20/11/2008

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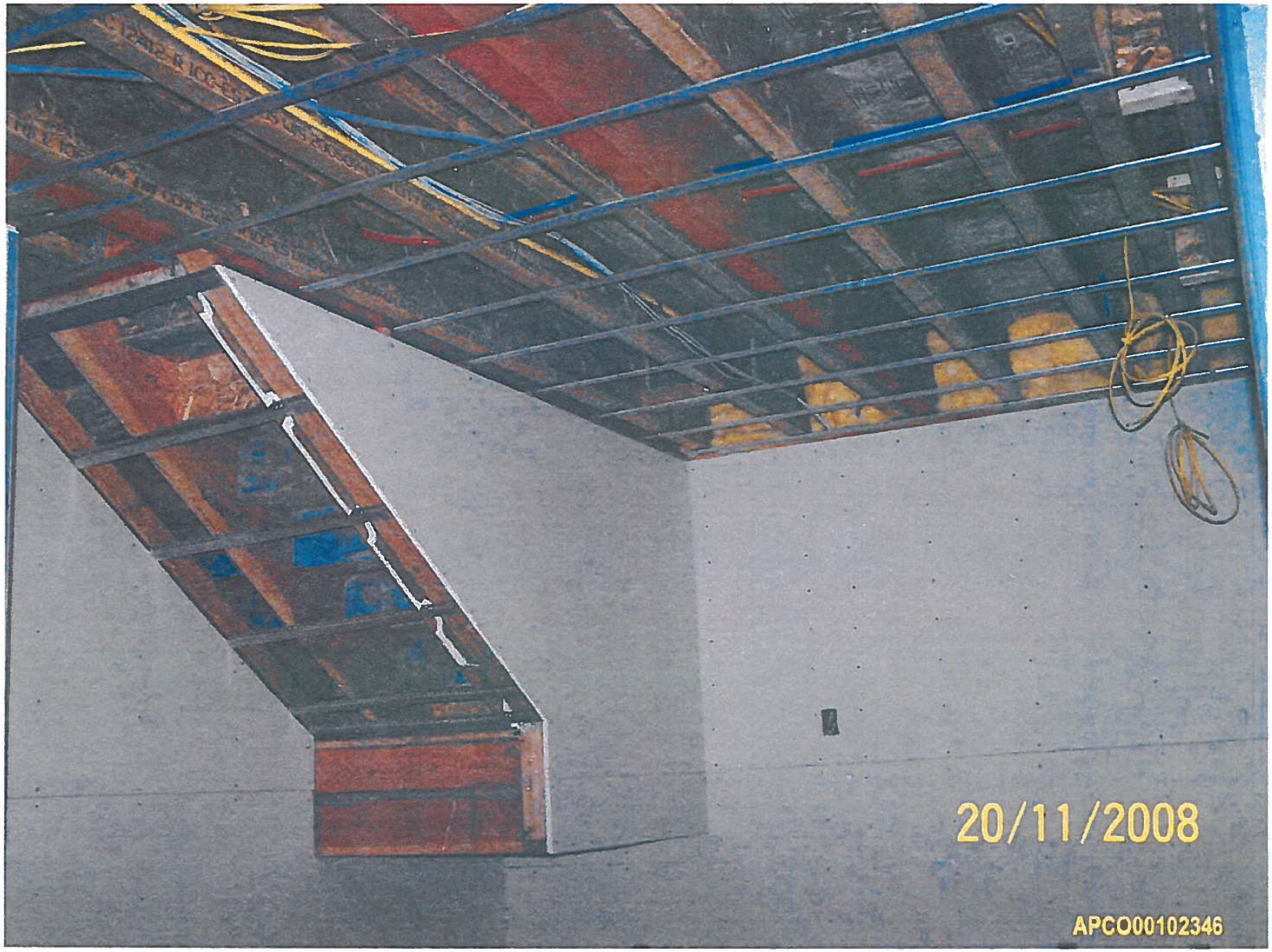
APCO00102345


20/11/2008
APCO00102346

20/11/2008
APCO00102299

EXHIBIT 12

ELECTRONICALLY SERVED
7/17/2017 2:15 PM

NDEP
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Nevada Bar No. 6787
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Nevada Bar No. 12247
WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP
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Attorneys for Lien Clamant,
Zitting Brothers Construction, Inc.

DISTRICT COURT

CLARK COUNTY, NEVADA

APCO CONSTRUCTION, a Nevada corporation, Plaintiff, vs. GEMSTONE DEVELOPMENT WEST, INC., a Nevada corporation, Defendant.	CASE NO. A571228 DEPT. NO. XIII Consolidated with: A574391; A574792; A577623; A583289; A587168; A580889; A584730; A589195; A595552; A597089; A592826; A589677; A596924; A584960; A608717; A608718; and A590319
AND ALL RELATED MATTERS	**ZITTING BROTHERS CONSTRUCTION, INC.'S NOTICE OF TAKING CONTINUED DEPOSITION OF APCO CONSTRUCTION PURSUANT TO NRCP 30(b)(6)** **DATE: July 19, 2017** **TIME: 9:00 a.m.** **(DATE CHANGE ONLY)**

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Case Number: 08A571228

ZITTING BROTHERS CONSTRUCTION, INC.'S NOTICE OF TAKING CONTINUED DEPOSITION OF APCO CONSTRUCTION PURSUANT TO NRCP 30(b)(6)

TO: APCO CONSTRUCTION

TO: JACK CHEN MIN JUAN, ESQ. and CODY S. MOUNTEER, ESQ., of MARQUIS, AURBACH & COFFING, Attorneys for APCO Construction

TO: ALL PARTIES AND THEIR RESPECTIVE ATTORNEYS OF RECORD

PLEASE TAKE NOTICE that pursuant to NRCP 30(b)(6), ZITTING BROTHERS CONSTRUCTION, INC., ("ZBCI"), by and through its counsel of record, Jorge A. Ramirez, Esq., and I-Che Lai, Esq., of the law firm of WILSON ELSER MOSKOWITZ EDELMAN & DICKER, LLP, will take the oral deposition of one or more designated representatives for APCO CONSTRUCTION ("APCO") on the 19th day of July, 2017, at the hour of 9:00 a.m. at Esquire Deposition Solutions, located at 2300 W. Sahara Ave., Suite 770, Las Vegas, NV 89102. ZBCI plans to depose APCO's designated representative(s) on each of the numbered categories identified below. The deposition will take place before an officer duly authorized by law to administer oaths and record testimony. This deposition will be recorded by stenographic means and will be taken pursuant to all applicable provisions of the Nevada Rules of Civil Procedure pertaining to the taking of and use of depositions. You are invited to attend and cross-examine.

DEFINITIONS

As used in this notice of deposition, the following terms have the meaning indicated:

1. The term "you" or "your" refers to APCO Construction, its employees, agents, representatives, attorneys, experts, and all other persons acting or purporting to act on its behalf.

2. The term "Gemstone" refers to Gemstone Development West, Inc., its employees, agents, representatives, attorneys, experts, and all other persons acting or purporting to act on its behalf

3. The term "ZBCI" refers to Zitting Brothers Construction, Inc., its employees, agents,

representatives, attorneys, experts, and all other persons acting or purporting to act on its behalf.

4. The term "Manhattan West Project" refers to the real property commonly referred to as Manhattan West mixed used development project at issue in this case and generally located at 9205 West Russell Road, Clark County, Nevada.

5. The term "Contract" refers to the agreement you entered into with Gemstone regarding the Manhattan West Project, including but not limited to the original contact(s), change orders, and any ratification agreements.

6. The term "Sub-Contract" refers to the agreement you entered into with ZBCI regarding the Manhattan West Project, including but not limited to the original contact(s), change orders, and any ratification agreements.

Areas of Examination Pursuant to Nev. R. Civ. P. 30(b)(6)

Pursuant to Nev. R. Civ. P. 30(b)(6), the designated witness(es) of APCO Construction will provide deposition testimony with respect to matters known or reasonable available to APCO Construction regarding the subjects described below:

1. All facts fact related to the Contract;

2. All facts fact related to the Sub-Contract;

3. All facts related to ZBCI's work under the Sub-Contract, including but not limited to the scope and quality of ZBCI's work;

4. All facts related to your process for obtaining payment under the Contract;

5. All facts related to your process for paying sub-contractors under the Sub-Contract and sub-contracts with other sub-contractors;

6. All facts related to all payments you received in connection with the Manhattan West Project;

7. All facts related to all payments you made to ZBCI in connection with the Manhattan West Project;

8. All facts related to all payments you made to sub-contractors other than ZBCI in connection with the Manhattan West Project;

9. All facts related to your communications with Gemstone regarding the Manhattan West Project;

10. All facts related to your communications with ZBCI regarding the Manhattan West Project;

11. All facts related to your assertion that your are not liable for any portion of ZBCI's general and/or lien claims against you;

12. All facts related to your defenses against ZBCI's claims as alleged in ZBCI's complaint in this case; and

13. All documents that you have disclosed in support of your defenses against ZBCI's claims against you.

DATED this 17th day of July, 2017.

WILSON ELSER MOSKOWITZ EDELMAN & DICKER LLP

By: _____

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

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of Wilson Elser Moskowitz Edelman & Dicker LLP, and that on this 17th day of July, 2017, I served a true and correct copy of the foregoing **ZITTING BROTHERS CONSTRUCTION, INC.'S NOTICE OF TAKING CONTINUED DEPOSITION OF APCO CONSTRUCTION PURSUANT TO NRCP 30(b)(6)** document as follows:

☐ by placing same to be deposited for mailing in the United States Mail, in a sealed envelope upon which first class postage was prepaid in Las Vegas, Nevada;

☒ via electronic means by operation of the Court's electronic filing system, upon each party in this case who is registered as an electronic case filing user with the Clerk;

☐ via hand-delivery to the addressees listed below;

☐ via facsimile;

☐ by transmitting via email the document listed above to the email address set forth below on this date before 5:00 p.m.

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Williams & Associates	
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BY _____
An Employee of WILSON ELSER MOSKOWITZ EDELMAN & DICKER LLP

EXHIBIT 13

DECLARATION OF MARY JO ALLEN IN SUPPORT OF MOTION FOR RECONSIDERATION OF COURT'S ORDER GRANTING ZITTING BROTHERS CONSTRUCTION, INC.'S PARTIAL MOTION FOR SUMMARY JUDGMENT ON ORDER SHORTENING TIME

Mary Jo Allen, 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. I am one of two designated NRCP 30(b)(6) witnesses for APCO Construction in lead case A571228 and associated consolidated actions, and I make this Declaration in support of APCO's Motion for Reconsideration of Court's Order Granting Zitting Brothers Construction, Inc.'s Partial Motion for Summary Judgment on Order Shortening Time.

3. As one of APCO's NRCP 30(b)(6) designees, I educated myself in the topics of my prior declaration and testimony by speaking with APCO employees, utilizing documents at APCO's disposal, and reviewed APCO's NRS 51.135 business records prior to preparing my declaration or giving testimony.

4. I also familiarized myself with APCO's business records prior to executing my prior declaration and giving any testimony to ensure all statements therein were truthful and accurate.

5. More specifically, during my preparation as an NRCP 30(b)(6) witness for APCO, I made myself aware of all facts in my prior declaration as one of APCO's NRCP 30(b)(6) representative through speaking with APCO employees including Joe Pelan and Brian Benson, and reviewing the Project's records, including but not limited to the drywaller's billings.

6. I am the Accounts Payable Clerk for APCO. I am directly responsible for cataloging approved change orders and pay applications that occur during the regular course of business.

7. I have personal knowledge as APCO's Accounts Payable Clerk that when APCO receives approved change orders they are copied and cataloged to be paid on receipt of funds.

8. I was able to confirm that the photos in question taken of the Project were in fact taken by Brian Benson, APCO's other NRCP 30(b)(6) witness, and done so in his regular course of business.

9. APCO was not paid for its work on the Project for June, July or August 2008.

10. APCO lost approximately $8,000,000 on this job, and APCO did not acquire the property. Instead, APCO endured a $900,000 legal battle on behalf of itself and its subcontractors to endeavor to get priority and paid from the owner.

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.

Mary Jo Allen

EXHIBIT 14

REGISTER OF ACTIONS

CASE NO. 08A571228

Apco Construction, Plaintiff(s) vs. Gemstone Development West Inc, Defendant(s)	§	Case Type:	**Business Court**
	§	Date Filed:	**09/09/2008**
	§	Location:	**Department 13**
	§	Cross-Reference Case Number:	**A571228**
	§		
	§		

RELATED CASE INFORMATION

Related Cases

08A574391 (Consolidated)
08A574792 (Consolidated)
08A577623 (Consolidated)
09A580889 (Consolidated)
09A583289 (Consolidated)
09A584730 (Consolidated)
09A587168 (Consolidated)
A-09-589195-C (Consolidated)
A-09-589677-C (Consolidated)
A-09-590319-C (Consolidated)
A-09-592826-C (Consolidated)
A-09-596924-C (Consolidated)
A-09-597089-C (Consolidated)
A-09-606730-C (Consolidated)
A-10-608717-C (Consolidated)
A-10-608718-C (Consolidated)

PARTY INFORMATION

		Lead Attorneys
Counter	**APCO Construction**	**Gwen Rutar Mullins**
Counter	**Asphalt Products Corporation**	
Counter	**Cactus Rose Construction**	
Counter	**Camco Pacific Construction Co Inc**	**Steven L. Morris**
Counter	**Camco Pacific Construction Co Inc**	**Steven L. Morris**
Counter Claimant	**Camco Pacific Construction Company Inc**	**Zachariah Parry** *Retained*
Counter Claimant	**Camco Pacific Construction Company Inc**	**Steven L. Morris** *Retained*

Counter	Club Vista Financial Sevices LLC	Mark E. Ferrario, ESQ
Counter	Gemstone Development West Inc	~~Greg S. Gilbert~~
Counter	Insulpro Projects Inc	Eric Dobberstein
Counter	Tharaldson Motels II Inc	Martin A. Muckleroy
Counter	Tharaldson, Gary D	Martin A. Muckleroy
Counter	Accuracy Glass & Mirror Company Inc	Dallin T. Wayment
Counter	Ahern Rentals Inc	D. Shane Clifford, ESQ
Counter	APCO Construction	Gwen Rutar Mullins
Counter	Arch Aluminum and Glass Co	Jeffrey R. Albregts
Counter	Atlas Construction Supply Inc	~~David W Dachelet~~
Counter	Bank of Oklahoma NA	
Counter	Bruin Painting Corporation	Dallin T. Wayment
Counter	Buchele Inc	Dallin T. Wayment
Counter	Cabinetec Inc	~~Justin L. Watkins~~
Counter	Camco Pacific Construction Co Inc	Steven L. Morris
Counter	Camco Pacific Construction Inc	Steven L. Morris
Counter	Cellcrete Fireproofing of Nevada Inc	Robert C. Reade
Counter	Concrete Visions Inc	
Counter	Creative Home Theatre LLC	
Counter	Dave Peterson Framing Inc	Stephen M. Dixon
Counter	E & E Fire Protection LLC	Stephen M. Dixon
Counter	Executive Plastering Inc	~~Matthew Q Callister~~
Counter	EZA P.C.	Donald H Williams

Counter	Fast Glass Inc	Michael T. Gebhart
Counter	Fast Glass Inc	Michael T. Gebhart
Counter	Ferguson Fire and Fabrication Inc	Dale B. Rycraft Jr.
Counter	Gemstone Development West Inc	~~Greg S. Gilbert~~
Counter	Gerdau Reinforcing Steel	William R. Urga
Counter	Granite Construction Company	David R. Johnson
Counter	Harsco Corporation	~~Donald H Williams~~
Counter	HD Supply Waterworks LP	Dallin T. Wayment
Counter	Heinaman Contract Glazing	Dallin T. Wayment
Counter	Helix Electric of Nevada LLC	Dallin T. Wayment
Counter	Hydropressure Cleaning Inc	
Counter	Inquipco	Jennifer R. Lloyd-
Counter	Insulpro Projects Inc	Eric Dobberstein
Counter	Interstate Plumbing & Air Conditioning	
Counter	John Deere Landscape Inc	
Counter	Las Vegas Pipeline LLC	Pro Se
Counter	Masonry Group Nevada Inc	Becky Pintar
Counter	Nevada Construction Services	Charles Vlasic
Counter	Nevada Prefab Engineers	Mindy C. Fisher
Counter	Nevada Prefab Engineers Inc	Christopher Craft
Counter	Noord Sheet Metal Company	T. James Truman
Counter	Noorda Sheet Metal Company	Stephen M. Dixon
Counter	Northstar Concrete Inc	~~Jennifer R. Lloyd-~~
Counter Defendant	Northstar Concrete Inc	~~Jennifer R. Lloyd-Robinson~~

		Retained
Counter	Pape Materials Handling	Christopher Craft
Counter	Patent Construction Systems	Donald H Williams
Counter	Professional Door and Mill Works LLC	Stephen M. Dixon
Counter	Professional Doors And Millworks LLC	
Counter	Ready Mix Inc	Brian Keith Berman
Counter	Renaissance Pools & Spas Inc	Steven B. Scow
Counter	Republic Crane Service LLC	~~Richard Allen Koch~~
Counter	Scott Financial Corporation	Glenn F Meier
Counter	Scott, Bradley J	Matthew S. Carter
Counter	Selectbuild Nevada Inc	Robert E. Schumacher
Counter	Steel Structures Inc	Christopher Craft
Counter	Supply Network Inc	Philip T. Varricchio
Counter	The Pressure Grout Company	
Counter	Tri City Drywall Inc	Jennifer R. Lloyd-
Counter	WRG Design Inc	Dallin T. Wayment
Counter	Zitting Brothers Construction Inc	Reuben Cawley
Cross	APCO Construction	Gwen Rutar Mullins
Cross	Gemstone Development West Inc	
Defendant	Commonwealth Land Title Insurance Co	
Defendant	First American Title Insurance Co	
Defendant	Gemstone Development West Inc	

		~~Monica Caffaratti~~ *~~Retained~~*
Defendant	Scott Financial Corporation	Glenn F Meier
Defendant	Scott, Bradley J	Jon Randall Jones
Doing	Apco Construction	~~Gwen Rutar Mullins~~
Doing	Helix Electric	
Doing	Oz Architecture of Nevada Inc	Donald H Williams
Doing	Pape Rents	Christopher Craft
Doing	Pape Rents	William R. Urga
Doing	Power Plus!	
Doing	Viking Supplynet	
Interpleader	Hydropressure Cleaning Inc	Gwen Rutar Mullins
Intervenor	Cell Crete Fireproofing Of NV Inc	Robert C. Reade
Intervenor	Custom Select Billing Inc	Gwen Rutar Mullins
Intervenor	Dave Peterson Framing Inc	~~T. James Truman~~
Intervenor	E & E Fire Protectiong LLC	T. James Truman
Intervenor	EZA P C	Donald H Williams
Intervenor	Granite Construction Company	David R. Johnson
Intervenor	Insulpro Projects Inc	Eric Dobberstein
Intervenor	National Wood Products, Inc.'s	Richard L Tobler
Intervenor	Nevada Prefab Engineers Inc	Martin A. Little
Intervenor	Noord Sheet Metal Company	T. James Truman
Intervenor	Patent Construction Systems	

		Donald H Williams *Retained* 7023207755(W)
Intervenor	Pressure Grout Co	T. James Truman
Intervenor	Professional Doors & Millworks LLC	T. James Truman
Intervenor	Steel Structures Inc	Martin A. Little
Intervenor	Tri-City Drywall Inc	Jennifer R. Lloyd-
Intervenor	Camco Pacific Construction Co Inc	Steven L. Morris
Intervenor	Camco Pacific Construction Co Inc	Steven L. Morris
Intervenor	Club Vista Financial Services LLC	Martin A. Muckleroy
Intervenor	Club Vista Financial Services LLC	Martin A. Muckleroy
Intervenor	Commonwealth Land Title Ins Co	
Intervenor	Commonwealth Land Title Ins Co	
Intervenor	Concrete Visions Inc	
Intervenor	E & E Fire Protection LLC	Stephen M. Dixon

Intervenor Defendant	Fidelity & Deposit Company Of Maryland	Steven L. Morris *Retained*
Intervenor	Fidelity And Deposit Co Of Maryland	Steven L. Morris
Intervenor	First American Title Insurance Co	
Intervenor	First American Title Insurance Co	
Intervenor	Gemstone Development West Inc	~~Monica Caffaratti~~
Intervenor	Gemstone Development West Inc	~~Monica Caffaratti~~
Intervenor	Gemstone Development West Inc	
Intervenor	Gemstone Development West Inc	
Intervenor	Gemstone Development West Inc	~~Monica Caffaratti~~
Intervenor	Jeff Heit Plumbing Co LLC	Keith E. Gregory
Intervenor	Marshall, Kelly	

Intervenor	Nevada Construction Services	~~Nikola Skrinjaric~~
Intervenor	Old Republic Surety	Keith E. Gregory
Intervenor	Scott Financial Corporation	Glenn F Meier
Intervenor	Tharaldson Motels II Inc	Martin A. Muckleroy
Intervenor	Tharaldson Motels II Inc	Martin A. Muckleroy
Intervenor Plaintiff	Arch Aluminum And Glass Co *Now Known As* Arch Aluminum and Glass LLC	Jeffrey R. Albregts *Retained* 702-483-5026(W)
Intervenor	Cabinetec Inc	~~Justin L. Watkins~~
Intervenor	Cactus Rose Construction Inc	Dallin T. Wayment
Intervenor	Camco Pacific Construction Co Inc	Steven L. Morris
Intervenor	Harsco Corporation	~~Donald H Williams~~
Intervenor Plaintiff	Interstate Plumbing & Air Conditioning Inc	Michael T. Gebhart *Retained*
Intervenor	Las Vegas Pipeline LLC	~~James E. Shapiro~~
Intervenor	Northstar Concrete, Inc.	~~Jennifer R. Lloyd~~
Intervenor	Pape Material Handling	William R. Urga
Intervenor	S R Bray Corp	Richard L. Peel
Intervenor	Selectbuild Nevada Inc	Robert E. Schumacher
Intervenor	Sunstate Companies Inc	Garry L. Hayes
Intervenor	SWPPP Compliance Solutions LLC	Richard L. Peel

Other	Graybar Electric Company	
Other	HD Supply Construction Supply LP *Doing Business As* White Cap Construction Supply Inc	
Other	PCI Group, LLC	
Other	RLMW Investments LLC	
Other	United Subcontractors Inc *Doing Business As* Skyline Insulation	
Other	Wiss, Janney, Elstner Associates, Inc.	Gwen Rutar Mullins
Plaintiff	Apco Construction	Jack Chen Min Juan
Special	Hale, Floyd, ESQ	
Third Party	Camco Pacific Construction Co Inc	Steven L. Morris
Third Party	Fidelity & Deposit Co Of Maryland	Steven L. Morris
Third Party	Fidelity & Deposit Co Of Maryland	Steven L. Morris
Third Party	Dave Peterson Framing Inc	~~T. James Truman~~
Third Party	E & E Fire Protection LLC	T. James Truman
Third Party	Insulpro Projects Inc	Eric Dobberstein
Third Party	Noorda Sheet Metal Company	T. James Truman
Third Party	Professional Doors & Millworks LLC	T. James Truman

EVENTS & ORDERS OF THE COURT

10/05/2017 **All Pending Motions** (9:00 AM) (Judicial Officer Denton, Mark R.)

