. V. Rawstron, 181 F.R.D. 441, 447048 (C.D. Cal. 1998);
8 Lawrence v. First Kan. Bank & Trust Co., 169 F.R.D. 657, 660-63 (D. Kan. 1996)(same); Hilt v.
9 SFC, Inc., 170 F.R.D. 182, 186-87 (D. Kan. 1997). APCO further objects to this Interrogatory on
10 the grounds of attorney client privilege and/or attorney work product. APCO further objects that
11 this Interrogatory is premature, as discovery has just commenced on this matter and APCO has
12 not yet identified what documents it may decide to utilize or offer as exhibits against Zitting
13 Brothers at the time of trial.

14 Subject to and without waiving any objections, See Response to Interrogatory No. 1 and
15 6 above, which are incorporated herein by this reference. Also, see documents identified by Bate
16 Stamp No. APC000000001⁴ through APC000078992 and APCO104200 through 104234, which
17 APCO has deposited into a depository established by APCO for this litigation matter with
18 Litigation Services and/or are hereby made available for review and copying (at requestor’s
19 expense) at a mutually agreeable time and place. 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. (See also further clarification supplement to APCO’s Answer to
22 Interrogatory 1).

23 **INTERROGATORY NO. 8:**

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

27
28 ⁴ See Footnote No. 3.

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

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

14 Subject to and without waiving any objections, See Response to Interrogatory No. 1, 6,
15 and 7 above, which are incorporated herein by this reference. Moreover, it is APCO's
16 understanding that after APCO terminated its prime contract with Gemstone for nonpayment,
17 Gemstone requested all subcontractors, including Zitting Brothers, to continue their work on the
18 Project. Further, it is APCO's understanding that Zitting Brothers elected not to complete its
19 work and insure that their work was accepted by the inspectors and Gemstone. As such, Zitting
20 Brothers failed to put themselves in the position to receive payment for the work that allegedly
21 remains unpaid at this time. Also, see documents identified by Bate Stamp No. APC000000001⁵
22 through APC000078992 and APC0104200 through 104234, which APCO has deposited into a
23 depository established by APCO for this litigation matter with Litigation Services and/or are
24 hereby made available for review and copying (at requestor's expense) at a mutually agreeable
25 time and place. 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 ⁵ See Footnote No. 3.

1 (See also further clarification supplement to APCO's Answer to Interrogatory 1).

2 **INTERROGATORY NO. 9:**

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

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

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 had
10 full knowledge and assumed the risk of any circumstance, condition, or result pertaining to or
11 arising from the Project as asserted in your Fifth and Eighth Affirmative Defenses." 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 Response to Interrogatory No. 1, 6, 7,
21 and 8 above, which are incorporated herein by this reference. Also, see documents identified by
22 Bate Stamp No. APC000000001⁶ 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 ⁶ See Footnote No. 3.

1 and analysis continues. (See also further clarification supplement to APCO's Answer to
2 Interrogatory 1).

3 **INTERROGATORY NO. 10:**

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

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

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'
11 claims to be owed by APCO Construction has been fully performed, satisfied, excused, and/or
12 discharged as asserted in your Tenth Affirmative Defense." Broad ranging written discovery is
13 improper when it essentially subsumes every fact in the case. See Hiskett v. Wal-Mart Stores,
14 Inc., 180 F.R.D. 403, 404 (D. Kan. 1998); Safeco of Am. V. Rawstron, 181 F.R.D. 441, 447048
15 (C.D. Cal. 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 to
17 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. Discovery is ongoing. APCO
23 reserves the right to supplement or amend its Response to this Interrogatory as investigation,
24 discovery, disclosure and analysis continues. (See also further clarification supplement to
25 APCO's Answer to Interrogatory 1).

26 **INTERROGATORY NO. 11:**

27 State each and every fact that you intend to rely upon to support your position that any
28 obligation or duty, contractual or otherwise that Zitting Brothers' claims to be owed by APCO

1 has been replaced, terminated, voided, cancelled or otherwise released as asserted in your
2 Sixteenth Affirmative Defense.

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

4 Objection. APCO objects to this Interrogatory on the grounds that this Interrogatory is
5 overly broad, unduly burdensome and oppressive because it seeks to force APCO to identify
6 "each and every fact" that APCO relied upon to support its position that "Zitting Brothers'
7 claims to be owed by APCO has been replaced, terminated, voided, cancelled or otherwise
8 released as asserted in your Sixteenth Affirmative Defense." Broad ranging written discovery is
9 improper when it essentially subsumes every fact in the case. See Hiskett v. Wal-Mart Stores,
10 Inc., 180 F.R.D. 403, 404 (D. Kan. 1998); Safeco of Am. V. Rawstron, 181 F.R.D. 441, 447048
11 (C.D. Cal. 1998); Lawrence v. First Kan. Bank & Trust Co., 169 F.R.D. 657, 660-63 (D. Kan.
12 1996)(same); Hilt v. SFC, Inc., 170 F.R.D. 182, 186-87 (D. Kan. 1997). APCO further objects to
13 this Interrogatory on the grounds of attorney client privilege and/or attorney work product.
14 APCO further objects that this Interrogatory is premature, as discovery has just commenced on
15 this matter and APCO has not yet identified all facts that it intends to use relative the Zitting
16 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. APC000000001⁷ through APC000078992 and APC0104200 through 104234,
20 which APCO has deposited into a depository established by APCO for this litigation matter with
21 Litigation Services and/or are hereby made available for review and copying (at requestor's
22 expense) at a mutually agreeable time and place. Discovery is ongoing. APCO reserves the right
23 to supplement or amend its Response to this Interrogatory as investigation, discovery, disclosure
24 and analysis continues. (See also further clarification supplement to APCO's Answer to
25 Interrogatory 1).

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28 ⁷ See Footnote No. 3.

1 **INTERROGATORY NO. 12:**

2 If you contend that Zitting Brothers entered into any independent agreement or
3 ratification with Cameo Pacific Construction Company, Inc. ("Cameo") or Gemstone, state each
4 and every fact that you rely on to support your position and on what basis any such agreement
5 relieves APCO of its contractual duties to Zitting Brothers.

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

7 It is APCO's understanding that after APCO's termination of the prime contract with
8 Gemstone for non-payment, Gemstone, through Camco Pacific Construction Company
9 ("Camco"), its replacement contractor, entered into independent and/or ratification agreements.
10 APCO is aware that several of its subcontractors have entered into such independent and/or
11 ratification agreement. APCO does not have personal knowledge of which subcontractors have
12 entered into such agreements. APCO objects that this Interrogatory is premature, as discovery
13 has just commenced on this matter and APCO has not yet identified all subcontractors who may
14 have entered into such agreements and whether or not Zitting Brothers was one of such
15 subcontractors. Discovery is ongoing. APCO reserves the right to supplement or amend its
16 Response to this Interrogatory as investigation, discovery, disclosure and analysis continues.
17 (See also further clarification supplement to APCO's Answer to Interrogatory 1).

18 **INTERROGATORY NO. 13:**

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

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

24 Objection. APCO objects to this Interrogatory on the grounds that this Interrogatory is
25 overly broad, unduly burdensome and oppressive because it seeks to force APCO to identify
26 "each and every fact" that APCO relied upon to support its position "that the damages sustained
27 by Zitting Brothers are the result of the acts, omission to act, or negligence of Zitting Brothers or
28 third party(ies) over whom APCO has no control as asserted in your Fourth Affirmative

1 Defense". Broad ranging written discovery is improper when it essentially subsumes every fact
2 in the case. See Hiskett v. Wal-Mart Stores, Inc., 180 F.R.D. 403, 404 (D. Kan. 1998); Safeco of
3 Am. V. Rawstron, 181 F.R.D. 441, 447048 (C.D. Cal. 1998); Lawrence v. First Kan. Bank &
4 Trust Co., 169 F.R.D. 657, 660-63 (D. Kan. 1996)(same); Hilt v. SFC, Inc., 170 F.R.D. 182, 186-
5 87 (D. Kan. 1997). APCO further objects to this Interrogatory on the grounds of attorney client
6 privilege and/or attorney work product. APCO further objects that this Interrogatory is
7 premature, as discovery has just commenced on this matter and APCO has not yet identified all
8 facts that it intends to use relative the Zitting Brothers' action.

9 Subject to and without waiving any objections, See Response to Interrogatory No. 1, 6,
10 and 7 above, which are incorporated herein by this reference. Also, see documents identified by
11 Bate Stamp No. APC000000001⁸ through APC000078992 and APCO104200 through 104234,
12 which APCO has deposited into a depository established by APCO for this litigation matter with
13 Litigation Services and/or are hereby made available for review and copying (at requestor's
14 expense) at a mutually agreeable time and place. Discovery is ongoing. APCO reserves the right
15 to supplement or amend its Response to this Interrogatory as investigation, discovery, disclosure
16 and analysis continues. (See also further clarification supplement to APCO's Answer to
17 Interrogatory 1).

18 **INTERROGATORY NO. 14:**

19 State each and every fact that you rely on to support your position that damages sustained
20 by Zitting Brothers were caused solely by a breach of contract, breach of warranty, expressed
21 and implied, and acts or omissions of Zitting Brothers or some third party(ies) over whom APCO
22 had no control as asserted in your Fourth Affirmative Defense.

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

25 Objection. APCO objects to this Interrogatory on the grounds that Interrogatory is overly
26 broad, unduly burdensome and oppressive because it seeks to force APCO to identify "each and

27 ⁸ See Footnote No. 3.

1 every fact" that APCO relied upon to support its position "that damages sustained by Zitting
2 Brothers were caused solely by a breach of contract, breach of warranty, expressed and implied,
3 and acts or omissions of Zitting Brothers or some third party(ies) over whom APCO had no
4 control as asserted in your Fourth Affirmative Defense". Broad ranging written discovery is
5 improper when it essentially subsumes every fact in the case. See Hiskett v. Wal-Mart Stores,
6 Inc., 180 F.R.D. 403, 404 (D. Kan. 1998); Safeco of Am. V. Rawstron, 181 F.R.D. 441, 447048
7 (C.D. Cal. 1998); Lawrence v. First Kan. Bank & Trust Co., 169 F.R.D. 657, 660-63 (D. Kan.
8 1996)(same); Hilt v. SFC, Inc., 170 F.R.D. 182, 186-87 (D. Kan. 1997). APCO further objects to
9 this Interrogatory on the grounds of attorney client privilege and/or attorney work product.
10 APCO further objects that this Interrogatory is premature, as discovery has just commenced on
11 this matter and APCO has not yet identified all facts that it intends to use relative the Zitting
12 Brothers' action.

13 Subject to and without waiving any objections, See Response to Interrogatory No. 1, 6,
14 and 7 above, which are incorporated herein by this reference. Also, see documents identified by
15 Bate Stamp No. APC000000001⁹ through APC000078992 and APC0104200 through 104234,
16 which APCO has deposited into a depository established by APCO for this litigation matter with
17 Litigation Services and/or are hereby made available for review and copying (at requestor's
18 expense) at a mutually agreeable time and place. Discovery is ongoing. APCO reserves the right
19 to supplement or amend its Response to this Interrogatory as investigation, discovery, disclosure
20 and analysis continues. (See also further clarification supplement to APCO's Answer to
21 Interrogatory 1).

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28 ⁹ See Footnote No. 3.

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 **ANSWER 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 claims
9 have been waived as a result of Zitting Brothers' respective acts and conduct as asserted in your
10 Second Affirmative Defense." Broad ranging written discovery is improper when it essentially
11 subsumes every fact in the case. See Hiskett v. Wal-Mart Stores, Inc., 180 F.R.D. 403, 404 (D.
12 Kan. 1998); Safeco of Am. V. Rawstron, 181 F.R.D. 441, 447048 (C.D. Cal. 1998); Lawrence v.
13 First Kan. Bank & Trust Co., 169 F.R.D. 657, 660-63 (D. Kan. 1996)(same); Hilt v. SFC, Inc.,
14 170 F.R.D. 182, 186-87 (D. Kan. 1997). APCO further objects to this Interrogatory on the
15 grounds of attorney client privilege and/or attorney work product. APCO further objects that this
16 Interrogatory is premature, as discovery has just commenced on this matter and APCO has not
17 yet identified all 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. APC000000001¹⁰ 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. (See also further clarification supplement to APCO's Answer to
26 Interrogatory 1).

27 ¹⁰ See Footnote No. 3.
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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 **ANSWER 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 are
8 premature as asserted in your Thirteenth Affirmative Defense." Broad ranging written discovery
9 is improper when it essentially subsumes every fact in the case. See Hiskett v. Wal-Mart Stores,
10 Inc., 180 F.R.D. 403, 404 (D. Kan. 1998); Safeco of Am. V. Rawstron, 181 F.R.D. 441, 447048
11 (C.D. Cal. 1998); Lawrence v. First Kan. Bank & Trust Co., 169 F.R.D. 657, 660-63 (D. Kan.
12 1996)(same); Hilt v. SFC, Inc., 170 F.R.D. 182, 186-87 (D. Kan. 1997). APCO further objects to
13 this Interrogatory on the grounds of attorney client privilege and/or attorney work product.
14 APCO further objects that this Interrogatory is premature, as discovery has just commenced on
15 this matter and APCO has not yet identified all facts that it intends to use relative the Zitting
16 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. APC000000001¹¹ through APC000078992 and APC0104200 through 104234,
20 which APCO has deposited into a depository established by APCO for this litigation matter with
21 Litigation Services located at and/or are hereby made available for review and copying (at
22 requestor's expense) at a mutually agreeable time and place. Discovery is ongoing. APCO
23 reserves the right to supplement or amend its Response to this Interrogatory as investigation,
24 discovery, disclosure and analysis continues. (See also further clarification supplement to
25 **APCO's Answer to Interrogatory 1).**

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27 ¹¹ See Footnote No. 3.
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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. APC000000001¹² 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 ¹² See Footnote No. 3.
28

1 and analysis continues. (See also further clarification supplement to APCO's Answer to
2 Interrogatory 1).

3 **INTERROGATORY NO. 18:**

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 **ANSWER TO INTERROGATORY NO. 18:**

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 of
16 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, 186-
18 87 (D. Kan. 1997). APCO further objects to this Interrogatory on the grounds of attorney client
19 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. (See also further clarification
24 supplement to APCO's Answer to Interrogatory 1).

25 **INTERROGATORY NO. 19:**

26 Identify and describe any and all complaints you made either verbally or in writing
27 regarding the quality of work, materials, and/or equipment furnished by Zitting Brothers at the
28 Project prior to the initiation of this lien action.

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

2 Objection. APCO objects to this Interrogatory on the grounds that this Interrogatory is
3 vague, ambiguous, overly broad, unduly burdensome and oppressive because it seeks to force
4 APCO to identify "all complaints you have regarding the quality of work materials, and/or
5 equipment furnished by Zitting Brothers at the Project." Broad ranging interrogatories are
6 improper when they essentially subsume every fact in the case or every person having
7 knowledge. See Hiskett v. Wal-Mart Stores, Inc., 180 F.R.D. 403, 404 (D. Kan. 1998).
8 ("Interrogatories should not require the answering party to provide a narrative account of its
9 case."). Parties can hardly know when they have identified "all" facts, persons, and documents
10 with respect to anything — particularly before the close of discovery. "How can the court make
11 enforceable orders with reference to 'all' of anything?" Often, the relevance of a particular fact
12 to a particular issue is not known until clarified and put into context by testimony at deposition
13 or trial. Such a question places the responding party in an impossible position. See id.; Safeco of
14 Am. V. Rawstron, 181 F.R.D. 441, 447048 (C.D. Cal. 1998)(finding unreasonable an
15 interrogatory calling for all facts supporting denial of a request for admission); Lawrence v. First
16 Kan. Bank & Trust Co., 169 F.R.D. 657, 660-63 (D. Kan. 1996)(same); Hilt v. SFC, Inc., 170
17 F.R.D. 182, 186-87 (D. Kan. 1997)(finding unduly burdensome an interrogatory seeking to
18 require plaintiff to state 'each and every fact' supporting allegations of a complaint).

19 Subject to, and without waiving the foregoing objections, Gemstone has asserted various
20 complaints about the quality of the work performed by APCO and its subcontractors. As of this
21 time, Gemstone has not identified specific issues that Gemstone has with APCO's or its
22 subcontractor's work, including that of Zitting Brothers. However, as a result of Gemstone's
23 assertions that there are issues with the quality of the work performed on the Project, Gemstone
24 has failed to pay APCO for the work that APCO performed including the work that was
25 performed by Zitting Brothers. Discovery is ongoing. APCO reserves the right to supplement or
26 amend its response to this Interrogatory as investigation, discovery, disclosure and analysis
27 continues. (See also further clarification supplement to APCO's Answer to Interrogatory 1).

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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. APC000000001¹³ 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. (See also further clarification supplement to APCO's Answer to
26 Interrogatory 1).

27 ¹³ See Footnote No. 3.
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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
29 claims made in this action.

30 8. Pete Smith
31 Gemstone Development West, Inc.
32 Address unknown

33 Mr. Smith is expected to testify regarding the facts and circumstances related to the
34 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
3800 Howard Hughes Pkwy., 17th Floor
Las Vegas, Nevada 89169

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

10 11. Bradley J. Scott
11 c/o Kemp, Jones & Coulthard
12 3800 Howard Hughes Pkwy., 17th Floor
Las Vegas, Nevada 89169

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

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

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

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

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

25 14. The Person Most Knowledgeable
26 Tharaldson Motels II, Inc.
27 c/o Cooksey, Toolen, Gage, Duffy & Woog
3930 Howard Hughes Pkwy., Ste. 200
28 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
4 15. Gary D. Tharaldson
5 c/o Cooksey, Toolen, Gage, Duffy & Woog
6 3930 Howard Hughes Pkwy., Ste. 200
7 Las Vegas, Nevada 89169

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

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

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

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

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

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

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

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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.
10 T. James Truman & Associates
3654 North Rancho Drive
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, ELSE, MOSKOWITZ, EDLEMAN & DICKER LLP
6 415 South Sixth Street, Ste. 300
7 Las Vegas, Nevada 89101

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

11 APCO further expects that each of the subcontractors who are participating in this action
12 will also testify as to his/her understanding of the facts on this matter and to support their claims
13 that were asserted in this action. Also, see APCO's disclosure of witnesses previously served on
14 this matter. Discovery is ongoing. APCO reserves the right to supplement or amend its response
15 to this Interrogatory as investigation, discovery, disclosure and analysis continues. **(See also**
16 **further clarification supplement to APCO's Answer to Interrogatory 1).**

17 **INTERROGATORY NO. 22:**

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

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

21 Objection. APCO objects to this Interrogatory as being overly broad, unduly burdensome
22 and oppressive because it seeks to force APCO to identify "all documents, records, writings, etc.,
23 that support your Answers to these Interrogatories and your responses to Requests for
24 Admission." Broad ranging written discovery is improper when it essentially subsumes every
25 fact in the case. See Hiskett v. Wal-Mart Stores, Inc., 180 F.R.D. 403, 404 (D. Kan. 1998);
26 Safeco of Am. V. Rawstron, 181 F.R.D. 441, 447048 (C.D. Cal. 1998); Lawrence v. First Kan.
27 Bank & Trust Co., 169 F.R.D. 657, 660-63 (D. Kan. 1996)(same); Hilt v. SFC, Inc., 170 F.R.D.
28 182, 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

1 yet identified all facts that it intends to use relative the Zitting Brothers' action.

