terminating sanctions in *McDonald v. Shamrock Invs., LLC.*[85] In *McDonald*, the court struck the defendant's answer after the defendant: did not make initial disclosures regarding witnesses or exhibits, did not sign the plaintiff's joint case conference report (nor file his own), did not appear for his deposition, did not oppose plaintiff's motion to strike his answer, and did not appear at the plaintiff's hearing on its motion to strike his answer. Defendant then failed to object to the discovery commissioner's report and recommendations recommending that the district court strike his answer. Plaintiff then filed a motion for default judgment, and defendant opposed this motion. The district court entered a default judgment, and the defendant appealed, alleging the district court abused its discretion in striking its answer without analyzing the *Young*[86] factors, and because it struck his answer without holding an evidentiary hearing. The Nevada Supreme Court reversed and remanded finding that the district court abused its discretion in striking defendant's answer without first conducting a *Young* analysis, and because it did not hold an evidentiary hearing to consider the Young factors. The same is true in this case, the Court has not conducted a Young analysis, nor has it held an evidentiary hearing.

APCO put its multiple affirmative defenses in its answer, it testified about them at its PMK deposition, and supplemented its interrogatory answers regarding defenses within two weeks of deposing Zitting. There were no motions to compel or meet and confers discussing the issue. Precluding APCO from pursuing any other defense besides pay-if-paid is an unnecessarily harsh sanction. This is especially true in light of the procedural history of this case, in which the parties agreed, and the Court allowed, critical party depositions after discovery was closed and dispositive motions were fully briefed. Further, Zitting has not suffered any identifiable harm because Zitting always knew it did not meet the conditions precedent to payment for either change orders or retention and deposed APCO on its affirmative defenses. See *Advanced Fiber Techs. Tr. v. J&L Fiber Servs., Inc.,*[87] ("[Plaintiff] has suffered no identifiable harm by [defendant's] failure to supplement its interrogatories as to this defense. Thus, [plaintiff's] request to strike Section III of Defendant's Memorandum is denied").

---

[85] No. 54852, 2011 Nev. Unpub. LEXIS 1628, at *1 (Sep. 29, 2011)
[86] *Young v. Johnny Ribeiro Bldg.*, 106 Nev. 88, 787 P.2d 777 (1990)

In this particular case, the record is replete with APCO's various defenses and it is error to preclude APCO from presenting those various defenses at trial.

C. Zitting's Reply did not dispute and thus conceded APCO's NRS 108 arguments.

APCO provided substantial law in its opposition to Zitting's Motion regarding its opposition to Zitting's NRS 108 claims.[88] Those facts and arguments included that APCO never owned the Project, and that there was no property to foreclose upon because the Court awarded it to the bank. Zitting did not address a single NRS 108 argument in its Reply. As explained below, the Court granting Zitting's NRS 108 claims was error since Zitting conceded these arguments, and because APCO cannot be responsible for a deficiency judgment.

In *Nev. Nat'l Bank v. Snyder,*[89] the owner of a project optioned a piece of land to develop. He engaged engineers to begin developing the land. The next year, the owner received a loan from a bank, and purchased the land. The owner did not pay the engineers, and the engineers recorded mechanic's liens against the property. The owner declared bankruptcy and owed the engineers money for work done for the project. The bank foreclosed upon the property and the district court granted the mechanic's liens priority over the bank, and found the bank to be personally liable to the engineer for the deficiency of their mechanic's liens, stating that the architect and the engineer were entitled to a "personal judgment for the residue against the Bank."[90] The bank appealed, arguing that "the remedy to enforce a mechanic's lien is to force a sale of the property" and that "it is not liable for any deficiency if the monies from the sale do not cover the amount of the [architect's and engineer's] liens."[91] The Nevada Supreme Court agreed, finding, "[i]t is unjust to hold the Bank personally liable for a deficiency when it was not a party to the C&S/Benny contract, and because the bank is not the personally liable for the debt under NRS 108.238."[92]

The architect and engineer argued that the bank was unjustly enriched because the work they performed increased the value of the property. The Court found that

---

[87] No. 1:07-CV-1191 (LEK/DRH), 2010 U.S. Dist. LEXIS 45938, at *39 (N.D.N.Y. May 11, 2010)
[88] See APCO's Opposition at 14-16, on file herein.
[89] 108 Nev. 151, 157, 826 P.2d 560, 563 (1992)
[90] *Id* at 157.
[91] *Id* at 157.
[92] *Id.* at 157.

[w]hile there was a benefit conferred on the Bank, it does not rise to unjust enrichment."[93]

The same logic applies here. While APCO received some minor benefit by being able to perform its work in conjunction with Zitting, APCO certainly was not unjustly enriched and APCO is not personally liable for the Owner's debt. APCO was not paid for June, July or August 2008.[94] APCO lost approximately $8,000,000 on this job and APCO did not acquire the property.[95] Instead, it endured a $900,000 legal battle on behalf of itself and its subcontractors to endeavor to get priority and paid from the owner.[96] Unfortunately, after the project shut down, everyone lost, most of all APCO.

V. The additional discovery authorized by this Court should be considered.

Zitting challenged the timing of APCO's supplemental brief. But it was Zitting's conduct that necessitated APCO's additional briefing. Further, Zitting was the party that originally requested its NRCP 30(b)(6) deposition be continued and agreed to the late discovery by APCO, as APCO in good faith acquiesced to Zitting request in an attempt to save the Parties and this Court valuable time and costs.

The hearing on Zitting's Motion was scheduled for October 5, 2017.[97] At that hearing, APCO informed the Court that depositions were not finished, and requested 45 days to complete the depositions.[98] The Court granted the parties until October 30, 2017 to take these depositions.[99]

"The timing of discovery as established in the Rules may be modified through the parties' stipulation or by court or discovery commissioner order in most instances."[100] In this case, Zitting and APCO (and other parties) agreed to postpone depositions.[101] The subsequent depositions are

---

[93] *Id.* at 157.
[94] Exhibit 13, Declaration of Mary Jo Allen.
[95] See Exhibit 13, Declaration of Mary Jo Allen.
[96] See Exhibit 13, Declaration of Mary Jo Allen.
[97] See Docket at October 5, 2017 entry.
[98] Exhibit 14, October 5, 2017 Minutes. ("Further, [APCO's counsel] requested discovery be extended another 45 days to finish up depositions, which resulted in colloquy as to deferring the hearing on the motions pending depositions… COURT FURTHER ORDERED that the deadline for taking depositions is October 30, 2017.")
[99] *Id.*
[100] 1-13 Nevada Civil Practice Manual § 13.03 (2017).
[101] See Affidavit of Cody Mounteer, Esq.

new evidence.[102] As such, both Zitting and this Court knew that additional information could come to light, and would need to be considered. This is obvious from the Court's ruling to defer a hearing on the pending dispositive motions. By agreeing to, and allowing its deposition, Zitting waived any argument it had to dispute the timeliness of APCO submitting any new deposition testimony to the Court.[103]

Further, APCO's supplemental briefing was necessitated by Zitting's conduct. When the Court reopened deposition discovery, everyone understood that the parties would be permitted to utilize any new evidence. Zitting cannot cry foul when APCO pointed out inconsistencies between the new deposition testimony and the prior affidavit submitted to the Court. Those patent inconsistencies and factual questions independently preclude summary judgment.

When discovery is re-opened, courts typically acknowledge that corresponding deadlines need to be adjusted to account for the change in discovery.[104] *Cf.* Visa *Int'l Serv. Ass'n v. JSL Corp.,*[105] (discovery was re-opened and the District Court for the District of Nevada concluded there was good cause to extend the deadline for filing dispositive motions). Under these circumstances the new deposition testimony should be considered by the Court. *See Morgan v. D&S Mobile Home Ctr., Inc.*,[106] (where the trial court considered the decision to reopen discovery as "implicitly negating" its previously issued order denying appellant the opportunity to proffer evidence on damages. The court cautioned litigants that reopening discovery "may change everything," that parties may have to "resubmit motions for Summary Judgment" and that by doing so, it may allow the opposing party to "create factual issues"). As in *Morgan*, once

---

[102] *Fertilizer v. Davis*, 567 So. 2d 451, 455, 15 Fla. L. Weekly 2171 (Dist. Ct. App. 1990)

[103] "A waiver is an intentional relinquishment of a known right . . . To be effective, a waiver must occur with full knowledge of all material facts." *State v. Sutton,* 120 Nev. 972, 987, 103 P.3d 8, 18, 2004 Nev. LEXIS 129, 27, 120 Nev. Adv. Rep. 99 (Nev. 2004).

[104] *See EEOC v. Autozone, Inc.,* 248 F.R.D. 542, 543 (W.D. Tenn. 2008) ("After the court granted in part the corporation's motion for summary judgment, it conducted a status conference during which it reopened discovery, set a new date for trial, and set new deadlines for discovery and dispositive motions."); *Boyd v. Etchebehere,* No. 1:13-01966-LJO-SAB (PC), 2015 U.S. Dist. LEXIS 152584, at *6 (E.D. Cal. Nov. 9, 2015) ("After Defendant's motion for summary judgment was denied, the Court reopened discovery and extended the discovery and dispositive motion deadlines.").

[105] No. 02:01-CV-0294-LRH (LRL), 2006 U.S. Dist. LEXIS 81923, at *10 (D. Nev. Nov. 3, 2006)

[106] Nos. 07-09-0315-CV, 07-09-0354-CV, 2010 Tex. App. LEXIS 7498, at *8-9 n.4 (App. Sep. 10, 2010)

deposition discovery was reopened, several critical material issues were brought to light, and APCO was able to clarify and magnify the factual issues it confirmed in its original Opposition.

A. Zitting's own testimony confirmed numerous factual issues that preclude summary judgment.

APCO deposed Zitting on October 27, 2017. At its deposition, APCO confirmed several material discrepancies between Zitting's deposition testimony and the affidavit Zitting submitted in support of its request for summary judgment to this Court. As such, it was incumbent upon APCO to highlight these contradictory statements to the Court.

B. Zitting always knew it was not entitled to payment under the retention and change order pay schedules.

It is undisputed that in order to be entitled to retention, Zitting had to meet five preconditions as described in Section 3.8 of the subcontract.[107] The first precondition for retention is that the building be complete. Zitting clarified the completion definition by further defining it as the completion of drywall.[108]

Zitting's July 31, 2017 affidavit swore to this Court as follows: "By the time the Project shut down, Zitting had completed its scope of work for two buildings on the Project—Buildings 8 and 9. The drywall was complete for those two buildings."[109] As quoted previously in section II of this Motion, three months later, Zitting's deposition testimony confirmed the opposite. So Zitting's 30(b)(6) designee confirmed drywall was not complete.

The second precondition is that the Owner must give final acceptance of APCO's or Zitting's work. Zitting's affidavit also represented that the Owner accepted and approved Zitting Brother's work: "I am not aware of any complaints with the timing or quality of Zitting's work on the Project. As far as I am aware, Gemstone Development West, Inc., the owner of the Project, has

---

[107] See Section 3.8 of Subcontract.
[108] Exhibit 15, Subcontract at Section 3.8.
[109] See Zitting Brother's Motion for Partial Summary Judgment Against APCO Construction, Inc. at Exhibit A, ¶ 7, on file herein.

approved the timing and quality of Zitting's work."[110] Three months later, Zitting Brother's NRCP 30(b)(6) designee testified he had no knowledge of the Owner's acceptance:

> "Q. While you -- let's look back at paragraph 3.8 of the subcontract, Exhibit 1. We've talked about subparagraph A, the completion as you further defined it in subparagraph F. Subparagraph B was the approval and final acceptance of the building work by owner. While you were working for APCO, did that occur, to your knowledge?
> A. I have no knowledge of that."[111]
> . . .
> "Q. Do you know if there was ever a certificate of occupancy for Building 8?
> A. I didn't -- I do not know.
> Q. Do you know if there was ever a certificate of occupancy for Building 9?
> A. I do not know."

The third precondition was that APCO had to receive the final payment from the Owner. Zitting's deposition designee did not have any knowledge of this condition being met:

> Q. Okay. Next item is, receipt of final payment by contractor from owner. Do you have any personal knowledge or information to suggest whether that occurred?
> A. I do not.[112]

In fact, APCO disclosed documentation showing it was not paid any of Zitting's retention or unapproved change order work by the Owner.[113]

The fourth precondition was Zitting providing its as-built drawings and other close out documentation related to its work. Zitting's affidavit swore to this Court that, "Zitting had submitted close-out documents for its scope of work, including as-built drawings and releases of claims for Zitting's vendors."[114] Once again, three months later, the story changed:

> Q. Item D [within Section 3.8 of Subcontract] is delivery to contractor from subcontractor, all as-built drawings for its scope of work, and other closeout documents. Did Zitting ever satisfy that requirement?
> **A. I don't recall.**

---

[110] See Zitting Brother's Motion for Partial Summary Judgment Against APCO Construction, Inc. at Exhibit A, ¶ 7, on file herein.
[111] Zitting Deposition.
[112] Exhibit 7, Zitting's NRCP 30(b)(6) Deposition at 31: 17-20.
[113] Exhibit 18, Accounting Records Confirming Owner Never Paid APCO Zitting Brothers' Retention.
[114] See Zitting Brother's Motion for Partial Summary Judgment Against APCO Construction, Inc. at Exhibit A, ¶ 7, on file herein.

> **Q. Do you know?**
> **A. I don't recall.**
> Q. Prior to today, have you seen any records in your file that would reflect the transmittal of that type of closeout documentation and as-builts?
> A. Not that I recall.[115]

In fact, the Zitting's designee summarized its failure to meet these last three preconditions to be entitled to its retention payment as follows:

> Q. Sitting here today as the corporate designee, are you aware of any documents, facts, information to suggest that Zitting met the conditions of subparagraphs B, C, and D of paragraph 3.8?
> A. I'm not aware of any.[116]

During its deposition, Zitting also acknowledged that it did not meet the conditions precedent to be entitled to payment for some of its change orders. Section 3.9 of the Subcontract delineated the following change order payment schedule:

> Subcontractor agrees that Contractor shall have no obligation to pay Subcontractor for any changed or extra work performed by Subcontractor until or unless Contractor has actually been paid for such work by the Owner **unless Contractor has executed and approved change order directing subcontractor to perform certain changes in writing and certain changes have been completed by subcontractor.**[117]

Zitting has acknowledged this is the payment schedule for change orders.[118] In fact, Zitting added the language in bold confirming that Zitting had to have an "executed and approved change order" to be entitled to payment for change orders if the Owner did not pay APCO for the change order:[119]

> Q. So your -- if I understand your testimony, your entitlement to a change order could be determined separate, apart from whether the owner paid APCO, if you had executed approved change orders?
> A. That was my intention here.
> Q. My statement is correct, yes?

---

[115] Zitting Deposition pp. 31-32.
[116] Zitting Depo. pp. 34-35.
[117] Exhibit 15, Section 3.9 of Subcontract.
[118] Exhibit 7, Zitting Deposition at p. 37:1-5 ("Q. Sitting here today as the corporate designee, would you agree that Zitting accepted that payment schedule for change orders? A. With some changes and modifications, it appears that I did.").
[119] Exhibit 7, Zitting Deposition at 37:6-16.

A. Yes.[120]

Zitting then confirmed that it did not have information to suggest that either APCO was paid for the change orders that Zitting submitted, or that it had "executed and approved change orders" for some of the change orders it is seeking:

> Q. -- okay -- do you have executed and approved change order forms from APCO on those?
> A. Not on all of them.
> Q. On some of them do you?
> A. I believe so.
> .....
> Q. (By Mr. Jefferies)· Sir, do you have -- as the corporate designee, do you have any information, documentation, evidence to suggest that APCO was paid your retention that you're seeking in this action?
> A. Not that I know of.
> Q. As you sit here today as the corporate designee, do you have any documents, facts, information to suggest that APCO received payment for the change orders you're seeking payment for in this action?
> A. Not that I know of.[121]

Additionally, Zitting also agreed that it would list any alleged claims it had against APCO on its progress releases:

> As a condition precedent to receiving partial payments from Contractor for Work performed, Subcontractor shall execute and deliver to Contractor, with its application for payment, a full and complete release (Forms attached) of all claims and causes of action Subcontractor may have against Contractor and Owner through the date of the execution of said release, **save and except those claims specifically listed on said release and described in a manner sufficient for Contractor to identify such claim or claims with certainty**.[122]

Zitting did not list any change order claims in its progress releases.[123]

As such, Zitting has not earned the right to any change order payment because it has not meet the preconditions in the Subcontract and because it did not list and reserve any alleged claims

---

[120] Exhibit 7, Zitting Deposition at 38:9-13.
[121] Exhibit 7, Zitting Deposition at 39:16-40:8.
122 Exhibit 15, Zitting Subcontract at Section 3.4 (emphasis added).
123 Exhibit 19, Zitting's Progress Releases.

against APCO in its progress releases. So not only was Zitting always on notice of APCO's defenses, it has known that it could not meet the necessary conditions precedent to payment for either retention or its change orders. By granting Zitting's Motion, the Court is awarding money that the original briefing and new evidence confirm was never due.

Further, as is proven above, it appears that Exhibit A to Zitting's Motion, a declaration from Sam Zitting, who was also the recent corporate designee, appears to be nothing more than a sham affidavit and should not be given any weight. *Nutton v. Sunset Station, Inc.,*[124] ("Even where a summary judgment motion has already been filed and a party seeks to defeat it by presenting last-minute inconsistent testimony, under federal jurisprudence, the general rule is that an apparent contradiction between an affidavit submitted in opposition to a summary judgment motion and the same witness's prior deposition testimony presents a question of credibility for the jury, unless the court affirmatively concludes that the later affidavit constitutes a sham.")

Awarding Zitting summary judgment in light of the inconsistencies between its affidavit and its deposition testimony constitutes legal error.

C. APCO supplemented its interrogatory responses after Zitting's deposition.

Zitting was deposed in this case for the first time on Friday, October 27, 2017.[125] After the deposition, APCO supplemented its interrogatory responses to reiterate its defenses given Zitting's critical admissions less than two weeks later, on Wednesday, November 8, 2017. [126] Zitting has acknowledged that APCO specifically reserved the right to supplement or amend its interrogatory answers as investigation, discovery, disclosure and analysis of the case continued.[127] Further, APCO did not need to amend its Answer since these defenses were already listed in its answer.

VI. Zitting's surreply contained many inaccuracies.

Zitting's surreply filed the day before the November 15, 2017 oral argument contained

---

[124] 2015 Nev.. LEXIS 4, *31-33, 357 P.3d 966, 977, 131 Nev. Adv. Rep. 34 App. (internal citations and quotations omitted).
[125] Exhibit 7, Zitting Deposition.
[126] APCO CONSTRUCTION'S SUPPLEMENTAL ANSWERS TO ZITTING BROTHERS CONSTRUCTION INC.'S FIRST REQUEST FOR INTERROGATORIES at 6-7.

many inaccuracies, including: (1) its interpretation of Section 9.4 of the Subcontract, (2) whether or not Zitting met the conditions precedent to be entitled to retention or payments for change orders, (3) the state of conditions precedent under Nevada law, (4) what a "schedule of payments" is under NRS 624, and (5) whether or not Zitting could unilaterally waive the condition that change orders had to be approved and in writing to be entitled to payment from APCO for change orders.

A. APCO's departure from the project does not trigger payment under Section 9.4 of the Subcontract.

On November 15, 2017, Zitting filed a Reply to APCO's Supplemental Brief.[128] In it, Zitting contends that APCO's payment obligation was triggered under Section 9.4 when APCO's contract with the owner was terminated. Zitting is incorrect. By its terms that section only applies to terminations for convenience. No one associated with this project can seriously contend, and certainly has not provided any evidence, that the Owner or APCO terminated the prime contract for conveience. Also, Section 9.4 confirms that APCO's payment obligation would only be triggered when APCO received payment from the Owner for Zitting's work, and per the Contract Documents:

> 9.4 Effect of Owner's Termination of Contractor. If there has been a termination of the Contractor's contract with the Owner, the Subcontractor shall be paid the amount due from the Owner to the Contractor for the Subcontractor's completed work, as provided in the Contract Documents, after payment by the Owner to the Contractor.[129]

So it is clear that APCO's payment obligation was not triggered by Section 9.4 of the Subcontract because there was not a convenience termination and the Owner never paid APCO for Zitting's work. The Contract Documents confirm that Zitting has to meet certain preconditions to be entitled to payment for retention and change orders under Sections 3.8 and 3.9 and Section 5 of the Contract Documents.[130]

---

[127] See Zitting's MIL at 8:25-27 and 9:16-18, on file herein.
[128] See Zitting's Reply to APCO's Supplemental Brief, on file herein.
[129] Exhibit 15, Zitting Subcontract at 9.4.
[130] See Zitting Subcontract.

B. Zitting did not comply with the conditions precedent for payment of its retention and change orders.

Zitting argues "Under Nevada law, compliance with a valid condition precedent requires only substantial performance" citing *Laughlin Recreational Enters. v. Zab Dev. Co.*[131] Zitting is wrong. The case it cited does not analyze, opine on, *or even mention conditions precedent.* Instead, the case addresses whether a construction contract was substantially performed and whether there was substantial evidence to support the court's findings on appeal.[132]

In *MB Am., Inc. v. Alaska Pac. Leasing Co.,*[133] the Nevada Supreme Court directly considered conditions precedent. In *MB Am., Inc.,* the contract between the parties contained a condition precedent to mediate disputes before proceeding to litigation. The plaintiff did not comply with this condition precedent, and initiated litigation before attempting mediation. The defendant filed a motion for summary judgment alleging that MBA prematurely initiated the litigation since it had not complied with the condition precedent, and awarded MBA attorneys fees as the prevailing party. The Supreme Court of Nevada affirmed both the motion for summary judgment and the award of attorneys fees. It cited to and adopted the position taken in *DeValk Lincoln Mercury, Inc. v. Ford Motor Co.*,[134] where that court specifically required "*strict compliance*" with a condition precedent. *See also Lucini-Parish Ins. v. Buck,*[135] (A party who seeks to recover on a contract has the burden of establishing any condition precedent to the respective contract).

Zitting had to strictly comply with the contractual conditions precedent to be entitled to retention. Next, contrary to Zitting's contention, the Nevada Supreme Court has ruled that a "schedule of payments" includes a situation where an owner has to first accept the subcontractor's work, and the prime contractor has to be paid for subcontractor's work. *See Padilla v. Big-D,* [136] ("Because the parties' subcontract contained a payment schedule that required that Padilla be

---

[131] 98 Nev. 285, 287, 646 P.2d 555, 556 (1982).
[132] *Id.* at 287.
[133] 367 P.3d 1286, 1288 (Nev. 2016)
[134] 811 F.2d 326, 336 (7th Cir. 1987)
[135] 108 Nev. 617, 620, 836 P.2d 627, 629 (1992)
[136] 386 P.3d 982, 2016 Nev. Unpub. LEXIS 958.

paid within ten days after IGT accepted Padilla's work and paid Big-D for that work and it is undisputed that IGT never accepted Padilla's work and never paid Big-D for Padilla's work, the district court correctly found that payment never became due to Padilla under the subcontract or *NRS 624.624(1)(a)*.").

C. Zitting effectively acknowledges that it did not meet the preconditions for retention.

Tellingly, Zitting's Surreply does not dispute that the drywall was not complete and the owner had not accepted Zitting's work when APCO left the Project. If Zitting competed the Project under replacement general contractor Camco as it contends, and the owner accepted that work, Zitting's remedy is against Camco, not against APCO. Zitting does not dispute that APCO was never paid by the owner for Zitting's work, and Zitting does not have any evidence within the record to show that it provided close-out documents to APCO. If it had them, it had the responsibility to produce these documents in this litigation, and attach them as an exhibit to its motion. It did neither.

D. The condition precedent of an executed and approved change order was not only for Zitting's benefit.

Zitting's Surreply contends that since Zitting added the language entitling it to payment if it had an executed and approved change order could be waived by Zitting since the provision was only for Zitting's benefit. This is incorrect. The addition of an "executed and approved change order" was for APCO's benefit as well since APCO would not be subject to erroneous and unjustified claims without a change order.

Zitting's argument that its change orders were approved by operation of law is also incorrect. Zitting's PMK admitted APCO rejected its change orders in its deposition:

> Q. So as the corporate designee, would you agree that APCO rejected certain change order requests because it objected to your labor rate?
> A. Based on an e-mail chain that I read, it appeared that that was the case.
> Q. So that's a yes?
> A. I don't have a memory of it. So I'm just going off of this limited e-mail chain and what was going on in it. I don't know if there was other conversation had outside. I don't know if somebody got mad and picked up the phone and called and had a discussion. I don't

> recall that. And the e-mail chain isn't inclusive of -- of a conclusion, but that looks like that's the direction it was going. And I just -- unfortunately, it's been so long and there's so many -- so many phone conversations and so forth that -- that I don't have the benefit of recalling.
> Q. Okay. Isn't it true, sir, that as the corporate representative for Zitting today, that APCO -- whether you agreed or not, APCO did reject some change order requests. Correct?
> A. It appeared that they had.
> Q. Okay. And as a result, Zitting repriced certain change order requests using a labor rate of $30 an hour. Correct?
> A. Correct.[137]

In fact, Zitting admitted that some of the change orders it is seeking payment for were completed under Camco's direction, not APCO's.[138]

Accordingly, Zitting's supplemental brief confirms it is not entitled to summary judgment.

VII. Lastly, material misstatements regarding the critical *Padilla v. Big-D Construction* case were made at the November 16, 2017 abbreviated hearing on this matter.

At the November 16, 2017 hearing on Zitting's Motion for Summary Judgment, Helix's counsel represented to the Court that the Nevada Supreme Court's decision in *Padilla v. Big-D* did not account for pay-if-paid arguments in its decision.[139] This is incorrect. Both Padilla's and Big-D's Supreme Court briefs argued their respective interpretations of pay-if-paid provisions, and specifically addressed the applicability of dicta from the *Lehrer McGovern Bovis v. Bullock Insulation,*[140] decision. This clarification is necessary because the Court may have considered the incorrect information provided by Helix in its decision.

A. The *Padilla v. Big-D* District Court Action

In *Padilla v. Big-D*,[141] Big-D was hired as the general contractor for a construction project and subcontracted with Padilla to install a stucco system on the building. While the stucco was being installed, separation issues developed and the owner rejected Padilla's work. Padilla filed a complaint against Big-D for non-payment. After trial, this Court found that: (1) Padilla's signed

---

[137] Exhibit 17, S. Zitting Deposition at 51-52.
[138] See Zitting's Deposition at 53-56.
[139] Exhibit 20, Transcript of November 16, 2017 hearing at 12.
[140] 124 Nev. 1102, 1117-1118, 197. P.3d 1032 (2008).
141 386 P.3d 982 (Nev. 2016).

subcontract bound it to the owner's decisions,[142] (2) NRS 624.624 was designed to ensure that general contractors pay subcontractors **after** the owner pays the general,[143] (3) NRS 624.624 yields to a schedule of payments,[144] (4) the subcontract confirmed that Padilla would get paid after the owner accepted and paid the prime contractor for the work,[145] and (5) the owner never accepted the work so Big-D's payment to Padilla never became due.[146] Then this court awarded Big-D damages and attorneys fees.[147] In the subsequent appeal, Padilla's opening brief, Big-D's responding brief, and Padilla's reply brief each made arguments regarding pay-if-paid provisions.

B. The Nevada Supreme Court

Padilla argued that the Court erred because it found that Padilla was to be paid after the owner paid the general contractor, and cited *Lehrer McGovern Bovis* for the proposition that pay-if-paid provisions are illegal under Nevada law.[148] So it is clear that the Nevada Supreme Court was aware of Padilla's pay-if-paid arguments since Padilla's opening brief.

Big-D addressed pay-if-paid provisions in its responding brief and argued that NRS 624.624 does not change when payment is due, and that payment was not due until: (1) the owner accepted Padilla's work, and (2) the owner paid Big-D for Padilla's work under the subcontract:

> The Subcontract provided that Padilla was to be paid within ten (10) days after IGT paid Big-D ***and*** after IGT accepted the Padilla Work. Specifically, Big-D "must have first received from the Owner the corresponding periodic payment, ***including the approved portion of your monthly billing,*** unless the Owner's failure to make payment was caused exclusively by us." *Id.* at Section 4.2.

---

[142] See Exhibit 21, Findings of Fact and Conclusions of Law and Judgment at 19:15-18 ("9A. In the Subcontract Agreement, Padilla agreed to be subject to the Owner's decisions and actions and that Big-D 'shall have the rights, remedies, powers and privileges as to, or against You which the Owner has against us.").

[143] *See Id.* at 21:14-16 (emphasis added). ("NRS 624.624 is designed to ensure that general subcontractors promptly pay subcontractor after the general contractor receives payment from the Owner associated with work performed by the subcontract.").

[144] *Id.* at 21: 17-19. ("By its own terms, NRS 624.624 yields to (a) payment schedules contained in subcontract agreements and (b) contractual rights to withhold payments from a subcontractor after arising from deficient work."); Id. at 22:6-9. ("Here, it is undisputed that the Subcontract Agreement is a written agreement between Big-D and Padilla. Accordingly, pursuant to NRS 624.624(1)(a) payment is due to Padilla on the date specified in the Subcontract Agreement.").

[145] *Id.* at 22:9-11. ("The Subcontract provided that Padilla was to be paid within ten (10) days after IGT paid Big-D and after IGT accepted the Padilla work.").

[146] See *Id.* at 23:2-3 ("Here, it is undisputed that IGT never accepted the Padilla work. Accordingly, payment to Padilla never became due.").

[147] Exhibit 22, Order Granting Motion for Attorney's Fees.

[148] Exhibit 23, Padilla's Opening Brief at 26 (internal citations to the record omitted).

> NRS 624.624 does not change the timing of when payment is due under a subcontract. The statute is designed to ensure that general subcontractors promptly pay subcontractors after the general contractor receives payment from the Owner associated with work performed by the subcontractor. NRS 624.624 is clear that its provisions yields to (a) payment schedules contained in subcontract agreements…[149]

Big-D also addressed *Lehrer McGovern Bovis* in its responding brief and argued that *Lehrer McGovern Bovis* was not at issue in *Padilla v. Big-D*, the issue was the payment schedule in the subcontract:

> First, NRS 624 was not in effect or being interpreted in *Lehrer McGovern Bovis, Inc. v. Bullock Insulation, Inc.* 124 Nev. 1102, 1117 (2008). Second, the issue here is not whether the payment schedule in the Big-D subcontract is a pay-if-paid clause that would excuse Big-D's obligation to pay Padilla if the owner failed to pay Big-D for Padilla's work. Rather, the issue is, for the purposes of NRS 624.624 notice of withholding, when was the payment from Big-D to Padilla due. The Subcontract Agreement contained a schedule for payments-payment to Padilla was due after IGT approved Padilla's work ***and*** after Big-D received payment attributable to Padilla's work.[150]

Padilla's reply brief reargued that *Lehrer McGovern Bovis* prohibits pay if paid provisions, and that there was not a schedule of payments in the subcontract.[151] This Court and the Nevada Supreme Court disagreed and applied the subcontract provision as written. That is exactly the case here with APCO's subcontract. So it is clear the Nevada Supreme Court had the opportunity to consider pay-if-paid clauses and *Lehrer McGovern Bovis* in its decision and still enforced agreed upon payment schedules.

The Nevada Supreme Court issued its decision on November 18, 2016 confirming that the Big-D/ Padilla subcontract contained a schedule of payments, and that payment obligation to the subcontractor never became due because the owner: (1) never accepted the subcontractor's work, and (2) never paid the general for the subcontractor's work:

> Because the parties' subcontract contained a payment schedule that required that Padilla be paid within ten days after IGT

---

[149] Exhibit 24, Big D's responding brief at 28-29.
[150] See Exhibit 24, Big-D's responding brief at 32 (citations to the record omitted).
[151] See Exhibit 25, Padilla's Reply Brief at 13 ("According to *Lehrer McGovern Bovis v. Bullock Insulation, 124 Nev. 1102, 1117-1118, 197 P.3d 1032 (2008)*, 'pay-if-paid provisions are unenforceable because they violate public policy.' Big-D's reliance on the NRS 624.624(1)(a) provision for agreements "that includes a schedule for payments" is inconsistent with the plain language of the Big-D – Padilla Subcontract; which does not contain a schedule of payments. Instead of a Schedule of Payments, the Subcontract provides for monthly payments.").

> accepted Padilla's work and paid Big-D for that work and it is undisputed that **IGT never accepted Padilla's work and never paid Big-D for Padilla's work,** the district court correctly found that payment never became due to Padilla under the subcontract or *NRS 624.624(1)(a)*.[152]

So the decision recognized that payment schedules that are triggered after owner payment are not unenforceable pay-if-paid provisions.

In the present action, the subcontract that APCO had with each subcontractor: (1) confirmed that the subcontractor would be bound to the owner to the same extent APCO was,[153] (2) contained a schedule of payments for both retention and change orders with preconditions that were clearly not met,[154] and (3) APCO was not paid for the subcontractor's work. Accordingly, APCO's payment obligation to the subcontractors never became due. NRS 624.624 was never intended to make the general contractor the owner's guarantor.

VIII. Pay-if-Paid Defenses

The Court's order on Zitting's motion for summary judgment incorporated the Court's order on the Peel Brimley's Partial Motion for Summary Judgment to Preclude Defenses Based on Pay-if-Paid Provisions. For the sake of judicial economy, APCO incorporates the arguments in its August 21, 2017 opposition and January 4, 2018 motion for reconsideration of the Peel Brimley motion by this reference. APCO believes the language in the contract requiring the owner's payment to APCO before APCO had an obligation to pay Zitting to be a valid condition precedent to payment.

IX. The Court's strong policy on deciding cases on the merits.

"This court has held that good public policy dictates that cases be adjudicated on their merits."[155] In fact, Nevada has a "judicial policy favoring the disposition of cases on their merits."[156] "[A]s a proper guide to the exercise of discretion, the basic underlying policy to have each case decided upon its merits. In the normal course of events, justice is best served by such a

---

[152] 386 P.3d 982, 2016 Nev. Unpub. LEXIS 958.
[153] Exhibit 15, Subcontract at 3.4.
[154] Exhibit 15, Subcontract at Section 3.8.
[155] *Kahn v. Orme*, 108 Nev. 510, 516, 835 P.2d 790, 794 (1992)

policy."[157] *Cf. Mansur v. Mansur,*[158] ("In regard to appellant's argument that the district court should not have considered respondent's untimely opposition to his motion, we conclude that that argument lacks merit" citing Nevada has a basic underlying policy in favor of deciding cases on their merits).

Thus, despite Zitting's argument about APCO's defenses (despite APCO's answer, its NRCP 30(b)(6) deposition and supplemental interrogatory answers), this case should be decided at a trial on the merits.

In light of the foregoing, and for the reasons set forth in APCO's original opposition, APCO respectfully requests that this Court grant the instant Motion for Reconsideration, set aside its related Order and deny Zitting's Motion for Summary Judgment.

DATED: January 5th, 2018.

SPENCER FANE LLP

By: _____

John H. Mowbray, Esq. (Bar No. 1140)
John Randall Jefferies, Esq. (Bar No. 3512)
Mary E. Bacon, Esq. (Bar No. 12686)
300 S. Fourth Street, Suite 700
Las Vegas, NV 89101
Telephone: (702) 408-3400
Facsimile: (702) 408-3401
Attorneys for APCO Construction, Inc.

---

[156] *Havas v. Bank of Nev., 96 Nev. 567, 613 P.2d 706 (1980).*
[157] *Hotel Last Frontier Corp. v. Frontier Props.,* 79 Nev. 150, 155, 380 P.2d 293, 295 (1963).
[158] No. 63868, 2014 Nev. Unpub. LEXIS 790, at *4 n.1 (May 14, 2014)

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of SPENCER FANE LLP and that a copy of the foregoing **MOTION FOR RECONSIDERATION OF COURT'S ORDER GRANTING ZITTING BROTHERS CONSTRUCTION, INC.'S PARTIAL MOTION FOR SUMMARY JUDGMENT AND EX PARTE APPLICATION FOR ORDER SHORTENING TIME AND TO EXCEED PAGE LIMIT** was served by electronic transmission through the E-Filing system pursuant to NEFCR 9, NRCP 5(b) and EDCR 7.26 or by mailing a copy to their last known address, first class mail, postage prepaid for non-registered users, on this 8 day of January, 2018, as follows:

Counter Claimant: Camco Pacific Construction Co Inc
Steven L. Morris (steve@gmdlegal.com)
Intervenor Plaintiff: Cactus Rose Construction Inc
Eric B. Zimbelman (ezimbelman@peelbrimley.com)
Intervenor Plaintiff: Interstate Plumbing & Air Conditioning Inc
Jonathan S. Dabbieri (dabbieri@sullivanhill.com)
Intervenor: National Wood Products, Inc.'s
Dana Y Kim (dkim@caddenfuller.com)
Richard L Tobler (rltltdck@hotmail.com)
Richard Reincke (rreincke@caddenfuller.com)
S. Judy Hirahara (jhirahara@caddenfuller.com)
Tammy Cortez (tcortez@caddenfuller.com)
Other: Chaper 7 Trustee
Elizabeth Stephens (stephens@sullivanhill.com)
Gianna Garcia (ggarcia@sullivanhill.com)
Jennifer Saurer (Saurer@sullivanhill.com)
Jonathan Dabbieri (dabbieri@sullivanhill.com)
Plaintiff: Apco Construction
Rosie Wesp (rwesp@maclaw.com)
Third Party Plaintiff: E & E Fire Protection LLC
TRACY JAMES TRUMAN (DISTRICT@TRUMANLEGAL.COM)

Other Service Contacts

"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)

"Martin A. Little, Esq." . (mal@juww.com)

Aaron D. Lancaster . (alancaster@gerrard-cox.com)

Agnes Wong . (aw@juww.com)

Amanda Armstrong . (aarmstrong@peelbrimley.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@litigationservices.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)

Dana Y. Kim . (dkim@caddenfuller.com)

David J. Merrill . (david@djmerrillpc.com)

David R. Johnson . (djohnson@watttieder.com)

Debbie Holloman . (dholloman@jamsadr.com)

Debbie Rosewall . (dr@juww.com)

Debra Hitchens . (dhitchens@maazlaw.com)

Depository . (Depository@litigationservices.com)

District filings . (district@trumanlegal.com)

Donna Wolfbrandt . (dwolfbrandt@dickinsonwright.com)

Douglas D. Gerrard . (dgerrard@gerrard-cox.com)
E-File Desk . (EfileLasVegas@wilsonelser.com)
Elizabeth Martin (em@juww.com)
Eric Dobberstein . (edobberstein@dickinsonwright.com)
Eric Zimbelman . (ezimbelman@peelbrimley.com)
Erica Bennett . (e.bennett@kempjones.com)
Floyd Hale . (fhale@floydhale.com)
George Robinson . (grobinson@pezzillolloyd.com)
Glenn F. Meier . (gmeier@nevadafirm.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)
Jennifer R. Lloyd . (Jlloyd@pezzillolloyd.com)
Jineen DeAngelis . (jdeangelis@foxrothschild.com)
Jorge Ramirez . (Jorge.Ramirez@wilsonelser.com)
Kathleen Morris . (kmorris@mcdonaldcarano.com)
Kaytlyn Bassett . (kbassett@gerrard-cox.com)
Kelly McGee . (kom@juww.com)
Kenzie Dunn . (kdunn@btjd.com)
Lani Maile . (Lani.Maile@wilsonelser.com)
Legal Assistant . (rrlegalassistant@rookerlaw.com)
Linda Compton . (lcompton@gglts.com)
Marie Ogella . (mogella@gordonrees.com)
Michael R. Ernst . (mre@juww.com)
Michael Rawlins . (mrawlins@rookerlaw.com)
Pamela Montgomery . (pym@kempjones.com)
Phillip Aurbach . (paurbach@maclaw.com)
Rachel E. Donn . (rdonn@nevadafirm.com)
Rebecca Chapman . (rebecca.chapman@procopio.com)
Receptionist . (Reception@nvbusinesslawyers.com)

Renee Hoban . (rhoban@nevadafirm.com)
Richard I. Dreitzer . (rdreitzer@foxrothschild.com)
Richard Tobler . (rltltdck@hotmail.com)
Rosey Jeffrey . (rjeffrey@peelbrimley.com)
Ryan Bellows . (rbellows@mcdonaldcarano.com)
S. Judy Hirahara . (jhirahara@caddenfuller.com)
Sarah A. Mead . (sam@juww.com)
Steven Morris . (steve@gmdlegal.com)
Tammy Cortez . (tcortez@caddenfuller.com)
Taylor Fong . (tfong@marquisaurbach.com)
Terri Hansen . (thansen@peelbrimley.com)
Timother E. Salter . (tim.salter@procopio.com)
Wade B. Gochnour . (wbg@h2law.com)

An employee of Spencer Fane LLP

EXHIBIT 1

COMP
MICHAEL M. EDWARDS
Nevada Bar No. 006281
REUBEN H. CAWLEY
Nevada Bar No. 009384
LEWIS BRISBOIS BISGAARD & SMITH LLP
400 South Fourth Street, Suite 500
Las Vegas, Nevada 89101
(702) 893-3383
FAX: (702) 893-3789
E-Mail: medwards@lbbslaw.com
E-Mail: cawley@lbbslaw.com
Attorneys for Plaintiff
Zitting Brothers Construction, Inc.

DISTRICT COURT

CLARK COUNTY, NEVADA

ZITTING BROTHERS CONSTRUCTION, INC., a Utah corporation,

Plaintiff,

v.

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

Defendants.

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

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

(Exemption from Arbitration - Concerns Title to Real Estate)

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

THE PARTIES

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

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

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

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

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

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

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

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

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

. . .

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

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

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

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

a. failing and/or refusing to pay the monies owed to Zitting Brothers for the Work.

b. failing to adjust the Agreement price to account for extra work and/or changed work, as well as suspensions, delays of Work caused or ordered by APCO, Gemstone, and/or their representatives.

c. failing and/or refusing to comply with the Agreement; and

d. negligently or intentionally preventing, obstructing, hindering, or interfering with Zitting Brothers performance of the Work.

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

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

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

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

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

. . .

. . .

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

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

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

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

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

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

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

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

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

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

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

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

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

. . .

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

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

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

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

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

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

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

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

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

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

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

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

. . .

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

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

SEVENTH CAUSE OF ACTION
(Violation of NRS 624)

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

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

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

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

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

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

WHEREFORE, Zitting Brothers prays that this Honorable Court:

1. Enters judgment against the Defendants, and each of them, jointly and severally, for Zitting Brothers's reasonable costs and attorney's fees incurred in the collection of the Outstanding Balance;

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

. . .

3. Enters a judgment declaring that Zitting Brothers has a valid and enforceable mechanic's lien against the Property, with priority over all Defendants, in an amount of the Outstanding Balance;

4. Adjudge a lien upon the Property for the Outstanding Balance, plus reasonable attorney's fees, costs and interest thereon, and that this Honorable Court enter an Order that the Property, and improvements, such as may be necessary, be sold pursuant to the laws of the State of Nevada, and that the proceeds of said sale be applied to the payment of sums due Zitting Brothers herein; and

5. For such other and further relief as this Honorable Court deems just and proper in the premises.

Dated this 30th day of April, 2009.

LEWIS BRISBOIS BISGAARD & SMITH LLP

By _____
Michael M. Edwards, Esq.
Nevada Bar No. 006281
Reuben H. Cawley, Esq.
Nevada Bar No. 009384
400 South Fourth Street, Suite 500
Las Vegas, Nevada 89101
Attorneys for Plaintiff
Zitting Brothers Construction, Inc.

EXHIBIT 1

EXHIBIT 1

4815-6730-1889.1

Recorded at the Request of and Return
Recorded Document to:

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

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

NOTICE OF LIEN

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

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

Dated this 23 day of December, 2008.

Ryan B. Simpson
Agent for Zitting Brothers Construction

STATE OF UTAH)
)ss
COUNTY OF SALT LAKE)

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

Notary Public
PAUL R OSBORN
Commission #575408
My Commission Expires
June 27 2012
State of Utah

Ryan R. Simpson
Agent for Zitting Brothers Construction

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

EXHIBIT A
LEGAL DESCRIPTION

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

PARCEL 1:
The West Half (W1/2) of the Northeast Quarter (NE1/4) of the Northwest Quarter (NW1/4) of the Northwest Quarter (NW1/4) of Section 32, Township 21 South, Range 60 East, M.D.B. & M.

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

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

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

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

EXCEPTING THEREFROM the Southerly 396 feet thereof.

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

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

PARCEL 3:
The Southerly 396 feet of the East Hast (E1/2) of the Northeast Quarter (NE1/4) of the Northwest Quarter (NW1/4) of the Northwest Quarter (NW1/4) of Section 32, Township 21 South, Range 60 East, M.D.B. & M.

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

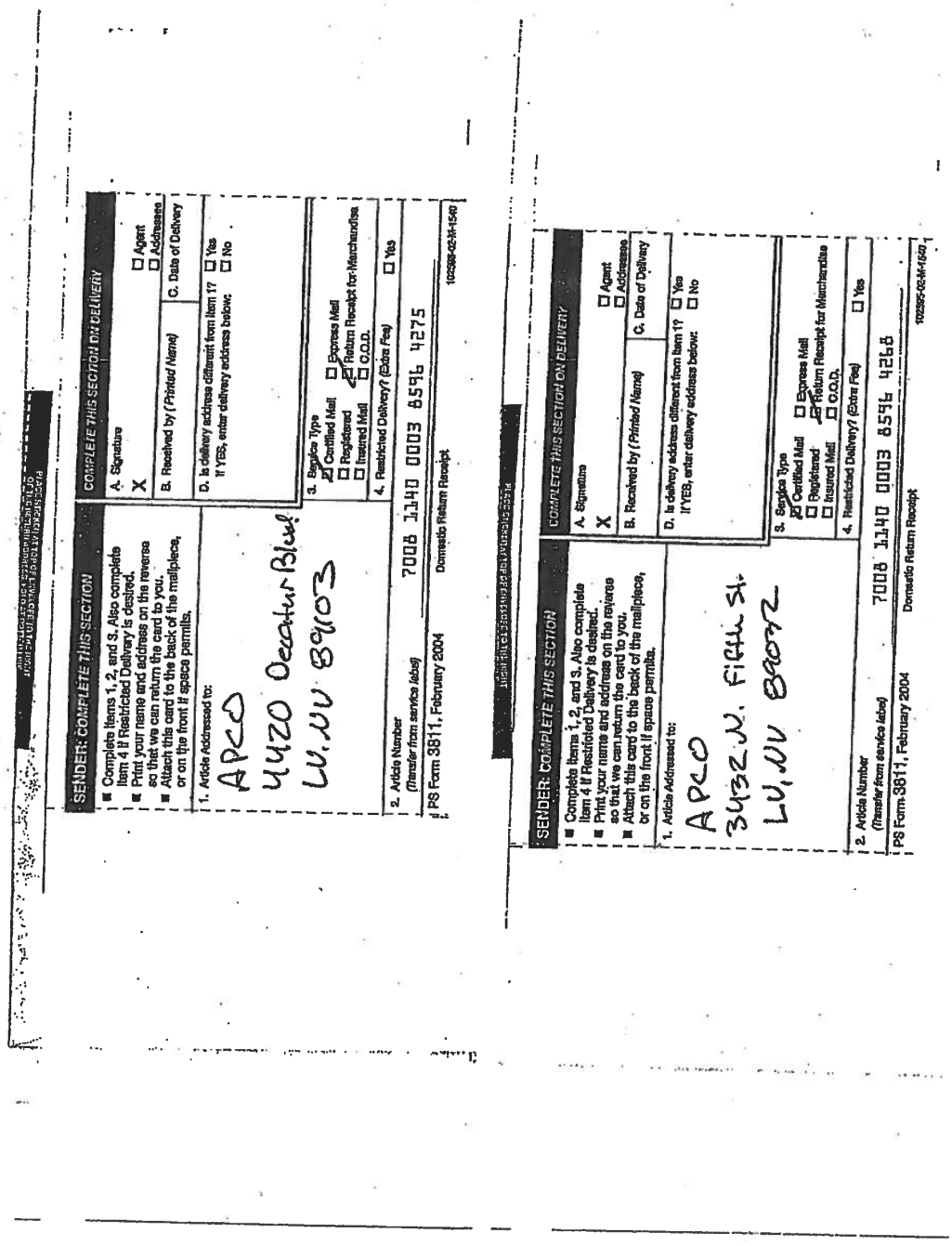
EXCEPTING THEREFROM that property conveyed to Clark County by Grant Deed recorded September 22, 1972 in Book 265 as Document No. 224994 of Official Records.