Minutes

10/05/2017 9:00 AM

- APPEARANCES: Jack Juan, Cody Mounteer, John Mowbray, and Mary Bacon, Attorneys for Apco Steven Morris, Attorney for Camco Pacific Construction Co Inc Eric Zimbelman, Attorney for Defts Helix Electric of Nevada, SWPP Compliance Solution, Buchele Inc, Cactus Rose Construction Inc, Fast Glass Inc, and Heinaman Contract Glazing Benjamin Johnson, Attorney for United Subcontractors Inc John Taylor and Rich Tobler, Attorneys for National Wood Products Elizabeth Stephens, Attorney for Trustee I-Che Lai, Attorney for Pltf, Zitting Brothers Construction Inc. Tracy Truman, Attorney for E & E Fire Michael Ernst, Attorney for Gerdau Reinforcing Steel, Steel Structures Inc, and Nevada Prefab Engineers CONFERENCE AT BENCH: Court disclosed that the wife of its current Law Clerk, Andrew Lajoie, is the niece of Steven Morris. Counsel acknowledged their agreement to proceed in light of the Court's disclosure. Further, Court advised that Mr. Lajoie would be screened from this case. Mr. Juan advised that at the settlement conference no global settlement was reached; however, progress was made with some. Further, Mr. Juan 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. Mr. Zeimbelman noted his opposition. COURT ORDERED, matter TRAILED for counsel to discuss the matter further. MATTER RECALLED - Court noted that there are some different points as to what should happen relative to scheduling of trial and/or hearing the motions that are before the Court today. Mr. Juan advised that the key concern is for those who are opposed to having their clients deposed and the trial being delayed. Court advised the case could be placed on the November 28, 2017 stack, which lead to further discussion as to that date changing any of the parties' position, the case having a date certain on the stack, the amount of time trial would require, and the specific depositions that would be taken. It was estimated that each subcontractor would take a day. After hearing from counsel, COURT ORDERED trial date SET November 28, 2017 at 9:00 am; new trial order to issue and a calendar call date will be set as well. COURT FURTHER ORDERED that the Motions on today's calendar CONTINUED to November 16, 2017 at 9:00 am. COURT FURTHER ORDERED that the deadline for taking depositions is October 30, 2017. COURT FURTHER ORDERED that any motions in limine be filed by November 5, 2017 will be SET for hearing on November 16, 2017 at 9:00 am; no more motions for summary judgment can be filed. Additional colloquy. Mr. Juan to prepare and circulate an order reflecting what has been done today. CLERK'S NOTE: This Minute Order has been amended to reflect that motions in liminie will be SET for hearing on November 16, 2107 at 9:00 a.m.

Return to Register of Actions

EXHIBIT 15

SUBCONTRACT AGREEMENT

PROJECT: **The West Manhattan Condominiums** Contract NO. **168-3** APCO Construction Project No. **168**
PROJECT LOCATION: West Russell Road and Rocky Hill Street, Las Vegas, NV, 89148

OWNER: **Gemstone Development West, Inc., 9121 West Russell Rd, Unit 117, Las Vegas Nevada 89148**

ARCHITECT/ENGINEER: **OZ Architecture,** 303.861.5704 Huron Street , Denver . CO . 80202 . **Redwine Engineering** (303) 575-9510 700 17th Street, Denver, CO 80202 . **Jordan & Skala Engineers,** (702) 362-5111, 2900 S. Rancho Dr, Suite 102, Las Vegas Nevada 89102. **WRG Engineering** (702990-9300 3011 West Horizon Ridge Parkway, Suite 100, Henderson Nevada 89052.

THIS AGREEMENT (hereinafter "the Subcontract") is entered into in consideration of the mutual promises made this 17th day of April , 2007, between:

ASPHALT PRODUCTS CORPORATION also known as APCO Construction, (hereinafter called the "Contractor") 3432 N. Fifth Street, North Las Vegas, Nevada 89032. Office: (702) 734-0198, Fax: (702) 734-0396. Nevada Contractors License No. **14563.**

And

Zitting Brothers Construction, Inc. (hereinafter called the "Subcontractor").
P.O. Box 178
Hurricane, UT 84737
P 435-635-4068 F 435-635-4137

Subcontractor's NV Contractor's License No. **58955** Limit: **Unlimited**

Contractor and Subcontractor agree as follows:

1. Contract Documents

1.1 The Contract Documents for this Subcontract Agreement, shall include all exhibits and other documents attached hereto or made a part thereof by reference, all drawings designed by **OZ Architecture, Redwine Engineering, Jordan & Skala Engineers, WRG Engineering** and approved by **Gemstone Development West, Inc.** and the Primary Contract between the Owner and Contractor (hereinafter "the Prime Contract"), including all exhibits, and other documents attached thereto or made part hereof by reference, the Project Specifications and Contract Documents, the Project Plans, and all addendum and subsequent modifications issued thereto. (All Contract Documents identified herein shall be hereinafter collectively referred to as the "Contract Documents").

1.2 The Contract Documents are available in Contractor's office. Subcontractor acknowledges that it has carefully examined the Contract Documents and fully understands them. Copies of the Plans and Specifications will be provided to Subcontractor, upon request, at Subcontractor's Cost. Subcontractor shall, prior to the commencement of the Work, review and compare all of the Subcontract Documents relating to the performance of the Subcontractor and any and all errors, ambiguities and inconsistencies shall immediately be reported to the Contractor in writing and resolved to Subcontractor's satisfaction.

APCO Construction _____
Subcontractor _____

1.3 Subcontractor is bound to the Contractor to the same extent and duration that Contractor is bound to Owner. Subcontractor assumes toward Contractor all obligations, liabilities and responsibilities that Contractor, by the Contract Documents, has assumed toward the Owner in the Prime Contract. Contractor shall further have the benefit of all rights, remedies, redress and limitations in respect to Subcontractor and all things done and used by Subcontractor in performance of its Work, which the Owner and its agents have against Contractor in the Contract Documents or by law. Any and all decisions by the Owner or its agents relative to interpretation of the Contract Documents or any ambiguity or discrepancy therein shall be binding on the Subcontractor to the same extent such are binding on Contractor. Subcontractor shall bind **lower tier** subcontractors and suppliers to full compliance with all Contract Documents, including all performance obligations and responsibilities which subcontractor assumes toward Contractor.

2. Scope of Work

2.1 Subcontractor agrees to furnish all supervision and labor, furnish and install all materials, equipment and supplies required, and do all things necessary to fully complete all of the items of work ("the Subcontract Work"), referred to in **Exhibit "A": Subcontractor Scope of Work** And Exhibit "B": Z.B.C. S2 Bid proposal #Rev5574 Dated 10-05-07

2.2 Subcontractor warrants to Contractor and Owner that all Work shall be performed in a neat, skillful, good and workmanlike manner and will be fit for its intended use both as to workmanship and materials. Subcontractor agrees that all materials and equipment furnished by Subcontractor shall be new and of the best description and quality of their respective kinds, unless otherwise specified and ordered by Contractor in writing. Subcontractor warrants that the materials and equipment furnished and the Work performed will strictly comply with the Contract Documents and this Subcontract, and shall be satisfactory to Owner and Contractor.

2.3 **Equal Opportunity Clause**

During the performance of any contract, Subcontractor, unless exempt, agrees as follows:

2.3.1 Subcontractor will not discriminate against any employee or applicant for employment because of race, color, religion, sex or national origin. Subcontractor will take affirmative action to ensure that color, religion, sex or national origin. Such action shall include, but not limited to the following; employment, upgrading, demotion or transfer, recruitment or recruitment advertising, layoff or termination, rates of pay or other forms of compensation, and selection for training, including apprenticeship. Subcontractor agrees to post in conspicuous places, available to employee and applicants for employment, notices to be provided by the government contracting officer setting forth the provisions of this nondiscrimination clause.

2.3.2 Subcontractor will, in all solicitations or advertisements for employees placed by or on behalf of Subcontractor, state that all qualified applicants will receive consideration for employment without regard to race, color, religion, sex or national origin.

3. Contract Price and Payments

3.1 In consideration of the strict and complete and timely performance of all Subcontract Work, Contractor agrees to pay Subcontractor or in the payment quantities and schedules as is more fully described in S2 **Exhibit "A": Subcontractor's Scope of Work.** And exhibit "B": Z.B.C. (Subcontractor) bid proposal #Rev 5574 Dated 10-05-07

3.2 In Consideration of the promises, covenants and agreements of Subcontractor herein contained, and the full, faithful and prompt performance of the Work in accordance with the Contract Documents, Contractor agrees to pay, and Subcontractor agrees to receive and accept as full compensation for doing all Work and

furnishing all materials and equipment contemplated and embraced in this Subcontract, and for all loss or damage arising out of the nature of said Work, or from all actions of the elements or from any unforeseen difficulties or obstacles which may arise or be encountered in the performance of the Work, and for all risks of every description connected with the Work, and for all expense incurred by or in consequence of the suspension, interruption or discontinuance of the Work, and for well and faithfully completing the Work and the whole thereof in the manner and according to the requirements and instructions of Contractor and Owner or Owner's agents in charge of the Work, if any, payment in the amount of the Subcontract Price.

3.3 Subcontractor, upon request of Contractor, and on such date as Contractor shall designate, shall submit to Contractor, in form and content acceptable to Contractor, a monthly billing, no later than the 25th of each month, showing quantities of Subcontract work that has been satisfactorily completed in the preceding month, as well as backup material for same for submittal to the Owner. Failure to submit by the 25th of each month may result in that monthly payment application being rolled over to the following month. Subcontractor shall also submit an original executed Conditional Release, in the form required by Contractor, verifying payment of all laborers, subcontractors, equipment and material suppliers. Subcontractor shall also furnish required releases from any sub-subcontractors and/or materials suppliers that have notified Contractor of their presence on the Project. Subcontractor further agrees to provide all required employment security department, fringe benefit trust funds, certified payroll, and/or other reports as may be required by the Contractor or the Contract Documents.

3.4 The progress payment to Subcontractor shall be one hundred percent (100%) of the value of Subcontract work completed (less 10% retention) during the preceding month as determined by the Owner, less such other amounts as Contractor shall determine as being properly withheld as allowed under this Article or as provided elsewhere in this Subcontract. The estimates of Owner as to the amount of Work completed by Subcontractor shall be binding upon Contractor and Subcontractor and shall conclusively establish the amount of Work performed by Subcontractor. 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. Upon the request of Contractor, Subcontractor shall provide an Unconditional Waiver of Release in form required by Contractor for any previous payment made to Subcontractor. Any payments to Subcontractor shall be conditioned upon receipt of the actual payments by Contractor from Owner. Subcontractor herein agrees to assume the same risk that the Owner may become insolvent that Contractor has assumed by entering into the Prime Contract with the Owner.

3.5 Progress payments will be made by Contractor to Subcontractor within 15 days after Contractor actually receives payment for Subcontractor's work from Owner. The progress payment to Subcontractor shall be one hundred percent (100%) of the value of Subcontract work completed (less 10% retention) during the preceding month as determined by the Owner, less such other amounts as Contractor shall determine as being properly withheld as allowed under this Article or as provided elsewhere in this Subcontract. The estimates of Owner as to the amount of Work completed by Subcontractor shall be binding upon Contractor and Subcontractor and shall conclusively establish the amount of Work performed by Subcontractor. 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. Upon the request of Contractor, Subcontractor shall provide an Unconditional Waiver of Release in form required by Contractor for any previous payment made to Subcontractor. Any payments to Subcontractor shall be conditioned upon receipt of the actual payments by Contractor from Owner. Subcontractor herein agrees to

assume the same risk that the Owner may become insolvent that Contractor has assumed by entering into the Prime Contract with the Owner.

3.6 Contractor shall have the right at all times to contact lower tier subcontractors and suppliers to verify that they are being paid by Subcontractor for labor or materials furnished for use in the Subcontract Work. If it appears that labor, material or other costs incurred in the performance of the Subcontract Work are not being paid when due, Contractor may take whatever steps it deems necessary to insure that the progress payments will be utilized to pay such costs, including, but not limited to, the issuance of joint checks payable to the claimant after written notice to Subcontractor, or additionally, making payment directly to claimant after written notice to Subcontractor. If such payment by Contractor exceeds the balance of payments due or to become due to Subcontractor from Contractor, then Subcontractor shall be liable to Contractor for the difference.

3.7 Contractor is hereby expressly granted the right to off set any sums due the Subcontractor under the provisions of this Subcontract against any obligation that may be due from Subcontractor to Contractor regardless of the source of said obligation. When requested by Contractor, Subcontractor shall furnish to Contractor a verified and itemized statement showing the names and addresses of all entities who have furnished or may furnish labor, materials, and/or equipment for the Subcontract Work together with the amount due or to become due for such work.

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3.8 The 10 percent withheld retention shall be payable to Subcontractor upon, and only upon the occurrence of all the following events, each of which is a condition precedent to Subcontractor's right to receive final payment hereunder and payment of such retention: (a) Completion of the entire project described in the Contract Documents; (b) The approval and final acceptance of the project Work by Owner; (c) Receipt of final payment by Contractor from Owner; (d) Delivery to Contractor from Subcontractor all as-built drawings for it's scope of work and other close out documents; (e) Delivery to Contractor from Subcontractor a Release and Waiver of Claims from all of Subcontractor's laborers, material and equipment suppliers, and subcontractors providing labor, materials or services to the Project, **(Forms attached)**. If any sub-subcontractor, supplier or other person refuses to furnish a release or waiver required by the Owner or Contractor, the Subcontractor shall, upon the request of Contractor, furnish a bond satisfactory to the owner and Contractor to indemnify them against any such claim or lien. Should the existence of any unsatisfied or undischarged claim, obligation or lien arising in conjunction with Subcontractor's Work become known after final payment is received from Contractor, Subcontractor shall promptly pay on demand all actual amounts Contractor and/or Owner pay in bonding around, satisfying, discharging or defending any such claim, obligation or lien, including all costs and attorney's fees incurred in connection therewith. Final payment shall not relieve Subcontractor from liability, or for warranty or guaranty, or for indemnity obligations for faulty or defective Work. (F) Building is considered complete as soon as drywall is completed. SZ

3.9 Subcontractor agrees that Contractor shall have no obligation to pay Subcontractor for any changed or extra work performed by Subcontractor until or unless Contractor has actually been paid for such work by the Owner. Unless contractor has executed + approved change order directing subcontractor to preform certain changes in writing and certain changes have been completed by subcontractor. SZ

3.10 Progress payments and Final Payment shall not be considered or construed as evidence of acceptance of any part of Subcontractor's work until final acceptance of the Project by Owner.

4. Prosecution of Work

4.1 TIME IS OF THE ESSENCE OF THIS SUBCONTRACT.

(a) Seven (7) copies of all Subcontractor submittals shall be received by Contractor to suit the requirements of the approved CPM target schedule unless otherwise agreed to in writing by Contractor. Subcontractor agrees to provide plan-sized sheets for all submittals of required size

24"x36" including one (1) sepia & five (6) blue line prints. Product specifications shall be provided in standard 8-1/2" by 11" paper, three hole punched and inserted into three ring binders labeled **"The Manhattanwest Condominiums"**. Any required re-submittals shall be submitted within five working days of receipt of request from the Owner.

(b) Final acceptance and approval of this Subcontract Agreement is contingent upon approval of Subcontractor's Submittals by the Owner/Architect/Engineer.

(c) Any delays in the submittal process caused in whole or part by Subcontractor may be grounds for immediate termination of this Subcontract Agreement and subject Subcontractor to damages as provided in Sections 8 and 9 below.

Subcontractor agrees to commence the Subcontract Work within five (5) calendar days after receiving notification from Contractor to proceed, or within such other time as may be specified by Contractor, and to proceed at such points as Contractor may designate, and to continue diligently in its performance in accordance with the Contractor's project schedule and at a pace that will cause no delay in the progress of the Contractor's or other subcontractor's work.

4.2 Upon request, Subcontractor shall promptly provide Contractor with scheduling information, in the format required in the Contract Documents, or any other information relating to the order or nature of the Subcontract Work. Subcontractor agrees that the project schedule may be revised by Contractor as work progresses. Contractor may require Subcontractor to prosecute segments of the Subcontract Work in phases as Contractor may specify. Subcontractor shall comply with instructions given by Contractor, including any instructions to suspend, delay or accelerate the Subcontract Work. Subcontractor shall not be entitled to any extra compensation from Contractor for any such suspension, delay or acceleration unless specifically agreed to in writing by the Contractor and Owner and paid for by Owner. The Owner's payment to Contractor of extra compensation for any such suspension, delay, or acceleration shall be a condition precedent to Subcontractor's right, if any, to receive such extra compensation from Contractor.

4.3 Subcontractor shall keep the work area reasonably clean of debris, daily, resulting from the performance of its work and shall remove from the work area all debris generated by the execution of the Subcontract work. Non-compliance with verbal direction from Prime Contractor's Project Superintendent for cleanup shall result in one (1) written notice for clean-up. Upon failure to properly police the debris from their own activity, 24 hours after written notification this subcontractor will be fined $500.00 plus the cost for clean-up.

4.4 Subcontractor, in undertaking to complete the Subcontract Work within the time specified, avows that it has considered ordinary delays incident to such work; including, but not limited to delays in securing materials, equipment or workmen, and minor changes, omissions or additions, unavoidable casualties, normal weather conditions, strikes or lockouts. If Subcontractor shall be delayed in the performance of the Work by any act or neglect of the Owner or Architect, or by agents or representatives of either, or by changes ordered in the Work, or by fire, unavoidable casualties, national emergency, or by any cause other that the intentional interference of Contractor, Subcontractor shall be entitled, as Subcontractor's exclusive remedy, to an extension of time reasonably necessary to compensate for the time lost due to the delay, but only if Subcontractor shall notify Contractor in writing within twenty four (24) hours after such occurrence, and only if Contractor shall be granted such time extension by Owner. No time extension will be allowed for delays or suspensions of work caused or contributed to by Subcontractor, and no time extension will be granted Subcontractor that will render Contractor liable for liquidated damages or other loss under the Contract Documents. The Subcontractor understands that this is an aggressive schedule and that should the Subcontractor fail to staff the Project with the proper workforce, to stay on schedule, then it is understood that the Subcontractor will have it's workforce work overtime and/or weekends to maintain the pace of the schedule solely at the subcontractors expense.

4.5 In addition to other damages and remedies provided in this Subcontract, Subcontractor agrees to pay any liquidated damages that may be assessed against the Contractor by the Owner, as provided in the Contract Documents, for any project delays caused by Subcontractor. Such damages shall be paid for each working day the Subcontract Work remains incomplete beyond the time specified for subcontract completion plus any extension thereof agreed to in writing by the Contractor, and granted by Owner.

4.6 Contractor shall not be liable to Subcontractor for delays caused by reason of fire or other casualty, or on account of riots, strikes, labor trouble, terrorism, acts of God, cataclysmic event, or by reason of any other event or cause beyond Contractor's control, or contributed to by Subcontractor.

4.7 All Subcontract work done and all Subcontract materials delivered to the project site shall become Contractor's property, and said material shall not be removed by Subcontractor or any other party from the project site without Contractor's written consent. After completion and final acceptance of the Subcontract work and final payment, Subcontractor shall promptly remove all remaining material, equipment and debris of Subcontractor.

5. Changes and Claims

5.1 Contractor may order or direct changes, additions, deletions or other revisions in the Subcontract work without invalidating the Subcontract. No changes, additions, deletions, or other revisions to the Subcontract shall be valid unless made in writing. Subcontractor mark up shall be limited to 10% overhead and profit in addition to the direct cost of the work. No markup shall be allowed on over time for original scope of work acceleration.