2 Subject to and without waiving any objections, see documents identified by Bate Stamp
3 No. APC000000001¹⁴ through APC000078992 and APCO104200 through 104234, which APCO
4 has deposited into a depository established by APCO for this litigation matter with Litigation
5 Services and/or are hereby made available for review and copying (at requestor's expense) at a
6 mutually agreeable time and place. Discovery is ongoing. APCO reserves the right to supplement
7 or amend its Response to this Interrogatory as investigation, discovery, disclosure and analysis
8 continues. (See also further clarification supplement to APCO's Answer to Interrogatory 1).

9 **INTERROGATORY NO. 23:**

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

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

14 Objection. APCO objects to this Interrogatory on basis that it is overly broad, unduly
15 burdensome and oppressive because it seeks to force APCO to identify "each and every
16 individual known to you who has knowledge of the facts involved in this matter including, but
17 not limited to, Zitting Brothers' work, material, and/or equipment at the Project." Broad ranging
18 written discovery is improper when it essentially subsumes every fact in the case. See Hiskett v.
19 Wal-Mart Stores, Inc., 180 F.R.D. 403, 404 (D. Kan. 1998); Safeco of Am. V. Rawstron, 181
20 F.R.D. 441, 447048 (C.D. Cal. 1998); Lawrence v. First Kan. Bank & Trust Co., 169 F.R.D. 657,
21 660-63 (D. Kan. 1996)(same); Hilt v. SFC, Inc., 170 F.R.D. 182, 186-87 (D. Kan. 1997). APCO
22 further objects to this Interrogatory on the grounds of attorney client privilege and/or attorney
23 work product. APCO further objects that this Interrogatory is premature, as discovery has just
24 commenced on this matter and APCO has not yet identified all individuals that have facts
25 relative this matter. (See also further clarification supplement to APCO's Answer to
26 Interrogatory 1).

27 ¹⁴ See Footnote No. 3.
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1 Subject to and without waiving any objections, see Response to Interrogatory No. 21
2 above. Also, see APCO's disclosure of witnesses previously served on this matter. Discovery is
3 ongoing. APCO reserves the right to supplement or amend its Response to this Interrogatory as
4 investigation, discovery, disclosure and analysis continues.

5 **INTERROGATORY NO. 24:**

6 State each and every fact that supports your position that you are not legally liable for
7 payment to Zitting Brothers for the work, material, and/or equipment that it furnished on the
8 Project. (See also further clarification supplement to APCO's Answer to Interrogatory 1).

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

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

22 Subject to and without waiving any objections, See Responses 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. APC000000001¹⁵ 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 ¹⁵ See Footnote No. 3.
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. (See also further clarification supplement to APCO's Answer to
4 Interrogatory 1).

5 **INTERROGATORY NO. 25:**

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

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

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

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

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

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

15 Objection. APCO objects to this Interrogatory on the grounds that it is premature. APCO
16 has not yet decided on which, if any, expert witnesses might be called at trial. In fact, APCO has
17 not yet retained any expert witness on this matter. Discovery is ongoing. APCO reserves the
18 right to supplement this Response when APCO has retained an expert witness on this matter.
19 (See also further clarification supplement to APCO's Answer to Interrogatory 1).

20 **INTERROGATORY NO. 26:**

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

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

25 Objection. APCO objects to this Interrogatory on the grounds that it is premature. APCO
26 has yet to determine the exhibits to be produced at trial. See also Response to Interrogatory No. 1
27 above, which is incorporated herein by this reference. Subject to and without waiving any
28

1 objections, see documents identified by Bate Stamp No. APC000000001¹⁶ through
2 APC000078992 and APCO104200 through 104234, which APCO has deposited into a
3 depository established by APCO for this litigation matter with Litigation Services and/or are
4 hereby made available for review and copying (at requestor's expense) at a mutually agreeable
5 time and place. See also documents produced by other parties to this action, including any
6 documents produced by Zitting Brothers in this action. Discovery is ongoing. APCO reserves the
7 right to supplement or amend its Response to this Interrogatory as investigation, discovery,
8 disclosure and analysis continues. (See also further clarification supplement to APCO's
9 Answer to Interrogatory 1).

10 **INTERROGATORY NO. 27:**

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

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

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

26 Subject to and without waiving any objections, APCO, in view of the claims that have

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¹⁶ See Footnote No. 3.

1 been asserted by Gemstone, APCO is evaluating all of its options, including asserting claims
2 against Zitting Brothers, including, but not limited to, breach of contract, unjust enrichment,
3 indemnity, set off, and contribution. Discovery is ongoing. APCO reserves the right to
4 supplement or amend its response to this Interrogatory as investigation, discovery, disclosure and
5 analysis continues. (See also further clarification supplement to APCO's Answer to
6 Interrogatory 1).

7 **INTERROGATORY NO. 28:**

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

10 **ANSWER TO INTERROGATORY NO. 28:**

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

13 Subject to and without waiving any objections, APCO responds as follows: Zitting
14 Brothers commenced with its work on the Project sometime in November 2007. APCO does not
15 know the last date that Zitting Brothers performed work on the Project. APCO understands that
16 Zitting Brothers continued to perform work on the Project after APCO ceased its work and
17 terminated the prime contract with Gemstone. Discovery is ongoing. APCO reserves the right to
18 supplement or amend its response to this Interrogatory as investigation, discovery, disclosure and
19 analysis continues. (See also further clarification supplement to APCO's Answer to
20 Interrogatory 1).

21 **INTERROGATORY NO. 29:**

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

25 **ANSWER TO INTERROGATORY NO. 29:**

26 Objection. This Interrogatory calls for multiple responses as there were denials made by
27 APCO to Zitting Brothers' Requests for Admissions. APCO objects to any attempt by Zitting
28 Brothers to evade any numerical limitations set on interrogatories by asking multiple

1 independent questions within single individual questions and subparts. APCO further objects on
2 the grounds of relevance and that this Interrogatory is vague, ambiguous, overly broad, unduly
3 burdensome and oppressive because it seeks to force APCO to identify "each and every denial."
4 See also Response to Interrogatory No. 1 above, which is incorporated herein by this reference.
5 Subject to and without waiving any objections, see APCO's Responses to Zitting Brothers'
6 Requests for Admissions. See also, Responses to Interrogatory No. 1, 6, and 7 above, which are
7 incorporated herein by this reference. Also, see documents identified by Bate Stamp No.
8 APC000000001¹⁷ through APC000078992 and APC0104200 through 104234, which APCO has
9 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. (See also further clarification supplement to APCO's Answer to Interrogatory 1).

14 **INTERROGATORY NO. 30:**

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

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

19 Objection. APCO objects to this request for Interrogatory is overly broad, unduly
20 burdensome and oppressive because it seeks to force APCO to identify "all facts and
21 circumstances leading up to your issuance of the stop work order to Zitting Brothers and describe
22 any and all reasons you believe you were justified you in taking such action." Broad ranging
23 written discovery is improper when it essentially subsumes every fact in the case. See Hiskett v.
24 Wal-Mart Stores, Inc., 180 F.R.D. 403, 404 (D. Kan. 1998); Safeco of Am. V. Rawstron, 181
25 F.R.D. 441, 447048 (C.D. Cal. 1998); Lawrence v. First Kan. Bank & Trust Co., 169 F.R.D. 657,
26 660-63 (D. Kan. 1996)(same); Hilt v. SFC, Inc., 170 F.R.D. 182, 186-87 (D. Kan. 1997). APCO

27 ¹⁷ See Footnote No. 3.
28

1 further objects to this Interrogatory on the grounds of attorney client privilege and/or attorney
2 work product. APCO further objects that this Interrogatory is premature, as discovery has just
3 commenced on this matter and APCO has not yet identified all facts that it intends to use relative
4 the Zitting Brothers' action.

5 Subject to and without waiving any objections, APCO responds as follows: After APCO
6 was not paid by Gemstone for work that was being performed by APCO and its subcontractors,
7 APCO, pursuant to Nevada law, gave notice to Gemstone of its intent to stop work and terminate
8 the prime contract unless payment was made. APCO provided a copy of such notice to its
9 subcontractors, including Zitting Brothers, so that the subcontractors, including Zitting Brother,
10 could take whatever action they deemed necessary to protect their respective rights under
11 Nevada law. After payment from Gemstone was not made, APCO, as allowed under Nevada law,
12 terminated its prime contract with Gemstone and further notified its subcontractors, including
13 Zitting Brothers of such termination. See also, Responses to Interrogatory No. 1, 6, and 7 above,
14 which are incorporated herein by this reference. Also, see documents identified by Bate Stamp
15 No. APC000000001¹⁸ through APC000078992 and APCO104200 through 104234, which APCO
16 has deposited into a depository established by APCO for this litigation matter with Litigation
17 Services and/or are hereby made available for review and copying (at requestor's expense) at a
18 mutually agreeable time and place. Discovery is ongoing. APCO reserves the right to supplement
19 or amend its Response to this Interrogatory as investigation, discovery, disclosure and analysis
20 continues. (See also further clarification supplement to APCO's Answer to Interrogatory 1).
21 **INTERROGATORY NO. 31:**

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

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28 ¹⁸ See Footnote No. 3.

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

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 construction,
11 had numerous conversations with Zitting Brothers relative Zitting Brothers' work and the Project
12 in general. APCO is unable to recall each and every conversation and their contents. Discovery is
13 ongoing. APCO reserves the right to supplement or amend its response to this Interrogatory as
14 investigation, discovery, disclosure and analysis continues. **(See also further clarification**
15 **supplement to APCO's Answer to Interrogatory 1).**

16 **INTERROGATORY NO. 32:**

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

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

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

1 APCO reserves the right to supplement or amend its response to this Interrogatory as
2 investigation, discovery, disclosure and analysis continues. **(See also further clarification**
3 **supplement to APCO's Answer to Interrogatory 1).**

4 **INTERROGATORY NO. 33:**

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

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

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 any conversations that APCO may have had with Gemstone
13 including the dates of each conversation, persons involved and the contents of the conversations.
14 See also Response to Interrogatory No. 2 above, which is incorporated herein by this reference.

15 Subject to and without waiving any objections, APCO, during the course of construction,
16 undoubtedly had some conversations with Gemstone relative Zitting Brothers' work and the
17 Project in general. APCO is unable to recall each and every conversation and their contents.
18 Discovery is ongoing. APCO reserves the right to supplement or amend its response to this
19 Interrogatory as investigation, discovery, disclosure and analysis continues. **(See also further**
20 **clarification supplement to APCO's Answer to Interrogatory 1).**

21 **INTERROGATORY NO. 34:**

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

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

27 Objection. APCO objects on the grounds of relevance and further objects that this
28 Interrogatory is vague, ambiguous, overly broad, unduly burdensome and oppressive because it

1 seeks to force APCO to identify any conversations that APCO may have had with a Third Party
2 including the dates of each conversation, persons involved and the contents of the conversations.
3 See also Response to Interrogatory No. 2 above, which is incorporated herein by 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. (See also further clarification
8 supplement to APCO's Answer to Interrogatory 1).

9 **INTERROGATORY NO. 35:**

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

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

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

18 Subject to and without waiving any objections, APCO responds as follows: APCO has
19 asserted priority over the deeds of trust that are of record against the Manhattan West Project
20 pursuant to NRS 108.225. Priority over the deeds of trusts is based on the fact that APCO first
21 performed work under the Grading Agreement on or about May 2007. APCO first performed
22 work under the ManhattanWest General Construction Agreement for GMP or about September
23 5, 2007. The deeds of trust on the property attached after construction work commenced. APCO
24 has further asked the Court to declare the rank of mechanic's liens pursuant to NRS 108.236. See
25 also documents identified by Bate Stamp No. APC000000001¹⁹ through APC000078992 and
26 APCO104200 through 104234, which APCO has deposited into a depository established by

27 ¹⁹ See Footnote No. 3.
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APCO for this litigation matter with Litigation Services and/or are hereby made available for review and copying (at requestor's expense) at a mutually agreeable time and place. Discovery is ongoing; APCO reserves the right to supplement or amend its Response to this Interrogatory as investigation, discovery, disclosure and analysis continues. (See also further clarification supplement to APCO's Answer to Interrogatory 1).

INTERROGATORY NO. 36:

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 breakdown of all amounts making up your lien on the Project.

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

1 this Interrogatory as investigation, discovery, disclosure and analysis continues. (See also
2 further clarification supplement to APCO's Answer to Interrogatory 1).

3 **INTERROGATORY NO. 37:**

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

6 **ANSWER TO INTERROGATORY NO. 37:**

7 Objection. APCO objects on the grounds of relevance and further objects that this
8 Interrogatory is vague, ambiguous, overly broad, unduly burdensome and oppressive because it
9 seeks to force APCO to describe "the work that was performed during the first three months of
10 the Project." APCO further objects on the grounds that it is vague and ambiguous in that
11 "construction", "work" and "first three months of the Project" are not defined. See also Response
12 to Interrogatory No. 2 above, which is incorporated herein by this reference. Subject to and
13 without waiving any objections, APCO responds as follows: APCO first performed work under
14 the Grading Agreement on or about May 2007. APCO first performed work under the Manhattan
15 West General Construction Agreement for GMP or about September 5, 2007. See also
16 documents identified by Bate Stamp No. APC000000001²⁰ through APC000078992 and
17 APCO104200 through 104234, which APCO has deposited into a depository established by
18 APCO for this litigation matter with Litigation Services and/or are hereby made available for
19 review and copying (at requestor's expense) at a mutually agreeable time and place. Discovery is
20 ongoing; APCO reserves the right to supplement or amend its Response to this Interrogatory as
21 investigation, discovery, disclosure and analysis continues. (See also further clarification
22 supplement to APCO's Answer to Interrogatory 1).

23 **INTERROGATORY NO. 38:**

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

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28 ²⁰ See Footnote No. 3.

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

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. (See also further clarification supplement to APCO's Answer to Interrogatory 1).

5 **INTERROGATORY NO. 39:**

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 work,
8 material, and/or equipment furnished by Zitting Brothers at the Project.

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

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 relative
18 the Zitting Brothers' action. APCO further objects on the basis that to answer this Interrogatory
19 would result in annoyance, embarrassment, or oppression to APCO in that the question is overly
20 broad, vague, ambiguous, indefinite as to time and without reasonable limitation in its scope.
21 APCO further objects on the basis that the question is oppressive, harassing and burdensome; the
22 information sought seeks APCO's counsel's legal analysis and theories regarding laws,
23 ordinances, safety orders, etc., which are equally available to Zitting Brother; the question also
24 invades the attorney's work product privilege. APCO further objects on the basis that the
25 question calls for information which is available to all parties equally, and is therefore oppressive
26 and burdensome to APCO. APCO further objects on the basis that the question seeks information
27 which is protected from disclosure by the attorney's work product privilege. APCO further
28 objects on the basis that the question seeks to invade APCO's counsel's work product privilege

1 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
3 conclusions. See also Response to Interrogatory No. 2 above, which is incorporated herein by
4 this reference. Subject to and without waiving any objections, APCO responds as follows:
5 Gemstone has asserted various complaints about the quality of the work performed by APCO
6 and its subcontractors. As of this time, Gemstone has not identified specific issues that Gemstone
7 has 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 the
10 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 actual
12 receipt of payment from Gemstone for Zitting Brothers' work. Moreover, the Subcontract
13 specifically provided that Zitting Brothers was assuming the same risk that Gemstone may
14 become insolvent and not be paid for its work as APCO assumed in entering into prime contract
15 with Gemstone. Zitting Brothers further agreed that APCO had no obligation to pay Zitting
16 Brothers for any work performed by Zitting Brothers until or unless APCO had actually been
17 paid for such work by Gemstone. To date, APCO has not been paid for the work performed,
18 including the work performed by Zitting Brothers. In fact, due to non-payment, APCO exercised
19 its rights pursuant to NRS Chapter 624 and terminated the prime contract with Gemstone and
20 further terminated the Subcontract with Zitting Brothers. After APCO ceased work on the
21 Project, Zitting Brothers may have negotiated with Camco, the replacement general contractor,
22 and/or Gemstone and may have entered into a ratification agreement, wherein APCO was
23 replaced as the general contractor under the Subcontract and Camco and/or Gemstone became
24 liable for any monies due Zitting Brothers on the Project. Discovery is ongoing. APCO reserves
25 the right to supplement or amend its response to this Interrogatory as investigation, discovery,
26 disclosure and analysis continues. **(See also further clarification supplement to APCO's**
27 **Answer to Interrogatory 1).**

1 **INTERROGATORY NO. 40:**

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

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

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

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

MARQUIS AURBACH COFFING

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

1 Bate Stamp No. APC000000001²¹ through APC000078992 and APC0104200 through 104234,
2 which APCO has deposited into a depository established by APCO for this litigation matter with
3 Litigation Services and/or are hereby made available for review and copying (at requestor's
4 expense) at a mutually agreeable time and place. Discovery is ongoing. APCO reserves the right
5 to supplement or amend its Response to this Interrogatory as investigation, discovery, disclosure
6 and analysis continues. (See also further clarification supplement to APCO's Answer to
7 Interrogatory 1).

8 Dated this 7th day of November, 2017.

9 MARQUIS AURBACH COFFING

10
11 By /s/ Cody S. Mounteer, Esq.
12 Jack Chen Min Juan, Esq.
13 Nevada Bar No. 6367
14 Cody S. Mounteer, Esq.
15 Nevada Bar No. 11220
16 10001 Park Run Drive
17 Las Vegas, Nevada 89145
18 Attorneys for APCO Construction
19
20
21
22
23
24
25
26
27

28 ²¹ See Footnote No. 3.