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

PARCEL 5:
The East Half (E1/2) of the Southeast Quarter (SE1/4) of the Northwest Quarter (NW1/4) of the Northwest Quarter (NW1/4) of Section 32, Township 21 South, Range 60 East, M.D.B. & M.

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

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


SENDER: COMPLETE THIS SECTION
Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
Print your name and address on the reverse so that we can return the card to you.
Attach this card to the back of the mailpiece, or on the front if space permits.
1. Article Addressed to:
APCO
4420 Decatur Blvd
LV, NV 89103
COMPLETE THIS SECTION ON DELIVERY
A. Signature
X
Agent
Addressee
B. Received by (Printed Name)
C. Date of Delivery
D. Is delivery address different from item 1? Yes
If YES, enter delivery address below: No
3. Service Type
Certified Mail
Express Mail
Registered
Return Receipt for Merchandise
Insured Mail
C.O.D.
4. Restricted Delivery? (Extra Fee) Yes
2. Article Number
(Transfer from service label) 7008 1140 0003 8596 4275
PS Form 3811, February 2004 Domestic Return Receipt
102595-02-M-1540
SENDER: COMPLETE THIS SECTION
Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
Print your name and address on the reverse so that we can return the card to you.
Attach this card to the back of the mailpiece, or on the front if space permits.
1. Article Addressed to:
APCO
3432 W. Fifth St.
LV, NV 89107
COMPLETE THIS SECTION ON DELIVERY
A. Signature
X
Agent
Addressee
B. Received by (Printed Name)
C. Date of Delivery
D. Is delivery address different from item 1? Yes
If YES, enter delivery address below: No
3. Service Type
Certified Mail
Express Mail
Registered
Return Receipt for Merchandise
Insured Mail
C.O.D.
4. Restricted Delivery? (Extra Fee) Yes
2. Article Number
(Transfer from service label) 7008 1140 0003 8596 4268
PS Form 3811, February 2004 Domestic Return Receipt
102595-02-M-1540

CERTIFIED MAIL

2115 SOUTH DALLIN STREET, SALT LAKE CITY, UTAH 84109

TURNER & SIMPSON
ATTORNEYS AT LAW

7008 1140 0003 8596 4268

SALT LAKE CITY UT DEC.24.08

00000020043

$05.66 ** U.S.POSTAGE PITNEY BOWES 382181

APCO
3432 North Fifth Street
Las Vegas, Nevada 89032

CERTIFIED MAIL

2115 SOUTH DALLIN STREET, SALT LAKE CITY, UTAH 84109

TURNER & SIMPSON
ATTORNEYS AT LAW

7008 1140 0003 8596 4275

SALT LAKE CITY UT DEC.24.08

00000020041

$05.66 ** U.S.POSTAGE PITNEY BOWES 382181

APCO
4420 Decatur Blvd
Las Vegas, Nevada 89103

CERTIFIED MAIL

2115 SOUTH DALLIN STREET, SALT LAKE CITY, UTAH 84109

TURNER & SIMPSON
ATTORNEYS AT LAW

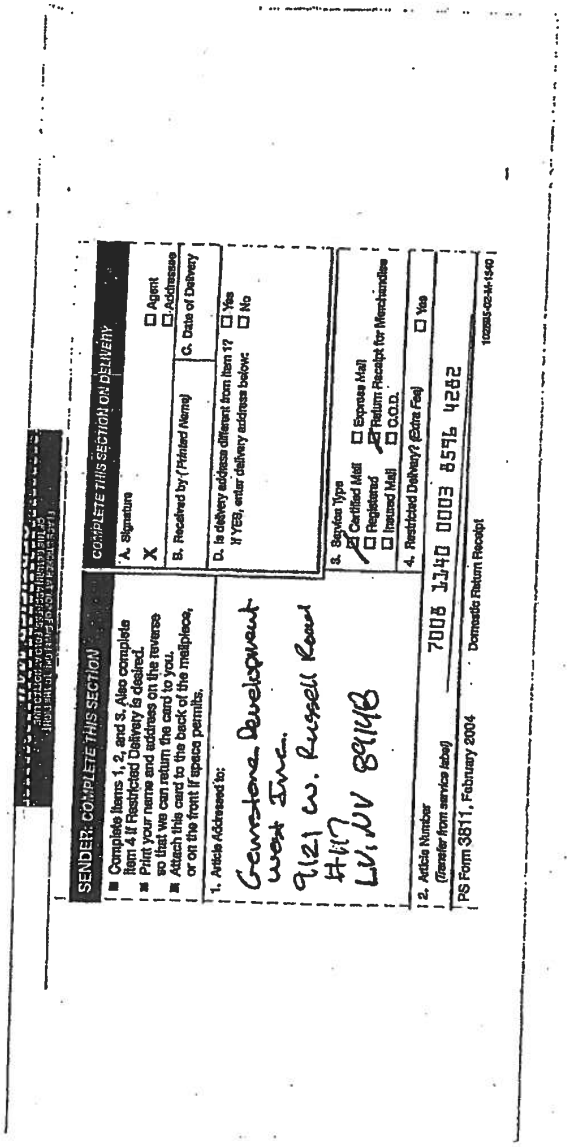
7008 1140 0003 8594 4282

SALT LAKE CITY UT FEB 24 08

0000020042

US POSTAGE 05.66 ** PSTAMA3R181

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



SENDER: COMPLETE THIS SECTION

- Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

Cornerstone Development West Inc.
9121 W. Russell Road
#117
LV, NV 89148

COMPLETE THIS SECTION ON DELIVERY

A. Signature
X
☐ Agent
☐ Addressee

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

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

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

4. Restricted Delivery? (Extra Fee) ☐ Yes

2. Article Number (Transfer from service label) 7008 1340 0003 8596 4282

PS Form 3811, February 2004 Domestic Return Receipt 102595-02-M-1540

NOTC
MICHAEL M. EDWARDS
Nevada Bar No. 006281
REUBEN H. CAWLEY
Nevada Bar No. 009384
LEWIS BRISBOIS BISGAARD & SMITH LLP
400 South Fourth Street, Suite 500
Las Vegas, Nevada 89101
(702) 893-3383
FAX: (702) 893-3789
E-Mail: medwards@lbbslaw.com
E-Mail: cawley@lbbslaw.com
Attorneys for Plaintiff
Zitting Brothers Construction, Inc.

FILED
APR 30 2 05 PM '09
CLERK OF THE COURT

DISTRICT COURT

CLARK COUNTY, NEVADA

ZITTING BROTHERS CONSTRUCTION, INC., a Utah corporation,

Plaintiff,

v.

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

Defendants.

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

NOTICE OF LIS PENDENS

(Exemption from Arbitration - Concerns Title to Real Estate)

PLEASE TAKE NOTICE that an action was commenced and is pending in the above-entitled Court to enforce that certain Notices and Claims of Lien recorded by Lien Claimant Zitting Brothers Construction, Inc., in the Official Records of Clark County on September 10, 2008, in book 20080910, as instrument number 0002029 and December 11, 2008, in book number 20081211, instrument number 0002636 effecting certain real property or portions thereof, owned or reputedly owned by Defendants and commonly referred to as the Manhattan West mixed use development project generally located at 9205 W. Russell Road, Clark County, Nevada and more particularly described as Assessor's Parcel Number 163-32-101-019.

LEWIS BRISBOIS BISGAARD & SMITH LLP ATTORNEYS AT LAW

Plaintiff Zitting Brothers Construction, Inc., hereby places a Lis Pendens against the same affecting real properties referenced herein, located in Clark County, State of Nevada.

Dated this 30th day of April, 2009.

LEWIS BRISBOIS BISGAARD & SMITH LLP

By _____

Michael M. Edwards, Esq.
Nevada Bar No. 006281
Reuben H. Cawley, Esq.
Nevada Bar No. 009384
400 South Fourth Street, Suite 500
Las Vegas, Nevada 89101
Attorneys for Plaintiff
Zitting Brothers Construction, Inc.

EXHIBIT 2

ORIGINAL

ANSW
Gwen Mullins, Esq.
Nevada Bar No. 3146
Wade B. Gochnour, Esq.
Nevada Bar No. 6314
Howard & Howard Attorneys PLLC
3800 Howard Hughes Parkway
Suite 1400
Las Vegas, NV 89169
Telephone (702) 257-1483
Facsimile (702) 567-1568
E-mails: grm@h2law.com
wbg@h2law.com
Attorneys for APCO Construction

Electronically Filed
06/10/2009 02:45:36 PM

CLERK OF THE COURT

DISTRICT COURT
CLARK COUNTY, NEVADA

APCO CONSTRUCTION, a Nevada corporation,

Plaintiff,

vs.

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.

ZITTING BROTHERS CONSTRUCTION, INC., a Utah corporation,

Plaintiff,

vs.

GEMSTONE DEVELOPMENT WEST, INC.,

CASE NO.: 08-A-571228
DEPT. NO.: X

Consolidated with: A574391, A574792, A577623, A583289, A584730, A587168 and A589195

APCO CONSTRUCTION'S ANSWER TO ZITTING BROTHERS CONSTRUCTION, INC.'S COMPLAINT

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

#529043-v1

a Nevada corporation; APCO CONSTRUCTION, a Nevada corporation; and DOES I through X; ROE CORPORATIONS I through X; BOE BONDING COMPANIES I through X and LOE LENDERS I through X, inclusive

Defendants.

AND ALL RELATED CASES AND MATTERS.

APCO CONSTRUCTION'S ANSWER TO ZITTING BROTHERS CONSTRUCTION, INC.'S COMPLAINT

Date: N/A
Time: N/A

APCO CONSTRUCTION ("APCO"), by and through its attorneys, Gwen Rutar Mullins, Esq. and Wade B. Gochnour of the law firm of Howard and Howard Attorneys PLLC, hereby files this Answer to Zitting Brothers Construction, Inc.'s Complaint (hereinafter "Complaint") and hereby responds and alleges as follows:

THE PARTIES

1. Answering Paragraph 1, 3, and 5 of the Complaint, APCO does not have sufficient knowledge or information upon which to base a belief as to the truth of the allegations contained therein, and upon said grounds, denies each and every allegation contained therein.

2. Answering Paragraph 2 of the Complaint, APCO, upon information and belief admits that Gemstone Development West, Inc. is, and at all times relevant to this action, the owner of the real property commonly referred to as Manhattan West Mixed Use Development Project, initially identified by the Assessor's Parcel Number 163-32-101-019 (the "Property"). As to the remaining allegations of Paragraph 2 of the Complaint, APCO does not have

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

sufficient knowledge or information upon which to base a belief as to the truth of these allegations and upon said grounds, denies them.

3. Answering Paragraph 4 of the Complaint, APCO admits that APCO was at all times relevant to this action, doing business as a licensed contractor authorized to conduct business in Clark County, Nevada. As to the remaining allegations of Paragraph 4 of the Complaint, APCO does not have sufficient knowledge or information upon which to base a belief as to the truth of these allegations and upon said grounds, denies them.

FIRST CAUSE OF ACTION

(Breach of Contract Against All Defendants)

4. Answering Paragraph 6 of the Complaint, APCO repeats and realleges each and every allegation contained in paragraphs 1 through 3 of this Answer to the Complaint as though fully set forth herein.

5. Answering Paragraph 7 of the Complaint, APCO admits the allegations contained therein.

6. Answering Paragraph 8 of the Complaint, APCO admits that Zitting Brothers Construction, Inc. ("ZBCI") furnished construction work on the Project. As to the remaining allegations of Paragraph 8 of the Complaint, APCO does not have sufficient knowledge or information upon which to base a belief as to the truth of these allegations and upon said grounds, denies them.

7. Answering Paragraph 9 of the Complaint, APCO does not have sufficient knowledge or information upon which to base a belief as to the truth of the allegations contained therein, and upon said grounds, denies each and every allegation contained therein.

8. Answering Paragraphs 10, 11, 12 and 13 of the Complaint, APCO denies all the allegations as they pertain to, or as they are alleged against, APCO. With respect to any allegations that have been asserted against the remaining Defendants, APCO does not have sufficient knowledge or information upon which to base a belief as to the truth of the allegations contained therein, and upon said grounds, denies each and every allegation contained therein.

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

SECOND CAUSE OF ACTION

(Breach of Implied Covenant of Good Faith & Fair Dealing – Against All Defendants)

9. Answering Paragraph 14 of the Complaint, APCO repeats and realleges each and every allegation contained in paragraphs 1 through 8 of this Answer to the Complaint as though fully set forth herein.

10. Answering Paragraph 15 of the Complaint, APCO admits the allegations contained therein.

11. Answering Paragraphs 16, 17, and 18 of the Complaint, APCO denies all the allegations as they pertain to, or as they are alleged against, APCO. With respect to any allegations that have been asserted against the remaining Defendants, APCO does not have sufficient knowledge or information upon which to base a belief as to the truth of the allegations contained therein, and upon said grounds, denies each and every allegation contained therein.

THIRD CAUSE OF ACTION

(Unjust Enrichment or in the Alternative Quantum Meruit – Against All Defendants)

12. Answering Paragraph 19 of the Complaint, APCO repeats and realleges each and every allegation contained in paragraphs 1 through 11 of this Answer to the Complaint as though fully set forth herein.

13. Answering Paragraphs 20, 22, 23, 26 and 27 of the Complaint, APCO denies all the allegations as they pertain to, or as they are alleged against, APCO. With respect to any allegations that have been asserted against the remaining Defendants, APCO does not have sufficient knowledge or information upon which to base a belief as to the truth of the allegations contained therein, and upon said grounds, denies each and every allegation contained therein.

14. Answering Paragraph 21 and 24 of the Complaint, APCO does not have sufficient knowledge or information upon which to base a belief as to the truth of these allegations and upon said grounds, denies them.

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

15. Answering Paragraph 25 of the Complaint, APCO admits that APCO has not paid ZBCI the Outstanding Balance but denies the fact that such sums are due to ZBCI. As to the remaining allegations of Paragraph 25 of the Complaint, APCO does not have sufficient knowledge or information upon which to base a belief as to the truth of these allegations and upon said grounds, denies them.

FOURTH CAUSE OF ACTION

(Foreclosure of Mechanic's Lien- Against All Defendants)

16. Answering Paragraph 28 of the Complaint, APCO repeats and realleges each and every allegation contained in paragraphs 1 through 15 of this Answer to the Complaint as though fully set forth herein.

17. Answering Paragraph 29 of the Complaint, APCO admits that ZBCI provided its Work on the Project. As to the remaining allegations of Paragraph 29, APCO does not have sufficient knowledge or information upon which to base a belief as to the truth of these allegations and upon said grounds, denies them.

18. Answering Paragraph 30 of the Complaint, APCO admits that APCO had knowledge that ZBCI was performing work on the Property. As to the remaining allegations of Paragraph 30, APCO does not have sufficient knowledge or information upon which to base a belief as to the truth of these allegations and upon said grounds, denies them.

19. Answering Paragraphs 31, 32, 33, 34 and 35 of the Complaint, APCO denies all the allegations as they pertain to, or as they are alleged against, APCO. With respect to any allegations that have been asserted against the remaining Defendants, APCO does not have sufficient knowledge or information upon which to base a belief as to the truth of the allegations contained therein, and upon said grounds, denies each and every allegation contained therein.

. . .

. . .

. . .

. . .

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

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

FIFTH CAUSE OF ACTION

(Claim for Priority- Against LOE LENDER Defendants)

20. Answering Paragraph 36 of the Complaint, APCO repeats and realleges each and every allegation contained in paragraphs 1 through 19 of this Answer to the Complaint as though fully set forth herein.

21. Answering Paragraph 37 of the Complaint, APCO admits that allegations contained therein.

22. Answering Paragraph 38 of the Complaint, APCO admits that the mechanic's liens filed against the Property are superior to the claims of Loe Lenders. As to remaining allegations of Paragraph 38, APCO does not have sufficient knowledge or information upon which to base a belief as to the truth of the allegations contained therein, and upon said grounds, denies them.

23. Answering Paragraph 39 of the Complaint, APCO denies all the allegations as they pertain to, or as they are alleged against, APCO. With respect to any allegations that have been asserted against the remaining Defendants, APCO does not have sufficient knowledge or information upon which to base a belief as to the truth of the allegations contained therein, and upon said grounds, denies each and every allegation contained therein.

SIXTH CAUSE OF ACTION

(Violation of NRS 624)

24. Answering Paragraph 40 of the Complaint, APCO repeats and realleges each and every allegation contained in paragraphs 1 through 23 of this Answer to the Complaint as though fully set forth herein.

25. Answering Paragraph 41 of the Complaint, APCO asserts that NRS 624.606 to 624.630 speak for themselves. As to the remaining allegations of Paragraph 41, APCO does not have sufficient knowledge or information upon which to base a belief as to the truth of the allegations contained therein, and upon said grounds, denies them.

26. Answering Paragraphs 42, 43, 44, and 45 of the Complaint, APCO denies each and every allegation contained therein.

FIRST AFFIRMATIVE DEFENSE

ZBCI has failed to state a claim against APCO upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

The claims of the ZBCI have been waived as a result of their respective acts and conduct.

THIRD AFFIRMATIVE DEFENSE

No monies are due ZBCI at this time as APCO has not received payment for ZBCI's work from Gemstone, the developer of the Manhattan West Project.

FOURTH AFFIRMATIVE DEFENSE

Any and all damages sustained by ZBCI are the result of negligence, breach of contract and/or breach of warranty, express and/or implied, of a third-party over whom APCO has no control, and for whose acts APCO is not responsible or liable to ZBCI.

FIFTH AFFIRMATIVE DEFENSE

At the time and place under the circumstances alleged by the ZBCI, ZBCI had full and complete knowledge and information with regard to the conditions and circumstances then and there existing, and through ZBCI's own knowledge, conduct, acts and omissions, assumed the risk attendant to any condition there or then present.

SIXTH AFFIRMATIVE DEFENSE

Whatever damages, if any, were sustained by ZBCI, were caused in whole or in part or were contributed to by reason of ZBCI's own actions.

SEVENTH AFFIRMATIVE DEFENSE

The liability, if any, of APCO must be reduced by the percentage of fault of others, including ZBCI.

EIGHTH AFFIRMATIVE DEFENSE

The damages alleged by ZBCI were caused by and arose out of the risk which ZBCI had knowledge and which ZBCI assumed.

. . .

. . .

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

NINTH AFFIRMATIVE DEFENSE

The alleged damages complained of by ZBCI were caused in whole or in part by a new, independent and intervening cause over which APCO had no control. Said independent, intervening cause was the result of any alleged damages resulting to ZBCI.

TENTH AFFIRMATIVE DEFENSE

APCO's obligations to ZBCI have been satisfied or excused.

ELEVENTH AFFIRMATIVE DEFENSE

ZBCI failed to perform their work in workmanlike manner thus causing damages in excess to the sums ZBCI claim are due under the subcontract with APCO.

TWELFTH AFFIRMATIVE DEFENSE

The claim for breach of contract is barred as a result of ZBCI's failure to satisfy conditions precedent.

THIRTEENTH AFFIRMATIVE DEFENSE

The claims, and each of them, are premature.

FOURTEENTH AFFIRMATIVE DEFENSE

ZBCI should indemnify APCO for any and all losses, damages or expenses APCO sustains as a result of any claims by Gemstone for damages that Gemstone allegedly sustained due to ZBCI's improper workmanship on the Manhattan West Project, including, but not limited to, any damage amount and the attorney's fees and costs incurred by APCO relative thereto.

FIFTEENTH AFFIRMATIVE DEFENSE

APCO is entitled to an offset or a setoff of any damages that APCO sustains as a result of ZBCI's failure to complete the work in a workmanlike manner and/or breach of contract.

SIXTEENTH AFFIRMATIVE DEFENSE

Any obligations or responsibilities of APCO under the subcontract with ZBCI, if any, have been replaced, terminated, voided, cancelled or otherwise released by the ratification entered into between ZBCI, Gemstone and CAMCO and APCO no longer bears any liability thereunder.

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

SEVENTEENTH AFFIRMATIVE DEFENSE

APCO has been forced to retain the services of an attorney to defend this action and therefore is entitled to reasonable attorneys' fees and costs.

EIGHTEENTH AFFIRMATIVE DEFENSE

ZBCI has failed to comply with the requirements of NRS 624.

NINETIETH AFFIRMATIVE DEFENSE

ZBCI may have failed to comply with all requirements of NRS 108 to perfect its lien.

TWENTY AFFIRMATIVE DEFENSE

Pursuant to NRCP Rule 8 and 11, as amended, all possible affirmative defenses may not have been alleged herein insofar as sufficient facts were not available after reasonable inquiry upon the filing of this Answer to the Complaint, and therefore, APCO reserves the right to amend their Answer to allege additional affirmative defenses if subsequent investigation so warrants.

WHEREFORE, APCO prays for judgment as follows:

1. That ZBCI take nothing by way of its Complaint on file herein and that the same be dismissed with prejudice against APCO;

2. For an award of attorneys' fees and costs incurred herein by APCO; and

3. For such other and further relief as this Court may deem just and proper.

DATED this 9th day of June, 2009.

HOWARD & HOWARD ATTORNEYS PLLC

Gwen Mullins, Esq.
Nevada Bar No. 3146
Wade B. Gochnour, Esq.
Nevada Bar No. 6314
3800 Howard Hughes Parkway
Suite 1400
Las Vegas, NV 89169
Attorneys for APCO Construction

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

CERTIFICATE OF MAILING

On the 9th day of June, 2009, the undersigned served a true and correct copy of the foregoing APCO CONSTRUCTION'S ANSWER TO ZITTING BROTHERS CONSTRUCTION, INC.'S COMPLAINT , by U.S. Mail, postage prepaid, upon the following:

Gregory S. Gilbert, Esq.
Sean D. Thueson, Esq.
HOLLAND & HART
3800 Howard Hughes Parkway, 10th Floor
Las Vegas, Nevada 89169
Attorneys for Gemstone Development West, Inc.

Marilyn Fine, Esq.
MEIER & FINE
2300 West Sahara Ave., Suite 430
Las Vegas, Nevada 89102
Attorneys for Scott Financial Corporation

Donald H. Williams, Esq.
WILLIAMS & WIESE
612 S. 10th Street
Las Vegas, Nevada 89101
Attorneys for Harsco Corporation and *EZA, P.C. dba OZ Architecture of Nevada, Inc.*

Jeffrey R. Albregts,Esq.
SANTORO DRIGGS WALCH KEARNEY HOLLEY AND THOMPSON
400 South Fourth Street, Third Floor
Las Vegas, Nevada 89101
Attorneys for Arch Aluminum And Glass Co. Esq.

Nik Skrinjaric, Esq.
2500 N. Buffalo, Suite 250
Las Vegas, Nevada 89128
Attorney for Nevada Construction Services

Martin A. Little, Esq.
Christopher D. Craft, Esq.
JOLLEY, URGA, WIRTH, WOODBURY & STANDISH
3800 Howard Hughes Parkway, 16th Floor
Las Vegas, NV 89169
Attorneys for Steel Structures, Inc. and *Nevada Prefab Engineers, Inc.*

Justin L. Watkins, Esq.
WATT, TIEDER, HOFFAR & FITZGERALD, LLP
3993 Howard Hughes Pkwy., Ste. 400
Las Vegas, Nevada 89169
Attorneys for Cabinetec, Inc.

Jennifer R. Lloyd-Robinson, Esq.
PEZZILLO ROBINSON
6750 Via Austi Parkway, Ste. 170
Las Vegas, Nevada 89119
Attorneys for Tri-City Drywall, Inc.

D. Shane Clifford, Esq.
Robin E. Perkins, Esq.
DIXON TRUMAN FISHER & CLIFFORD
221 North Buffalo Drive, Suite A
Las Vegas, Nevada 89145
Attorneys for Ahern Rentals, Inc.

Christopher R. McCullough, Esq.
McCULLOUGH, PEREZ & ASSOCIATES
601 South Rancho Drive, #A-10
Las Vegas, Nevada 89106
Attorneys for Cell-Crete Fireproofing of Nevada, Inc.

#529043-v1

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

Tracy Truman, Esq.
T. James Truman & Associates
3654 N. Rancho Drive
Las Vegas, NV 89130
Attorneys for Noorda Sheetmetal, Dave Peterson Framing, Inc., E&E Fire Protection, LLC, Professional Door and Millsworks, LLC

Craig S. Newman, Esq.
David W. Dachelet, Esq.
FENNEMORE CRAIG
300 S. Fourth Street, Suite 1400
Las Vegas, Nevada 89101
Atlas Construction Supply, Inc.

Kurt C. Faux, Esq.
Willi H. Siepmann, Esq.
THE FAUX LAW GROUP
1540 W. Warm Springs Road, Ste. 100
Henderson, Nevada 89014
Attorneys for Platte River Insurance Company

Alexander Edelstein
10170 W. Tropicana Avenue
Suite 156-169
Las Vegas, Nevada 89147-8465
Executive of Gemstone Development West, Inc.

Mark M. Jones, Esq.
KEMP, JONES, & COULTHARD, LLP
3800 Howard Hughes Pkwy., 17th Floor
Las Vegas, NV 89169
Attorney for Scott Financial Corporation

G. Mark Albright, Esq.
D. Chris Albright, Esq.
ALBRIGHT, STODDARD, WARNICK & ALBRIGHT
801 South Rancho Dr., Bldg. D-4
Las Vegas, Nevada 89106
Attorney for Club Vista Financial Group. Tharaldson Motels Ii, Inc. And Gary D. Tharaldson

K. Layne Morrill, Esq.
Martin A. Aronson, Esq.
MORRILL & ARONSON
One E. Camelback Road, Suite 340
Phoenix, AZ 85012
Attorney for Club Vista Financial Group. Tharaldson Motels Ii, Inc. And Gary D. Tharaldson

Von S. Heinz, Esq.
Abran E. Vigil, Esq.
Ann Marie McLoughlin, Esq.
LEWIS AND ROCA LLP
3993 Howard Hughes Parkway, Ste. 600
Las Vegas, Nevada 89169
Attorneys for Bank of Oklahoma, N.A.

J. Randall Jones, Esq.
Mark M. Jones, Esq.
Matthew S. Carter, Esq.
KEMP, JONES & COULTHARD, LLP
3800 Howard Hughes Pkwy. 17th Floor
Las Vegas, Nevada 89169
Attorneys for Scott Financial Corporation and Bradley J. Scott

Gwen Rutar Mullins
Wade B. Gochnour, Esq.
HOWARD & HOWARD
3800 Howard Hughes Pkwy., Ste. 1400
Las Vegas, Nevada 89169
Attorneys for Hydropressure

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

Joseph G. Went, Esq.
Georlen K. Spangler, Esq.
KOLESAR & LEATHAM, CHTD.
3320 W. Sahara Avenue, Ste. 380
Las Vegas, Nevada 89102
Attorneys for Uintah Investments, LLC, d/b/a Sierra Reinforcing

Ronald S. Sofen, Esq.
Becky A. Pintar, Esq.
GIBBS, GIDEN, LOCHER, TURNER & SENET LLP
3993 Howard Hughes Pkwy, Ste. 530
Las Vegas, Nevada 89169-5994
Attorneys for The Masonry Group Nevada, Inc

Brian K. Berman, Esq.
721 Gass Avenue
Las Vegas, Nevada 89101
Attorney for Ready Mix, Inc.

Eric Dobberstein, Esq.
G. Lance Welch, Esq.
DOBBERSTEIN & ASSOCIATES
1399 Galleria Drive, Suite 201
Henderson, Nevada 89014
Attorneys for Insulpro Projects, Inc.

Phillip S. Aurbach, Esq.
MARQUIS & AURBACH
10001 Park Run Drive
Las Vegas, Nevada 89145
Co-Counsel for Nevada Construction Services

Andrew F. Dixon, Esq.
Jonathan W. Barlow, Esq.
Bowler Dixon & Twitchell, LLP
400 N. Stephanie Street, Suite 235
Henderson, Nevada 89014
Attorneys for The Pressure Grout Company

Richard A. Koch, Esq.
KOCH & BRIM, L.L.P.
4520 S. Pecos Road, Ste. 4
Las Vegas, Nevada 89121
Attorneys for Republic Crane Services, LLC

Philip T. Varricchio, Esq.
MUIJE & VARRICCHIO
1320 S. Casino Center Blvd.
Las Vegas, NV 89104
Attorneys for John Deere Landscaping, Inc.

Matthew Q. Callister, Esq.
CALLISTER & REYNOLDS
823 S. Las Vegas Blvd., South; 5th Floor
Las Vegas, NV 89101
Attorneys for Executive Plastering, Inc.

Steven L. Morris, Esq.
WOODBURY MORRIS & BROWN
701 N. Green Valley Parkway, #110
Henderson, NV 89074
Attorneys for CAMCO Pacific

Michael M. Edwards, Esq.
Reuben H. Cawley, Esq.
LEWIS BRISBOIS BISGAARD & SMITH
400 South Fourth Street, Ste. 500
Las Vegas, Nevada 89101
Attorneys for Zitting Brothers Construction, Inc.

Kellie Piet

An employee of Howard and Howard Attorneys PLLC

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

#529043-v1

EXHIBIT 3

Electronically Filed
04/23/2013 03:21:21 PM

CLERK OF THE COURT

ORIGINAL

ORDR
Mark E. Ferrario (NV Bar No. 1625)
Tami D. Cowden (NV Bar No. 8994)
GREENBERG TRAURIG, LLP
3773 Howard Hughes Parkway
Suite 400 North
Las Vegas, Nevada 89109
E-Mail: ferrariom@gtlaw.com; cowdent@gtlaw.com
Telephone: (702) 792-3773
Facsimile: (702) 792-9002
Attorneys for Defendants Club Vista Financial Services, LLC and Tharaldson Motels II, Inc.

DISTRICT COURT
CLARK COUNTY, NEVADA

APCO CONSTRUCTION, a Nevada corporation,

Plaintiffs,

v.

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 CASES AND MATTERS

Case No.: A571228
Dept. No.: XXIX

CONSOLIDATED CASES:
A571792, A574397, A574792, A577623, A579963, A580889, A583289, A584730, A587168, A589195, A589677, A590319, A592826, A596924, A597089, A606730, A608717, and A608718

ORDER APPROVING SALE OF PROPERTY

Evidentiary hearings were held in the above-entitled matter on July 9 and 11, 2012 before the Honorable Susan Scann, Department 29, District Court, Clark County, on Scott Financial Corporation's Motion to Lift Stay, Allow Sale to Proceed with Deposit of Funds Pending Further Court Order, and for Posting of Bond on Order Shortening Time ("Motion"). At that time, the Seller, Gemstone Development West, Inc. ("Gemstone"), the Purchaser, WGH Acquisitions, Inc. ("WGH"), and lender Scott Financial Corporation ("Scott") sought Court approval of a Purchase and Sale Agreement ("the PSA") dated May 12, 2012. On July 31, 2012, this Court issued an

Order Granting In Part And Denying In Part Scott Financial Corporation's Motion To Lift Stay, Allow Sale To Proceed With Deposit Of Funds Pending Further Court Order And For Posting Of Bond On Order Shortening Time. Among other things, the Court:

- Denied Scott's request to approve the sale of the Property to WGH for $18,050,000.00;
- Deemed the PSA to be "unenforceable and of no further effect;" and
- Decided to hold additional hearings to "determine the best and most appropriate way to proceed to the expeditious sale of the property in the event the parties cannot agree on a stipulated method of sale."

On July 11, 2012, this Court issued an Order to Show Cause Re: Summary Determination of Lien Amounts; and the Possible Sale of the Property, and a hearing on the same was held on July 18, 2012. At the July 18, 2012 hearing, the Court granted the Motion in Part, ordering the sale of the property, and scheduled a hearing for July 26, 2012, which was continued to August 16, 2012, to determine the bidding and sale procedures. At the August 16, 2012 hearing, the Court scheduled an auction for the sale of the Manhattan West Property ("Property") for October 9, 2012.

At a September 26, 2012 telephonic conference with the Court, the parties informed the Court of the possibility the parties would consent to the sale of the Property to a specific buyer, without need for an auction, provided the price was acceptable to all parties. On September 28, 2012, the Court issued an Order Vacating the Auction Set for October 9, 2012 and set an Order to Show Cause Re: Sale of the Property. The September 28, 2012 Order to Show Cause Re: Sale of the Property decreed that all interested parties to the action appear on October 9, 2012 to show cause why an Order allowing the sale of the Property free of liens and establishment of a fund as replacement security for the liens should not be entered by the Court.

On October 9, 2012, the Court held a hearing on the Order to Show Cause Re: Sale of the Property. The Court subsequently continued the hearing to allow the parties the opportunity to review and clarify the terms of the proposed sale and to propose a written Order approving

GREENBERG TRAURIG, LLP
3773 Howard Hughes Parkway, Suite 400 North
Las Vegas, Nevada 89169
Telephone: (702) 792-3773
Facsimile: (702) 792-9002

the sale of the Property to WGH for $20,000,000, preserving the net proceeds of the sale and otherwise setting forth terms and conditions under which the Court would approve the sale.

In or about October 2012, Gemstone, WGH, and Scott executed a First Amendment to the PSA ("First Amendment") as a convenient method to memorialize Gemstone's agreement to sell the Property to WGH, with Scott's consent, for $20,000,000. The First Amendment purports to ratify the terms of the PSA, except as modified by the First Amendment. In or about November 2012, Gemstone, WGH, and Scott executed a Second Amendment to the PSA ("Second Amendment"), which by its terms supersedes and replaces the First Amendment to the PSA, but which also purports to ratify the terms of the PSA, except as modified by the Second Amendment.

By way of a Motion to Set Hearing, certain lien claimants raised concerns they had with the PSA and Amendments and requested a hearing to discuss the same. The Court held a hearing regarding such issues on January 3, 2013, which hearing was continued for further consideration on January 16, 2013.

ACCORDINGLY, IT IS HEREBY ORDERED that:

A reasonable opportunity to object or be heard regarding the requested relief has been afforded to all interested persons and there being no objection, the Court finds:

1. Compelling circumstances exist requiring the Property to be sold on the terms outlined herein. The sale of the Property is in the best interest of all parties holding liens on the Property.

2. The Purchase and Sale Agreement dated as of May 10, 2012 and the Second Amendment to Purchase and Sale Agreement and Escrow Instructions dated as of November 7, 2012, which supersedes and replaces the First Amendment (collectively, the "Purchase and Sale Agreement") between Gemstone Development West, Inc. and WGH Acquisitions, LLC constitutes the best offer for the Property. The Court hereby approves the Purchase and Sale Agreement, except as modified or amended by the terms of this Order, as follows:

3. Paragraph 2 of the Second Amendment is amended, modified and superseded as

GREENBERG TRAURIG, LLP
3773 Howard Hughes Parkway, Suite 400 North
Las Vegas, Nevada 89169
Telephone: (702) 792-3773
Facsimile: (702) 792-9002

follows: All contingencies shall be satisfied or waived by, the Property shall close escrow by, and the Closing Date shall be, no later than June 17, 2013 unless extended by further Order of this Court upon application prior to the Closing Date for good cause shown and with notice to all parties.

4. Paragraph 4 of the Second Amendment is amended, modified and superseded as follows: the sale of the Property is subject to approval of this Court as set forth in this Order.

5. Paragraph 9 of the Second Amendment is amended, modified and superseded as follows: the amount of the broker commissions payable from the proceeds of the sale shall be $200,000.00 (Two Hundred Thousand U.S. Dollars).

6. The Property shall be sold free and clear of all liens including but not limited to all liens as shown on the Preliminary Title Report No. 12-02-1358-KR prepared by Nevada Title Company on March 12, 2013 and amended on April 3, 2013 attached hereto as Exhibit A. Those existing liens on the Property, identified in the attached Exhibit "B," will be transferred to the net proceeds from the sale and will retain the same force, effect, validity and priority that previously existed against the Property subject to the determination of priority by the Supreme Court of Nevada in the Writ Petition procedure discussed below. For purposes of this Order "net proceeds from the sale" shall mean the sale proceeds available after the payment of sales commissions (as determined by the Court), and other ordinary closing costs and any unpaid property taxes.

7. The net proceeds from the sale (including any deposit under the Purchase and Sale Agreement) are to be held in an interest-bearing account ("Account") pending final resolution of the mechanic lien claimants' Joint Petition for Writ of Mandamus or, in the Alternative, Prohibition filed in the Supreme Court of Nevada on June 22, 2012, or upon resolution of any appeal brought with respect to the net proceeds from the sale. The contents of the Account are to remain subject to Court control until the Court orders the distribution of the contents to the party or parties the Nevada Supreme Court determines has a first priority lien on the proceeds or as may otherwise be agreed upon by the parties. Nothing in the

GIBBS GIDEN LOCHER TURNER SENET & WITTBRODT LLP
1140 Howard Hughes Parkway, Suite 300 North
Las Vegas, Nevada 89169
Telephone: (702) 792-3773
Facsimile: (702) 792-9002

Purchase and Sale Agreement or this Order shall be deemed to be a waiver of any party's legal arguments or positions regarding priority.

IT IS SO ORDERED.

DATED this 23rd day of April, 2013.

DISTRICT COURT JUDGE

Respectfully submitted,

By: _____
Mark E. Ferrario (Bar No. 1625)
Tami D. Cowden (Bar No. 8994)
3773 Howard Hughes Parkway
Suite 400 North
Las Vegas, Nevada 89169
Attorneys for Defendants Club Vista Financial Services, LLC and Tharaldson Motels II, Inc.

Approved as to form and content.

By: _____
J. Randall Jones (Bar No. 1927)
Matthew S. Carter (Bar No. 9524)
3800 Howard Hughes Parkway
Seventeenth Floor
Las Vegas, Nevada 89169
Attorneys for Scott Financial Corporation and Bradley J. Scott

By: _____
Gwen Rutar Mullins (Bar No. 3146)
Wade B. Gochnour (Bar No. 6314)
3800 Howard Hughes Parkway
Suite 1400
Las Vegas, Nevada 89169
Attorneys for APCO Construction

By: _____
Richard L. Peel (Bar No. 4359)
Eric B. Zimbelman (Bar No. 9407)
Michael T. Gebhart (Bar No. 7718)
3333 E. Serene Avenue
Suite 200
Henderson, Nevada 89074
Attorneys for Various Lien Claimants

Purchase and Sale Agreement or this Order shall be deemed to be a waiver of any party's legal arguments or positions regarding priority.

IT IS SO ORDERED.

DATED this _____ day of April, 2013.

_____
DISTRICT COURT JUDGE

Respectfully submitted,

By: _____
Mark E. Ferrario (Bar No. 1625)
Tami D. Cowden (Bar No. 8994)
3773 Howard Hughes Parkway
Suite 400 North
Las Vegas, Nevada 89169
Attorneys for Defendants Club Vista Financial Services, LLC and Tharaldson Motels II, Inc.

Approved as to form and content,

By: _____
J. Randall Jones (Bar No. 1927)
Matthew S. Carter (Bar No. 9524)
3800 Howard Hughes Parkway
Seventeenth Floor
Las Vegas, Nevada 89169
Attorneys for Scott Financial Corporation and Bradley J. Scott

By: _____
Gwen Rutar Mullins (Bar No. 3146)
Wade B. Gochnour (Bar No. 6314)
3800 Howard Hughes Parkway
Suite 1400
Las Vegas, Nevada 89169
Attorneys for APCO Construction

By: _____
Richard L. Peel (Bar No. 4359)
Eric B. Zimbelman (Bar No. 9407)
Michael T. Gebhart (Bar No. 7718)
3333 E. Serene Avenue
Suite 200
Henderson, Nevada 89074
Attorneys for Various Lien Claimants

Purchase and Sale Agreement or this Order shall be deemed to be a waiver of any party's legal arguments or positions regarding priority.

IT IS SO ORDERED.

DATED this _____ day of April, 2013.

DISTRICT COURT JUDGE

Respectfully submitted,

By: _____
Mark B. Ferrario (Bar No. 1625)
Tami D. Cowden (Bar No. 8994)
3773 Howard Hughes Parkway
Suite 400 North
Las Vegas, Nevada 89169
Attorneys for Defendants Club Vista Financial Services, LLC and Thoraldson Motels II, Inc.

Approved as to form and content,

By: _____
J. Randall Jones (Bar No. 1927)
Matthew S. Carter (Bar No. 9524)
3800 Howard Hughes Parkway
Seventeenth Floor
Las Vegas, Nevada 89169
Attorneys for Scott Financial Corporation and Bradley J. Scott

By: _____
Gwen Rutar Mullins (Bar No. 3146)
Wade B. Gochnour (Bar No. 6314)
3800 Howard Hughes Parkway
Suite 1400
Las Vegas, Nevada 89169
Attorneys for APCO Construction

By: _____
Richard L. Peel (Bar No. 4359)
Eric B. Zimbelman (Bar No. 9407)
Michael T. Gebhart (Bar No. 7718)
3333 E. Serene Avenue
Suite 200
Henderson, Nevada 89074
Attorneys for Various Lien Claimants

EXHIBIT 4

Electronically Filed
06/13/2016 08:53:49 AM

CLERK OF THE COURT

Marquis Aurbach Coffing
Jack Chen Min Juan, Esq.
Nevada Bar No. 6367
Cody S. Mounteer, Esq.
Nevada Bar No. 11220
10001 Park Run Drive
Las Vegas, Nevada 89145
Telephone: (702) 382-0711
Facsimile: (702) 382-5816
jjuan@maclaw.com
cmounteer@maclaw.com
Attorneys for APCO Construction

DISTRICT COURT

CLARK COUNTY, NEVADA

APCO CONSTRUCTION, a Nevada corporation,

Plaintiff,

vs.

GEMSTONE DEVELOPMENT WEST, INC., A Nevada corporation,

Defendant.

AND ALL RELATED MATTERS

Case No.: A571228
Dept. No.: 13

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

NOTICE OF ENTRY OF ORDER

PLEASE TAKE NOTICE that on the 9th day of June, 2016 an Order was entered in the above-referenced Court. A copy of which is attached hereto.

Dated this 10 day of June, 2016.

MARQUIS AURBACH COFFING

By _____
Jack Chen Min Juan, Esq.
Cody S. Mounteer, Esq.
10001 Park Run Drive
Las Vegas, Nevada 89145
Attorneys for APCO Construction

MAC:05161-019 2819046_1

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

CERTIFICATE OF SERVICE

I hereby certify that the foregoing TITLE was submitted electronically for filing and/or service with the Eighth Judicial District Court on the 10th day of June, 2016. Electronic service of the foregoing document shall be made in accordance with the E-Service List as follows:[1]

Bennett Tueller Johnson & Deere

Contact	Email
Benjamin D. Johnson	ben.johnson@btjd.com

Brian K. Berman, Chtd.

Contact	Email
Brian K. Berman, Esq.	b.k.berman@att.net
Attorneys for Read Mix Inc.	

Cadden & Fuller LLP

Contact	Email
Dana Y. Kim	dkim@caddenfuller.com
S. Judy Hirahara	jhirahara@caddenfuller.com
Tammy Cortez	tcortez@caddenfuller.com

David J. Merrill P.C.

Contact	Email
David J. Merrill	david@djmerrillpc.com

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
Gina LaCascia	glacascia@djplaw.com

Fox Rothschild

Contact	Email
Jineen DeAngelis	jdeangelis@foxrothschild.com
Richard I. Dreitzer	rdreitzer@foxrothschild.com

GERRARD COX & LARSEN

Contact	Email
Aaron D. Lancaster	alancaster@gerrard-cox.com
Douglas D. Gerrard	dgerrard@gerrard-cox.com
Kanani Gonzales	KGonzales@Gerrard-cox.com
Kaytlyn Bassett	kbassett@gerrard-cox.com

[1] Pursuant to EDCR 8.05(a), each party who submits an E-Filed document through the E-Filing System consents to electronic service in accordance with NRCP 5(b)(2)(D).

Gibbs, Giden, Locher, Turner & Senet LLP		
	Contact	**Email**
	Becky Pintar	bpintar@ggllt.com
	Linda Compton	lcompton@ggllts.com
	Attorneys for Masonry Group Nevada Inc.	
Gordon & Rees		
	Contact	**Email**
	Marie Ogella	mogella@gordonrees.com
	Robert Schumacher	rschumacher@gordonrees.com
	Attorneys for Selectbuild Nevada Inc.	
Gordon & Rees LLP		
	Contact	**Email**
	Brian Walters	bwalters@gordonrees.com
GRANT MORRIS DODDS		
	Contact	**Email**
	Steven Morris	steve@gmdlegal.com
	Attorneys for Camco Pacific Construction Co Inc; Fidelity & Deposity Company of Maryland; and Cellcrete Fireproofing of Nevada Inc	
Greenberg Traurig, LLP		
	Contact	**Email**
	6085 Joyce Heilich	heilichj@gtlaw.com
	7132 Andrea Rosehill	rosehilla@gtlaw.com
	7368 Sandy Jackson	jacksonsa@gtlaw.com
	CNN Cynthia Ney	neyc@gtlaw.com
	IGH Bethany Rabe	rabeb@gtlaw.com
	IOM Mark Ferrario	lvlitdock@gtlaw.com
	LVGTDocketing	lvlitdock@gtlaw.com
	MOK Moorea Katz	katzmo@gtlaw.com
	QSN Shayna Noyce	noyces@gtlaw.com
	WTM Tami Cowden	cowdent@gtlaw.com
	Attorneys for Club Vista Financial Services LLC	
Holley, Driggs, Walch, Puzey & Thompson		
	Contact	**Email**
	Jeffrey R. Albregts, Esq.	jalbregts@nevadafirm.com
	Attorneys for Arch Aluminum and Glass Co.	
Howard & Howard		
	Contact	**Email**
	Gwen Rutar Mullins	grm@h2law.com
	Kellie Piet (Legal Assistant)	kdp@h2law.com
	Wade B. Gochnour	wbg@h2law.com
	Attorneys for APCO Construction; Hydropressure Cleaning Inc; Custom Select Billing Inc; and Wiss, Janney, Elstner Associates, Inc.	
Jolley Urga Woodbury & Little		
	Contact	**Email**
	Elizabeth J. Martin	em@juww.com
	Kelly McGee	kom@juww.com
	Martin A. Little, Esq.	mal@juww.com
	Michael R. Ernst	mre@juww.com
	Attorneys for Pape Material Handling, Steel Structures Inc., Nevada Prefab Engineers Inc, Pape Rents	
Kemp, Jones & Coulthard		

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

	Contact	Email
	Erica Bennett	e.bennett@kempjones.com
	J. Randall Jones	jrj@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
	Attorneys for Bradley J. Scott	

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

McCullough, Perez & Dobberstein, Ltd.

Contact	Email
Eric Dobberstein, Esq.	edobberstein@mcpalaw.com
Christine Spencer	cspencer@mcpalaw.com
Attorneys for Imsulpro Projects Inc.	