5.2 Subcontractor, prior to the commencement of such changed or revised work, shall submit, (within 24 hours of request) to Contractor, written copies of the cost or credit proposal, including work schedule revisions, for changes, additions, deletions or other revisions in a manner consistent with the Contract Documents. Contractor shall not be liable to Subcontractor for a greater sum, or additional time extensions, than Contractor obtains from Owner for such additional work, less reasonable overhead and profit due to Contractor, and also less professional and attorney's fees, costs, and other expenses incurred by Contractor in the collection of any such sum or time extension. Payment to Subcontractor for such work shall be conditioned upon Contractor's actual receipt of payment from the Owner and such payment by Owner to Contractor with whatever documentation or support, as Contractor may deem necessary to negotiate with Owner.

5.3 In any dispute between Contractor and Owner as to amount, classification, price, time or value of Subcontract Work, or any Subcontract material or supplies, or any delay in the prosecution of the Subcontract work caused by Owner, or any other matter whatsoever pertaining to the Subcontract work, Subcontractor agrees to promptly and adequately provide Contractor with whatever documentation or support as Contractor may deem necessary to negotiate with Owner.

5.4 Contractor may dispute, appeal resist, litigate or arbitrate any decision of Owner, without being deemed to have admitted any obligation or liability to Subcontractor, and if the decision shall be against Contractor, then Subcontractor shall be bound thereby. Subcontractor may, at its own expense, participate with Contractor in arbitration or legal proceedings. Subcontractor shall bear part or all costs, including attorneys' fees and legal expenses, incurred by Contractor in any such proceeding involving a claim, which, if allowed, would result in one or more payments to Subcontractor. Subcontractor's costs shall bear to the total amount sought in the proceeding. Prosecution of any such claim or proceeding shall be at the sole risk of Subcontractor, and Contractor shall have no liability for or in relation to the outcome.

6. **Assignments**

6.1 Subcontractor shall not assign or sublet the Subcontract or any part of the Subcontract Work or any payments due hereunder, without prior written consent of Contractor. Any such assignment made by Subcontractor without Contractor's prior written consent is void, and shall be grounds for termination of this Subcontract by Contractor, terminates the Subcontractor's right to any further payment and authorizes Contractor to withhold all monies due or to become due to Subcontractor.

7. **Taxes**

7.1 All applicable taxes, contributions, interest and/or penalties due under any federal, state, or municipal statute or regulation arising from Subcontractor's Work are included in the price to be paid to Subcontractor under the Subcontract. Subcontractor shall indemnify, defend, and save Contractor and Owner harmless from all liability, loss, and expense resulting from Subcontractor's failure to satisfy such obligations. Subcontractor shall, on demand, provide proof that all taxes and other charges have been, and are being properly paid.

7.2 If Contractor is assessed or charged for any Subcontractor taxes, contributions, interest or penalties, Contractor shall have the right to withhold such amount from funds due or the become due under the Subcontract, and to pay directly to taxing authorities any sums otherwise due Subcontractor, but not otherwise subject to offset in accordance with Section 3 above, upon receipt of a tax levy from such taxing authority.

8. **Default and Termination**

8.1 If, in the opinion of Contractor or Owner, Subcontractor fails, at any time, to supply a sufficient number of properly skilled workmen or sufficient materials and equipment of the proper quality; or fails to adequately or timely perform the Subcontract work to the satisfaction of Contractor or Owner; or becomes insolvent or makes any filing under the Acts of Congress relating the bankruptcy; or fails, neglects and/or refuses to comply with the project plans and specification; or fails to perform the Subcontract work in a good and workmanlike manner; or causes any stoppage of the work of the other trades upon the project; or fails to correct defective work; or fails to comply in any other respect with the terms and conditions of this Subcontract, Contractor may declare a default by Subcontractor as herein provided.

8.2 Contractor shall provide prompt written notice of default to Subcontractor, by regular mail or as may otherwise be considered to reasonably provide notice to Subcontractor at Subcontractor's place of business described above. Such notice shall be complete upon deposit at a regular receptacle of the U.S. mail, Fax Transmission or upon actual hand delivery as provided herein.

In the event of default by Subcontractor as provided above, Contractor may, at his option, demand Subcontractor to cure or otherwise correct the default and breach within three calendar days after written notice by Contractor. If, after three days, Subcontractor has failed to cure and correct the default, Contractor may, at his sole option, provide any such labor, materials or equipment as may be necessary to complete the Work covered by this Subcontract Agreement and thereafter deduct the cost thereof from any money then due or thereafter to become due to Subcontractor under this Agreement. Alternatively, Contractor may terminate Subcontractor's right to proceed with the Work and thereafter enter upon the premises and take control of all materials, tools, equipment, and/or appliances of Subcontractor, and may employ any other person, persons, or organizations to finish the Work and provide the labor, materials and equipment to accomplish that purpose. Following completion of the Work by the Contractor or other persons or organizations, all unused materials, tools, equipment and/ or appliances shall be returned to

Subcontractor. Subcontractor shall not be entitled to rent or payment of any kind for the use of Subcontractor owned equipment or materials, nor shall Contractor be liable for any damages arising from said use unless resulting from gross negligence, or willful destruction by Contractor.

In the event Subcontractor has provided a payment or performance bond to Contractor, in accordance with Section 10 of this Agreement, and following expiration of the three days cure period, Contractor will make notice and demand by registered mail upon Subcontractor's surety to complete the Work covered by this Subcontract Agreement. In the event Subcontractor's surety fails to notify Contractor within 10 days after receipt of notice and demand by Contractor of surety's election to complete the work on behalf of Subcontractor, such failure shall be deemed a waiver by surety to exercise its rights to complete the Work. Thereafter, Contractor may at his sole option, complete the Work as otherwise provided by this Section.

8.3 In case of any such termination of Subcontractor's right to proceed with the Work, Subcontractor shall not be entitled to receive any further payment under this Subcontract Agreement until the Work undertaken by Contractor in his prime contract is completely finished. At that time, if the unpaid balance of the amount to be paid under this Agreement exceeds the expenses incurred by Contractor in finishing Subcontractor's Work, such excess shall be paid by Contractor to Subcontractor; but, if such expense shall exceed the unpaid balance, then Subcontractor shall promptly pay to Contractor the amount by which such expense exceeds the unpaid balance.

"Expense" as referred to in this Section shall include all direct and indirect costs incurred by Contractor for furnishing labor, materials, and equipment; to complete the Work covered by this Subcontract Agreement. "Expense" shall further include, but shall not be limited to, replacement of Subcontractor costs, liquidated damages incurred by Contractor, extended field office overhead, and home office overhead, Contractor's attorneys fees and costs, and any and all other damages sustained by Contractor by reason of Subcontractor's default.

8.4 In the event Contractor elects to use its own labor forces to complete Subcontractor's Work, Subcontractor and Subcontractor's surety agree to pay Contractor for such Work at the following rates: (a) Labor – At Contractor's then prevailing labor rates, plus labor burden, including, but not limited to, employment taxes, liability insurance, workmen compensation insurance, and all other benefits; (b) Contractor Owned Equipment-At the then prevailing Equipment Rental Rates as established by the Blue Book for Contraction Equipment as published by Data Quest; all rental costs shall be determined by dividing the monthly rental rate by twenty-two days per month to determine a daily rental rate. Hourly rental rates shall be determined by dividing the daily rate by eight; (c) Materials, Rental Equipment-Direct Invoice Costs, including transportation, if any; (d) Replacement Subcontractor-Direct Invoice Costs paid Replacement Subcontractor; (e) Field and home office overhead; (f) Ten percent profit on all expenses indicated in a-e above.

In lieu of computing overhead, as provided for above, Contractor may, at his sole option, elect to assess a charge, on items a, b, and c above, of 15% for General Overhead expenses. In addition, Contractor may assess a charge on items a, b, and c above 10% for Profit. Contractor shall be entitled to an additional markup on any and all of such expenses. Contractor shall also be entitled to an additional markup of 5% for General Overhead and 10% for Profit on all expenses and cost incurred pursuant to item d and e above.

8.5 If the cost to complete the Subcontract work is more than the unpaid balance of the Subcontract, then Subcontractor shall be liable to Contractor for the deficiency, and Contractor may hold, sell or otherwise realize upon any Subcontractor materials or equipment, or take other steps to collect the deficiency, including making a claim against Subcontractor's surety.

8.6 Whether Contractor exercises one or more of the above options or rights, nothing contained herein shall release Subcontractor within the specified time. Subcontractor agrees in the event of default that it will immediately assign and turn over to Contractor all sub-contracts, material contracts, or orders, bills of lading for material en route, and any other necessary data or information that would minimize the cost of completion of the Subcontract work. SZ

9. **Termination for ~~Convenience~~** Nonperformance

9.1 Right to Terminate for ~~Convenience.~~ Nonperformance The Contractor shall have the right to terminate for ~~convenience~~ Nonperformance, at any time, and with ~~or without~~ cause, Subcontractor's performance of all or part of the Subcontract or Subcontract Work, as defined in paragraph 2.1.

9.2 Notice to Subcontractor. The Contractor SZ shall provide Subcontractor with written notice of the termination two calendar days in advance of the effective date of the termination. The two-day period shall begin to run upon receipt of the termination for ~~convenience~~ Nonperformance notice by the Subcontractor.

9.3 Subcontractor's Obligations. Upon receipt of the written notice of termination, the Subcontractor shall:

A. Stop all work or its performance of all the Subcontractor or Subcontract Work that has been terminated, or stop work on the part of the Subcontract Work that has been terminated if its performance of only part of the Subcontract Work has been terminated.

B. Enter into no further sub-subcontracts or place any orders for supplies, materials, or facilities, except as necessary to complete any portion of the Subcontract Work not terminated for convenience.

C. Terminate all sub-subcontracts or orders to the extent related to the terminated Subcontract Work.

D. As directed by the Contractor, transfer title and deliver to the Contractor any fabricated or unfabricated parts, work in progress, completed work, supplies, and other materials produced or acquired for the Subcontractor or Subcontract Work terminated and the completed or partially completed plans, drawings, information, and other property that, if the Subcontract had been completed, the Subcontractor would be required to furnish to the Contractor.

E. Complete non-terminated portions of the Subcontractor Work if the Subcontractor's performance of only a part of the Subcontract Work has been terminated.

F. Use its best efforts to sell, as directed by the Contractor, any materials of the types referred to in paragraph (D) above; provided, however, that the Subcontractor is not required to extend credit to any purchaser of this material and may acquire the material under the conditions prescribed by, and at prices approved by, the Contractor. The proceeds from the sale of such material shall be applied to reduce any payment due from the Contractor under this Subcontract, and credited to the price or cost of the Subcontract Work, or paid in any other manner directed by the Contractor.

G. Submit with 60 days of the effective date of termination, to the Contractor, a written termination claim, along with all documentation required to support the claim.

H. Take any other action toward termination as directed by the General Contractor.

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.

9.5 Compensation. If the Contractor's contract has not been terminated, the Contractor shall pay the Subcontractor as follows:

A. The direct cost of the work performed by Subcontractor prior to termination.

B. Overhead, general, and administrative expenses (including those for any sub-subcontracts) in an amount equal to 5% percent of direct costs.

C. 5% percent profit of the total of the amounts allowed in paragraphs (A) and (B) above. If, however, it appears that the Subcontractor would have sustained a loss on the entire Subcontract had it been completed, no profit shall be compensated by the Contractor, and the amounts paid for the termination shall not be compensated for.

9.6 Items Not Compensated. The Subcontractor shall not be compensated for.

A. Any accounting, legal, clerical, or other expenses incurred by the Subcontractor in the preparation of the Subcontractor's termination claim.

B. Unabsorbed overhead and anticipated lost profits.

9.7 Permitted Deductions. The Contractor shall be entitled to deduct from any payment due the Subcontractor (A) any advance payment it has made to the Subcontractor for work not yet performed under the terms of the Subcontract and (B) the amount of any claim that the Contractor has against the Subcontractor.

9.8 Consideration. If no work has been performed by the Subcontractor at the time of termination, Subcontractor shall be paid the sum of $100.00 for its undertaking an obligation to perform.

9.9 Settlement and Release of Any and All Claims. The settlement of termination costs pursuant to Paragraph 9.5 of this Clause shall constitute a settlement and release of any and all claims, known and unknown by the Subcontractor, arising prior to termination.

10. Bonds

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10.1 Should the Contractor require it, the Subcontractor shall execute a Labor and Material Bond and Faithful Performance Bond in an amount equal to 100% of the Subcontract Price in Section 3. Said bonds shall be executed by a corporate surety acceptable to Contractor, shall name Asphalt Products Corporation as an Obligee, and shall further name and protect all persons and entities to the same extent as may be required of Contractor pursuant to the Prime Contract. The cost of the bonds shall be added to the Subcontract amount. The terms of this Subcontract Agreement are incorporated by reference into the bonds required by this section, and the terms, conditions, and remedies of Contractor, shall prevail over any similar terms contained in said bond. By issuing a bond to Subcontractor pursuant to this Agreement, the Subcontractor's surety specifically agrees to be bound to Contractor to the same extent and in the same amount as Subcontractor.

VOID

11. **Indemnity and Insurance** -

11.1 INSURANCE REQUIREMENTS – Unless the Contract Documents require otherwise, Subcontractor agrees to procure and maintain, at his sole cost and expense, the following insurance coverage,

1. **Worker's Compensation:** Coverage A. Statutory policy form; Coverage B. Employer's liability; Bodily injury by accident - $1,000,000 each accident; Bodily injury by disease- $1,000,000 each employee. Coverage shall be maintained in accordance with NRS 616 and 617.

2. **Commercial Auto Coverage:** Auto liability limits of not less than $1,000,000 each accident combined bodily injury and property damage liability insurance including, but not limited to, owned autos, hired or non-owned autos.

3. **Comprehensive General Liability or Commercial General Liability, "Occurrence Form" only. "Claims Made" is not acceptable.** The limits of liability shall not be less than:

   a) Comprehensive General Liability: $1,000,000 combined single limit bodily/property damage per occurrence or,

   b) Commercial General Liability: The limits of liability shall not be less than: Each Occurrence limit - $1,000,000; Personal injury limit - $1,000,000; Products Completed Operations Aggregate Limit - $5,000,000; General Aggregate Limit (other than products-completed operations).

VOID

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4. Excess Liability: Umbrella Form or Follow Form Excess where necessary to meet required minimum amounts of coverage.

5. **The Project is covered by an OCIP.** Subcontractor shall enroll into this OCIP. Subcontractor shall be responsible for a deductible/SIR equal to that of the subcontractors' non-OCIP GL policy; not to be less than $20,000 for light hazard trade contractors, $25,000 for medium hazard trade contractors and $75,000 for high hazard trade contractors.

6. Any deductible or self-insured retention must be declared on the Certificate and is subject to prior approval.

7. Liability Policy forms must include: a) Premises and operation with no X, C or U exclusions; b) Products and completed operations coverage (Subcontractor agrees to maintain this coverage for a minimum of 1 year following completion of his work); c) Full blanket contractual coverage; d) Broad form property damage including completed operations or its equivalent; e) An endorsement naming Asphalt Products Corporation, Gemstone LVS, LLC. and any other required interest as additional insured(s); f) An endorsement stating: "Such coverage as is afforded by this policy for the benefit of the additional insured(s) shall be noncontributing with the coverage provided under this policy."

8. **Other Requirements:** (a) All policies must contain an endorsement affording an unqualified thirty (30) days notice of cancellation to the additional insured(s) in the event of cancellation or reduction in coverage; (b) All policies must be written by insurance companies whose rating in the most

9. recent Best's rating guide, is not less than A:VII Rating must be shown on Certificate under "Companies Affording Coverage"; (c) Certificates of insurance with the required endorsement evidencing the coverage must be delivered to APCO Construction prior to commencement of any work under this Contract; **(see attached samples)** (d) If the Subcontractor fails to secure and maintain the required insurance, Asphalt Products Corporation shall have the right (without obligation to do so, however) to secure same in the name and for the account of the Subcontractor in which event the Subcontractor shall pay the costs thereof and furnish upon demand all information that may be required in connection therewith. (e) Liability insurance policies containing warranties must be reviewed for prior approval and acceptance by Contractor. (f) The Subcontractor's insurance shall be primary with respects to Asphalt Products Corporation, its officers, employees and volunteers.

11.2 INDEMNIFICATION

a) **General Indemnity:** All work covered by this agreement that is performed at the project site, or performed in preparing or delivering materials or equipment to the project site, or in providing services for the Project, shall be at the sole risk of the Subcontractor. Subcontractor, to the fullest extent permitted by law, with respect to all such work which is covered by or incidental to this agreement, shall defend all claims through legal counsel acceptable to Contractor, and indemnify and hold Contractor, it's insurance carriers and bonding companies, Owner and any other interested party designated by Contractor, or their agents, employees or representatives (collectively referred to as "Indemnities") harmless from and against any claim, liability, loss, damage, cost, expense, including attorney's fees, awards, fines or judgments arising by reason of the death or bodily injury to persons, injury or damage to tangible property, including the loss of use therefrom, whether or not it is caused in part by an Indemnitee; provided, however, that the Subcontractor shall not be obligated under this agreement to indemnify the Indemnities with respect to damages which are ultimately determined to be due the sole negligence or willful misconduct of the Indemnities.

b) **Indemnity Not Limited:** In any and all claims against the Indemnities by any employee of the Subcontractor, or lower tier subcontractor, anyone directly or indirectly employed by any of them or anyone for whose acts any of them may be liable, the indemnification obligation under this Paragraph shall not be limited in any way by any limitation on the amount or type of damages, compensation or benefits payable under any Workers' or Workmen Compensation Acts, disability benefit acts or other employee benefit acts. Said indemnity is intended to apply during the period of this Agreement and shall survive the expiration or termination of the Agreement until such time as action on account of any matter covered by such indemnity is barred by the applicable Statute of Limitations.

12. Warranty and Guarantee

12.1 Subcontractor agrees to promptly repair, rebuild, replace or make good, without cost to Contractor or Owner, any defects due to faulty workmanship and/or materials which may appear within the guarantee or warranty period established in the Contract Documents. If no such period is stipulated in the contract Documents, then Subcontractor's guarantee shall be for a period of two year from the date Certificate of Occupancy is obtained for the project. Subcontractor shall require similar guarantees from all vendors and lower tier subcontractors.

13. **Patents**

13.1 Subcontractor agrees to pay all applicable patent royalties and license fees and to defend all suits or claims made for infringement of any patent rights involved in the Subcontract work.

14. **Compliance with Regulations, Applicable Law and Safety**

14.1 All Work, labor, services and materials to be furnished by Subcontractor shall strictly comply with all applicable federal, state, and local laws, rules, regulations, statutes, ordinances, building codes, and directives now in force or hereafter in effect as may be required by the Prime Contract. Subcontractor shall satisfy and comply with the foregoing as a part of the Subcontract without any additional compensation.

14.2 Subcontractor agrees that the prevention of accidents to workmen engaged in the work under the Subcontract is solely its responsibility. If requested, Subcontractor shall submit a safety plan for review by Contractor. Contractor's review of any safety plan shall not be deemed to release Subcontractor, or in any way diminish its indemnity or other liability as assumed under the Subcontract, nor shall it constitute an assumption of liability by Contractor.

14.3 When so ordered, Subcontractor shall stop any part of the Work that the Contractor or Owner deems unsafe until corrective safety measures, satisfactory to Contractor and or Owner, have been taken. Should Subcontractor neglect to adopt such corrective measures, Contractor may do so and deduct the cost from payments due or to become due to Subcontractor. Upon request, Subcontractor shall timely submit copies of all accident or injury reports to Contractor.

14.4 Subcontractor agrees to cooperate with the Contractor in efforts to prevent injuries to workmen employed by either party in carrying out operations covered by this agreement, and to adopt and place in effect OSHA requirements and such practical suggestions as may be offered by the Contractor and/or the Owner to promote safety and safe working conditions. Should the Subcontractor fail to fulfill its obligations in relation to safety matters on the job site, at the option of the Contractor, this Agreement, upon ten (10) days written notice to Subcontractor, may be cancelled, and the Subcontractor required to immediately remove his equipment and employees from the project.

15. **Damage to Work**

other than that of fire SZ

15.1 All loss or damage to Subcontractors' work resulting from any cause whatsoever shall be borne and sustained by Subcontractor and shall be solely at its risk until final acceptance by Contractor, Owner, or Owner's Representative. Subcontractor shall at all times and at its sole expense fully secure and protect against any damage, injury, destruction, theft or loss, all work and all labor, materials, supplies, tools and equipment furnished by Subcontractor or its sub-subcontractors, laborers and material men. Subcontractor shall at its sole expense promptly repair or replace damage to the work of others, or to any part of the project, resulting from Subcontractor's activities.

16. **Inspection and Approvals**

16.1 Contractor and Owner at all times shall have the right to inspect Subcontractor's materials, workmanship and equipment. Subcontractor shall provide facilities necessary to effect such inspection, whether at the place of manufacture, the project site, or any intermediate point. This point of inspection may be exercised at any time during performance of the Subcontract Work.

16.2 Any Subcontract work or material furnished that fails to meet the requirements or specifications of the Contract Documents, or the Subcontract, shall be promptly removed and replaced by Subcontractor at its own cost and expense. If, in the opinion of Contractor or Owner, it would not be economical or expedient to

correct or remedy all or any part of the rejected Subcontract work or materials, then Contractor, at its option may deduct from payments due or to become due to Subcontractor either: (a) such amount as in Contractor's sole judgment represents the difference between the fair value of the Subcontract work and materials rejected and the value if same had been performed in full compliance with the Contract documents; or (b) such reductions in price that are provided for or determined for this purpose under the Contract Documents.