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **APCO CONSTRUCTION'S SUPPLEMENTAL 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 8th day of November, 2017. Electronic service of the foregoing document shall be made in accordance with the E-Service List as follows:²²

Select All Select None		
Bennett Tueller Johnson & Deere		
Name	Email	Select
Benjamin D. Johnson	ben.johnson@btjd.com	<input checked="" type="checkbox"/>
Kenzie Dunn	kdunn@btjd.com	<input checked="" type="checkbox"/>
Cadden & Fuller LLP		
Name	Email	Select
Dana Y. Kim	dkim@caddenfuller.com	<input checked="" type="checkbox"/>
S. Judy Hirahara	jhirahara@caddenfuller.com	<input checked="" type="checkbox"/>
Tammy Cortez	tcortez@caddenfuller.com	<input checked="" type="checkbox"/>
David J. Merrill P.C.		
Name	Email	Select
David J. Merrill	david@djmerrillpc.com	<input checked="" type="checkbox"/>
Dickinson Wright, PLLC		
Name	Email	Select
Cheri Vandermeulen	cvandermeulen@dickinsonwright.com	<input checked="" type="checkbox"/>
Christine Spencer	cspencer@dickinsonwright.com	<input checked="" type="checkbox"/>
Donna Wolfbrandt	dwolfbrandt@dickinsonwright.com	<input checked="" type="checkbox"/>
Eric Dobberstein	edobberstein@dickinsonwright.com	<input checked="" type="checkbox"/>
Durham Jones & Pinegar		
Name	Email	Select
Brad Slighting	bslighting@djplaw.com	<input checked="" type="checkbox"/>
Cindy Simmons	csimmons@djplaw.com	<input checked="" type="checkbox"/>
G.E. Robinson Law		
Name	Email	Select
George Robinson	grobenson@pezzilloloyd.com	<input checked="" type="checkbox"/>
GERRARD COX & LARSEN		
Name	Email	Select
Aaron D. Lancaster	alancaster@gerrard-cox.com	<input checked="" type="checkbox"/>
Douglas D. Gerrard	dgerrard@gerrard-cox.com	<input checked="" type="checkbox"/>
Kaytlyn Bassett	kbassett@gerrard-cox.com	<input checked="" type="checkbox"/>

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MARQUIS AURBACH COFFING

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

1
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5
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19
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26
27
28

Gibbs, Giden, Locher, Turner & Senet LLP		
Name	Email	Select
Becky Pintar	bpintar@gglt.com	<input checked="" type="checkbox"/>
Linda Compton	lcompton@gglt.com	<input checked="" type="checkbox"/>
Gordon & Rees		
Name	Email	Select
Robert Schumacher	rschumacher@gordonrees.com	<input checked="" type="checkbox"/>
Gordon & Rees LLP		
Name	Email	Select
Andrea Montero	amonero@gordonrees.com	<input checked="" type="checkbox"/>
Brian Walters	bwalters@gordonrees.com	<input checked="" type="checkbox"/>
Marie Ogella	mogella@gordonrees.com	<input checked="" type="checkbox"/>
GRANT MORRIS DODDS		
Name	Email	Select
Steven Morris	steve@gmdlegal.com	<input checked="" type="checkbox"/>
Greenberg Traurig, LLP		
Name	Email	Select
6085 Joyce Heilich	heilichj@gtlaw.com	<input checked="" type="checkbox"/>
7132 Andrea Rosehill	rosehilla@gtlaw.com	<input checked="" type="checkbox"/>
CNN Cynthia Ney	neyc@gtlaw.com	<input checked="" type="checkbox"/>
IGH Bethany Rabe	rabe@gtlaw.com	<input checked="" type="checkbox"/>
IOM Mark Ferrario	lvlitdock@gtlaw.com	<input checked="" type="checkbox"/>
LVGTDocketing	lvlitdock@gtlaw.com	<input checked="" type="checkbox"/>
WTM Tami Cowden	cowdent@gtlaw.com	<input checked="" type="checkbox"/>
HOLLEY DRIGGS WALCH FINE WRAY PUZEY & THOMPSON		
Name	Email	Select
Glenn F. Meier	gmeier@nevadafirm.com	<input checked="" type="checkbox"/>
Renee Hoban	rhoban@nevadafirm.com	<input checked="" type="checkbox"/>
Holley Driggs Walch Fine Wray Puzey & Thompson		
Name	Email	Select
Cynthia Kelley	ckelley@nevadafirm.com	<input checked="" type="checkbox"/>
Rachel E. Donn	rdonn@nevadafirm.com	<input checked="" type="checkbox"/>
Howard & Howard		
Name	Email	Select
Gwen Rutar Mullins	grm@h2law.com	<input checked="" type="checkbox"/>
Wade B. Gochnour	wbg@h2law.com	<input checked="" type="checkbox"/>
Jolley Urga Woodbury & Little		
Name	Email	Select
Agnes Wong	aw@juww.com	<input checked="" type="checkbox"/>
Kelly McGee	kom@juww.com	<input checked="" type="checkbox"/>
Martin A. Little, Esq.	mal@juww.com	<input checked="" type="checkbox"/>
Martin A. Little, Esq.	mal@juww.com	<input checked="" type="checkbox"/>
Michael R. Ernst	mre@juww.com	<input checked="" type="checkbox"/>
Kemp, Jones & Coulthard		

MARQUIS AURBACH COFFING

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

1	Name	Email	Select
2	Erica Bennett	e.bennett@kempjones.com	<input checked="" type="checkbox"/>
3	Mark M. Jones	mmj@kempjones.com	<input checked="" type="checkbox"/>
4	Matt Carter	msc@kempjones.com	<input checked="" type="checkbox"/>
	Matthew Carter	m.carter@kempjones.com	<input checked="" type="checkbox"/>
	Pamela Montgomery	pym@kempjones.com	<input checked="" type="checkbox"/>
5	Law Offices of Floyd Hale		
6	Name	Email	Select
	Debbie Holloman	dholloman@jamsadr.com	<input checked="" type="checkbox"/>
	Floyd Hale	fhale@floyd hale.com	<input checked="" type="checkbox"/>
7	Law Offices of Sean P. Hillin, P.C.		
8	Name	Email	Select
	Caleb Langsdale, Esq.	caleb@langsdalelaw.com	<input checked="" type="checkbox"/>
9	Litigation Services & Technologies		
10	Name	Email	Select
11	Calendar	calendar@litigationservices.com	<input checked="" type="checkbox"/>
	Depository	Depository@litigationservices.com	<input checked="" type="checkbox"/>
12	Marquis Aurbach Coffing		
13	Name	Email	Select
14	Cody Mounteer, Esq.	cmounteer@marquisaurbach.com	<input checked="" type="checkbox"/>
	Courtney Peterson	cpeterson@maclaw.com	<input checked="" type="checkbox"/>
	Jack Juan	jjuan@marquisaurbach.com	<input checked="" type="checkbox"/>
	Jennifer Case	jcase@maclaw.com	<input checked="" type="checkbox"/>
	Phillip Aurbach	paurbach@maclaw.com	<input checked="" type="checkbox"/>
	Taylor Fong	tfong@marquisaurbach.com	<input checked="" type="checkbox"/>
16	McCullough, Dobberstein & Evans, Ltd.		
17	Name	Email	Select
	Christine Spencer	cspencer@mcpalaw.com	<input checked="" type="checkbox"/>
	Eric Dobberstein, Esq.	edobberstein@mcpalaw.com	<input checked="" type="checkbox"/>
19	McDonald Carano Wilson, LLP		
20	Name	Email	Select
	Kathleen Morris	kmorris@mcdonaldcarano.com	<input checked="" type="checkbox"/>
	Ryan Bellows	rbellows@mcdonaldcarano.com	<input checked="" type="checkbox"/>
22	Meier Fine & Wray, LLC		
	Name	Email	Select
	Receptionist	Reception@nvbusinesslawyers.com	<input checked="" type="checkbox"/>
24	Morrill & Aronson		
	Name	Email	Select
	Christine Taradash	CTaradash@maazlaw.com	<input checked="" type="checkbox"/>
26	Morrill & Aronson P.L.C.		
	Name	Email	Select
	Debra Hitchens	dhitchens@maazlaw.com	<input checked="" type="checkbox"/>
28	Peel Brimley LLP		
	Name	Email	Select

MARQUIS AURBACH COFFING

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

1	Amanda Armstrong	aarmstrong@peelbrimley.com	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
2	Eric Zimbelman	ezimbelman@peelbrimley.com	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
3	Rosey Jeffrey	rjeffrey@peelbrimley.com	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
	Terri Hansen	thansen@peelbrimley.com	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
4	Pezzillo Lloyd			
	Name	Email	<input checked="" type="checkbox"/>	Select
5	Jennifer R. Lloyd	Jlloyd@pezzillolloyd.com	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
	Marisa L. Maskas, Esq.	mmaskas@pezzillolloyd.com	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
6	Procopio Cory			
7	Name	Email	<input checked="" type="checkbox"/>	Select
	Timother E. Salter	tim.salter@procopio.com	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
8	Procopio Cory Hargreaves & Savitch			
9	Name	Email	<input checked="" type="checkbox"/>	Select
	Andrew J. Kessler	andrew.kessler@procopio.com	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
10	Rebecca Chapman	rebecca.chapman@procopio.com	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
11	Procopio Cory Hargreaves & Savitch LLP			
	Name	Email	<input checked="" type="checkbox"/>	Select
12	Cori Mandy, Legal Secretary	cori.mandy@procopio.com	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
13	Richard L. Tobler, Ltd.			
	Name	Email	<input checked="" type="checkbox"/>	Select
14	Richard Tobler	rltldck@hotmail.com	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
15	Rooker Rawlins			
	Name	Email	<input checked="" type="checkbox"/>	Select
16	Legal Assistant	rlegalassistant@rookerlaw.com	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
	Michael Rawlins	mrawlins@rookerlaw.com	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
17	T. James Truman & Associates			
	Name	Email	<input checked="" type="checkbox"/>	Select
18	Beverly Roberts	broberts@trumanlegal.com	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
19	District filings	district@trumanlegal.com	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
20	The Langsdale Law Firm			
	Name	Email	<input checked="" type="checkbox"/>	Select
21	Caleb Langsdale	Caleb@Langsdalelaw.com	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
22	Watt, Tieder, Hoffar & Fitzgerald, L.L.P.			
	Name	Email	<input checked="" type="checkbox"/>	Select
23	David R. Johnson	djohnson@watttieder.com	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
24	Jennifer MacDonald	jmacdonald@watttieder.com	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
25	Williams & Associates			
	Name	Email	<input checked="" type="checkbox"/>	Select
26	Donald H. Williams, Esq.	dwilliams@dhwlawlv.com	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
27	Wilson Elser Moskowitz Edelman & Dicker			
	Name	Email	<input checked="" type="checkbox"/>	Select
28	E-File Desk	EfileLasVegas@wilsonelser.com	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
	Hrustyk Nicole	Nicole.Hrustyk@wilsonelser.com	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>

MARQUIS AURBACH COFFING

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

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10
11
12
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27
28

Jorge Ramirez	Jorge.Ramirez@wilsonelser.com	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
Wilson Elser Moskowitz Edelman & Dicker LLP			
Name	Email	Select	
Lani Maile	Lani.Maile@wilsonelser.com	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
Wilson, Elser			
Name	Email	Select	
I-Che Lai	I-Che.Lai@wilsonelser.com	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>

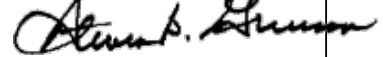
/s/ Rosie Wesp
an employee of Marquis Aurbach Coffing

VERIFICATION/DECLARATION

MARY JO ALLEN, being first duly sworn, deposes and says:

That I am the designated NRCP 30(b)(6) for APCO Construction, Inc. I have read the foregoing APCO CONSTRUCTION'S SUPPLEMENTAL ANSWERS TO ZITTING BROTHERS CONSTRUCTION INC.'S FIRST REQUESTS FOR INTERROGATORIES 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.


MARY JO ALLEN



RIS
JORGE A. RAMIREZ, ESQ.
Nevada Bar No. 6787
I-CHE LAI, ESQ.
Nevada Bar No. 12247
WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP
300 South 4th Street, 11th Floor
Las Vegas, NV 89101-6014
Telephone: (702) 727-1400
Facsimile: (702) 727-1401
Jorge.Ramirez@wilsonelser.com
I-Che.Lai@wilsonelser.com
*Attorneys for Lien Claimant,
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

Date of Hearing: November 16, 2017
Time of Hearing: 9:00 a.m.

ZITTING BROTHERS CONSTRUCTION, INC'S REPLY IN SUPPORT OF MOTION IN
LIMINE TO LIMIT THE DEFENSES OF APCO CONSTRUCTION ("APCO") TO THE
ENFORCEABILITY OF PAY-IF-PAID PROVISION

Zitting Brothers Construction, Inc. ("Zitting"), a lien claimant, submits this reply in support of its Motion in Limine to Limit the Defenses of APCO Construction ("APCO") to the Enforceability of Pay-if-Paid Provision. The accompanying memorandum of points and authorities provides the basis for Zitting's reply and is further supported by the attached exhibit, the record of this case and any oral argument that this Court may entertain at the hearing on Zitting's motion.

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Dated: November 15, 2017

WILSON ELSE MOSKOWITZ EDELMAN &
DICKER LLP

Jorge Ramirez, Esq.
Nevada Bar No. 6787
I-Che Lai, Esq.
Nevada Bar No. 12247
300 South 4th Street, 11th Floor
Las Vegas, NV 89101
Telephone: (702) 727-1400
Facsimile: (702) 727-1401
*Attorneys for Lien Claimant,
Zitting Brothers Construction, Inc.*

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 For seven years, APCO led Zitting and other lien claimants to believe that its sole defense
4 against paying Zitting and the other lien claimants was the enforceability of the pay-if-paid
5 provision. Two law firms representing APCO asserted this single defense throughout this seven year
6 period. APCO repeatedly told Zitting and the other lien claimants that it would surrender and pursue
7 bankruptcy instead if this Court ultimately finds that the pay-if-paid provision is void. This was
8 APCO's litigation plan. Now, seven years later and after the close of discovery and after the lien
9 claimants have filed their summary judgment motions, APCO abandoned that plan. It hired
10 additional attorneys and decided to pursue additional defenses that were waived during discovery.

11 APCO's explanations for the additional defenses are contradictory and self-defeating. One
12 point is clear. APCO has had since 2010, independent knowledge of the defenses it is now asserting.
13 It has no justification for never asserting this defense in its discovery responses or deposition
14 testimonies. Asserting those defenses now has irreparably prejudiced Zitting's litigation plan. Courts
15 throughout the country have repudiated this tactic and have precluded the raising of additional
16 defenses at trial after having waived them during discovery, as shown by cases with nearly identical
17 facts. This Court should follow those courts' lead and grant Zitting's motion.

18 **II. ARGUMENT**

19 **A. APCO's opposition only reinforces the propriety of an exclusion against APCO**
20 **because of APCO's failure to justify not supplementing its discovery responses**
21 **seasonably and to show the absence of any prejudice to Zitting.**

22 APCO's opposition raises various arguments without addressing the standards for avoiding
23 exclusion of evidence or defenses under Nev. R. Civ. P. 37. To help this Court focus on those
24 standards, it bears repeating such standards. The purpose of the discovery rules is to avoid "surprise"
25 or "trial by ambush." *Am. Stock Exch., LLC v. Mopex, Inc.*, 215 F.R.D. 87, 93 (S.D.N.Y. 2002). To
26 that end, Nev. R. Civ. P. 37(c)(1) prohibits a "party that without substantial justification fails to ...
27 amend a prior response to discovery as required by Rule 26(e)(2) ... [from] us[ing] as evidence at a
28 trial ... any ... or information not so disclosed" unless "such failure is harmless." For example,
"failure to supplement interrogatory responses under Rule 26(e)(2) may ... result in the exclusion of

1 all evidence related to the non-supplemented subject.” *Heidelberg Harris, Inc. v. Mitsubishi Heavy*
2 *Indus., Ltd.*, No. 95 C 0673, 1996 WL 680243, at *8 (N.D. Ill. Nov. 21, 1996) (citing *Holiday Inn,*
3 *Inc. v. Robertshaw Controls Co.*, 560 F.2d 856, 858 (7th Cir. 1977)). “Rule 37(c)(1)’s preclusionary
4 sanction is ‘automatic....’” *Mopex*, 215 F.R.D. at 93.

5 APCO seeks to distract from this standard by claiming that preclusion would prejudice
6 APCO. (Opp’n¹ 15:17-19.) However, APCO cites to no authority for this argument. (*See id.*) Nor
7 can it. As discussed above, substantial justification for the non-compliant discovery responses and
8 prejudice to the party seeking preclusion are the sole factors. APCO cannot shift the consequence of
9 its actions onto Zitting and the other lien claimants. If APCO wanted to avoid prejudice, it should
10 have complied with the rules.

11 Regarding the “substantial justification” and “prejudice” factors, APCO raises three main
12 arguments in its opposition: (1) APCO’s vague and boilerplate affirmative defenses—filed before
13 APCO’s discovery responses—should have apprised Zitting of the additional defenses; (2) APCO’s
14 Rule 30(b)(6) deposition testimony—taken place seven years after APCO’s interrogatory
15 responses—should have apprised Zitting of the additional defenses; and (3) APCO eventually
16 supplemented its interrogatory responses after the close of discovery. (*See* Opp’n 2:4-7.) As
17 explained below, this fails to meet APCO’s burden to establish those two factors.

18 **1. APCO fails to establish substantial justification for deficient interrogatory**
19 **responses.**

20 APCO’s opposition dispels any doubt that APCO cannot justify its deficient interrogatory
21 responses. Nev. R. Civ. P. 26(e)(2) requires a party to seasonably amend a prior interrogatory
22 response if the prior response is incomplete or incorrect. Here, APCO fails to do so, and its
23 arguments are unavailing.

24 First, APCO’s affirmative defenses cannot discharge APCO’s duty to supplement because
25 those defenses were served before the commencement of discovery and therefore before APCO’s
26 original interrogatory responses. Logically speaking, the original responses should have never been
27

28

¹ Zitting cites APCO’s opposition to Zitting’s motion in limine as “Opp’n.”

1 incomplete. *See, e.g., Heidelberg Harris*, 1996 WL 680243, at *1 (finding that affirmative defenses
2 did not justify the failure to supplement interrogatory responses).