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
Attorneys for Scott Financial Corporation	

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
Eric Zimbelman	ezimbelman@peelbrimley.com
Gina Dillingham	gdillingham@peelbrimley.com
Kathy Gentile	kgentile@peelbrimley.com
Ronnie Cox	rcox@peelbrimley.com
Attorneys for Various Lien Claimants, S R Bray Corp, and SWPPP Compliance Solutions LLC	

Pezzillo Lloyd

Contact	Email
Jennifer R. Lloyd	Jlloyd@pezzillolloyd.com
Marisa L. Maskas, Esq.	mmaskas@pezzillolloyd.com

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

Procopio Cory		
	Contact	**Email**
	Timother E. Salter	tim.salter@procopio.com
	Attorneys for Unitah Investments LLC	
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
	Attorneys for Unitah Investments LLC	
Procopio Cory Hargreaves & Savitch LLP		
	Contact	**Email**
	Cori Mandy, Legal Secretary	cori.mandy@procopio.com
	Attorneys for Unitah Investments LLC	
Procopio, Cory, Hargreaves & Savitch		
	Contact	**Email**
	Elmer Flores	elmer.flores@procopio.com
	Joseph Frank	joseph.frank@procopio.com
	Attorneys for Unitah Investments LLC	
Procopio, Cory, Heagreaves & Savitch		
	Contact	**Email**
	Lenore Joseph	calendaring@procopio.com
	Attorneys for Unitah Investments LLC	
Richard L. Tobler, Ltd.		
	Contact	**Email**
	Richard Tobler	rltltdck@hotmail.com
	Attorneys for National Wood Products, Inc.	
Rooker Rawlins		
	Contact	**Email**
	Legal Assistant	rrlegalassistant@rookerlaw.com
	Michael Rawlins	mrawlins@rookerlaw.com
T. James Truman & Associates		
	Contact	**Email**
	District filings	district@trumanlegal.com
	Attorneys for Professional Doors & Millworks LLC, Noorda Sheet Metal Company, E & E Fire Protection LLC, Pressure Grout Co	
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
	Attorneys for Supply Network Inc.	
Watt, Tieder, Hoffar & Fitzgerald, L.L.P.		
	Contact	**Email**
	David R. Johnson	djohnson@watttieder.com
	Jennifer MacDonald	jmacdonald@watttieder.com

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

Attorneys for Granite Construction Company	
Williams & Associates	
Contact	**Email**
Donald H. Williams, Esq.	dwilliams@dhwlawlv.com
Attorneys EZA P.C., Patent Construction Systems, Oz Architecture of Nevada Inc	
Wilson Elser Moskowitz Edelman & Dicker	
Contact	**Email**
E-File Desk	EfileLasVegas@wilsonelser.com
Hrustyk Nicole	Nicole.Hrustyk@wilsonelser.com
Reuben H. Cawley	Reuben.Cawley@wilsonelser.com
I-Che Lai	I-Che.Lai@wilsonelser.com

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

N/A

an employee of Marquis Aurbach Coffing

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

MAC:05161-019 2819046_1

CLERK OF THE COURT

Marquis Aurbach Coffing
Jack Chen Min Juan, Esq.
Nevada Bar No. 6367
Cody S. Mounteer, Esq.
Nevada Bar No. 11220
10001 Park Run Drive
Las Vegas, Nevada 89145
Telephone: (702) 382-0711
Facsimile: (702) 382-5816
jjuan@maclaw.com
cmounteer@maclaw.com
Attorneys for APCO Construction

DISTRICT COURT
CLARK COUNTY, NEVADA

APCO CONSTRUCTION, a Nevada corporation, Plaintiff, vs. GEMSTONE DEVELOPMENT WEST, INC., A Nevada corporation, Defendant. AND ALL RELATED MATTERS	Case No.: A571228 Dept. No.: 13 *Consolidated with:* *A574391; A574792; A577623; A583289; A587168; A580889; A584730; A589195; A595552; A597089; A592826; A589677; A596924; A584960;A608717; A608718 and A590319* Hearing Date: June 20, 2016 Hearing Time: 9:00 a.m.

ORDER: APPOINTING SPECIAL MASTER

This matter came before the Court on APCO's Motion to Appoint Special Master, with Limited Oppositions by Insulpro and the parties represented by Peel Brimley, LLP. All parties appeared through their respective counsel of record. Having reviewed all the pleadings, exhibits and oral arguments of counsel, the Court hereby adjudicates, finds and orders as follows:

1. APCO's Motion to Appoint Special Master is Granted;

a. Floyd Hale, Esq. shall be appointed as the Special Master;

b. All the parties shall meet with Special Master Hale within 10 days or as soon as the Special Master is available to set the case management order, coordinate the discovery / depositions and address related matters;

c. After completion of such discovery as the Special Master may allow, the Special Master, upon the request of any party, shall conduct hearings to ascertain and report

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

upon the liens and the amount justly due thereon, if any, that is owed to the parties and on other respective claims and defenses;

2. It is also ordered that the Special Master appointed pursuant to this Order shall be compensated at an hourly rate of $350.00 per hour. The compensation of the Special Master shall be paid 25% by APCO, 25% by Camco, and 50% by the remaining lien claimants;

3. It is further ordered that to the fullest extent permitted by NRS 108.239 and NRCP 53, Special Master shall, without limitation, have the power and authority to, among other things:

a. Review all pleadings, papers or documents filed with the Court concerning the action, and coordinated and enter Case Management Order and amendments thereto;

b. Coordinate and make orders concerning discovery of any books, photographs, records, papers or other documents by the parties, including the disclosure of witnesses and the taking of deposition of any party;

c. Order any inspections of records, site of the property, by a party and any consultants or experts of a party;

d. Order mediation or settlement conferences, and attendance a those conferences by counsel and any representatives of the insurer of a party;

e. Require any attorney representing a party to provide statements of legal and factual issues concerning the action; and

f. Refer to the Court which the action is commenced on any matter requiring assistance from the Court.

////

////

////

////

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

g. Hear all discovery and/or scheduling motions.

IT IS SO ORDERED this 9th day of June, 2016.

DISTRICT COURT JUDGE DENTON

Respectfully submitted by:

Jack Chen Min Juan, Esq.
Nevada Bar No. 6367
Cody S. Mounteer, Esq.
Nevada Bar No. 11220
10001 Park Run Drive
Las Vegas, Nevada 89145
Telephone: (702) 382-0711
Facsimile: (702) 382-5816
jjuan@maclaw.com
cmounteer@maclaw.com
Attorneys for APCO Construction

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

MAC:05161-019 2815915_4

EXHIBIT 5

Electronically Filed
05/08/2017 09:41:15 AM

CLERK OF THE COURT

SMR
FLOYD A. HALE, ESQ.
Nevada Bar No. 1873
JAMS
3800 Howard Hughes Pkwy, 11th Fl.
Las Vegas, NV 89169
Ph: (702) 457-5267
Fax: (702) 437-5267
Special Master

DISTRICT COURT

CLARK COUNTY, NEVADA

APCO CONSTRUCTION, a Nevada corporation, Plaintiff, v. 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

SPECIAL MASTER REPORT REGARDING DISCOVERY STATUS

This litigation was initiated by APCO Construction seeking damages for construction services performed for the construction of the Manhattan West mixed use development project located at 9205 West Russell Road, Clark County, Nevada. The APCO Complaint also sought a declaration ranking the priority of all lien claimants and secured claims. The Special Master and counsel drafted a Questionnaire for all parties to document what parties remain in the litigation, with a completed Questionnaire being required to continue in the lawsuit. On October 7, 2016, a Special Master Recommendation and District Court Order was entered confirming the only remaining 20 lien claimants.

This matter is set for trial on September 12, 2017. A Special Master Hearing was conducted on May 4, 2017, to confirm that discovery will be completed prior to the trial. Counsel for the parties agreed that the majority of discovery will be completed by the end of May, 2017. A Special Master Order will be entered allowing the remaining depositions and discovery to be completed by June 30, 2017. There will be no additional Special Master Hearings scheduled unless requested by the parties.

RESPECTFULLY SUBMITTED this 8th day of May, 2017.

By: */s/ Floyd A. Hale*
FLOYD A. HALE, Esq.
Nevada Bar No. 1873
3800 Howard Hughes Pkwy, 11th Fl.
Las Vegas, NV 89169
Special Master

EXHIBIT 6

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

DECLARATION OF CODY S. MOUNTEER, ESQ. IN SUPPORT OF MOTION FOR RECONSIDERATION

Cody S. Mounteer, declares as follows:

1. I am over the age of 18 years and have personal knowledge of the facts stated herein, except for those stated upon information and belief, and as to those, I believe them to be true. I am competent to testify as to the facts stated herein in a court of law and will so testify if called upon.

2. While APCO noticed Zitting's deposition on March 29, 2017, APCO and Zitting agreed to continue the deposition to permit the parties to spend less on attorneys fees, and more time engaging in settlement discussions.

3. Three months later, APCO noticed Zitting's deposition for June 28, 2017.

4. Following APCO re-noticing Zitting's deposition on June 28, 2017, APCO and Zitting, on or about July 12, 2017, again agreed to continue the deposition of Zitting's NRCP 30(b)(6) witness to engage in further settlement discussions that ultimately lead to the Settlement Conference conducted through the Court's settlement program that occurred on September 21, 2017. (See Notice of Scheduling Settlement Conference on file with the Court dated August 21, 2017).

5. Furthermore, to evidence the above and Zitting's willingness to delay its renoticed deposition in furtherance of settlement discussions, APCO and Zitting agreed to continue the hearing on APCO's Motion to Dismiss or for Summary Judgment on Lien Claimant's NRS CH 108 Claim for Foreclosure of Mechanics Lien. (See Joint Stipulation prepared and submitted by Zitting on file with the Court dated July 14, 2017).

Pursuant to NRS § 53.045, I declare under penalty of perjury under the laws of the State of Nevada that the foregoing is true and correct.

Dated this 5th day of January, 2018.

/s/ Cody Mounteer
Cody S. Mounteer

EXHIBIT 7

DISTRICT COURT

CLARK COUNTY, NEVADA

APCO CONSTRUCTION, a Nevada corporation, Plaintiff, vs. GEMSTONE DEVELOPMENT WEST, INC., A Nevada corporation, Defendant. AND ALL RELATED MATTERS	)	CASE NO: A571228 DEPT NO: 13

DEPOSITION OF SAMUEL ZITTING

PERSON MOST KNOWLEDGEABLE OF

ZITTING BROTHERS CONSTRUCTION COMPANY

LAS VEGAS, NEVADA

FRIDAY, OCTOBER 27, 2017

REPORTED BY: VANESSA LOPEZ, CCR NO. 902

JOB NO.: 427127

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

APPEARANCES:

For APCO Construction:

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

For Zitting:

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

Also Present: Lisa Lynn, APCO
Joe Pelan

INDEX

WITNESS: SAMUEL ZITTING

EXHIBITS

LAS VEGAS, NEVADA; FRIDAY, OCTOBER 27, 2017

9:00 A.M.

-oOo-

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

Whereupon,

SAMUEL ZITTING,

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

EXAMINATION

BY MR. JEFFERIES:

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

A. Samuel Zitting.

Q. Have you had your deposition taken before?

A. Yes.

Q. How many times?

A. I don't recall.

Q. More than five?

A. Possibly.

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

A. Yes.

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

the ground rules. There are a few that are important to me, but I do want to emphasize -- you understand you're under oath --

A. Yes.

Q. -- and is -- your testimony today -- as if you were testifying in a court of law?

A. Yes.

Q. If you don't understand my questions, let me know. I'll try and clarify it for you. If you answer the question, I'm going to assume that you understood it as asked. Okay?

A. Okay.

Q. In conversation, we tend to know where the other person is going. So if you let me finish my question before you start your answer, I'm going to let you finish your answer before I move on to my next question. Okay?

A. Fair enough.

Q. So if I say, Were you through with your answer? I'm not trying to be rude. I just want to make sure you were done, because when I ask my questions, I have some awkward pauses in my head. And so if you're answering the same way, I just want to make sure we're through with the answer. Okay?

A. Okay.

Q. What is your position with Zitting Brothers

Construction, Inc.?

A. President.

Q. How long have you held that position?

A. Around 25 years.

Q. Are you an owner of the company?

A. Yes.

Q. Are you the sole owner?

A. No.

Q. Who are the other owners?

A. Leroy Zitting, Jared Zitting, and William Zitting.

Q. Brothers?

A. Yes.

Q. What type of business is Zitting Brothers in?

A. Wood framing subcontractor.

Q. I'm going to shorthandedly use the term "the project." And when I do, please understand I'm referring to the Manhattan West project that brings us here today. Okay?

A. Okay.

Q. And unless I specify otherwise, as I use the term "project," it will refer to work that I believe Zitting did pre and post APCO being involved with the project. Okay?

A. Okay.

Q. What did you do to prepare for your deposition today?

A. Went over some of the documents that were

provided.

Q. Which documents?

A. I think -- I think the subcontract was in there, the schedule of -- the original schedule of change orders that is outstanding and the retention amount owing that's outstanding.

Q. When you say "schedule of change orders," what are you referring to?

A. There's a -- somewhere there was produced a list of change orders that we were saying we were still owed for when the project shut down.

Q. Is that something that you transmitted to APCO?

A. I think it's something that was produced -- produced in document production.

Q. Fair enough. Let me make sure my record is clear. The list that you're talking about, is it something that you transmitted to APCO prior to the litigation?

A. I believe so.

Q. Do you know how it was transmitted?

A. I don't without looking at it.

Q. Do you guys, by chance, have a copy of what you're referring to here today?

MR. DREITZER: That's exactly what I'm looking for right now. Let's see if I can -- I do know it had a Bates stamp number on it.

MR. JEFFERIES: All right.

MR. DREITZER: So it was produced.

MR. JEFFERIES: Okay. I -- again, for my purposes, I'm going to try and clarify it pre and post litigation.

Q. (By Mr. Jefferies) Okay. So while Rich is looking, you looked at the subcontract, schedule of change orders, and then?

A. Some e-mails.

Q. E-mail, okay. Do you recall what the e-mails -- and in asking you all these questions, I do intend to exclude e-mails with your counsel and discussions you had with your counsel. So please understand that. Okay?

A. Okay.

Q. Do you recall what e-mails you looked at?

A. I believe there were some e-mails between my office and Joe -- Joe Pelo (phonetic), I believe. I don't remember who all was included in the e-mail chain.

Q. Do you recall what the subject was?

A. Getting together final change order amounts and final contract amounts.

Q. Would this have been a list or a submission after you revised the labor rate?

A. It was actually some e-mails that were dealing with the labor rate.

MR. DREITZER: Go off the record for just one moment?

MR. JEFFERIES: Sure.

(Pause in proceedings.)

Q. (By Mr. Jefferies) You understand, sir, you're here today as the corporate designee for the topics in my PMK designation?

A. Yes.

Q. Okay. What was your personal role on the project, if any?

A. I mostly managed the office and made sure that change orders and payments were being processed appropriately, and came down, did job walks every couple weeks --

Q. Okay.

A. -- to make sure that things were running smoothly.

Q. So when you say you managed the office, you're doing it from your office in Utah?

A. Hurricane, yes.

Q. Who -- strike that.

How did your company staff the project on-site?

A. My brother Roy was the on-site project superintendent.

Q. Okay.

A. And he had a group of superintendents under him

and then a bunch of carpenters under them that were all Zitting Brothers employees.

Q. So Roy, if I can call him Roy --

A. Yeah.

Q. Just for clarity, Roy was the most senior person on your project?

A. That was on a day-to-day basis. I was more senior, but I wasn't there every day.

Q. Who had responsibility for documenting changes in the supporting cost labor time?

A. Roy.

Q. Roy, okay. Have you worked with APCO before?

A. Yes.

Q. How many times?

A. I thought we did one other job with APCO. So probably just one other job and it was actually successful.

Q. Okay. Obviously there were problems on the project with the owner, its financing. As you sit here today, do you have any complaints of APCO that are unrelated to the owner?

A. Yes.

Q. What are those?

A. They had a project manager named Shawn that was absolutely, in my mind, horrible -- what he was doing -- and unethical.

Q. What are you referring to?

A. He would direct -- direct you to do stuff on-site and then didn't seem like he was being transparent with the owner on the owner's side. And so it seemed like we could never get approval for the things he was directing us to do in an appropriate time.

Q. What type of things was he directing you to do?

A. The changes that are in question that he would never approve.

Q. Okay. Anything else in terms of a complaint against APCO?

A. No.

Q. Okay. Did you negotiate the subcontract --

A. Yes.

Q. -- with APCO? Who did you negotiate with?

A. I believe it was with Shawn and Joe.

Q. Okay. Are you the person that assumes that role for your company?

A. Yes.

Q. How many -- prior to the project, how many subcontracts would you say you negotiated, estimate?

A. In the hundreds.

Q. Okay.

MR. JEFFERIES: Mark that.

(Pause in proceedings.)

(Exhibit 1 was marked.)

Q. (By Mr. Jefferies) Sir, I'm going to show you what I've marked as Exhibit 1 to your deposition. Can you tell me what this is?

A. Looks like a subcontract agreement.

Q. Okay. There are handwritten changes in the text. Is that your handwriting?

A. I believe these are my initials, but I don't know if this is my handwriting or not. I don't believe that this is my handwriting. It's just my initials.

Q. Would this handwriting have been inserted at your request?

MR. DREITZER: Objection. Calls for speculation. You can answer.

MR. JEFFERIES: Well, that's fair. Let me rephrase.

Q. (By Mr. Jefferies) Do the handwritten changes reflect modifications to the subcontract that Zitting requested from APCO?

A. It appears to.

Q. Okay. And is that an SZ that represents your signature?

A. Yes.

Q. Okay. Do you know whose signature that is for APCO?

A. I do not.
MR. JEFFERIES: Who is that?
MS. LYNN: Shawn.
MR. JEFFERIES: Shawn.
Q. (By Mr. Jefferies) Okay. Some of these changes have Shawn's initials next to yours. Some of them don't. Do you see that?
A. Yes.
Q. Do you attribute any significance to the fact that Shawn did not initial any of those changes -- strike that.
Do you attribute any significance to the fact that Shawn did not initial some of your changes?
A. I do not, because he still initialed the bottom of each page.
Q. Can you explain why he even -- on the same page -- I'm looking at page 2 as an example -- he would have initialed specifically your change in the right-hand margin to paragraph 3.1 but not 2.1?
A. I don't -- I don't know why he would have done it.
Q. Did you ever discuss that with him?
A. No, not that I recall. I know that my -- my changes and markups were done prior to him initialing the pages at the bottom. So everything that I marked up happened previous to him in initialing the bottom of the page. So by initialing that page, you're essentially

agreeing to what's on that page previous to it. So I didn't deem it as significant.
Q. Had you or your company done work for Gemstone prior to the project?
A. We had never contracted with Gemstone, but we had worked on a Gemstone owned project.
Q. What is that?
A. We had worked on a different project that Gemstone owned, but we didn't contract directly with Gemstone before.
Q. What was the name of that other Gemstone project?
A. Manhattan Condominiums or Manhattan Apartments.
Q. When was that in relation to the project?
A. It was previous to this project by a couple years --
Q. Okay.
A. -- if I recall.
Q. Other than Gemstone, had you done work for any of Gemstone's principals prior to the project?
A. Other than Gemstone?
Q. Yeah, like Alex -- I'm drawing a blank on his name. You know who Alex is?
A. Edelstein?
Q. Yes. Had you done work for him before?
A. I had done a project, like I said earlier, that he was an owner of. The -- the Manhattan, but that was the

only other one.
Q. Did you do any work for Alex or any of his related entities after the project?
A. No.
Q. Would you agree that Exhibit 1 to your deposition reflects the final negotiated terms and conditions for your work on the project?
A. It would not.
Q. And why do you disagree with that statement?
A. Well, it's not the final -- it's not the final dollar amount, because it doesn't include any changes that were requested throughout, for -- for one -- for instance. Other than -- other than that, I would agree that it's the agreement that we settled on.
Q. Okay. Pursuant to Article 1.2, prior to starting work on the project, did Zitting review the design documents for sufficiency and accuracy?
A. I would assume we did.
Q. That's a yes?
A. Yes.
Q. Okay. And do you recall reporting any issues regarding the design documents to APCO prior to the start of your construction on-site?
A. I don't recall.
Q. Are you aware of any such paperwork in your

company files?
A. I don't recall.
Q. My question is a little different. Are you aware of the existence of any such documents?
A. I'm not.
Q. Okay. Pursuant to subparagraph 1.3, you understood that Zitting was bound to APCO to the same extent that APCO was bound to the owner. Correct?
A. As far as Nevada law allows.
Q. What do you mean by that?
A. I'm not an attorney, but there's certain statutes that require the contracting parties to be bound to each other, regardless of what happens with APCO or with -- with Gemstone.
Q. Give me an example.
MR. DREITZER: I'm going to object to the line of questioning as calling for a legal conclusion, but you can answer.
MR. JEFFERIES: It did spin off into one.
THE WITNESS: For instance, a pay if paid.
MR. JEFFERIES: Okay.
THE WITNESS: Or pay when paid.
MR. JEFFERIES: All right.
THE WITNESS: They're welcome to put that kind of stuff in writing, but it's not supported by Nevada statute.

Q. (By Mr. Jefferies) And did you know that before you negotiated and signed the subcontract?
A. I don't recall.
Q. Well, this is -- when did you sign this? Oh April 17, 2007. Prior to that time, were you aware that Nevada law precluded or somehow dealt with pay if paid provisions?
A. I don't recall.
MR. DREITZER: Same objection. Sorry. You can answer.
Q. (By Mr. Jefferies) When did you -- this contract says April of 2007. When did you actually start work on the project?
A. I don't recall.
Q. Okay. In paragraph 1.3, tell me what those first two sentences meant to you when you agreed to be bound to APCO to the same extent that APCO was bound to the owner?
A. I don't recall.
Q. Okay. Sir, you do realize you're the designee of the company to testify about these things?
A. I do.
Q. Okay. And --
A. We covered that earlier.
Q. Okay. And you're telling me you can't answer my question?

A. I told you I don't recall what that meant to me at the time I signed this.
Q. Okay. Well, sitting here as the corporate designee, what does that mean to you?
A. What does it mean to me now --
Q. Yeah.
A. -- or when I signed it?
Q. Well --
A. Because that's a different question.
Q. It is and that's fair. You're telling me you don't recall what it meant to you at the time you signed it. I get that.
But sitting here as the corporate designee, what does that sentence mean, that subcontractor is bound to the contractor to the same extent and duration that contractor is bound to owner?
MR. DREITZER: Same objection. It calls for a legal conclusion, but you can answer.
THE WITNESS: I think it means exactly what it says.
Q. (By Mr. Jefferies) How does it relate to APCO's obligation to pay you?
A. I -- I don't know. That's --
Q. Okay.
A. That's above my pay grade.

Q. Now, as I understand it, the work you did for APCO was called phase 1, which was Buildings 8 and 9. Is that right?
A. I don't recall how they phased it. I know that, primarily, our scope was in 8 and 9.
Q. For APCO?
A. Yes.
Q. Would you go to paragraph 3.4 within Exhibit 1. I've got a jump on you guys because mine's highlighted. Looking at about the third of the way down, it starts, As a condition precedent. Do you see that?
A. Yes.
Q. Why don't you read that to yourself.
A. Okay.
Q. Are you -- strike that.
As the corporate representative, you understand that, to the extent Zitting had outstanding claims -- that those were to be listed on the releases that you signed. Correct?
A. I didn't -- I didn't have that understanding.
Q. Do you see that language in paragraph 3.4?
A. I do.
Q. Okay. Did Zitting ever identify any outstanding claims, CORs on any of the releases that it signed?
A. I don't recall.

Q. The last two sentences reference the fact that, Any payments to subcontractors shall be conditioned upon receipt of the actual payments by contractor from owner. Subcontractor herein agrees to assume the same risks that the owner may become insolvent that contractor has assumed by entering into the prime contract with the owner.
Do you recall assuming that risk when you signed this subcontract?
A. I don't.
Q. As you sit here today as the corporate designee, do you agree that Zitting assumed that risk of owner nonpayment or insolvency?
A. I do not.
Q. Why not?
A. Because I -- at this point, sitting here today, I have the knowledge of a statute that exists that says the pay if paid, which this basically is, is not supported by Nevada law.
Q. You signed a lot of those type of pay if/pay when paid clauses, haven't you?
A. I don't know.
Q. Wouldn't you agree, sir, that in the hundreds of subcontract forms that you negotiated, that that is a pretty standard clause?
A. I don't --

MR. DREITZER: Objection.
THE WITNESS: -- recall.
MR. DREITZER: Calls for a legal conclusion.
THE WITNESS: I don't recall.
Q. (By Mr. Jefferies) Would you look at paragraph 3.5. First two sentences of Exhibit 1 state, Progress payments will be made by contractor to subcontractor within 15 days after contractor actually receives payment for subcontractor's work from owner.
A. Yes.
Q. Progress payment to subcontractor shall be 100 percent of the value of subcontract work completed, less 10 percent retention during the preceding month, as determined by the owner.
Would you agree that Zitting agreed to that payment schedule for the progress payments?
A. I agree that it's in this contract.
Q. Yes?
A. I agree that it's -- I -- I agree with what you -- I agree that what you just read exists in this contract.
Q. Okay. And that was the payment schedule that Zitting agreed to at the time. Correct?
A. Apparently.
Q. Is that a yes?
A. It appears that that was the case, yes.

Q. The bottom of page 3, still within paragraph 3.5, the subcontract states, Any payments to subcontractor shall be conditioned upon receipt of the actual payments by contractor from owner. Zitting agreed to that precondition at the time. Correct?
A. It appears that it was in the document I signed when I signed it.
Q. So that's a yes?
A. Yes.
Q. The next sentence, you -- do you agree that Zitting knowingly assumed the risk that the owner may become insolvent?
MR. DREITZER: Objection. Calls for a legal conclusion.
THE WITNESS: I agree that I signed this document that had this verbiage in it.
Q. (By Mr. Jefferies) Okay. Would you look at paragraph 3.8. Why don't you take a minute and review that provision. Then I'm going to ask you about it.
MR. JEFFERIES: Now you're giving me the sniffles.
MR. DREITZER: Sorry.
MR. JEFFERIES: It's all in my head.
MR. DREITZER: It's actually allergies.
THE WITNESS: All right. I've read it.
Q. (By Mr. Jefferies) Did Zitting agree to this

payment schedule for the retention?
A. I signed this document.
Q. Is that a yes?
A. I signed the document. You can take that however you want it.
Q. All right. As the corporate designee for today's deposition, would you agree that, by signing this document, Zitting agreed to that payment schedule for retention?
A. I would not.
Q. And why do you disagree with what I said?
A. I -- just saying that I signed this document the way -- the way it's stated, the way it's changed.
Q. Okay. I thought I was accounting for that in my question. So I'm going to have her re-read my question. I'm not trying to be difficult. So --
MR. JEFFERIES: And when you do the transcript, don't just say, Question re-read. Actually plug it in, so I have his answer, if you would. You know what I mean?
All right. I'm going to have her re-read my last question to you. Okay?
A. Okay.
MS. REPORTER: Let me know if this is the question.
(Question on page 24, line 6 was read back.)
THE WITNESS: Sorry. Yes.

MR. JEFFERIES: Okay. And that's why I like it plugged back in, so you and I know what you're re-reading. Thank you.
Q. (By Mr. Jefferies) You actually -- strike that.
There are five requirements for the release of retention, subparagraphs A through E. Agreed?
A. It appears to be.
Q. And to your -- your change actually clarified the handwritten addition of F, actually. You clarified when a building is to be considered complete for purposes of your retention. Right?
A. It appears so.
Q. Okay. I mean, that is a change you requested. Right?
A. Yes.
Q. Okay. As we sit here today, have -- strike that.
As we sit here today, has Zitting satisfied those requirements for release of retention?
A. To my knowledge, we did.
Q. Okay. Let's go through them. Maybe what I should do -- let's book in -- during what dates approximately -- I don't need specific, but if you can give me month and year -- did Zitting work for APCO on the project?
A. I don't recall.
Q. Is there somebody else at the company that would

know this type of information? Because this was within the scope of my PMK designation.

A. I'm your guy, but it's been roughly ten years. So for me to give accurate dates is difficult.

Q. And I respect that. The reason we lawyers do PMK notices is because, in my view of the world -- Rich doesn't have to agree or disagree -- you kind of -- it's incumbent on the person to kind of get prepared to talk about those topics.

So as I -- as you sit here today, are you prepared or able to tell me when Zitting worked for APCO on the project?

A. To the best of my memory.

Q. Okay. Tell me what that is.

A. I don't recall if we started before 2007 ended on this project or if we started in 2008.

Q. Okay.

A. I also don't recall if we did anything for APCO, specifically, into 2009 or not. So it's in the time frame of 2007 to 2009.

Q. Okay. Now we're getting somewhere.

A. The bulk of it was 2008.

Q. Okay.

A. So for me to tell you anything more finite than that, I wouldn't remember.

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

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

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

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

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

A. Yes.

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

A. No, it doesn't.

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

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

knowledge, not complete was some soffits in the kitchens, that there was an issue with the assembly -- the fire assembly or something. So they were not done, but they had done flooring under them and they had even done some cabinets in some areas.

And so there was some open soffits that they were still waiting for clarification or design on. And to my knowledge, that's the only thing that was not complete, in terms of drywall.

Q. So the bottom line is the drywall was not complete when you stopped working for APCO. Correct?

MR. DREITZER: Objection. Calls for a legal conclusion.

THE WITNESS: My belief is that the drywall was complete, but they had to add some more soffit steel. So the drywaller was still doing whatever changes he was being directed to do or whatever changes the assembly needed. So I don't know how -- how to really dice that any different than that.

Q. (By Mr. Jefferies) So based on your answer, the drywaller wasn't finished. Right?

MR. DREITZER: Objection. Misstates his testimony. You can answer.

THE WITNESS: I'm not -- I'm not the one that was administering his contract. So APCO would be a little

better person to ask that question to.

MR. JEFFERIES: Okay.

THE WITNESS: I know the building was covered up with drywall, which was the intent of this -- this change in this contract. So the intent of what was written was complied with.

Q. (By Mr. Jefferies) Okay. Did you go to work for CAMCO after APCO?

MR. DREITZER: Objection. Calls for a legal conclusion.

THE WITNESS: I remember -- I remember CAMCO coming onto the site and we were pretty much done with everything in our scope. And I believe they asked us to do a few things for them which we did. I don't remember if there was any kind of a formal agreement or anything or any understanding that they would be paying us versus APCO paying us. I don't recall any of that, but I do remember, for instance, like, they asked us to put up some safety rails which we complied with. I don't remember what the arrangements were though.

Q. (By Mr. Jefferies) Okay. One of my topics in the notice -- I think we've got . . . the notice . . .

MR. DREITZER: Counsel, is that the second amended --

MR. JEFFERIES: Yes.

MR. DREITZER: Okay. I've got it.
MR. JEFFERIES: I'm just going to mark it, just so I got it tagging along with the depo.
MR. DREITZER: So that will be 2.
(Exhibit 2 was marked.)
Q. (By Mr. Jefferies) Sir, showing you what I've marked as Exhibit 2 to your deposition, just for the record, this is the topics. Topic 9. Did you -- it relates to CAMCO. Did you have a ratification agreement with CAMCO?
MR. DREITZER: Objection. Calls for a legal conclusion.
THE WITNESS: I don't know of any. I don't recall any ratification agreement with CAMCO.
Q. (By Mr. Jefferies) How much work did you do after APCO left the project for CAMCO or Gemstone?
A. Almost none. Very little.
Q. Okay. Were you paid for that work you did after APCO?
A. I don't believe so.
Q. Do you have any photographs, video, or other documentation that would show the state of the drywall at the point that you stopped work for APCO?
A. I believe that we've turned over any -- any documentation that we have along those lines, if any.
Q. Okay. My question was a little different. Are

you aware of any photos that would show the state of the drywall when you stopped working for APCO?
A. I don't believe so.
Q. Okay.
A. It would be interesting to see how much of the -- there's -- the drywaller's scope they had billed APCO for.
Q. Okay.
A. I don't know if that's ever been produced.
Q. While you -- let's look back at paragraph 3.8 of the subcontract, Exhibit 1. We've talked about subparagraph A, the completion as you further defined it in subparagraph F. Subparagraph B was the approval and final acceptance of the building work by owner.
While you were working for APCO, did that occur, to your knowledge?
A. I have no knowledge of that.
Q. Okay. Next item is, See receipt of final payment by contractor from owner. Do you have any personal knowledge or information to suggest whether that occurred?
A. I do not.
Q. Item D is delivery to contractor from subcontractor, all as-built drawings for its scope of work, and other closeout documents.
Did Zitting ever satisfy that requirement?
A. I don't recall.

Q. Do you know?
A. I don't recall.
Q. Prior to today, have you seen any records in your file that would reflect the transmittal of that type of closeout documentation and as-builts?
A. Not that I recall.
Q. Subparagraph E, it says, Delivery to contractor from subcontractor, release and waiver of all claims from all subcontractors, laborers, material and equipment suppliers, and subcontractors providing labor or materials or services to the project. Did you do that?
A. I don't recall.
Q. Do you know if you did that?
A. I don't recall if I did or not.
MR. JEFFERIES: Rich, it seems like as the corporate designee, he should be better prepared to talk about some of this --
MR. DREITZER: Well, I think he is prepared and I think that as you -- as you rephrased a couple of questions before and you got into the topic, he was able to kind of meet you where you wanted to go on some of the stuff. So I think if you rephrase it, he may be able to get there.
MR. JEFFERIES: Fair enough.
Q. (By Mr. Jefferies) As the corporate designee -- strike that. And that's probably a fair clarification.

So what I'm going to try and do is ask a question that I think that accounts for his comment, that I don't have to reask paragraphs -- question about paragraphs B through E. Okay?
A. Okay.
Q. As the corporate designee sitting here today, are you aware of any documentation or other information to suggest that the conditions referenced in B through E were satisfied by Zitting?
A. I know that every draw request that we put in, we had to submit conditional labors for the period we were submitting from any supplier, sub, and -- and a final for the period previous to that. So I know that we complied with that. I just don't recall specific ones that I've seen.
Q. Okay. And, admittedly, I think the record reflects there are periodic conditionals and unconditionals. I get that. You would agree, though, that this subparagraph E in paragraph 3.8 is dealing with a final from your lower tier people. Right?
A. Yes.
Q. Okay. So since you called out the releases, let me make sure my record is clear. Sitting here today as the corporate designee, do you have any information to suggest that Zitting satisfied the conditions in B, C, and D of

paragraph 3.8?
A. I believe that I could go to my files and find lien waivers from all the suppliers --
Q. Okay.
A. -- for the draws that we submitted.
Q. No, I respect that. I -- I carved E out. E relates -- E relates to the releases. Do you see that?
A. Yeah, I do.
Q. Okay. So I'm carving those out. I hear your words and I understand what you're telling me. So I'm going to exclude that. So let me make sure my record is clear.
Sitting here as the corporate designee, are you aware of any documents, facts, information to suggest that Zitting met the conditions of subparagraphs B, C, and D of paragraph 3.8?
A. Let me re-read them.
(Pause in proceedings.)
THE WITNESS: I don't know of any documents that we have in our files that pertain to these sections.
Q. (By Mr. Jefferies) All right. So our record is clear for both of us, I'm going to have her re-read the question now that you've reviewed the document and I think you're able to answer it.
MR. JEFFERIES: So, again, plug it in here.
MR. DREITZER: Thank you.

(Question on page 34, line 9 was read back.)
THE WITNESS: I'm not aware of any.
Q. (By Mr. Jefferies) And then with regard to E, there are periodic releases that I have seen in the file.
A. Okay.
Q. So my question is: Prior to today, do you have any facts, information, documents to suggest that Zitting has tendered final releases from its lower tier subs or suppliers?
A. I believe there has been final releases submitted for lower tier suppliers.
Q. Okay.
A. We actually paid our bills. That's not where the problem occurred.
Q. Sitting here today, do you have any personal knowledge as to -- well, strike that.
Describe for me, sir, what you understood to be the payment application process on the project?
A. I understood it to be each month on a designated date. We submit progress billing for work that was completed for the previous period. And along with that, we submitted conditional waivers from all of our lower tier subs and suppliers and then we also submitted final labors for the previous period from -- from the same set of people.
Q. Okay. And you were paid by APCO or the owner

through funds control?
A. I don't recall how the -- how that was set up on the job.
Q. Okay. Do you recall there being a Nevada Construction Services that facilitated the release? Is that the proper name?
MS. LYNN: Mm-hmm.
Q. (By Mr. Jefferies) Release of money.
A. I don't recall how this particular job was handled that way.
Q. Okay. Do you recall, over the last approximate two months that APCO was on the project, there was joint checks being issued?
A. I don't recall that.
Q. How -- strike that.
What was your standard practice for delivering the pay applications to APCO?
A. I believe back then we were just using a good old fax.
Q. In paragraph 3.9 of Exhibit 1, it states, Subcontractor agrees that contractor shall have no obligation to pay subcontractor for any changed or extra work performed by subcontractor, until or unless contractor has actually been paid for such work by the owner.
Did you agree to that -- strike that.

Sitting here as the corporate designee, would you agree that Zitting accepted that payment schedule for change orders?
A. With some changes and modifications, it appears that I did.
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.
Q. I don't see the reference to owner payment in there, in that language.
A. But it was a continuation of the first sentence in 3.9. So it was finishing that thought that was expressed in 3.9.
Q. Oh, I see. So you're saying it's a continuation of the sentence before or is it -- and I'm not trying to be argumentative. I want to make sure I understand what your intent was.

A. Yeah, that's why I started with, Unless.
Q. Okay. So you're -- unless what?
A. Unless subcontractor has an executed or approved change order.
Q. Okay.
A. So I was trying to continue the sentence.
Q. All right.
A. The first sentence of 3.9.
Q. So your -- if I understand your testimony, your entitlement to a change order could be determined separate, apart from whether the owner paid APCO, if you had executed approved change orders?
A. That was my intention here.
Q. My statement is correct, yes?
A. Yes.
Q. Okay. Did you --
MR. DREITZER: Hold on one second. Go -- you don't have to go off. Do you need a break, because we're about at an hour.
THE WITNESS: Yeah, whatever is --
MR. DREITZER: Do you mind if we take a minute?
MR. JEFFERIES: Sure. No, we can do that.
(Pause in proceedings.)
MR. JEFFERIES: Let me ask it.
Q. (By Mr. Jefferies) Did you get -- I'm going to use your term -- executed and approved changers from APCO?
A. On some stuff we did. On other stuff, we got -- we got asked to do -- do the work and we were told that it would be approved and -- by Shawn and told it would be approved and told that it was approved, but he would never produce a document showing that it was approved. And so we had that struggle throughout the second part of the project with him. So verbally, yes, he approved them.
MR. JEFFERIES: Okay. I'll make this the last one. Then we can break.
MR. DREITZER: Sure.
Q. (By Mr. Jefferies) Given the list of schedule and change orders that you reviewed -- that you contend you weren't paid for, I assume --
A. Yes.
Q. -- okay -- do you have executed and approved change order forms from APCO on those?
A. Not on all of them.
Q. On some of them do you?
A. I believe so.
MR. JEFFERIES: All right. Let's take a break.
(Pause in proceedings.)
MR. JEFFERIES: Let's go back on the record.
Q. (By Mr. Jefferies) Sir, do you have -- as the corporate designee, do you have any information, documentation, evidence to suggest that APCO was paid your retention that you're seeking in this action?
A. Not that I know of.
Q. As you sit here today as the corporate designee, do you have any documents, facts, information to suggest that APCO received payment for the change orders you're seeking payment for in this action?
A. Not that I know of.
Q. Did you ever prepare any correspondence to APCO, transmitting claims or change order requests?
A. I'm sorry. Can you re-ask that?
MR. JEFFERIES: Why don't you read it. I can never do it the same twice. So I'm going to have her repeat.
(Question on page 40, line 9 was read back.)
THE WITNESS: I believe so. I believe they've been produced.
Q. (By Mr. Jefferies) A letter where you asserted a claim against APCO?
A. Well, we filed a lien.
Q. I respect that. I have the lien. Did you ever submit a written notice of claim to APCO?
A. I believe we sent them a change order log which was a claim, yes.
Q. Okay.
A. I believe we were looking at it earlier.
MR. JEFFERIES: Do you mind if we mark that, just because he keeps referring to it?
MR. DREITZER: No, let me fish it out. For the record, it's document ZBC1178.
MR. JEFFERIES: Thank you.
MR. DREITZER: Sure.
MR. JEFFERIES: Why don't you mark it. I'll see if we can get a copy of it.
(Exhibit 3 was marked.)
(Exhibit 4 was marked.)
(Pause in proceedings.)
Q. (By Mr. Jefferies) Sir, showing you what I've marked as Exhibit 4 to your deposition, have you seen this before today? And by "this," I will represent to you Exhibit 4 -- I have pulled some -- some handwritten notes. It's just one of a few in the file that I saw. And then I also pulled what looked to be, like, some field change directives and change requests that look -- so they're not -- you can tell by the Bates they're not sequential. I just pulled some examples to ask you about. Okay?
A. Okay.
MR. DREITZER: Oh, I thought they were.
MR. JEFFERIES: No, they're not.
MR. DREITZER: Okay. Glad you mentioned that.

Q. (By Mr. Jefferies) So please take a minute and look at those and then I want to ask you some general questions about it.

MR. DREITZER: Counsel, would it be okay if I just put the Bates number on the record really quick?

MR. JEFFERIES: Absolutely.

MR. DREITZER: So for Exhibit 4, it's ZBC2082, 2085, 2078, 2079, 2089, and 2086.

MR. JEFFERIES: Thank you.

MR. DREITZER: Thank you. Thanks.

THE WITNESS: Okay.

Q. (By Mr. Jefferies) Okay. So it's my understanding that, by at least September 6 of '08, Zitting was doing work for CAMCO. Would you agree with that?

A. It appears that way, yes.

Q. Okay. And tell me what the first page of Exhibit 4 is.

A. It appears to be an accounting of hours spent by Zitting employees doing change order work that was signed off by somebody with CAMCO, it looks like.

Q. Okay. As the corporate designee, do you have similar type of source documents for the change order requests that you have made against APCO, as are summarized in Exhibit 3?

A. Which is Exhibit 3? Oh, thanks. I believe we've

turned over all the source documents we have in our files. So whatever has been turned over is what we have. I don't believe there's any documentation we've withheld in regards to any of these change orders.

Q. So if I understand your answer, to the extent this type of source document or -- documentation or support for the amounts in a change order request -- those would be in the Bate-labeled documents that have been produced in this litigation?

A. Correct.

Q. Second page of Exhibit 4 is a field change directive. Actually, pages 2 and 3 of the exhibit are just different examples of the same form. Field change directive. Do you have any similar field change directives signed off by APCO for any of the change order requests that you're seeking in this action?

A. Anything that I have has been submitted as -- in the document request.

Q. Okay. Go to the last three pages of Exhibit 4 and tell me what form that is.

A. That's a change request form that's generated in our software system.

Q. What -- how do you use this form?

A. We use it as a way to document changes.

Q. Okay. As you sit here today as the corporate

designee, do you have any such forms issued to APCO for the change order requests that are outstanding in this litigation?

A. Anything that we have has been submitted in the document request.

Q. Okay. So it would have been Bates labeled and produced prior to today?

A. Yes.

Q. As the corporate designee today, have you seen any change order requests form, field directive form, or field notes that would support any of the change order requests you're seeking from APCO?

A. I don't recall.

Q. You don't recall seeing any?

A. I don't. It's been a long time.

Q. The -- what is the difference between a quote form and a change order request form?

A. Can you show me a quote form.

Q. Sure.

MR. JEFFERIES: Let's mark this.

MR. DREITZER: Exhibit 5?

MR. JEFFERIES: I think so.

Q. (By Mr. Jefferies) Sir, I'm showing you what I've marked as Exhibit 5, which this is an example of -- you'll see some of the Zitting forms.

MR. DREITZER: Right. No, I see that the -- this is roughly a eight- or nine-page exhibit. The cover page has a Bates on it of 2098, but everything else -- it's obviously Zitting paperwork, but it's unBatesed. So I'm assuming it has been produced and I'm assuming it lies elsewhere in the case, but we don't have Bates numbers for it at this point.

MR. JEFFERIES: That's my assumption as well. I don't want to -- the other thing I will represent to you is these were not sequential. I pulled these together --

MR. DREITZER: Okay.

MR. JEFFERIES: -- so that I could try and make some semblance of what I think is the summary sheet. And we will have them all together in one.

MR. DREITZER: Could I ask this just so -- as a favor of -- as you're talking about each document, if you can, you know, refer to dates and amounts just so we can key it back to something that's been Batesed later on. And if we have that as part of the record, we should be able to do that.

MR. JEFFERIES: Sure. Fair enough.

MR. DREITZER: Thank you.

Q. (By Mr. Jefferies) Okay. Sir, I assembled Exhibit 5. I was going to get to this, but you asked a question. If you go -- pick one of these, I believe these

are Zitting Brother bid forms. Is that right?
A. Yes.
Q. And they say "quote" in the upper right-hand corner, after -- or before a numerical designation. Do you see that?
A. Yes.
Q. Okay. What are these forms?
A. These are a field change form or a quote form. So when Roy was asked by APCO to do -- perform a certain change, he would summarize it in this form. And then if they told him to go ahead and do the work and -- then he would send these forms to me, and then I would typically summarize it into a change request form in our system or into a change order form.
Q. Okay.
A. So it would eventually get from the field copy into the software, basically.
Q. Okay. So these particular forms, because they say "quote" and then some of the language says "bid includes," this is -- this is kind of what your estimate of what this change could --
A. I don't know if this is reflecting an estimate or actual time and he was just using a form that said "quote" on it.
Q. Okay.

A. But it appears that he was actually summarizing actual time that was spent.
Q. How can you --
A. But I -- I'm just assuming that.
Q. That was going to be my question is: How can somebody tell whether this work has been done or not? Strike that.
Procedurally, given your standard practice, if this -- if the purported or extra change order work was actually performed, would you have processed it from these forms that are included in Exhibit 5 into a change order request like I have, for example, in Exhibit 4?
A. I would -- if -- if this -- if -- if this was actually performed, I would either put it into a change order request or write into a change order.
Q. And do you have change order -- okay. Strike that.
Change order form different than Bates label 2086, within Exhibit 4, or is that your change order form?
A. That's a change request.
Q. Okay.
A. And a change request -- the only difference, really, between a change request and a change order is a change request doesn't adjust our contract amount. Once you switch it into a change order, then that adjusts the

contract amount. So this is a little more preliminary than a change order --
Q. The change request --
A. -- in our system.
Q. Okay. So the progression would be from the . . . Document has "quote" written on it in Exhibit 5 to potentially either a change request, like we have in Exhibit 4, or a change order form?
A. Correct.
Q. All right. Okay. I'm going to come back to this, Exhibit 5, just because I want to understand -- well, shoot, we can do it while we're here. Do you have Exhibit 5 in front of you?
A. I do.
Q. Seen this document before today. Right?
A. I don't recall seeing it before today or before the topics. And I actually went over it today, this morning.
Q. Exhibit 5?
A. Yeah, this (gesturing) document.
MR. DREITZER: Do you mean the first page or the entire document?
THE WITNESS: First page. First page.
Q. (By Mr. Jefferies) I wasn't that nice to send over all my exhibits. So you wouldn't have seen Exhibit 5

in its entirety. Okay. Tell me what the first page of Exhibit 5 is?
A. It looks like an Exhibit C to the ratification. Submitted change orders.
Q. Okay. What ratification?
A. I do not know.
Q. Somebody on the first page of Exhibit 5 has been -- has gone through and listed change order requests, and some of them have an AR by them which is APCO responsibility. Do you see that?
A. I do.
Q. Do you know what that represents?
A. It appears that it represents somebody's interpretation of which ones were APCO responsibilities.
Q. Okay.
A. I don't know who generated this document originally though. I don't recognize it previous to today.
Q. Okay. As the corporate designee today, do you know if Zitting received payment for those items that are not designated AR on the first page of Exhibit 5?
A. I don't believe so.
Q. Did Zitting submit those items -- strike that.
Did Zitting submit any of the items on the first page of Exhibit 5 to CAMCO or Gemstone for payment?
A. I don't recall.

Q. As the corporate designee, do you know if Zitting received any payments from CAMCO or Gemstone after Zitting stopped working for APCO?

A. I don't believe so.

Q. Did you agree to reduce your labor rate down to $30 per hour for your change order request?

A. I saw some documentation in e-mails of such this morning that appears that I did.

Q. Is that a yes?

A. It appears that I did.

Q. Okay.

A. I don't have a personal memory of it, but based on the e-mails that I reviewed, it appears that I did.

Q. Okay. As the corporate designee, would you agree that Zitting agreed to reduce its labor rate to $30 per hour on whatever the outstanding change order requests were?

A. From the -- from the e-mails that I -- the e-mail chain that I reviewed this morning, it appears that . . .

MR. DREITZER: Counsel, could we possibly identify which e-mails we're talking about? I mean, if there's e-mails that firm that up, I'd like to have that part of the record.

MR. JEFFERIES: I don't know what -- he keeps referring to e-mails. I'm just trying to establish the fact.

MR. DREITZER: Okay.

MR. JEFFERIES: So that's why I'm asking it the way I am.

Q. (By Mr. Jefferies) I don't care what you looked at. I'm just trying to -- for purposes of today -- make sure we're on the same page. So as the corporate designee, would you agree that APCO rejected certain change order requests because it objected to your labor rate?

A. Based on an e-mail chain that I read, it appeared that that was the case.

Q. So that's a yes?

A. I don't have a memory of it. So I'm just going off of this limited e-mail chain and what was going on in it. I don't know if there was other conversation had outside. I don't know if somebody got mad and picked up the phone and called and had a discussion. I don't recall that.

And the e-mail chain isn't inclusive of -- of a conclusion, but that looks like that's the direction it was going. And I just -- unfortunately, it's been so long and there's so many -- so many phone conversations and so forth that -- that I don't have the benefit of recalling.

Q. Okay. Isn't it true, sir, that as the corporate representative for Zitting today, that APCO -- whether you agreed or not, APCO did reject some change order requests. Correct?