16.3 The Subcontractor shall keep, maintain and require its subcontractors and suppliers to keep and maintain all books, papers, records, files, accounts, reports, bid documents with backup data, and all other materials relating to the Contract Documents and Project.

16.4 All of the material set forth in paragraph 16.3 shall be made available to the Owner and to Contractor for auditing, inspection and copying and shall be produced, upon request, at either the Owner's offices or such other place as Contractor may specify. Said request for information shall be limited to instances when specifically required to comply with at request for information by the Owner, and should not be construed as a general right by Contractor to request proprietary or privileged information of Subcontractor.

17. Arbitration

17.1 Contractor shall have the option to, and Subcontractor shall be required to resolve all claims, disputes and matters in question arising out of, or relating to the Subcontract, or breach thereof, except for claims which have been waived by the making or acceptance of final payment, by submission to arbitration in the time period and in accordance with the Contract Documents.

17.2 In accordance with Paragraph 17.1, Subcontractor hereby waive its right to otherwise litigate any and all such disputes, claims and matters in question in any court or governmental tribunal in any jurisdiction. If Subcontractor submits any matter to arbitration hereunder, at its sole option, Contractor may refuse to arbitrate any such disputes, claims, and matters in question. In that event, and in only that event, Subcontractor may litigate the matters subject to its demand for arbitration.

17.3 All arbitration and other legal proceedings instituted pursuant to this Section shall be conducted in Las Vegas, Nevada, or at such other venue as Contractor and Subcontractor shall agree to in writing.

17.4 The award rendered by the arbitrator(s) shall be final and judgment may be entered upon it in accordance with applicable law in any court having jurisdiction.

17.5 Unless otherwise agreed in writing, the Subcontractor shall carry on the Subcontract work and maintain the schedule of work pending arbitration or litigation, and the Contractor shall continue to make payments in accordance with the Subcontract.

17.6 To the extent not prohibited by their contracts with others, the claims and disputes of Owner, Contractor, Subcontractor and other Subcontractors involving a common question of fact or law shall be heard by the same arbitrator(s) in a single proceeding.

17.7 This Agreement to arbitrate shall not apply to any claim of contrition or indemnity asserted by one party to the Subcontract against the other party and arising out of any action brought in a state or federal court, or in arbitration by a person who is under no obligation to arbitrate the subject matter of such action with either of the parties hereto; or does not consent to such arbitration.

17.8 In any dispute arising over the application of paragraph 17.7, all questions regarding the arbitration requirements of this section shall be decided by the appropriate court and not by arbitration.

18. **Miscellaneous**

18.1 Contractor's waiver of any of the provisions of the Subcontract, or Contractor's failure to exercise any options or legal remedies provided therein, shall not be construed as a general waiver of its right thereafter to require such compliance or to exercise such option or remedy.

18.2 The Subcontract, including all Contract Documents as provided in Section One, comprises the entire Agreement between the parties relating to the Subcontract Work and no other agreements, representations, terms, provisions or understandings concerning the Subcontract Work have been made. All modifications or amendments to the Subcontract must be in writing.

18.3 To the best knowledge and belief of the parties, the Subcontract contains no provision that is contrary to Federal or State law, ruling or regulation. However, if any provision of this Subcontract shall conflict with any such law, ruling or regulation, then such provision shall continue in effect to the extent permissible. The illegality of any provisions, or parts thereof, shall not affect the enforceability of any other provisions of this Subcontract.

18.4 The Subcontract shall be construed and interpreted according to the laws of the State of Nevada.

18.5 In the event either party employs an attorney to institute a lawsuit or to demand arbitration for any cause arising out of the Subcontract Work or the Subcontract, or any of the Contract Documents, the prevailing party shall be entitled to all costs, attorney's fees and any other reasonable expenses incurred therein.

18.6 All sections and headings are descriptive only and are not controlling.

18.7 Contractor's rights and remedies under the Subcontract are not exclusive and Contractor shall have all other remedies available at law or in equity to enforce the Subcontract.

IN WITNESS WHEREOF: The parties hereto have executed this Agreement for themselves, their heirs, executors, successors, administrators, and assignees on the day and year first above written.

Zitting Brothers Construction, Inc.

Pres
TITLE

APCO CONSTRUCTION

Project Manager
TITLE

EXHIBIT 'A'
Subcontractor Scope of Work
APCO Contract No. 0168

This Agreement includes the supply of all labor, materials, tools, equipment, supervision, management, permits and taxes necessary to complete the BELOW SCOPE OF WORK for the referenced Project in accordance with the Contract Documents including Addenda/Delta Number(s) ___ through ___ Subcontractor acknowledges that he has performed his own take-off, site visit and therefore, any items necessary to complete the work depicted in accordance with the Contract Documents, shall be included in this Agreement. The Subcontractor also acknowledges that all of the costs related to the successful completion of the work including any unforeseen or unseen items, or as described herein, are included in the amount reflected in the schedule below.

The Scope of Work shall specifically include but not be limited to the following list of bid items:

Wood Framing, Sheathing, and Shimming Complete: Complete work per governing codes, furnish and install all necessary Design, Labor, Material, Equipment, Cartage, Freight, Supervision, Taxes and Necessary Insurance to install and complete ~~all Glass~~ Labor and ~~Glazing~~ Materials, including ~~Spandrel Glass~~ Submittals per plans by OZ Architecture, Redwine Engineering, Jordan & Skala Engineers, WRG Engineering (see attached Project Drawing List) for the amount of **Fourteen Million Four Hundred and Sixty One Thousand and no/100, ($14,461,000.00) for the project. The breakdown for these costs are as follows:** SZ SZ

Building Type 1 Podium:	**$ 1,805,000.00**	X 6 Buildings = 10,830,000
Building Type 4 Podium:	**$ 1,400,000.00**	X 1 Building = 1,400,000
Building Type 5 Podium:	**$ 1,115,500.00**	X 2 Buildings = 2,231,000
		Total = 14,461,000

Our understanding of the clarifications / qualifications associated with your bid is as follows: Your proposal is hereby amended to reflect the terms and conditions of this subcontract. APCO Construction may at its option exercise its right to choose any or all alternate/option items of work as shown on your proposal at the stated alternate price during the course of construction

Zitting Brothers Construction, Inc.

Pres.
TITLE

APCO CONSTRUCTION

Project Manager
TITLE

SPECIAL CONDITIONS

In addition to the conditions outlined in the Subcontract Agreement, the following Special Conditions shall form a part of the Subcontract Agreement.

(a) The Subcontractor shall be responsible for clean up of employees break & lunch trash on the job site. Subcontractor employees are not to wander around the Owner/General Contractor jobsite office area while on duty. No parking of private vehicles will be allowed in the Owners Operations Area. NO EXCEPTIONS.

(b) The Contractor will provide an adequate temporary construction area for staging. Enclosed with security fence. SZ

(c) The Contractor will provide reasonable access to all working areas.

(d) The Subcontractor shall be responsible for the cleaning of his work area and removing its debris and all work shall be left in a clean condition following his activities. The APCO shall be the sole judge to determine the cleanliness.

(e) The Contractor will provide one (1) set of full size conformed construction documents for the Subcontractor's use. Additional sets may be purchased by the Subcontractor from a source designated by the Contractor. Plan change drawings will be supplied in the same quantities.

(f) Subcontractor must submit a "Daily Work Report" **(see attached Appendix 'C')** prior to 10:00 a.m. the following day for all work performed on the job site the previous day. Subcontractor monthly pay requests will not be accepted for processing unless all "Daily Work Reports" for the pay period have been submitted to the Contractor.

(g) Subcontractor is required to submit a Payroll Certificate representing all work performed on the job site on a monthly basis. The Payroll Certificate must be submitted no later than the 1st of the month for all work performed during the previous month. Subcontractor shall use a format similar to AIA G702 & G703.

(h) The Subcontractor is required to attend weekly site progress meetings and to participate in the preparation of Monthly updates of the Project schedule.

(i) The Contractor cannot guarantee continuity of progress of work; Subcontractor shall employ as many mobilizations as required to complete the work as required by the project schedule.

(j) The Subcontractor shall provide drinking water for its own employee's.

(k) Subcontractor shall at all times protect stored equipment, materials from: damage from weather, sun. Materials shall be stored off the ground and not in contact the ground.

(l) APCO Construction cannot guarantee price stability and therefore cannot grant any additional monies to subcontractor due to escalation of price between bid/quote time and when materials/labor/shipping is actually purchased and/or incorporated into the project. SZ See exhibit "B" for exception on material pricing.

APCO Construction
Subcontractor SZ

EXHIBIT 16

DISTRICT COURT

CLARK COUNTY, NEVADA

APCO CONSTRUCTION, a Nevada corporation,

Plaintiff,

vs.

CASE NO. A571228
DEPT. NO. XIII

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

Defendants.

AND ALL RELATED MATTERS.

THE DEPOSITION OF

MARY JO ALLEN

PMK on behalf of APCO

VOLUME II

Wednesday, July 19, 2017
9:15 a.m.

2300 West Sahara Avenue, Suite 770
Las Vegas, Nevada

June W. Seid, CCR No. 485

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* * * * *

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70	APCO Construction's answers to Zitting Brothers Construction, Inc.'s firs request for interrogatories	109
71	ManhattanWest General Construction Agreement for GMP, ZBCI002090 through 2141	113
72	Subcontract agreement APCO and Zitting Brothers Construction, Inc., APCO00044592 through 44624	114
73	Scott Financial Corporation correspondence, April 28, 2009 to Nevada State Contractor's Board, CAMCO-MW 00029 through 37	122
74	APCO Construction ManhattanWest Subcontractor Summary documents, APCO 106198 through 106218	131
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Deposition of MARY JO ALLEN

July 19, 2017

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

Thereupon--

MARY JO ALLEN,

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

(Exhibit 69 marked for identification.)

EXAMINATION

BY MR. LAI:

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

Could you state your full name for the record.

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

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

A. Yes, sir.

Q. Have you consumed any drugs, medication or

alcohol within the past 24 hours?

A. No.

Q. Do you believe that there is anything to prevent you from giving your best and most truthful testimony today?

A. No.

Q. Any reason why we can't go forward that you can think of?

A. No, sir.

Q. Your current employer is APCO Construction, correct?

A. Yes.

Q. Just to avoid any confusion, when I say APCO in today's deposition, I mean APCO Construction; do you understand?

A. Yes.

Q. The next question I ask all witnesses. You may have covered them yesterday, have you ever been convicted of a felony?

A. No, sir.

Q. Have you ever been convicted of a crime involving dishonesty, deceit, larceny or fraud?

A. No.

Q. In front of you is an exhibit premarked Allen Exhibit 69. Do you see that?

A. Yes, sir.
Q. Have you ever seen this document before?
A. Yes, sir.
Q. Did you read this document before coming here today?
A. Yes, sir. I read about a million documents.
Q. So this is one of the millions that you read?
A. Yes, sir.
Q. Do you agree to testify today on behalf of APCO?
A. Yes, sir.
Q. On the topics concerning payment and payment related questions, correct?
A. Yes, sir.
Q. Are you prepared to go over those topics today?
A. Yes, sir.
Q. So you just testified that you reviewed about a million documents for your preparation. Can you describe briefly what type of documents did you review for your preparation?
A. My job files, the documents that APCO disclosed for the specific subs that are involved in these depositions. The documents that they disclosed.
Q. When did you review these documents?

A. Oh, my goodness. Over the last month maybe.
Q. You can ballpark it.
A. A month.
Q. How long was that review approximately; was it hours or days?
A. Hours, days. Well, I did a little here, a little there. At times I spent, you know a whole day doing it. I have a regular job that I have to do in between all of this, so I can't just stop functioning; do you know what I mean?
Q. I understand. Hopefully we will get you out of here today as soon as possible so you can get back to your real job.
Did you talk to anyone other than your attorney?
A. My boss Joe Pelan, Brian Benson. Not really, no, that's it.
Q. What did you guys generally talk about with respect to this deposition?
A. I read Brian Benson's deposition and I asked him questions about it. Joe Pelan when I was reviewing documents, I would show them to him and we discussed them. ManhattanWest in general. That was about it.
Q. When you talked to Mr. Benson about his deposition testimony, did you ever have a conversation

about anything in that testimony of his that was incorrect, in your opinion?

A. No.

Q. Did you take any notes during your preparation for this deposition?

A. Yes.

Q. And that was during the month or so that you prepared?

A. Yes.

Q. Do you still have a copy of those notes?

A. Not here.

Q. Is it back at your office?

A. Sure.

Q. Do you still have those notes?

A. Sure.

Q. Any reason why you took the notes when you did your preparation?

A. Because I'm old and I forget things, so as I read things I write it down and it refreshes my memory so I can go back and review.

MR. LAI: Counsel, if you can, I would like to get a copy of those notes that she prepared, if possible.

BY MR. LAI:

Q. Other than your review of those documents and

talking to Mr. Pelan and Mr. Benson, is there anything else you did in preparation for your deposition?

A. No.

(Exhibit 70 marked for identification.)

MR. MOUNTEER: Let's go off the record really quick if you don't mind.

MR. LAI: Sure.

(Off-record discussion held.)

BY MR. LAI:

Q. Ms. Allen, the court reporter handed you a document that's marked as Allen 70; do you see that document?

A. Yes, sir.

Q. Have you ever seen that document before?

MR. DABBIERI: Excuse me, would you kindly identify what the document is.

MR. LAI: Sure. The document marked as Exhibit Allen 70 is APCO Construction's answers to Zitting Brothers Construction's first request for interrogatories.

MR. DABBIERI: Thank you.

A. I know this was in the binders and saw it in there yesterday.

BY MR. LAI:

Q. The binder documents that you reviewed in preparation?

A. Yes.

Q. Did you assist in providing answers to this set of requests for interrogatories marked as Allen 70?

A. If there was a question asked by someone that was completing these, I believe Joe did this. Let me look and see.

Q. Take your time.

A. I would have given them financial numbers. For example, the amount that was paid.

Q. I saw you gesturing to a page. What page are you looking at, just so I have an idea what you're referencing?

A. What I just looked at was page 6 of 50.

Q. So when you're gesturing to the numbers, are you talking about the sum of about 3.2 million?

A. Yes, sir.

Q. So is it fair to say that your role with respect to providing responses to these set of interrogatories dealt with the financial part of the project?

A. Yes, sir.

Q. Let me direct your attention to page 46. Do you see that page?

A. Um-hum.

Q. Do you have any reason why this page is unsigned?

A. No.

Q. Were you ever asked to sign a verification for these interrogatories?

A. No.

Q. Based on your review of these set of interrogatory responses, with respect to the financial part of the questions, is there anything in there that you saw that should be changed or clarified in any way? And you can take your time to look through the documents if you need to.

A. Not without my documents in front of me, I could not verify anything under oath, I'm sorry.

Q. Let's talk about the ManhattanWest mixed use condominium project, which I'll refer to as the project as shorthand. What was -- scratch that.

APCO's role with respect to the project was general contractor, correct?

A. Yes, sir.

Q. And that role lasted until September 20, 2008, correct?

A. August 21st, 2008.

Q. And when did APCO's role as general

contractor for the project begin?

A. Approximately September of '07.

Q. And that began when APCO signed a contract with Gemstone Development West to serve as the general contractor, correct?

A. Yes.

Q. And I'll refer to Gemstone as shorthand.

Any other general contractors during the time that APCO served as a general contractor that you're aware of?

A. On August the 15th of 2008, we were served a termination notice, and Gemstone signed a contract with CAMCO on August the 15th of 2008.

Q. Do you recall what was the reason that Gemstone gave for serving that notice of termination?

A. I believe it was called breach nonperformance. Not without the document in front of me.

Q. Were you involved with the project?

A. Yes, sir.

Q. Can you describe briefly your involvement with the project?

A. Bookkeeper.

Q. And that includes bookkeeping for the work done by Zitting?

A. Yes, sir.

Q. Does your role require an understanding of the contracts entered into by APCO with respect to the project?

A. Which contract, sir?

Q. The prime contract with Gemstone and the subcontract with Zitting Brothers.

A. For the most part, yes, sir. I'm not legal counsel, I don't make legal conclusions, but I do understand what has to be done. My role is to make sure that people were paid.

Q. Sure. Isn't it fair to say your understanding from any of those two contracts was to get an understanding about how to do the bookkeeping for the project, correct?

A. Yes, sir.

(Exhibit 71 marked for identification.)

BY MR. LAI:

Q. Ms. Allen, the court reporter has handed you a document marked as Exhibit Allen 71. Do you see that document?

A. Yes, sir.

Q. What is this document?

A. This is an executed copy of the contract

between Gemstone and APCO.

Q. Was this the contract between Gemstone and APCO that you've seen before during your role as the bookkeeper for the project?

A. Yes, sir.

Q. Do you believe that this is a true and correct and complete copy of that contract that you've seen before as a bookkeeper for the project?

A. Yes, sir.

Q. And this was a document that you read before during your role as a bookkeeper for the project?

A. Somewhat, yes, sir.

Q. I understand there's a lot of legalese, but roughly you looked through it, correct?

A. Yes, sir.

(Exhibit 72 marked for identification.)

BY MR. LAI:

Q. Ms. Allen, the court reporter has handed you a document marked as Exhibit Allen 72. Do you see that document in front of you?

A. Yes, sir.

Q. Do you recognize document Allen 72?

A. Yes, sir.

Q. Was this the subcontract between APCO and

Zitting regarding the project you're familiar with?

A. Yes, sir.

Q. Is this document marked Allen 72 a true and correct copy of the subcontract?

A. Yes, sir.

Q. Let me direct your attention to page 16 of 17. It has a number that we lawyers call Bates numbers, APCO 00044607. Do you see that page?

A. Yes, sir.

Q. Is it your understanding that the total original price for this contract is 14,461,000 dollars?

A. For the entire project, phase 1 and phase 2, yes, sir.

Q. When you say for the entire project, that's for the entire project with respect to Zitting, correct?

A. Yes, sir.

Q. Is it your understanding that Zitting would provide work on a per building basis as set forth on this page?

A. The phase 1 portion of the project, which is the first phase that was being performed at this time, there were two buildings that Zitting was doing, building 8 and building 9. They were the only wood frame buildings.

Q. Is it your understanding that Zitting would be paid on a per building basis?

A. Yes.

Q. On the page Bates stamped APCO 00044607, do you see three rows, building type 1, building type 4, building type 5.

A. Yes.

Q. Where do buildings 8 and 9 fit in there for these three rows that you see there?

A. You know, I believe -- I don't even want to say because I'm not sure. I believe it was podium 5.

Q. But you're not sure?

A. No, because there were two buildings and they were identical.

I believe so, sir. That would have to be it, building type 5 podium.

Q. Can I direct your attention to page 3 of 7 that has a Bates stamp of APCO 00044594?

A. Um-hum.

Q. Do you see the section 3.4 on that page?

A. Yes, sir.

Q. In there, there's three terms that are in parentheses that says less ten percent retention. Do you see that?

A. Yes, sir.

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 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 1.3 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 --

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.

Q. Let me direct your attention to page 4 of 17, which is the next page.

A. I believe Zitting had terms in there.

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.

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."

Q. Do you see two sets of initials to the right of that?

A. I do.

Q. Do you recognize any of those initials?

A. I believe that's Sam Zitting's and Sean Bowen's.

Q. Do you have any reason to dispute that it was Sean Bowen's initials to the right of that?

A. No, sir.

Q. Since I'm a layperson, I'm completely foreign to the process of construction. Just from my understanding of the retention amount, is it fair to say that's sort of like a temporary discount that expires once a certain work is done; is that a fair way to describe it?

A. No. Retention is a guarantee that there's no problems with the work. If a contractor has to go back in -- subcontractor, excuse me, has to go back in and do work, it's kind of like holding a piece of guarantee until everything is accepted.

Q. Let me direct your attention to page APCO 00044613.

A. Page 12 of 17?

Q. No, it actually has no page number at the bottom. So if you look at the Bates number at the bottom right corner, look for page 44613. Do you recognize this page?

A. Yes, sir.

Q. What is this page showing?

A. It's an AIA payment application form.

Q. This is the payment application form that you

believe Zitting Brothers used during the course of seeking progress payments, correct?

A. I believe so. Do you have one that I could see?

Q. We will get into it shortly, that way you can have an idea what we are talking about in more detail. In the bottom right corner of this page you're looking at, do you see where it says, "Architect's certificate for payment"?

A. Yes, sir.

Q. Even though there's this section on this page, did APCO require an architect's certificate before making progress payments to Zitting for the project?

A. No, sir.

(Exhibit 73 marked for identification.)

BY MR. LAI:

Q. Ms. Allen, the court reporter's handing you a document marked as Exhibit Allen 73. Have you ever seen this document before?

A. No, sir.

Q. Even though you haven't seen this document before, can I direct your attention to the bottom on the first page where it starts with APCO Construction;

do you see that?

A. Yes, sir.

Q. Can you read that to yourself, starting that section right there all the way through where -- all the way to the section where it begins with "Upon receiving sufficient hard cost funds."

MR. DABBIERI: Excuse me, can we have the document identified, please?

MR. LAI: Yes, this is a document that has Bates number CAMCO-MW00029. It's a letter dated April 28, 2009 from Scott Financial Corporation to Nevada State Contractors Board.

MR. DABBIERI: Thank you.