3 Second, APCO's Rule 30(b)(6) deposition testimony on July 19, 2017 cannot excuse
4 APCO's failure to supplement. By the time of the deposition, more than seven years had passed
5 since APCO's 2010 interrogatory responses and about two months had passed since APCO's 2017
6 interrogatory responses. (MIL,² Ex. C; MIL, Ex. D.) APCO claims that its deponent was
7 knowledgeable and able to testify about APCO's defenses besides the defense based on the
8 enforceability of the pay-if-paid provision. (Opp'n 3:17-7:10.) Although APCO's Rule 30(b)(6)
9 witness was knowledgeable about those additional defenses, APCO does not provide any
10 justification why it did not supplement its interrogatory responses before that deposition. Nor can it.

11 At APCO's Rule 30(b)(6) depositions on June 5, 2017 and July 19, 2017, APCO produced a
12 witness who would testify about "[a]ll facts related to [APCO]'s defenses against [Zitting]'s claims
13 as alleged in [Zitting]'s complaint in this case." (Ex. A 10:24-12:20, Ex. 1.) When Zitting's counsel
14 asked both witnesses about any changes they want to make to APCO's interrogatory responses, both
15 witness did not make any changes. (Ex. A 14:21-24; Ex. B 109:16-111:15.) APCO—through its
16 Rule 30(b)(6) deposition testimonies—has made a deliberate decision to limit itself to only one
17 defense. (MIL, Ex. E 40:16-41:4.)

18 Moreover, APCO's Rule 30(b)(6) witnesses depositions were truncated based on the either
19 lies or at the very least misrepresentation in the testimony given of the limited defense APCO was
20 mounting. APCO cannot justify that its Rule 30(b)(6) witnesses' testimony mislead the lien
21 claimants into believing that the only defense was the pay-if-paid that had been previously
22 established through sworn written discovery. There is no excuse for this gamesmanship and that is
23 the very reason why the preculsory effect of NRCP 37 was put in place.

24 Lastly, APCO's supplemental interrogatory responses run afoul of the discovery rules.
25 APCO claims that Zitting's "critical admissions" during Zitting's Rule 30(b)(6) deposition
26 warranted the late supplement. (Opp'n 2:6-7.) However, this claim is disingenuous and contradicted
27 by APCO's other arguments. If APCO was able to raise those defenses in its 2009 answer to

28 _____
² Zitting cites its motion in limine as "MIL."

1 Zitting's complaint and in its Rule 30(b)(6) deposition, it never needed Zitting's deposition
2 testimony. Importantly, APCO was able to raise those defenses in opposing Zitting's motion for
3 partial summary judgment, which occurred months before Zitting's deposition. And there was a
4 reason for this.

5 APCO had independent knowledge to assert those defenses since 2010. Notably, APCO does
6 not need Zitting's deposition testimony to determine

- 7 ▪ whether APCO never received payment from the Owner—a purported condition
8 precedent to payment under the subcontract;
- 9 ▪ whether APCO did not receive close out documents from Zitting—another purported
10 condition precedent to payment under the contract; or
- 11 ▪ whether APCO provided executed change orders to Zitting—another purported condition
12 precedent to payment under the contract.

13 Through it all, APCO does not dispute that it could have availed itself of those additional defenses in
14 its 2010 interrogatory responses. Only when Zitting argued for exclusion of APCO's evidence did
15 APCO see fit to supplement its discovery responses. Again, the supplement was done well after the
16 close of discovery, after motions for summary judgment were filed, and about two weeks before
17 trial.

18 Based on similar conduct, courts have found no justification for the late supplement:

19 Because the supplemental response was delivered almost thirty-two
20 months after the interrogatory was served, more than three months
21 after discovery had already closed, and only two weeks before the start
22 of trial, and because there are no mitigating circumstances to justify
23 such a delay, defendant's supplemental response was not seasonable
24 within the meaning of ... Rule 26(e)(1).

25 *Am. Sporting Goods v. U.S.*, 24 C.I.T. 1156, 1156–57 (2000).

26 [T]his type of supplementation was not what the drafters of Rule
27 26(e)(2) envisioned. "The purpose of [Rule 26(e)(2)] is to prevent trial
28 by ambush." [citation omitted] If a party is allowed to withhold the
supplementation of its discovery responses until after fact discovery is
closed, the purpose of the Rule is effectively frustrated because the
opposing party is denied the opportunity to conduct discovery on the
supplemented responses.

1 *Heidelberg Harris*, 1996 WL 680243, at *8. This Court should follow the esteemed wisdom of
2 these holdings and precluded the evidence as well.

3 **2. APCO fails to show that its discovery conduct did not prejudice Zitting.**

4 APCO's opposition also fails to show that its untimely supplemental interrogatory response
5 is harmless. Failure to comply with Rule 26(e)(2) is harmless "when there is no prejudice to the
6 party entitled to the disclosure." *Mopex*, 215 F.R.D. at 93. Here, the arguments in APCO's
7 opposition support a showing of prejudice.

8 First, APCO's affirmative defenses alleged in APCO's 2009 answer did not mitigate any
9 prejudice to Zitting. The affirmative defenses identified in APCO's opposition were vague and boiler
10 plate. (Opp'n 2:16-3:16.) This prompted Zitting to serve contention interrogatories to ascertain what
11 evidence APCO could present for its defenses at the outset of discovery. As discussed in Zitting's
12 motion in limine, the point of contention interrogatories—such as those asking a "defendant to
13 identify its affirmative defenses and state the facts supporting these defenses"—are to "narrow and
14 define the issues for trial and enable the propounding party to determine the proof required to rebut
15 the responding party's claim or defense." (MIL 7:23-8:3 (citations omitted).) APCO's answers in
16 interrogatories waived the undisclosed defense and narrowed APCO's defenses to one. (*Id.*)

17 As explained by Zitting in its motion and ignored by APCO in its opposition, Zitting
18 formulated and pursued a litigation plan for seven years in reliance on this single defense. (*See id.*
19 10:20-11:9.) This plan included filing a simple motion for partial summary judgment on liability that
20 focused on the enforceability of the pay-if-paid provision, with hearing to prove up Zitting's
21 damages. With APCO's about-face regarding its defenses, Zitting lost the ability to pursue a new
22 litigation plan, and any pursuit of a new litigation plan will result in substantial expense to Zitting
23 and interfere with the parties' schedule and the Court's docket.

24 Second, APCO cannot rely on its July 19, 2017 Rule 30(b)(6) deposition testimony to
25 mitigate prejudice to Zitting. APCO overlook the fact that the deposition occurred seven years after
26 APCO's 2010 interrogatory responses and near the close of discovery. By that point, Zitting was
27 near the end of its litigation plan. APCO seems to just ignore the fact that it had seven years to
28 supplement or amend its interrogatory answers.

1 More importantly, APCO overlook the fact that when given a second opportunity to
2 supplement or amend its answers seven years later it failed to do so again. Instead, APCO produced
3 a Rule 30(6) witness on June 5, 2017 to testify about APCO's affirmative defenses and that witness
4 confirmed APCO's seven-year-long position that it was refusing payment solely because of the pay-
5 if-paid provision. (Ex. A 10:24-12:20, 40:16-41:4, Ex. 1.) Again, both of APCO's Rule 30(b)(6)
6 witnesses declined to amend or supplement the interrogatory responses at their deposition. Zitting
7 had relied on this in preparing its motion for partial summary judgment, which focused on the pay-
8 if-paid provision. Zitting had no idea that APCO would raise additional defenses in its opposition to
9 Zitting's motion. APCO's gamesmanship in throughout seven years of discovery should not go
10 rewarded.

11 Lastly, APCO's supplemental interrogatory response—served after the close of discovery
12 and about two weeks from trial—does not mitigate any prejudice. Discovery is already closed, and
13 Zitting has already begun trial preparation based on the limited evidence it obtained in reliance on
14 APCO's original interrogatory responses.

15 Against this backdrop, it is simply incredible for [APCO] to contend
16 that it was unaware there were genuine issues of material fact
17 concerning [the conditions precedent for Zitting's payment]. It is
18 similarly far-fetched for [APCO] to contend that [Zitting] was
19 [not] prejudiced by revealing potentially critical information after all
20 parties had filed their motions for summary judgment and after they
had painstakingly developed their statements of material facts, based
on the incomplete information. Holding back this information was a
deliberate attempt to gain strategic advantage from non-disclosure and
violates the letter and spirit of the Court's Orders and the rules of civil
procedure.

21 *Cf. Maine v. Kerramerican, Inc.*, 480 F. Supp. 2d 343, 348 (D. Me. 2007). This Court should
22 therefore preclude APCO from presenting any evidence and raising any defense at trial other than
23 the enforceability of the pay-if-paid provision, which is the defense APCO maintained for seven
24 years was its only defense to payment of the subcontractors work.

25 **3. Contrary to APCO's argument, courts that considered nearly identical facts**
26 **have granted motion in limine to exclude information not previously**
disclosed in a supplemental discovery response.

27 APCO cites *Wooldridge v. Abrishami*, 233 Md. App. 278, 163 A.3d 851 (2017), a case from
28 Georgia's intermediate court of appeal that applied Georgia's rules of civil procedure to incorrectly

1 argue that a failure to assert a defense in interrogatory responses does not waive that defense. (Opp’n
2 15:1-5.) APCO misapplies *Wooldridge*. In *Wooldridge*, the court has found that discovery responses
3 at issue did disclose the affirmative defense to be excluded. *Id.* at 297, 163 A.3d at 861. In fact, the
4 court in *Wooldridge* only held that the failure to disclose a defense does not “in every case” waive that
5 defense. That means that even in Georgia when a litigant plays games in discovery, like APCO has
6 in this case, the court can find that the litigant waived the defense. This is consistent with Nev. R.
7 Civ. P. 37(c)(1), which precludes use of undisclosed information based on the “substantial
8 justification” and “prejudice” factors.

9 In any event, federal courts interpreting the federal counterpart to Nev. R. Civ. P. 37(c) have
10 consistently precluded use of undisclosed information based on those factors. *See, e.g., Mopex*, 215
11 F.R.D. at 95-96 (granting a motion to exclude evidence based on a party’s failure to amend
12 discovery responses until after the close of fact discovery). “Federal cases interpreting the Federal
13 Rules of Civil Procedure are strong persuasive authority, because the Nevada Rules of Civil
14 Procedure are based in large part upon their federal counterparts.” *Exec. Mgmt., Ltd. v. Ticor Title*
15 *Ins. Co.*, 118 Nev. 46, 53, 38 P.3d 872, 876 (2002) (internal quotation marks omitted). APCO makes
16 no effort to distinguish and therefore concede Zitting’s discussion of *Inamed Corp. v. Kuzmak*, 275
17 F.Supp. 2d 1100 (C.D. Cal. 2002), which precluded defenses not properly disclosed during
18 discovery based on nearly identical facts. (*See* MIL 11:7-12:7.) Further, a federal court in
19 *Heidelberg Harris, Inc. v. Mitsubishi Heavy Indus., Ltd.*, No. 95 C 0673, 1996 WL 680243 (N.D.Ill.
20 Nov. 21, 1996), considered the same arguments raised in APCO’s opposition and granted a motion
21 in limine to exclude information disclosed in untimely supplemental interrogatory responses.

22 *Heidelberg Harris, Inc* involved a patent infringement. *Id.* at *1. The defendants had asserted
23 an affirmative defense that claimed the plaintiffs’ violation of 35 U.S.C. § 112. *Id.* Like APCO, the
24 defendants in *Heidelberg Harris, Inc.* never disclosed this defense in their original interrogatory
25 responses. *See id.* at *7. After the close of discovery and in a supplemental interrogatory response,
26 the plaintiffs became aware for the first time that the defendants intended to raise a defense under 35
27 U.S.C. § 112. *Id.* at *1. The court granted the plaintiffs’ motion in limine to exclude any evidence
28

1 and arguments in support of the defense under 35 U.S.C. § 112. *Id.* at *8-10. In doing so, the court
2 adopted the plaintiffs' arguments on absence of justification for the late defense:

3 [A]lthough [the d]efendants made broad allegations in their answer
4 that the patents at issue were invalid under 35 U.S.C. § 112, when
5 asked about the nature of their Section 112 defense in subsequent
6 interrogatory questions, [the d]efendants failed to set forth any grounds
7 upon which they were going to challenge the validity of the asserted
8 claims under Section 112. [The d]efendants revealed the basis of their
9 Section 112 defense for the first time in their expert reports, after fact
10 discovery had closed, thereby failing to comply with their duty to
11 supplement information contained in interrogatory responses under
12 [Rule] 26(e)(2).

13 *Id.* at *7-8. The court also found prejudice to the plaintiffs from the failure to “timely supplement its
14 interrogatory responses.” *Id.* at *9. Had the plaintiffs “been aware of [the d]efendants' intention to
15 raise this defense, [they] would have altered the way it conducted discovery.” *Id.*

16 The court rejected the defendants' argument that the plaintiffs were

17 fully aware of their intention to assert this defense as a result of [the
18 defendants'] answer and interrogatory responses. The Court finds that,
19 while the [d]efendants' answer and nebulous interrogatory responses
20 may have served to put [the plaintiffs] on notice as to the possibility of
21 a Section 112 defense being raised, they failed to apprise [the
22 plaintiffs] of the substance and basis for that defense. Consequently,
23 the Court finds that [the plaintiffs were] surprised as to the factual
24 basis and substance of [the d]efendants' §112 defense.

25 *Id.* at *8. The court also rejected the defendants' argument that critical information from a deposition
26 justified the late supplement:

27 While the Plaintiff was given general notice of Defendants' intent to
28 assert a Section 112 defense, both through the Defendants' answer and
its responses to interrogatories, the details of and the basis for that
defense were never fleshed out until after fact discovery closed and the
Defendants' expert reports were disclosed. The Defendants imply that
they were unable to provide the specifics of their Section 112 defense
until after they deposed Harris' named inventors on the subject. These
depositions took place one month before the Defendant provided the
Plaintiff with the expert reports. However, after reviewing the
deposition testimony provided, there is no indication that the
depositions did anything to enhance the Defendants' understanding of
this defense or provide the Defendants with any of the facts they
needed to flesh out this defense.

Id. at *7. The court had found that the “Defendants' had notice of the facts that form the basis of their
Section 112 defense well before the close of fact discovery.” *Id.* This Court should follow the well-

1 reasoned ruling on arguments nearly identical to APCO's arguments in its opposition and grant
2 Zitting's motion.

3 **III. CONCLUSION**

4 For the foregoing reasons and the reasons set forth in Zitting's motion in limine, this Court
5 should preclude APCO from introducing any evidence or argument challenging Zitting Brothers'
6 recovery other than the evidence and arguments pertaining to the enforceability of the pay-if-paid
7 provision of APCO's subcontract with Zitting Brothers for the Project.

8 Dated: November 15, 2017

9 WILSON ELSER MOSKOWITZ EDELMAN &
10 DICKER LLP

11 /s/ I-Che Lai
12 Jorge Ramirez, Esq.
13 Nevada Bar No. 6787
14 I-Che Lai, Esq.
15 Nevada Bar No. 12247
16 300 South 4th Street, 11th Floor
17 Las Vegas, NV 89101
18 Telephone: (702) 727-1400
19 Facsimile: (702) 727-1401
20 *Attorneys for Lien Claimant,*
21 *Zitting Brothers Construction, Inc.*
22
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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 15th day of November, 2017, I served a true and correct copy of the foregoing **ZITTING BROTHERS CONSTRUCTION, INC’S REPLY IN SUPPORT OF MOTION IN LIMINE TO LIMIT THE DEFENSES OF APCO CONSTRUCTION (“APCO”) TO THE ENFORCEABILITY OF PAY-IF-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;
- ☐ by transmitting via email the document listed above to the email address set forth below on this date before 5:00 p.m.

BY /s/ De’Awna Crews
An Employee of WILSON ELSER MOSKOWITZ
EDELMAN & DICKER LLP

Exhibit “A”

Exhibit “A”

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DISTRICT COURT
CLARK COUNTY, NEVADA

APCO CONSTRUCTION, a Nevada
corporation,

Plaintiff,

vs. CASE NO. A571228
DEPT. NO. XIII
GEMSTONE DEVELOPMENT WEST, INC.,
a Nevada corporation; NEVADA
CONSTRUCTION SERVICES, a Nevada
corporation; SCOTT FINANCIAL
CORPORATION, a North Dakota
corporation; COMMONWEALTH LAND
TITLE INSURANCE COMPANY; FIRST
AMERICAN TITLE INSURANCE COMPANY
and DOES I through X,

Defendants.

AND ALL RELATED MATTERS.