A. It appeared that they had.

Q. Okay. And as a result, Zitting repriced certain change order requests using a labor rate of $30 an hour. Correct?

A. Correct.

Q. Okay. Can you identify any -- well, let's see. I'm not sure how the list of change order requests . . . in Exhibit 3 and 5 . . .

MR. DREITZER: Well, Counsel, I can show you -- I can say that on Exhibit 3, No. 15 for 155,896 --

MR. JEFFERIES: I'm sorry. One more time.

MR. DREITZER: Sure. In Exhibit 3, Item 15 for 155,896 --

MR. JEFFERIES: Yeah.

MR. DREITZER: -- can be found on Exhibit 5, third line from the bottom, but I haven't matched them up one to one though.

THE WITNESS: Does anyone know who generated this document originally?

Q. (By Mr. Jefferies) Exhibit 5?

A. The cover of Exhibit 5.

Q. I can't personally represent to you. I found it in your document production. It has your Bates on it.

A. Okay.

MR. DREITZER: Can we go off the record for a

moment.

MR. JEFFERIES: Sure.

(Pause in proceedings.)

Q. (By Mr. Jefferies) Just while we were off the record, we compared the summary in Exhibit 3 and the summary in Exhibit 5, and it appears what you're designating as Nos. 22, 23, 24, and 25 on Exhibit 3 are not included in Exhibit 5. Correct?

A. Correct.

Q. And just looking at the timing, would you agree that Change Order Request 22, 23, 24, and 25 were done at the direction of CAMCO?

A. I would come to that conclusion based off of Exhibit 5 -- is it Exhibit 5? Somewhere I saw some actual CAMCO verbiage.

Q. I think it was Exhibit 4.

A. Is it Exhibit 4?

Q. First page.

A. Well -- but if you look further in, you've got . . .

MR. DREITZER: Oh, you're right.

THE WITNESS: CAMCO somewhere.

MR. DREITZER: Actually, in Exhibit 4, if you go to the fourth page in, which is ZBC2079, that's Change Request 24 which -- with a dollar figure of 19,9 and then --

MS. REPORTER: I'm sorry? Which will then?
MR. DREITZER: With -- which -- with a dollar figure of 19,900 that matches up to No. 22 on Exhibit 3.
THE WITNESS: And then going down, you get the same thing on the next page, 3750. So it would appear that these -- these last four changes were done after CAMCO showed up on-site.

Q. (By Mr. Jefferies) Okay. Let me make sure my record is clear. We've got a lot of rambling in there when we read this. Would you agree, sir, that what you're showing is Change Order Request 22, 23, 24, and 25 in Exhibit 3 were actually performed for CAMCO?

A. Performed under their direction. I don't know, contractually, how -- how that works. To my knowledge, I didn't have a contractual obligation to CAMCO. I had a contractual obligation to APCO. And so I don't know -- I don't know where that -- we did work for the project, work for the project under the contract that I had signed.

And I don't know if I had a real clear understanding of how APCO and CAMCO were interacting with each other or if they were interacting with each other, but it does appear that those were done after CAMCO showed up on-site.

Q. Okay. Let me -- let me -- I'm going to try and account for your answer in this next question. Would you

agree, sir, that the items that are designated 22, 23, 24, and 25 on Exhibit 3 were performed after APCO stopped working on the project and after CAMCO came onboard?

A. I would agree with that.

Q. Didn't you receive copies of correspondence from APCO and/or Gemstone -- words to the effect, There's a dispute between those two parties and APCO was stopping work on the project?

A. I don't recall.

Q. Did you take any steps to confirm what CAMCO's role was on the project?

A. I don't recall.

Q. Just given the issues on the project, you would have likely had to have confirmed their involvement before you performed extra work. Correct?

A. Correct. I just don't recall what their involvement, in my understanding, was.

Q. Was Zitting paid for Items 22 through 25 on Exhibit 3?

A. I don't believe so.

Q. May save us a lot of time with this question. As the corporate designee here today, if I were to walk you through the individual change order requests that are outlined Items 3 through 20, would you be able to explain to me the underlying factual basis as to why it was a change in

scope?

A. All I could do is rely on the description to lead me to believe what it was, but I would have to have a set of plans in front of me to -- to see what was -- what was shown or not shown and what prompted the change.

Q. Would you -- okay. So you can't do that sitting here today, other than just reading to me what I can read --

A. Mm-hmm.

Q. -- as the heading. Right?

A. Correct.

Q. Okay. Do you, as the corporate designee today, have the ability to explain to me how the amounts reflected in Change Order Request 3 through 20 on Exhibit 3 were calculated?

A. Without going and finding the supporting documentation, I don't have that ability.

Q. Okay. If you look at Exhibit 5 -- we can pick an example. Go to Quote No. 18 for $3,300.

A. What page is that? Oh, I'm sorry. It's not . . . 3300?

Q. Yes.

A. Okay. I got it.

Q. Can you tell, looking at this, if this work was actually performed?

A. I cannot, other than it says "presnap lines" on

No. 7, as per Herschel and Shawn's instructions. So this indicates that the work was done. And it was instructed verbally by John -- by Shawn. So beyond that, I can't verify it. From this document, that is.

Q. And go to the Quote No. 3, page before it, in the amount of $30,412. Can you tell, looking at this, whether this work was actually done or is this an estimate?

A. I can tell this work was actually done.

Q. Okay. How?

A. Because the description here says, Install, tighten screws for 8 and 9 in concrete, as directed by Shawn Bounds, in order to eliminate the problem with finishing the concrete around them and having them kicked out of place and not end up in the wall. This also fixes the problem of having the bolts come up under the studs.

Q. Okay.

A. So I know that that work was done. All the inspections were passed off. The bolts had to be in there in order to be passed off.

Q. Okay. Should there be a change order request or -- in your system or your files implementing this change or --

A. Not necessarily.

Q. No? Do you recall that APCO had rejected change order requests because of a lack of supporting

documentation?
A. I don't recall that.
Q. Do you recall the owner receiving copies of -- communications from the owner to APCO, that APCO then forwarded to you, that the owner was requesting further support for certain change order requests?
A. I don't recall that. Unfortunately, probably for everyone, in a sense, Shawn Bounds' method was verbal request, oftentimes. And he, oftentimes, failed to go and put his request in writing. Sometimes it's kind of a challenge to get as complete a picture of his changes as would -- otherwise would have.
Q. Well, you knew from your own change to the subcontract that, in order for you to get paid, you needed to have something signed off on by APCO. Correct?
A. That's what the contract states and that's why we kept pushing for something more than verbal. All the way through the job, we kept pushing him to get something more than verbal. Yeah, I'll get it. Yeah, I'll get it. Yeah, I'll get it. Do the work. I'll get it. Do the work. I'll get it. All the way through.
Q. Didn't you reach a point where you actually advised APCO that you're not performing any change order work unless you get something in writing?
A. I don't recall, but that sounds like something

that we possibly could have done based on the frustration we were having from them not -- from Shawn not producing something in writing for what he was asking us to do.
Q. Is it your testimony that, despite your saying that, you went ahead and continued to do change order work without anything in writing?
A. There may be some instances where we did changes without anything in writing, just verbally. And that's the frustrating thing about a contract is that verbiage relates to both parties.
Is APCO -- is APCO denying that this work was done?
MR. DREITZER: Let me -- let's let him ask the questions.
THE WITNESS: Okay.
Q. (By Mr. Jefferies) That's the nice thing about this process is I get to ask the questions.
A. Fine.
MR. DREITZER: We'll have our day.
THE WITNESS: All right.
Q. (By Mr. Jefferies) Okay. Why don't we flip through these. So you think Quote 3 has been performed historically?
A. Yes.
Q. Okay. I wasn't clear on Quote 18, the next

one, 3300 bucks. Can you tell?
A. That was performed.
Q. Okay. How about Quote 16?
A. That was performed.
Q. How about Quote 15?
A. That was performed. That was per Joe's instruction.
MR. PELAN: Wrong Joe. Joe Dehaas.
THE WITNESS: Oh, you're right.
Q. (By Mr. Jefferies) So you're concluding that these were performed because what, they have a date?
A. I'm concluding they were performed because of the inscription down here that says who instructed them to do it. And I'm also saying that based on the fact that I know that the work was completed which allowed the framing portion of the work to be -- receive final inspection pass off.
Q. Looking at the first page of Exhibit 5, I want to make sure the record is clear. You don't know who prepared this?
A. I don't recall who prepared this.
Q. Did you see a ratification agreement during the course of the project?
A. I don't recall any kind of a ratification agreement. Ratification of what?

Q. Well, I'm going to . . .
MR. JEFFERIES: Let's mark this.
MS. LYNN: Yeah.
MR. DREITZER: You need copies? Or we can take a minute.
MR. JEFFERIES: I have --
MS. LYNN: No, we have it.
MR. JEFFERIES: Thank you.
(Exhibit 5 was marked.)
(Exhibit 6 was marked.)
Q. (By Mr. Jefferies) Sir, I'm going to show you what I've marked as Exhibit 6 and this was in some Bates-numbered production.
MR. DREITZER: Okay.
Q. (By Mr. Jefferies) But showing you what's entitled Ratification and Amendment of Subcontract Agreement. This one is for . . .
MS. LYNN: Buckley.
MR. JEFFERIES: Buckley.
THE WITNESS: Really? I wouldn't have never come to that.
Q. (By Mr. Jefferies) Do you see that?
A. I do.
Q. Okay. In fact, if you look at the first page under change orders --

A. Mm-hmm.
Q. -- it references, Change orders. And attached hereto as Exhibit C are all the change orders that have been submitted by subcontractor to APCO prior to the effective date of this agreement which will correspond to what I marked as Exhibit 5, the first page.
A. Okay.
Q. Which is what prompted the question in my mind: Did Zitting have a ratification agreement like Exhibit 6 for the project?
A. I don't believe so.
Q. Have you ever seen a document form of agreement like this in relation to the project?
A. I don't believe so.
Q. Now, if you look at -- would you put Exhibit 3 in front of you and also Exhibit 5. Put that out of the way. And if you go to the Quote No. 3 within Exhibit 5, it totals 30,412. And if I'm reading the description, it says, Install, tighten screws. Do you see that?
A. Yes.
Q. Does that correspond with Item 20 on Exhibit 3?
A. I don't know if it's inclusive of, because the dollar amount changed. So apparently there was some jockeying back and forth between the time this was generated and the time this was generated.

Q. Well, that's why I'm asking the question: Would the difference be the difference in the labor rate?
A. I don't know the answer to that right off the bat. Might be a completely different scenario. I'm not sure.
Q. Well, let's look at -- go to the next one, Presnap lines.
A. Okay.
Q. I think it's Item 19 on Exhibit 3 and then Quote No. 18 within Exhibit 5. That number that looks to be the same scope of work, but it's now been reduced to 3300. Do you see that?
A. Yes.
Q. And would you agree that is based on the change in the labor rate?
A. It would appear to be. I'd have to take a calculator and see --
Q. If you don't mind --
A. -- what the labor rate would be.
Q. -- if you could back into it. If you're able to answer the question --
A. It appears to be the same change with a different price amount. And I know this one states $30 an hour. So it appears that that's the case. I just -- I haven't done the math backwards to --
Q. Do you mind?

A. No. It appears that this one was based off of $50 an hour for 110 hours and this one is based off of $30 an hour for 110 hours.
Q. Would you be able to do that same calculation on the first one we looked at for the tightened screws?
A. Let's try that. It appears that that's the case as well.
Q. Okay. I don't want to take the time to walk through all of these in Exhibit 5, but the numbers in Exhibit 5 do appear to be different from what you're showing on Exhibit 3, generally. Correct?
A. It -- it appears to be. It appears that there was some reduction in the field that didn't get translated into the office for work that was completed, on at least some of them.
Q. Well, all of the items that I included in Exhibit 5 are all based on the $30 rate, as you've calculated it.
A. Okay.
Q. Do you see that?
A. Yes.
Q. Isn't it true, sir, that you understood that APCO was rejecting your change order request unless and until they would get owner approval for those items?
A. It is not.

Q. And why do you say that?
A. That wasn't my understanding.
Q. APCO did reject your change orders. Right?
A. I don't recall.
Q. I thought we went through this.
A. There was some of them that they wanted a reduction in rate; they didn't reject it. And then there's some that were approved. So to throw them all in that one basket --
Q. Okay.
A. -- I don't agree with.
Q. Fair enough. Which ones do you believe were approved by APCO?
A. I'd have to go through them individually. I assume there was some that they actually approved early on that we billed for. And then I believe that there was some that they approved verbally that we were waiting to bill for until they brought their paperwork through which Shawn was horrible at. So they verbally approved all of them. So when you say "approved," then I have to try to define what that means.
Q. Okay. Would you look at Exhibit 1, the subcontract.
A. Okay.
Q. Paragraph 5 talks about changes and claims.

A. Which section?
Q. Five. Page 6.
A. Okay. Okay.
Q. Did -- does that comply with paragraph 5.1 and 5.2 by providing written notice of these claims to APCO?
A. This documentation shows that we did.
Q. Okay.
A. And the problem is we couldn't get anything in writing from APCO. So it kind of takes two parties to make a contract work. It's just not fair for APCO to list all of the terms of the contract and then not uphold any of the terms themselves and then hold us liable for that.
Q. Describe for me the process that you would go by, in terms of what change orders you would bill on a pay application.
A. Typically we wouldn't bill for any change orders until we've got a change order form from APCO that shows they've adjusted our contract amount. Then we would put it in our system as a change order which would change our contract amount and then we'd immediately bill for it if it was done.

Unfortunately, APCO, mostly Shawn, was not keeping up his end of that process. So it stalled our ability to bill them out, but he was still directing us to do everything and verbally approving them. And so all we could

do is send them a piece of paper from our side and . . .
Q. Why did Zitting comply with directions that it considered to be changes in scope if it wasn't getting anything in writing?
A. Because he was verbally telling us to do it and verbally telling us he'd get it in writing.

MR. JEFFERIES: No.
MS. LYNN: No, I just had it out . . .
MR. DREITZER: This one has the -- okay.
MR. JEFFERIES: Has all the answers on it.
THE WITNESS: Cheat sheet.
MR. DREITZER: Is this Exhibit 7?
(Exhibit 7 was marked.)

Q. (By Mr. Jefferies) Sir, showing you what I've marked as Exhibit 7. Appears to be an e-mail exchange, starts on April 2, 2008. Do you see that?
A. Yes.
Q. And at the bottom -- Roy, that's your brother? --
A. Yes.
Q. -- is stating one approved change order on this job. If we can't get this resolved in the next week, we will stop all extra work on Manhattan West. Is it your testimony that you proceeded with extra work from and after April 2, 2008, even without anything in writing?
A. I -- we may have gotten some stuff in writing, but

for the most part, we did not get change orders revising our contract amount from APCO after this date.
Q. Did you ever bill APCO for retention?
A. I believe so.
Q. Did you ever send APCO an invoice or pay application for retention while APCO was working on the project?
A. I don't believe so.
Q. Don't believe so?
A. I don't believe so.
Q. Did you ever send any correspondence or communications to APCO indicating that it was your position that APCO was somehow responsible for retention to Zitting?
A. I believe I sent them an invoice. That would suggest that I feel like they're responsible to pay it.
Q. Did you ever send any follow-up e-mail letter after you sent that invoice?
A. A lien.
Q. Okay. The lien went to the owner. Right?
A. I believe APCO got a copy of it.
Q. Let me make sure my record is clear. And when you're -- do you know what date you sent the pay application for the retention?
A. I don't recall.
MR. JEFFERIES: You got this?

MS. LYNN: Is it this one . . .
Q. (By Mr. Jefferies) Do you have proof that you delivered the pay application for retention to APCO?
A. I don't recall.
Q. Okay. Sitting here today as the corporate designee, do you have proof that Zitting delivered an application for payment for retention to APCO?
A. I don't know of proof right -- just from sitting here, but I'm under the assumption that we e-mailed it to them.
Q. E-mail, okay.
A. Or, excuse me, faxed probably back then.
Q. Did you -- that's why I was asking the question. When that amount obviously didn't get paid, did you send any follow-up letter or e-mail to APCO saying, APCO, you're somehow responsible for retention?
A. A lien.
Q. Other than the lien document?
A. I don't recall.
Q. Are you aware of any --
A. I don't --
Q. -- such --
A. -- recall any.
Q. All right.
A. If I was aware of it, I'd recall it,

theoretically.

Q. As the corporate designee here today, are you presently aware of any communications, letters, e-mails to APCO saying, You owe me retention, you haven't paid it, other than the lien?

A. None that I recall. None that I'm aware of.

Q. I'm going to show you, sir, what was previously marked as Exhibits 85 and 86 to Ms. Allen's deposition.

MR. DREITZER: Counsel?

MR. JEFFERIES: Yes.

MR. DREITZER: Go off the record for a second.

MR. JEFFERIES: Yeah.

(Pause in proceedings.)

Q. (By Mr. Jefferies) Okay. Do you have Allen Exhibit 85 in front of you?

A. Yes.

Q. Tell me what you're billing here.

A. Looks like we're billing for window installation and change orders.

Q. Okay. Can you walk me through the items you're billing here?

A. On the very last page --

Q. Okay.

A. -- down under the first place, it says Subtotal. And if you go across the top heading, it says, This period.

Q. Yep.

A. Everything under this period.

Q. So $20,500 for window installation?

A. Yes.

Q. Is that change order work or . . .

A. I'm not sure. The description is cut off, but it appears that it is, yes.

Q. The reason I ask, because it doesn't say changes. It just says, Window installation.

A. I think it's cut off. I think the description is cut off, but window installation was not in our original scope. So I would assume it's a change order.

Q. And you're only billing half, again, some schedule value?

A. Where are you seeing that?

Q. Well, if you look at --

A. Oh, I got you. Yeah, we had previously billed half. So we were billing the -- the final half.

Q. When was this work completed?

A. I don't recall.

Q. Your -- you didn't sign this pay application until January 30, 2009. Correct?

A. Correct.

Q. Why did you wait so long to submit this?

A. I don't recall.

Q. The next item says, Changes to plans, and then you have star AR. Do you see that?

A. Yes.

Q. Does that refer to APCO responsibility?

A. That appears to be kind of what has been going on throughout the documents.

Q. Okay. So that -- so that my record is clear, that AR reference, 257,957, is the same AR that is reflected on Exhibit 5. Correct?

A. I'd have to do a calculation to see if the two correlate amount-wise.

Q. Well, we can do that. I was trying to --

A. Because there's not a total on this exhibit.

Q. Okay. I was trying to simplify our respective lives. The AR designation is consistent between your pay application, 509, Allen Exhibit 85, and the AR designation in Exhibit 5. Correct?

A. Appears to be. I just don't know if the dollar amounts correlate.

MR. DREITZER: Counsel, can I just clarify? So are you asking him whether he's conceding that AR, as used in Allen Exhibit 85, stands for APCO's responsibility as it does in Exhibit 5?

MR. JEFFERIES: Yes.

MR. DREITZER: Oh, okay. Do you understand that

question?

THE WITNESS: And I -- yeah, I understand that question. I believe it does.

Q. (By Mr. Jefferies) Okay. Was Exhibit Allen 85 the first time that you formally did a pay application for those change order requests to the tune of 257,957?

A. I don't recall.

Q. You have another item, Options on Buildings 8, 9, 7 -- that's not being billed this period. Strike that.

If I go further down, you've got changes to plans. Looks like it should be GR. Is that right?

A. Yes.

Q. Okay. Is that Gemstone responsibility?

A. That's consistent with some of the -- well, I don't see GR here. I see APCO. So I don't know the answer to that.

Q. Well, that's your -- isn't that what you intended by "GR"?

A. I don't know.

Q. What did you mean when you used the term "changes to plans"?

A. That would mean change orders that were -- plan change orders. So revisions to the plan. So it looks to me like -- and -- it looks to me like everything was split up between AR and GR and it would -- it would -- it would make

sense that that's a Gemstone responsibility designation. I just don't know that indefinitely. And that would possibly be a way for APCO to split the stuff that they're paying for in-house and the stuff that they're billing Gemstone for, but I just don't know the answer to that.

Q. Okay. But however you did it, it was Zitting that did the AR and the GR designations on Allen Exhibit 85. Correct?

A. I don't know. I -- and I don't know what the GR -- I don't know for sure what that even stands for. We could make assumptions here.

Q. Well --

A. But I don't know if this is the right exercise for assumptions.

MR. DREITZER: And that also assumes that's an abbreviation, because it's cut off. It could be a whole other word.

MR. JEFFERIES: Yeah. Well, let me make sure my record is clear. I thought we did this earlier.

Q. (By Mr. Jefferies) You would agree that it looks like it's GR. Correct?

A. It looks like it could be an R, yeah. It looks like it's GR. I'm just making assumptions as to what that would mean. I don't know who created Exhibit C in Exhibit 5, but at the bottom they gave a little key that

says, AR equals APCO's responsibility. So I don't see a key anywhere that there's anything about that.

Q. Okay. If I asked you this, I apologize. In Allen Exhibit 85, you say Period 2, 6/30/2008. Why did you pick that time period?

A. I don't know the answer to that.

Q. And do you know why you waited until the end of January 2009 to submit this pay application?

A. I don't know if this was the first time this was submitted or not. I may have been repetitively billing it with no response. I just don't know.

Q. Are you able to tell me where the 423,654.85 comes on Allen Exhibit 85 for change orders?

A. I'd have to do a calculation, but I'm assuming it's those bottom two subtotals.

Q. The 107 and the 316?

A. Mm-hmm. That is correct. That's -- that total correlates.

Q. Would the 107,589.30 that is shown for changes to plans on Allen Exhibit 85 correspond to the item difference in bid set to permitted construction set on Exhibit 5?

A. Well, that's 155,000 on Exhibit 5. So the dollar amounts don't correlate.

Q. I respect that. I'm asking because I don't see any other reference to plan changes on your itemization of

outstanding change order requests either on your Exhibit 3 that we marked today or Exhibit 5. Would you agree?

A. That's probably because it wasn't outstanding. It was approved, potentially.

Q. Okay. Maybe I'm not being clear. I'm just trying to find an apple to an apple.

A. Okay.

Q. I recognize the dollars don't tie out, but topically and substantively, are those the same claims, if you will -- the difference in bid set to permitted construction set depicted on Exhibit 5 and what you've billed as changes to plans for 107,000 on Allen Exhibit 85?

A. I don't know the answer to that.

Q. Okay. In looking at Allen Exhibit 85, how much had you been paid as of January 30, 2009?

A. I don't think this reflects how much I've been paid. I think it reflects how much I've billed. So I don't think I can answer that question from this document.

Q. Okay. Let's look at Allen Exhibit 86. Now you're showing the billing period still under Application No. 509, but you're showing November 30, 2008. Do you know why you picked that date?

A. I don't.

Q. But you signed this document on January 30, 2009. Correct?

A. It appears so, yes.

Q. What are you billing in this pay application?

A. Retention.

Q. Is this the first time you've sought to bill retention?

A. I don't know the answer to that. I don't recall.

Q. What documentation do you have to confirm how much you've been paid on the project?

A. I believe any documentation that I would have for that would have been submitted in document request.

MS. LYNN: What's the date on the document . . .

MR. JEFFERIES: Before that, I think.

(Exhibit 8 was marked.)

Q. (By Mr. Jefferies) Sir, showing you what I've marked as Exhibit 8 to your deposition, can you identify that for me, please.

A. Looks like a statement of account for the Manhattan West project.

Q. Are these -- well, the first page shows an invoice dated 6/30/2008 for 347,441.67. Do you see that?

A. I do.

Q. That's the number reflected in Allen Exhibit 85. Right?

A. Yes.

Q. And it wasn't billed on June 30, 2008, was it?

A. I don't believe it was. I believe that it's an error. When you go in to create an invoice, you -- you can change the period.

Q. Okay.

A. And I believe someone failed to do that.

Q. Now, if you go to the second page of Exhibit 8, this doesn't have the cutoff on some of the letters we were looking at earlier. Is this a summary of all of the outstanding change orders in your mind?

A. It appears to be.

Q. Okay. Can you -- the first item is window installation. And I'm not asking you this to be obnoxious. Is there any way that you can find that reference in either Exhibit 3 or 5 or was it a prior change order that was actually signed?

A. I believe it was one that actually did get sent all the way through the system.

Q. Okay.

A. So it wasn't hanging out there.

Q. Okay. Item No. 2 is changes to plans and it has the AR. Now, this is your terminology in your system. So that's APCO responsibility, in your mind. Right?

A. I don't know where that came from. I don't know if that came off of this document, and I was just trying to conform with this document.

Q. Exhibit --

A. And I don't know who created this (gesturing) document. So this (gesturing) document says AR equals APCO's responsibility. So I don't know if -- if we sent all the changes into APCO and they -- they internally sorted and decided, Okay. This one goes to the owner, this one's us, this is owner, this is us, sent this back to us and said, Bill these in separate line items, so that we can bill the owner for this one. I just don't recall that. That seems logical.

Q. Okay. I didn't want to interrupt you, but in your answer, you were pointing to this document. You were pointing to Exhibit 5. Right?

A. Yes.

Q. Okay. As the corporate designee here today, would it be reasonable for us to conclude that the AR, as used in Zitting's internal accounting, corresponds to those items that you're designating as APCO's responsibility, consistent with Exhibit 5?

A. I would say yes.

Q. Okay. The next item in Exhibit 8 in the change order summary says, Options at Buildings 8 and 9. Is there a corresponding item in Exhibits 3 or 5 or do you believe that to be a change order?

A. I believe that to be something that was actually

processed through and our contract amount increased on APCO's books.

Q. Okay.

A. So I don't believe that it would have a reason to be on either of these lists.

Q. Three and five?

A. Correct.

Q. Then the last item is -- well, strike that.

Before I -- the APCO responsibility -- strike that.

Item No. 2 that has the AR designated on page 2 of Exhibit 8 -- when we take a break for lunch and so we don't have to do it on the record, would you all be willing to at least see if that 257,957 ties out to the ARs on Exhibit 5?

A. Yes.

Q. Okay. And which brings me to the last item and that was changes to plans, GR on page 2 of Exhibit 8. And I'm -- still have this lingering question as to whether that topical, slash, substantive issue is the item that was priced out at 155,896. So I'm rambling. I don't even think that's a question.

Does any of this refresh your recollection as to whether those two tie out?

A. It does not.

Q. Okay. If you go to page 3 of Exhibit 8, what does

this show that Zitting was paid on the project?

A. This document shows that we paid 3. -- $3,282,849.

Q. Okay. Which ties out pretty closely to the dollar amount on the less previous certificates for payment of Allen Exhibit 65. Correct?

A. Correct.

Q. Okay. So given the fact that those two numbers tie out, would it be fair to conclude prior to the July -- strike that.

Given those two payment numbers, between Exhibit 8, page 3 and Allen Exhibit 85, that, in fact, Zitting was paid everything that had billed prior to November -- excuse me, prior to January 30, 2009?

MR. JEFFERIES: Can you fix that? Fix that.

Q. (By Mr. Jefferies) Correct?

A. It shows there's an open amount of 750,807. So . . .

Q. I get that. I'm asking a different question. Given the fact that the numbers for payments received correspond, wouldn't it be fair to conclude that prior to you signing Allen Exhibits 85 and 86 on or about January 30, 2009, that everything you had submitted in the pay application had been paid?

A. I don't think that I would draw that conclusion. I'd rather go and look up actual cash receipts and come to a

number based off of that, in case there's an accounting error with accounts -- with the receivables. We may have been paid more than that at that point. I mean, payments to date, 3.2. As of 2 -- 4/6 of 2010, it seems too low on a $14 million contract.

Q. Well, as far as APCO goes, your -- the scope you did -- worked on for APCO was only Building 8 and 9 and that --

A. That was 14 million.

Q. -- original scope --

A. No.

Q. -- was approximately 3.6 million --

A. Oh, I'm sorry. Where is the subcontract?

MR. DREITZER: Exhibit 1.

MR. JEFFERIES: Or 3.2.

THE WITNESS: Where is the amount? What page is your dollar amount on, Joe?

MS. LYNN: I think 16.

MR. JEFFERIES: Sixteen.

THE WITNESS: What am I missing? I'm seeing a $14 million contract here.

Q. (By Mr. Jefferies) Well, I think you're right. When you -- when you factor in all the buildings, but --

A. So you're referring to Buildings 8 and 9?

Q. Yeah, but I don't want to talk you into anything.

I want to make sure our record is clear. Your phase 1 that brought us to this point was your work on Buildings 8 and 9 under the APCO subcontract. Correct?

A. Yes.

Q. Okay. So I'm showing you a document. APCO's position is that the original contract amount, based on your subcontract pricing, was 3 million --

A. 310.

Q. -- 610,000. Do you agree with that?

A. I'd have to go back and verify it, because I'm -- I've got the contract set up for the full 14,400,000. So . . .

Q. Can you confirm it based on page 16 and 17 of Exhibit 1?

A. So how does Building Type 4 and 5 correlate with Buildings 8 and 9? Does anyone know? Was Buildings 8 and 9 Building Type -- Building Types 4 and 5?

Q. If he answers, I'll have to swear him in. So we can do it off the record.

A. I was just thinking out loud. I was talking out loud. So 3.6 -- 311. What was that amount that APCO was claiming?

MR. JEFFERIES: Oh, let's go off the record. Do you mind?

MR. DREITZER: No.

(An off-the-record discussion was had.)

Q. (By Mr. Jefferies) Sir, while we were off the record, we had a discussion about -- while you're pricing in the original scope of Exhibit 1, the subcontract included in excess of $14 million, you would agree that your original scope, as directed, only included Buildings 8 and 9 which would be one Building Type 4 and two Type 5?

A. Yeah, that's my understanding.

Q. Okay. For an approximate 3,600,000 original contract price for phase 1?

A. That's what it appears to me, yes.

Q. All right. So we started down this path because I get these thoughts in my brain, but to firm up that -- you had been paid $3,282,849 as of April 6, 2010, the date of Exhibit 8, which --

A. Sorry. Which exhibit?

Q. Eight.

A. That appears to be correct.

Q. Which, given the billings, Allens Exhibit 85 and 86 would mean you had been paid everything you had submitted in a pay application. Correct?

A. Up to this point, correct.

Q. This point being April 6, 2010?

A. The only -- the only things that I show open are these -- are Exhibits Allen 86 and Exhibits Allen 85.

Q. Okay.

A. Everything else I show as paid.

Q. Okay. That's why I asked you this the way I did. Then I'm going to close this out, we'll go grab something to eat real quick.

A. Okay.

Q. So given your answer, Allen 80- -- Exhibit 85, it shows almost the exact amount that you -- showing you got paid in Exhibit 8. Right?

A. That is correct.

Q. Okay. Given that fact, doesn't that confirm to you that, as of January 30, 2009, you have been paid everything you had invoiced in a pay application prior to your issuance of Allen Exhibits 85 and 86?

A. That would appear to be the case.

Q. All right. Okay. I -- before we end, let's finish Exhibit 8. Go to the next two pages. Am I understanding that, in fact, Zitting has written off the retention and the change order billings?

A. It appears that I made a note of such. I don't -- I'd have to verify whether that actually happened on our books or not.

Q. That's what you're showing here. Right?

A. It appears that that was -- that's what I was shown, but I'd have to verify if that happened or not.

Q. What would you need to look at, because it actually looks like it's being done here in this aging detail. Would you agree?

A. It looks like the aging detail's showing a write-off of 403,365.

Q. Okay. That would be the retention?

A. I believe that number correlates with retention.

Q. Okay. And then go to page Bates label 120 within Exhibit 8. It looks like that 347,441 for change orders has, in fact, been written off. Correct?

A. It appears that way.

Q. Okay. All right.

A. The thing I would have to verify is our tax returns to make sure that, in terms of IRS purposes, it truly was written off. It appears that -- that it was on this document, but I'd have to verify.

Q. Okay. Let's grab a quick bite. If you guys -- before we go off the record, if you guys could -- if you wouldn't mind -- looking at Exhibit 5 and seeing if the ARs equate to the numbers you were showing on Exhibit 8.

A. Okay.

Q. And what I will do is make the corresponding commitment to go through my stack of remaining documents, seeing how much I truly need or what I can save for trial.

THE WITNESS: Okay.

MR. JEFFERIES: Let's go off the record.

(A lunch recess was taken.)

Q. (By Mr. Jefferies) Okay. Sir, while we were off the record for our lunch break, I had shown you my cheat sheet that's included in my version of Exhibit 5, and I will represent to you that what we did is we had Mary Jo put the corresponding August 8th, 2008, quote from you, from Zitting -- that, to my understanding, is based on the $30-an-hour rate and those quotes are what I've included in Exhibit 5.

So I know it's not fair to ask you this today, but as I understand it, based on our discussion off the record, you-all will confirm or look at this and get back to me on -- because, by our calculation, even the 257 in Exhibit --

MR. DREITZER: Five?

MR. JEFFERIES: -- 8 --

MR. DREITZER: Oh, 8.

MR. JEFFERIES: -- would actually -- using your revised pricing -- go down to 176. That's -- you don't have to respond to that. That's just me popping off for the record.

MR. DREITZER: Okay.

MR. JEFFERIES: Okay.

MR. DREITZER: I understand how you get there. We

need to run through it. So we'll do that.

(Exhibit 9 was marked.)

(Exhibit 10 was marked.)

Q. (By Mr. Jefferies) Sir, showing you what I've marked as Exhibit 10. Is -- it's Mr. Pelan's letter of April 18, 2008. I think I alluded to this earlier. Do you recall seeing this before today?

A. Let me read it real quick. I don't recall seeing this.

MR. JEFFERIES: Okay. Let's do this one.

(Exhibit 11 was marked.)

MR. DREITZER: Thanks.

Q. (By Mr. Jefferies) Sir, showing you what I've marked as Exhibit 11, is that your signature? No, that's --

A. That's my brother Roy's --

Q. -- Roy's.

A. -- signature.

Q. Roy's.

MS. LYNN: Roy's signature.

Q. (By Mr. Jefferies) Do you recognize that being Roy's signature?

A. Yes.

Q. Okay. Have you seen this before today?

A. Let me look through it.

Q. Not all of them are yours, if you go to the next

page.

MR. DREITZER: Oh, by the way, I should -- while we're on the record, I do want to raise the same concern about this not having been Batesed anywhere, but, you know, we're confident it's got to be in the record somewhere with a stamp on it.

MR. JEFFERIES: Well, I hope so. Obviously, that's -- he's confirmed that's Roy's signature. So I don't think there's any question that --

MR. DREITZER: Well, there's no -- yeah, I mean, I get that, but I just -- the issue is that if it had never been produced before today, that's my concern, but we'll see where it turns up.

THE WITNESS: I don't recall seeing this before today.

MR. JEFFERIES: Okay.

(Exhibit 12 was marked.)

Q. (By Mr. Jefferies) Sir, showing you what I've marked as Exhibit 12. You know what, I'm going to withdraw 12.

MR. DREITZER: Okay.

Q. (By Mr. Jefferies) Just leave it in. I'm not going to ask you about it. There's a cleaner one that's more worth our time. And let's go with this one.

MR. JEFFERIES: Could you be a little quicker next

time.

THE WITNESS: Chop, chop.

MR. JEFFERIES: Man, why don't you just do this.

(Exhibit 13 was marked.)

Q. (By Mr. Jefferies) Sir, showing you what I've marked as Exhibit 13, is that your signature?

A. Yes.

Q. Okay. Tell me what this is.

A. It's a lien. Unconditional lien waiver --

Q. Up through what date?

A. -- upon progress payment. Through May of 2008 is what it says.

Q. And did you make any attempt to itemize any pending or unresolved claims or change order requests?

A. It doesn't appear that I did on this document.

Q. Would you have done so in any corresponding letter, e-mail, transmitting Exhibit 13 to APCO?

A. I don't -- I don't recall. I -- I could have.

(Exhibit 14 was marked.)

Q. (By Mr. Jefferies) Sir, showing you what I've marked as Exhibit 14, for the record, is an August 12, 2008, e-mail from Gemstone to various subcontractors. And if you look a couple of lines from the bottom, you'll see Roy Zitting. See that?

A. Oh, yeah.

Q. Just confirming --

A. Yes.

Q. Tell me if you've seen this before today.

A. I don't recall seeing this.

Q. Does it refresh your recollection as to any -- well, strike that.

You'll notice in the e-mail Gemstone says, We're going to start reaching out to the subcontractor to try and resolve change orders, et cetera. Does it refresh your recollection as to discussions you may have had with Gemstone about some of your change order requests?

A. It doesn't.

MR. DREITZER: Counsel, while we're on the record on this one, it looks like it references an attachment. Do we know what -- do we have that or know what it is?

MR. JEFFERIES: I don't have it with me.

MR. DREITZER: Okay.

MR. JEFFERIES: We didn't copy it.

MR. DREITZER: Okay. I just wanted to note that.

Q. (By Mr. Jefferies) Do you recall after APCO left that the permits -- I don't know what the right word is -- were rescinded or cancelled in APCO's name for the project?

A. I don't recall anything about that.

MR. JEFFERIES: Let's do this one.

(Exhibit 15 was marked.)

Q. (By Mr. Jefferies) Sir, showing you what I've marked as Exhibit 15, which I'll represent to you is the executed agreement between Gemstone and CAMCO after APCO left the project. Do you see that?

A. That's what -- if that's what you represent. I . . .

Q. I will represent -- it is -- you can tell on the first paragraph -- Gemstone and CAMCO. It's signed on page 19.

A. Okay.

Q. Have you seen this document before today?

A. Never.

Q. Okay. If you go to the second page, it talks about third party service providers, and you will note that there is a list of third party service providers that the general contractor is to engage to continue working on the project in Exhibit C.

If you go to page 23 within the exhibit, you'll see a listing of existing third party service providers. And you'll see Zitting Construction at the bottom. Do you see that?

A. I do.

Q. Does that refresh your recollection as to any discussions you may have had with Gemco [sic] -- I don't

know why I want to say that. Strike that.

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

A. Does not.

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

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

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

MR. JEFFERIES: Yeah, but . . .

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

A. Okay.

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

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

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

A. Okay.

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

A. Okay.

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

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

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

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

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

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

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

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

A. That would be drywaller.

Q. Okay.

MR. JEFFERIES: Let's mark this.

(Exhibit 16 was marked.)

MR. DREITZER: Sixteen?

Q. (By Mr. Jefferies) Sir, I marked as Exhibit 16 what I believe is a payment -- well, strike that.

Why don't you tell me what Exhibit 16 is.

A. Looks like some sort of accounting report on a couple checks that were cut to Zitting for the Manhattan West project and then a copy of a check that corresponds.

Q. If you go to the last page, I think I need to clear up the record, because I was mistaken when I read your subcontract pricing in those pods we went over --

A. Mm-hmm.

Q. -- to get to the -- if you look at the top of the third page of Exhibit 16, it shows lump -- one lump sum for Building 8, Building 9 at 1.805 million. The total is 3,610,000. Would you agree that's how your original phase 1 contract price was arrived at?

A. I'd have to go back in this contract. This number is different than these two added together.

Q. It is. I think I screwed the record up when I said that earlier.

A. I would -- I would have to say that this looks

like how the contract amount was derived.

Q. Okay. Let me make sure my record is clear. Your phase 1 pricing under the subcontract for Buildings 8 and 9 totaled $3,610,000 based on one building each at $1,805,000. Correct?

A. Correct.

Q. All right.

A. Previous to change orders, of course.

Q. Sure.

A. And then I'm noticing here, Install windows on 2 and 3. So I did do some work on other buildings, as I had thought.

Q. Okay. Which I wanted to ask you. You're getting this check for $33,847. Does this resolve the 17,000 that you were shown as owed in Exhibit 8?

A. Which page are you referring to?

Q. Page 2 of Exhibit 8 shows --

A. Well, this isn't saying what's owed. It's saying what's approved.

Q. But I'm -- I guess my point is, through Exhibit 16, if I'm reading this correctly, you were paid the 17108.

A. It appears that's the case.

Q. Okay.

A. Yeah, it shows it in this draw request it was

previously drawn . . .

Q. In which one?

A. In --

MR. DREITZER: Allen 85.

THE WITNESS: Eighty-five.

MR. JEFFERIES: Okay.

Q. (By Mr. Jefferies) I guess what threw me -- why is it showing up in Exhibit 8? Do you know?

A. It's just an approved change order log.

Q. But --

A. It's not talking about payment status in Exhibit 8.

Q. All right.

A. So they did actually approve some change orders and it's reflected in Exhibit A -- 8 in writing and the rest were just verbally approved and in the process of approval.

Q. Okay. Exhibit 5. I know you told me that you didn't prepare it. Did you have negotiations concerning Exhibit 5 with CAMCO and/or Gemstone?

A. I don't recall any at this time.

Q. If you had received verbal directions from Shawn, did Zitting ever follow up with any type of e-mail confirmation or -- or letter or fax?

A. I think that these work orders we've been discussing is evidence that we did follow up in writing.

Q. Okay. Prior to performing the work, would you have -- would Zitting have -- strike that.

Would it have been Zitting's company practice to confirm verbal directions to perform what you consider to be extra work prior to the work being performed?

A. Not always.

Q. Okay. Did you -- did Zitting do that on this project?

A. Do what?

Q. Send a fax, letter, e-mail confirming verbal direction before you did the work?

A. Not always.

Q. Are you aware of any?

A. None that I can think of right now.

Q. Isn't it true, sir, that you filed the lien before you billed APCO for the retention in those change orders, Allen Exhibits 85 and 86?

A. I don't recall the date of the lien.

Q. Did you ever provide APCO with actual invoices for the materials you used for claimed extra work?

A. I don't recall. I don't recall being asked for them.

Q. How did you track disputed change order requests in your accounting system?

A. The only ones that I put in my accounting system

were the ones that were approved. And the ones that were still being disputed were in the little worksheets that we've been looking at.

MR. JEFFERIES: I'm not going to mark this.

MR. DREITZER: What is it?

MR. JEFFERIES: It's your complaint for foreclosure.

MR. DREITZER: Okay.

MR. JEFFERIES: Exhibit 1.

MR. DREITZER: Mm-hmm. You're going after the date it was recorded? I mean, we can stipulate that it was recorded on December 23rd of 2008. So . . .

MR. JEFFERIES: The lien?

MR. DREITZER: Yeah, the lien. Mechanics lien. Yeah, that's when it was recorded.

Q. (By Mr. Jefferies) Given that stipulation, would you agree that you recorded the lien before you billed retention in change orders to APCO in a pay application?

A. There may have been a previous pay application sent to them previous to this one. I don't know, but that certainly is previous to the date that's on these two pay applications. The date on these is January 30th, 2009.

Q. Why would you have done Allen Exhibits 85 and 86 -- i.e., those pay applications -- on January 30, 2009, if you had previously billed those?

A. Maybe as a reminder that we still need it paid.

MR. DREITZER: Did you want to see the mechanics lien? Would that help you at all?

THE WITNESS: No.

MR. DREITZER: Okay. Just want to make sure.

Q. (By Mr. Jefferies) Do you know if APCO ever received final payment from the owner?

A. I don't know.

Q. Are you aware of when APCO last received a payment from Gemstone?

A. I'm not.

Q. In looking at the paperwork that I marked as Exhibit 16, does that confirm for you that that project used construction funds control?

A. It does.

Q. And you're familiar -- generally familiar with that process?

A. Yes.

Q. And given the mechanics of those systems, APCO, as the general contractor, would not have received your retention until final completion of the project. Correct?

A. I don't know their arrangement with the owner in regards to retention.

Q. Okay. Did you review the prime contract between Gemstone and APCO?

A. I don't recall.

Q. Ever?

A. I don't recall ever doing it.

Q. Exhibit 16 reflects a joint check from funds control to Zitting and APCO. Correct?

A. Correct.

Q. How did Zitting learn that CAMCO was going to be acting as a replacement contractor for APCO?

A. I don't recall.

Q. Do you know if there was ever a certificate of occupancy for Building 8?

A. I didn't -- I do not know.

Q. Do you know if there was ever a certificate of occupancy for Building 9?

A. I do not know.

Q. Do you know if those buildings were ever completed to the point where they could have been beneficially used and occupied?

A. They're being lived in right now. Is that what you're asking?

Q. No.

A. I'm sure they got a C of O in order to do that.

Q. Did you do any work on the project after Gemstone lost the project and it was sold?

A. No.

Q. Are you aware of Buildings 8 and 9 ever being completed in 2009?
A. They were not.
Q. Did your field crews prepare daily reports?
A. I don't recall -- I -- on this job, if they did or not.
Q. Would it have been Zitting's standard practice and procedure for its field crews and/or project superintendents or project manager to prepare daily reports for a project like this one?
A. Typically we do.
Q. That's a yes?
A. Yes.
Q. I'm going to represent to you that, in the documents that have been produced in this case, there are only Zitting daily reports between January and April 2008. Can you explain why there would be gaps and the lack of daily reports?
A. I cannot.
Q. You would agree that your daily reports have a spot for extra work that's being either directed and/or tracked. Correct?
A. Yes.
Q. As the company designee, have you seen any of the Zitting daily reports where that extra work that is being

performed is being noted on a daily report and/or being tracked for compensation?
A. We typically don't utilize that piece of the form. We typically utilize an external document.
Q. Did you assemble the change order -- I don't know what to call them. They're not change order requests. They're not field directives. The bids or quote designations that are included in Exhibit 5, did you do the quantification for those items?
A. That was typically done by Roy on this job.
Q. Did you do any of them?
A. I don't believe so.
Q. If Ms. Allen testified that every pay application that was submitted by Zitting during the course of construction -- and by "course of construction," I mean when APCO was on the project into August of '08 -- was actually received from Zitting via e-mail, do you have any reason to dispute that?
A. No, this job was happening kind of in that whole e-mail/fax transition. So we did some of each.
Q. You say you did some of each. Some projects were fax; some were e-mail?
A. Some people in the office were faxing. Some people were e-mailing. Some customers wanted to receive them via fax or via e-mail.

Q. If I were to represent to you that the Zitting records produced to us in this case show that Zitting actually performed over $200,000 in work after APCO left the project, would you have any reason to dispute that?
A. I would have to add up the change orders that -- that we identified as CAMCO change orders to quantify that number. I thought it was less than that.
Q. And you're referring to the non-AR items in Exhibit 5?
A. I believe it was Exhibit 5. Scattered, it looks like. Thank you. Okay. There's some back here that actually say CAMCO on them, I thought.
Q. Well, I may have misled you. I think you're referring to -- Exhibit 3 has CAMCO.
A. Okay. That's --
Q. Let me strike the question.
A. That's the only place that I've seen it.
Q. Look at Exhibit 3, if you would. You're killing me, Smalls. Here.
A. I got it, man.
MR. DREITZER: Exhibit 3, Counsel?
MR. JEFFERIES: Yeah.
Q. (By Mr. Jefferies) And let me ask you a question. That's usually how this proceeds best, instead of me just talking. In looking at Exhibit 3 -- it looks like we went

through this -- Nos. 22, 23, 24, and 25 are the change orders you did for CAMCO. Right?
A. I wouldn't say that I did them for CAMCO. I'd say I did them while CAMCO was on-site.
Q. Fair enough. Those approximate 28 grand?
A. Yeah, which is a lot less than the number you're trying to quantify here.
Q. So back to my question. Do you have any reason to dispute that Zitting did over $200,000 in work after APCO left the project?
A. I don't believe we did.
Q. Did Zitting ever punch list phase 1, Buildings 8 and 9?
A. Yes.
Q. Wouldn't it be true, sir, that -- well, strike that.
MR. JEFFERIES: Why don't we go off the record and let's take a quick break and I think I'm close to done.
MR. DREITZER: Okay.
(Pause in proceedings.)
Q. (By Mr. Jefferies) Sir, I'm going to show you Exhibit 11.
A. Okay.
Q. And one of the large change orders that Zitting submitted was a change order regarding the differences

between the bid set and -- bid set and the permanent set, I believe. That's your position. Right? It's the largest change order.

A. I'd have to -- which exhibit are you referring to?

Q. We could do it on any. We could do it on Exhibit 3 if you wanted.

A. Seems to be the only one -- here we go.

MR. DREITZER: Are you talking about Item 15?

MR. JEFFERIES: Yeah.

Q. (By Mr. Jefferies) And you recall seeing that Gemstone approved, like, $16,000 for that?

A. I don't recall seeing that.

Q. It was on Exhibit 5. See that reference to 16,000?

A. Okay.

Q. My question to you is: After Zitting was advised that that change order was rejected, did Zitting ever respond back and support the balance of that change order?