BY MR. LAI:

Q. To the next page.

A. I'm sorry, what am I supposed to do?

Q. Just read --

A. From this point on?

Q. From this point on to the next page, ending with the paragraph starting with, "Upon receiving such hard cost funds." I'll be asking you questions about that section.

Do the sections that you've read accurately summarize the process for paying subcontractors for their work on the project at the time that APCO was the

general contractor?

A. Yes, sir.

Q. Do you know who holds or controls the funds for the project?

A. The bank.

Q. When say the bank, do you know the name of the bank?

A. Right there, Scott Financial.

Q. This document marked as Allen 73 mentions a company by the name of Nevada Construction Services; do you see that reference?

A. Yes, sir.

Q. Do you know who Nevada Construction Services is?

A. Yes.

Q. Who is that?

A. They were the disbursement company hired by Gemstone to verify and release the funds.

Q. Can you walk me through briefly about the process of how a subcontractor would get paid based on what you've seen for the project?

A. Once the payment application was approved by the owner, they would -- the owner would approve the percentage of complete for each subcontractor. They would then approve the payment application once it was

done. Once everything was approved, if there were changes to be made, the changes would be made.

The subcontractors would have to rebill their billings according to what the owner approved. We would then redo the AIA payment application with the subcontractors' proper amounts that were approved by the owner.

That AIA document plus all the backup would go to Nevada Construction Services, every invoice from every subcontractor would accompany it. So if Zitting billed a hundred thousand dollars, that hundred thousand dollars was on the payment application, their bill would also accompany it. Every sub. They would review, they would send their inspectors out, once everything was approved by Nevada Construction Services after Gemstone approved it, then they would release funds -- prior to July, they would release the funds to APCO. APCO would then pay the subcontractors the monies that the owner approved for them.

After July, Nevada Construction Services actually did joint checks with the subcontractors and APCO.

Q. Okay. So I have a few follow-up questions to clarify my understanding of that process. Just walk me through. So the payment application goes to the owner,

meaning Gemstone, correct?

A. Yes.

Q. And this application came from APCO, correct?

A. Yes.

Q. And this application from APCO, does it contain payment applications from the subs?

A. Once everything was approved, yes, sir.

Q. When you say once everything is approved, approved by who?

A. The owner.

Q. And the owner would only approve payment only after an inspection of the work, correct?

A. By them, yes, sir.

Q. And only if the work inspected was satisfactory, correct?

A. To them, yes.

Q. In other words, they wouldn't release any payments if the work was unsatisfactory, correct?

A. Correct.

Q. Did APCO have to approve the subs' payment application as well?

A. No, sir, the owner.

Q. And you mentioned earlier that -- excuse me, scratch that. Start over.

You mentioned earlier that at some point a

joint check was issued to the subs after July 2008, correct?

A. Yes, sir.

Q. Do you know the reason why they wanted the joint checks to be issued?

A. Yes, sir.

Q. What is the reason?

A. At that point when the checks were ready to be issued, APCO was already terminated.

Q. When you say terminated, what do you mean by that?

A. The owner terminated our contract on August the 15th, 2008.

Q. Just to make sure I understand the time frame then, you mentioned the owner terminated the contract August 15, so what is the significance of August 21st, 2008?

A. That's when we left the project.

Q. So there was a time period between when APCO was terminated and the point at which APCO left the project?

A. That is correct.

Q. So what did APCO do during that time period after it was terminated by the owner until August 21st?

A. I believe in the termination letter it gave

them so many days.

Q. So many days to do what exactly?

A. To rectify some problems or something. It wasn't my decision, sir. That was a legal decision.

Q. I understand. I'm not asking you why you yourself decided to terminate. I'm not asking you that. I'm trying to gain an understanding of that six-day period between the 15th and 21st, what APCO did at the project. You mentioned there were some problems, correct?

A. Evidently.

Q. Do you recall what type of problems?

A. It's not my scope of work.

Q. How much has APCO applied for payment from Gemstone to date for their work on the project?

A. I don't have documents in front of me. I can't tell you.

Q. Let me direct your attention to Exhibit Allen 70. Hopefully it will jog your memory. Should be in front of you, Allen 70. We will look at page 40 of 50. So does this refresh your recollection about how much APCO has applied for payment from Gemstone?

A. Can you repeat your question that you're asking?

Q. Sure, I'll start over.

How much has APCO applied for payment from Gemstone to date for their work on the project?

A. It would have been 60 million dollars, according to this, 60, 69. 69,494,018.21.

Q. And this includes both contract work and change order work, correct?

A. Yes, sir, according to this.

Q. For what time period does this work cover?

A. It says through August of 2008.

Q. Did it begin in November 2007? I'm trying to find the beginning time.

A. September of 2007.

MR. MOUNTEER: I'm going to make a quick objection here. Maybe it could be just a clarification for the record potentially. You're asking questions regarding application for payments.

MR. LAI: Correct.

MR. MOUNTEER: You're referring to an interrogatory that's talking about a lien, which in my mind is separate from application of payment. So are we talking about how much APCO is asking Gemstone to pay on behalf of your client, or are we saying here's a lien amount that's thrown on the property? Because they are two completely different legal avenues and ramifications regarding these.

I just want to make sure we're on the same page here regarding the record. You can ask questions about both, but I don't want to get a confused record if you're talking about the lien versus applications to Gemstone. Do you see what I'm saying?

MR. LAI: I understand what you're saying. And I don't know whether the lien amount is the same as the amount applied for. That's what I'm asking her, does she know whether the lien amount accurately reflects what was applied for.

MR. MOUNTEER: I just want to make sure it's clear, they are two separate things.

MR. LAI: Right. No problem.

MR. MOUNTEER: With that clarification, go ahead.

BY MR. LAI:

Q. And the payments that are being applied for are done through monthly payment applications, correct?

A. Yes, sir.

Q. And you believe that APCO first applied for payment sometime in September 2007?

A. Could have been the first payment application request. I don't recollect, sir, without my documents in front of me.

Q. Sure, and we will look at those documents

momentarily.

Do you know how much APCO has received from Gemstone to date? And you can ballpark the number.

A. No. I don't remember.

(Exhibit 74 marked for identification.)

BY MR. LAI:

Q. Ms. Allen, the court reporter is handing you a document marked Allen 74. Have you seen this document before?

A. Yes, sir.

Q. What is this document?

A. This is a summary of all the bills of the payments and how they were requested, whom to be paid for this payment application.

Q. Is it fair to say that this document reflects the amount applied for by APCO to Gemstone?

A. Yes, sir.

Q. And on here I see that the first page is showing an application number 2 for November 2007; do you see that?

A. Yes, sir.

Q. As far as you know, is this the first application that was submitted to Gemstone?

A. No, it says number 2 up there.

Q. So this is not the first application for payment that you're aware of?

A. No, sir.

Q. Where is application number 1?

A. I don't know. It's not here.

Q. I'll represent to you that this document came from your counsel, so I wasn't sure whether or not there was a payment application number 1 at all.

A. There was a payment application number 1. I believe this document was not generated for the first payment application.

When the project started, there was no funding in place. APCO signed a contract with the owner in September, and the funding was not in place until January of '08, if I'm -- and the first payment, because Gemstone didn't have any -- things weren't in place. I believe an invoice was done differently.

Q. Okay. And do you know who prepared this document marked as Allen 74?

A. Shannon Havely.

Q. Who is Shannon?

A. She was the girl that did the billings to the owner.

Q. Any reason why this document was prepared to begin with?

A. It was to help Nevada Construction Services.
Q. Was it prepared at their request?
A. No.
Q. I see that document has a bunch of tables with a lot of amounts indicated. Do you know from which documents did Shannon use to derive these numbers to put in this exhibit here?
A. Their billings.
Q. When you say "their billings," do you mean --
A. The subcontractor billings.
Q. I see there's a column for gross billings; do you see that?
A. Yes.
Q. Is it fair to say that the gross billings do not reflect the deduction of the retention amount?
A. Correct.
Q. And has the owner withheld retention amounts from all the subs?
A. Yes, sir.
Q. Is it the same ten percent as Zitting?
A. Yes, sir.
Q. And I see also an application number. Are these the application numbers referring to APCO's payment application number?
A. Yes, sir.

Q. And as far as you know, for each table with the list of subcontractors, do you believe that this is a complete list of the subs for each payment numbers? For example, on the first page, does that show a complete list of subs for payment application number 2?

A. Yes, sir.

Q. So other than payment application number 1, are there any other payment application numbers that you're aware of that are missing from this document?

A. From this exhibit?

Q. Exhibit Allen 74.

MR. MOUNTEER: Just to clarify for the record, it appears Exhibit 74 is the subcontractor summaries, which wouldn't typically be placed in this particular numerical order, but have been compiled it appears by counsel just for ease through application 2 through 11.

MR. LAI: Sure.

MR. MOUNTEER: Is that a fair representation?

MR. LAI: That's a fair representation.

MR. DABBIERI: Excuse me, could I get the Bates number of that document?

MR. LAI: Sure. APCO 106198 through 106218.

MR. DABBIERI: Thank you.

BY MR. LAI:

Q. So, Ms. Allen, do you believe there's any payment applications that are not addressed in this exhibit, other than application number 1, application being from APCO?

A. No, sir. I believe they are there.

Q. Let me direct your attention to page APCO 106207. Excuse me, 106206. Do you see at the bottom where it states, "See changes made by owner, next nine pages"; do you see that?

A. Yes.

Q. Who wrote that, if you know?

A. I did.

Q. Any reason why you made that notation at the bottom there?

A. Yes, sir.

Q. What's the reason?

A. This was what was submitted to the owner, originally 220,000 dollars for Zitting, and if you look on the next page, that's what we received back from Nevada Construction Services that was approved by the owner.

Q. When did you make this notation for "see changes made by owner"?

A. When I did my binders for discovery, when I put everything together.

Q. In other words, you made these changes during the course of litigation?

A. Just this right here, see notes.

Q. That's what I'm referring to, just that note, you made that notation during the course of this case; is that correct?

A. Yes, sir.

Q. Any reason why you only made a notation for Zitting and not for any other subs?

A. Because this was put in Zitting's books that I compiled. I made a different binder for each subcontractor.

Q. Understood. And just for the record, I'm not trying to criticize your decision for doing that, I'm trying to get an understanding about why notations were written in certain places so that I understand what's going on.

A. This is what I submitted, and this is what I got back from Nevada Construction Services when they cut the joint checks.

Q. When you're saying this is what you got back from Nevada Construction Services, since this is not a videotaped deposition, for the record are you referring to APCO 106207?

A. Yes, sir.

Q. When you got back changes from Nevada Construction Services as shown on APCO 106207, was this the first time that APCO received any markups to the application billings from the owner or a representative of the owners?

A. Without document -- for this pay application?

Q. Right.

A. Just for June?

Q. Just for all the applications, was this the first time that this happened?

A. That I received it back marked up like this?

Q. Yes.

A. Yes, because prior to this, the billings did not go into Nevada Construction Services until the owner told us what was approved. And all the pay applications for the subcontractors would have to be revised based on what the owner approved as a percentage of completion.

MR. MOUNTEER: Can I make one quick question?

MR. LAI: Sure.

MR. MOUNTEER: For clarification, we are talking about two different documents here, ending in 206 and 207. Just to ask the client really quick, the notations on 207 that are handwritten, did you have any additions to those handwritten notations?

THE WITNESS: No, sir.

MR. MOUNTEER: So you made no markups on 207?

THE WITNESS: No, sir.

MR. MOUNTEER: So when you referenced the additions that you made at the beginning of litigation, it was only "See changes made by owner"?

THE WITNESS: Correct.

MR. MOUNTEER: Just so we are clear that we understand that this page has not been altered during litigation, referring to ending 207.

MR. LAI: Yes.

MR. MOUNTEER: Thank you.

BY MR. LAI:

Q. Ms. Allen, the only reason why there's no applications as far as Exhibit Allen 74 shows, after August 2008, was because APCO was no longer general contractor for the project, correct?

A. After August?

Q. Right.

A. That's correct.

Q. Did APCO receive any payment application after August 2008 from any subs?

A. I don't understand your question.

Q. Sure. I see that APCO hasn't submitted any payment applications to the owner after August 2008,

correct?

A. They were dated through the period of August 2008.

Q. Right. And even though there were no payment applications submitted to the owner, did APCO in fact receive any payment applications from the subs after August 2008?

A. APCO's payment application for August wasn't done August 31st. It would have been done -- you have to get the subs' bills and then compile it, so it would be done, you know, just like any other one.

Q. I understand. I guess I'll phrase my question differently. Did APCO receive any applications from the subs for payment, but APCO itself did not submit an application to the owner for payment of those amounts sought by the subs?

A. The billings that we received by the end of August for the period through the end of August --

Q. Correct.

A. -- for subcontractors, were put on an August billing to the owners, yes, they were.

Q. So as far as you know, any time that APCO received a payment application from the subs after the billing cycle for August 2008, APCO did, in fact, submit those applications to the owner?

A. Yes.

Q. Any reason why this exhibit Allen 74 did not reflect any applications after the billing cycle for August 2008?

A. That is the billing cycle for August 2008.

Q. Maybe there's a misunderstanding between us.

A. I must not understand the question.

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.

Q. Is the information on Exhibit Allen 74 true

and accurate, as far as you know, in terms of the calculation of the gross billings --

A. Yes.

Q. -- in the list of the gross billings?

Just so that we have a clear record, it's important for you to wait until my question is fully asked before you answer; do you understand that?

A. Yes, sir.

Q. Let's talk about the payment applications that Zitting submitted for the project.

(Exhibit 75 marked for identification.)

BY MR. LAI:

Q. Ms. Allen, the court reporter has handed you a document marked as Allen 75. Do you recognize this document?

A. Yes, sir.

Q. What is this document?

A. I prepared it.

Q. Can you describe what this document is?

A. If you take from Exhibit 74 the amounts for Zitting on each payment application, this is where their payment applications, it's a summary of them. Okay? If you look at 74 and you look at payment application 2, you see that it was 1,298,650, that's

the first line, payment application number 2 for November of 2007, less the retention, that's the net billed to the owner.

Next one says payment application number 3 in Allen Exhibit 74, says 630,000 dollars for payment application for December, that is the second line, and so on and so forth.

This is just a summary of what APCO billed the owner on behalf of Zitting.

MR. DABBIERI: I'm sorry, can we get a Bates number, please?

MR. LAI: Sure APCO 106196.

BY MR. LAI:

Q. Ms. Allen, when did you prepare the document marked as Allen 75?

A. During this litigation.

Q. Any reason why you prepared this document?

A. Yes, sir.

Q. What is the reason?

A. We submitted a binder for each subcontractor, like I told you before.

Q. And is it fair to say that the information reflected on Exhibit Allen 75 came from Zitting's payment applications?

A. Yes, sir. The payment applications that were

submitted to the owner.

Q. Is it fair to say that the column on Allen 75 showing APCO pay app with a pound sign, that corresponds to APCO's payment application number that we looked at for Exhibit Allen 74?

A. Yes, sir.

Q. And on the column where it states less ten percent retention, that came from your understanding of the subcontract with Zitting Brothers, correct?

A. Yes, sir.

Q. Would you direct your attention real quick to Allen 71, which is the prime contract with Gemstone. I'll have you turn to page ZBCI002127. I'll have you look at section 5.07 retainage, subsection A. Do you see that section?

If you see it, can you read subsection A into the record, please.

A. "Each progress payment shall be subject to retainage equal to five percent multiplied by the contract of such progress payments, the standard retention."

Q. Is it fair to say that the prime contract between Gemstone and APCO only references a five percent retention amount?

A. That's what this document says.

Q. But as far as you know during your role as the bookkeeper, ten percent is the amount that controls; is that correct?

A. That is correct.

Q. Do you know why there's a difference between the five percent shown in the prime contract and the ten percent shown in the subcontract?

A. I do not.

Q. Going back to Exhibit Allen 75, which is that table in front of you, the columns showing net amount billed owner, that's just the gross amount less the ten percent retention amount, correct?

A. Correct.

Q. And does this document reflect a complete list of Zitting payment applications that APCO is aware of?

A. Yes, sir.

Q. So in other words, November 2007 was the first time that APCO received a payment application from Zitting Brothers; is that correct?

A. Yes, sir.

Q. And in June 2008 was the last time that APCO received a payment application from Zitting Brothers; is that correct?

A. That was submitted to the owner, yes, sir,

that I know of.

Q. I understand you added a qualifier that was submitted to the owner, but did APCO receive a payment application from Zitting Brothers that was not submitted to the owner?

A. Not to my knowledge.

Q. Then to the best of your knowledge, the row showing the total amount, that's a sum of all the amounts indicated for the respective columns, correct?

A. Yes.

Q. Is this information in this exhibit accurate, as far as you know?

A. Yes, sir.

Q. And to clarify, the amount that we are looking at, Exhibit Allen 75, only reflects the amount that APCO billed Gemstone for Zitting work, not the amount actually paid to Zitting, correct?

A. This document reflects what was billed to Gemstone.

Q. And not the amount actually paid to Zitting; is that correct?

A. I don't have those documents in front of me.

Q. So you don't know whether this reflects the amount actually paid to Zitting?

A. I don't recollect.

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.

Q. Let's go back to Exhibit Allen 70, which is the answers to Zitting Brothers interrogatories that we

look at earlier. I'll direct your attention to the last page. Do you recognize this last page on Exhibit Allen 70 showing a table for response to interrogatory number 3?

A. Um-hum.

Q. What is this table showing?

A. These are the actual payments made to Zitting in the amount of $3,282,848.55.

Q. And who prepared this table on -- in Exhibit Allen 70?

A. I probably did. It looks like my work.

Q. You have no reason to doubt --

A. No.

Q. -- that you prepared this?

A. Yes, I'm sure I did.

Q. Is this information in this exhibit accurate, as far as you know?

A. Yes, sir.

Q. Is the column showing date of payment, as far as you know, the date that the check was issued to Zitting Brothers?

A. Yeah. The check -- it would be the check of the date -- the actual check date. That's what this is.

Q. And the amount paid for Zitting Brothers,

this is the gross amount less the ten percent retention amount, correct?

A. Correct.

Q. What does the column showing percent paid on completion of phase 1 only, what does that mean?

A. Would probably be based upon the gross amount of their contract, their contract amount and divide it in to get a percentage, so they were paid 90 percent of their contract.

Q. So the percentage is actually -- scratch that.

So you're saying that the amount paid, at least for this percentage shown in this column, is only a percentage of the total contract price? Because I'm trying to get an understanding about what 22 percent meant for the amount paid for 800,000 dollars.

A. I am thinking that what this is, is if you took 800,000 dollars and you divide it into the contract amount, that is how you came up with 22 percent. Without a calculator and all the documents, I can't say that right now.

Q. So you just don't know really the reason why those percentages were shown the way it is and why the column was there?

You have to give a verbal response since this

is not a videotaped deposition.

A. Yes.

Q. Do you agree that the approximate amount of 3.2 million dollars paid to Zitting, that was for owner approved work on the project completed by Zitting before August 2008; do you agree with that statement?

A. Through August, yes. Yeah.

Q. And this was after an inspection by Gemstone's representatives, correct?

A. Correct.

Q. Do you know whether or not there was a ten percent retention amount check cut for these progress payments referenced on this table in Allen 70?

A. No retention checks were ever cut, sir.

Q. As far as APCO knows, is the date August 28, 2008 the date of the last payment to Zitting for the work on the project?

A. From while APCO was on the job?

Q. Just in general, before and after. Do you know when was the last payment to Zitting for their work on the project?

A. I know that they worked for CAMCO.

Q. How do you know that?

A. In their documents.

Q. When you say those documents --

A. There was a ratification document, and I believe it was 2027 in the very back of their booklet, that showed that they had billings to CAMCO. 20...

Q. You mentioned billings to CAMCO, but did you, in fact, see a ratification agreement between CAMCO or the owner and Zitting Brothers?

A. I did not see -- there was just one sheet of paper that said ratification-something at the top.

Q. But you don't recall exactly what that page was showing, correct?

A. It showed billings to APCO -- monies -- change orders to APCO, and billings to CAMCO, and monies due from CAMCO, and monies due from APCO and CAMCO. So it listed that there were billings, actual billings to CAMCO.

Q. But as of the time when APCO was the general contractor, August 28, 2008 was the last time that APCO saw a check issued to Zitting for its work on the project; is that correct?

A. From APCO's -- while they were under APCO's watch, that was the last check that was issued to them for the work that they performed while APCO was the general contractor.

Q. Let me direct your attention to page -- staying on the same exhibit, 6 of 50.

MR. DABBIERI: If we can have the control number, please.

MR. LAI: Page 6 of 50 for APCO's response to Zitting Brothers interrogatories.

MR. DABBIERI: All right. Thank you.

BY MR. LAI:

Q. Do you see where it states on line 24, where -- I'll read it for the record. Where it states, "However, from the information obtained from Zitting Brothers' discovery requests propounded upon APCO, it appears that Gemstone may have paid Zitting Brothers at least 364,760 dollars." Do you see that?

A. Yes.

Q. Earlier when you were talking about you saw billings from Zitting to CAMCO, is that what you're referring to?

A. I didn't write this, so I have no idea.

Q. So you don't know where that number came from, 364,760?

A. Not me, sir. I can only tell you that what is on this table that was paid to Zitting Brothers --

Q. Are you -- sorry, I didn't mean to cut you off.

A. -- which is on line 16.

Q. Are you aware of any unpaid balance to

Zitting for its work on the project at the time when APCO was the general contractor?

A. No, sir.

MR. LAI: We have been going about an hour or so. Do you want to take a break? I can keep going. It's up to you.