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

APPEARANCES OF COUNSEL

For Plaintiff:

JACK CHEN MIN JUAN, ESQ.
Marquis Aurbach & Coffing
10001 Park Run Drive
Las Vegas, Nevada 89145
702.382.0711
702.207.6072 Fax
jjuan@maclaw.com

For Helix Electrical of Nevada, LLC:

ERIC B. ZIMBELMAN, ESQ.
Peel Brimley, LLP
3333 East Serene Avenue
Suite 200
Henderson, Nevada 89074
702.990.7272
702.990.7273 Fax
ezimbelman@peelbrimley.com

For Interstate Plumbing & Air Conditioning:

ELIZABETH E. STEPHENS, ESQ.
Sullivan Hill Lewin Rez & Engel
228 South Fourth Street
First Floor
Las Vegas, Nevada 89101
702.382.6440
702.384.9102 Fax
stephens@shlaw.com

For National Wood Products, Inc.:

JOHN B. TAYLOR, ESQ.
Cadden & Fuller, LLP
114 Pacifica
Suite 450
Irvine, California 92618
949.788.0827
949.450.0650 Fax
jtaylor@caddenfuller.com



800.211.DEPO (3376)
EsquireSolutions.com

APPEARANCES OF COUNSEL (continued)

For Lien Clamant, Zitting Brothers Construction, Inc.:

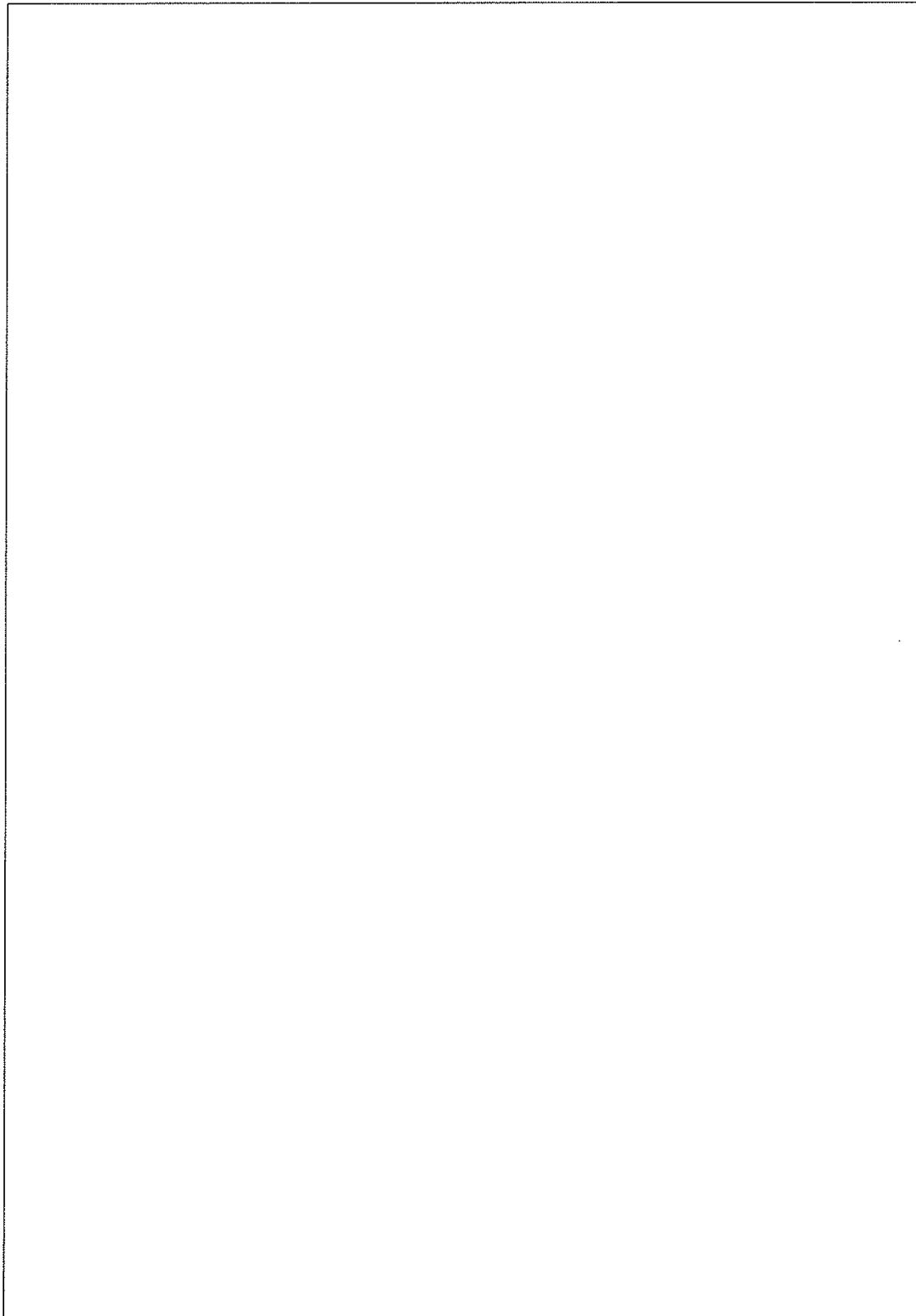
I-CHE LAI, ESQ.
Wilson Elser Moskowitz
Edelman & Dicker, LLP
300 South Fourth Street
11th Floor
Las Vegas, Nevada 89101
702.727.1400
702.727.1401 Fax
I-Che.Lai@wilsonelser.com

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14		amended notice of deposition of APCO	
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5	7	Correspondence from APCO Construction, James Barker to Alexander Edelstein, Gemstone, July 18, 2008, ZBCI001151 through 1154 29
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Deposition of BRIAN DAVID BENSON

June 5, 2017

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

Thereupon--

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

EXAMINATION

BY MR. LAI:

Q. Good morning. Is it Mr. Benson?

A. Yes, sir.

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

A. Sure.

Q. Can you state your name for the record.

A. Brian Daniel Benson.

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

A. Yes.

Q. Have you ever had your deposition taken before?

1 it done.

2 Q. Did you go to high school?

3 A. Yes.

4 Q. Where did you go to high school?

5 A. West Scranton High School.

6 Q. Where is that?

7 A. Scranton, Pennsylvania.

8 Q. Did you graduate?

9 A. Yes.

10 Q. When?

11 A. 1989.

12 Q. Did you go to college?

13 A. No.

14 Q. Do you have any professional licenses or
15 certifications?

16 A. No.

17 Q. The next two questions are questions I ask
18 all deponents, so please don't take offense. Have you
19 ever been convicted of a felony?

20 A. No.

21 Q. Have you ever been convicted of crime
22 involving dishonesty or fraud?

23 A. No.

24 MR. LAI: Mark this as Exhibit 1.

25 (Exhibit 1 marked



1 for identification.)

2 BY MR. LAI:

3 Q. Mr. Benson, the court reporter has handed you
4 a document marked as Benson 1. Have you seen this
5 document before?

6 A. Yes.

7 Q. Did you read this document before coming here
8 today?

9 A. Yes.

10 Q. So what is this document?

11 A. I guess the best way to say it is Zitting
12 Brothers' case against APCO.

13 Q. I'll represent to you that Benson 1 is the
14 deposition notice we served on APCO Construction for
15 your deposition here today. Do you agree to testify on
16 APCO's behalf today?

17 A. Yes.

18 Q. I want to flip to page, starting at page 3.
19 Do you see the bolded words saying "Area of
20 examination"?

21 A. Yes.

22 Q. Beneath that, do you see a list of numbers
23 going up to 13?

24 A. Yes.

25 Q. Just for the sake of clarity, do you

1 understand which topics under these areas of
2 examination that you agree to testify on APCO's behalf
3 today?

4 A. Yes.

5 Q. Which topics?

6 MR CHEN: If I can help out, he's going to be
7 talking on the money issues, which is number 4 -- I'm
8 sorry. The money issues that he's not going to be
9 talking about are numbers 4, 5, 7, 8. And as for 9,
10 10, 11 and 12, if they relate to payments, that's all
11 going to be Mary Jo. So payments will be Mary Jo. He
12 will talk about things out in the field and everything
13 else.

14 BY MR. LAI:

15 Q. Mr. Benson, does your counsel's statements
16 make sense to you?

17 A. Yes.

18 Q. Are you prepared to go through these topics
19 today?

20 A. Yes.

21 Q. What did you do to prepare for your
22 deposition?

23 A. Just reviewed the documents presented for the
24 deposition.

25 Q. Can you please explain what type of documents



1 Q. Mr. Benson, the court reporter has handed you
2 documents marked as Benson 2 and 3. Have you ever seen
3 those documents before?

4 A. I believe so, yes.

5 Q. Were these the documents that you reviewed as
6 part of your preparation for today's deposition?

7 A. Yes, briefly.

8 Q. Let's talk about Benson 2. Let's turn to
9 page 46 of 47. Do you see the name Joseph Pelan?

10 A. Joseph Pelan, yes.

11 Q. Who is Joseph Pelan?

12 A. The man sitting two chairs to the right of
13 me.

14 Q. Do you believe that this is a true and
15 correct copy of APCO'S responses to interrogatories?

16 A. Yes.

17 Q. Let me direct your attention to Benson 3.
18 Did you assist in preparing the responses to the
19 interrogatories in Exhibit Benson 3?

20 A. No.

21 Q. After your review of both Benson 2 and 3, is
22 there anything that you notice that you want to change
23 in those responses?

24 A. I didn't go over them in that much detail.

25 Q. Let's talk about the ManhattanWest mixed use



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.



[illegible]

That prior to being deposed, the witness was duly sworn by me to testify to the truth. That I thereafter transcribed my said stenographic notes via computer-aided transcription into written form, and that the typewritten transcript is a complete, true and accurate transcription of my said stenographic notes. That review of the transcript was requested.

IN WITNESS WHEREOF, I have set my hand in my
office in the County of Clark, State of Nevada, this
15th day of June, 2017.

June W. Lord



ESQUIRE
DEPOSITION SOLUTIONS

AA 003135

1 ANTD
2 JORGE RAMIREZ, ESQ.
3 Nevada Bar No. 6787
4 I-CHE LAI, ESQ.
5 Nevada Bar No. 12247
6 WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP
7 300 South 4th Street, 11th Floor
8 Las Vegas, NV 89101-6014
9 Telephone: (702) 727-1400
10 Facsimile: (702) 727-1401
11 Jorge.Ramirez@wilsonelser.com
12 I-Che.Lai@wilsonelser.com
13 Attorneys for Lien Clamant,
14 Zitting Brothers Construction, Inc.

DISTRICT COURT
CLARK COUNTY, NEVADA

10 APCO CONSTRUCTION, a Nevada
11 corporation,

12 Plaintiff,

13 vs.

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

16 Defendant.

CASE NO. A571228
DEPT. NO. XIII

Consolidated with:

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

17 AND ALL RELATED MATTERS

ZITTING BROTHERS CONSTRUCTION,
INC.'S AMENDED NOTICE OF
DEPOSITION OF APCO
CONSTRUCTION PURSUANT TO NRCP
30(b)(6)

DATE: June 5, 2017
TIME: 9:00 a.m.

23 ///

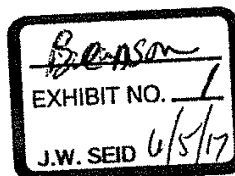
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1 ZITTING BROTHERS CONSTRUCTION, INC.'S AMENDED NOTICE OF DEPOSITION
2 OF APCO CONSTRUCTION PURSUANT TO NRCP 30(b)(6)

3 TO: APCO CONSTRUCTION

4 TO: JACK CHEN MIN JUAN, ESQ. and CODY S. MOUNTEER, ESQ., of MARQUIS,
AURBACH & COFFING, Attorneys for APCO Construction

5 TO: ALL PARTIES AND THEIR RESPECTIVE ATTORNEYS OF RECORD

6 PLEASE TAKE NOTICE that pursuant to NRCP 30(b)(6), ZITTING BROTHERS
7 CONSTRUCTION, INC., ("ZBCI"), by and through its counsel of record, Jorge A. Ramirez, Esq.,
8 and I-Che Lai, Esq., of the law firm of WILSON ELSEER MOSKOWITZ EDELMAN & DICKER,
9 LLP, will take the oral deposition of one or more designated representatives for
10 APCO CONSTRUCTION ("APCO") on the 5th day of June, 2017, at the hour of 9:00 a.m. at
11 Esquire Deposition Solutions, located at 2300 W. Sahara Ave., Suite 770, Las Vegas, NV 89102.
12 ZBCI plans to depose APCO's designated representative(s) on each of the numbered categories
13 identified below. The deposition will take place before an officer duly authorized by law to
14 administer oaths and record testimony. This deposition will be recorded by stenographic means and
15 will be taken pursuant to all applicable provisions of the Nevada Rules of Civil Procedure pertaining
16 to the taking of and use of depositions. You are invited to attend and cross-examine.
17
18

19 DEFINITIONS

20 As used in this notice of deposition, the following terms have the meaning indicated:

21 1. The term "you" or "your" refers to APCO Construction, its employees, agents,
22 representatives, attorneys, experts, and all other persons acting or purporting to act on its behalf.

23 2. The term "Gemstone" refers to Gemstone Development West, Inc., its employees,
24 agents, representatives, attorneys, experts, and all other persons acting or purporting to act on its
25 behalf
26

27 3. The term "ZBCI" refers to Zitting Brothers Construction, Inc., its employees, agents,
28 representatives, attorneys, experts, and all other persons acting or purporting to act on its behalf.

1 4. The term "Manhattan West Project" refers to the real property commonly referred to
2 as Manhattan West mixed used development project at issue in this case and generally located at
3 9205 West Russell Road, Clark County, Nevada.

4 5. The term "Contract" refers to the agreement you entered into with Gemstone
5 regarding the Manhattan West Project, including but not limited to the original contact(s), change
6 orders, and any ratification agreements.

7 6. The term "Sub-Contract" refers to the agreement you entered into with ZBCI
8 regarding the Manhattan West Project, including but not limited to the original contact(s), change
9 orders, and any ratification agreements.
10

11 Areas of Examination Pursuant to Nev. R. Civ. P. 30(b)(6)

12 Pursuant to Nev. R. Civ. P. 30(b)(6), the designated witness(es) of APCO Construction will
13 provide deposition testimony with respect to matters known or reasonable available to APCO
14 Construction regarding the subjects described below:
15

- 16 1. All facts fact related to the Contract;
- 17 2. All facts fact related to the Sub-Contract;
- 18 3. All facts related to ZBCI's work under the Sub-Contract, including but not limited to
19 the scope and quality of ZBCI's work;
- 20 4. All facts related to your process for obtaining payment under the Contract;
- 21 5. All facts related to your process for paying sub-contractors under the Sub-Contract
22 and sub-contracts with other sub-contractors;
- 23 6. All facts related to all payments you received in connection with the Manhattan West
24 Project;
- 25 7. All facts related to all payments you made to ZBCI in connection with the Manhattan
26 West Project;
- 27 8. All facts related to all payments you made to sub-contractors other than ZBCI in
28

1 connection with the Manhattan West Project;

2 9. All facts related to your communications with Gemstone regarding the Manhattan
3 West Project;

4 10. All facts related to your communications with ZBCI regarding the Manhattan West
5 Project;

6 11. All facts related to your assertion that you are not liable for any portion of ZBCI's
7 general and/or lien claims against you;

8 12. All facts related to your defenses against ZBCI's claims as alleged in ZBCI's
9 complaint in this case; and

10 13. All documents that you have disclosed in support of your defenses against ZBCI's
11 claims against you.

12 DATED this 11th day of May, 2017.

13
14
15 WILSON ELSE MOSKOWITZ EDELMAN &
DICKER LLP

16
17 By: 

Jorge Ramirez, Esq.
Nevada Bar No. 6787
I-Che Lai, Esq.
Nevada Bar No. 12247
300 South 4th Street, 11th Floor
Las Vegas, NV 89101
Telephone: (702) 727-1400
Facsimile: (702) 727-1401
Attorneys for Lien Claimant,
Zitting Brothers Construction, Inc.

1 **CERTIFICATE OF SERVICE**

2 Pursuant to NRCP 5(b), I certify that I am an employee of Wilson Elser Moskowitz Edelman
3 & Dicker LLP, and that on this 11th day of May, 2017, I served a true and correct copy of the
4 foregoing **ZITTING BROTHERS CONSTRUCTION, INC.'S AMENDED NOTICE OF**
5 **DEPOSITION OF APCO CONSTRUCTION PURSUANT TO NRCP 30(b)(6)** document as
6 follows:

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

15 **Bennett Tueller Johnson & Deere**

Contact	Email
Benjamin D. Johnson	ben.johnson@btjd.com
Chalise Walsh	cwalsh@btjd.com

18 **Brian K. Berman, Chtd.**

Contact	Email
Brian K. Berman, Esq.	b.k.berman@att.net

20 **Cadden & Fuller LLP**

Contact	Email
Dana Y. Kim	dkim@caddenfuller.com
S. Judy Hirahara	jhirahara@caddenfuller.com
Tammy Cortez	tcortez@caddenfuller.com

24 **David J. Merrill P.C.**

Contact	Email
David J. Merrill	david@djmerillpc.com

26 **Dickinson Wright, PLLC**

Contact	Email
Cheri Vandermeulen	cvandermeulen@dickinsonwright.com
Christine Spencer	cspencer@dickinsonwright.com

Donna Wolfbrandt dwolfbrandt@dickinsonwright.com
Eric Dobberstein edobberstein@dickinsonwright.com

Durham Jones & Pinegar

Contact	Email
Brad Slighting	bslighting@djplaw.com
Cindy Simmons	csimmons@djplaw.com

Fox Rothschild

Contact	Email
Jineen DeAngelis	jdeangelis@foxrothschild.com

G.E. Robinson Law

Contact	Email
George Robinson	grobinson@pezzilloloyd.com

GERRARD COX & LARSEN

Contact	Email
Aaron D. Lancaster	alancaster@gerrard-cox.com
Douglas D. Gerrard	dgerrard@gerrard-cox.com
Kaytlyn Bassett	kbassett@gerrard-cox.com

Gibbs, Giden, Locher, Turner & Senet LLP

Contact	Email
Becky Pintar	bpintar@gglt.com
Linda Compton	lcompton@gglt.com

Gordon & Rees

Contact	Email
Robert Schumacher	rschumacher@gordonrees.com

Gordon & Rees LLP

Contact	Email
Andrea Montero	amontero@gordonrees.com
Brian Walters	bwalters@gordonrees.com
Marie Ogella	mogella@gordonrees.com

GRANT MORRIS DODDS

Contact	Email
Steven Morris	steve@gmdlegal.com

Greenberg Traurig, LLP

Contact	Email
6085 Joyce Heilich	heilichj@gtlaw.com
7132 Andrea Rosehill	rosehilla@gtlaw.com
CNN Cynthia Ney	neyc@gtlaw.com

IGH Bethany Rabe	rabe@gtlaw.com
IOM Mark Ferrario	lvitdock@gtlaw.com
LVGTDocketing	lvitdock@gtlaw.com
MOK Moorea Katz	katzmo@gtlaw.com
WTM Tami Cowden	cowdent@gtlaw.com

HOLLEY DRIGGS WALCH FINE WRAY PUZEY & THOMPSON

Contact	Email
Glenn F. Meier	gmeier@nevadafirm.com
Renee Hoban	rhoban@nevadafirm.com

Holley Driggs Walch Fine Wray Puzey & Thompson

Contact	Email
Cynthia Kelley	ckelley@nevadafirm.com
Rachel E. Donn	rdonn@nevadafirm.com

Howard & Howard

Contact	Email
Gwen Rutar Mullins	grm@h2law.com
Kellie Piet (Legal Assistant)	kdp@h2law.com
Wade B. Gochmour	wbg@h2law.com

Jolley Urga Woodbury & Little

Contact	Email
Agnes Wong	aw@juww.com
Elizabeth J. Martin	em@juww.com
Kelly McGee	kom@juww.com
Martin A. Little, Esq.	mal@juww.com
Martin A. Little, Esq.	mal@juww.com
Michael R. Ernst	mre@juww.com
Michael R. Ernst, Esq.	mre@juww.com

Kemp, Jones & Coulthard

Contact	Email
Erica Bennett	e.bennett@kempjones.com
J. Randall Jones	r.jones@kempjones.com
Janet Griffin	jlg@kempjones.com
Mark M. Jones	mmj@kempjones.com
Matt Carter	msc@kempjones.com
Matthew Carter	m.carter@kempjones.com
Pamela Montgomery	pym@kempjones.com

Law Offices of Floyd Hale

Contact	Email
Debbie Holloman	dholloman@jamsadr.com
Floyd Hale	fhale@floydhale.com

Law Offices of Sean P. Hillin, P.C.