A. Well, the whole change order's still listed as 155,000. It's just only -- only 16,000 is being allocated to Gemstone in this -- in Exhibit 5. The rest is being allocated to APCO.

Q. Okay. Go to -- do you have Exhibit 11?

A. Yes. Okay.

Q. This is the transmittal from APCO back to Zitting,

enclosing the owner's review of Change Order 11. Do you see -- at the bottom of page --

A. Yes.

Q. -- 3 of the exhibit? And if you look at the writeup, you can see the owner and APCO are rejecting it because there's no breakout of cost. I won't read all that on the record for time's sake. And they -- Gemco confirms the structural portion is 8,056 and consists of header and beam revisions to after 5/25/07 set. So if they're going to double that for the two buildings, that's where you get the 16,000?

A. Right.

Q. Do you get that?

A. Yeah, I get that.

Q. Okay. So my question is: From and after the point that you got this rejection, did Zitting ever respond back to APCO saying, The balance of COR 11 is justified because of X, Y, or Z?

A. I don't have anything in front of me that says that we did, and I don't recall anything.

Q. Okay. I'm going to show you -- I don't mean this to sound unreasonable, as it's going to initially. I have your job cost, Bates label ZBCI1231 --

MR. JEFFERIES: Is it consecutive?

MS. LYNN: Yeah.

Q. (By Mr. Jefferies) -- through 1733. And my question to you is: Anywhere in your job cost for the project do you track time or materials for the disputed change order request at issue?

A. No.

Q. Do you want to look at it before --

A. No, we don't.

MR. JEFFERIES: Okay. All right. Sir, I think that's all the questions I have. I will ask that you read and sign.

MR. DREITZER: That's fine.

MR. JEFFERIES: So she will get -- you've been through this before.

Q. (By Mr. Jefferies) She'll get the draft to your counsel.

A. Okay.

Q. And I ask that you read and sign it and make any changes you deem necessary or proper. Understand that at trial I'll be able to comment on any changes you might make.

A. Okay.

MR. JEFFERIES: Okay.

MR. DREITZER: Just have a few questions. Very briefly.

MR. JEFFERIES: You do or don't?

MR. DREITZER: I do.

MR. JEFFERIES: Okay.

MR. DREITZER: Just a couple.

EXAMINATION

BY MR. DREITZER:

Q. Earlier on in the deposition, counsel showed you documents with regard to the change in the labor rate. Is it your recollection that the labor rate was, in fact, changed or are you just relying on the documents that were put in front of you?

A. I'm just relying on the documents that are put in front of me.

Q. So is it possible that there was history either before those documents or after it which changes the contours of what was agreed on, as far as the labor rate is concerned?

A. Yeah, absolutely. And a lot of -- unfortunately, a lot of our communication on change orders on this job was verbal, because we couldn't get Shawn to do his job and put it in writing.

Q. Right. Okay. And then if you go back to Exhibit 3, which is right in front of you, with regard to Items 22, 23, 24, 25, those have dates in the date column of 10/9/08 and 10/10/08. What does the date refer to on this document?

A. That would be the date that I would -- I believe that's the date that the actual change request was entered into our system.

Q. Okay. But that is not the date -- is that the date the work was performed?

A. No.

Q. Okay. So do you know what kind of lag time there is between when the work is performed and when the date the change order is submitted or could -- does that vary?

A. It could be months and months, because we were trying to wait for Shawn to approve them in writing before we put them in our system.

Q. Okay.

A. But when we got to the point where we realized he wasn't going to do that, then we just put them in the system and billed for them.

Q. So just because item -- counsel before talked to you in terms of change orders that were the responsibility of APCO and change orders that -- what they claim were the responsibility of CAMCO. And so what I'm wondering is: Is it possible that the CAMCO change orders he was discussing with you could reference work that was done while APCO was still the general on the project?

A. Yes.

Q. Okay. Then if you go to Exhibit 15, please --

MS. LYNN: What's the date of that? Sorry.

Q. (By Mr. Dreitzer) Yep, that's the one.

A. Okay.

Q. Then if you go to page 26 --

A. Okay.

Q. -- where it talks about previously completed work --

A. Yes.

Q. -- we -- do you know how this was compiled?

A. I assume that --

Q. Do you have any knowledge how this was --

A. I don't.

Q. Is it possible that as of August 25th, 2008, that this -- the information in Exhibit E might be incorrect?

A. That's possible.

Q. Okay. And -- but you were never consulted as far as what your percentages were --

A. Not that I recall.

MR. DREITZER: Okay. I have no more questions.

MR. JEFFERIES: I've got one follow-up. I'm going to show you -- there's . . .

(Exhibit 17 was marked.)

MR. DREITZER: Is this 19?

(An off-the-record discussion was had.)

///

EXAMINATION

BY MR. JEFFERIES:

Q. Sir, showing you what's been marked as Exhibit 17, I think. Take a minute and look at that.

MR. DREITZER: And, again, I voiced the same concern before about this being an unBates-stamped document. Notwithstanding that, it appears to be involved Mr. Zitting.

THE WITNESS: Okay.

Q. (By Mr. Jefferies) Okay. Are you -- in light of Exhibit 17, are you standing behind your $30 hourly rate that you quoted?

A. It appears that he gave them a one-week time frame to pay them -- to pay -- pay the $30 rate. And obviously that didn't happen. So . . .

Q. That's why I asked you the question the way I did. Are you honoring the $30 as you sit here today?

A. In light of this new exhibit that I'm seeing, it looks like it had a one-week offer which expired, so no.

Q. So you understood that APCO rejected the change orders because it rejected the $50 per hour that was claimed. Right?

A. I don't believe that I've seen that. Does it state that in the -- in -- in the exhibit we were just looking at?

(Exhibit 18 was marked.)

MR. DREITZER: This will be 18?

MR. JEFFERIES: Yeah.

Q. (By Mr. Jefferies) Take a minute, sir, and review Exhibit 18.

A. Okay.

Q. You'll note that APCO is rejecting the $50, because, at least in APCO's position or mind, the $50 didn't comply with the contract. Right?

A. That's what it appears as, yes.

Q. Okay. So it was actually Roy who explained how the $50 was calculated and then proposed the $30. Right?

A. Yes.

Q. There's no -- strike that.

Is it your testimony that the $50 is supported by the contract or the $30?

MR. DREITZER: Objection. Calls for a legal conclusion.

THE WITNESS: I don't believe the contract called -- calls for either dollar amount, does it?

Q. (By Mr. Jefferies) Well, you'll see down below where Ms. Lynn is quoting the contract or paraphrasing the contract, stating that it calls for actual costs -- actual cost plus 10 percent markup plus your labor burden. Do you see that?

A. Yeah, I see that.
Q. Okay.
A. So you're indicating that Roy didn't have the right to give them a one-week time line to -- to pay them?
Q. No, I'm not getting there yet. As the company designee today -- and we can pull out Exhibit 1 if we need to -- does the contract support the $50 or the $30?
MR. DREITZER: Objection. Calls for a legal conclusion.
THE WITNESS: I don't know if I have the expertise to tell you the answer to that.
Q. (By Mr. Jefferies) Yes, you do.
Okay. Whether you agreed with APCO or not, they rejected the change orders based on the labor rate. Right?
A. That's what it appears.
Q. Okay. So you submitted the $30. And is it your testimony today that -- $30 per hour you're not honoring because it expired?
A. That's what Roy's e-mail here states.
Q. Okay.
A. That's what I'm testifying.
Q. But as the company rep sitting here today, are you going to charge $50 or $30?
MR. DREITZER: Counsel, I'm not going to have him negotiate the case on the record. I mean, it's been asked

and answered. So if there's, you know, some other factual question, let's do it, but I don't -- there's no reason to negotiate this while we have a court reporter.
MR. JEFFERIES: I'm not negotiating and I haven't asked that question that way before.
Q. (By Mr. Jefferies) So go ahead.
A. Right now, the way that our claim stands, it appears that we're charging the $50 rate on all of the change orders --
Q. Okay.
A. -- that are --
Q. After --
A. -- outstanding.
Q. -- the one week expired, did you resubmit any of your change order requests?
A. I don't recall.
MR. JEFFERIES: Okay. I have nothing.
MR. DREITZER: Just a follow-up.

EXAMINATION

BY MR. DREITZER:
Q. So Exhibit 18, the second exhibit that counsel just talked about with you, that references a July 30, 2008, e-mail. Did you see that?
A. Yes.

Q. You looked at that before. Okay. Now, reading up, Randy Nickerl is telling Roy and Lisa that -- you know, how the -- how the labor cost was supposed to be calculated on the project. And then if you go to 17, 17 appears to be later on in time where it's on -- it references an e-mail from August 8th, 2008, and that is Roy attaching the condition that they will -- you will only agree to the reduced per-labor-hour rate if payment is made within a week. Is that right?
A. Yes.
Q. So after this was communicated to APCO, did you hear anything back from APCO basically saying, to the effect of, We're not playing games here. Your contract doesn't call for this and we want the $30 rate?
A. I don't think they ever did.
MR. DREITZER: Okay. I have nothing further.
MR. JEFFERIES: We're done.
(The proceedings concluded at 2:05 p.m.)
-oOo-

CERTIFICATE OF DEPONENT

PAGE	LINE	CHANGE	REASON

* * * * *

I, SAMUEL ZITTING, Deponent herein, do hereby certify and declare under penalty of perjury the within and foregoing transcription to be my deposition in said action; that I have read, corrected, and do hereby affix my signature to said deposition, under penalty of perjury.

SAMUEL ZITTING, Deponent

STATE OF NEVADA)
) SS:
COUNTY OF CLARK)

CERTIFICATE OF REPORTER

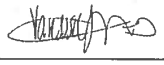
I, Vanessa Lopez, a duly commissioned and licensed court reporter, Clark County, State of Nevada, do hereby certify: That I reported the taking of the deposition of SAMUEL ZITTING, commencing on Friday, October 27, 2017, at the hour of 9:00 a.m.;

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

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

That the reading and signing of the transcript was requested.

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



VANESSA LOPEZ, CCR NO. 902

IN THE SUPREME COURT OF THE STATE OF NEVADA

APCO CONSTRUCTION, INC., A NEVADA CORPORATION, Appellant, vs. ZITTING BROTHERS CONSTRUCTION, INC., Respondent.	Case No.: 75197 Appeal from the Eighth Judicial District Court, the Honorable Mark Denton Presiding

APPELLANT'S APPENDIX
(Volume 16, Bates Nos. 3518–3763)

Marquis Aurbach Coffing
Micah S. Echols, Esq.
Nevada Bar No. 8437
Cody S. Mounteer, 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
cmounteer@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

INDEX TO APPELLANT'S APPENDIX

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

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

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

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

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

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

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

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

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

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

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

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

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

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

EXHIBIT 13

Case Nos. 67397 & 68683

IN THE SUPREME COURT OF THE STATE OF NEVADA

PADILLA CONSTRUCTION COMPANY OF NEVADA, A NEVADA CORPORATION,

Appellant,

vs.

BIG-D CONSTRUCTION CORP., A UTAH CORPORATION,

Respondent.

APPEAL FROM
THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF CLARK

THE HONORABLE MARK R. DENTON, DISTRICT COURT JUDGE

A-10-609048-C

APPELLANT'S OPENING BRIEF

Bruce R. Mundy, NSB #6068
200 South Virginia Street, Eighth Floor
Post Office Box 18811
Reno, Nevada 89511-0811
reno-attorney@sbcglobal.net
(775) 851-4228

Attorney for the Appellant

Rule 26.1 Disclosure

Pursuant to NRAP 26.1, the undersigned counsel certifies that Appellant, Padilla Construction Company of Nevada, is a Nevada corporation in good standing, no parent company nor any publicly held company owns any interest in the corporation, and is and has been exclusively represented in this matter by Bruce R. Mundy, Nevada State Bar number 6068, a sole practitioner.

Table of Contents

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

Jurisdictional Statement

This Court has jurisdiction pursuant to NRAP 3A(b)(1): "A final judgment entered in an action of proceeding commenced in the court in which the judgment is rendered." The Judgments appealed from include the district court's Findings of Fact and Conclusions of Law (JA Vol. VII., pg. 813) and Order Granting Attorneys' Fees, Costs and Interest (JA Vol. VII., pg. 905).

Routing Statement

This appeal is presumptively retained by the Supreme Court because it is an Appeal of a Judgment issued by the business court, Department XIII of the District Court, Clark County, Nevada and Appellant believes an issue involved in the Appeal raises a question of first impression involving the US Bankruptcy Court: Whether a state court has subject matter jurisdiction to award judgment in excess of the Bankruptcy Court's Chapter 11 approved claim amount.

Statement of Issues for Review

1. Whether Respondent met its burden to prove-up causation in a breach of contract matter?
2. Whether Respondent violated Nevada law, NRS 624.624, for failure to provide the requisite notice prior to withholding payment to Appellant?
3. Whether district court had subject matter jurisdiction to award Judgment in an amount in excess of the Bankruptcy Court Chapter 11 approved claim?

Statement of the Case

The Appellant filed its First Amended Complaint March 9, 2010. Amended, solely to drop a Defendant, the construction project owner, after Respondent construction company posted a bond in lieu of the Appellant's mechanics' and materialmen's Lien. The Complaint alleges Breach of Contract, Breach of Implied

Covenant of Good Faith and Fair Dealing, Negligence per se and a Claim against the lien release bond. The Respondent filed its Answer and Counterclaim April 8, 2010 citing claims for Breach of Contract and Negligence. The Respondent stipulated to dismiss its negligence claim and the district court entered Stipulation and Order to Dismiss August 10, 2015. The case proceeded to a bench trial December 2 & 3, 2014. The court entered its Findings of Facts and Conclusions of Law and Judgment January 22, 2015 for the Respondent in the amount of $600,000.00. Subsequently, Respondent filed a Motion for Attorneys' Fees, Costs and Interest, which was granted July 22, 2015 in the amount of $414,433.99 plus interest in the amount of $59.61 per day starting January 22, 2015.

Statement of Facts

Respondent Big-D Construction Corp. ("Big-D") entered into a construction agreement to build a facility for IGT in Las Vegas, which included a stone façade glued to stucco both on the exterior of the building as well as some parts of the interior. Shortly after the job was finished and IGT occupied the building, stones fell off the exterior façade. IGT's consultant, Ian Chin, a Nevada licensed Architect and Structural Engineer, and Big-D investigated the falling stones and found deficiencies in the adhesive used to bond the stone to the stucco. It was further determined that the stones and underlying stucco needed to be removed and replaced. In preparation for the second stone installation, Big-D entered into a Subcontract in September[1] of 2009 with Appellant, Padilla Construction Company of Nevada ("Padilla").

The second stone installation project commenced with Padilla installing the stucco on the exterior and interior walls where stone panels would be glued. In mid-September, during the stone adhesion coverage process, when stones were pulled

[1] Trial Exhibit, JA Vol. 1, pg. 91

back to check the adhesive coverage, there were several events[2] when the stone pulled the second (brown) coat of the stucco from the first (scratch) coat. Padilla's theory of the cause of the separations was Big-D's scheduling of the stone installation did not allow its stucco to properly dry (cure)[3]. At that time, Big-D did not have a theory of cause.[4] After inspections and conferences between IGT and Big-D, it was decided to substitute a prefabricated cement board that was better suited to the stone adhesive coverage pulling and did not require a cure time.[5] Padilla left the job and submitted its Payment Request, which was approved[6], and Big-D issued a check in payment only to stop payment due to unresolved disputes[7] with Padilla.

Big-D retained the services of IGT's former consultant, Ian Chin, after the conclusion of his relationship with IGT. In the absence of a settlement of the dispute between Big-D and Padilla, Padilla filed a Complaint[8] March 9, 2010 alleging claims for Breach of Contract, Breach of Implied Covenant of Good Faith and Fair Dealing, Negligence per se and a Claim against the lien release bond. Big-D responded with an Answer and Counterclaim[9] April 8, 2010 citing claims for Breach of Contract and Negligence. Big-D stipulated to dismiss its negligence claim and the district court entered Stipulation and Order to Dismiss August 10, 2015. The case proceeded to a bench trial December 2 & 3, 2014. The district court entered its Findings of Facts and Conclusions of Law and Judgment[10] January 22, 2015 for the Respondent in the amount of $600,000.00. Subsequently, Respondent filed a Motion for Attorneys' Fees, Costs and Interest, which was granted[11] July 22, 2015 in the amount of

[2] Trial Exhibit, JA Vol. 3, pg. 261
[3] Lopez depo, JA Vol. V., pg. 411, lines 10-25
[4] TSRCP 1, JA Vol. V., pg. 469, lines 10-23.
[5] Lopez depo, JA Vol. V., pg. 413, lines 17-21
[6] TEXH 9, JA Vol. II., pg. 215
[7] TEXH 61, JA Vol. III., pg. 281
[8] Complaint, JA Vol. 1, pg. 1
[9] Answer and Counterclaim, JA Vol. 1, pg. 10.
[10] FF&CL, Judgment, JA Vol. 7, pg. 813
[11] Order, JA Vol. 7, pg. 905

$414,433.99 plus interest in the amount of $59.61 per day starting January 22, 2015.

Summary of the Argument

Respondent failed to meet its burden to prove causation by a preponderance of evidence; that a Padilla commission or omission caused the complained of separations of its stucco. Appellant also argues Respondent's withholding payment to Padilla, when at the same time admitting it did not know what caused the separations, was a breach of the Subcontract as well as Nevada law, NRS 624.624. In addition, Appellant argues the district court awarded judgment and attorneys' fees, costs and interest in violation of the parties' Stipulation and in excess of the Bankruptcy Court's Chapter 11 allowed claim

Argument

I. STANDARD OF REVIEW FOR FINDINGS AND CONCLUSIONS OF LAW

The district court's factual findings will be upheld if not clearly erroneous, and if supported, by substantial evidence. *Ogawa v. Ogawa*, 125 Nev. 660, 668, 231 P.3d 699 (2009). In the absence of evidence to support the trial court's findings, they are clearly erroneous. *Pink v. Busch*, 100 Nev. 684, 688, 691 P.2d 456 (1984). This Court has defined substantial evidence as evidence that a reasonable mind might accept as adequate to support a conclusion. *Cook v. Sunrise Hospital & Medical* Center, 124 Nev. 997, 1004, 194 P.3d 1214 (2008). The Court reviews conclusions of law de novo. *Grosjean v. Imperial Palace*, 125 Nev. 349, 359, 212 P.3d 1067 (2009).

II. BIG-D FAILED TO CARRY ITS BURDEN OF PROOF

As the Counterclaimant, it is Big-D's duty to present evidence and argument to prove its allegation that Padilla Construction breached the Subcontract. *Nassiri and Johnson v. Chiropractic Physicians' Board*, 130 Nev. Adv. Op., No. 27, pg. 4

(2014). The standard for Big-D's proof is the general civil standard: a preponderance-of-the-evidence. *Id.* at pg. 6. A preponderance of evidence is not a measurement of the greatest number of witnesses, instead, it's the persuasive weight of evidence to lead a trier of fact to find the existence of the contested fact is more probable than its nonexistence. *Brown v. State*, 107 Nev. 164, 166, 807 P.2d 1379 (1991).

The proof elements for a breach of contract claim are: (1) The existence of an enforceable agreement between the parties; (2) Plaintiff/Counter-claimant's performance; (3) Defendant/Counter-defendant's unjustified or unexcused failure to perform; and (4) Damages resulting from the unjustified or unexcused failure to perform. *Nevada Jury Instructions*, (2011) Instruction 13CN.1. A breach of contract claim for damages requires a failure to perform that is material; that the failure to perform defeats the purpose of the contract. *Id.* at Instruction 13CN.42. Integral to the proof of damages is proximate cause, causation: "That is if the damage of which the promisee [Big-D] complains would not have been avoided by the promisor's [Padilla Construction] not breaking [its] promise, the breach cannot give rise to damages." *Clark Cty. Sch. Dist. V Richardson Constr.*, 123 Nev. 383, 396, 168 P.3d 87 (2007). The existence of a valid agreement between the parties was never in dispute. Trial Exhibit[12] (TEXH") 1, Subcontract JA Vol. I. pg. 91.

III. NO EVIDENCE PADILLA CAUSED DAMAGES

The complained of damages arise from the separation of the second (brown) coat of stucco from the first (scratch) coat during the process to check for proper stone adhesive coverage when an installed stone was pulled back from the brown coat to visually check the adhesive coverage. Padilla does not dispute the separations occurred and were observed by everyone involved with the IGT stone project.

What is not known, and the primary focus of the trial, is the causation of the

[12] As stipulated by the parties, Trial Exhibits 1-91 were admitted, JA Vol. V, pg. 456, L 9-24.

separations. Between the parties, there was no dispute the trial was about causation: (1) "the reason we are here today is why did the separations occur" (Padilla Opening, Trial Transcript Day 1 ("TSRCP 1", JA Vol. V., pg. 440, lines 24-25); (2) "as Mr. Mundy [Padilla trial counsel] characterized this is, frankly, a trial related to causation" (Big-D Opening, TSRCP 1, JA Vol. V., pg. 445, lines 4-5); and (3) the court, "is that [trial related to causation] correct" directed to Mr. Mundy, "That is correct", the court "All right. The record will so reflect." TSRCP 1, JA Vol. V., pg. 445, lines 6-11.

It is Padilla's position the separations were caused by the premature installation of the stone on the stucco before it was fully dry (cured). TSRCP 1, JA Vol. V., pg. 440, line 25 – pg. 441, line 4. According to EXPO, the stucco mix supplier to this job, "Proper curing is essential" and "Proper curing is important especially in hot or windy conditions." It's not unduly speculative to imagine the Las Vegas jobsite as hot, and maybe even windy in September. TEXH 26, JA Vol. II., pg. 111, CURING heading). Each stone panel measured four feet wide and thirty inches high and weighed close to forty pounds. TSRCP 1, JA Vol. VI., 597, lines 3-9. Padilla's analogy was the cause of the separations was no different than the damage caused by parking your car on your new concrete driveway before it fully dried (cured). TSRCP 1, JA Vol. V., pg. 441, lines 2-4. According to Chin, in answer to the question of what the Architect's plan instruction to determine the most effective procedures for curing and lapse time between coats based on climatic and job conditions, meant:

> It means that it's important to make sure that, first of all, the scratch coat is – has sufficient cure time before you apply the brown coat to it. It's also – and it talks about making sure that the brown coat has sufficient cure time – as well as the other times involved before you apply anything to it.
>
> So this is very important because you want to make sure that the strength of the materials are up to the point where

you can apply materials to it without causing any damage to the [stucco] system. TSRCP 2, JA Vol. VI., pg. 682, line 22 – pg. 683, line 6.

III. A. CURE TIMES NEVER SETTLED

As will be evident, cure times were far from settled and an ongoing controversy. Chin testified that according to the project specifications, the parties responsible for specifying the cure time included the "contractor, the subcontractor, and the [stucco] materials supplier . . ." TSRCP 2, JA Vol. VI., pg. 29, lines 7 – 13. Lopez, Chief Operating Officer for Padilla Construction Company of Nevada, who worked in the lath and plastering business (stucco) all his adult life including 13 years with Padilla, (Lopez depo, JA Vol. V., pg. 415, lines 1-3, pg. 410, line 21), testified he told Brinkerhoff the brown coat needed to cure 28 days before installing the stone on it. Lopez depo, Vol. V., pg. 416, lines 19-25, pg. 417, lines 1 – 4. After Lopez observed some of the separations, Brinkerhoff testified Lopez's only response was "the product should have cured for 30 days before the stone was allowed to be installed on it." TSRCP 1, Vol. V., pg. 593, lines 22-24.

Chin, in his role as an IGT consultant (TSRCP 2, JA Vol. VI., pg. 742, line 20), informed IGT's counsel, Ferrario, that the scratch coat should cure one day and the brown coat twenty-one days, unless the stucco mix was mixed with latex, then it would require seven to fourteen days. (T Exh 38-1) Chin testified at trial he didn't believe latex was used in the stucco mix. (TSRCP 2, JA Vol. VI., pg. 741, line 3) Then, IGT's counsel Ferrario reports "The stucco cure issue continues to evolve. Right now we are operating under a 2 day scratch 7 day brown cure. This is consistent with the county requirements" (verified as minimum intervals, cure time, between plaster coats in the Clark County Building Code, (TEXH 450[13], JA Vol. V. pg. 400, Table 2512.6) and asks for Chin's thoughts. TEXH 38, JA Vol. III, pg. 259 Ferrario 09/04/09 email. In response, Chin agrees the seven day cure is consistent

[13] Admitted, JA Vol., VII, pg. 784, line 2.

with the low published cure time he has reviewed so he doesn't think that it can be shortened; however, he notes that while the two day cure for the scratch coat is consistent with the high published time he has reviewed, he thinks there is a possibility to lower the scratch cure time to one day with a stucco subcontractor inspection after one day to determine if its rigid enough to install the brown coat. TEXH 38, JA Vol. III., pg. 259, Chin 09/04/09 email.

Meanwhile, Brinkerhoff, advised IGT's Stecker on August 28th: (1) "[s]tone installation on Wednesday is contingent on 48 hours cure time" (TEXH 400[14], JA Vol. IV., pg. 368, paragraph four) and in the same paragraph advises he has sent the approved plaster product (EXPO MX3) data to ABB Engineers, PSI Engineering, and the product manufacturer (EXPO) for cure time recommendations. Subsequently, Brinkerhoff testified he received a reply from EXPO (TSRCP 1, JA Vol. VI, pg. 631, lines 6-13) that "normal curing and applications are required." TEXH 32, JA Vol. III., pg. 250. Although he acknowledged receiving cure time recommendations from ABB and PSI, he didn't remember what they were. T Trans D-1, pg. 190, lines 5-15. In answer to the question did he ever find out what the normal curing time was, he answered "We used two days and seven days." TSRCP 1, JA Vol. VI., pg. 631, line 24 - pg. 632, line 2.

Nowhere, is there any evidence of a 'summit' meeting between IGT, Big-D, EXPO and Padilla to resolve the obvious dispute as to the critical cure times. Instead, it appears as the person solely responsible for scheduling work, Brinkerhoff arbitrarily set the cure time to two days for the scratch coat and seven days for the brown coat. During trial, Brinkerhoff testified he had exclusive responsibility for scheduling the work of all subcontractors; Q. Would it be fair to say that, if you didn't schedule it, it was not going to happen? A. Yes, absolutely. TSRCP 1 JA Vol.

[14] Admitted, JA Vol., VI, ;g. 567, line 2

V., pg. 462, lines 12-14.

III. B. BIG-D NEVER TESTED FAILED STUCCO FOR CAUSATION

Big-D never determined the cause of the separations. According to Big-D's Brinkerhoff, answering the question why Big-D didn't terminate the Subcontract with Padilla: "[W]e made a decision based on the rejection of Padilla's work by IGT. We didn't know cause." TSRCP 1, JA Vol. V., pg. 469, lines 10-23. In a letter to Padilla's Lopez dated November 3, 2009, Big-D's counsel, Hurley, stated Big-D "is looking to Padilla to assist in investigating the cause of the failure." TEXH 58, JA Vol. III., pg. 276, paragraph 3. On November 18, 2009, when questioned whether he had released the check to Padilla, Big-D's McNabb responded: "No way. Why would I? Their work is failing. We still don't know who's at fault." TSRCP 1, JA Vol. VI, pg. 650, lines 12-13, TEXH 61, JA Vol. III., pg. 281.

III. C. CHIN'S TESTS WHILE CONSULTANT TO IGT

On April 8, 2010, Big-D filed its Counterclaim alleging "Padilla's Work was substandard and improperly installed and did not comply with the plans and specifications for the Project and/or ASTM Standards." Counterclaim, JA Vol. I., pg. 16, lines 27-28. Nearly seven months after Padilla was informed the project was going in a different direction (Lopez depo, JA Vol. V., pg. 413, lines 1-2) with a concrete board that didn't require a cure time and four months after finding out its payment for the work completed was being held ransom (TEXH 59, JA Vol. III., pg. 277, last paragraph, first sentence) pending Padilla's assistance to find the cause of the separations; Big-D first divulged its allegations as to why the separations occurred.

In support of the Counterclaim, Chin testified at trial about his observations of the stucco separations but failed to put forth evidence that any of the alleged deviations from the plans and specifications were material; caused the separations. For example, Chin's testimony included several references to the thickness of the

stucco coats vs. the project's plans and specifications, but then admitted "whether the brown coat was 2 inches or a quarter of an inch, scratch coat an inch or one-quarter of an inch, it did not affect the bond strength", the strength of the connection between the scratch and brown coats. TSRCP 2, JA Vol. VI., pg. 735, lines 18-21.

As to claims the scratch coats were not properly roughened; nowhere did Chin show any measurement of the grooves; determine whether they were the "approximately 1/8 inch" specified by EXPO. TEXH 37, JA Vol. III., pg. 256, paragraph 3.39B, NOTE. After admitting he never saw grooving of the scratch coat in more than one direction at the jobsite (TSRCP 2, JA Vol., pg. 712, lines 9 11) and commenting on Trial Exhibit 448 (TEXH 448[15], JA Vol. V., pg. 391), three photographs of the same separation showing a minor amount of grooving in a second direction, TSRCP 2, JA Vol. VI., pg. 711, lines 13-14), Chin was unable to identify a percentage of wrong direction grooving that would cause a failure of the bond. TSRCP 2, JA Vol. VII., pg. 749, lines 10-14. He eventually admitted the wrong direction grooving only "maybe contributing to" the lack of bond between the brown coat and the scratch coat. TSRCP, JA Vol. VI., pg. 712, lines 17-19. For Trial Exhibit 438[16], Chin sites no grooving of the scratch coat is evident (TSRCP 2, Vol. VI., pg. 718, lines 24-25), however, admits that he didn't use a 3D camera that can capture the depth dimension, but when questioned, he claimed to have put his hand on the scratch coat at the bottom of the three inch diameter[17] core hole (TSRCP 2, JA Vol. VII., pg. 750, lines 10 – 15); perhaps the grooving, dark shadows on the scratch coat, was more readily observed in (TEXH 438-4, JA Vol. V., pg. 386) with the close-up photograph of the scratch coat and the apparent more direct lighting?

In all instances, when Chin noted no bond between the scratch and brown coats,

[15] TEXH 448, Admitted for limited purpose: not for the truth of the matter asserted, JA Vol. VI, pg. 717, line 13.
[16] Admitted, JA Vol. VI, pg. 720, line 18.
[17] TSRCP 2, JA Vol. VI., pg. 717, line 20.

he admitted no knowledge of when the brown coat had been installed; where in the curing period the stucco might have been or whether sampling/testing was done before the brown coat fully cured? For Trial Exhibit 438, photos of coring/testing on the inside of the building September 17th (TSRCP 2, JA Vol. VI., pg. 720, lines 20-22) as well as trial exhibit (TEXH 15-7, JA Vol. II., pg. 232), which summarizes Chins notes for the 17th testing; Chin admitted he did not know when the brown coat had been installed. TSRCP 2, JA Vol. pg. 749, line 24 – pg. 750, line 2.

Similarly for Trial Exhibit 449[18], (JA Vol. V., pg. 395), the references to the September 22nd testing, Chin admitted he did not know when either the scratch or brown were installed. TSRCP 2, Vol. VII., pg. 751, lines 17-18. Both of the admissions of no knowledge when the relevant stucco was installed also applies to (TEXH 60, JA Vol. III., pg. 279), Chin's November 17, 2009 email to IGT's counsel, Ferrario, reporting on both the September 17th and 22nd testing. Neither TEXH 406[19] nor TEXH 446[20] were admitted for the truth of the matter asserted, so neither contributed any evidence of a material breach.

In summary, Big-D failed to carry its burden to present a preponderance of evidence that Padilla's alleged deviations from the plan and specifications were material and caused the complained of damages. That the damage of which Big-D complains would not have been avoided by Padilla not breaking its promise to furnish stucco in compliance with the plans and specifications.

IV BIG-D'S STOP PAYMENT OF CHECK BREACHED THE SUBCONTRACT

The proof elements for a breach of contract claim are: (1) The existence of an enforceable agreement between the parties; (2) Plaintiff/Counter-claimant's

[18] Admitted, JA Vol. VII., pg. 717, line 13.
[19] Admitted for limited purpose: not for the truth of the matter asserted, JA Vol. VI., pg. 709, line 19.
[20] Admitted for limited purpose: not for the truth of the matter asserted, JA Vol. VI, pg. 695, line 7-9.

performance; (3) Defendant/Counter-defendant's unjustified or unexcused failure to perform; and (4) Damages resulting from the unjustified or unexcused failure to perform. *Nevada Jury Instructions*, (2011) Instruction 13CN.1. A breach of contract claim for damages requires a failure to perform that is material; that the failure to perform defeats the purpose of the contract. *Id.* at Instruction 13CN.42. Integral to the proof of damages is proximate cause, causation: "That is if the damage of which the promisee [Big-D] complains would not have been avoided by the promisor's [Padilla Construction] not breaking [its] promise, the breach cannot give rise to damages." *Clark Cty. Sch. Dist. V Richardson Constr.*, 123 Nev. 383, 396,168 P.3d 87 (2007). The existence of a valid agreement between the parties was never in dispute. SUBCONTRACT AGREEMENT, TEXH 1, JA Vol. I., pg. 91.

After leaving the project in mid-September because "they were going in a different direction" (Lopez depo, JA Vol. V., pg. 413, lines 1-2) with a prefabricated cement "board that can handle the pressure of them [stone installers] pulling on it, plus they could install that board and immediately start installing the stone [no cure time]." (Id. at pg. 413, lines 17-21), Padilla submitted a Big-D Payment Request form as specified by the Subcontract (TEXH 1, JA Vol. I., pg. 92, paragraph D) for the work completed to date of the 'going in a different direction' notice. Padilla's performance was confirmed by Big-D's Brinkerhoff. Q: Describe for the Court the process of what happens from the time you receive a payment application until the time that a check goes out the door. TSRCP 1, JA Vol. V., pg. 490, lines 22-24. A: "I approved this [TEXH 9, JA Vol. II., pg. 215, Padilla's 09/25 Payment Request] at 82 percent complete, absolutely did. I felt like Padilla had installed 82 percent of the product." TSRCP 1, JA Vol. V., pg.491 lines 8-10. Brinkerhoff approved the September 25, 2009 Payment Request in the amount of $185,991.85 for payment

October 25, 2009. TEXH 9, JA Vol. II., pg. 215[21].

Big-D failed to perform; to pay Padilla in accordance with the approved Payment Request without justification or excuse. According to the district court, Big-D's performance was excused by Padilla's breach of the Subcontract, which occurred before Big-D's alleged breach (Conclusion of Law ("CL") JA Vol. VII., pg.831, lines 5-6); that payment was excused because IGT rejected Padilla's work (CL, JA Vol. VII pg. 831, lines 7-10), and; Big-D was excused from giving the Subcontract mandated notice of default and opportunity to cure because Padilla refused to participate in the investigation of the cause of the failures and any remediation. CL, JA Vol. pg. 831, line 12, pg. 832, line 7.

Notwithstanding Big-D's failure to present a preponderance of evidence that Padilla's alleged deviations from the plans and specifications caused the complained of separations, Padilla's breach could not have been prior to Big-D's. Big-D stopped payment November 18, 2009 of the payment check for the work Brinkerhoff affirmed Padilla had completed in September (TEXH 61, JA Vol. III., pg. 281) and at a time when Big-D admittedly did not know the cause of the separations. On November 18, 2009, when questioned whether he had released the check to Padilla, Big-D's McNabb responded: "No way. Why would I? Their work is failing. We still don't know who's at fault." TSRCP 1, JA Vol. VI, pg. 650, lines 12-13.

There was no justification to withhold Padilla's payment because IGT rejected the stucco in the absence of an erroneous assumption there was only one cause of the separations, Padilla. The assumption of a single potential cause was contradicted by Brinkerhoff:

> [A]t the time, we made the decision [substitute cement board in place of stucco] based on the rejection of Padilla's work by IGT. We didn't know the cause. We didn't know whether it was labor related. We didn't know whether it

21

> was material related. We didn't know whether it was weather condition related." TSRCP, JA Vol. V., 469, lines 18-23.

Additionally, Padilla complained the cause was Big-D's scheduling the installation of the stone before its stucco properly cured[22], which was never disputed until April 8, 2010 when Big-D filed its Counterclaim alleging deviations from the plans and specifications caused the damages; rejection of the stucco requiring the removal and replacement. CC, JA Vol. I., pgs. 16 & 17, paragraphs 11-13. Not when Big-D notified Padilla in mid-September 2009 that the project was going in a new direction (Lopez depo, JA Vol. V., pg. 413, lines 1-2) with a cement board that could better stand the stone pulling forces and didn't require a cure time (*Id.* at 413, lines 17-21) nor in Big-D's counsel, Hurley's November 3rd letter stating "Big-D is looking to Padilla to assist in investigating the cause of the failure." TEXH 58, JA Vol. III., pg. 276, third paragraph, last sentence. IGT's rejection of the stucco was not justification to withhold Padilla's payment in November when Big-D admittedly had no knowledge Padilla caused the separations.

Padilla neither refused to participate in the investigation of the failure or remediation. Upon receipt of Big-D's counsel, Hurley's November 3rd letter stating "Big-D is looking to Padilla to assist in investigating the cause of the failure" (TEXH 58, JA Vol. III., pg. 276, third paragraph, last sentence), Padilla responded stating that "without third party confirmation that its work is sub-standard" it expected to be paid. TEXH 59, JA Vol. III., pg. 278. Big-D never responded to the letter, including suggestions for a third party expert to verify the cause of the separations and a proposal for the fair sharing of the costs. The reason? The reality of the situation in November 2009, there was nothing for anyone to investigate. Lopez

[22] Padilla's Lopez testified he told Brinkerhoff the brown coat needed to cure 28 days before installing the stone on it. Lopez depo, Vol. V., pg. 416, lines 19-25, pg. 417, lines 1–4. After Lopez observed some of the separations, Brinkerhoff testified Lopez's only response was "the product should have cured for 30 days before the stone was allowed to be installed on it." TSRCP 1, Vol. V., pg. 593, lines 22-24

testified that the same day Brinkerhoff told him the project was going in a different direction, Big-D was "destroying the product [stucco] and ripping stone off the wall and starting over." (Lopez depo, JA Vol. V., pg. 413, lines 1-2, pg. 412, lines 17-22). Brinkerhoff's calendar shows "Demo Padilla Substrate" September 14-16, 2009. (TEXH 74, JA Vol. III., pg. 294). As for refusing to participate in the remedial work, installation of the cement board (Durock), Padilla was never asked. Big-D's Brinkerhoff testified he didn't "specifically recall that conversation" asking Padilla if they would install the Durock. (TSRCP 1, JA Vol. VI., pg. 504, lines 4-5), nor could Big-D's McNabb produce proof that a request for proposal, standard in the construction industry for requesting work/materials beyond the terms of the contract, was issued to Padilla for the installation of the Durock. TSRCP 1, JA Vol. VI., pg. 530, lines 21-25. Big-D's withholding Padilla's payment at a time when it admittedly did not know the cause of the separations was a material breach of the Subcontract that caused damages to Padilla in the amount of the payment due for its services, and as approved by Big-D's Brinkerhoff. TEXH 9, JA Vol. II., pg. 215.

V. BIG-D'S FAILURE TO PROVIDE PADILLA NOTICE OF DEFAULT AND OPPORTUNITY TO CURE WAS ANOTHER BREACH

Big-D's failure to provide Padilla written notice of an alleged defect of its work and resulting opportunity to inspect and to cure the defect is a breach of the implied covenant of good faith and fair dealing. "In every contract or agreement there is an implied promise of good faith and fair dealing. This means that each party impliedly agrees not to do anything to destroy or injure the right of the other to receive the benefits of the contract. Thus, each party has the duty not to prevent or hinder performance by the other party." *Hilton Hotels v. Butch Lewis Productions*, 107 Nev. 226, 234 808 P.2d 919 (1991). Padilla's position is the failure of Big-D to provide Padilla written notice of an alleged defect of its work and resulting opportunity to inspect and to cure the defect as provided by the terms of the Subcontract, section

5.1 and Exhibit "Z", prior to withholding payment, prevented Padilla's performance and denied it the benefit (payment) of the Subcontract; a breach of the of the implied covenant of good faith and fair dealing. Joint Pre-Trial Memorandum Pursuant to EDCR 2.67. JA Vol. I., pg. 64, lines 12 – 21.

In mid-September 2009[23], Padilla was informed by Big-D's Brinkerhoff that installation of the stucco, Padilla's work, was stopped because "they were going in a different direction" (Lopez depo, JA Vol. V., pg. 413, lines 1-2) with a prefabricated cement "board [Durock] that can handle the pressure of them [stone installers] pulling on it, plus they could install that board and immediately start installing the stone [no cure time]." (Lopez depo, JA Vol. V., pg. 413, lines 17-21) This change in material from stucco to a prefabricated cement board didn't surprise Lopez who had been adamant to that point the only problem with the stucco was the premature installation of the stone before the stucco was allowed to properly cure. Concerned that the stucco wasn't being allowed to cure properly, when asked who at Big- D he communicated that concern to, he replied "Everyone." Lopez depo, JA Vol. V., pg. 411, lines 10-25. A switch to a substrate that didn't require curing time was understandable because Lopez knew Big-D was under pressure from IGT to finish the project in time for some type of IGT event at the project site. Lopez depo, JA Vol. V., pg. 413, line 22 – pg. 414, line 3.

There was no evidence that at the time of the mid-September announcement of going in a new direction that Big-D alleged the separations were caused by a Padilla commission or omission. To the contrary, reference to the advantage of no cure time for the cement board indicated adequate cure time was an issue. Further, trial testimony made it apparent that in mid-September, Big-D couldn't have given

[23] Lopez testified that the same day Brinkerhoff told him the project was going in a different direction, Big-D was "destroying the product [stucco] and ripping stone off the wall and starting over." (Lopez depo, JA Vol. V., pg. 413, lines 1-2, pg. 412, lines 17-22). Brinkerhoff's calendar shows "Demo Padilla Substrate" September 14-16, 2009. (TEXH 74, JA Vol. III., pg. 294).

Padilla notice of a defect/deficiency in their work causing the separations; Big-D was not aware of any. According to Big-D's Brinkerhoff, answering the question why Big-D didn't terminate the Subcontract with Padilla: "[W]e made a decision [substitute cement board in place of stucco] based on the rejection of Padilla's work by IGT. We didn't know cause." TSRCP 1, JA Vol. V., pg. 469, lines 10-23. In a letter to Padilla's Lopez dated November 3, 2009, Big-D's counsel, Hurley, stated Big-D "is looking to Padilla to assist in investigating the cause of the failure." TEXH 58, JA Vol. III., pg. 276, third paragraph, last sentence. On November 18, 2009, when questioned whether he had released the check to Padilla, Big-D's McNabb responded: "No way. Why would I? Their work is failing. We still don't know who's at fault." TSRCP 1, JA Vol. VI, pg. 650, lines 12-13, TEXH 61, JA Vol. III., pg. 281.

According to the pertinent language of Section 5.1 of the Subcontract titled Notice to Cure:

> If you [subcontractor] are guilty of a material breach of a provision of this Subcontract, you may be deemed in default of this Subcontract. If you fail, within three (3) days after written notification, to commence and continue satisfactory correction of such default, then at your expense, we will: (a) Provide the most expeditious correction of the default . . . . (b) Supply labor, materials, equipment . . . necessary for the satisfactory correction of your default . . . (c) Withhold payment of moneys due you until the work is fully completed and accepted by the Owner. TEXH 1, JA Vol. I., pgs. 101-102, Section 5.1.

When a contract is clear on its face, it will be construed from the written language and enforced as written. *Canfora v. Coast Hotels & Casinos, Inc.*, 121 Nev. 771, 776, 121 P.3d 599 (2005). Clear on its face, Section 5.1 required Big-D provide a written notice to Padilla of a material default and three days for Padilla to commence and continue satisfactory correction of the alleged default before Big-D was entitled to withhold payment to Padilla. In addition to Padilla's Section 5.1 right to inspect, inherent in the right to commence and continue correction of an alleged default is

Nevada Exhibit "Z" right to inspect a claimed defect in its work. The fourth paragraph states in part:

> There shall not be any back charge or deduction from the contract price due Padilla for expense alleged to have been caused by Padilla without prior written notice to Padilla, and Padilla having been given a reasonable opportunity to inspect the claimed defect. TEXH 1, JA Vol. I., pg. 106, 4th paragraph. Note – Brinkerhoff stipulated he initialed the Subcontract on behalf of the Big-D. TSRCP 1, JA Vol. V, pg. 464, lines 18-19.

Big-D's failure to give the requisite written notice of a material breach/defect deceived Padilla to any need to defend its work; to have their expert inspect the failed work, and take samples necessary for laboratory analysis while the alleged failed work was available and before the six month shelf life of the EXPO MX3 expired precluding the scientifically necessary control samples. What else would Padilla believe under the circumstances that its work was being replaced with material that doesn't require cure time and without any notice alleging a breach of the contract or that its work is defective? Padilla's state of mind that inadequate cure time was the problem, and a problem over which Padilla had no control was unchallenged. The stone installation was exclusively scheduled by Big-D. During trial, Brinkerhoff testified he had exclusive responsibility for scheduling the work of all subcontractors; Q: "Would it be fair to say that, if you didn't schedule it, it was not going to happen?" A: "Yes, absolutely." TSRCP 1 JA Vol. V., pg. 462, lines 12-14.

A couple of problems arise from the lack of the Section 5.1 written notice: Padilla was denied an opportunity to cure and mitigate the damages, but this pales in comparison to the denial of Padilla's opportunity to defend its work while the evidence of failed stucco was still available. Neither of which were fair or in good faith, therefore, Big-D breached the implied covenant of good faith and fair dealing in the Subcontract.

VI. BIG-D VIOLATED NEVADA LAW WITHOLDING PAYMENT TO PADILLA

Nevada Revised Statute 624.624 (JA Vol. V., pg. 425) specifies the law for payments or withholding payments to subcontractors. "When the language of a statute is plain and unambiguous, a court should give that language its ordinary meaning and not go beyond it." *Nevada Dept. of Corrections v. York Claims Services*, 131 Nev. Adv. Op., No. 25, pg. 7 (2015). This Court reviews issues of statutory construction de novo. *A.F. Constr. Co. v. Virgin River Casino*, 118 Nev. 699, 703, 56 P.3d 887 (2002). A violation of a statute constitutes negligence per se if the injured party belongs to the class of persons that the statute was intended to protect, and the injury suffered is of the type the statute was intended to prevent. *Vega v. E. Courtyard Associates*, 117 Nev. 436, 440, 24 P.3d 219 (2001).

Big-D and Padilla executed a Subcontract for the IGT project September 3, 2009. TEXH 1, JA Vol. I. pg. 93. After the mid-September "going in a new direction" notice from Big-D, Padilla submitted its Payment Request September 25th to Big-D, which Big-D's Brinkerhoff acknowledged he signed September 30th with the notation payment was due in thirty days on October 25th. TEXH 9, JA Vol. II., pg. 215, TSRCP 1, JA Vol. V., pg. 474, line 17 – pg. 475, line 10.

NRS 624.624(1), JA Vol. V., pg. 425, pertains to written agreements between a higher-tiered contractor [Big-D] and a lower-tiered subcontractor [Padilla]. Accordingly, if the written agreement [Subcontract] includes a schedule for payments, Big-D

> shall pay [Padilla] (1) On or before the date payment is due, or (2) Within 10 days after the date [Big-D] received payment for all or a portion of the work, materials, or equipment described in a request for payment . . ., **Whichever is earlier**." NRS 624.624(1)(a), Emphasis Added

If the Subcontract does not include a schedule for payments, Big-D

> "shall pay [Padilla] (1) Within 30 days after the date the

> [Padilla] submits a request for payment, or (2) Within 10 days after the date [Big-D] received payment for all or a portion of the work, labor, or equipment described in a request for payment . . ., **Whichever is earlier**." NRS 624.624(1)(b), Emphasis Added

The district court concluded NRS 624.624 was designed to ensure general contractors pay subcontractors after the general contractor receives payment from the Owner of the project [IGT]. CL, JA Vol. VII., pg. 833, lines 14-16, Emphasis Added. This is contrary to the plain language of the statute. The relevance of the Owner's payment to the general contractor in either subsection 1, paragraph a. or b., is the potential to shorten the time for payment if the Owner were to pay either before the payment to the subcontractor is due, (a.), or before 30 days after the subcontractor submits a request for payment, (b). In this instance, the Subcontract did not contain a schedule for payments, therefore, as Brinkerhoff stated as standard practice (TSRCP 1, JA Vol. V., pg. 474, line 18 – pg. 475, line 7), payment was due within 30 days after the date Padilla submitted their Payment Request. TEXH 9, JA Vol. II., pg. 216.