MR. MOUNTEER: How long do you think you have left?

MR. LAI: My outline shows three pages left. But it could be an hour or could take longer.

(Whereupon, a recess was taken.)

(Exhibit 76 marked for identification.)

BY MR. LAI:

Q. Ms. Allen, the court reporter handed you a document marked as Allen 76. Jon, this is the document Bates number APCO 44740 to 743, and also has another set of Bates number of APCO 106220 and 106222. And then it has another set of Bates number of APCO 000744746, 737, 106221, 106223.

MR. DABBIERI: Thank you very much.

BY MR. LAI:

Q. Ms. Allen, do you recognize the document marked as Allen 76?

A. Yes, sir.

Q. What is the document shown as Allen 76?

A. Would you like me to tell you what every page is, sir?

Q. If you can. You can walk us through it.

A. This is Zitting's payment application number 1 through period 11/25/07. Whereas, sir, if I refer to this document Exhibit 75, you will see that noted as number 2 payment application, APCO's number 2 payment application. You will see they billed a gross amount of 1,298,650 with a ten percent retention. And a net amount of 1,168,785.

The pages subsequently following the first page is the detail of the work performed on the specific buildings. And if you look on Exhibit Number 44743, you will see the amount of 1,298,850 as a total. That is the work that is completed to date, which agrees with that. That's their payment application. And they were paid the 1,168,785, looks like in two installments. The first one being 800,000 dollars.

You will see an unconditional progress release that they received the 800,000 dollars on 2/1, and then they also received a check for 368,785, an unconditional progress release, and there's also a copy of the check.

Exhibits number 44746 and 44737, these are

internal accounting sheets that we prepare when we pay someone, as we pay the checks, and they relate to this payment application.

Q. Thank you, Ms. Allen. I appreciate the explanation. I have some follow-up question dealing with Allen 76. Turning to page APCO 44741, which is the second page of the exhibit, do you see handwritten notations on this page?

A. Yes, sir.

Q. Do you know who made these notations?

A. Yes.

Q. Who?

A. Shannon Havely.

Q. That's the Shannon you mentioned earlier, correct?

A. Yes.

Q. So in other words, these are notations made by APCO, correct?

A. Yes, sir.

Q. What do the notations mean?

A. Zitting's billing, their schedule of values, which is column C, schedule of value; do you see that, sir?

Q. Yes.

A. On 44741, you will see that is on all the

next three pages, totaling their contract of 14,481,000. That is their original schedule where they are billing against.

Their billing and schedule is mirrored on APCO's billing and schedule to the owner. So on our billing, you will find that we have a line for building number 8, first level, 199,015 dollars. So this is the line on APCO's billing where that amount of money was placed, so that Nevada Construction Services could follow that.

Our billing had line numbers, because our billing was so large and it consumed all the subcontractors. It was 11-12 pages long, so every sub's schedule of values was on our schedule of values, so we would tell Nevada Construction Services for ease that this 19,500 dollars was put on APCO's billing line 462. The 172,000 was put on APCO's line 463, and so on and so forth.

Is that clear?

Q. That was very clear. Thank you very much. Let me direct your attention to APCO 00044746, it's the internal reporting that you mentioned earlier.

A. 46?

Q. And then I'll have you look at 737 as well. So earlier you testified that you used the word "we"

prepared this document. Did APCO prepare this page right here?

A. Yes.

Q. Was this prepared after receiving a payment application from Zitting Brothers?

A. Yes, sir.

Q. At the bottom to the right, do you see where there's an approved for payment section?

A. Um-hum.

Q. Do you recognize those signatures?

A. Yes.

Q. Who do you recognize?

A. If you'll see, Shannon's name is on the bottom. She actually prepared it. Approved for payment is above it, is the R and the circle is Randy Nickerl. And then the person above that is someone from our corporate office, because every check over 10,000 dollars had to have two signatures. So these checks would go over to our corporate office for signature, and that's who signed the check.

And if you don't mind, I'll look at the check to see whose signature it is.

Q. Sure. Take your time.

A. Oh, hell, this is a voided one.

I believe it must have been -- it was either

Jay Smith or Terry Mendenhall.

Q. And they are with APCO, right?

A. Yes. No -- yes. They are the --

Q. For clarification of the record, are they with APCO?

A. Yes.

Q. You don't recall the specific name, but you know they are with APCO?

A. Yes.

Q. Let me direct your attention, staying on page 44746, do you see the column where it says request?

A. Yes.

Q. And where it says quantity and there's a percentage behind it -- below it?

A. Um-hum.

Q. What does that percentage mean?

A. It's when you take 800,000 dollars and divide it into 1,805,000, it's 44 percent of that.

Q. Let's take a quick reference back to Allen 72, do a side by side. I'll have you look at page APCO 00044607. Do you see on Exhibit Allen 76 where it indicates estimated contract dollar of 1.8 million, an approximate number, on Exhibit Allen 75. Sorry, 76?

A. Where I see what?

Q. On Exhibit Allen 76, this internal report.

A. Oh, okay.

Q. Do you see a column where it says estimated contract dollar?

A. Um-hum.

Q. Do you see 1.8 million?

A. Um-hum.

Q. Do you believe that accurately reflects on Exhibit Allen 72, building type 1 podium? So do you believe that building 8 or 9 dealt with building type 1 podium?

A. Yes. All I said before when you asked me the question, and I was not sure of it, that is why I wasn't sure.

Q. You've been very good about that. That's why I want to go back and clarify for the record, now that you've had a chance to look at the documents.

A. This is -- I don't know what the hell a podium is.

Q. I don't know either.

A. You know what, that's why this is very confusing to me. So I'm sorry. Now I know, I guess.

MR. LAI: Allen 77.

(Exhibit 77 marked for identification.)

BY MR. LAI:

Q. Ms. Allen, the court reporter handed you a document marked as Allen 77. Do you recognize that document? And you can look at Exhibit Allen 75 side by side. You should keep that out as handy reference going forward.

A. Yes, sir.

Q. What is Allen 77 showing?

A. This is Zitting Brothers' payment application number 2 through December 25th of '07.

Q. Does this exhibit correspond to the row on Exhibit Allen 75 for APCO payment application number 3?

A. Yes, sir.

Q. Going to page APCO 44723, is this the same internal report that you referenced earlier for Exhibit Allen 76 dealing with a report you will prepare after receiving a payment application from Zitting?

A. Yes.

Q. At the bottom, do you see the approved for payment? The section for approved for payment?

A. Um-hum.

Q. As far as you know, are these signed by an APCO employee?

A. Yes.

Q. The last page of this exhibit, do you believe that this is a check issued for the payment on this

application?

A. Yes, sir. This would tell me that they received the check because it's nonconditional progress.

Q. And that's one of the conditions for receiving progress payments?

A. Yes, sir. That's APCO 106224.

Q. And according to this application then -- excuse me, sorry, Allen 75, as part of the payment for this progress payment, the owner withheld $63,016.46?

A. Sir, I would like to bring something up at this point, because I know you're going to notice it. APCO rounded the retention to an even amount.

Q. Sure.

A. This was just -- it was pennies. Okay? Just to simplify things.

If you notice there, it's a formula there that rounds it. It's not much difference and you will find that on all subcontract -- most of the subcontract payments were done like that, just about all of them.

Q. Sure, and we will ballpark it. So the amount for retention; is that correct?

A. Yes. This is what was withheld from their check.

Q. From this particular application?

A. Probably from all of theirs. You may find pennies difference. This was just a formula of ten percent.

Q. But the ballpark number of 63,000 dollars, that came from this application, correct?

A. Yes, sir, that's correct.

(Exhibit 78 marked for identification.)

MR. LAI: Jon, the documents we are looking at are pretty much the applications for payment from Zitting, including internal report prepared by APCO in response to the application, as well as a check for the payment. That's what we have been looking at so far.

MR. DABBIERI: Right, and I've been able to track and follow. I have all the documents here, so if you give me the APCO number I can locate it pretty quickly and I appreciate that.

MR. LAI: Sure.

BY MR. LAI:

Q. Ms. Allen, the court reporter has handed you a document marked Allen 78. Do you recognize this document?

A. Yes, sir.

Q. What is Allen 78 showing?

A. This is Zitting Brothers' payment application

number 3 through the period of January of '07, requesting payment for 408,225.33, which is the same amount listed on APCO Exhibit Number 75 under APCO's payment of pay application number 4.

Q. Even though this shows a period of January 2007, it's actually for January 2008, correct?

A. Yes, sir. They probably just made a typo. It's a common thing that people do at the beginning of the year.

Q. I assumed so, because the contract date on this shows --

A. Right.

Q. -- October 8, 2007. You can't really have an application before the contract, correct?

A. It would be nice. Correct.

Q. And this was an application that APCO received from Zitting, correct?

A. Yes.

Q. Going to page APCO 44709, which is the internal report, again this is an internal report prepared by APCO, correct?

A. Yes, sir.

Q. At the bottom do you see the signature field for approved for payment?

A. Yes.

Q. Again, these are signed by APCO employees, correct?

A. Yes.

Q. Now, I see that the prepared signature line doesn't have Shannon's name anymore. Do you recognize that signature?

A. Mine.

Q. Again, the retention for this application was for approximately 45,358 dollars?

A. Yes. Rounded.

Q. But the accurate retention amount is listed on Allen 75, correct?

A. Correct.

(Exhibit 79 marked for identification.)

BY MR. LAI:

Q. Ms. Allen, the court reporter handed you a document marked Allen 79. Do you recognize this document?

A. Yes, sir.

Q. What is Allen 79 showing?

A. It is Zitting's application payment number 4. Once again, they messed up on the date. This should be 2008. It's 2007. Why it was signed 2007, I don't know.

Q. And this reflects the application that's part of APCO payment application number 5?

A. That's correct, on Exhibit 75.

Q. And this was the application that APCO received from Zitting?

A. Yes.

Q. Directing your attention to page APCO 44694, the internal report again. This was a report that was prepared by APCO, correct?

A. Yes, sir.

Q. And the signature field for approved for payment, again, that's signed by an APCO employee, correct?

A. Yes, sir.

Q. And the retention amount for this application was approximately $55,067, correct?

A. 55,067. No cents.

(Exhibit 80 marked for identification.)

BY MR. LAI:

Q. Ms. Allen, do you recognize the exhibit marked as Allen 80?

A. Yes, sir.

Q. What does Exhibit Allen 80 show?

A. Zitting Brothers payment application for the

period of March 2008.

Q. This will correspond to APCO payment application number 6?

A. Yes, sir.

Q. This was the application that APCO received from Zitting?

A. Yes, sir.

Q. Again, directing your attention to the internal report with APCO 44677 --

A. Yes, sir.

Q. Again, this was a report prepared by APCO?

A. Yes, sir.

Q. And the signature in the approved for payment signature block, again, that's signed by APCO employee?

A. Can I say something here?

Q. Sure.

A. That you need to understand. This approved for payment is the money that was given to us by the owner and approved by the owner. I was to be made sure, and they were to be made sure, that the subcontractor was paid exactly what was allocated and approved by the owner. That's why these say approved for payment.

That is the way that this is approved. The approval from APCO is to make sure that what is given

to us from Nevada Construction Service via approval by the owner is paid to the sub. That is what's verified right here, and that is what is telling you here. This is what we billed to Gemstone. They approved these amounts of money, and were given to APCO, and then APCO had to give them every dime that was paid to APCO on behalf of Zitting was paid to Zitting.

No monies were held, not a penny, other than maybe the rounding of this retention. Okay? But other than that, every dime received from the owner, Nevada Construction Services, Scott Financial to APCO, was paid directly. This was saying that that was -- that was approved.

Q. And I appreciate the explanation.

A. Okay. I just wanted to make sure that you understood that.

Q. Right. I definitely appreciate that because again, I didn't prepare the document so I don't understand your thought process, so I appreciate that.

A. I want you to understand that our job, my job was to make sure what was paid by the owner was paid to the subs. I actually cut the checks. That was my end. So when we received approval from the owner that Zitting Brothers was approved to be paid $1,168,785, they had to be paid that money. And that's what those

approvals on those sheets are, to make sure that what we were paid, they were paid. We had no control and couldn't hold a dime for anybody.

And not only that, once they receive this money, they would sign an unconditional. If you saw this unconditional release, that release had to go to Nevada Construction Services before any monies for the next month could be paid. We had to prove that those subcontractors were paid that money.

Q. Understood.

A. So it was a very, very secure process to make sure that the subs were paid. Every dime that was received was paid to Zitting. No monies were held. Nobody got any extra money.

Q. And for this application shown on Allen 80, again, the retention amount for this application is 47,188 dollars, correct, roughly?

A. Yes. And that's another thing. The retention was told to us what we had to hold. And we had to hold ten percent.

Q. When you say told to us, who told you to hold on to ten percent?

A. The owners and the bank, and I believe Nevada Construction Services.

Q. Had they told you specifically to hold on to

that money?

A. That's what they held onto. That's what they released.

MR. LAI: Allen 81.

(Exhibit 81 marked for identification.)

THE WITNESS: APCO never held the money, just so you understand that. The bank held the money.

BY MR. LAI:

Q. I'm only --

A. The deduct for retention. Maybe that's the proper way it should have been phrased. They told us what to deduct from the payment applications. So our payment application, if you have one, will show a ten percent retention held.

The bank held the money, APCO did not hold any funds for anybody. Every dime paid for a specific supplier, sub, was paid to them.

Q. I understand. The reason I'm not saying anything is because I'm trying to give the court reporter some time to mark the exhibit. Every time you say something she needs to write it down. We will wait a bit.

Ms. Allen, the document being handed to you is a document marked as Exhibit Allen 81. Do you

recognize this exhibit?

A. Yes, sir.

Q. What is Exhibit Allen 81 showing?

A. It is Zitting Brothers' payment application for the period ending April of 2008, along with the same document, sir, their unconditional release showing they accepted the check, a copy of the accounting paper, the check, which also relates to Allen 75, which is on line APCO pay application 7.

Q. And the check was issued for this payment application, correct?

A. It's 156,000.

Q. So that's correct?

A. Yes, sir. There's an unconditional progress release saying that they received it.

Q. So the fact that this application appears to be unsigned by Zitting, it did not preclude a check being issued for this application, correct?

A. They were paid.

Q. So the signature, the fact that it's unsigned, it didn't matter in the end, correct?

A. Evidently not, sir. They were paid.

Q. Going to the internal accounting sheet that you referenced, again, that's prepared by APCO, correct?

A. Yes, sir.

Q. And the retention amount being retained was about 70,397 dollars, correct?

A. Yes.

Q. And the approved for payment signature block, again, that's signed by an APCO employee, correct?

A. Yes, sir.

(Exhibit 82 marked for identification.)

BY MR. LAI:

Q. Ms. Allen, Exhibit 82, do you recognize this?

A. Yes, sir.

Q. What does Exhibit Allen 82 show?

A. It is Zitting Brothers application through May of 2008, along with the same supporting documents and APCO sheets, and a copy of the check which relates to APCO 75, line -- billing number 8.

Q. And this is the application that APCO received from Zitting?

A. Yes.

Q. I direct your attention to the internal accounting sheet that we have been looking at. That's APCO 44644?

A. Yes, sir.

Q. Again, this is a document prepared by APCO?

A. Yes, sir.
Q. And the approved for payment signature line, that's signed by an APCO employee?
A. Yes.
Q. And the retention amount for this was 3,108 dollars, about?
A. Yes, sir.
Q. Turning your attention to the top where it says total to date, do you see that column on the internal accounting sheet?
A. Um-hum.
Q. Where it states quantity 100 percent; do you see that?
A. Yes.
Q. What does 100 percent mean to you?
A. They billed 100 percent of the project before retention was held.
Q. Does that mean that APCO -- sorry, scratch that.
Does that mean that Zitting could not bill any more for the work on buildings 8 and 9 since it's showing a hundred percent?
A. That is correct.
Q. What would happen if they submitted a payment application after this for additional work for building

8 and 9; would it be declined by the owner?

A. Unless it was a change order.

Q. So the 100 percent here, that doesn't reflect the completion of the project for that building?

A. That is correct. Their portion of the work only.

(Exhibit 83 marked for identification.)

BY MR. LAI:

Q. Ms. Allen, the court reporter has handed you a document marked Exhibit Allen 83. Do you recognize that document?

A. There's more than one invoice in here, sir.

Q. When you say that, what do you mean?

MR. MOUNTEER: Just for clarification, you've got application period 6/25/08, and if you jump to -- it starts a whole new Bates stamp number ZBCI. I don't know if that's clipped together wrong or not, but you've got an APCO production on a Zitting Brothers production.

THE WITNESS: That's correct.

BY MR. MOUNTEER:

Q. I'll for sure stress the foundational question of whether or not you recognize these documents.

A. Not this one.

Q. When you say "not this one," can you identify the Bates number?

A. ZBC1002025.

MR. DABBIERI: Could I have the name of that document, because I don't have any ZB docs.

MR. LAI: These are applications and certificates for payment. These are part of Zitting Brothers' initial disclosures.

MR. DABBIERI: Thank you.

BY MR. MOUNTEER:

Q. So Ms. Allen, just to kind of shortcut the process then, you're saying that you don't recognize the documents with the Bates number of ZBCI2025 through 2029; is that correct?

A. These are dated November of '08, and we were off the project then.

Q. So it's correct you don't recognize the number with those Bates numbers as referenced?

A. I never paid these. I don't recognize them, I'm sorry.

Q. No need to apologize.

A. And this release, I don't know why this release came.

Q. The release, what's the Bates number on it?

A. It's an APCO, and it's got a 9/18 date, which doesn't even relate to this date on this billing.

Q. Let's go through this document bit by bit just to make sure we understand what you recognize and what you don't recognize.

A. Okay.

Q. Looking now at APCO 106209 through 106213, do you recognize the document with these Bates numbers?

A. Yes, sir.

Q. What is that document showing?

A. That is a billing that we received from Zitting Brothers through the period of June 25th, '08, which is -- what was part of the billing that went into the owner that's listed on payment application number 9.

Q. When you say payment application number 9, that's APCO's payment application number 9?

A. Yes, sir.

Q. Now, stay on the page with the page number of APCO 106209; do you see that page?

A. Um-hum.

Q. I see there's a lot of notations on here, handwritten notations; do you see that?

A. Um-hum.

Q. Do you know who made these notations?

A. Nevada Construction Services.
Q. Do you know what these notations mean?
A. They were asking for releases from the different suppliers. Those are supplier names of Zitting.
Q. Do you see near the top of this page where it has three sets of numbers, 37,608.55, 3761, and 33,847.55; do you see those three sets of numbers?
A. Um-hum.
Q. Do you know what those numbers mean?
A. Oh, now I know what this is. That was what was approved by the owner on this. Out of this pay application there was another billing that -- another sheet that you're missing. And it was change orders that Zitting Brothers billed for in June. They billed 200,000 dollars gross, and of that 200,000 dollars gross, the owner only approved 17,000 dollars.
Q. Okay, just to --
A. Let's go back to Exhibit Number 74. Here, I'll give you mine.
Q. You can look at yours. I have my own. Thank you, though.
A. If you could look at payment application number -- that one right there, the one that's handwritten on by Nevada Construction Services, you

will see that Zitting Brothers, what was approved for them was 37,608.55. You see that number at the top of this payment application, Exhibit 83, that you refer to? Right there, sir.

Q. Okay.

A. That is the gross amount that was approved for them.

Q. So just make sure we have a clear understanding of what these numbers all mean, let me know if I'm incorrect.

A. No.

Q. So there was an application that Zitting Brothers submitted that was approximately 220,000 dollars for the June 2008 billing period, correct?

A. It consisted of two billings.

Q. That totaled to about 220K, correct?

A. Yes.

Q. And the number 37,608.55 that's shown on Allen 83, that's the gross billing approved by the owner, correct?

A. Correct.

Q. And that's the same number shown on Exhibit Allen 74 on page APCO 106207, correct?

A. Correct.

Q. And the number next to that on Allen 83, the

3,761.00 number, is that the retention amount retained for the approved gross billing? A ten percent amount?

A. Yes, sir.

Q. Is the number next to that, the 33847.55, is that the gross amount less the ten percent retention amount shown on Allen 83?

A. That is the amount of the joint check that was issued by Nevada Construction Services.

Q. So the 33847.55, that was ultimately the payment made by the owner, correct?

A. Yes, sir.

Q. Let me direct your attention to the document that you didn't recognize beginning with ZBCI002025.

A. Um-hum.

Q. On this page, do you see number 8 where it says current payment due 33,847.49?

A. I'm sorry. What are we talking about again?

Q. It's the payment application you don't recognize. It's the ones with the Bates number of ZBCI2025.

A. Let me see if they revised it.

Q. Do you see the number 8, current payment due?

A. Okay.

Q. Do you believe this is a revised payment application to reflect the amount that was actually

accounting for the owner approved changes?

A. Oh, yes, sir, sorry.

Q. No reason to doubt that?

A. No. That looks like the numbers.

Q. In other words, you believe that the ZBCI payment application that you didn't recognize before was a companion to the application you saw earlier for Allen 83?

A. It was what was approved by the owner.

Q. Then the conditional waiver that you didn't recognize before with the Bates number of APCO 106236; do you see that?

A. Um-hum.

Q. Do you believe that this also is associated with the payment application that was approved by the owner shown on Allen 83?

A. Yes, sir.

Q. Going to the internal accounting sheet with the Bates number of APCO 104226, did APCO prepare this document?

A. Yes, sir.

Q. And is that your signature at the prepared signature line?

A. Yes.

Q. Did you prepare this on September 1st, 2008?

A. Possibly, yes.

Q. No reason to doubt that?

Would there be any reason why this would be prepared after APCO left the project on August 21st, 2008?