Contact	Email
Caleb Langsdale, Esq.	caleb@langsdalelaw.com

Litigation Services & Technologies

Contact	Email
Calendar	calendar@litigation-services.net
Depository	Depository@litigation-services.net

Marquis Aurbach Coffing

Contact	Email
Cally Hatfield	chatfield@maclaw.com
Cody Mounteer, Esq.	cmounteer@marquisaurbach.com
Courtney Peterson	cpeterson@maclaw.com
Jack Juan	jjuan@marquisaurbach.com
Jennifer Case	jcase@maclaw.com
Phillip Aurbach	paurbach@maclaw.com
Taylor Fong	tfong@marquisaurbach.com

McCullough, Perez & Dobberstein, Esq.

Contact	Email
Eric Dobberstein, Esq.	edobberstein@mcpalaw.com

McCullough, Perez & Dobberstein, Ltd.

Contact	Email
Christine Spencer	cspencer@mcpalaw.com

McDonald Carano Wilson, LLP

Contact	Email
Kathleen Morris	kmorris@mcdonaldcarano.com
Ryan Bellows	rbellows@mcdonaldcarano.com

Meier Fine & Wray, LLC

Contact	Email
Receptionist	Reception@nvbusinesslawyers.com

Morrill & Aronson

Contact	Email
Christine Taradash	CTaradash@maazlaw.com

Morrill & Aronson P.L.C.

Contact	Email
Debra Hitchens	dhitchens@maazlaw.com

Peel Brimley LLP

Contact	Email
Amanda Armstrong	aarmstrong@peelbrimley.com
Eric Zimbelman	ezimbelman@peelbrimley.com
Kathy Gentile	kgentile@peelbrimley.com
Ronnie Cox	rcox@peelbrimley.com
Rosey Jeffrey	rjeffrey@peelbrimley.com

Pezzillo Lloyd

Contact	Email
Jennifer R. Lloyd	jlloyd@pezzillolloyd.com
Marisa L. Maskas, Esq.	mmaskas@pezzillolloyd.com

Procopio Cory

Contact	Email
Timothy E. Salter	tim.salter@procopio.com

Procopio Cory Hargreaves & Savitch

Contact	Email
Andrew J. Kessler	andrew.kessler@procopio.com
Carla Clark, Legal Secretary	carla.clark@procopio.com
Rebecca Chapman	rebecca.chapman@procopio.com
Rebecca Chapman, Legal Secretary	rebecca.chapman@procopio.com
Scott R. Omohundro	scott.omohundro@procopio.com
Timothy E. Salter	tim.salter@procopio.com

Procopio Cory Hargreaves & Savitch LLP

Contact	Email
Cori Mandy, Legal Secretary	cori.mandy@procopio.com

Procopio, Cory, Hargreaves & Savitch

Contact	Email
Elmer Flores	elmer.flores@procopio.com
Joseph Frank	joseph.frank@procopio.com

Procopio, Cory, Hargreaves & Savitch

Contact	Email
Lenore Joseph	calendaring@procopio.com

Richard L. Tobler, Ltd.

Contact	Email
Richard Tobler	rltldck@hotmail.com

Rooker Rawlins

Contact	Email
Legal Assistant	rlegalassistant@rookerlaw.com
Michael Rawlins	mrawlins@rookerlaw.com

T. James Truman & Associates

Contact	Email
District filings	district@trumanlegal.com

The Langsdale Law Firm

Contact	Email
Caleb Langsdale	Caleb@Langsdalelaw.com

Varricchio Law Firm

Contact	Email
Paralegal	paralegal@varricchiolaw.com
Philip T. Varricchio	phil@varricchiolaw.com

Watt, Tieder, Hoffar & Fitzgerald, L.L.P.

Contact	Email
David R. Johnson	djohnson@watttieder.com
Jennifer MacDonald	jmacdonald@watttieder.com

Williams & Associates

Contact	Email
Donald H. Williams, Esq.	dwilliams@dhwlawlv.com

BY


An Employee of WILSON ELSER MOSKOWITZ
EDELMAN & DICKER LLP

Exhibit “B”

Exhibit “B”

DISTRICT COURT

CLARK COUNTY, NEVADA

APCO CONSTRUCTION, a Nevada
corporation,

Plaintiff,

vs.

CASE NO. A571228
DEPT. NO. XIII

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

Defendants.

AND ALL RELATED MATTERS.

THE DEPOSITION OF

MARY JO ALLEN

PMK on behalf of APCO

VOLUME II

Wednesday, July 19, 2017
9:15 a.m.

2300 West Sahara Avenue, Suite 770
Las Vegas, Nevada

June W. Seid, CCR No. 485

APPEARANCES OF COUNSEL

For Plaintiff:

CODY S. MOUNTEER, ESQ.
Marquis Aurbach & Coffing
10001 Park Run Drive
Las Vegas, Nevada 89145
702.382.0711
702.207.6072 Fax
cmounteer@maclaw.com

For Helix Electrical of Nevada, LLC:

ERIC B. ZIMBELMAN, ESQ.
Peel Brimley, LLP
3333 East Serene Avenue
Suite 200
Henderson, Nevada 89074
702.990.7272
702.990.7273 Fax
ezimbelman@peelbrimley.com

For National Wood Products, Inc.:

JOHN B. TAYLOR, ESQ.
Cadden & Fuller, LLP
114 Pacifica
Suite 450
Irvine, California 92618
949.788.0827
949.450.0650 Fax
jtaylor@caddenfuller.com

APPEARANCES OF COUNSEL (continued)

For Lien Clamant, Zitting Brothers Construction, Inc.:

I-CHE LAI, ESQ.
Wilson Elser Moskowitz
Edelman & Dicker, LLP
300 South Fourth Street
11th Floor
Las Vegas, Nevada 89101
702.727.1400
702.727.1401 Fax
I-Che.Lai@wilsonelser.com

For Interstate Plumbing & Air Conditioning:

JONATHAN S. DABBIERI
Sullivan Hill Lewin Rez & Engel
228 South Fourth Street
First Floor
Las Vegas, Nevada 89101
702.382.6440
702.384.9102 Fax
dabbieri@shlaw.com
(Appearing Telephonically)

* * * * *

I N D E X

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By Mr. Lai	209

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70	APCO Construction's answers to Zitting Brothers Construction, Inc.'s first request for interrogatories	109
71	ManhattanWest General Construction Agreement for GMP, ZBCI002090 through 2141	113
72	Subcontract agreement APCO and Zitting Brothers Construction, Inc., APCO00044592 through 44624	114
73	Scott Financial Corporation correspondence, April 28, 2009 to Nevada State Contractor's Board, CAMCO-MW 00029 through 37	122
74	APCO Construction ManhattanWest Subcontractor Summary documents, APCO 106198 through 106218	131
75	ManhattanWest Billings Submitted To Owner By APCO On Behalf of Zitting Brothers Construction, APCO 106196	141

1	E X H I B I T S		
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2 starting ZBCI002037 through 2041
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5 Zitting Brothers Construction,
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7 87 Document titled Camco Buildings 8 & 9, 190
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9 88 Notice to All ManhattanWest 191
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11 with attachment, APCO 106288 AND
12 106287
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INFORMATION TO BE SUPPLIED

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Deposition of MARY JO ALLEN

July 19, 2017

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

Thereupon--

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

(Exhibit 69 marked
for identification.)

EXAMINATION

BY MR. LAI:

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

Could you state your full name for the record.

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

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

A. Yes, sir.

Q. Have you consumed any drugs, medication or

1 alcohol within the past 24 hours?

2 A. No.

3 Q. Do you believe that there is anything to
4 prevent you from giving your best and most truthful
5 testimony today?

6 A. No.

7 Q. Any reason why we can't go forward that you
8 can think of?

9 A. No, sir.

10 Q. Your current employer is APCO Construction,
11 correct?

12 A. Yes.

13 Q. Just to avoid any confusion, when I say APCO
14 in today's deposition, I mean APCO Construction; do you
15 understand?

16 A. Yes.

17 Q. The next question I ask all witnesses. You
18 may have covered them yesterday, have you ever been
19 convicted of a felony?

20 A. No, sir.

21 Q. Have you ever been convicted of a crime
22 involving dishonesty, deceit, larceny or fraud?

23 A. No.

24 Q. In front of you is an exhibit premarked Allen
25 Exhibit 69. Do you see that?

1 A. Yes, sir.

2 Q. Have you ever seen this document before?

3 A. Yes, sir.

4 Q. Did you read this document before coming here
5 today?

6 A. Yes, sir. I read about a million documents.

7 Q. So this is one of the millions that you read?

8 A. Yes, sir.

9 Q. Do you agree to testify today on behalf of
10 APCO?

11 A. Yes, sir.

12 Q. On the topics concerning payment and payment
13 related questions, correct?

14 A. Yes, sir.

15 Q. Are you prepared to go over those topics
16 today?

17 A. Yes, sir.

18 Q. So you just testified that you reviewed about
19 a million documents for your preparation. Can you
20 describe briefly what type of documents did you review
21 for your preparation?

22 A. My job files, the documents that APCO
23 disclosed for the specific subs that are involved in
24 these depositions. The documents that they disclosed.

25 Q. When did you review these documents?

1 A. Oh, my goodness. Over the last month maybe.

2 Q. You can ballpark it.

3 A. A month.

4 Q. How long was that review approximately; was
5 it hours or days?

6 A. Hours, days. Well, I did a little here, a
7 little there. At times I spent, you know a whole day
8 doing it. I have a regular job that I have to do in
9 between all of this, so I can't just stop functioning;
10 do you know what I mean?

11 Q. I understand. Hopefully we will get you out
12 of here today as soon as possible so you can get back
13 to your real job.

14 Did you talk to anyone other than your
15 attorney?

16 A. My boss Joe Pelan, Brian Benson. Not really,
17 no, that's it.

18 Q. What did you guys generally talk about with
19 respect to this deposition?

20 A. I read Brian Benson's deposition and I asked
21 him questions about it. Joe Pelan when I was reviewing
22 documents, I would show them to him and we discussed
23 them. ManhattanWest in general. That was about it.

24 Q. When you talked to Mr. Benson about his
25 deposition testimony, did you ever have a conversation

1 about anything in that testimony of his that was
2 incorrect, in your opinion?

3 A. No.

4 Q. Did you take any notes during your
5 preparation for this deposition?

6 A. Yes.

7 Q. And that was during the month or so that you
8 prepared?

9 A. Yes.

10 Q. Do you still have a copy of those notes?

11 A. Not here.

12 Q. Is it back at your office?

13 A. Sure.

14 Q. Do you still have those notes?

15 A. Sure.

16 Q. Any reason why you took the notes when you
17 did your preparation?

18 A. Because I'm old and I forget things, so as I
19 read things I write it down and it refreshes my memory
20 so I can go back and review.

21 MR. LAI: Counsel, if you can, I would like
22 to get a copy of those notes that she prepared, if
23 possible.

24 BY MR. LAI:

25 Q. Other than your review of those documents and

1 talking to Mr. Pelan and Mr. Benson, is there anything
2 else you did in preparation for your deposition?

3 A. No.

4 (Exhibit 70 marked
5 for identification.)

6 MR. MOUNTEER: Let's go off the record really
7 quick if you don't mind.

8 MR. LAI: Sure.

9 (Off-record discussion held.)

10 BY MR. LAI:

11 Q. Ms. Allen, the court reporter handed you a
12 document that's marked as Allen 70; do you see that
13 document?

14 A. Yes, sir.

15 Q. Have you ever seen that document before?

16 MR. DABBIERI: Excuse me, would you kindly
17 identify what the document is.

18 MR. LAI: Sure. The document marked as
19 Exhibit Allen 70 is APCO Construction's answers to
20 Zitting Brothers Construction's first request for
21 interrogatories.

22 MR. DABBIERI: Thank you.

23 A. I know this was in the binders and saw it in
24 there yesterday.

25 BY MR. LAI:

1 Q. The binder documents that you reviewed in
2 preparation?

3 A. Yes.

4 Q. Did you assist in providing answers to this
5 set of requests for interrogatories marked as Allen 70?

6 A. If there was a question asked by someone that
7 was completing these, I believe Joe did this. Let me
8 look and see.

9 Q. Take your time.

10 A. I would have given them financial numbers.
11 For example, the amount that was paid.

12 Q. I saw you gesturing to a page. What page are
13 you looking at, just so I have an idea what you're
14 referencing?

15 A. What I just looked at was page 6 of 50.

16 Q. So when you're gesturing to the numbers, are
17 you talking about the sum of about 3.2 million?

18 A. Yes, sir.

19 Q. So is it fair to say that your role with
20 respect to providing responses to these set of
21 interrogatories dealt with the financial part of the
22 project?

23 A. Yes, sir.

24 Q. Let me direct your attention to page 46. Do
25 you see that page?

1 A. Um-hum.

2 Q. Do you have any reason why this page is
3 unsigned?

4 A. No.

5 Q. Were you ever asked to sign a verification
6 for these interrogatories?

7 A. No.

8 Q. Based on your review of these set of
9 interrogatory responses, with respect to the financial
10 part of the questions, is there anything in there that
11 you saw that should be changed or clarified in any way?
12 And you can take your time to look through the
13 documents if you need to.

14 A. Not without my documents in front of me, I
15 could not verify anything under oath, I'm sorry.

16 Q. Let's talk about the ManhattanWest mixed use
17 condominium project, which I'll refer to as the project
18 as shorthand. What was -- scratch that.

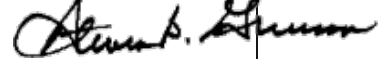
19 APCO's role with respect to the project was
20 general contractor, correct?

21 A. Yes, sir.

22 Q. And that role lasted until September 20,
23 2008, correct?

24 A. August 21st, 2008.

25 Q. And when did APCO's role as general



1 **RTRAN**

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DISTRICT COURT
CLARK COUNTY, NEVADA

APCO CONSTRUCTION,
Plaintiffs,

vs.

GEMSTONE DEVELOPMENT
WEST, INC.,
Defendants.

CASE NO. 08A571228
DEPT. XIII

BEFORE THE HONORABLE MARK R. DENTON, DISTRICT COURT JUDGE
THURSDAY, NOVEMBER 16, 2017

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

(Appearances on Page 2)

RECORDED BY: JENNIFER GEROLD, COURT RECORDER

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APPEARANCES:

For the Plaintiffs:	JOHN JEFFERIES, ESQ. CODY S. MOUNTEER, ESQ.
For Camco Pacific Construction Co., Inc.:	STEVEN L. MORRIS, ESQ.
For various Lien Claimants:	ERIC B. ZIMBELMAN, ESQ.
For Zitting Brothers Construction, Inc.:	I-CHE LAI, ESQ. JORGE A. RAMIREZ, ESQ.
For various Counter Defendants:	MICHAEL R. ERNST, ESQ.
For E&E Fire Protection, LLC:	JAMES T. TRUMAN, ESQ.
For National Wood Products, Inc.:	JOHN B. TAYLOR, ESQ. RICHARD L. TOBLER, ESQ.

1 Las Vegas, Nevada; Thursday, November 16, 2017

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

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

6 MR. MORRIS: Good morning, Your Honor, Steven Morris on behalf
7 of Camco Pacific Construction Company, Inc.

8 MR. JEFFERIES: John Jefferies, Spencer Fane, on behalf of Apco.

9 MR. MOUNTEER: Good morning, Your Honor, Cody Munteer on
10 behalf of Apco.

11 MR. ZIMBELMAN: Morning, Your Honor, Eric Zimbelman on behalf
12 of the Peel Brimley lien claimants, Helix, Fast Glass, Buchele, Heinaman, and I
13 always forget, several others -- couple others.

14 MR. TOBLER: Rich Tobler on behalf of Third-Party Intervenor,
15 National Wood Products.

16 MR. TAYLOR: John Taylor also on behalf of National Wood
17 Products.

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

19 MR. ERNST: Morning, Your Honor, Michael Ernst on behalf of Steel
20 Structures, Nevada Prefab Engineers and Gerdau Steel Reinforcing. Also with
21 me is our newest admin to the bar, Kyle Wayan [phonetic].

22 MR. RAMIREZ: Jorge Ramirez also on behalf of Zitting Brothers.

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

24 THE COURT: All right. The first item I'll take up is the motion to
25 withdraw. That's Peel Brimley firm; correct?

1 MR. ZIMBELMAN: Yes, Your Honor. That's me. It's with regard to
2 Buchele. It appears that Mr. Buchele has passed away. Buchele, the entity, is
3 long gone and we've had no contact with them for some time. There's really
4 nothing I can do for them at this point.

5 THE COURT: All right. I've received no written opposition to it.
6 Apparently, there is no opposition to it. Cause appearing that motion's granted.

7 MR. ZIMBELMAN: Thank you, Your Honor.

8 THE COURT: Okay. Thank you. Now, let me tell you what's going to
9 have to happen here. You have two alternatives. One, you can just briefly argue
10 the matters, because I'm in the middle of a jury trial -- I'm at the end of a jury trial,
11 we're settling jury instructions at 10 o'clock. We're behind on it. So I have very
12 little time here.

13 So the idea would be you just emphasize the things you want me to
14 take into account and I'll -- I'm going to have to take the case under advisement,
15 okay, and issue a ruling -- rulings. The alternative is that I pass this to Tuesday,
16 next Tuesday at 10 o'clock in the morning. I know we have calendar call on
17 Monday, I believe, but you know, I can hear from you longer on Tuesday than I
18 can today. Today's got to be very brief. Okay? It's well -- the case is well
19 briefed, so, I mean --

20 MR. ZIMBELMAN: Yeah.

21 THE COURT: -- if you want to just deem it submitted, I'll --

22 MR. ZIMBELMAN: I think we -- very brief comments and deem it
23 submitted.

24 THE COURT: Just emphasize the things you want me to pay
25 particular attention to because I --

1 MR. ZIMBELMAN: That would work for me.

2 THE COURT: -- you know, I don't have a law clerk in this case, you
3 understand that. I'm, you know, working on it without that assistance because
4 my law clerk's been screened off of it, so. Okay?

5 MR. ZIMBELMAN: Which would you like to take? Are you guys okay
6 with that?

7 MR. MOUNTEER: I think we're okay with that, Your Honor, and
8 maybe just brief oral arguments. I don't know if you want to set a time limit or
9 something, but just to mention on each motion would be fine.

10 THE COURT: Yeah. I want to have you finished with this case by
11 say, 25 after 9:00. Okay? Because I've got some other things I've got here.