Similarly, the district court concluded "Padilla was to be paid . . . after IGT paid Big-D" according to a term of the Subcontract. CL, JA Vol. VII., pg. 834, lines 9-10. This conclusion is contrary to this Court's finding that "pay-if-paid provisions are unenforceable because they violate public policy." *Lehrer McGovern Bovis v. Bullock Insulation*, 124 Nev. 1102, 1117-1118, 197. P.3d 1032 (2008). Also noted in the Subcontract, Section 4.2 (TEXH 1, JA Vol. pg. 101), paragraph above Section 4.3), which contains the statement "As an absolute condition precedent to you receiving payment . . . we must have first received from the Owner the corresponding periodic payment", there is the handwritten notation, "Nevada Law will take precedence" and initialed by Big-D's Brinkerhoff.[24]

[24] Brinkerhoff stipulated he initialed the Subcontract on behalf of the Big-D. TSRCP 1, JA Vol. V, pg. 464, lines 18-19.

Big-D had no lawful right to withhold Padilla's payment. Pursuant to NRS 624.624(2), Big-D's right to withhold Padilla's payment was contingent on compliance with subsection 3. According to NRS 624.624(3), if Big-D intended to withhold any amount from its payment to Padilla, Big-D must have given, on or before the date payment was due, a written notice to Padilla of any amount that will be withheld and give a copy of the notice to all other contractors and the Owner. The written notice must:

> (a) Identify the amount of the request for payment that will be withheld from the lower-tiered subcontractor;
> (b) Give a reasonably detailed explanation of the condition or the reason the higher-tiered contract will withhold that amount, including, without limitation, a specific reference to the provision of section of the agreement with the lower-tiered subcontractor, and any documents relating thereto, and the applicable building code, law or regulation with which the lower-tiered subcontractor has failed to comply; and
> (c) Be signed by an authorized agent of the higher-tiered contractor. NRS 624.624(3)(a), (b), (c).

Accordingly, Big-D's NRS 624.624 written notice to Padilla of its intent to withhold payment was due October 25, 2009, in accordance with Brinkerhoff's calculation of the payment due date. TSRCP 1, JA Vol. V., pg. 474, line 18 – pg. 475, line 7, TEXH 9, JA Vol. II., pg. 216. Such notice never occurred, instead, Big-D, citing "unresolved disputes with Padilla" stopped payment November 18th on its check in the amount of Padilla's requested payment. TEXH 12, JA Vol. II., pg. 222, TEXH 61, JA Vol. III., pg. 281. The district court found Big-D's counsel letter dated November 3 (TEXH 58, JA Vol. III., pg. 276) was "sufficient to constitute required written notice to justify withholding payment." CL, JA Vol. VII., pg. 837, lines 8-9. The letter does not conform substantially with the NRS 624.624 written notice requirement; notably, there is no specific reference to the provision or section of the agreement with the lower-tiered subcontractor, and any documents relating thereto, and the applicable building code, law or regulation with which the lower-tiered

subcontractor has failed to comply, which is not surprising, when the gist of the letter is "looking to Padilla to assist in investigating the cause of the failure." TEXH 58, JA Vol. III., pg. 276, third paragraph, last sentence, Emphasis Added.

In addition to the NRS 624.624 requisite notice before withholding payment, NRS 624.624(4) provides the subcontractor an opportunity to cure alleged reasons for withholding payment. A subcontractor who receives a notice of withholding may: "Correct any condition or reason for the withholding described in the notice of withholding . . ." NRS 624.624(4)(b).

It is obvious the intent of NRS 624.624 is to protect subcontractors' payments from irrational and undefined reasons for withholding payment and to provide a subcontractor an opportunity to cure, that in the instant matter, Padilla was denied by Big-D's failure to provide the requisite written notice of the reasons for withholding payment and withholding payment when Big-D admitted it did not know the cause of the separations nor that Padilla was culpable for all potential causes. According to Big-D's Brinkerhoff:

> [A]t the time, we made the decision [substitute cement board in place of stucco] based on the rejection of Padilla's work by IGT. We didn't know the cause. We didn't know whether it was labor related. We didn't know whether it was material related. We didn't know whether it was weather condition related." TSRCP 1, JA Vol. V., pg. 469, lines 10-23.

And according to Big-D's McNabb, when questioned whether he had released the check to Padilla, Big-D's McNabb responded: "No way. Why would I? Their work is failing. We still don't know who's at fault." TSRCP 1, JA Vol. VI , pg. 650, lines 12-13.

Big-D's stopping Padilla's payment was in violation of NRS 624.624 causing injury in the way of non-payment of the amount Big-D agreed was due for the work performed on the IGT Stone Replacement project. TSRCP 1, JA Vol. V., pg.491 lines 8-10. Big-D was negligent per se.

VII. NO DUTY FOR PADILLA TO INDEMNIFY

According to the district court, Padilla had a duty to indemnify, defend, and hold harmless pursuant to Section 3.6 of the Subcontract. CL pg. 22, lines 22-23. Pursuant to the express language of this section, Padilla's duty arises solely from its acts or omissions, willful or negligent conduct, which as noted above, Big-D has failed to prove-up.

VIII. PADILLA'S CLAIM AGAINST F&D CONTINGENT ON AWARD OF DAMAGES

Although the district court found Big-D's Motion for Judgment as a Matter of Law on the issue of Padilla's claim against the bond posted to release Padilla's lien on the IGT building was not meritorious, it found the issue was moot under the circumstances of the court's denial of Padilla's damages. CL, JA Vol. VII, pg. 838, lines 8-13. In the instance that Padilla shall prevail in this appeal and a finding it is entitled to damages, its claim against F&D should be restored.

IX. PADILLA ENTITLED TO SPOLIATION INSTRUCTION

According to the district court, "it would be improper to order a spoliation remedy when Padilla did not intend to take additional advantage of additional inspection opportunities even if they had been available." CL, JA Vol. VII., pg. 842, lines 6-7. The obstacle to finding the truth in this matter, what caused the separations, is the lack of evidence, more specifically, the absence of any samples of failed stucco: stucco that cured the two and seven day periods specified by Big-D and failed during the stone installation adhesive test; that is, the stone pulled the second coat of stucco from the first coat of stucco after the stucco was properly cured. All of which was the result of Big-D's failure to obtain valid samples when they were available, and to give Padilla fair notice that it needed to obtain samples for a defense.

Big-D had a prelitigation duty to preserve samples of the failed stucco when litigation was reasonably foreseeable. *Bass-Davis v. Davis*, 122 Nev. 442, 450, 134 P.3d 103 (2006). Nothing should have been more apparent to Big-D, at the time of

the stucco separations and IGT's rejection of the stucco, that litigation was imminent and the failed stucco would be relevant. Big-D's McNabb testified that at the time of first event of a stone pulling the stucco apart "our counsel [Bill Hurley] was involved in every communication because it was such a controversial issue. They [IGT] had Mark [Ferrario], their attorney, everything was Mark and Bill and then Valerie [Higgins], their [IGT's] internal counsel. TSRCP 1, JA Vol. VI., pg. 647, lines 17-23. And, at a time when Big-D admitted it didn't know the cause of the separations, and as noted below, IGT was commanding the removal and replacement of the failed stucco, the evidence, its incomprehensible Big-D wouldn't have preserved samples of the failed stucco for both their defense and to prosecute an action if it was established the cause was a third party, such as Padilla.

According to the district court, spoliation sanctions are only appropriate to a party controlling the evidence, which Big-D didn't have because it was IGT that directed Big-D "to remove and replace the Padilla Work on an expedited basis." CL, JA Vol. VII. pg. 841, lines 24 – 26. There is no showing that IGT's order to remove and replace the Padilla Work prohibited IGT from preserving samples of failed work.

According to the district court, Padilla was invited to participate in the testing Big-D performed, and there wasn't any evidence Big-D excluded Padilla from any available opportunities to inspect the Padilla Work. CL, JA Vol. VII., pg. 841, line 26 – pg. 842, line 2. There isn't any evidence that Big-D ever tested failed work that it could have invited Padilla to participate in. As evidenced by the appearance of Chin, former IGT consultant, at trial and Big-D's exclusive reliance on him for proof of Padilla's culpability; there wasn't any Big-D's testing for causation. However, Big-D did exclude Padilla from inspecting failed work with their failure to preserve samples and to give any notice to Padilla of its culpability; alerted to the prospect Padilla would need a defense. Instead, Padilla received notice the project was "going in a different direction" (Lopez depo, JA Vol. V., pg. 413, lines 1-2) with a

prefabricated cement "board that can handle the pressure of them [stone installers] pulling on it, plus they could install that board and immediately start installing the stone [no cure time]" (Lopez depo, JA Vol. V., pg. 413, lines 1-2); nothing that even implies suspicion of Padilla's culpability.

Brinkerhoff's calendar shows "Demo Padilla Substrate" September 14-16, 2009. TEXH 74, JA Vol. III., pg. 294. Two weeks before Brinkerhoff approved Padilla's Payment request (TSRCP 1, JA Vol. V., pg.491 lines 8-10) and seven weeks before Big-D's counsel's letter conditioning further payment to Padilla on assistance establishing Padilla met all its obligations under the Subcontract Agreement. TEXH 58, JA Vol. III., pg. 277, last paragraph. Additionally, when Padilla requested "third party confirmation that its work is sub-standard", Big-D never responded. TEXH 59, JA Vol. III., page 278, last paragraph. In the absence of valid samples, what could be scientifically investigated by anyone? Not once in the course of discovery did Big-D put forth a sample of failed stucco with information of installation dates to confirm specified cure times.

Big-D breached its duty to preserve the failed stucco, at least valid samples, when litigation was reasonably foreseeable and samples of the failed would be relevant. Therefore, Padilla was entitled to an adverse inference instruction that the district court may draw an inference that if samples of the failed stucco were available for testing, the results would have been unfavorable to Big-D.

X. BIG-D NOT ENTITLED TO JUDGMENT IN THE AMOUNT OF $600,000.00

The district court found Big-D proved it was entitled to recover damages against Padilla, and according to the Joint Stipulation, "judgment against Padilla in the amount of $600,000.00." CL, JA Vol. VII., pg. 840, lines 5-6. The district court misread the stipulation: "Padilla stipulates to entry of judgment in the amount of the Allowed Claim ($123,091.39)." Stipulation ("STIP"), JA Vol. V., pg. 430, lines 1-

2.

Pursuant to Eighth Judicial District Court Rule 7.50, a stipulation is effective if it is in writing subscribed by the party against whom the same shall be alleged. In an effort to reduce trial time, counsel for both Big-D and Padilla discussed the futility of the time proving up alleged damages of more than $750,000.00, when the fact was the most Big-D could recover pursuant to the Bankruptcy Court's allowed claim and approved Chapter 11 plan, was $123,091.39[25]. STIP, JA Vol. V., pg. 430, lines 1-2. Accordingly, counsel for Big-D drafted a Joint Stipulation as to Damages on Big-D Construction Corporation's Counterclaim which was in writing, signed by the President of Padilla Construction Company of Nevada, announced to the court (TSRCP JA Vol. V., pg. 444, line 24 – pg. 445, lines 1-11) and filed December 3, 2014. STIP, JA Vol. V., pg. 427. A settlement agreement is a contract governed by the general principles of contract law, the interpretation of such is reviewed de novo. "We have stated that contracts will be construed from their written language and enforced as written." *The Power Company v. Henry*, 130 Nev. Adv. Op., No. 21, pgs. 6-7 (2014).

According to the Stipulation, pages 3 & 4, paragraph, 6:

> Given that any recovery by Big-D against Padilla is limited to the Stipulated Payment, in the event that this Court determines Padilla is liable to Big-D for costs to remove and replace the Padilla Work, Padilla stipulates to entry of judgment in the amount of the Allowed Claim, ($123,091.39) . . . STIP, JA Vol. V., pg. 429, line18 – pg. 430, line 2.

The district court misstated the amount of the stipulated judgment as $600,000.00, which must be corrected to $123,091.39, the parties' stipulation.

[25] During the course of the instant matter, Padilla Construction Company of Nevada filed a Chapter 11 Petition October 11, 2011, after which Big-D and Padilla stipulated to a contingent claim upon Big-D prevailing in the instant manner of a maximum $600,000.00, to be paid according to the approved plan, which parties agreed, was $123,091.38. See following Argument, XI.

XI. BIG-D NOT ENTITLED TO ATTORNEY'S FEES, COSTS, INTEREST

Post judgment, Big-D submitted a motion for Attorneys' Fees, Costs and Interest Pursuant to Judgment and to Amend Judgment to $1,234,678.55. Motion, JA Vol. VII., pg. 854 line 13. Padilla filed an Opposition contesting the district court's jurisdiction to award a judgment in excess of the maximum amount of the Bankruptcy Court's allowed claim, $600,000.00. Opposition, JA Vol. VII., pg. 865, lines 8-10. Big-D responded that the costs, fees and interest are post-petition debts not impacted by the bankruptcy action. REPLY, JA Vol. VII., pg. 887, lines 12-16. The district court issued an Order awarding Big-D Fees and Costs in the amount of $414,433.99 and post judgment interest at a daily rate of $59.61. ORDER, JA Vol. VII., pg. 908 lines 2-7.

Padilla argued the Bankruptcy Court had retained jurisdiction over any and all disputes regarding the operation and interpretation of the Plan and this Order [Confirming Debtors' First Amended Joint Plan of Reorganization, JA Vol. VII., pg. 896, lines 18-22]. TSRCP, JA Vol. VI., pg. 30, lines 23-28. Therefore, whether the fees, costs and interest sought by Big-D was post-petition or not subject to the stipulated claim, was for the Bankruptcy Court to decide, and not the Eighth Judicial District Court. Trans pg. 23, line 23 – pg. 7, line 2.

> [W]here the judgment or decree of the Federal court determines a right under a Federal statute, that decision is final . . . and an adjudication under the reorganization provisions of the Bankruptcy Act, effect as res judicata is to be given the Federal order. *Stoll v. Gottlieb*, 305 U.S. 165 (1938).

In the absence of the district court's subject matter jurisdiction to determine Big-D's request for an Amended Judgment exceeding the Bankruptcy Court's allowable claim against Padilla, the district court's Order entered July 22, 2015 is void. *Landreth v. Malik*, 127 Nev. Adv. Op., No. 16, pg. 4 (2011)

XII. CONCLUSION

The district court overlooked Big-D's numerous admissions, by word and conduct, that there is no evidence that a Padilla commission or omission caused the complained of separations. Equally sure, is the fact that the responsibility of no evidence of the cause of the separations is exclusively Big-D's. Big-D's failure to retain samples of the failed stucco was neither precluded nor restrained by IGT's command to remove and replace the stucco. Equally certain, is the fact that Big-D's failure to give Padilla notice required by both Subcontract and Nevada law denied Padilla critical notice of potential culpability for the separations and the need to inspect, investigate, potentially cure, and most importantly, be alerted to the need to prepare a defense. Accordingly, Padilla is entitled to judgment against Big-D for breach of the Subcontract, breach of the implied covenant of good faith and fair dealing, and violation of Nevada law. Irrespective of the Court's decision of liability, the district court's misunderstanding of the stipulated judgment must be corrected and its award of attorney's fees, costs, and interest without subject matter jurisdiction must be voided.

NRAP 28.2 Attorney's Certificate/NRAP 32(8)(A)

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and type style of NRAP 32(a)(6) because:

This brief has been prepared in a proportionally spaced typeface using Microsoft 2013 Word in 14 font size and Times New Roman.

2. I further certify that this brief complies with the page limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either:

Does not exceed 30 pages.

3. Finally, I hereby certify that I have read this appellate brief, and to the best of

my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 28th day of January 2016.

/s/ Bruce R. Mundy

BRUCE R. MUNDY
NV 6068
200 South Virginia Street, Eighth Floor
Post Office Box 18811
Reno, Nevada 89511-0811
reno-attorney@sbcglobal.net
(775) 851-4228
FAX 851-4239
Attorney for: Appellant

EXHIBIT 14

IN THE SUPREME COURT OF THE

STATE OF NEVADA

PADILLA CONSTRUCTION COMPANY OF NEVADA, A NEVADA CORPORATION, Appellant, v. BIG-D CONSTRUCTION CORP., A UTAH CORPORATION, Respondents.	Supreme Court No. 67397 Supreme Court No. 68581 District Court Case No.: A-10-609048

RESPONDENT'S ANSWERING BRIEF

Nicole E. Lovelock, Esq.
Nevada Bar No. 11187
HOLLAND & HART LLP
9555 Hillwood Drive, 2nd Floor
Las Vegas, Nevada 89134
(702) 669-4600
(702) 669-4650 – fax
nelovelock@hollandhart.com

Melissa A. Beutler, Esq.
Nevada Bar No. 10948
BIG-D CONSTRUCTION CORPORATION
3030 South Highland Drive
Las Vegas, Nevada 89107-1047
Melissa.Beutler@big-d.com

Attorneys for Respondent

RULE 26.1 DISCLOSURE

Pursuant to Nev. R. App. Proc. 26.1, the undersigned counsel certifies that Respondent Big-D Construction Corp. is a Utah Company licensed to perform construction in Nevada. The parent company is Big-D Corporation, a Wyoming Company. Big-D is represented by its in-house counsel, Melissa A. Beutler, Esq. (Bar No. 10809) and Nicole E Lovelock (Bar No. 11187) of Holland & Hart LLP.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

I. STATEMENT OF THE ISSUES[1]

1. Did the District Court clearly err in determining that the stucco work performed by Padilla was defective?

2. Did the District Court clearly err in finding that Big-D gave proper notice of withholding to Padilla pursuant to NRS 624.624?

3. Did the District Court abuse its discretion in declining to give itself a spoliation instruction?

4. Did the District Court have the authority to award attorneys' fees and costs to Big-D to defend the Padilla Action?

II. STATEMENT OF THE CASE

Padilla Construction Company of Nevada ("Padilla") commenced a mechanic's lien action in the Eighth Judicial District Court for Clark County (the "Padilla Action"). Padilla was a subcontractor to Big-D Construction Corp. ("Big-D"), who was acting as the general contractor for IGT to construct its office headquarters and related facilities on South Buffalo Drive in Las Vegas, Nevada ("the "Project"). Padilla performed stucco work on the Project (the "Padilla Work"). IGT rejected the Padilla Work and required Big-D to remove and replace it.

[1] The defined terms set forth in the Statement of the Issues are defined in the Statement of the Case.

In January 2010, Padilla initiated the Padilla Action even though it is undisputed that the Padilla Work had been rejected by IGT and Big-D had removed and replaced the Padilla Work at IGT's direction. Big-D filed a counterclaim related to the nearly $1 million incurred by Big-D to remove and replace the Padilla Work and the adjacent work damaged by the defective Padilla Work (the "Big-D Counterclaim").

In October 2011, Padilla filed a Chapter 11 bankruptcy action in the Central District of California (the "Padilla Bankruptcy"). Padilla continued to prosecute the Padilla Action, as it was not stayed by the Padilla Bankruptcy. Big-D filed a proof of claim in the Padilla Bankruptcy and received relief from the automatic stay to continue to prosecute the Big-D Counterclaim. Subsequently, Big-D stipulated to the reorganization plan in the Padilla Bankruptcy, which capped the maximum amount of Big-D's Counterclaim for pre-confirmation claims at $600,000—subject to actual proof and liquidation in the Padilla Action.

Big-D and Padilla stipulated to nearly all operative facts—except causation. Padilla agrees that the Padilla Work failed but contends that the failure was not the result of workmanship. Critically, Big-D and Padilla stipulated the amount of costs incurred by Big-D to remove and replace the defective Padilla Work exceeded the $600,000 allowed claim (in order to avoid the need for additional trial time to prove these damages). As a result of the stipulations, the only

remaining issue for trial was causation—was Padilla responsible for the failures in the Padilla Work. If yes, then pursuant to the parties' stipulations, Big-D was entitled to damages in the principal amount of $600,000.00.

The Padilla Action proceeded to a three-day bench trial in December 2014. Judge Denton issued detailed Findings of Fact and Conclusions of Law and a Judgment in favor of Big-D. The District Court's factual findings were supported by substantial evidence that Padilla failed, in several independent ways, to construct the Padilla Work in compliance with the plans and specifications. Subsequently, Judge Denton awarded Big-D its post-petition costs and fees associated with defending the Padilla Action.

III. STATEMENT OF THE FACTS

The parties stipulated to nearly all operative facts in the Joint Pretrial Memorandum. JA Vol. 1, pg. 45-52. Padilla's Opening Brief mischaracterizes the context of those facts—the most material of which are explained below. Notably, the "Joint Appendix" filed by Padilla selectively omits a number of admitted trial exhibits that were included with the substantial evidence that Padilla's Work was defective. Those exhibits are now included with Respondent's Appendix.

A. The Padilla Work Was Defective; The Owner Directed Big-D to Remove and Replace the Padilla Work.

The Project. Between 2006 and 2008, Big-D acted as the general contractor for the Project—IGT's corporate headquarters. JA Vol. 1, pg. 46:10-7, Pre-Trial

Memorandum, Stipulated Facts. The centerpiece of the Project was an office building constructed with large sandstone panels installed on the exterior and in the interior lobby. IGT took occupancy of the Project in the early summer of 2008. *Id.* at 46:17-22.

After deficiencies were identified with the stone work performed in the initial construction, IGT directed Big-D to remove and replace the original stone work. *Id.* Because the stone could not be removed without damaging the underlying two-coat stucco system, Big-D was required to remove the stucco system as well as the stone. *Id.* at 46: 23-25. IGT directed Big-D to perform the repair work in August and September 2009, with a firm finish deadline to enable IGT to entertain customers in town for the G2E convention in mid-October 2009. *Id.* at 46:27-47:11.

The Padilla Subcontract. Padilla was not involved in the original construction of the Project. In August 2009, Padilla contacted Big-D and requested the opportunity to submit a proposal for the stucco portion of the replacement work. JA Vol. VI, pp. 555:14-557:13 (Brinkerhoff Testimony); JA Vol. II, pp. 223-225 (Tr. Ex. 13). The stucco scope of work required an initial metal lath layer, followed by a two-coat stucco system (the "Padilla Work"). JA Vol. 1, pg. 48:10-19, Pre-Trial Memorandum, Stipulated Facts. Big-D ultimately contracted with Padilla to perform the Padilla Work and the parties executed a

subcontract agreement (the "Subcontract Agreement"). *Id.* at 46:27-47:4. JA Vol. I, pp. 91-107, (Tr. Ex. 1, Subcontract Agreement).

The Subcontract Agreement required Padilla to furnish "all labor, materials, equipment, and necessary services to install complete exterior and interior stucco (plaster) including lath, scratch, and brown coat." JA Vol. 1, pp. 91-93 (Tr. Ex. 1, Subcontract Agreement). The Subcontract Agreement required Padilla to perform the Padilla Work in compliance with the Plans and Specifications for the Project, which included specific parameters, including the following:

- Minimum plaster thicknesses as specified [in included chart]. JA Vol. 1, pg. 456, (Tr. Ex. 4, Section 09220 at 3.4G).
- The scratch coat was to be "horizontally cross-rake[d] to provide key for second Base Coat (brown coat)." *Id.* at Section 09220 at 3.4C.
- The base coat was to be "applied so that it meets the required total thickness" and "not vary more than 1/4 in." *Id.* at Section 09220 at 3.4D 1, 2.
- Remove and replace unacceptable plaster and base. *Id.* at Section 09220 at 3.10D.
- Comply with specified plastering standards.[2]

[2] The Specifications, at Section 092200 at 1.1 .A, provided that the Padilla Work was to comply with the following plastering standards: (a) ASTM-C926, [contained at JA. Vol. 4, pg. 352-61, Trial Exhibit 89]; (b) Portland Cement Association Plaster (Stucco) Manual, Trial Exhibit 90, [contained at RA. Vol II, pg. 277-325 (Tr. Ex. 90)]; and (c) per Building Code, as locally adopted,

Cure Times. As the specialty subcontractor with substantial expertise in stucco, Padilla was required to both (i) select the stucco product for approval by the Architect [JA Vol. VI, pp. 559:24-566:1 (Brinkerhoff Testimony)] and (ii) control the means and methods of the Padilla Work, including setting the required "cure" times between the stucco coats and before stone work was to be installed over the Padilla Work. JA Vol. VI, pp. 620:10-631:17 (Brinkerhoff Testimony); JA Vol. VI, pp. 682:12-683:13 (Chin Testimony).

Contrary to Padilla's claim that "cure times were far from settled and an ongoing controversy," [Opening Br. at 7], the record is clear that the cure times were set at (i) two days between scratch coat and brown coat and (ii) seven days between brown coat and stone installation. JA Vol. VI, pp. 620:10-631:10 (Brinkerhoff Testimony); JA Vol. VI, pp. 685:16-687:11 (Chin Testimony). In fact, IGT's consultant testified, he was "very comfortable with [the 2-day/7-day cure times] because it was consistent with the Code and all other standards and, especially, the stucco manufacturer's recommendation." *Id.* at 685:4-11. Further, Padilla's assertion that there was no "summit meeting between IGT, Big-D, EXPO and Padilla" related to cure times is inapposite. Opening Br. at 8. Rather, all

---

[contained at RA. Vol. II, pg. 326-327,(Tr. Ex. 91); JA Vol. 1, pg. 456 (Tr. Ex. 4,, Section 09220 at 1.1 .A).

parties understood that Padilla was responsible for the cure times—and no party objected to the cure times. JA Vol. VI, pp. 739:14-24 (Chin Testimony).

Although the Architect and IGT *reviewed* the proposed cure times, neither party disputed them; they allowed the means and methods to remain in Padilla's hands, as the 2-day/7 day time periods presented no concerning deviation from industry standard or local code. JA Vol. VI, pp. 620:10-631:10 (Brinkerhoff Testimony); JA Vol. VI, pp. 742:14-25 (Chin testimony). In addition, Big-D implemented quality control measures to ensure the stone contractor did not install stone over the Padilla Work until after the seven-day period expired. JA Vol. VI, pp. 583:2-584:8 (Brinkerhoff Testimony).

Failures of the Padilla Work. Shortly after Padilla commenced its work, the two layers of the Padilla Work began to separate from each other. JA Vol. 1, pg. 49:9-13, Pre-Trial Memorandum, Stipulated Facts; RA Vol. 1, pg. 137-156, Tr. Ex. 17 (Padilla's crew's daily logs); RA Vol. 1, pg. 173-202; Tr. Ex. 21 (email to Padilla management). IGT's consultant, Ian Chin, reported that Padilla's Work failed to comply with the Plans and Specification in several respects. JA Vol. VII, pp. 743-786 (Chin Testimony). The testing revealed multiple, independent causes of the failures, including (a) improper thicknesses of the stucco; (b) failure to adequate hydrate the stucco mix; (c) failure to adequately compact the brown and scratch coats; (d) contaminated materials within the stucco mix; and (e) failure to

adequately score the scratch coat to allow the brown coat to bond. *Id.*; JA Vol. IV, pp. 380-382 (Tr. Ex. 406). Any of these failures, alone, would have been a sufficient basis to reject the work.

Padilla was involved in the on-site meetings and invited to all testing sessions. Further, information regarding IGT's testing and results were communicated real-time to Padilla. Accordingly, Padilla's assertion in its Opening Brief that it first learned of the basis for IGT rejecting the stucco in Big-D's counterclaim is false.

Stucco Failures Widespread; Unrelated to Stone Installation. Contrary to Padilla's characterization, the failures in the Padilla Work were widespread. The Padilla Work failed in all of its locations. Although the failures were initially observed during the stone installation, the failures were not limited to areas in which stone was installed over the stucco. Rather, the same failures were identified throughout the entire project—including the interior of the building where it is undisputed that no stone work was installed over the Padilla Work. JA Vol. VI, pp. 722:1-728:25 (Chin Testimony); JA Vol. V, pg. 480:16-481:16 (Brinkerhoff Testimony); JA Vol. III, pp. 279-80 (Tr. Ex. 60). As Big-D's project manager testified regarding the interior stucco, "as we started taking these cores out, you could simply twist them like a mason jar and separate the brown coat from

the scratch coat....there was just no adhesion between the scratch and the brown." JA Vol. V, pg. 480:16-481:16 (Brinkerhoff Testimony).

IGT Directs Big-D to Remove and Replace the Padilla Work. IGT made the decision to reject the Padilla Work both in the interior and exterior of the Project. JA. Vol. V, pg. 421-24 (IGT Deposition). The basis for IGT's decision included the recommendation of Mr. Chin that "he didn't believe it was installed to the standards that would give him high confidence that the system would be able to take and handle stone." *Id.* As a result, it is undisputed that IGT made the decision to reject the Padilla Work because it determined Padilla failed to comply with the Plans and Specifications. *Id.*; JA Vol. VI, pp. 722:1-728:25 (Chin Testimony); JA Vol. V, pg. 480:16-481:16 (Brinkerhoff Testimony). The Padilla Work on the site further presented a safety concern that required immediate remove and replacement because 40 lb stone panels had been installed over the top of portions of the Padilla work that was failing. JA Vol. VI, pp. 526-27 (McNabb Testimony).

B. Big-D Gave Padilla *Repeated* Notice of the Failures in the Padilla Work and Requested Padilla's Assistance to Defend the Work.

Padilla was regularly and repeatedly advised of failures of its work both during ***and*** after the Project. JA Vol. 1, pg. 49:9-50:13, Pre-Trial Memorandum, Stipulated Facts. In addition, Padilla's own crew advised Padilla management of the failures in the Padilla Work. *Id.* at 49:9-27; RA Vol. 1, pg. 137-156, Tr. Ex. 17 (Daily Field Logs of Padilla's crew).

During the Project. Both IGT and Big-D specifically and repeatedly requested Padilla to participate in testing to determine whether the Padilla Work was suitable. JA Vol. 1, pg. 50:1-28, Stipulated Facts; JA Vol. III, pg. 265, Tr. Ex. 46 (email informing Padilla "we have another area of separation between the brown and scratch coat" and requesting a telephone call to discuss). JA Vol. V, pp. 486:14-23, 487:4-15 (Brinkerhoff Testimony). Padilla was present during testing performed on-site on September 16 and 23 and was present when the demolition of the Padilla Work commenced. JA Vol. V, pg. 476:24-477:15, 480:2-25 (Brinkerhoff testimony).

These invitations were made both during the construction and after the Padilla Work was rejected. Yet, Padilla did nothing to investigate. Padilla did not investigate whether the brown coat that it was using was too stiff. RA. Vol. II, pg. 352-353 (Lopez Deposition at 129:2-9). Padilla did not investigate whether the two layers of its stucco were sufficiently compacted. *Id.* (Lopez Deposition at 129:10-13). Padilla did not investigate whether the water content of the brown coat was sufficient at the time that it was applied. *Id.* (Lopez Deposition at 132:18-22). When Padilla first became aware of the presence of chunks in its stucco work, its expert, Mr. Roberts, recommended that it investigate the product mix to identify the source of contaminates. *Id.* at 335 (Lopez Deposition at 43-45). Padilla did

not take any action to investigate the product because "***that cost money***." *Id.* (Lopez Deposition at 44:1-2) (emphasis added).

Padilla's executive responsible for the Project made clear "we weren't going to participate" in testing and investigation of Padilla's Work. *Id.* at 342 (Lopez Deposition at 84: 12-17; 82-84).

> *Q. And do you recall, did Big-D in fact request Padilla to assist it to investigate the cause of the failures of the product?*
> *A. Yes*
> *Q. And what, if anything, did Padilla do to assist Big-D to investigate the cause of the product failure?*
> *A. Ask for our money.*
> Id. *at 354 (Lopez Deposition at 135:16-23).*

After the Project. Even with Padilla's failure to assist, Big-D continued to defend the Padilla Work for a period of weeks and requested Padilla's assistance and participation in its efforts. JA Vol. 1, pg. 50:1-7 Stipulated Facts; RA Vol. 1, pg. 237-238, Tr. Ex. 52; JA Vol. 3, pg. 272, Tr. Ex. 55; JA. Vol. III, pg. 268, Tr. Ex. 53 (email confirming teleconference between Big-D and Padilla to discuss plan to defend work); JA Vol V, pg. 469:10-24 (Brinkerhoff Testimony); JA Vol VI, pg. 497-502 (Brinkerhoff Testimony).

This included the following measures: (i) a request for a meeting immediately after IGT rejected the Padilla Work (which was scheduled for September 29, 2009); (ii) several telephone calls from Big-D to Padilla to follow up on the September 29 meeting, JA Vol. 5, pg. 473:13-18 (Brinkerhoff testimony)

and (iii) a formal letter that stated, "Big-D is looking to Padilla to assist in investigating the cause of the failure...It would be a tremendous assistance if Padilla would furnish Big-D with any documentation or other evidence at its disposal which relates to the involvement of IGT or its consultant, Ian Chin." JA Vol. III, pg. 275- 77, Tr. Ex. 58 (letter from Big-D requesting that Padilla assist Big-D to defend the Padilla work to IGT; confirming payment to be withheld unless and until work could be defended). Padilla unequivocally declined unless it was immediately paid in full for the removed and rejected work. JA Vol. III, pg. 278 (Tr. Ex. 275); JA Vol VI, pg. 497-502 (Brinkerhoff Testimony); RA Vol. II, pp. 352-354 (Lopez Deposition at 135:16-23).

Padilla's Crews' Knowledge.

It was no secret that the Padilla work was failing. Even Padilla's own crews identified the separation. RA Vol. 1, pg. 137-156, Tr. Ex. 17 (Daily Field Logs of Padilla's crew). Padilla's field notes indicate as follows:

Date	**Notation**
September 10, 2009	"The brown is pulling from the scratch on the first two columns that we scratch and brown after the mock-up."
September 11, 2009	"We have the same problem on the brown coat on the second column when the stone installers do the bonding test the brown pulls from the scratch. Call Joe [Lopez] let him know. **Also, Joe [Padilla management] says for me to keep doing the production**."
September 15, 2009	"Today, 3 more areas where install stone when stone installers pull it to check bonding, brown coat came loose

Date	Notation
	from scratch coat. Joe Lopez [Padilla management] let him know what happened. **His response was for me to keep doing what I was doing and that nothing was wrong.**"
September 16, 2009	"Today, two more areas came loose."

Id. (emphasis added). Padilla management brazenly instructed the Padilla crews to keep working, in spite of identified instances of failure in Padilla's Work. *Id.*

C. Big-D Gave Padilla *Repeated* Notice of the Failures in the Padilla Work and Requested Padilla's Assistance to Defend the Work.

IGT did not give Big-D the opportunity to remove and replace the Padilla Work. JA Vol. VI, pp. 525-536 (McNabb Testimony). On the outside of the building, IGT immediately directed Big-D to place an alternate system. Because there was no longer time to allow the two-coat stucco system to cure before IGT needed the project for its international client event, IGT directed Big-D to use an alternate, slightly less desirable method of construction using a cement board base for the stone instead of the stucco.[3] JA Vol. 1, pg. 50:7-13, Pre-Trial Memorandum, Stipulated Facts; JA. Vol. V, pg. 421-24 (IGT Deposition); JA Vol 5, pg. 489-90 (Brinkerhoff testimony); JA Vol. VI, pp. 525-536 (McNabb).

[3] Again, Padilla brazenly misrepresents the evidence on this issue. Opening Br. at 3. Contrary to Padilla's representation that Big-D and IGT determined the cement board "was better suited to the stone adhesive coverage pulling," all evidence indicates that the sole basis for the switch was timing and IGT firmly believed it was a less desirable solution than the stucco—not some sort of improvement. JA. Vol. V, pg. 421-24 (IGT Deposition); JA Vol 5, pg. 489-90 (Brinkerhoff testimony)

Months later, IGT informed Big-D that it refused to allow Big-D the opportunity to replace the Padilla Work on the interior of the building. JA Vol. VI, pp. 517-18 (McNabb Testimony); JA Vol. III, pp. 286-290. In fact, the failure of the Padilla Work formed the basis for a dispute between Big-D and IGT and resulted in Big-D paying substantial damages to IGT. JA Vol. VI, pp. 524-26 (McNabb Testimony); JA Vol. III, pp. 283-285 (Tr. Ex. 64).

By a mistaken accounting error, Big-D released a check to Padilla in October 2009. JA Vol. V, pp. 490:20-492:25 (Brinkerhoff Testimony); JA Vol. VI, pp. 494:1-498:1, 507:18-511:8 (Brinkerhoff Testimony); JA Vol. II, pp. 215-220, Tr. Ex. 9 (Payment Request); JA Vol. II, pp. 291-292, Tr. Ex. 73 (Big-D AP History). Big-D immediately stopped payment on the check and called Padilla to advise that the check was released in error and that payment was to be withheld pending further investigation into the causes of the failure of the Padilla Work. JA Vol. VI, pp. 494:1-498:1, 507:18-511:8 (Brinkerhoff Testimony); JA Vol. III, pp. 281-282, Tr. Ex. 61 (Email).

D. District Court Relied on Substantial Evidence that the Padilla Work Was Defective.

Based upon the presentation of the evidence, the District Court considered substantial factual evidence that the Padilla Work was defective and was not constructed in compliance with the Plans and Specifications. This included evidence from:

(i) On-site investigation: JA. Vol. 3, pg. 261-266 (Tr. Ex. 43, 44, 46); RA Vol I, pg. 231-238 (Tr. Ex. 45, 47, 48, 49, 51); ; JA Vol. 5, pg. 48-85; [Chin testimony]

(ii) Photographs of the defective work as it was observed, JA Vol. IV, pp. 374-384, Tr. Ex. 404 and 405;

(iii) Testimony of Big-D on-site project manager, Brent Brinkerhoff, JA Vol. V, pp. 480-86 (Brinkerhoff Testimony); JA Vol. VI, pp. 498-503 (Brinkerhoff Testimony);

(iv) Testimony of Big-D's principal in charge who was onsite, Forrest McNabb, JA Vol. V, pp. 527 (McNabb Testimony);

(v) Testimony of Padilla's executive responsible, Joseph Lopez, JA Vol. V, pp. 407-417 (Lopez Testimony); RA Vol. II, pp. 328-356 (Lopez testimony);

(vi) Testimony of IGT's responsible executive, Robert Stecker, JA Vol. V, pp. 418-424 (IGT Testimony); RA Vol. II, pp. 357-384 (IGT testimony);

(vii) Testimony of IGT's designated on-site expert based upon personal observation and investigation, Ian Chin, JA Vol. VII, pp. 734-784 (Chin Testimony);

(viii) testimony regarding findings of IGT's off-site petrographic analysis, *Id.* and JA. Vol. IV, pp. 380-381 (Tr. Ex. 406); and

(ix) further extensive analysis after the Padilla Work was removed and replaced. JA Vol. VI, pp. 498-503 (Brinkerhoff Testimony).

Chronologically, this included the following sequence of events relied upon by the District Court to determine that the Padilla Work was defective.

On **September 10, 2009**, visual review of the Padilla Work confirmed that the first layer of the Padilla Work was not adequately "scored" to allow bonding to the second layer; Finding of Fact 34 (citing Tr. Ex. 404[4], 405[5], 446-50); JA Vol. VI, pp. 696:12-697:8 (Chin Testimony).

On **September 10, 2009**, visual review of the Padilla Work confirmed that it was not properly hydrated with enough water to activate the cementitious properties of the material. Finding of Fact 34 (citing Tr. Ex. 403, 404, 405, 446-50); JA Vol. VI, pp. 702:3-704:1 (Chin Testimony). Big-D immediately contacted Padilla and asked Padilla to investigate the failures. JA. Vol. V, pp. 484:12-24.

On **September 14, 2009**, photographs of the failed work demonstrated that, in contravention of the plans and specifications, the grooving of the Padilla Work is in two directions. JA Vol. VI, pp. 711:12-712:4 (Chin Testimony).

On **September 15, 2009**, Ian Chin's petrographer reported that microscopic examination of the Padilla Work was consistent with Mr. Chin's conclusions based

[4] Contained at JA Vol. 4, pg. 369-73.
[5] Contained at JA Vol. 4, pg. 374-79.

upon on-site investigation. JA Vol. VI, pp. 702:3-704:1, 704:9-706:20 (Chin Testimony); JA Vol. IV, pp. 380-381 (Tr. Ex. 406).

On **September 16, 2009**, Mr. Chin conducted an on-site investigation of the failed conditions. JA Vol. VI, pp. 707:11-708:15.

On **September 17, 2009**, Mr. Chin analyzed, 3-inch diameter core samples of the Padilla Work. JA Vol. VI, pp. 716-720 (Chin Testimony); JA Vol. IV, pp. 383-386 (Tr. Ex. 438); JA Vol IV, pp. 395-397 (Tr. Ex. 449). Of the 11 samples, the following results were identified: (i) on eight of the samples, the brown coat had failed to bond to the scratch coat; (ii) on seven samples, the scratch coat was not properly scored to receive the brown coat; and (iii) on an eighth sample, the scratch coat was only 50% bonded to the brown coat. JA Vol. IV, pp. 383-386 (Tr. Ex. 438); JA Vol. III, pp. 279-80 (Tr. Ex. 60).

On **September 23, 2009**, Big-D performed testing of several interior areas of the building to determine whether it could defend the Padilla Work. JA Vol. VI, pp. 722:1-728:25 (Chin Testimony); JA Vol. V, pg. 480:16-481:16 (Brinkerhoff Testimony). Those investigations revealed the same types of failures as identified on the exterior of the building. JA Vol. III, pp. 279-80 (Tr. Ex. 60).

E. District Court Awarded Big-D Its Attorneys Fees and Costs as Prevailing Party in the Padilla Action.

On March 6, 2015, Big-D filed a Motion for Attorneys' Fees, Costs, and Interest Pursuant to Judgment and to Amend Judgment in the amount of

$1,234,678.55. This Motion sought to Amend the Judgment in the following amounts plus post-judgment interest on those amounts:

Category	Amount
Attorneys Fees	$383,399.00
Expert Fees	$38,882.34
Lien Release Bond Fees	$24,700.00
Other Costs	$6,344.99
Pre-Judgment Interest	$164,921.92

JA Vol. VII, pg. 849. In its Reply on May 18, 2015, Big-D voluntarily removed its claim for Pre-Judgment Interest in response to Padilla's Opposition; Big-D acknowledged the pre-judgment interest claim was barred by the Padilla Bankruptcy. JA Vol. VII, pg. 885.

The District Court entered an order awarding Big-D the following:

Category	Amount
Attorneys' Fees	$383,399.00
Fees to Depose Padilla's Expert	$2,730.00
Bond Fees	$24,700.00
Storage of Stucco	$3.614.99
Subtotal	**$414,433.99**

JA Vol. VII, pp. 905. Padilla has represented that the Padilla claim was abandoned by the Padilla Bankruptcy and that Padilla, itself, is entitled to any affirmative recovery from the Padilla Action (and that such funds are not to be paid into the Padilla Bankruptcy). As a result, the District Court entered the fee award as Big-D has a contractual right to attorneys' fees in prevailing on defending against the

Padilla claim—which claim was not impacted by the Padilla Bankruptcy. JA Vol. VII, pp. 905.

IV. SUMMARY OF ARGUMENT

The District Court relied on substantial evidence in support of its determination that the Padilla Work was defective. As a result, the District Court's determination is not clearly erroneous and must be upheld. Accordingly, Padilla is not entitled to payment for defective work that Big-D was required to remove and replace immediately after it was installed. Rather, Padilla is responsible to Big-D for the costs to remove and replace the Padilla Work (in the amount stipulated by the parties prior to trial).

Because IGT rejected the Padilla Work and ordered Big-D to remove and replace it, payment to Padilla never became due. Further, even if payment had become due, Big-D complied with the mandate of NRS 624.624 by providing Padilla regular and repeated notice that the Padilla Work failed—and Padilla had actual knowledge.

Further, the District Court did not abuse its discretion in declining to give itself a spoliation instruction based upon Padilla's assertion that Big-D failed to preserve adequate samples of the Padilla Work.

Finally, as the prevailing party in defending against the Padilla Action, Big-D is contractually entitled to its costs and attorneys fees pursuant to the

Subcontract Agreement (and post-judgment interest on such amounts). These costs and fees were not barred by the Padilla bankruptcy.

V. STATEMENT OF THE STANDARD OF REVIEW

As to the factual determination that the Padilla Work was defective, the District Court made specific and detailed factual findings that the Padilla Work was defective. Thus, rather than the preponderance standard proposed by Padilla, this Court must only review whether those factual findings are clearly erroneous. "Where a question of fact has been determined by the trial court, this court will not reverse unless the judgment is clearly erroneous and not based on substantial evidence." *Kockos v. Bank of Nevada*, 90 Nev. 140, 143 (1974). Accordingly, the correct standard is whether the District Court's own detailed and extensive factual findings were clearly erroneous.

Regarding the District Court's evidentiary ruling in declining to give itself a spoliation instruction regarding whether Big-D preserved adequate samples of the Padilla Work, this Court should only disrupt the District Court's ruling if the District Court abused its discretion. *Sheehan & Sheehan v. Nelson Mallev & Co.*, 121 Nev. 481, 492 (2005) (specifying that a district court's evidentiary rulings shall not be overturned "absent an abuse of discretion").

VI. ARGUMENT

A. The District Court Did Not Clearly Err Because It Based Its Determination that the Padilla Work Was Defective Upon Substantial Evidence.

The District Court made two distinct categories of factual conclusions that are both supported by substantial evidence—the Padilla Work was defective and Padilla failed to present reliable evidence to the contrary. The trial judge has "the opportunity to hear and perceive the witnesses," as a result, he or she is "better able to consider and balance the equities than [is this Court] relying solely on the cold record." *Cunningham v. Cunningham*, 61 Nev. 93 (1941). "It is not [this Court's] province to determine the credibility of witnesses. It is the exclusive province of the trial court, sitting without a jury, to determine the facts on conflicting evidence and its finding will not be disturbed ***unless it is clear that a wrong conclusion was reached***. *Ormachea v. Ormachea*, 67 Nev. 273, 280 (1950) (emphasis added). As a result, there was no clear error.

i. Substantial Evidence Thoroughly Demonstrated the Padilla Work Was Defective.

The District Court's factual determination that the Padilla Work was defective is supported by the overwhelming weight of the evidence. Accordingly, this Court must determine there was no clear error.

First, Padilla contractually agreed to perform the Padilla Work in compliance with the Subcontract Agreement. This included an agreement to meet

the requirements of the plans and specifications, including very precise specifications regarding the thickness of the layers, the method of "scoring" of the base layer, the compaction, and the hydration. *See* §III, Statement of Facts ("SOF") pp 3-4.

Second, visual examination on the project site indicated that the Padilla Work failed to comply with the contract provisions. SOF pp. 5-6. This evidence was further supported by the testimony of Ian Chin explaining the on-site pictures. As even an untrained eye can see from the pictures, Padilla failed to score the base layer of the stucco to a sufficient depth to create a "key" for bonding. Similarly, the variation in thicknesses is also apparent. In addition, Padilla failed to score the base layer in a single direction as required by the contract. The District Court noted these obvious nonconformities from the pictures at trial. SOF pp. 5-8.

Third, petrographic analysis of the stucco during the Project revealed that the Padilla Work has at least three independent defects: (a) incorrect thickness, (b) failure to uniformly score, and (c) inadequate hydration to active the cement properties. This was further supported by the testimony of IGT's consultant that he commissioned petrographic analysis of the Padilla Work; the petrographic report was consistent with his conclusions based upon visual examination; and relied upon the results to determine the Padilla Work was defective. SOF pp. 5-6, 11-12.

Fourth, persons on-site could literally peal one layer of the Padilla Work from the other with bare hands and minimal force—indicating a serious defect. Both Mr. Chin and Brent Brinkerhoff (Big-D) testified of this condition. SOF pp. 4-6, 11-13.

Fifth, the parties took several samples of the stucco work on the interior of the building to perform further tests. Of the eleven usable core samples, eight exhibited serious defects in the form of incorrect thickness of the layers and failure of the layers to bond together. SOF pp. 13.

Sixth, after IGT rejected the Big-D Work, Big-D commissioned an expert to perform further testing and analysis of the Padilla Work in attempt to defend the work as acceptable. Brent Brinkerhoff and Forrest McNabb (Big-D) both testified they were unable to identify a defensible basis to assert to IGT that the Padilla Work was acceptable. SOF pp. 11-13.