A. Certainly. I probably found out -- this check was cut August the 28th. We left the job August the 21st. At that point, Nevada Construction Services cut the joint checks and gave them -- gave us notice as to what was paid after they were paid.

We had a payable on our books for Zitting Brothers. It had to be removed. And also the revenue that we had booked for the owner had to be decreased by the amount of money paid to the subcontractors. So we had what we called a joint checking account that was kind of an accounting procedure that you have to do.

If you will note, you will see APCO 44625 in that packet, which is a piece of paper that looks like a check.

When a joint check was paid to a subcontractor, and the money did not enter into APCO's bank account, to release the payable and to reduce the revenue, we would have to flow the money through APCO's account. So what we would do was we would manually show the money coming in for this check, and then the

money going out for the check, so it would just zero it out.

In order to do that, we would have to run a paper check, which is this, that ties to this, because Nevada Construction Services paid these bills and never gave APCO any of the money.

Do you understand that procedure, sir?

Q. Yes. I think you gave a pretty good explanation. So my follow-up question was, other than the 33,847.55 are there any other account payable amount for Zitting Brothers for you to zero out as you just explained?

A. No, sir, because this was all that was approved by the owner.

Q. During the time that APCO what the general contractor, correct?

A. That's correct.

Q. So you're not aware of any other amounts approved by the owner after APCO left the project, correct?

A. No, sir. Only what was listed on that ratification form. I don't know the numbers by heart that they show -- no, those were billings. No.

MR. LAI: Allen 84.

(Exhibit 84 marked

for identification.)

BY MR. LAI:

Q. Ms. Allen, the court reporter handed you a document marked Exhibit Allen 84. Do you recognize this document?

A. I do.

Q. What is this document?

A. It is a document that I did, prepared.

Q. When did you prepare this document?

A. During the litigation.

Q. Any reason why you prepared this document?

A. Yes.

Q. What is that reason?

A. For my studying what was billed and what was paid. In the top box right there, is what was billed from Zitting to APCO.

Q. Do you recall the exact date when you prepared this document?

A. No.

Q. Is it fair to say that the numbers reflected here is accurate through August of 2008?

A. Yes, sir. These are the billings that I submitted to the owner, which agrees with this.

Q. And staying with Allen 84 then, these are a number that was current as of the time that APCO was

the general contractor, correct?

A. Yes, sir.

Q. So it doesn't reflect any amount that would come in after APCO left the project, correct?

A. Correct.

(Exhibit 85 marked for identification.)

BY MR. LAI:

Q. Ms. Allen, the court reporter has handed you a document marked Exhibit Allen 85. Do you recognize this document?

A. No.

Q. So you've never seen this document before?

A. It's dated January of '09.

Q. I understand, so you've never seen this document before?

A. Not to my knowledge.

Q. Do you know whether or not APCO has ever received this document?

A. I haven't seen that, so I can't say that. Do you have -- that's all I have.

MR. DABBIERI: I'm sorry, could I have the name of that document and a control number, preferably if you have an APCO number.

MR. LAI: Sure. Unfortunately, it's not an

APCO number. It's an application and certificate for payment. It has a Bates number of ZBCI 002037 through 2041.

MR. DABBIERI: Thank you.

BY MR. LAI:

Q. Let me direct your attention to the last page, even though you haven't seen this document before. Do you see near the middle of this page where it indicates an item number beginning with Z-000-001?

A. Yes.

Q. Are you familiar with these three rows here, 001, 2 and 4?

A. Only number 1, sir. It was a change order that was issued by APCO for installing windows for 41,000 dollars. The others, sir --

Q. You don't recognize the other two -- or three actually, going to the bottom?

A. I didn't have anything to do with change orders or the processing of change orders. I do know that we submitted a bill for approximately 200,000 dollars. I don't know if you have it, and I don't know where that relates to here, and they were not approved by the owner.

Q. Let's take this by piecemeal so we have a clear record of what's going on. Speaking with respect

to C-000-001 where it says window installation; do you see that?

A. Um-hum.

Q. Was that a change order approved by the owner?

A. It was a change order approved by APCO.

Q. Has the owner made any payment on that change order?

A. Yes.

Q. And is the number reflected on this page showing 20,500 dollars, is that the only payment made by the owner towards that change order?

A. Yes.

Q. Any reason why they only paid half?

A. Because that's all that was billed. If you would go back to Allen Exhibit 83, that billing is dated 6/23/08. This is the billing that APCO received from Zitting for the period of June.

If you will look on APCO 106213, you will see that Zitting through June, that went in with the June payment application, billed 20,500 dollars.

Now you're showing me another invoice from Zitting that is also dated through -- it's dated 6/30/08, that they are billing an additional 20,000 dollars on.

This is what we received for June, and this is what we billed the owner, and this is what the owner approved to pay.

Q. So just to kind of clarify for the record, you were looking at Exhibit Allen 83 and saying that Zitting Brothers applied for payment for 20,500 dollars for that change order; is that correct?

A. That is correct.

Q. And do you understand that in Exhibit Allen 85, that Zitting Brothers was applying for the remainder of the 41,000 dollars; is that your understanding?

A. That's what the invoice says.

Q. Now, looking at the change order for the item number below that, with C-00-002 on Exhibit Allen 85; do you see where it states changes to plan, asterisk AR?

A. I see that, sir.

Q. Do you know whether or not the owners ever approved that for payment?

A. I could not tell you that.

Q. Same thing for the one below that, C-00-004, where it states options on buildings 8 and 9; do you see that?

A. 17,000?

Q. Right. Do you believe that --
A. Excuse me, sir.
Q. Sure.
THE WITNESS: I don't know. Just go ahead.
BY MR. LAI:
Q. It may be helpful for us to look at Allen 83 for that questioning.
Do you believe that the owner had previously approved this item and paid for this item before?
A. Yes.
Q. Now going below that, looking at C0-00-004, changes to plan, asterisk GR; do you see that?
A. Yes.
Q. Do you know whether or not the owner has ever approved the payment for that amount?
A. No, it was never approved.
Q. When you say never approved, for the amounts we discussed so far, do you mean you've seen a document coming from the owner disapproving it, or you're not aware of any document approving it?
A. The invoice that was submitted for the change orders in June that you do not have here, for some reason they only approved 17,000 dollars and the billing was for 200,000 dollars, with different changes orders on them.

Q. Now, speaking with respect to the two items on Exhibit Allen 85 where it states changes to plans asterisk AR and asterisk GR, do you know for a fact whether or not these were the change orders not approved by the owner in the June 2008 pay application?

A. Without the other invoice here that you don't have, I can't say that for sure.

Q. Now, when the owner disapproved payment for a change order, how is that communicated to you or APCO?

A. When we submit a payment application with a change order or any item on it -- when Zitting gave us a bill, we would take their bill, we would put it on our bill exactly as they submitted it. We would give the owner that. They would then come back and say, no, this is only approved and this is only approved, so we would have to notify Zitting and say, okay, this is what's approved. You have to revise your billing accordingly.

Q. Right. And when you say you get back a communication from the owner about what's approved, what's not approved, is that like a formal document that's submitted by the owner to APCO showing all this out, or is it a phone call; how is that communicated?

A. Sometimes e-mail, sometimes phone call. You know, I wasn't the one that did the payment

applications, so it would be transmitted to Shannon Havely, but the owner would tell us what was approved.

Q. And as far as you know, for the application in Exhibit Allen 85, do you know whether or not the amount requested in the application was ever paid to Zitting?

A. Sir, this was never received before APCO was off the -- it was received far after APCO was off the job. January of '09? Our payment applications and everything were in to the owner and payments were made long before that.

This is -- do you have proof that this was sent to APCO? Because I don't have any.

Q. That's what I'm asking you --

A. No.

Q. -- whether or not you know whether or not APCO received this?

A. This invoice was prepared January of '09. APCO left the job August the 21st of '08. So...

Q. So then is it fair to say that you have no knowledge whether or not the amount requested in Allen 85 was ever paid to Zitting?

A. That's correct.

(Exhibit 86 marked for identification.)

BY MR. LAI:

Q. Ms. Allen, the reporter handed you a document marked as Exhibit 86. Have you ever seen this document before?

A. No, sir. It's also dated and signed January 30th of '09.

Q. Even though you haven't seen this document before, do you have an understanding that this application for Allen 86 is seeking the payment of retention amount withheld by the owner?

A. I could see that based on the front page, sir, yes.

Q. And that's because the amount requested is ten percent of the gross billing to date, correct?

A. It's the amount that's listed as the retention on this billing that you just gave to me --

Q. When you --

A. -- which is Exhibit 85. That's correct, and it's zeroed out on that.

Q. Do you know whether or not Zitting had completed owner-approved work for 4,033,654.85?

A. What I know is when APCO left the job they completed a total of gross monies 3,647,608.55 that was approved by the owner.

Q. And that's from your understanding of Exhibit

Allen 84, correct? There should be an exhibit stamp at the bottom.

A. Yes, that's correct.

Q. And you're not aware whether or not Zitting completed owner-approved work after APCO left the project, correct?

A. Not to my knowledge, sir.

Q. Do you know whether or not the amount requested in the application for Allen 86 was ever paid to Zitting?

A. Not to my knowledge, sir.

MR. LAI: We have been going about an hour, do you want to take a break?

THE WITNESS: Go ahead.

MR. MOUNTEER: How much longer do you have?

MR. LAI: 15-20 minutes tops.

MR. MOUNTEER: Let's go ahead.

(Exhibit 87 marked for identification.)

BY MR. LAI:

Q. Ms. Allen, the court reporter has handed you a document marked Allen 87. Have you seen this document before?

A. If I would have, I wouldn't have paid any attention to it.

Q. So this document looks foreign to you; is that correct?

A. It's a schedule. I don't deal with the schedules, I'm sorry. I don't even understand them.

Q. Me neither. So you're not the only one.

A. Okay, good.

MR. LAI: Exhibit 88.

(Exhibit 88 marked for identification.)

BY MR. LAI:

Q. Ms. Allen, the court reporter has handed you a document marked as Exhibit Allen 88. Have you ever seen this document before?

A. Yes, sir.

Q. What is Exhibit Allen 88?

A. There's two pages here. One is a notice to all the subcontractors by in-house counsel, telling them that APCO stopped work as of 5:00 p.m. on Thursday, August the 23rd -- 21st.

Q. Earlier you testified that APCO did, in fact, stop work on August 21st, correct?

A. That's correct.

Q. Does stopping work mean that APCO no longer paid its subcontractors?

A. Our subcontractors were paid everything that

was approved by the owner through August of 2008.

Q. And staying on the first page of Allen 88 where it says APCO 106288; can you read the first paragraph under subsection note?

A. Where is that at?

Q. It's near the bottom. Can you read that into the record?

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

Q. Are you aware of any writing by APCO Construction to its subcontractors about whether or not APCO would terminate the contracts with the subcontractors?

A. I had no legal -- I don't understand it.

Q. That's why I'm asking if you're aware of any --

A. I'm sorry.

Q. That's okay.

A. Not my scope of work.

Q. Are you aware of any communications between APCO and Zitting Brothers after the stop work date on

the project?

A. Not that -- I can't recollect, sir. I'm sorry, but...

Q. And CAMCO become the general contractor after APCO left, correct?

A. Yes, sir.

Q. Do you know whether or not CAMCO asked Zitting to continue work on the project?

A. The only way I would have known that was on that ratification form that was in Zitting's disclosure book showing there were billings to CAMCO.

Q. And do you still have that binder with the --

A. It was disclosed by Zitting. It was a Z2-something, somewhere in the back of the book.

Q. Do you know whether or not Gemstone asked Zitting to continue work on the project after APCO stopped work?

A. Based on showing that there were billings, yes, they would have asked them to continue.

MR. LAI: Those are all the questions I have. I'll pass the witness.

MR. MOUNTEER: Jon, how long do you think you have?

MR. DABBIERI: My best guess would be three minutes, maybe less, maybe a little bit more, but in

that general time frame.

MR. MOUNTEER: Okay. If it's okay with the court reporter, I would prefer just plugging through and getting this done.

(Off-record discussion held.)

EXAMINATION

BY MR. DABBIERI:

Q. (Telephonically) Ms. Allen, this may be a little disjointed because I'm moving from topic to topic and trying not to repeat too much what you've already been asked. You did testify concerning the preparation you've done and gave a description of what you have reviewed. Did you review anything specific to Interstate?

A. My job files and the binders. I looked through the documents that Interstate disclosed, I guess you call it, in the binders.

Q. And did you create at any time a binder specific to Interstate?

A. Yes.

Q. To the best of your knowledge, is that included in what has been disclosed --

A. Yes.

Q. -- by APCO?

A. Yes.

Q. And you also testified concerning some notes you made. Did you make notes with respect to Interstate?

A. I guess the notes that I made were transferred into the binder. That was kind of a -- do you understand what I'm saying? As I made notes, then I, you know, transferred. But if I saw something that when I was looking through the book, I made a note for me to remember something. That's it. Nothing major.

Q. My impression was that these notes were created relatively recently as you were preparing to be deposed; is that correct?

A. Yes, some.

MR. MOUNTEER: Jon, this is Cody. If there's any notes, we can verify it and we will stipulate to produce them to you.

MR. DABBIERI: Okay. Then I'll stop asking.

MR. MOUNTEER: Yes.

BY MR. DABBIERI:

Q. You testified concerning how change orders were processed. What would happen if a change order was disputed, if Interstate, for example, presented a change order, would APCO review that for accuracy and completeness or would it simply pass it on to the owner?

A. I did not have anything to do with change orders. I really cannot testify to that. I believe everything was passed on to the owner. The only thing that APCO might request was backup to support it. Everything that was given to us, was given to the owner. They had the ultimate decision whether or not something was approved or not.

Q. Did APCO submit changes orders to the owner?

A. I didn't do them. I believe so.

Q. To the best of your knowledge, were any of those disputed by the owner?

A. To the best of my knowledge, I believe they were. Some were disputed, sure. As to what, I can't tell you.

Q. Were those -- your turn.

A. No, go ahead.

Q. Were those disputes resolved?

A. No.

Q. Does APCO contend it is owed money by Gemstone?

A. Nobody is owed any money. The Supreme Court made a decision and released all the liens to pay the bank. Nobody's going to get any money. It's done. APCO's not going to get any money. It's over.

Q. Well, and without arguing too fine a point,

there's a difference between a contractual obligation to pay, and a lien against a property. To the best of your knowledge, does APCO contend that Gemstone has a contractual obligation to pay APCO money?

A. Yes.

Q. How much is that?

A. I have no idea.

Q. Is that amount inclusive of anything which the subcontractors contend are owed to it -- to them?

A. I guess you could say that.

Q. And do you know how much that is?

A. I don't.

Q. When a subcontractor presented APCO with a billing which included change order work -- let me rephrase that.

What was the sequence and the timing of a sub preparing its application for payment to APCO and then APCO presenting its application for payment to the owner; was there a lag there?

A. Possibly a few days that it would be given to them for their review for approval, because you would have to compile all the numbers onto our pay application.

Q. So when a subcontractor's pay application included change order work, would that application --

would that change order work be included in the APCO application which was submitted a few days later to the owner?

A. Yes.

Q. And if I understand it correctly, it was essentially included without substantial review by APCO, it was simply passed on; is that correct?

A. Correct.

Q. Now, the certification on the APCO application to the owner has the certification that the application includes work which has been completed in accordance with contract documents and should be paid for. How do you reconcile that with the pass-through attitude that APCO apparently took?

A. Per the prime contract, the owner had the ultimate decision, and the subcontract agreements, as to what was approved. It was the owner -- the owner was the one that approved the percentage of completion and the payment of the subcontractors. That's a standard form that's used, and until it's verified and it's approved, those are just -- those are -- it's just a form until the final amount. Then the owner approves it, and then the billings have to be revised based on their approval, and that's what's paid.

Q. Did you keep any record of the amount in

dollars of work for which applications for payment were made, but the owner disapproved of them?

A. I didn't do that, I'm sorry. I didn't do the billings. Shannon Havely did.

Q. I'm sorry, who did?

A. Shannon Havely.

Q. And I thought -- at least on some of the certifications, you started signing them in lieu of Shannon; is that correct?

A. Yeah, towards the end. Yes, sir.

Q. At that point did you take over Shannon's other functions or just that one function?

A. That was mainly Shannon's function. I only did the last few billings.

Q. So, for example, we have had some testimony about Zitting submitting change orders in excess of a hundred thousand dollars and the owner only approving 17,000?

A. Yes.

Q. Do you recall that?

Is there some separate accounting where I could see for Zitting and for Interstate, change order requests submitted and disapproved by the owner, and a cumulative total of that amount?

A. Can you repeat that, please?

Q. Right. What I'm looking for is do your accounting records reflect anywhere amounts that the subcontractors contend they are entitled to versus what the owner has approved?

A. On the summary sheet --

MR. MOUNTEER: When you say "summary sheet," I mean you're looking at Zitting, do you have a summary sheet for --

THE WITNESS: I don't have anything for Interstate. I have nothing to look at for Interstate.

BY MR. DABBIERI:

Q. I understand that, and I had brought something -- I was going to bring some documents with me, but we can use Zitting's, and correct me if I'm wrong, the same processes and procedures would apply to all subcontractors, correct?

MR. MOUNTEER: You need to respond.

A. Yes, sir. Exhibit 84 from Zitting --

BY MR. DABBIERI:

Q. I'm sorry. What?

MR. MOUNTEER: That's APCO 106189.

MR. DABBIERI: Give me a second. I hope to get to it shortly. I apologize. I did hope to be there in person.

MR. LAI: Hey, Jon, just to help you out, are

you referring to the table with the Bates number of APCO 106196?

MR. DABBIERI: I'm trying to locate it. We are getting close to it. I do now have 106196.

THE WITNESS: Could you repeat your question?

BY MR. DABBIERI:

Q. I'll rephrase it.

What I'm looking for is what documentation would reveal the difference between the amount the subcontractor has requested payment for and what the owner has authorized payment for, and if you look at 106196 --

MR. LAI: That's Exhibit Allen 75.

BY MR. DABBIERI:

Q. That's a summary of the amounts billed, but I take it that is the amount billed after the adjustment process if a change order was disputed; is that correct?

A. This Allen 75 represents what was submitted to the owner on behalf of -- on behalf of Zitting.

Q. If the owner disapproved a portion of the payment application so that, as I understood it, there would be an adjustment and a rebilling, correct?

A. Yes.

Q. Now, would this Exhibit 75 reflect the first

billing or the adjusted billing?

A. Well, this is -- in this case, this one I did was actually what was submitted to them.

Q. Regardless of whether the owner approved it?

A. What happened here was on Zitting number 9 where the amount was changed, we submitted for -- in June, July and August, we submitted billings to the owner, and there was no going back and forth. They changed it and we found out after the fact.

Q. Well, were there -- I mean, there were obviously other instances where a subcontractor's initial billing was not approved by the owner and a revised billing was submitted; is that correct?

A. Yes.

Q. Now, on your -- was that true for Interstate?

A. Without a document, I can't tell you.

Q. I apologize, but I think I'm somewhat repeating the question, but I'm trying to find out if there's anywhere where there is a summary of disputed work --

A. No, sir.

Q. -- by subcontractors?

A. There's no summary of that, no.

Q. There's no summary where I could compare how much a subcontractor contends its owed, versus what the

owner has approved; is that a fair statement?

A. That's a fair statement.

Q. And again, and I had hoped to show this to you in person, but there is an application for payment by APCO submitted to ManhattanWest, which has -- starts with APCO control number 35436, and continues to APCO 35453, and it is application number 11 and it is dated October 3 of 2008. Are you familiar with that application?

A. Yes.

Q. Why was that submitted?

A. It was the invoice to Gemstone, payment application number 11 through the end of the job.

Q. Why the delay in submission?

A. I have no idea.

Q. Does this pay application include work by subcontractors which the owner contested?

A. I have no idea.

Q. Did APCO receive any response to this payment application?

A. The only response that we know is what was paid by the owner to the subcontractors.

Q. Was that paid after October of 2008?

A. Yes.

Q. And it was for work performed during the time

APCO what the general contractor?

A. Yes.

Q. And you have records reflecting those payments?

A. Yes.

Q. And have those been included in the disclosures?

A. Yes.

Q. Do you recall when those documents were disclosed, since there's been I think nine or ten different disclosures?

A. They were disclosed by Nevada Construction Services.

Q. Not by APCO?

A. I received copies of the checks and they probably were put in my files, because I had to post joint checks releasing those billings off of my accounts payable, and also reduce the revenue.

Q. Are you aware of any instances where APCO felt that a change order should be approved and Gemstone disagreed?

A. Not my scope.

Q. You weren't involved in any of that?

A. None of it.

Q. APCO's payment applications, how would one

tell from an APCO payment application, the subcontractors who performed the work which is included in the APCO payment application?

A. Do you have a document? One of my payment applications?

MR. MOUNTEER: Sorry, Jon, to cut in here.

MR. DABBIERI: No, that's fine.

MR. MOUNTEER: On the documents you referenced earlier, you had like a line number for the payment application. On your payment application, do you recall whether it specifically said that line was for a particular sub or not?

THE WITNESS: Oh, geez, I don't know if their name was on there.

BY MR. DABBIERI:

Q. As I recall, that was where you were taking the Zitting payment application and putting down your line number.

A. Correct.

Q. Is there somewhere that shows something of the reverse, where I could take the APCO payment application and determine which line items reflect work done by Interstate?