12 MR. ZIMBELMAN: By what time, I'm sorry?

13 THE COURT: 25 after 9:00.

14 MR. ZIMBELMAN: I can do my part in, you know, five minutes.

15 THE COURT: Okay.

16 MR. ZIMBELMAN: Okay. Do you want to go motion by motion or do
17 you want to hear from one party or all --

18 THE COURT: Well, they're -- a lot of them are joinders, so.

19 MR. ZIMBELMAN: Some of them, yeah.

20 THE COURT: Again, I can give you more time on Tuesday if you
21 want to do that.

22 MR. ZIMBELMAN: Yeah, again, Your Honor's familiar with these
23 issues. To me, it's relatively straight forward.

24 THE COURT: Okay. Well, let's go then. I'm going to have to cut you
25 off if you're not done by --

1 MR. ZIMBELMAN: I understand.

2 THE COURT: Okay.

3 MR. ZIMBELMAN: Can I do the motion for summary judgment
4 regarding pay-if-paid?

5 THE COURT: Okay. Is that okay with everybody?

6 MR. ZIMBELMAN: It might be the most pressing.

7 MR. MOUNTEER: Sure.

8 THE COURT: Okay.

9 MR. ZIMBELMAN: Thank you, Your Honor. So the only thing I would
10 like that -- obviously, we briefed this well, but I'd like you to focus on two things.
11 One is the *Bullock* decision. It's extremely clear the Supreme Court has spoken
12 on the fact that pay-if-paid is void and unenforceable. While there's a reference
13 in a footnote to a limited exception, that just doesn't apply, right. And If you read
14 the actual statute, NRS 624.624, that limited exception is simply talking about the
15 remedy for stopping work. It's at 626. And that extends to 45 days, right.

16 The subcontractors that go need to actually issue a notice of intent to
17 stop work, stop work on the project, terminate the contract, and you know, and be
18 entitled to some of the other remedies that 626 entitles it to. Including, you know,
19 to have its change orders be deemed approved, to have its pay application be
20 deemed approved, to be immune from defenses that might come back to it.
21 624.624 spells out exactly when the general contractor can withhold money and
22 the only times it can withhold money. And the only times it can do that is by
23 issuing a notice of withholding.

24 None of that has happened. It's never happened. It's been nine
25 years. My clients are entitled to be paid and it's as simple as that. You can't just

1 hide behind this agreement that says, you'll look to the owner, because that's
2 pay-if-paid. And that is what's prohibited expressly by the Supreme Court.

3 THE COURT: Is that the *Manhattan West* -- is that the case you're
4 referring to? Which case were you referring to a minute ago?

5 MR. ZIMBELMAN: The *Bullock* decision.

6 THE COURT: The *Bullock* decision.

7 MR. ZIMBELMAN: Yeah. *Lehrer McGovern Bovis versus Bullock*.

8 THE COURT: Okay.

9 MR. ZIMBELMAN: Right. And there were a couple of decisions, the
10 second one, the Supreme Court sort of amended it by putting in a footnote that,
11 you know, everybody wants to rely on now and say oh, there might be a limited
12 exception for pay-if-paid, but the statute 624.624 is extremely clear that there
13 really isn't an exception, anytime. It works in favor of the lower tiered
14 subcontractor, right, because it says exactly when they have to be paid.

15 And the absolute outside is 30 days after submitting a request for
16 payment if there's no schedule of payments. And one of the arguments that's
17 been made is that the schedule of payments is you'll get when we get paid, right.
18 That that's -- that's just the same thing. That's a completely circular argument.
19 So if you're -- if you have an obligation to pay, you can't avoid it and the statute
20 says you can't have provisions -- conditions, stipulations, or provisions that avoid
21 the obligations of the statute.

22 THE COURT: Okay.

23 MR. ZIMBELMAN: So I think -- I think the legislature and the
24 Supreme Court have been very clear and have made it extremely difficult to get
25 around that provision. Thank you.

1 THE COURT: All right. Thank you. We're -- okay. Are there any of
2 the joinders want to say anything very briefly? Okay.

3 MR. LAI: Zitting Brothers actually submitted a separate motion for
4 summary judgment that sort of followed along what Eric Zimbelman had said in
5 his and I can briefly summarize those arguments, if you'd like.

6 THE COURT: Well, is that okay with you?

7 MR. MOUNTEER: That's fine with me, Your Honor.

8 THE COURT: Go ahead.

9 MR. LAI: Kind of tagging on, Zitting also asserted the avoidance of
10 the pay-if-paid provision, but more importantly in its motion for summary
11 judgment, Zitting has also asserted the fact that Apco, at this stage of the
12 litigation, cannot assert any other defenses besides the enforceability of the pay-
13 if-paid provision because under Rule 37 subsection (c) subsection (1), there's an
14 automatic preclusion unless Apco can show that this nondisclosure and other
15 defenses was substantially justified or that the late disclosure at this end of the
16 game did not harm Zitting. And they can't show that based on the briefing. And
17 the Court can look at the briefing for a detailed explanation for that purpose.

18 But moving on to the actual merits of the breach of contract claim,
19 which we discussed in our motion, was that there's a strict legal issue on the
20 liability for breach of contract that this Court can resolve as a matter of law. For
21 example, under the contracts sections 9.4 specifically, indicates that if there's a
22 termination of the prime contract between the owner and Apco, it provides an
23 automatic payment for all the work completed by Zitting. And more importantly,
24 under section NRS 624.626, if Apco's right that the contract between Zitting and
25 Apco are terminated, that statute also provides for automatic payment for all the

1 work completed to date. These are automatic payments. Zitting doesn't need to
2 submit any request for payment. These are amount that are due and payable as
3 of date of termination. And Apco's never refuted that the contracts were
4 terminated so on that specific issue alone, it warrants a liability finding by this
5 Court on breach of contract.

6 THE COURT: All right.

7 MR. MOUNTEER: Good morning, Your Honor, Cody Munteer on
8 behalf of Apco. Let me touch on Zitting's motion first. With all due respect,
9 counsel's argued issues that have not been briefed in the pleadings, so we'd like
10 to reserve our right to address those contractual defenses. And I wanted to
11 specifically discuss these contractual defenses because we did, in fact, through
12 our 30(b)(6) witness testify to the defenses that we have. Zitting was at the
13 deposition, took over a hundred pages of deposition of Ms. Mary Jo Allen
14 regarding payment, regarding the contract clauses, and it was clear what the
15 defenses are.

16 This was also six months before we even had the opportunity to take
17 Mr. Zitting's deposition. And Mr. Zitting's deposition, you could see, Your Honor,
18 has completely and 100 percent contradicting statements from the declaration
19 that he provided to this Court. And with the short time that I have before this
20 Court, I want to draw attention to that because for the very reason alone that Mr.
21 Sam Zitting testified to this Court on July 31st, that we had drywall complete in
22 Buildings 8 and 9 and then testified during his deposition that he was not aware if
23 drywall was completed and that he didn't know or have any documents to
24 support the drywall was completed. When in fact, we have provided evidence in
25 our moving papers to show that Buildings 8 and 9 were in fact anywhere between

1 60 to 80 percent complete; creates an issue of material fact for this Court to hear
2 and to reserve over for trial to deny Zitting's motion in its entirety.

3 Moving onto the pay-if-paid. Your Honor, I'm going to refer to Helix in
4 general, I know there's been a lot of moving parties, but they're the ones that
5 primarily brought the motion and there's been joinders and also will apply to
6 Zitting too. What they're asking the Court to do is give an advisory opinion.
7 What we've shown in our moving papers is that the pay-if-paid clause is not clear
8 and that's through, if you want to call it *Bullock* or *Lehrer*, I call it the *Lehrer* case.
9 *Lehrer* one was clarified by *Lehrer* two. There was a lot of confusion between
10 the two cases. That's why we had to have *Lehrer* two come out only a few short
11 months later. The revised opinion in *Lehrer* two attempted to clarify portions of
12 the decision regarding the inconsistent verdicts.

13 Now, without explanation, the new decision actually removed the
14 language that the pay-if-paid provisions are per se unenforceable and replaced it
15 with this. Pay-if-paid provisions entered into subsequent to the legislature's
16 amendment are enforceable only in limited circumstances and are subject to the
17 restrictions laid out in the statute. The restrictions laid out in the statute are in our
18 brief, but specifically, Your Honor, I want to touch on three of them, two, three, and
19 four. The Court needs to consider factors that are laid out in the statute whether
20 the clause is unreasonable under the circumstances, was not within the
21 contemplation of the parties at the time the agreement was entered into or for
22 which the lower-tier subcontractor is not responsible. Those are factors in fact
23 that need facts applied. We have to have facts.

24 The payment schedule in the contracts that was spoken of by Helix
25 have specific pre-conditions that have to be met. During Mr. Zitting's deposition

1 he admitted those pre-conditions weren't met. The fact of the matter is, we have
2 to know whether Helix even met those pre-conditions because if those pre-
3 conditions in the contract were not met, that brings us all back to a famous case
4 that was decided by this Court, *Padilla*. I'm sure Your Honor's familiar with it.
5 Where the Supreme Court came down and Your Honor had held that if we have
6 pre-conditions in a contract for payment, and those pre-conditions are not met so
7 payment's not due, we don't even get to the pay-if-paid clause.

8 So there are a number of factors. One, we have inconsistent
9 testimony by Zitting that should deny their entire motion so the Court can actually
10 have Mr. Zitting on the stand and test his veracity to the statements that he's
11 already provided this Court. And two, we have to have facts to be able to apply it
12 to NRS 624 statute in order to grant these motions. And without those, granting
13 would be nothing more than an advisory opinion by the Court so we respectfully
14 request both those two motions be denied. Thank you, Your Honor.

15 THE COURT: Okay.

16 MR. MORRIS: Very quickly, Your Honor. Steven Morris on behalf of
17 Camco. We would join in the arguments presented by Apco's counsel. We'd
18 also draw the Court's attention to Camco's proposition, specifically Exhibit B,
19 Your Honor, and this is Bates labeled Camco-MW00030. Camco was in a
20 somewhat of a different situation as Your Honor will recall from these facts.
21 Camco was the follow-on general contractor on this project after the Apco
22 contract was terminated in or about August 2008. Camco was on the project
23 approximately four months before funding was pulled.

24 Camco's dealings with the various subcontractors were different and
25 the differences are pointed out in -- in the Exhibit B, the Bates number that I just

1 presented Your Honor. So again, we would join with the arguments made with
2 respect to the pay-if-paid and Camco is in a different position. Your Honor, we
3 respectfully request this. This trial can be streamlined as it pertains to Camco,
4 essentially, these lien claimants, some of which don't even have contracts with
5 Camco are alleging that Camco should be the de facto lender and owner of the
6 project and guarantor for the amounts that they claim to be due and owing when
7 those amounts never came through Camco and that is pointed out in the exhibit
8 that I presented. I'll submit on that, Your Honor.

9 THE COURT: All right. Thank you.

10 MR. ZIMBELMAN: May I have one minute to reply on the *Padilla*
11 issue?

12 THE COURT: Yes.

13 MR. ZIMBELMAN: As the Court probably knows, *Padilla* is not a
14 published decision and it was referred to by counsel as that famous -- it's
15 probably famous to Your Honor because you were the trial judge, but it's not
16 famous to me. I am, however, familiar with it and from what I can tell from the
17 Supreme Court's own published decision, nobody ever raised the pay-if-paid
18 question in that case. And it certainly wasn't addressed by the Supreme Court's
19 decision.

20 And furthermore, as I understand *Padilla*, there was an allegation that
21 *Padilla* had done shoddy work and that that had been brought to *Padilla's*
22 attention by the general contractor. *Padilla* ignored those concerns and never
23 satisfied the owner as to the quality of its work. We don't know if a notice of
24 withholding had been made or what conditions had occurred there. None of that
25 is apparent from the Supreme Court's unpublished decision.

1 So I can tell you here, and you'll see it in one of our motions in limine,
2 there is no evidence, zero evidence of -- of improper work, of defective work, of
3 work that failed to comply or to conform to contract. So that's clearly not the
4 same factual situation and again, legally, pay-if-paid wasn't apparently
5 addressed. Maybe it was in your court, it certainly isn't in the Supreme Court's
6 decision, so. Thank you.

7 THE COURT: All right. Thank you.

8 MR. LAI: Your Honor, if I could respond.

9 THE COURT: Real quickly.

10 MR. LAI: Just going to put some comments about the Rule 37
11 conclusion. Apco's relying on a 30(b)(6) deposition that occurred in 2017, seven
12 years after they swore up-and-down that the only defense that they're relying on
13 was the pay-if-paid provision. We actually sent specific interrogatories back in
14 2010 asking them to provide all factual basis for the fact that Zitting did not
15 comply with the condition precedent to the contract, their specifically -- their 12th
16 affirmative defense. And Apco in their response mentioned only the pay-if-paid
17 provision.

18 We crafted a very limited discovery plan to explore solely that issue
19 and prepare motions for summary judgment solely on that specific issue and they
20 raise a defense seven years later on a 30(b)(6) deposition that wasn't even a
21 30(b)(6) witness for the affirmative defenses. Their 30(b)(6) witness on
22 affirmative defenses actually testified under oath that they're still relying on the
23 pay-if-paid provision and that was also taken place one month before their
24 deposition testimony that they're relying on right there.

25 So Zitting and the rest of the subcontractors have been misled for

1 seven years by this defense that they're asserting on. Now, they're
2 [indiscernible] at the 11th hour and that's fundamentally unfair, Your Honor.

3 THE COURT: All right. Thank you.

4 MR. MOUNTEER: You -- briefly, just 30 seconds. Your Honor, if
5 you'll recall for the first time that we want to talk about any prejudice, they've had
6 our 30(b)(6) deposition for six months. We testified to many defenses. We were
7 able to get our discovery plan and everything figured out exactly what Mr. Zitting
8 was testified to not even 30 days ago. There's no prejudice here. The case must
9 be tried on its merits.

10 MR. ZIMBELMAN: Can I give the Court one citation on that *Padilla* --

11 THE COURT: Quickly.

12 MR. ZIMBELMAN: -- question? There actually is a published
13 Supreme Court decision from 2016 that affirmed the pay-if-paid provisions in
14 *Bullock* and that is the *Cashman Equipment* decision and it's 380 P.3rd 844 132
15 Nevada Advanced Opinion 69.

16 THE COURT: All right.

17 MR. ZIMBELMAN: Thank you, Your Honor.

18 THE COURT: I got a slew of -- yeah what are you going to address?

19 MR. TAYLOR: Just one really quick comment on one of the motions
20 in limine before we close up. National Wood, in our complaint we said that we
21 found Apco and Camco to be jointly and separately liable for our claims. The
22 special master asked us to allocate between one and the other and it said that
23 that was for budgeting purposes only, it wouldn't be held against us.

24 So we did allocate between the portion of our claim that related to the
25 time before Camco and the portion that related after. But at no point in time did

1 we ever say we were backing off of our complaint saying joint and several
2 liability. Recently, Apco said well, we didn't understand that you meant joint and
3 several when you said joint and several so we clarified that later, but clarifying it
4 later shouldn't -- has not prejudiced Apco. They could have prepared their
5 defense entirely totally from day one based on our language of our complaint.
6 Thank you.

7 THE COURT: All right. Did you want to address that?

8 MR. JEFFERIES: Your Honor, Randy Jefferies. We filed a motion in
9 limine that has seven motions subsumed in one. I just want to address our
10 motion number seven given the time constraints.

11 THE COURT: I thought you were going to respond to what he just
12 said.

13 MR. JEFFERIES: I -- I am because he essentially addressed my
14 motion in limine on September 30, 2016, National disclosed specifically to Apco
15 \$30,110. On March 3, 2017, again confirmed the damages they were seeking
16 against Apco was \$30,110. And then six days ago we get a disclosure of 1. --
17 approximately 1.2 million dollars. And that is clearly improper under any set of
18 circumstances and they were making those \$30,000 disclosures and
19 designations within their joint and severable context. Secondly, within our motion
20 in limine number seven is we're asking the Court to restrict Helix to the damages
21 that its PMK testified to.

22 THE COURT: Okay. This is all briefed, right?

23 MR. JEFFERIES: It is.

24 THE COURT: Okay. Thanks.

25 MR. ZIMBELMAN: Just briefly on the Helix part --

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THE COURT: Okay.

MR. ZIMBELMAN: -- of the motion in limine seven. You know, their motion was based in part upon the special master questionnaires which, of course, were, you know, were intended to be informative only. But nonetheless, it's out there and that special master questionnaire from Helix clearly identified Helix's damages of about 2.9 million and we've subsequently reduced that.

THE COURT: Right.

MR. ZIMBELMAN: But those were intended against both Apco and Camco together. That was our position. It's always been our position.

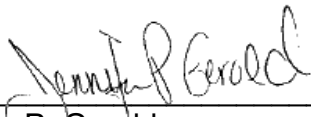
THE COURT: All right. Thank you very much. That's all the time I've got so the matter stands submitted. It's been briefed. I'll issue my rulings as soon as I can. I'll see you Monday at the calendar call at 2 o'clock.

ALL COUNSEL: Thank you, Your Honor.

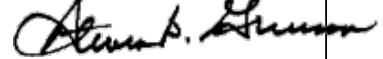
[Hearing concluded at 9:27 a.m.]

* * * * *

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



1 **RSPN**
2 JORGE A. RAMIREZ, ESQ.
3 Nevada Bar No. 6787
4 I-CHE LAI, ESQ.
5 Nevada Bar No. 12247
6 WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP
7 300 South 4th Street, 11th Floor
8 Las Vegas, NV 89101-6014
9 Telephone: (702) 727-1400
10 Facsimile: (702) 727-1401
11 Jorge.Ramirez@wilsonelser.com
12 I-Che.Lai@wilsonelser.com
13 *Attorneys for Lien Claimant,*
14 *Zitting Brothers Construction, Inc.*

8 **DISTRICT COURT**

9 **CLARK COUNTY, NEVADA**

10 APCO CONSTRUCTION, a Nevada
11 corporation,

12 Plaintiff,

13 vs.

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

16 Defendant.

CASE NO. A571228
DEPT. NO. XIII

Consolidated with:

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

17 AND ALL RELATED MATTERS

Date of Hearing: November 16, 2017
Time of Hearing: 9:00 a.m.

18
19 **ZITTING BROTHERS CONSTRUCTION, INC.'S RESPONSE TO APCO**

20 **CONSTRUCTION'S SUPPLEMENTAL OPPOSITION TO ZITTING BROTHERS**

21 **CONSTRUCTION, INC.'S MOTION FOR PARTIAL SUMMARY JUDGMENT**

22 Zitting Brothers Construction, Inc. ("Zitting"), a lien claimant, hereby responds to APCO
23 Construction's Supplemental Opposition to Zitting's Motion for Partial Summary Judgment. The
24 accompanying memorandum of points and authorities provides the basis for Zitting's response and is
25 further supported by the attached exhibits, the record of this case and any oral argument that this
26 Court may entertain at the hearing on Zitting's motion.