Seventh, Mr. Chin testified, unequivocally, that the reason the Padilla Work failed was because the workmanship deviated from the Plans and Specifications. He also testified unequivocally that the length of the cure times both (i) between the first and second coat of the Padilla Work and (ii) between the second coat of the Padilla Work and the exterior stone application had ***no bearing*** on the failures in the Padilla Work. In fact, Mr. Chin indicated that this conclusion is further reinforced by the fact that the Padilla Work on the interior of the buildings—that

was tested *weeks* after the cure period expired and ***never had any stone installed over it***—exhibited the same weakness as the work over which stone was installed. The cure times—the responsibility of Padilla to determine—were, in fact, in compliance with applicable local code. SOF pp. 4-6, 11-13.

Eighth, Big-D requested that Padilla provide any information or analysis to support Padilla's position that the Padilla work failed for reasons other than workmanship. Padilla indicated that it had samples of the material that it would test to determine whether the material, itself, was defective. Padilla never provided any information or took any steps to defend the Padilla Work. SOF pp. 7-10.

ii. **Padilla's Counter-Argument Regarding Causation Is Supported by Minimal Evidence and No Expert Testimony.**

Padilla's factual assertions that, (a) the cause of the failures in the Padilla work was not known, and (b) the cause of the failures in the Padilla work was failure to cure, both mischaracterize the record.

a. Substantial Evidence Supports the Finding that the Padilla Work Was Defective.

Contrary to Padilla's assertion, the Padilla Work was rejected by IGT because of workmanship issues. SOF pp. 3-5, 11-13. IGT had petrographically examined the Padilla Work and had its consultant (Ian Chin) investigate the work on site. As a result, (i) IGT knew that the basis for rejecting Padilla's Work was

Padilla's failure to comply with the plans and specification and (ii) Big-D presented substantial evidence in support of this at trial.

First, Padilla's assertion that the "causation of the separations" in the Padilla Work "is not known" is false. Opening Br. at 5. The record is clear that IGT was very firm; it rejected the Padilla Work because the work failed to conform to the Plans in Specifications in several respects: (i) inadequate hydration, (ii) failure to score the first layer sufficiently, and (iii) failure to compact. SOF pp. 3-5, 11-13. At the time the work was rejected, Big-D still disputed IGT's rejection of the Padilla Work on the interior of the building and arduously requested Padilla to step up and defend its work. Later, after months of investigation, Big-D concluded that the Padilla Work was in fact defective and could not be defended to IGT. SOF pp. 11-13. Accordingly, the District Court did not clearly error.

Second, Padilla falsely asserts that Big-D "failed to put forth evidence that any of the alleged deviations from the plans and specifications were material; caused the separations." Opening Br. at 9. In fact, Big-D presented substantial evidence demonstrating that the Padilla Work's failures were caused by the failure to follow the plans and specifications. SOF pp. 7-11. Accordingly, the District Court did not clearly err.

///

///

b. Substantial Evidence Indicates the Failures in the Padilla Work Were Unrelated to Cure Time.

The District Court relied upon the substantial evidence to determine the cause of the failure in the Padilla work was *not* a result of cure times. While Padilla asserts, "It is Padilla's position the separations were caused by the premature installation of the stone on the stucco before it was fully dry (cured)," this assertion is directly contrary to the weight of the evidence. SOF 3-5, 11-13.

Padilla did not present an expert to offer an opinion in support of this causation. In fact, in support of its assertion, Padilla cites not to evidence in the record but to statements of its counsel during argument to support its "failure to cure theory." The only evidence in the trial record supporting Padilla's "failure to cure" theory are citations to the deposition testimony of former Padilla COO, Joseph Lopez. The District Court, as the fact finder, is the proper party to weigh the evidence and determine which factual theory has the most evidence. The District Court did this exercise and relied upon the substantial evidence to make a factual finding that the Padilla Work failed because it was defective and Padilla did not construct the Padilla Work in compliance with the plans and specifications. SOF 1-5, 11-13. As a result, the District Court's express factual finding that the failures in the Padilla Work were not caused by the cure time are not clearly erroneous and must be upheld.

B. Big-D Had No Obligation to Pay Padilla For the Padilla Work that Was Removed and Rejected; NRS 624.624 Does Not Provide Otherwise.

Big-D is not required by either the subcontract agreement or Nevada's prompt payment statute (NRS 624.624) to pay Padilla for defective work that the Owner rejected and directed Big-D to remove.

i. The Subcontract Does Not Require Big-D to Pay Padilla for Defective Work that Was Rejected by the Project Owner.

As a matter of law, Big-D's obligation to pay Padilla under the Subcontract Agreement was excused because Padilla materially breached the contract by installing defective work. Further, the District Court correctly determined that no implied covenant or equitable theory requires Big-D to pay Padilla for work that was rejected by the Project owner and which Big-D was required to remove and replace on its own dime. Again, this determination was also based upon the factual finding supported by substantial evidence that Padilla's work was defective. Accordingly, there is no basis to find that Big-D breached the express or implied obligation in the Subcontract Agreement.

ii. Big-D Had No Obligation to Give Padilla an Opportunity to "Cure" Work.

Padilla's argument that Big-D must pay Padilla because Padilla was not given an opportunity to cure its work also fails for four reasons. First, Big-D gave Padilla written notice and request to cure the defective Padilla work when the failures were first identified. SOF 7-8. Second, Big-D was obligated to follow the

directions of IGT who directed the Padilla stucco work be removed and replaced with a cement board system (making any further cure request impracticable). SOF 6-7, 10. Third, the safety risk posed by the stone panels on Padilla's Work further excused any required notice to cure. SOF 10. Fourth, Padilla was unwilling to take any actions to investigate or cooperate—making any additional request to cure futile. SOF 8-9. Accordingly, the District Court did not clearly err in determining that Big-D did not have an additional obligations to request Padilla to cure its defaults.

iii. NRS 624.624 Does Not Require Payment to a Subcontractor for Defects of which It Was Aware and Notified.

Nothing in Nevada's prompt payment statutes, NRS 624.624, requires Big-D to pay Padilla for work that the Owner rejected and required Big-D to remove and replace. Padilla argues it is entitled to payment for rejected work claim pursuant to NRS 624.624 based upon two *false* factual assertions: (i) payment to Padilla "was due on October 25, 2009" and (ii) Big-D's first notice of withholding was not provided to Padilla until November 3, 2009.

a. Payment to Padilla Was Not "Due" on October 25, 2009.

The District Court did not clearly err in its factual determination that payment to Padilla was not due on October 25, 2009. The Subcontract provided that Padilla was to be paid within ten (10) days after IGT paid Big-D ***and*** after IGT

accepted the Padilla Work. JA Vol. 1, pg. 91-104, Trial Exhibit 1.[6] Specifically, Big-D "must have first received from the Owner the corresponding periodic payment, ***including the approved portion of your monthly billing***, unless the Owner's failure to make payment was caused exclusively by us." *Id.* at Section 4.2.

NRS 624.624 does not change the timing of when payment is due under a subcontract. The statute is designed to ensure that general subcontractors promptly pay subcontractors after the general contractor receives payment from the Owner associated with work performed by the subcontractor. NRS 624.624 is clear that its provisions yields to (a) payment schedules contained in subcontract agreements and (b) contractual rights to withhold payments from a subcontractor arising from deficient work. Specifically, NRS 624.624 provides payments are due to a subcontractor under "[a] written agreement with a lower-tiered subcontractor that includes a schedule for payments," that payments are due as follows:

> (1) On or before the date payment is due; or
>
> (2) Within 10 days after the date the higher-tiered contractor receives payment for all or a portion of the work, materials or equipment described in a request for payment submitted by the lower-tiered subcontractor,
>
> whichever is earlier

---

[6] "Contractor will issue payment to Subcontractor by US Mail ... within ten (10) days of receiving payment from the Owner." Section D.

NRS 624.624(1)(a).

Further, even after such due date, a general contractor has the right to withhold payment for "[c]osts and expenses reasonably necessary to correct or repair any work which is the subject of the request for payment ..." NRS 624.624(2)(b). NRS 624.624 does require that a general contractor provide written notice to the subcontractor as to the basis for withholding "on or before the date the payment is due." *Id.* at (3).

Here, it is undisputed that the Subcontract Agreement is a written agreement between Big-D and Padilla. Accordingly, pursuant to NRS 624.624(1)(a), payment is due to Padilla as specified in the Subcontract Agreement—after IGT accepted the Padilla Work.

Padilla dated its Application for Payment on September 25, 2009 and it was received by Big-D on September 30, 2009. Padilla erroneously contends that the payment was "due" on October 29, 2009. This assertion is incorrectly based upon a notation by Big-D's project manager on an internal accounting document tracking received project payments—which Padilla misconstrues and takes out of context. Yet, the District Court did not clearly err in its factual finding that Padilla's work had not been approved by IGT by October 29th (and, in fact, had been rejected by IGT on September 20th and replaced by Big-D by October 9, 2009). As a result, because IGT has not accepted Padilla's work by October 29,

2009, payment to Padilla was not due at that time. As a result, there is no basis to use October 29, 2009 as a payment due date for purposes of NRS 624.624.

b. Big-D Provided Padilla Repeated Written Notice of the Defects in the Padilla Work.

The District Court did not clearly err in determining that Padilla received repeated written notice that it work was defective. Rather, the District Court relied on substantial evidence that Padilla had actual and direct notice of the potential defects in the Padilla Work including the following:

- Real-time notice by Padilla's own crews that the work was separating from itself, SOF 9-10;
- Written notice from Big-D to Padilla requesting that Padilla immediately investigate its work on several occasions, SOF 7-8;
- Telephone notice from Big-D to Padilla following up on Big-D's requests that Padilla investigate the failures in the Padilla Work, SOF 11-13;
- Meetings on-site with the product manufacturer and IGT's consultants discussing the failures in the Padilla Work, SOF 11-13;
- Real-time information that IGT had rejected the Padilla Work and directed Big-D to remove and replace it, SOF 11-13; and
- Finally, formal written notice from Big-D on November 3, 2009 informing Padilla that no payment would be processed unless and until Padilla could assist Big-D to demonstrate that the failures in Padilla's work were caused by factors other than Padilla (which Padilla took no efforts to do), SOF 8-9.

Assuming *arguendo* that payments to Padilla for the rejected Padilla Work had become due, Big-D provided repeated written notices to Padilla of the failures in the Padilla Work. Further, Big-D was authorized by the Subcontract Agreement to withhold payment from Padilla for "defective work not remedied" and "your

failure to perform any obligation made by You in this Subcontract." JA Vol. 1, pg. 91-104, Trial Exhibit 1, at Section 4.4(2) and (5). As a result, NRS 624.624(3) authorizes Big-D to withhold sums due to Padilla amounts to remove and replace the Padilla Work. Accordingly, NRS 624.624 does not override the subcontract terms to impose any affirmative payment obligations upon Big-D to pay Padilla for work that was rejected and removed.

iv. Padilla's Reliance on *Lehrer McGovern Bovis* Is Inapposite.

Padilla's reliance on dicta in *Lehrer McGovern Bovis* is inapposite—it had no bearing on determining whether Big-D gave time notice of withholding to Padilla pursuant to NRS 624.624. *See* Opening Br. at 20. First, NRS 624 was not in effect or being interpreted in *Lehrer McGovern Bovis, Inc. v. Bullock Insulation, Inc.* 124 Nev. 1102, 1117 (2008). Second, the issue here is not whether the payment schedule in the Big-D subcontract is a pay-if-paid clause that would excuse Big-D's obligation to pay Padilla ***if*** the owner failed to pay Big-D for Padilla's work. Rather, the issue is, for the purposes of NRS 624.624 notice of withholding, when was the payment from Big-D to Padilla due. The Subcontract Agreement contained a schedule for payments—payment to Padilla was due after IGT approved Padilla's work ***and*** after Big-D received payment attributable to Padilla's work.

This is not a "pay-if-paid case." Rather, this is a case where payment to a subcontractor is excused when the subcontractor performs defective work that is rejected by the Owner and which the general contractor is required to remove and replace. The legal rights and obligations in such a circumstance are governed by clear contract provisions and case law interpreting when obligations for payment under a subcontract are excused. Nothing in NRS 624.624 or *Lehrer McGovern Bovis* determine that payment is required when an Owner rejects a subcontractor's work and requires it to be removed and replaced. This is a contract compliance issue not a prompt payment issue.

v. It Is Undisputed that Padilla's Application for Payment Is Overstated Even If Padilla Were Entitled to Payment.

Further, even if Padilla were entitled to payment (which it is not), it is undisputed that Padilla's Application for Payment dated September 25, 2015 is overstated. The Application for Payment fails to credit Big-D for the initial $25,000.00 deposit made to Padilla prior to starting work. JA Vol. 6, pp. 494-497 (Brinkerhoff testimony). Further, it is undisputed that Big-D was required to pay one of Padilla's material suppliers directly after the material supplier filed a mechanic's lien against the Project. Nothing in NRS 624.624 provides that Padilla is entitled to payment for an overstated application for payment. Accordingly, even if Padilla were entitled to payment for the defective and rejected work (which it is not), the amount of damages would be reduced by amounts that Padilla had

previously been paid and amounts that Big-D was required to pay Padilla's subcontractors.

C. The District Court Did Not Abuse Its Discretion in Declining to Give Itself a Spoliation Instruction.

The District Court did not abuse its discretion in electing not to give itself a spoliation instruction. *Sheehan & Sheehan v. Nelson Mallev & Co.*, 121 Nev. 481, 492 (2005) (specifying that a district court's evidentiary rulings shall not be overturned "absent an abuse of discretion"). Padilla asserts it is entitled to a spoliation instruction based on Padilla's contention that Big-D did not retain enough samples of the rejected Padilla Work. For five reasons, the District Court did not abuse its discretion.

First, Padilla does not contend that Big-D failed to preserve stucco samples of Padilla's Work for its testing and investigation. It is undisputed that several stucco samples were preserved and provided to Padilla. Rather, Padilla contends that Big-D failed to retain portions of the stucco over which stone was installed. This argument is a red herring because it is premised upon Padilla's incorrect argument that only the stucco over which stone installation had commenced failed. This is incorrect. IGT was clear that its basis to reject the Padilla Work related to its testing and inspection of Padilla Work over which no stone was installed—including on the interior of the building where no stone was installed. The failures in the Padilla Work were widespread and there is no evidence of any kind that the

Padilla stucco over which stone was installed performed any differently than the stucco (over which no stone was installed) that was rejected by IGT.

Second, the remedy that Padilla requests—tantamount to a direction by the Court that the Padilla Work is not defective—is not supported by Nevada law. Rather, Nevada recognizes an "adverse inference" for negligent destruction of evidence. An "adverse inference" "is permissible, not required, and it does not shift the burden of proof." *Bass-Davis v. David*, 122 Nev. 442, 449, 34 P.3d 103, 107 (2006). An "adverse inference" instruction informs a jury that it is "permitted" to draw an inference that such evidence may have been unfavorable to the destroying party. Here, Padilla, Big-D, and IGT witnesses observed the separation of the Padilla Work. Contemporaneous photographs demonstrate the separation of the Padilla Work. Both Big-D and IGT retained expert consultants to test the Padilla Work. And, there are existing samples remaining of the Padilla Work that were provided to Padilla during discovery. Even if the district court allowed itself the "permission" to infer that the portions of the Padilla Work that were discarded may have contained unfavorable evidence to Big-D, this permissible inference does not counter the mountain of evidence relied upon by the District Court that the Padilla Work failed.

Third, the concept of an adverse inference instruction is to provide evidentiary balance to a proceeding and ensure the jury understands the scope of

inferences it is permitted to draw based upon the availability of evidence. Such an explanation is not necessary when the fact finder is a sophisticated district court judge—who is well equipped to make such determinations himself. "Adverse inference instructions generally are not appropriate sanctions in bench trials." *See Thompson v. U.S. Dep't of Hous. and Urban Dev.*, 219 F.R.D. 93, 105 (D. Md. 2003) (holding the district judge was sophisticated enough to factor in any spoliation issues in its own factual findings).

Fourth, Padilla failed to timely request or demand such a spoliation remedy. When a party waits until trial to seek a remedy that equates to a declaration of victory on an issue, it is appropriate to deny the request. *See JOM, Inc. v. Adell Plastics, Inc.*, 193 F.3d 47, 49-50 (1st Cir. 1999); *Gault v. Nabisco Biscuit Co.*, 184 F.R.D. 620, 622 (D. Nev. 1999).

Fifth, Big-D did not have custody and control over the evidence and had the same access to such evidence as did Padilla. Spoliation sanctions are only appropriately issued to a party "controlling the evidence." *Bass-Davis*, 122 Nev. at 450.[7] IGT was the Owner of the Project and required Big-D to remove and replace

[7] "Obviously, the party charged with spoliation must have been in the possession, custody, or control of the evidence in order for the duty to preserve to arise. The party requesting sanctions for spoliation has the burden of proof on such a claim." *Hammann v. 800 Ideas, Inc.*, 2010 U.S. Dist. LEXIS 131097 at *21 (D. Nev. 2010) (denying motion for spoliation related to records of certain 1-800 numbers when there was no evidence that party was in the "possession, custody, or control" of relevant documents, even when party had business relationship with party in

the Padilla Work on an expedited basis. Both Big-D and Padilla were on the project site at the time that the order was issued. Had Big-D not removed and replaced the Work, IGT would have inevitably done so. Big-D did not have the option to leave Padilla Work on the exterior of the building for an extended period—meaning that it is not proper to issue a spoliation sanction against Big-D.

As a result, for these five reasons, the District Court did not abuse its discretion in failing to give itself a spoliation instruction.

D. Big-D Is Entitled to Recover Its Attorneys' Fees, Costs, and Interest.

The District Court had jurisdiction to award Big-D attorneys' fees and costs related to post-petition matters and costs to defend against Padilla's affirmative claim. Padilla's bankruptcy action did not, as a matter of law, impact Big-D's right to post-petition attorney's fees and costs to defend Padilla's affirmative claim or post-petition costs to maintain an NRS 108 bond related to Padilla's mechanic's lien.

Post-confirmation "debts" are liabilities of reorganized Chapter 11 debtor and are not affected by the bankruptcy proceeding. 11 U.S.C. Section 1141(d); *In re Nuttall Equipment Co., Inc.*, 188 B.R. 732 (Bkrtcy.W.D.N.Y.1995); *Rozel*, 120 B.R. at 949 ("Generally, a claim or debt must be found to be absolutely owing at

---

control of such documents). *See also Rhodes v. Robinson*, 399 Fed. Appx. 160, 166 (9th Cir. 2010) (discussing required proof that "the party ***with control*** over [evidence] had a duty to preserve it") (emphasis added).

the time of the filing of the petition to be considered a pre-petition item."). A Chapter 11 plan and confirmation order does not preclude a claimant from seeking post-petition attorneys' fees. *In re Mariner Post Acute Network, Inc.* 312 B.R. 520 (Bankr. D. Del. 2004). For example, confirmation of a debtor's chapter 11 plan did not terminate a mortgage agreement or impact the mortgagee's contractual right to recover attorney fees incurred in litigating its rights under agreement. *In re Sure-Snap Corp.*, 983 F.2d 1015 (11th Cir. 1993). Rather, the effect of the Chapter 11 plan was only to prevent the mortgagee from enforcing the terms of the mortgage agreement against the debtor to collect a pre-confirmation debt. *Id.* Similarly, a creditors post-petition claim against a Chapter 11 debtor was not impacted by plan confirmation when the actions that formed the basis for the claim occurred post-petition, even though the contract was executed pre-petition. *In re Texaco, Inc.*, 218 B.R. 1 (S.D.N.Y. 1998).

Here, the attorneys' fees and costs that Big-D seeks are post-petition fees not impacted by the bankruptcy action. The bankruptcy petition did not modify Big-D's contractual right to its attorneys' fees in defending against Padilla's claim. *See e.g., In re Sure-Snap Corp.,* 983 F.2d 1015 (11th Cir. 1993). Attorneys' fees incurred by Big-D post-petition to defend Padilla's affirmative claim for relief are not impacted by the bankruptcy petition, which only impacts pre-confirmation debts. Padilla prosecuted a mechanic's lien claim against Big-D.

Further, Big-D was required by IGT to procure a bond to prevent the Padilla lien from being a cloud on the title to the Project. This bond incurred an annual fee of approximately $5,000—which Big-D was required to pay each year between 2010 and 2015 during the duration of the case. This bond cost has no relation to the Big-D Counterclaim—it arises exclusively from the Padilla mechanic's lien claim. Further, Big-D did not incur any attorneys' fees or costs in support of the Big-D Counterclaim that were not necessary to defend the Padilla Action.

As a result, Big-D is entitled to collect its fees and costs against the reorganized Padilla.

VII. CONCLUSION

Accordingly, for the foregoing reasons, this Court should uphold the District Court's decision and affirm the judgment entered in favor of Big-D.

VIII. CERTIFICATE OF COMPLIANCE

I certify that I have read this Answering Brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this Brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found. The Brief complies with the formatting requirements of NRAP 32(a)(4)-

(6) and the type-volume limitation stated in NRAP 32(a)(7) because it is presented in a 14-point Times New Roman font, contains 1,071 lines and 10,024 words, including headings and footnotes, as counted by Microsoft Word—the program used to prepare this brief.

I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 10th day of March, 2016.

Nicole E. Lovelock, Esq.
HOLLAND & HART LLP
9555 Hillwood Drive, 2nd Floor
Las Vegas, Nevada 89134
(702) 669-4600
(702) 669-4650 – fax

Melissa A. Beutler, Esq.
Big-D Construction Corporation
3030 South Highland Drive
Las Vegas, Nevada 89107-1047

Attorneys for Respondent

EXHIBIT 15

Case Nos. 67397 & 68683

IN THE SUPREME COURT OF THE STATE OF NEVADA

PADILLA CONSTRUCTION COMPANY OF NEVADA, A NEVADA CORPORATION,

Appellant,

vs.

BIG-D CONSTRUCTION CORP., A UTAH CORPORATION,

Respondent.

APPEAL FROM
THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF CLARK

THE HONORABLE MARK R. DENTON, DISTRICT COURT JUDGE

A-10-609048-C

APPELLANT'S REPLY BRIEF

Bruce R. Mundy, NSB #6068
200 South Virginia Street, Eighth Floor
Post Office Box 18811
Reno, Nevada 89511-0811
reno-attorney@sbcglobal.net
(775) 851-4228

Attorney for the Appellant

Rule 26.1 Disclosure

Pursuant to NRAP 26.1, the undersigned counsel certifies that Appellant, Padilla Construction Company of Nevada ("Padilla"), is a Nevada corporation in good standing, no parent company nor any publicly held company owns any interest in the corporation, and is and has been exclusively represented in this matter by Bruce R. Mundy, Nevada State Bar number 6068, a sole practitioner.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

ARGUMENT

I. NO SUBSTANTIAL EVIDENCE PADILLA OMISSION OR COMMISSION CAUSED THE SEPARATIONS

In its Answering Brief ("AB"), Respondent, Big-D Construction Corp. ("Big-D"), states the District Court made two distinct categories of factual conclusions: (1), that Padilla's Work was defective and (2), Padilla failed to present reliable evidence to the contrary.[1] The district court's factual findings will be upheld, if not clearly erroneous, and if supported, by substantial evidence. *Ogawa v. Ogawa, 125 Nev. 660, 668, 231 P.3d 699 (2009).*

The trial issue, as recognized by the District Court, was causation.[2] Not whether Padilla's work deviated from the projects plans and specifications, but instead, whether the alleged deviations were material[3], *Calloway v. City of Reno, 116 Nev. 250, 256, 993 P.2d 1259 (2000)*; caused the claimed damages. The District Court: "is that [trial related to causation] correct" directed to Padilla Counsel; "That is

[1] RAB pg. 21, section A., first sentence.
[2] RAB pg. 2, last paragraph, first sentence.
[3] A failure to perform is material if it defeats the purpose of the contract. Nevada Jury Instruction, 13CN.42.

correct"; the District Court "All right. The record will so reflect." TSRCP 1, JA Vol. V., pg. 445, lines 6-11. Causation is an essential element of a claim for breach of contract. *Clark Cty. Sch. Dist. V Richardson Constr., 123 Nev. 383, 396, 168 P.3d 87 (2007)*. Causation is defined as the act by which an effect is produced. *Black's Law Dictionary 221 (6th ed. 1990)*. And further, "That is if the damage of which the promisee [Big-D] complains [separations of stucco coats] would not have been avoided by the promisor's [Padilla] not breaking [its] promise [to complete all work in accordance with the project plans and specification], the breach cannot give rise to damages." *Clark Cty. Sch. Dist. at 396*.

II. DEFECTIVE IS NOT UNEQUIVOCALLY CAUSATION

According to Big-D, the District Court's factual determination that the Padilla Work was defective is supported by the overwhelming weight of the evidence.[4] "A product is 'defective' if it is not fit for the ordinary purpose for which such articles are sold and used." *Black's Law Dictionary 418 (6th ed. 1990)*. At no point has

[4] RAB pg. 21, section A.i., first sentence.

Padilla denied its Work (product), in some instances, failed to support the stone facade, the purpose for which it was intended. Instead, as agreed by all parties, the disputed issue before the court was not if the product failed, but instead, **what caused the product failure**: Big-D claimed it was because of deviations from the plans and specifications for the project;[5] and Padilla claimed it was because its product was not allowed to cure long enough before installing the stone facade.[6]

Evidence of causation by Padilla's alleged deviations from the plans and specifications doesn't exist as argued in Padilla's Opening Brief[7], which is supplemented here, and because Chin's testing was flawed. Contrary to Big-D's assertion, there is no evidence as to compaction, hydration, nor petrographic analysis.[8] The only exhibit alleging a petrographic study and containing the words hydration or compaction is trial exhibit 406[9], which Padilla objected to as hearsay[10]

---

[5] Joint Appendix ("JA") Vol. 1, pg. 000017, paragraphs 12 & 13.
[6] JA Vol. V, pg. 000411, lines 10-25.
[7] AOB pg. 9, last paragraph – pg. 10, last full paragraph.
[8] RAB pg. 22, first partial paragraph, third line of text; last partial paragraph, first sentence.
[9] JA Vol. IV, pgs. 380-381.
[10] JA Vol. VI, pg. 000704, lines 15-16.

and the District Court allowed "limited admission, not for the truth of the matter asserted, but for what happened in his [Chin's] mind as to why he acted the way he did."[11] A statement merely offered to show that a statement was made and the listener was affected by the statement, and which is not offered to show the truth of the matter asserted is admissible as non-hearsay. *Grosjean v. Imperial Palace, 125 Nev. 349, 362, 212 P.3d 1068 (2009).* Consequently, the alleged truth of the matters asserted as to petrographic studies, compaction or hydration in trial exhibit 406 were not admitted into evidence.

There wasn't any testing of the failed product; stucco that had been allowed to cure the requisite time, and was found to have separations between the first coat (scratch) and the second coat (brown). Despite the controversy regarding the correct cure time, there isn't any evidence of testing of stucco when the scratch coat cured two days and the brown coat cured seven days as specified by Big-D[12] and the bond between the two coats failed. There is nothing in the record relating to any of the

[11] JA Vol. VI, pg. 000709, lines 19-23.
[12] JA Vol. VI, pg. 631, line 24 – pg. 632, line 2.

observations/testing Chin[13] performed, September 17th and 22nd,[14] showing the installation dates of either the scratch or the brown coat, and, Chin testified he didn't know when Padilla installed the examined/tested stucco.[15] The cure time is critical to the strength of the bond between the scratch and the brown coats. According to Chin, in answer to the question of what the Architect's plan instruction to determine the most effective procedures for curing and lapse time between coats based on climatic and job conditions, meant:

> It means that it's important to make sure that, first of all, the scratch coat is – has sufficient cure time before you apply the brown coat to it. It's also – and it talks about making sure that the brown coat has sufficient cure time – as well as the other times involved before you apply anything [stone] to it.
>
> So this is very important because you want to make sure that the strength of the materials are up to the point where you can apply materials to it without causing any damage to the [stucco] system. TSRCP 2, JA Vol. VI., pg. 682, line 22 – pg. 683, line 6.[16] Emphasis added.

While Big-D's Project Manager, Brinkerhoff, described a project procedure that the date Padilla finished a scratch coat or brown coat was marked on the wall so they knew when the cure time started, Big-D never produced evidence showing dates

[13] AOB pg. 2, pg. 3, Ian Chin was IGT's consultant during the IGT project and subsequently, Big-D's consultant.
[14] JA Vol. VII pg. 000751; Vol. V, TEXH 449, pg. 000395.
[15] JA Vol. VII, pg. 000749, line 24 – pg. 000750, line 2; pg. 000751, lines 15-19.
[16] AOB pgs. 6-7.

marked on the walls that were the subject of Chin's examinations/tests. Instead, the only evidence of any date markings were on stucco samples provided to Padilla's expert in March of 2012 that were marked "Brown coat Finished 9/14", "Sample date 9/18[17]." Obviously, rendering any examination/testing of those samples invalid in the absence of the 7 days cure time specified by Big-D for the brown coat. Given Chin's assertion that proper curing is important to the strength of the stucco and the absence of any evidence that the examined/tested stucco had been properly cured, it shouldn't be a surprise that Chin could report he peeled stucco coats apart with his hands[18] and Big-D's Brinkerhoff reported "you could just twist" the stucco coats apart.[19]

The absence of documentation for the stucco installation corrupted the veracity of any conclusions drawn from Chin's examination/testing as to the cause of the separations of the two coats of stucco. For instance, if a sample of stucco exhibited a separation of the two coats of stucco and exhibited a deviation from the plans and

[17] JA Vol. VII, pgs. 000793-000796.
[18] JA Vol. VI, pg. 000707, lines 18-20.
[19] JA Vol. VI, pg. 000589, lines 7-9.

specifications, e.g. the scratch coat wasn't grooved the specified one-eighth inch, and the brown coat was only cured four days instead of the specified seven days; what valid conclusion could be made as to the cause of the separations; the lack of proper grooving or the lack of proper curing?

III. NO DUTY FOR PADILLA TO PRESENT CONTRARY EVIDENCE

Big-D's assignment of the burden of proof to Padilla to present reliable evidence contrary to Big-D's alleged proof[20] that Padilla's work was defective ignores the lawful assignment of the burden of proof. Instead, it was Big-D's exclusive burden to present evidence and argument to prove the allegations of its Counterclaim. *Nassiri and Johnson v. Chiropractic Physicians' Board, 130 Nev. Adv. Op., No. 27, pg. 3 (2014).* That, pursuant to *Clark Cty. Sch. Dist., at 396*, but for Padilla's alleged deviations from the project plans and specifications, the complained of separations of the stucco would not have occurred.

Additionally, how was Padilla going to obtain the reliable evidence? Padilla

[20] RAB pg. 21, section A. first sentence.

never received any samples of the 'failed' work, nor had the opportunity to obtain them.[21]

IV. DUTY TO PAY PADILLA ACCORDING TO TERMS OF THE SUBCONTRACT

Big-D asserts it had no obligation under the terms of the Subcontract to pay Padilla in light of Padilla's material breaches and IGT's rejection of the stucco.[22] In addition to its AOB argument[23], Padilla asserts that at the time that Padilla was owed a written notice of a material breach/default of the Subcontract or payment[24], Big-D did not possess knowledge of a Padilla material breach. As late as November 18, 2009[25], when Big-D stopped payment on its check and two months after Padilla left the project, Big-D's Project Principal-In-Charge McNabb,[26] admitted Big-D didn't know the cause of the failures: "We still don't know who's at fault."[27]

Big-D's argument that IGT's rejection of the stucco justifies not paying Padilla;

---

[21] AOB pg. 24, last paragraph, last full sentence – pg. 25, second paragraph.
[22] RAB pg. 27, section i.
[23] AOB pg. 15, section V. – pg.18.
[24] AOB pg. 17 section 5.1 of Subcontract, pg. 18 Exhibit "Z" to the Subcontract.
[25] JA Vol III, pgs. 000281-000282.
[26] JA Vol. VI, pg. 000513, line 16.
[27] AOB pg. 9, section III. B. last sentence.

ignores the differing justifications for rejection and withholding payment. IGT had a right to reject Padilla's work merely on the premise that it wasn't fit for the purpose IGT was purchasing it for, it was defective, *Black's Law Dictionary 418 (6th ed. 1990)*, which under the circumstances of instances when the stucco would not hold the stone facade, it was. According to Chin, his recommendation to IGT was the stucco was not suitable and should be rejected.[28] IGT didn't consider the cause of the separations, only that it wasn't fit for IGT's intended use.

On the other hand, withholding payment requires a material breach of the Subcontract and proof of several elements, including causation, *Clark County School Dist. at 396*, which as argued above, there isn't any evidence that a Padilla omission or commission was the cause of the separations.

V. DUTY TO PROVIDE PADILLA AN OPPORTUNITY TO CURE ACCORDING TO THE TERMS OF THE SUBCONTRACT

Big-D argues it "gave Padilla written notice and request to cure the defective Padilla work when the failures were first identified. SOF 7-8."[29] A review of the

[28] JA Vol. VI, pg. 000714, lines 13-15.
[29] AOB pg. 27. Section ii, second sentence.

cites to the record in the Answering Brief's Statement of Facts ("SOF") on pages 7-8 does not find any record that Big-D gave Padilla written notice and request to cure. Not surprising, in that the record as a whole does not contain a written notice to Padilla to cure; an issue raised in its Opening Brief.[30]

Big-D asserts it "was obligated to follow the directions of IGT who directed the Padilla work be removed and replaced with a cement board system (making any further cure request impractical). SOF 6-7, 10."[31] Again, the cites to the record in the SOF 6-7, 10, do not support an obligation to IGT to remove and replace Padilla's work to the determent of Padilla's right to cure. There is nothing in the record indicating that IGT prevented Big-D from providing the requisite written notice of default as specified in Section 5.1 of the Subcontract,[32] or mandated Big-D to breach its Subcontract with Padilla.

Big-D's assertion that a safety risk excused any required notice to cure[33] is

[30] AOB pg. 15, section V., first sentence; pg. 18, last paragraph, first sentence.
[31] AOB pg. 27, last sentence beginning with the word "Second" – pg. 28, remainder of sentence.
[32] AOB pg. 17, single spaced indented paragraph, Section 5.1 of the Subcontract.
[33] AOB pg. 28, first partial paragraph, sentence beginning with the word "Third."

unsupported by the cites to the record at SOF 10. Lastly, Big-D states "Padilla was unwilling to take any actions to investigate or cooperate-making any additional request to cure futile. SOF 8-9."[34] None of the cites to the record in SOF pgs. 8 and 9 support the statement that Padilla was unwilling to take any actions to investigate or cooperative; except, JA Vol. 1, pg. 49, lines 18-19 that states Padilla made a telephone call to the stucco mix manufacturer to discuss the separations in response to Big-D's email notice of the separations.

VI. PAYMENT WAS DUE TO PADILLA IN THE ABSENCE OF WRITTEN NOTICE CONFORMING WITH NRS 624.624(3)

According to Big-D, Padilla wasn't due payment in conformance with the provisions of NRS 624.624 because payment wasn't due on October 25, 2009 or because Big-D's notice of withholding wasn't given until November 3, 2009.[35] In addition to the argument put forth on the issue of NRS 624.624 payment in its opening brief,[36] Padilla adds the following.

According to Big-D, payment to Padilla wasn't due on October 25, 2009 because

[34] AOB pg. 28, first partial paragraph, sentence beginning with the work "Fourth."
[35] RAB pg. 28, section iii, first paragraph.
[36] AOB pgs. 19-22.

the Subcontract provided Padilla was to be paid within 10 days after Big-D received payment from IGT and after IGT accepted the Padilla work.[37] This assertion ignores the plain language of NRS 624.624(1)(a) or (b)[38], which clearly limits the condition of when, if ever, the higher-tiered contractor (Big-D) receives payment for the Subcontractor's (Padilla) work from the project owner (IGT) to influencing the date payment is made to the Subcontractor, "whichever is earlier." In the instance of a subcontract with a schedule of payments, the NRS 624.624(1)(a) date payment was due would be prescribed in the schedule of payments, and if earlier than when the Contractor received payment from the project owner, if ever, the date payment was due to the Subcontractor. In the instance of a Subcontract without a NRS 624.624(1)(b) schedule of payments, the due date for payments is dictated by the relevant provisions of the Subcontract, and again, if earlier than when the Contractor received payment from the project owner, if ever, the date payment was due to the Subcontractor. To the extent that Big-D's argument relies on the single factor of

[37] RAB pg. 28, section a.
[38] JA Vol. V, pg. 425.

when, if ever, it received payment from IGT[39], as the excuse not to pay Padilla, it is void as a matter of law. Contract provisions that contravene the law do not create a right of action and must be severed if it does not destroy the symmetry of the contract. *Vincent v. Santa Cruz, 98 Nev. 338, 341 (1982)* The 'pay if paid' provision of Section 4.2, including its waiver if Big-D exclusively caused the Owner's failure to make the payment, was specifically and expressly subordinated to Nevada law by the parties: "Nevada Law will take precedence."[40] According to *Lehrer McGovern Bovis v. Bullock Insulation, 124 Nev. 1102, 1117-1118, 197 P.3d 1032 (2008)*, "pay-if-paid provisions are unenforceable because they violate public policy."

Big-D's reliance on the NRS 624.624(1)(a) provision for agreements "that includes a schedule for payments"[41] is inconsistent with the plain language of the Big-D – Padilla Subcontract[42]; which does not contain a schedule of payments.

Instead of a Schedule of Payments, the Subcontract provides for monthly

---

[39] RAB pg. 29, first partial paragraph, first full sentence.
[40] JA Vol. I, pg. 101, handwritten text at end of section 4.2, initialed by Big-D's Brinkerhoff; JA Vol. V. pg. 461, lines 18-19: "We'll stipulate that every edit in this contract Mr. Brinkerhoff has initialed."
[41] RAB pg. 29, second full paragraph, last sentence before indented quoted text.
[42] JA Vol. I, pgs. 91-107.

payments:

> 4.2 Billings/Payments[43]
>
> We agree to make monthly payments to You for that portion of the work satisfactorily performed in the preceding month in accordance with monthly billings prepared by you and approved by us, Architect and Owner . . . on approved forms, with a schedule of values and conditional waivers submitted to us on or before the date outlined in your Subcontract.
>
> D: Payments[44]
>
> [P]ayment Request form, with Schedule of Values and Big-D's Conditional Lien Waiver submitted to Contractor before the **25th** day of each month.

Padilla submitted its payment request on the specified Big-D Construction Payment Request form, 9/25/09.[45] As Brinkerhoff testified[46], Padilla's work had been satisfactorily performed. The language which conditions payment approval, in addition to Big-D, also on the Architect and Owner, is ambiguous in practice given the content of the specified payment request and its sole approval by Big-D's Brinkerhoff without anything in the record indicating, although Brinkerhoff had approved the payment request, a final approval was contingent on the approval of

---

[43] JA Vol. I, pg. 101, section 4.2, first two sentences.
[44] JA Vol. I, pg. 92, paragraph D, first sentence.
[45] JA Vol. II, pg. 215.
[46] JA Vol. V, pg. 491, lines 11-12.

both the Architect's and IGT's. Instead, Brinkerhoff testified:

> I approved this [Payment Request] at 82 percent complete, absolutely did. I felt like Padilla has installed 82 percent of the product. Was I convinced that the product was going to continue to fail or was failing? No.[47]

Consistent with the conditions of section 4.21 and paragraph D of the Subcontract, above, Padilla was entitled to payment October 25, 2009; as Brinkerhoff testified:

Q It says approved it [Payment Request] and, above, it says payment date 10/25

A Payment date is reflective of the 9/25 date on your pay application. That's just - -

Q Right

A - - standard procedure.[48]

VII. PADILLA NEVER RECEIVED REQUISITE NOTICE WITHHOLDING PAYMENT[49]

Big-D argues it "provided repeated written notices of the failures in the Padilla

[47] JA Vol. V, pg. 491, lines 8-12.
[48] JA Vol. V., pg. 475, lines 1-6.
[49] RAB pg. 31, a., Padilla's response.

Work."[50] According to section 5.1 Notice to Cure provision of the Subcontract, if you (subcontractor):

> are guilty of a material breach of a provision of this Subcontract, You may be deemed in default of this Subcontract. If You fail, within three (3) days **after written notification**, to commence and continue satisfactory correction of such default, then at your expense, we will: (a) . . . (b) . . . (c) Withhold payment of moneys due You until the work is fully completed and accepted by the Owner. Emphasis added.

Pursuant to NRS 624.624(3): if a Contractor intends to withhold any amount from a payment to be made to a Subcontractor, **the Contractor must give, on or before the date the payment is due, a written notice** to the Subcontractor.

> The written notice of withholding must:
>
> (a) Identify the amount of the request for payment that will be withheld from the [Subcontractor];
>
> (b) Give a reasonably detailed explanation of the condition or the reason the [Contractor] will withhold that amount, including, without limitation, a specific reference to the provision or section of the agreement with the [Subcontractor], and any documents relating thereto, and the applicable building code, law or regulation with which the [Subcontractor] has failed to comply; and
>
> (c) Be signed by an authorized agent of the [Contractor].

None of the documents cited by Big-D meet the criteria for notices as described in either the Subcontract or NRS 624.624 as condition precedent to withholding the

[50] RAB pg. 31, last partial paragraph, first sentence.

October 25th payment due Padilla.

Big-D's document list:[51]

1. "Real time notice by Padilla's own crews that the work was separating itself. SOF 9-10." In the face of Padilla's complaints that its product wasn't allowed to cure long enough, this wasn't notice of a material breach as required by the Subcontract or specific reference required by NRS 624.624, but rather a confirmation by Padilla's stucco crew of the peril of the premature installation of the stone façade.
2. "Written notice from Big-D to Padilla requesting that Padilla immediately investigate its work on several occasions, SOF 7-8." A review of the record cites found in the designated pages of the Answering Brief's Statement of Facts did not disclose any written notice to Padilla in conformity to either the requirements of the Subcontract or NRS 624.624.
3. "Telephone notice from Big-D to Padilla . . . ." On its face, this is not a written

[51] RAB pg. 31.

notice.

4. "Meetings on-site with the product manufacturer and IGT consultants discussing the failures in the Padilla work, SOF 11-13." A review of the record cites found in the designated pages of the Answering Brief's Statement of Facts did not disclose any written notice to Padilla in conformity to either the requirements of the Subcontract or NRS 624.624.

5. "Real-time information that IGT had rejected the Padilla Work and direct Big-D to remove and replace it, SOF 11-13." A review of the record cites found in the designated pages of the Answering Brief's Statement of Facts did not disclose any written notice to Padilla in conformity to either the requirements of the Subcontract or NRS 624.624.

6. "Finally, formal written notice from Big-D on November 3, 2009 informing Padilla that no payment would be processed unless and until Padilla could assist Big-D demonstrate that the failures in Padilla work were caused by factors other than Padilla (which Padilla took no efforts to do), SOF 8-9." A review of the

record cites found in the designated pages of the Answering Brief's Statement of Facts did not disclose any written notice to Padilla in conformity to either the requirements of the Subcontract or NRS 624.624. Additionally, see this Reply Brief pg. 8, and reference, footnote 21.

Big-D's withholding Padilla's payment it approved September 29th in the absence of the requisite written notice before withholding was both a breach of the Subcontract and NRS 624.624.

VIII. BIG-D NOT ENTITLED TO CLAIMED DEDUCTIONS

According to Big-D, even if Padilla is entitled to payment for its work, it overstated the payment due in its September 25th Payment request.[52] Big-D admits a $25,000.00 payment before Padilla started work on the project was precontract[53], then at trial first made a claim for a $25,000.00 credit against the contract amount. There's nothing in the record that the payment was part of the contract amount shown on the Payment Request, which Brinkerhoff approved September 25th.[54]

[52] RAB pg. 33, section v., first sentence.
[53] JA Vol. VI., pg. 494, lines 24-25.
[54] JA Vol. II, pg. 216

As to the alleged payment of one of Padilla's material suppliers, there is nothing in the record that Big-D ever contacted Padilla to verify, if in fact, it received the materials, and if so, whether Padilla had paid the bill. Instead, in the absence of any cite to the record, Big-D claims "it is undisputed that Big-D was required to pay one of Padilla's material suppliers."[55]

IX. PADILLA WAS ENTITLED TO A SPOLIATION INSTRUCTION

According to Big-D, Padilla contends that Big-D failed to retain portions of the stucco over which stone was installed and that is a red herring because it is premised upon Padilla's incorrect argument that only the stucco over which stone installation had commenced failed.[56] Fundamental forensics starts with an examination of the failure. According to Chin in response to the question whether he would start his investigation looking at the failed pieces: "Yes. We would do an inspection of the failed site, not just the failed piece, but also the location on the building where the failure occurred to see what was supporting the piece."[57] Q. [Y]ou're starting with

[55] RAB pg. 33, section v., third sentence.
[56] RAB pg. 34, section C., second paragraph, third and fourth sentence.
[57] JA Vol. VI, pg.734, lines 11-17.

the failure and working out from there? A. "In the case of failure, that's –we start from – the failure initiates the investigation."[58]

As argued, above, the alleged deviations from the plans and specifications were not material; did not cause the separations from which this case arises.[59] Testing of samples that had not failed would thwart any possibility to identify a nexus between the failure and the cause: deviation from the plans and specifications, premature installation of the stone, etc. Even Big-D admitted there was the possibility of causes unrelated to the plans and specifications. According to Brinkerhoff in answer to the question why Big-D never terminated the Subcontract with Padilla: "[W]e made a decision based on the rejection of Padilla's work by IGT. We didn't know the cause. We didn't know whether it was labor related. We didn't know whether it was material related. We didn't know whether it was weather condition related. We didn't know the cause."[60] While IGT never determined causation, Big-D acquiesced and never put them to their proof: that the alleged deviations from the plans and

[58] JA Vol. VI, pg. 734, lines 18-21.
[59] Reply Brief, pgs. 2-4.
[60] JA Vol. V, pg. 469, lines 10-24.

specifications were material; caused the separations, the defect. This unilaterally prejudiced Padilla's defense in that by the time Padilla received written notice[61] that Big-D believed the cause of the separations was the alleged deviations from the plans and specifications, no samples of the failed stucco were available, having been destroyed, according to Brinkerhoff's calendar, September 14 – 16th.[62] In fact, the only samples provided to Padilla were marked "Brown coat Finished 9/14", "Sample date 9/18[63]." The brown coat had been cured far less than the seven days specified by Big-D.

Big-D argues that the requested adverse inference is not necessary for a sophisticated judge[64] and Padilla's request was not timely.[65] Both of these arguments were made in Opposition to Padilla's Motion in Limine II. February 5, 2014, resulting in the District Court deferring its ruling "until all evidence is heard."[66]

---

[61] JA Vol. I, pg. 10; pg. 16, lines 27-28; pg. 17, lines 13.
[62] JA Vol. III, pg. 294.
[63] JA Vol. VII, pgs. 000793-000796.
[64] RAB pg. 36, first partial paragraph, first sentence.
[65] RAB pg. 36, first full paragraph, first sentence.
[66] Appellant's Supplemental Brief, pg. 000912.

Finally, Big-D argues that sanction in the way of an adverse inference are only appropriately issued to a party 'controlling the evidence.'" There isn't anything in the record that Big-D didn't control the failed stucco. While it is true they were directed to demolish the stucco[67] to make way for installation of the replacement cement board to mount the stone façade on, there isn't anything in the record that IGT prohibited them from preserving samples of the failed stucco for future defense, either theirs or Padilla's. Therefore, their lack of control argument fails.

X. CLAIMED ATTORNEYS' FEES, COSTS, AND INTEREST ARE NOT POST CONFIRMATION DEBT

Padilla supplements its Opening Brief argument relevant to Attorney's Fees, Costs, and Interest[68] to address the issue of post confirmation debt. According to Big-D, the District Court had jurisdiction to award Big-D attorneys' fees and costs because post confirmation "debts are liabilities of reorganized Chapter 11 debtor and are not affected by the bankruptcy proceeding."[69]

---

[67] JA Vol. III, pg. 294.
[68] AOB pg. 27.
[69] RAB pg. 37, section D., first partial paragraph, first sentence.

According to *In re Vickie Lynn Marshall, 273 B.R. 822, 830 (Bankr.C.D.Cal., 2002)*, the court found that attorneys' fees and costs arising out of prepetition litigation rooted in prepetition conduct must be treated as prepetition debt, not postpetition debt citing Ninth Circuit cases: *In re Kadjevich, 220 F. 3d 1016 (9th Cir. 2000) and In re Abercrombie, 139 F.3d 755 (9th Cir. 1998)*. In the instant matter, the prepetition conduct occurred in September 2009, the prepetition litigation was filed March 9, 2010 and Padilla's bankruptcy petition was filed October 14, 2011. As a result, and according to *In re Marshall*, Big-D's fees and costs are prepetition debt and subject to the discharge, *In re Marshall, at 830-831*, Padilla received in its bankruptcy case.

XI. CONCLUSION

The District Court's finding of fact that Padilla's omission or commission caused the complained of damages; the separations of the first coat from the second coat of stucco, is not supported by substantial evidence and must be reversed, including those determinations arising from the erroneous findings, Judgment for Big-D and

the associated award of attorney's fees and costs. Instead, there is substantial evidence that Big-D breached the Subcontract, and therefore, Padilla is entitled to Judgment in the amount of the stopped payment check, $185,991.95.[70] In the alternative, should this Court determine that Big-D is entitled to money damages, then the District Court's misunderstanding of the Stipulated Judgment and its jurisdiction to award judgment in excess of the claim authorized by the United States Bankruptcy Court must be addressed.

Note: On page 3 of the Respondent's Answering Brief, Respondent points out Appellant's Joint Appendix ("JA") omits a number of admitted trial exhibits. It was agreed between counsels that the JA would include all admitted Trial Exhibits. Our investigation indicates the error arose from the scanning process to create the Joint Appendix PDF Volumes that was not noticed when the Table of Contents was subsequently created. While undersigned counsel takes full responsibility for the administrative error, there was no intention to hide any evidence, and after review

[70] JA Vol. 2, pg. 221, Trial Exhibit 11.

of the Respondents Appendix and the missing Exhibits, our error did not prejudice the Respondent's Argument.

NRAP 28.2 Attorney's Certificate/NRAP 32(8)(A)

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and type style of NRAP 32(a)(6) because:

This brief has been prepared in a proportionally spaced typeface using Microsoft 2013 Word in 14 font size and Times New Roman.

2. I further certify that this brief complies with the volume limitations of NRAP 32(a)(7)(A)(ii) because it does not contain more than 7,000 words.

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a

reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 25th day of April 2016.

/s/ Bruce R. Mundy

BRUCE R. MUNDY
NV 6068
200 South Virginia Street, Eighth Floor
Post Office Box 18811
Reno, Nevada 89511-0811
reno-attorney@sbcglobal.net
(775) 851-4228
FAX 851-4239
Attorney for: Appellant

MOT

SPENCER FANE LLP
John H. Mowbray, Esq. (Bar No. 1140)
John Randall Jefferies, Esq. (Bar No. 3512)
Mary E. Bacon, Esq. (Bar No. 12686)
300 S. Fourth Street, Suite 700
Las Vegas, NV 89101
Telephone: (702) 408-3411
Facsimile: (702) 408-3401
E-mail: JMowbray@spencerfane.com
RJefferies@spencerfane.com
MBacon@spencerfane.com

-and-

MARQUIS AURBACH COFFING
Jack Juan Chen, Esq.
Cody S. Mounteer, Esq. (Bar No. 11220)
10001 Park Run Drive
Las Vegas, NV 89145
Telephone: 702.207.6089
Email: cmounteer@maclaw.com

Attorneys for APCO Construction, Inc.

DISTRICT COURT

CLARK COUNTY, NEVADA

APCO CONSTRUCTION, a Nevada corporation, Plaintiff, v. 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* **MOTION FOR RECONSIDERATION OF COURT'S ORDER GRANTING ZITTING BROTHERS CONSTRUCTION, INC.'S PARTIAL MOTION FOR SUMMARY JUDGMENT AND EX PARTE APPLICATION FOR ORDER SHORTENING TIME AND TO EXCEED PAGE LIMIT**
AND ALL RELATED MATTERS	

APCO Construction, Inc. ("APCO"), by and through its undersigned counsel of record, the law firms of SPENCER FANE LLP and MARQUIS AURBACH COFFING, submits the

following Motion for Reconsideration of the Court's Order Granting Zittings Brothers Construction, Inc.'s ("Zitting") Partial Motion for Summary Judgment. The Motion for Reconsideration should be granted because: (1) APCO's original opposition confirmed no less than eight material facts that remain in dispute, (2) Zitting's Reply did not meaningfully address any of those eight material facts and did not accurately represent APCO's affirmative defenses, (3) this Court authorized and Zitting agreed to additional discovery, which, as reflected in APCO's supplemental briefing, resulted in new evidence confirming Zitting misrepresented several key facts, (4) Zitting's Surreply contained many inaccuracies, none of which account for the material facts that are in dispute, (5) because inaccurate statements regarding the critical *Padilla v. Big-D Construction* case were made at the hearing on this matter, and (6) when the Nevada Supreme Court has analyzed pay-if-paid provisions without a mechanic's lien waiver, it has found such provisions to be valid conditions precedent to a general contractor's obligation to pay a subcontractor. These new facts and considerations require reconsideration and a denial of Zitting's Motion. APCO is entitled to a trial on the merits.

DATED: January 5th, 2018.

SPENCER FANE LLP

By: _____

John H. Mowbray, Esq. (Bar No. 1140)
John Randall Jefferies, Esq. (Bar No. 3512)
Mary E. Bacon, Esq. (Bar No. 12686)
300 S. Fourth Street, Suite 700
Las Vegas, NV 89101
Telephone: (702) 408-3400
Facsimile: (702) 408-3401
Attorneys for APCO Construction, Inc.

ORDER SHORTENING TIME AND TO EXCEED PAGE LIMIT

The Court having reviewed APCO Construction, Inc.'s Motion for Reconsideration on Order Shortening Time and good cause appearing:

It is HEREBY ORDERED that the time may be shortened and the Motion shall be set for hearing on the 11th day of January, 2018, at 9:00 a.m., in Department XIII.

It is also HEREBY ORDERED that APCO can exceed the 30 page limit set forth in EDCR 2.20. APCO's Motion may be 39 pages (including its table of contents and table of authorities).

Dated this 8th day of January, 2018.

for District Court Judge

MARK R. DENTON

Submitted by:

SPENCER FANE LLP

John H. Mowbray, Esq. (Bar No. 1140)
John Randall Jefferies, Esq. (Bar No. 3512)
Mary E. Bacon, Esq. (Bar No. 12686)
300 S. Fourth Street, Suite 700
Las Vegas, NV 89101
Attorneys for APCO Construction, Inc.

Declaration of Mary Bacon, Esq. in Support of an Order Shortening Time to Hear Motion for Reconsideration

Mary Bacon, Esq. hereby declares under penalty of perjury under the laws of the State of Nevada that the foregoing is true and correct and if called upon to testify, would do so.

1. I am an attorney at the law firm of Spencer Fane, LLP, co-counsel for APCO Construction, Inc. ("APCO"). I have personal knowledge of the information contained in this declaration and could testify as a witness if called upon to do so.
2. I am making this declaration in support of an Order Shortening Time for the Court to hear its Motion for Reconsideration of the Court's ruling on Zitting Brothers Construction, Inc.'s ("Zitting") Motion for Partial Summary Judgment.
3. APCO makes this Motion for Reconsideration on an order shortening time in the interest of judicial economy before trial starts on the remaining claims. Additionally, in the event the Court grants the instant Motion for Reconsideration, it would give the parties a fair chance to prepare for trial since Zitting would likely proceed to trial with the other subcontractors on January 17, 2018.
4. I declare under penalty of perjury as provided under the laws of the State of Nevada that the foregoing is true and correct and if called upon to testify, would do so.

DATED: January 5th, 2018.

MARY BACON, ESQ.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

- *Hotel Last Frontier Corp. v. Frontier Props.*, 79 Nev. 150, 155, 380 P.2d 293, 295 (1963).
- *Kahn v. Orme*, 108 Nev. 510, 516, 835 P.2d 790, 794 (1992)
- *Indianapolis Minority Contractors Ass'n.*, 1998 U.S. Dist. LEXIS 23349, 1998 WL 1988826.
- *Lehrer McGovern Bovis v. Bullock Insulation, 124 Nev. 1102, 1117-1118, 197 P.3d 1032 (2008)*
- *Laughlin Recreational Enters. v. Zab Dev. Co.*, 98 Nev. 285, 287, 646 P.2d 555, 556 (1982).
- *Lorraine v. Markel Am. Ins. Co.*, 241 F.R.D. 534, 552 (D. Md. 2007)
- *Lucini-Parish Ins. v. Buck,* 108 Nev. 617, 620, 836 P.2d 627, 629 (1992)
- *Mansur v. Mansur,* No. 63868, 2014 Nev. Unpub. LEXIS 790, at *4 n.1 (May 14, 2014)
- *Masonry & Tile Contractors Ass'n of S. Nev. v. Jolley, Urga & Wirth, Ltd., 113 Nev. 737, 741, 941 P.2d 486, 489 (1997)*
- *MB Am., Inc. v. Alaska Pac. Leasing Co.*, 367 P.3d 1286, 1288 (Nev. 2016)
- *McDonald v. Shamrock Invs., LLC,* No. 54852, 2011 Nev. Unpub. LEXIS 1628, at *1 (Sep. 29, 2011)
- *Morgan v. D&S Mobile Home Ctr., Inc.*, Nos. 07-09-0315-CV, 07-09-0354-CV, 2010 Tex. App. LEXIS 7498, at *8-9 n.4 (App. Sep. 10, 2010)
- *Nev. Nat'l Bank v. Snyder,* 108 Nev. 151, 157, 826 P.2d 560, 563 (1992)
- *Padilla Construction Company of Nevada v. Big-D Construction, Corp.* 386 P.3d 982, 2016 Nev. Unpub. LEXIS 958.
- *Pulliam v. Tallapoosa Cty. Jail*, 185 F.3d 1182, 1185 (11th Cir. 1999)
- *Schettler v. RalRon Capital Corp.*, 128 Nev. 209, 221 n.7 (2012)
- *Sunbelt Worksite Mktg. v. Metro. Life Ins. Co.*, No. 8:09-cv-02188-EAK-MAP, 2011 U.S. Dist. LEXIS 87387, at *5-6 (M.D. Fla. Aug. 8, 2011)
- *Theriault v. State*, 92 Nev. 185, 547 P.2d 668, 1976 Nev. LEXIS 561 (Nev. 1976),
- Visa *Int'l Serv. Ass'n v. JSL Corp.*, No. 02:01-CV-0294-LRH (LRL), 2006 U.S. Dist. LEXIS 81923, at *10 (D. Nev. Nov. 3, 2006)
- *Williams v. Cottonwood Cove Dev. Co.*, 96 Nev. 857, 619 P.2d 1219, (1980)
- *Young v. Johnny Ribeiro Bldg.*, 106 Nev. 88, 787 P.2d 777 (1990)

Statutes and Other Authorities

- NRCP 15(b)
- Fed.R.Civ.P. 16(e)
- NRCP 30(b)
- NRS 624
- NRS 624.624
- NRS 624.626

I. PROCEDURAL HISTORY

This case's procedural history is fraught with complexity. Zitting filed its complaint against APCO asserting lien claims, breach of contract, and other causes of action more than eight

years ago on April 30, 2009.[1] On June 10, 2009, APCO filed its answer to Zitting's complaint.[2] APCO asserted 20 affirmative defenses in its answer, including Zitting's failure to meet conditions precedent to payment.[3] All related actions were consolidated and APCO took the lead in pursuing its claims against Gemstone.[4] This enured to Zitting's benefit because it was simply able to join a significant amount of APCO's briefing.[5] The bank who financed the Project filed a motion for summary judgment as to lien priority, and the court granted the bank's motion.[6] This had the practical effect of granting all residual funds from the Project to the bank. APCO spearheaded *and* financed the related appeal, which Zitting joined. The appeal was denied in September 2015, and a special master was appointed in June 2016 to oversee discovery.[7] Just last year, in August 2016, the special master scheduled discovery and requested that parties submit answers to a questionnaire about their respective claims.[8] Just last year, Zitting filed its *initial* list of witnesses and production of documents on September 1, 2016, and responded to the special master questionnaire on September 23, 2016.[9] On September 29, 2016, the special master held a hearing to confirm which parties were asserting claims in the instant matter since it was not clear.[10] So discovery with respect to Zitting's claims against APCO and APCO's defenses really only started in September 2016.

---

[1] Exhibit 1, Zitting Complaint against APCO.
[2] Exhibit 2, APCO's Answer to Zitting's Complaint.
[3] Exhibit 2, APCO's Answer to Zitting's Complaint.
[4] See Docket Entries at: 2010-03-08 (APCO files Objections to Lenders' Standard Interrogatories to the Lien Claimants) ;.2010-03-09 (Zitting's Joins APCO's Objections to Lenders' Standard Interrogatories to the Lien Claimants); 2010-05-28 (Zitting files a Motion for Summary Judgment Against Gemstone and for Certification of Final Judgment Pursuant to NRCP 54(B); 2010-07-01 (APCO files an Opposition to Bank's Motion for Partial Summary Judgment as to Priority of Liens); 2010-07-21 (Zitting files a Joinder to APCO's Opposition to Bank's Motion for Partial Summary Judgment as to Priority of Liens); 2010-07-22 (Zitting files a Joinder to APCO's Motion for Partial Summary Judgment as to Priority of Liens); 2011-11-04 (APCO files a Motion for Issuance of Order on Priority on Order Shortening Time); 2011-11-08 (Zitting files a Joinder to APCO's Motion for Issuance of Order on Priority on Order Shortening Time); 2011-12-12 (APCO files Opposition to Motion for Reconsideration or Re-Hearing); 2012-01-04 (Zitting files a Joinder to APCO's Opposition to Motion for Reconsideration or Re-Hearing); 2012-03-15 (APCO files an Opposition to SFC's Supplement to Summary Judgment as to Priority of Liens); 2012-03-20 (Zitting files a Joinder to APCO's Opposition to SFC's Supplement to Summary Judgment as to Priority of Liens); 2012-06-25 (APCO files Appeal); (Zitting joined the appeal and APCO carries the cost of the Appeal); 2015-09-24 (Unfortunately, the Appeal is Denied).
[5] *Id.*
[6] Exhibit 3, Notice of Entry of Order Granting the Bank's Motion for Summary Judgment.
[7] See Exhibit 4, Order Appointing Special Master.
[8] Exhibit 5, Special Master Order.
[9] See Docket.
[10] See Special Master Hearing Order.

And while APCO noticed Zitting's deposition on March 29, 2017,[11] APCO and Zitting agreed to continue the deposition to permit the parties to spend less on attorneys fees, and more time engaging in settlement discussions.[12] Three months later, APCO noticed Zitting's deposition for June 28, 2017. [13] Once again, APCO and Zitting agreed to continue the deposition.[14] Then on July 31, 2017, Zitting filed its partial motion for summary judgment against APCO. APCO opposed the motion, and Zitting replied in September 2017.

The Court had a calendar call on September 5, 2017.[15] Tellingly, the parties noted confusion regarding which parties were still in the case at the calendar call.[16] And parties that did not timely comply with their mandatory pre-trial disclosure requirements were given more time to comply.[17] The remaining parties participated in a settlement conference on September 29, 2017, which was not fruitful. The Court was scheduled to hear Zitting's Partial Motion for Summary Judgment on October 5, 2017. At that hearing, APCO's counsel requested that discovery be extended 45 days to allow the parties to complete depositions that had been intentionally delayed per the mutual agreement of the parties.[18] This Court authorized and the parties agreed to reopen deposition discovery until the end of the month.[19] Tellingly, while the parties came prepared to argue the dispositive motions before the Court, the Court delayed hearing the pending dispositve motions until after the depositions would be completed.[20]

On October 27, 2017, *less than 2 months ago*, Zitting's NRCP 30(b)(6) witness was deposed for the first time.[21] That Court authorized deposition occurred after all initial briefing in

---

[11] See Exhibit 17, March 29, 2017 Notice of Deposition to Zitting.
[12] See Exhibit 6, Declaration of Cody Mounteer, Esq.
[13] See Exhibit 26, June 28, 2017 Notice of Deposition to Zitting.
[14] Exhibit 6, Declaration of Cody Mounteer, Esq.
[15] See docket.
[16] See Exhibit 27, Minutes from September 5, 2017 Hearing ("Mr. Johnson noted confusion with the number of parties in the case, knowing what's going on procedurally, and the Motion for Summary Judgment and Joinders being moved to October.").
[17] See Minutes from September 5, 2017 Hearing ("COURT ORDERED deadline for parties who have not complied with the Special Master's questionnaire and have not filed their pretrial disclosures SET Friday, September 8, 2017 by 5:00 pm and FURTHER ORDERED hearing SET Monday, September 11, 2017 on Pltf's Oral Motion to Dismiss Pursuant to Rule 7(b).").
[18] See Minutes from October 5, 2017 Hearing.
[19] See Exhibit 30, Order from October 5, 2017 Hearing.
[20] See Exhibit 28, Transcript from October 5, 2017 hearing at 10-12.
[21] See Exhibit 7, Deposition of S. Zitting.

Zitting's original Motion.

Zitting's deposition revealed a significant amount of new information that contradicted Zitting evidence submitted with its motion. As such, APCO filed a supplemental brief on November 6, 2017 to make the Court aware of this new critical evidence.[22] Critically, Zitting did not timely object to the supplement because of the order allowing new discovery. The next day, APCO supplemented its interrogatory responses to Zitting to account for the defenses APCO was able to clarify through Zitting's deposition.[23] Then on November 15, 2017, Zitting filed supplemental briefing to respond to APCO's supplemental brief.[24] The Court held an abbreviated hearing on the matter on November 16, 2017, and then the Court issued a minute order granting Zitting's Partial Motion for Summary Judgment on November 27, 2017 despite the documented factual disputes.[25]

Following issuance of the Court's minute order, APCO followed up with counsel for Zitting to acquire a draft order on Zitting's motion for Partial Summary Judgment. Zitting finally provided the order on Wednesday, December 20, 2017. Subsequent to receiving the draft order, it became apparent that the Parties fundamentally disagreed with regard to the interpretation of the language in the Decision. Specifically, the minute order states that "the Court still has before it the question of whether there are genuine issues going to breach of the contract related to Zitting's performance of the same."[26] Yet, then provides that "the subject Motion is GRANTED in its entirety."[27] As the Court's Decision reads, it is APCO's position that the Court specifically found "genuine issues" of material fact remain as to Zitting's "performance" and breach of the contract that must be presented at trial. Conversely, Zitting asserts that regardless of the above finding, the Court granted the Motion in its entirety and, as such, Zitting is effectively removed from the case and there are no issues of fact to present at trial. As evidenced by the instant Motion, it is clear that the Court, in fact, "still has before it the question of whether there are genuine issues going to

---

[22] See Docket at November 6, 2017.
[23] See Exhibit 8, APCO's Supplemental Responses to Zitting's First Set of Interrogatories.
[24] See Docket at November 15, 2017.
[25] See Exhibit 9, Court's November 27, 2017 Minute Order.
[26] *Id.*
[27] *Id.*

breach of the contract related to Zitting's performance of the same."[28] Lastly, Zitting's order is materially flawed, as it contains language from Helix's motion for partial summary judgment that was not presented by Zitting in any form or fashion.

II. LEGAL STANDARD.

The Nevada Supreme Court has held that "[u]nless and until an order is appealed, the district court retains jurisdiction to reconsider the matter."[29] In Clark County, a motion for rehearing must be filed within 10 days after service of written notice of entry of the order following the original hearing.[30] Rehearings are appropriate only when "substantially different evidence is subsequently introduced or the decision is clearly erroneous."[31] This Court has discretion on the question of rehearing. *See Harvey's Wagon Wheel, Inc. v. MacSween,*[32] (reconsideration of previously denied motion for summary judgment approved as the "judge was more familiar with the case by the time the second motion was heard, and he was persuaded by the rationale of the newly cited authority").

In addition, a motion for reconsideration of summary judgment may be brought under both *NRCP 59(e)* and *NRCP 60(b)*. Rehearings are justified when a party seeks to reargue a point of law and provides a convincing legal basis for doing so. *See Gibbs v. Giles,*[33] (holding trial court did not err in granting motion for rehearing in order to permit a party to reargue the law).

APCO submits that the unique procedural history of this case requires this Court to entertain this Motion for Reconsideration because new facts became available with the late discovery ordered by the Court and after briefing on Zitting's Motion was completed. In light of those new facts, the application of law mandates reconsideration and the denial of Zitting's Motion. There are triable issues of fact that entitle APCO to a trial on the merits. Reconsideration now will save the parties significant time and money associated with an appeal.

---

[28] *Id.*
[29] *Gibbs v. Giles, 96 Nev. 243, 245, 607 P.2d 118, 119 (1980)*; *accord Barry v. Lindner, 119 Nev. 661, 670, 81 P.3d 537, 543 (2003).*
[30] *See EDCR 2.24(b).*
[31] *Masonry & Tile Contractors Ass'n of S. Nev. v. Jolley, Urga & Wirth, Ltd., 113 Nev. 737, 741, 941 P.2d 486, 489 (1997)*
[32] *96 Nev. 215, 217–18, 606 P.2d 1095, 1097 (1980)*
[33] 96 Nev. 243, 244-45, 607 P.2d 118, 119 (1980)

III. APCO's original Opposition raised Material Issues of Fact.

1. APCO disputed eight material facts necessary for summary judgment, and Zitting did not adequately address these material facts.

Zitting's Motion for Summary Judgment asked for summary judgment on its breach of contract and NRS 108 claims.[34] APCO cited admissible evidence directly disputing no less than eight material facts in its opposition to Zitting's Motion. Those facts included: whether the drywall was complete as required per the subcontract for a release of retention, whether Zitting invoiced APCO after 06/30/08 (and whether Zitting's purported pay applications were inconsistent or ever received by APCO), whether Zitting segregated the amount of work it allegedly completed under APCO or Camco, the value of Zitting's completed work (and whether or not it was ever submitted, approved, or rejected by APCO or Camco), whether Zitting ever submitted close-out documents, and whether Zitting received a notice of stop work.[35] APCO's rebuttal of these points was based on the affidavits of Mary Jo Allen, APCO's PMK. Resolving these critical facts was necessary for the Court to decide in Zitting's favor. As explained below, Zitting's Reply did not adequately address these material facts. As such, this Court was necessarily weighing the credibility of the evidence and witnesses. "[A] district court cannot make findings concerning the credibility of witnesses or weight of evidence in order to resolve a motion for summary judgment."[36] "[T]he trial judge may not in granting summary judgment pass upon the credibility or weight of the opposing affidavits or evidence. That function is reserved for the trial. On a summary judgment motion the court is obligated to accept as true all evidence favorable to the party against whom the motion is made."[37]

Thus, any award of a breach of contract action would be error since Zitting's Reply did not sufficiently address the eight genuine issues of material fact that APCO presented and the Court was mandated to accept as true.

IV. Zitting's subsequent deposition testimony undermined the basis of Zitting's Motion.

---

[34] Exhibit 10, Zitting's Motion for Summary Judgment.
[35] See APCO's Opposition at 3-6, on file herein.
[36] *Borgerson v. Scanlon*, 117 Nev. 216, 220, 19 P.3d 236, 238 (2001)
[37] *Hidden Wells Ranch v. Strip Realty*, 83 Nev. 143, 145, 425 P.2d 599, 601 (1967)

Notably, Zitting's original Reply did not even address four of APCO's disputed facts.[38] And of the four disputed material facts that Zitting did address, all were later directly contradicted by its own deposition testimony. More specifically, Zitting addressed: (1) Camco's responsibility for the amount owed to Zitting, (2) Zitting's failure to submit the pay applications at issue, (3) the fact that the change orders at issue were never approved, and (4) completion of the drywall for Buildings 8 and 9, which was the milestone per the retention payment schedule.[39]

Addressing amounts allegedly owed by Camco, Zitting's Reply claimed it "never had any relationship" with Camco on the Project.[40] Zitting's deposition confirmed differently. Zitting admitted that it performed change order work under Camco's direction:

> Q. (By Mr. Jefferies) Okay. So it's my understanding that, by at least September 6 of '08, Zitting was doing work for CAMCO. Would you agree with that?
> A. It appears that way, yes.
> Q. Okay. And tell me what the first page of Exhibit 4 is.
> A. It appears to be an accounting of hours spent by Zitting employees doing change order work that was signed off by somebody with CAMCO, it looks like.41
> . . .
> Would you agree, sir, that what you're showing is Change Order Request 22, 23, 24, and 25 in Exhibit 3 were actually performed for CAMCO?
> A. Performed under their direction.42

Zitting's Reply also alleges that APCO does not have any admissible proof that Zitting worked on the Project after APCO's departure.[43] As represented above, Zitting's own accounting records and its deposition testimony confirm this statement is not accurate.[44] Further, Zitting's Reply also represented that the amount it sought from this Court was only for approved and completed work on Buildings 8 and 9, completed *before* APCO left the Project.[45] As quoted above, Zitting admitted its employees were on the Project doing change order work for Camco in

---

[38] Zitting's Reply failed to address four disputed facts listed in APCO's opposition: whether Zitting's pay applications were inconsistent, the value of Zitting's completed work, whether its work was ever approved by APCO or Camco, and whether Zitting submitted close out documents.
[39] See Zitting's Reply at 11-13, on file herein.
[40] Reply at 11:19-23, on file herein.
[41] Zitting Deposition at 42.
[42] Zitting Deposition at 54.
[43] Reply at 11:23-24.
[44] See Zitting deposition at 42, 54.
[45] Reply at 11:25-27.

September 2009, which was *after* APCO left the Project in August 2008. Those amounts are incorrectly included in the amount Zitting was just awarded by the Court's granting of Zitting's Motion.[46]

Among other things, Zitting was not entitled to retention until the drywall was completed in Buildings 8 and 9. APCO's original opposition included photos of the Project in August and November of 2008 confirming the drywall was not complete.[47] And then, in Zitting's Court authorized deposition, Zitting not only acknowledged the drywall requirement but confirmed it had no evidence to satisfy that precondition of the retention payment schedule:

> Q Okay. So as you sit here today, are you able to testify as to whether the drywall was complete prior to the time you stopped working for APCO on the project?
> A. **I can testify that the first layer, if you will, of drywall was complete and the only thing that was, to my knowledge, not complete was some soffits in the kitchens, that there was an issue with the assembly -- the fire assembly or something. So they were not done,** but they had done flooring under them and they had even done some cabinets in some areas. **And so there was some open soffits that they were still waiting for clarification or design on. And to my knowledge, that's the only thing that was not complete, in terms of drywall.**[48]
> . . .
> Q.Okay. Go to page 27 [of Exhibit 15]. And, again, I've got a head start on you. Mine's highlighted, but if you look under Buildings 8 and 9, you'll see references to drywall.
> A. Okay.
> Q. And there's some percentages complete for the various floors in those two buildings, 8 and 9.
> A. Okay.
> Q. Continuing on to the next page, 28, under Building 9, it says, **Corridors, drywall has not started**. First floor corridor lid framing is 70 percent complete and **then the drywall itself is shown as being 55 to 70 percent complete depending upon the building**. My question to you is: Sitting here as the corporate designee for Zitting, do you have any facts documents, or information to rebut these purported percentages of completion for the drywall on Buildings 8 and 9?
> A. I don't.[49]

---

[46] See Zitting Deposition at 42 and 54.
[47] See Exhibit 11, Photos of Buildings 8 and 9 confirming the drywall was not completed.
[48] Zitting Brother's NRCP 30(b)(6) deposition at 27:21-29:2.
[49] Zitting Deposition at 93:6-94:15.

Lastly, Zitting's Reply argues APCO never denied certain change orders in its Reply. Zitting's deposition confirmed the opposite:

> Q. Okay. Isn't it true, sir, that as the corporate representative for Zitting today, that APCO – whether you agreed or not, APCO did reject some change order requests. Correct?
> A. It appears that they had.[50]

APCO's original Opposition and newly authorized evidence raised genuine issues of material fact. As such, the only way the Court could have decided in Zitting's favor was to weigh the credibility of the evidence at this summary judgment stage.

A. <u>All of APCO's Opposition exhibits were admissible.</u>

Zitting Reply takes issue with Ms. Allen's affidavit arguing that most of it is inadmissible.[51] Zitting's objections are unfounded. As Zitting admitted, Ms. Allen acted as APCO's NRCP 30(b)(6) designee. Accordingly, Ms. Allen had not only the opportunity but the mandate to inform herself to speak for APCO.[52]

Zitting insisted Ms. Allen needed to have personal knowledge for her affidavit.[53] Zitting is wrong. "The testimony of a Rule 30(b)(6) designee represents the knowledge of the corporation, not of the individual deponents." *Great Am. Ins. Co. of New York v. Vegas Const. Co.,*[54] (providing an exhaustive overview of the principles behind a Rule 30(b)(6) deposition). As such, a Rule 30(b)(6) designee need not have any personal knowledge of the designated subject matter.[55] This is true even of affidavits submitted by 30(b)(6) designees.[56]

---

[50] Zitting Deposition at 51:22-52:1.
[51] See Zitting's Reply at 3-5.
[52] *See NRCP 30(b)(6)* (Under NRCP 30(b)(6), an organization must designate individuals to "testify as to matters known or reasonably available to the organization.")
[53] Zitting's Reply at 3-5.
[54] 251 F.R.D. 534, 538 (D. Nev. 2008) (internal quotation marks omitted).
[55] *Id.*
[56] *Sunbelt Worksite Mktg. v. Metro. Life Ins. Co.*, No. 8:09-cv-02188-EAK-MAP, 2011 U.S. Dist. LEXIS 87387, at *5-6 (M.D. Fla. Aug. 8, 2011) (collecting cases) and citing *Atlantic Marine Florida, LLC. V. Evanston Ins. Co.*, 2010 U.S. Dist. LEXIS 56067, 2010 WL 1930977 (M.D. Fla. May 13, 2010) (where the Court refused to strike an authorized corporate representative's filed affidavit in support of the corporation's motion for summary judgment on the grounds of insufficient *personal* knowledge, because the court found that it is not necessary for a corporate representative designated as a Rule 30(b)(6) witness to have direct, personal knowledge of each and every fact discussed in an affidavit or deposition because a Rule 30(b)(6) representative or designee can be inferred to have knowledge on the behalf of the corporation as the corporation is meant to appear vicariously through them); *ABN Amro Mortgage Group, Inc. v. Maximum Mortgage, Inc., et al*, No. 1:04cv492, 2006 U.S. Dist. LEXIS 64455, 2006 WL 2598034, *7 (N.D.Ind. Sept.8, 2006) (finding a corporate representative's knowledge is inferred regarding the

To prepare, a 30(b)(6) designee must, if necessary, "use documents, past employees, and other resources."[57] Here, Ms. Allen, as APCO's NRCP 30(b)(6) designee, educated herself in the topics of her affidavit, spoke with APCO employees, utilized documents at APCO's disposal, and reviewed APCO's NRS 51.135 business records in making her affidavit.[58] *Cf. Theriault v. State*,[59] (NRS 51.135 provides that business records are admissible in any form). The chart below summarizes why each of Zitting's alleged objections to Ms. Allen's NRCP 30(b)(6) affidavit is without merit.

Exhibit in APCO's Opposition	**Zitting's Objection to Exhibit**	**Why it is admissible.**
Exhibit 1, paragraph 3 of Ms. Allen declaration ("Attached as Exhibit 2 to the Opposition are photographs of buildings 8 and 9 at the Project, and that were taken by APCO during its ordinary course of business."	Ms. Allen cannot authenticate the photos.	As APCO's NRCP 30(b)(6) designee, Ms. Allen familiarized herself with APCO's business records to make her affidavit. She was able to confirm that the photos in question were taken by Brian Benson in the regular course of business.[60]
Exhibit 1, paragraph 5. "All of Zitting's approved change orders that APCO was responsible for were paid through August 2008."	Ms. Allen's statement calls for a legal conclusion, and a lack of foundation.	Ms. Allen's statement was never intended to make a legal conclusion. Her factual statement was simply that APCO paid for the approved change orders it received through August 2008. Further, there is foundation for Ms. Allen's statement. Ms. Allen is APCO's accounts payable clerk. She is responsible for processing and paying approved change orders.[61]
Exhibit 1 at paragraph 7. "APCO was never	Foundation and alleged contrary	Ms. Allen's statement is admissible. As stated above, Ms. Allen confirmed that APCO was

matters she attests to and does not have to a demonstrated "personal knowledge"); *Hijeck v. Menlo Logistics, Inc.*, No. 3:07-cv-0530-G, 2008 U.S. Dist. LEXIS 12886, 2008 WL 465274, *4 (N.D.Tex. Feb.21, 2008) (acknowledging a corporate representative does not have to have direct personal knowledge of each and every fact discussed in affidavit or deposition but can be subjective beliefs and opinions of the corporation).

[57] *Bridell v. Saint Gobain Abrasives Inc.*, 233 F.R.D. 57, 60 (D. Mass. 2005).

[58] Exhibit 13, Declaration of Mary Jo Allen.

[59] 92 Nev. 185, 547 P.2d 668, 1976 Nev. LEXIS 561 (Nev. 1976), overruled, *Alford v. State*, 111 Nev. 1409, 906 P.2d 714, 111 Nev. Adv. Rep. 163, 1995 Nev. LEXIS 161 (Nev. 1995), overruled as stated in *Hill v. State*, 114 Nev. 169, 953 P.2d 1077, 114 Nev. Adv. Rep. 21, 1998 Nev. LEXIS 24 (Nev. 1998), overruled in part, *Bigpond v. State*, 128 Nev. 108, 270 P.3d 1244, 128 Nev. Adv. Rep. 10, 2012 Nev. LEXIS 27 (Nev. 2012).

[60] Exhibit 13, Declaration of Mary Jo Allen.

[61] See Declaration of Mary Jo Allen.

provided or received Zitting's alleged pay applications dated 06/30/2008 and 11/30/2008 that are collectively attached to the Opposition as Exhibit 4."	deposition statement.	never provided or received the referenced pay applications by reviewing Project documents, and speaking with APCO employees.
Exhibit 1 at paragraph 7. "Zitting still had a remaining part of its scope of work to complete at the Project when APCO stopped work and turned the Project over to Camco in August 2008."	No personal knowledge of the Project's construction	Ms. Allen made herself aware of these facts as the NRCP 30(b)(6) representative through speaking with Joe Pelan and Brian Benson and reviewing the Project's records, including the drywaller's billings.[62] And as cited above, 30(b)(6) designees do not need to have personal knowledge for their declarations on behalf of the company.
Exhibit 2 (photographs of buildings 8 and 9).	Authentication and admissibility, APCO didn't have personal knowledge of the construction since it left the project before November 2008 when the photos were taken	As APCO's NRCP 30(b)(6) designee, Ms. Allen familiarized herself with APCO's business records to make her affidavit. She was able to confirm that the photos in question were taken by Brian Benson in the regular course of business.[63]
Exhibit 6 (Camco's Payment Application)	Authentication and admissibility, no evidence documents are what they claim to be, no declaration to authenticate, no personal knowledge.	These were documents produced by Camco, a party to this litigation. "[D]ocuments provided to a party during discovery by an opposing party are presumed to be authentic, shifting the burden to the producing party to demonstrate that the evidence that they produced was not authentic." *Lorraine v. Markel Am. Ins. Co.,*[64] citing *Indianapolis Minority Contractors Ass'n.,*[65] ("The act of production is an implicit authentication of documents produced…").

Notably, the Court's minute entry granting Zitting's Motion did not address these evidentiary issues, and the Court's order found Zitting's evidentiary objections to be "moot."[66]

B. Zitting was on notice of APCO's defenses eight years ago when APCO filed its answer.

---

[62] Exhibit 13, Declaration of Mary Jo Allen.
[63] Exhibit 13, Declaration of Mary Jo Allen.
[64] 241 F.R.D. 534, 552 (D. Md. 2007)
[65] 1998 U.S. Dist. LEXIS 23349, 1998 WL 1988826, at *6
[66] Exhibit 29, Findings of Fact and Conclusions of Law and Order Granting Zitting's Motion.

Zitting's Reply claims that APCO is precluded from opposing Zitting's Motion on any other basis than a pay-if-paid defense because APCO only listed a pay-if-paid defense in its interrogatories.[67] Zitting argued that "[d]uring the seven years of litigation, APCO has consistently refused payment based solely on the void pay-if-paid provision."[68] This is completely inaccurate, and quite frankly, lacks candor to this Court. APCO filed its answer to Zitting's complaint on June 1, 2009 and specifically asserted 20 affirmative defenses, including the following:[69]

> **SECOND AFFIRMATIVE DEFENSE**
> The claims of the ZBCI have been waived as a result of their respective acts and conduct.
> ...
> **THIRD AFFIRMATIVE DEFENSE**
> No monies are due ZBCI at this time as APCO has not received payment for ZBCI's work from Gemstone, the developer of the Manhattan West Project.
> ...
> **FIFTH AFFIRMATIVE DEFENSE**
> At the time and place under the circumstances alleged by the ZBCI, ZBCI had full and complete knowledge and information with regard to the conditions and circumstances then and there existing, and through ZBCI's own knowledge, conduct, acts and omissions, assumed the risk attendant to any condition there or then present.
> ...
> **EIGHTH AFFIRMATIVE DEFENSE**
> The damages alleged by ZBCI were caused by and arose out of the risk which ZBCI had knowledge and which ZBCI assumed.
> ...
> **TENTH AFFIRMATIVE DEFENSE**
> APCO's obligations to ZBCI have been satisfied or excused.
> ...
> **TWELFTH AFFIRMATIVE DEFENSE**
> The claim for breach of contract is barred as a result of ZBCI's failure to satisfy conditions precedent.
> ...
> **SIXTEENTH AFFIRMATIVE DEFENSE**
> Any obligations or responsibilities of APCO under the subcontract with ZBCI, if any, have been replaced, terminated, voided, canceled or otherwise released by the ratification entered into between ZBCI, Gemstone and CAMCO and APCO no longer bears any liability thereunder.
> **EIGHTEENTH AFFIRMATIVE DEFENSE**
> ZBCI has failed to comply with the requirements of NRS 624.[70]

So Zitting has been on notice of APCO's defenses since June 1, 2009.

---

[67] Reply at 5.
[68] Reply at 7:16-17.
[69] Exhibit 2, APCO's Answer to Zitting's Complaint.

APCO also testified about its multiple affirmative defenses at its NRCP 30(b)(6) deposition. Zitting's July 17, 2017 NRCP 30(b)(6) deposition notice specifically requested that APCO's designee be prepared to testify to "[a]ll facts related to your defenses against ZBCI's claims as alleged in ZBCI's complaint in this case."[71] On July 19, 2017, APCO's NRCP 30(b)(6) designee, Mary Jo Allen, testified about several of APCO's defenses, including that Zitting did not meet the conditions of the subcontract's retention payment schedule:

> Q. What is your understanding of a retention?
> A. Retention is not due on the project until the project has totally been completed in its entirety. Not only that, the owner has to accept all the work that was completed, the as-builts must be in, the closeouts must be in, and retention is then paid from the owner and will then be paid to the subcontractors. **It is not due until all those five things [in paragraph 3.8 of the subcontract] have been completed.**
> Q. Understood. And during the course of Zitting's work on the project, Zitting received progress payments; correct?
> A. Yes, sir.
> Q. In the course of making those progress payments, there were retention that were withheld, is that correct?
> A. Yes, sir.
> Q. **You testified that Zitting would not get those retentions until certain conditions were met, correct?**
> **A. Yes, sir.**
> Q. **Until those conditions were met, was there an actual retention check being issued to anyone and held by anyone?**
> A. **No.**
> Q. The retention would only be withheld if the work had already been approved and completed by Zitting, correct?
> A. When completed by all subcontractors.
> **Q.** Let me clarify. When you say completed by all subcontractors, that's only when the retention is being paid to Zitting, correct?
> **A.** The project had to be completed in its entirety. This contract was bound to the prime contract. They signed this – in they are bound to the same terms of the prime contract. The prime contract states that no retention will be released until the entire project is completed in its entirety.
> Q. Understood. And I'm not talking about when the actual retention is released to Zitting, I'm talking about the process before that, basically when the progress payments are authorized to be issued, where someone retains ten percent of that progress .

---

[70] Exhibit 2, APCO's Answer to Zitting's Complaint.
[71] See Exhibit 12, Zitting Notice of Deposition to APCO at 4:10-12.

A. The bank.
Q. Right, the bank retains ten percent of that amount. Before the bank can even retain that amount and once the payment was authorized, that work for which the proper assignment was assigned to, that had to be approved and completed by Zitting, correct?

A. The work that was paid for, the 90 percent that was paid, yes. The percentage of work that was completed was approved by the owner. The owner approved the percentage. They were the one that told us what to pay the subcontractors.
Q. **Right, so the only reason why the retention was not paid right away was that there were other conditions that may depend on other subcontractors, correct?**
A. **The job in its entirety.**
Q. Earlier you testified that the retention would be released once the entire project is complete; is that correct?
A. Yes.[72]

More specifically to the retention payment schedule, APCO's NRCP 30(b)(6) designee also discussed Subcontract Section 3.8 and the preconditions to APCO's obligation to pay Zitting's retention:

Q. Right, can I direct you to section 3.8?
A. Um-hum. The building was not completed. Neither building. Neither 8 nor 9 was completed.
Q. Understood. But I haven't asked any questions with respect to buildings 8 or 9, so there was no questions pending.
A. Sorry.
Q. I'm not trying to be rude, I'm trying to make the record clear. I know you're very excited to answer questions.
Q. Can I have you read the first sentence up until Part A, where it starts with "the ten percent withheld" into the record, please.
A. "The ten percent withheld retention shall be payable to subcontractor upon and only upon the occurrence of the following events, each of which is a condition precedent to the subcontractor's right to receive final payment hereunder and payment of such retainer."
Q. Earlier you talked about how the release of retention is conditioned precedent to the completion. Can I have you read the handwritten part at the end of section 3.8 into the record.
A. F, down here, sir?
Q. Yes.
A. "Building is considered complete as soon as the drywall is complete."[73]
. . .

---

[72] Exhibit 16, Allen Deposition, Volume II at 117:1-119:17.
[73] Allen Deposition, Volume II at 119:18-120:19.

Q. Right. After the payment application number 11 shown on APCO 106218, did APCO receive any payment applications from the subs?
A. No.
Q. Not that you're aware of?
A. No, sir.
Q. As far as you know, the owner has withheld a retention amount from all the subs, not just Zitting, for their work on the project?
A. Yes, sir.
Q. Has APCO ever received any payment of the retention amount?
A. No, sir.
Q. And just for clarity of the record then, that means APCO has not paid any retention amount to anyone; is that correct?
A. That is correct.[74]

So it is clear that Zitting knew of APCO's position that the retention preconditions were not met. Zitting's Reply and Court's ruling did not account for these references to defenses unrelated to the pay-if-paid issue.

APCO's 30(b)(6) designee also testified that not all of Zitting's change order work was approved by the owner, a condition precedent to Zitting being paid under the change order payment schedule:

Q. Do you know whether Zitting has completed work for the project for the total amount of $4,033,654.85. Does that number ring a bell to you?
A. Not without papers in front of me.
Q. And the numbers shown on Exhibit Allen 75, this reflects both the contract work and the change order work, correct?
A. The change order work that was submitted to the owner.
Q. And approved, correct?
A. Not all of it was approved, sir.
Q. Is there a reason for APCO to submit a bill containing change orders that was not approved by the owner?
A. The owner was the one that would determine what was approved. If Zitting gave us a change order billing, we would give it to the owner. The owner would say yes or no.
Q. Understood. So during the application review process that's when, as far as you know, the owner would approve or disapprove of the change order work being billed, correct?
A. Correct.[75]

In addition to its answer and 30(b)(6) deposition testimony, APCO also supplemented its responses to Zitting's interrogatories within two weeks of taking Zitting's NRCP 30(b)(6)

---

[74] Allen Deposition, Volume II at 140, lines 8-24.
[75] Allen Volume II at 146:1-23.

deposition.[76] The Court's failure to consider these various sources and articulations of APCO's affirmative defenses is the equivalent of case terminating sanctions. Such a sanction would only be appropriate after the Court conducted a full sanctions analysis under *Young v. Johnny Ribeiro Bldg,*[77] including evaluating: the degree of wilfulness of the offending party; the extent to which the non-offending party would be prejudiced by a lesser sanction; the severity of the sanction of ssal relative to the severity of the alleged discovery abuse; whether any evidence has been irreparably lost; the feasability and fairness of alternatives; the poilcy favoring adjudication on the merits; whether sanctions unfairly operate to penalize a party for the misconuct of its attorney, and the need to deter parties and future litigants from similar abuses.[78] No such analysis was performed in this case.

Further, "Nevada is a notice-pleading jurisdiction and pleading should be liberally construed to allow issues that are fairly noticed to the adverse party."[79] "However, even if not properly pleaded, an affirmative defense may be tried by consent or when fairness warrants consideration of the affirmative defense and the plaintiff will not be prejudiced by the district court's consideration of it."[80] And, NRCP 15(b) permits liberal amendment of pleadings during trial "when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits."[81] "And omission of an affirmative defense is not fatal as long as it is included in the pretrial order."[82]

---

[76] Exhibit 8, APCO's Supplement to Zitting's First Set of Interrogatories.
[77] 106 Nev. 88, 93, 787 P.2d 777, 780 (1990).[77]
[78] *Id.*
[79] *Great Am. Ins. Co. v. Gen. Builders, Inc.*, 113 Nev. 346, 353–54 (1997) (quoting *Nevada State Bank v. Jamison Partnership*, 106 Nev. 792, 801 (1990)).
[80] *Douglas Disposal, Inc. v. Wee Haul, LLC*, 123 Nev. 552, 558 (2007) (affirming the district court's decision to consider affirmative defenses that were not included in defendants' answers because plaintiff had notice of them). *See also Schettler v. RalRon Capital Corp.*, 128 Nev. 209, 221 n.7 (2012) (finding that fair notice of an affirmative defense was given on reconsideration and thus allowing the affirmative defense to be considered); *Williams v. Cottonwood Cove Dev. Co.*, 96 Nev. 857, 619 P.2d 1219, (1980) (affirming the decision of the district court because the buyers were given reasonable notice and opportunity to respond to the newly asserted affirmative defense in limited partnership's motion for summary judgment).
[81] NRCP 15(b).
[82] *Pulliam v. Tallapoosa Cty. Jail*, 185 F.3d 1182, 1185 (11th Cir. 1999) *citing Hargett v. Valley Fed. Sav. Bank,* 60 F.3d 754, 763 (11th Cir.1995) (failure to assert affirmative defense in answer curable by insertion of defense in pretrial order); *Id. citing* Fed.R.Civ.P. 16(e) (pretrial order "shall control the subsequent course of action").

In *Colony Ins. Co. v. Kuehn,*[83] the defendants were completely uncooperative in that they did not file initial disclosures and failed to respond to plaintiff's discovery. Plaintiffs filed a motion to compel to force defendants to respond and file its initial disclosures. Shockingly, the defendants did not even bother to oppose the motion. The motion was granted and the defendants were given several weeks to comply. Plaintiffs filed another motion to compel months later because the defendants did a poor job of answering the discovery. Plaintiffs requested that defendants be ordered to completely answer its discovery and asked for sanctions including striking the defendant's affirmative defenses, and disallowing certain witnesses from testifying on a particular issue. The court ordered that certain witnesses would be prohibited from testifying since defendants still had not made its initial disclosures. The court did not strike the defendants' affirmative defenses.

Plaintiffs were forced to file a third motion to compel because defendants would still not completely answer their discovery. The court reviewed defendant's interrogatories and found that one interrogatory went to the veracity of one of the defendant's defenses regarding mental state. The court found that interrogatory answer to be vague and lacked factual detail. *Instead of granting the request to preclude this critical defense, the court granted the defendants an opportunity to supplement this interrogatory.* Shockingly, defendants resubmitted the exact same response to the critical interrogatory they were given an opportunity to supplement. Only then did the court preclude the defendants from providing any testimony on this defense. The court recognized that, "Precluding all evidence on this issue is tantamount to striking defendant's affirmative defense of Mr. Kuehn's mental state."[84] *Colony Ins.* exemplifies the rare circumstances in which a court may or should consider striking affirmative defenses.

Through the granting of Zitting's Motion on the current record, the Court is issuing a case terminating sanction by not considering APCO's affirmative defenses because of its interrogatory responses. The Nevada Supreme Court had the opportunity to consider the severity of case

---

[83] No. 2:10-cv-01943-KJD-GWF, 2011 U.S. Dist. LEXIS 155198, at *6 (D. Nev. Dec. 22, 2011)

[84] *Id.* at 7.