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Dated: November 15, 2017

WILSON ELSE MOSKOWITZ EDELMAN &
DICKER LLP

Jorge Ramirez, Esq.
Nevada Bar No. 6787
I-Che Lai, Esq.
Nevada Bar No. 12247
300 South 4th Street, 11th Floor
Las Vegas, NV 89101
Telephone: (702) 727-1400
Facsimile: (702) 727-1401
*Attorneys for Lien Claimant,
Zitting Brothers Construction, Inc.*

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Wanting a second chance at defeating Zitting's motion for partial summary judgment, APCO
4 has filed an improper supplemental opposition to Zitting's motion. This Court has not permitted any
5 supplemental briefing regarding Zitting's motion, and the timing of the supplement denies Zitting a
6 full and fair opportunity for summary judgment. This Court should therefore disregard the
7 supplement.

8 Nonetheless, APCO's supplemental arguments do not defeat Zitting's motion. In its
9 Supplemental Opposition, APCO claims that Zitting's Rule 30(b)(6) deposition testimony "directly
10 contradicted" Sam Zitting's declaration in support of Zitting's motion and therefore undermines the
11 motion. (Supp. Opp'n¹ 3:1-3.) However, as discussed below, the deposition testimony is consistent
12 with the declaration and, in any event, should not be a factor in this Court's consideration of
13 Zitting's motion. Zitting has demonstrated that, as a matter of law, it is entitled to payment of the
14 retention amount and the unpaid change orders based on the express terms of the subcontract and
15 Nevada's statutory scheme. Importantly, APCO's departure from the Project automatically triggers
16 APCO's payment obligation to Zitting under Nevada law and APCO's subcontract with Zitting.
17 Therefore, APCO's payment obligations became mandatory. This purely legal issue allows Zitting
18 the benefit of obtaining summary judgment on APCO's liability for the outstanding balance of the
19 work done. This Court should grant Zitting's motion.

20 **II. ARGUMENT**

21 **A. This Court should disregard APCO's supplemental opposition as a fugitive**
22 **document because the opposition is both untimely and unfairly prejudicial to**
23 **Zitting.**

24 APCO's supplemental opposition is improper. Under EDCR 2.20(e), a party can only file an
25 opposition to a motion within 10 days of service of the motion. A supplemental opposition "will
26 only be permitted if filed within the original time limitations ... or by order of the court." EDCR
27 2.20(i). Here, APCO's supplemental opposition violates this Court's rules.

28

¹ Zitting cites APCO's supplemental opposition as "Supp. Opp'n."

1 APCO filed its supplemental opposition outside of the original time to oppose the motion for
2 partial summary judgment. Further, this Court never permitted supplemental briefing on the pending
3 motions for summary judgment. According to the order prepared and submitted by APCO regarding
4 the October 5, 2017 hearing on the pending motions, this Court did not allow additional briefing on
5 dispositive motions. Instead, this Court only continued the hearing on the pending motions to
6 November 16, 2017 and allowed the parties to take depositions that were previously noticed. (Order
7 2:1-15 (Oct. 26, 2017).) APCO certainly could have sought leave to file a supplement, but they
8 failed to do so. (*See id.*)

9 The basis for the supplement is also suspect. APCO claims that Zitting's recent Nev. R. Civ.
10 P. 30(b)(6) deposition warrants the supplement. (Supp. Opp'n 2:2.) So one expects that APCO will
11 raise arguments based on information that APCO would not have until the deposition. However,
12 APCO's supplemental opposition includes argument based on information that APCO knew or
13 should have known long before the deposition and could have been raised in APCO's original
14 opposition to the motion for partial summary judgment.

15 For example, APCO argues that its subcontract with Zitting includes a payment schedule for
16 the retention and change orders. (Supp. Opp'n 3:16-4:7, 7:10-9:24.) The subcontract has been in
17 APCO's possession since the outset of the case. The language of the subcontract speaks for itself,
18 and APCO could have availed itself of any arguments based on the subcontract in its original
19 opposition.

20 APCO also argues that it never received payment of the retention from the Owner, which
21 excused its payment obligation to Zitting. (*Id.* 6:4-13.) Again, APCO did not need Zitting's
22 deposition to confirm that it never received payment from the Owner. That information was within
23 APCO's knowledge when it filed the original opposition to the motion for partial summary
24 judgment. Moreover, APCO continues to ignore the fact that many of the provisions of its
25 subcontract violate Nevada law and that those provision it chose to argue in the supplement are void
26 and therefore not binding on the parties.

27 The improper supplement is no more than APCO's "second bite at the apple" to defeat
28 Zitting's motion for partial summary judgment. APCO's conduct prejudices Zitting as it deprives

1 Zitting of the full and fair opportunity to respond. This is becoming an alarming trend of APCO
2 raising new issues after seven years of litigation and after the close of discovery. This Court should
3 reject this trend and disregard the improper supplement.

4 **B. Again, APCO's discovery conduct precludes APCO from opposing Zitting's motion**
5 **for partial summary judgment on any basis other than arguing the enforceability of**
6 **the pay-if-paid provision in APCO's subcontract with Zitting.**

7 As explained in Zitting's reply in support of its motion for partial summary judgment, APCO
8 cannot raise any defenses other than the enforceability of the pay-if-paid provision. (Reply² 5:17-
9 8:24.) Since the filing of Zitting's reply, APCO has apparently admitted that it cannot raise any other
10 defenses. For example, APCO in its omnibus motion in limine argues that Zitting and the other
11 subcontractors' Rule 30(b)(6) deposition testimonies bind Zitting and the other subcontractors and
12 preclude Zitting and the other subcontractors from introducing any evidence that would contradict
13 the deposition testimonies. (Omnibus MIL³ 5:8-10:18, 14:23-21:8.) Therefore, utilizing APCO's
14 own belief of how Rule 30(b)(6) testimony is to be used, APCO cannot contradict its own Rule
15 30(b)(6) deposition testimony wherein he testified that the enforceability of the pay-if-paid provision
16 is the sole basis for refusing payment of the unpaid change orders and retention:

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

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

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

28 A. Yes.

(MSJ,⁴ Ex. B 40:16-41:4 (emphasis added).) As further evidenced by its multiple interrogatory
responses, APCO has therefore waived its right to challenge the other defenses in opposing the

² Zitting cites its reply in support of its motion for partial summary judgment as "Reply."

³ Zitting cites APCO's Omnibus Motion in Limine as "Omnibus MIL."

⁴ Zitting cites its motion for partial summary judgment as "MSJ."

1 motion for summary judgment. (*See, e.g.*, Omnibus MIL 15:22-21:8.) This Court should therefore
2 grant Zitting's motion for summary judgment if it concludes that the pay-if-paid provision is
3 unenforceable.

4 **C. APCO supplemental opposition cannot defeat Zitting's right to summary judgment**
5 **on the amount owed for the unpaid change orders and the retention.**

6 Even if this Court considers APCO's arguments in the supplemental opposition, the
7 arguments fail as a matter of law. APCO argues that Zitting did not satisfy the payment conditions
8 for the unpaid change orders and the retention. (Supp. Opp'n 3:6-9:24.) As explained below, the
9 evidence and authorities reject those arguments.

10 **1. APCO's departure from the Project automatically triggers payment of**
11 **Zitting's change orders and retention.**

12 Regardless of Zitting's compliance with the purported "payment schedule" for its completed
13 work, APCO's departure from the Project automatically entitles Zitting to payment. Section 9.4 of
14 APCO's subcontract with Zitting requires APCO to pay Zitting for its "completed work" upon
15 termination of APCO's contract with the Owner. (MSJ, Ex. D at APCO00044601.) APCO's Rule
16 30(b)(6) witness has testified that this contract has been terminated. (MSJ, Ex. B 34:7-11, 35:6-
17 36:13.) Therefore, APCO must pay Zitting for the work completed on the change orders plus the
18 retention amount.

19 In addition to section 9.4 of APCO's subcontract, Chapter 624 of the Nevada Revised
20 Statutes also required APCO to pay Zitting after APCO left the project. Specifically, Nev. Rev. Stat.
21 624.626(6) requires APCO to pay Zitting the following amount if APCO's subcontract with Zitting
22 is terminated:

23 (a) [t]he cost of all work, labor, materials, equipment and services
24 furnished by and through [Zitting], including any overhead [Zitting]
25 and [its] lower-tiered subcontractors and suppliers incurred and profit
[Zitting] and [its] lower-tiered subcontractors and suppliers earned
through the date of termination;

26 b) [t]he balance of the profit that [Zitting] and [its] lower-tiered
27 subcontractors and suppliers would have received if the agreement had
been performed in full;

28 c) [i]nterest determined pursuant to Nev. Rev. Stat. 624.630; and

1 d) [t]he reasonable costs, including court costs and arbitration costs,
2 incurred by [Zitting] and [its] lower-tiered subcontractors in collecting
the amount due.

3 This list is non-exhaustive and serves to make subcontractors whole. *See* Nev. Rev. Stat. 624.626(6).

4 The parties cannot waive this statutory right to payment. *See* Nev. Rev. Stat. 624.628(3).

5 Even if this Court accepts APCO's claim that APCO's subcontract with Zitting is terminated,
6 APCO must pay Zitting the above amount without any actions by Zitting. Zitting has argued this in
7 its original briefing in support of its motion for partial summary judgment. (Reply 12:7-20.)
8 However, APCO—again—ignores this in its rogue supplemental opposition. Either of these two
9 statutory rights leads to the conclusion that APCO must pay Zitting the amount owed.

10 More important, however, is that these statutory rights raise a purely legal issue for this Court
11 to decide. The only facts that are critical to the Court's analysis are whether APCO's contract with
12 the Owner is terminated and whether APCO's subcontract with Zitting is terminated. APCO's
13 payment obligations become absolute once the undisputed facts establish either or both of these
14 events taking place. There are no additional facts that this Court needs to determine to grant
15 Zitting's, or the other lien claimants, summary judgments. Therefore, the arguments raised in
16 APCO's supplemental opposition makes no difference.

17 **2. Zitting has complied with the conditions precedent for payment of the**
18 **retention and the change orders at issue.**

19 Nevertheless, Zitting has complied with the valid conditions precedent to payment of the
20 retention and change orders at issue. Under Nevada law, compliance with a valid condition
21 precedent requires only substantial performance. *See, e.g., Laughlin Recreational Enterprises, Inc. v.*
22 *Zab Dev. Co., Inc.*, 98 Nev. 285, 287, 646 P.2d 555, 556–57 (1982). Here, the evidence shows at
23 least substantial performance on Zitting's part.

24 Before Zitting discusses its performance, it is important to clarify whether APCO's
25 subcontract included a schedule of payment. APCO argues that the subcontract included a schedule
26 of payment for the retention and change orders. (Supp. Opp'n 3:6-4:7, 7:11-17.) However, APCO
27 cites no authorities to support this allegation. Nor can it.
28

1 The distinguishing characteristic of an agreement with a “schedule for payments” under Nev.
2 Rev. Stat. 624.624 is that the schedule provides a date certain for payment and does not allow an
3 indefinite postponement of payment. *Compare* Nev. Rev. Stat. 624.624(1)(a)(1), *with* Nev. Rev.
4 Stat. 624.624(1)(b)(1). Although the Nevada Supreme Court has not expressly ruled on this issue,
5 courts that have considered statutes similar to Chapter 624 of the Nevada Revised Statutes have
6 reached similar, if not the same, conclusion. *See, e.g., West-Fair Elec. Contractors v. Aetna Cas. &*
7 *Sur. Co.*, 661 N.E.2d 967, 971-72, 87 N.Y.2d 148, 158-59 (1995). Importantly, courts have
8 consistently concluded that conditions precedent are not a schedule for payment. *See, e.g., Weniger*
9 *v. Union Ctr. Plaza Assocs.*, 387 F. Supp. 849, 865 n.6 (S.D.N.Y. 1974); *Children's Hosp. Colorado*
10 *v. Digisonics, Inc.*, No. 16-CV-00011-RBJ, 2017 WL 2778521, at *6 (D. Colo. June 27, 2017);
11 *EquiSolar Int'l, Inc. v. Willard & Kelsey Solar Grp., LLC*, No. 3:10 CV 18, 2010 WL 2106207, at *3
12 (N.D. Ohio May 25, 2010).

13 Here, APCO’s subcontract with Zitting does not meet the requirement for inclusion of a
14 “schedule of payment.” APCO argues that the conditions precedent for payment of the retention and
15 the change orders constitute a schedule for payment. (*See* Supp. Opp’n 3:6-4:7, 7:11-17.) But the
16 pay-if-paid condition in the subcontract allows for an indefinite postponement of payment—payment
17 to Zitting only when APCO receives payment. (MSJ 8:23-24 (citing Ex. D at APCO00044594).)
18 APCO can only rely on its false claim that Zitting’s Rule 30(b)(6) witness “acknowledged [that] this
19 is the payment schedule....” (Supp. Opp’n 7:17-8:1.) APCO’s excerpt of the deposition testimony
20 shows that Zitting’s Rule 30(b)(6) witness did not reference a “schedule.” (*See id.*) Therefore,
21 APCO’s subcontract with Zitting did not contain a schedule for payment.

22 **a. APCO cannot dispute that the drywall was complete.**

23 APCO argues that Zitting’s Rule 30(b)(6) deposition testimony contradicted Sam Zitting’s
24 declaration and the other evidence regarding the completion of the drywall. (Supp. Opp’n 4:8-5:12.)
25 However, the deposition testimony, the declaration, and the other evidence consistently show the
26 completion of the drywall by the time the Project was shut down in December 2008.

27 APCO is apparently confused about the timeline of the Project. To claim that the drywall was
28 never completed, APCO relies on its questioning about the drywall status as of August 25, 2008.

1 (See Supp. Opp'n 4:13-5:9; *see also* Ex. A 93:6-94:15, Ex. 15 CAMCO-MW 01320, 46-47.) This
2 date is about 4 months before the shut down. (MSJ, Ex. B 40:13-15.) Zitting has not presented any
3 evidence at this time showing that the drywall was complete as of August 2008, only the evidence
4 showing that Zitting's scope of work on Buildings 8 and 9 were complete. (See Zitting Decl. ¶ 7; *see*
5 *also* Ex. A 93:6-94:15, Ex. 15 CAMCO-MW 01320, 46-47 (showing completion of Zitting's scope
6 of work on Buildings 8 and 9).)

7 Evidenced disclosed by CAMCO, the general contractor who replaced APCO, shows that the
8 drywall was completed for both Buildings 8 and 9 by November 6, 2008. (Ex. B.) APCO cannot
9 dispute this evidence. APCO left the Project in August 2008 and therefore has no personal
10 knowledge of the Project's status. (See Reply, Ex. A 39:18-23 (confirming in deposition that APCO
11 has no personal knowledge of the work on the Project after APCO left).) In any event, the certificate
12 of occupancy for the Project is indisputable proof of the drywall's completion. (Ex. C.) APCO has
13 no admissible evidence to dispute the completion of the drywall.

14 **b. APCO cannot dispute that the Owner accepted Zitting's work.**

15 The ratification agreement relied on by APCO shows the completion of Zitting's scope of
16 work by the time APCO departed the Project. APCO admits that Zitting provided "wood framing"
17 for the Project. (MSJ, Ex. B 22:3-14.) The ratification agreement shows the completion of Zitting's
18 scope of work by the time APCO departed the Project. (Ex. A, Ex. 15 at CAMCO-MW 01346.)
19 APCO's Rule 30(b)(6) witness has also testified as to no quality concerns with Zitting's work. (MSJ,
20 Ex. B 28:15-29:5.) This is proof of the Owner's final acceptance of Zitting's work.

21 Further, the progress of the drywall installation shows the Owner's acceptance of Zitting's
22 work. As APCO claimed in its original opposition to Zitting's motion for partial summary judgment,
23 the drywall was more than 70% complete around the time of APCO's departure from the Project.
24 (Opp'n⁵ 3:9-17.) As Zitting's Rule 30(b)(6) witness explained at the deposition, covering up
25 Zitting's work with drywall shows acceptance. (Ex. A 27:3-13.) This makes sense. One would not
26 cover up defective framing work with drywall because the drywall would then have to be ripped
27

28

⁵ Zitting cites APCO's opposition to its motion for partial summary judgment as "Opp'n."

1 down to make any repairs to the framing. (*See id.*) Nonetheless, the certificate of occupancy for the
2 Project is conclusive proof of final acceptance of Zitting's work. (Ex. C.)

3 **c. The condition precedent requiring final payment from the Owner is**
4 **void.**

5 APCO, again, relies on the non-fulfillment of the pay-if-paid condition for Zitting's right to
6 payment. (Supp. Opp'n 6:5-13.) As discussed extensively in the original briefing on Zitting's
7 motion, this condition is void ab initio. (*See, e.g.*, MSJ 8:20-10:10.) This outcome is consistent with
8 the findings of the Nevada Supreme Court and courts throughout the country that addressed this
9 issue. *West-Fair Elec. Contractors* 661 N.E.2d at 971-72, 87 N.Y.2d at 158-59. So Zitting need not
10 comply with this condition in order to receive payment.

11 **d. There is no evidence to undermine Zitting's submission of close out**
12 **documents.**

13 APCO argues that Zitting's Rule 30(b)(6) deposition testimony contradicted Sam Zitting's
14 declaration regarding Zitting's submission of close out documents to APCO. (Supp. Opp'n 6:14-
15 7:9.) However, the deposition testimony only shows that the witness did not recall those documents
16 at the time of the deposition. (*See id.* 6:20-7:8.) This cannot raise a genuine issue of fact regarding
17 the close out documents.

18 Importantly, although APCO submitted a declaration challenging Sam Zitting's declaration,
19 APCO never denied that it received the close out documents from Zitting. (*See* Opp'n, Ex. 1.) Since
20 the condition requires submission of those documents to APCO, APCO could have denied that it
21 received the close out documents if it did not receive any. The fact that APCO has not denied receipt
22 of the documents constitutes APCO's concession on this issue.

23 Nevertheless, Zitting can re-submit the close out document to APCO now if APCO insists.
24 APCO's subcontract with Zitting does not place a deadline on when Zitting can submit the close out
25 documents. (MSJ, Ex. D at APCO00044595.) Therefore, this condition does not preclude Zitting's
26 recovery of the retention. Moreover, this subcontract condition runs contrary to Nevada's statutory
27 scheme as referenced herein.

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