A. There was a report that was given to Nevada Construction Services, and it was done in three

different ways. It was an Excel spreadsheet that number one, each line item was listed and the subcontractor was listed next to it. And then we would sort it by sub, so another spreadsheet was generated, whereas Interstate would be listed all together and next to their -- next to their name would be the line number that they were on. Then what we also had was the summary sheet -- one moment -- which is Allen Exhibit 74, so it would summarize on this sheet the total amount of monies that were billed for that sub for that month. And it was turned in and it was also part of discovery with the pay applications.

Q. So just to make sure I understand, your Excel spreadsheets would show, when an APCO payment application was being submitted, there would be an Excel spreadsheet that would also reflect on an APCO line item basis, which subcontractor had performed the work for that line item; is that correct?

A. Correct, and the amount billed.

Q. And so if a subcontractor had performed work that was shown through, say, ten or fifteen different line items on the APCO payment application, the -- for each line item that subcontractor's name would appear each time, correct?

A. Yes, sir.

Q. And the amount billed by that subcontractor with respect to that particular APCO line item?

A. That is correct. Sir, this was done --

Q. And --

A. Go ahead.

Q. I'm sorry, you go ahead.

A. That's all right.

Q. I do recall seeing the summary that just had for each contractor the amount included in that particular APCO pay application. Has there been marked today an exhibit that also includes that more extensive line item breakdown?

A. Today?

Q. Right, among the documents you've been shown today.

A. No, sir.

MR. LAI: Only for Zitting Brothers. That's the only document that we discussed in terms of more detailed breakdowns.

MR. DABBIERI: I'm sorry, was that directed to me or the witness?

MR. LAI: That was directed to you, in case you were curious about the exhibits presented today.

THE WITNESS: That detailed list that I just explained to you was not exhibited today.

MR. DABBIERI: Okay. That was my question.

Just give me a moment here to look over my notes.

BY MR. DABBIERI:

Q. Was the way you processed Interstate payment applications any different from the way the Zitting payment applications were processed?

A. No, sir.

Q. So essentially your responses to counsel as to how everything was done for Zitting would also apply to Interstate?

A. Yes, sir.

MR. DABBIERI: In that case I have no other questions. Actually, I do have one area.

BY MR. DABBIERI:

Q. Do you know, did Interstate have two contracts or one with APCO?

A. One.

Q. Did it submit each month a single pay application, or one for each aspect of its work?

A. Each aspect of its work, sir.

Q. So there were two separate pay applications?

A. Yes, sir.

MR. DABBIERI: Okay. That completes my questions.

MR. LAI: I have three quick ones and should be done. Just follow-up.

MR. MOUNTEER: Okay.

FURTHER EXAMINATION

BY MR. LAI:

Q. Ms. Allen, APCO has completed work on the project before it left work on August 21st, 2008, correct?

A. There was work performed, yes.

Q. As APCO's payment applications, did the owner also retain a portion of the amount from APCO's progress payments?

A. Was there a retention held?

Q. Right, just for APCO's payments?

A. Yes, everyone.

Q. This was for APCO's work itself as well, correct?

A. Yes.

Q. Has APCO ever requested a payment for its retention amount?

A. No.

Q. And are you aware of any communications from Gemstone or its representatives to not pay any of the subcontractors after August 21st, 2008?

A. Could you repeat that question?

Q. Sure. Are you aware of any communications from Gemstone or its representatives to not pay any of the subcontractors after August 21st, 2008?

A. If I'm understanding this correctly --

Q. And I can rephrase.

A. -- Gemstone had Nevada Construction Services actually pay the August payment application.

Q. Right. My question was did someone from Gemstone or its agent like someone from Nevada Construction Services tell APCO, hey, don't pay any of the applications submitted by any subs to you after you stop work on the project?

A. Not to my knowledge, sir. I didn't speak to Gemstone. I had no communication.

MR. LAI: I have no further questions.

MR. MOUNTEER: With that we will conclude the deposition. Thank you, Jon.

MR. DABBIERI: Thank you.

MR. LAI: Off the record.

(PROCEEDINGS ADJOURNED AT 12:13 PM)

* * * *

CERTIFICATE OF REPORTER

STATE OF NEVADA)
) ss:
COUNTY OF CLARK)

I, June W. Seid, a Certified Court Reporter licensed by the State of Nevada, certify: That I reported the deposition of MARY JO ALLEN, on Wednesday, July 19, 2017, at 9:15 a.m.;

That prior to being deposed, the witness was duly sworn by me to testify to the truth. That I thereafter transcribed my said stenographic notes via computer-aided transcription into written form, and that the typewritten transcript is a complete, true and accurate transcription of my said stenographic notes. That review of the transcript was requested.

I further certify that I am not a relative, employee or independent contractor of counsel or of any of the parties involved in the proceeding; nor a person financially interested in the proceeding; nor do I have any other relationship that may reasonably cause my impartiality to be questioned.

IN WITNESS WHEREOF, I have set my hand in my office in the County of Clark, State of Nevada, this 30th day of July, 2017.

June W. Seid

JUNE W. SEID, CCR NO. 485

ESQUIRE DEPOSITION SOLUTIONS

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

Electronically Filed
Apr 15 2019 02:58 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

APPELLANT'S APPENDIX
(Volume 17, Bates Nos. 3764–4013)

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EXHIBIT 8

ELECTRONICALLY SERVED
11/7/2017 5:32 PM

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DISTRICT COURT

CLARK COUNTY, NEVADA

APCO CONSTRUCTION, a Nevada corporation, Plaintiff, vs. GEMSTONE DEVELOPMENT WEST INC., A Nevada corporation, Defendant.	Case No.: A571228 Dept. No.: XIII Consolidated with: A574391; A574792; A577623; A583289; A587168; A580889; A584730; A589195; A595552; A597089; A592826; A589677; A596924; A584960; A608717; A608718; and A590319
AND ALL RELATED MATTERS	

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

Case Number: 08A571228

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

GENERAL RESPONSES AND OBJECTIONS

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

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

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

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

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

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

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

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

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

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

ANSWER TO INTERROGATORIES

INTERROGATORY NO. 1:

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

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ANSWER TO INTERROGATORY NO. 1:

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

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

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

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

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

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

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

APCO has no record of receiving any billing from Zitting for the retention or disputed change orders. Zitting also is not entitled to payment for disputed changes, because such payments are not due under the Change Order payment schedule. There is also no factual scenario where APCO could have been enriched, as it never received any value for Zitting's purported retention and change orders. Further, Zitting admitted during deposition that it has no knowledge as to whether it followed up on any request for payment short of filing the lien against the Property. Moreover, due to Zitting's direct assertions at deposition, and as determined throughout discovery, it has also been discovered that Zitting has written off some, if not all, of the damages it currently asserts it is purportedly owed by APCO[2].

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

INTERROGATORY NO. 2:

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

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

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ANSWER TO INTERROGATORY NO. 2:

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

INTERROGATORY NO. 3:

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

ANSWER TO INTERROGATORY NO. 3:

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

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

INTERROGATORY NO. 4:

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

ANSWER TO INTERROGATORY NO. 4:

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

INTERROGATORY NO. 5:

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

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

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

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

ANSWER TO INTERROGATORY NO. 5:

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

Subject to and without waiving any objections, APCO responds as follows: See documents identified by Bate Stamp No. APC000000001[3] through APC000078992 and

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

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

INTERROGATORY NO. 6:

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

ANSWER TO INTERROGATORY NO. 6:

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

INTERROGATORY NO. 7:

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

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

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ANSWER TO INTERROGATORY NO. 7:

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

Subject to and without waiving any objections, See Response to Interrogatory No. 1 and 6 above, which are incorporated herein by this reference. Also, see documents identified by Bate Stamp No. APC000000001[4] through APC000078992 and APCO104200 through 104234, which APCO has deposited into a depository established by APCO for this litigation matter with Litigation Services and/or are hereby made available for review and copying (at requestor's expense) at a mutually agreeable time and place. Discovery is ongoing; APCO reserves the right to supplement or amend its Response to this Interrogatory as investigation, discovery, disclosure and analysis continues. **(See also further clarification supplement to APCO's Answer to Interrogatory 1).**

INTERROGATORY NO. 8:

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

[4] See Footnote No. 3.

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ANSWER TO INTERROGATORY NO. 8:

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

Subject to and without waiving any objections, See Response to Interrogatory No. 1, 6, and 7 above, which are incorporated herein by this reference. Moreover, it is APCO's understanding that after APCO terminated its prime contract with Gemstone for nonpayment, Gemstone requested all subcontractors, including Zitting Brothers, to continue their work on the Project. Further, it is APCO's understanding that Zitting Brothers elected not to complete its work and insure that their work was accepted by the inspectors and Gemstone. As such, Zitting Brothers failed to put themselves in the position to receive payment for the work that allegedly remains unpaid at this time. Also, see documents identified by Bate Stamp No. APC000000001[5] through APC000078992 and APCO104200 through 104234, which APCO has deposited into a depository established by APCO for this litigation matter with Litigation Services and/or are hereby made available for review and copying (at requestor's expense) at a mutually agreeable time and place. Discovery is ongoing; APCO reserves the right to supplement or amend its Response to this Interrogatory as investigation, discovery, disclosure and analysis continues.

[5] See Footnote No. 3.

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

INTERROGATORY NO. 9:

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

ANSWER TO INTERROGATORY NO. 9:

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

Subject to and without waiving any objections, See Response to Interrogatory No. 1, 6, 7, and 8 above, which are incorporated herein by this reference. Also, see documents identified by Bate Stamp No. APC000000001[6] through APC000078992 and APCO104200 through 104234, which APCO has deposited into a depository established by APCO for this litigation matter with Litigation Services and/or are hereby made available for review and copying (at requestor's expense) at a mutually agreeable time and place. Discovery is ongoing. APCO reserves the right to supplement or amend its Response to this Interrogatory as investigation, discovery, disclosure

[6] See Footnote No. 3.

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

INTERROGATORY NO. 10:

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

ANSWER TO INTERROGATORY NO. 10:

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

Subject to and without waiving any objections, See Response to Interrogatory No. 1, 6, and 7 above, which are incorporated herein by this reference. Discovery is ongoing. APCO reserves the right to supplement or amend its Response to this Interrogatory as investigation, discovery, disclosure and analysis continues. **(See also further clarification supplement to APCO's Answer to Interrogatory 1).**

INTERROGATORY NO. 11:

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

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

ANSWER TO INTERROGATORY NO. 11:

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

Subject to and without waiving any objections, See Response to Interrogatory No. 1, 6, and 7 above, which are incorporated herein by this reference. Also, see documents identified by Bate Stamp No. APC000000001[7] through APC000078992 and APCO104200 through 104234, which APCO has deposited into a depository established by APCO for this litigation matter with Litigation Services and/or are hereby made available for review and copying (at requestor's expense) at a mutually agreeable time and place. Discovery is ongoing. APCO reserves the right to supplement or amend its Response to this Interrogatory as investigation, discovery, disclosure and analysis continues. **(See also further clarification supplement to APCO's Answer to Interrogatory 1).**

[7] See Footnote No. 3.

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INTERROGATORY NO. 12:

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

ANSWER TO INTERROGATORY NO. 12:

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

INTERROGATORY NO. 13:

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

ANSWER TO INTERROGATORY NO. 13:

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

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

Subject to and without waiving any objections, See Response to Interrogatory No. 1, 6, and 7 above, which are incorporated herein by this reference. Also, see documents identified by Bate Stamp No. APC000000001[8] through APC000078992 and APCO104200 through 104234, which APCO has deposited into a depository established by APCO for this litigation matter with Litigation Services and/or are hereby made available for review and copying (at requestor's expense) at a mutually agreeable time and place. Discovery is ongoing. APCO reserves the right to supplement or amend its Response to this Interrogatory as investigation, discovery, disclosure and analysis continues. **(See also further clarification supplement to APCO's Answer to Interrogatory 1).**

INTERROGATORY NO. 14:

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

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ANSWER TO INTERROGATORY NO. 14:

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

[8] See Footnote No. 3.

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

Subject to and without waiving any objections, See Response to Interrogatory No. 1, 6, and 7 above, which are incorporated herein by this reference. Also, see documents identified by Bate Stamp No. APC000000001[9] through APC000078992 and APCO104200 through 104234, which APCO has deposited into a depository established by APCO for this litigation matter with Litigation Services and/or are hereby made available for review and copying (at requestor's expense) at a mutually agreeable time and place. Discovery is ongoing. APCO reserves the right to supplement or amend its Response to this Interrogatory as investigation, discovery, disclosure and analysis continues. **(See also further clarification supplement to APCO's Answer to Interrogatory 1).**

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[9] See Footnote No. 3.

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INTERROGATORY NO. 15:

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

ANSWER TO INTERROGATORY NO. 15:

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

Subject to and without waiving any objections, See Response to Interrogatory No. 1, 6, and 7 above, which are incorporated herein by this reference. Also, see documents identified by Bate Stamp No. APC000000001[10] through APC000078992 and APCO104200 through 104234, which APCO has deposited into a depository established by APCO for this litigation matter with Litigation Services and/or are hereby made available for review and copying (at requestor's expense) at a mutually agreeable time and place. Discovery is ongoing. APCO reserves the right to supplement or amend its Response to this Interrogatory as investigation, discovery, disclosure and analysis continues. **(See also further clarification supplement to APCO's Answer to Interrogatory 1).**

[10] See Footnote No. 3.

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INTERROGATORY NO. 16:

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

ANSWER TO INTERROGATORY NO. 16:

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

Subject to and without waiving any objections, See Response to Interrogatory No. 1, 6, and 7 above, which are incorporated herein by this reference. Also, see documents identified by Bate Stamp No. APC000000001[11] through APC000078992 and APCO104200 through 104234, which APCO has deposited into a depository established by APCO for this litigation matter with Litigation Services located at and/or are hereby made available for review and copying (at requestor's expense) at a mutually agreeable time and place. Discovery is ongoing. APCO reserves the right to supplement or amend its Response to this Interrogatory as investigation, discovery, disclosure and analysis continues. **(See also further clarification supplement to APCO's Answer to Interrogatory 1).**

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[11] See Footnote No. 3.

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INTERROGATORY NO. 17:

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

ANSWER TO INTERROGATORY NO. 17:

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

Subject to and without waiving any objections, See Response to Interrogatory No. 1, 6, and 7 above, which are incorporated herein by this reference. Also, see documents identified by Bate Stamp No. APC000000001[12] through APC000078992 and APCO104200 through 104234, which APCO has deposited into a depository established by APCO for this litigation matter with Litigation Services and/or are hereby made available for review and copying (at requestor's expense) at a mutually agreeable time and place. Discovery is ongoing. APCO reserves the right to supplement or amend its Response to this Interrogatory as investigation, discovery, disclosure

[12] See Footnote No. 3.

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

INTERROGATORY NO. 18:

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

ANSWER TO INTERROGATORY NO. 18:

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

Subject to and without waiving any objections, APCO responds as follows: Discovery is ongoing. APCO reserves the right to supplement or amend its Response to this Interrogatory as investigation, discovery, disclosure and analysis continues. **(See also further clarification supplement to APCO's Answer to Interrogatory 1).**

INTERROGATORY NO. 19:

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

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ANSWER TO INTERROGATORY NO. 19:

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

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

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INTERROGATORY NO. 20:

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

ANSWER TO INTERROGATORY NO. 20:

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

Subject to and without waiving any objections, See Response to Interrogatory No. 1, 6 and 7 above, which are incorporated herein by this reference. Also, see documents identified by Bate Stamp No. APC000000001[13] through APC000078992 and APCO104200 through 104234, which APCO has deposited into a depository established by APCO for this litigation matter with Litigation Services and/or are hereby made available for review and copying (at requestor's expense) at a mutually agreeable time and place. Discovery is ongoing. APCO reserves the right to supplement or amend its Response to this Interrogatory as investigation, discovery, disclosure and analysis continues. **(See also further clarification supplement to APCO's Answer to Interrogatory 1).**

[13] See Footnote No. 3.

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INTERROGATORY NO. 21:

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

ANSWER TO INTERROGATORY NO. 21:

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

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

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

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

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

2. Joe Pelan
APCO Construction
Marquis Aurbach Coffing
10001, Park Run Drive
Las Vegas, Nevada 89145

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

3. Lisa Lynn
APCO Construction
Marquis Aurbach Coffing
10001, Park Run Drive
Las Vegas, Nevada 89145

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

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4. Mary Jo Allen
APCO Construction
Marquis Aurbach Coffing
10001 Park Run Drive
Las Vegas, Nevada 89145

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

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

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

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

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

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

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

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

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

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9. Craig Colligan
Address unknown

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

INTERROGATORY NO. 22:

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

ANSWER TO INTERROGATORY NO. 22:

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

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

Subject to and without waiving any objections, see documents identified by Bate Stamp No. APC000000001[14] through APC000078992 and APCO104200 through 104234, which APCO has deposited into a depository established by APCO for this litigation matter with Litigation Services and/or are hereby made available for review and copying (at requestor's expense) at a mutually agreeable time and place. Discovery is ongoing. APCO reserves the right to supplement or amend its Response to this Interrogatory as investigation, discovery, disclosure and analysis continues. **(See also further clarification supplement to APCO's Answer to Interrogatory 1).**

INTERROGATORY NO. 23:

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

ANSWER TO INTERROGATORY NO. 23:

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

[14] See Footnote No. 3.

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

INTERROGATORY NO. 24:

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

ANSWER TO INTERROGATORY NO. 24:

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

Subject to and without waiving any objections, See Responses to Interrogatory No. 1, 6, and 7 above, which are incorporated herein by this reference. Also, see documents identified by Bate Stamp No. APC000000001[15] through APC000078992 and APCO104200 through 104234, which APCO has deposited into a depository established by APCO for this litigation matter with Litigation Services and/or are hereby made available for review and copying (at requestor's

[15] See Footnote No. 3.

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expense) at a mutually agreeable time and place. Discovery is ongoing. APCO reserves the right to supplement or amend its Response to this Interrogatory as investigation, discovery, disclosure and analysis continues. **(See also further clarification supplement to APCO's Answer to Interrogatory 1).**

INTERROGATORY NO. 25:

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

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

b. a summary of the grounds for each opinion;

c. whether written document was prepared by such expert;

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

ANSWER TO INTERROGATORY NO. 25:

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

INTERROGATORY NO. 26:

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

ANSWER TO INTERROGATORY NO. 26:

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

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objections, see documents identified by Bate Stamp No. APC000000001[16] through APC000078992 and APCO104200 through 104234, which APCO has deposited into a depository established by APCO for this litigation matter with Litigation Services and/or are hereby made available for review and copying (at requestor's expense) at a mutually agreeable time and place. See also documents produced by other parties to this action, including any documents produced by Zitting Brothers in this action. Discovery is ongoing. APCO reserves the right to supplement or amend its Response to this Interrogatory as investigation, discovery, disclosure and analysis continues. **(See also further clarification supplement to APCO's Answer to Interrogatory 1).**

INTERROGATORY NO. 27:

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

ANSWER TO INTERROGATORY NO. 27:

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

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

[16] See Footnote No. 3.

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

INTERROGATORY NO. 28:

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

ANSWER TO INTERROGATORY NO. 28:

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

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

INTERROGATORY NO. 29:

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

ANSWER TO INTERROGATORY NO. 29:

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

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independent questions within single individual questions and subparts. APCO further objects on the grounds of relevance and that this Interrogatory is vague, ambiguous, overly broad, unduly burdensome and oppressive because it seeks to force APCO to identify "each and every denial." See also Response to Interrogatory No. 1 above, which is incorporated herein by this reference. Subject to and without waiving any objections, see APCO's Responses to Zitting Brothers' Requests for Admissions. See also, Responses to Interrogatory No. 1, 6, and 7 above, which are incorporated herein by this reference. Also, see documents identified by Bate Stamp No. APC000000001[17] through APC000078992 and APCO104200 through 104234, which APCO has deposited into a depository established by APCO for this litigation matter with Litigation Services and/or are hereby made available for review and copying (at requestor's expense) at a mutually agreeable time and place. Discovery is ongoing. APCO reserves the right to supplement or amend its Response to this Interrogatory as investigation, discovery, disclosure and analysis continues. **(See also further clarification supplement to APCO's Answer to Interrogatory 1).**

INTERROGATORY NO. 30:

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

ANSWER TO INTERROGATORY NO. 30:

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

[17] See Footnote No. 3.

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

Subject to and without waiving any objections, APCO responds as follows: After APCO was not paid by Gemstone for work that was being performed by APCO and its subcontractors, APCO, pursuant to Nevada law, gave notice to Gemstone of its intent to stop work and terminate the prime contract unless payment was made. APCO provided a copy of such notice to its subcontractors, including Zitting Brothers, so that the subcontractors, including Zitting Brother, could take whatever action they deemed necessary to protect their respective rights under Nevada law. After payment from Gemstone was not made, APCO, as allowed under Nevada law, terminated its prime contract with Gemstone and further notified its subcontractors, including Zitting Brothers of such termination. See also, Responses to Interrogatory No. 1, 6, and 7 above, which are incorporated herein by this reference. Also, see documents identified by Bate Stamp No. APC000000001[18] through APC000078992 and APCO104200 through 104234, which APCO has deposited into a depository established by APCO for this litigation matter with Litigation Services and/or are hereby made available for review and copying (at requestor's expense) at a mutually agreeable time and place. Discovery is ongoing. APCO reserves the right to supplement or amend its Response to this Interrogatory as investigation, discovery, disclosure and analysis continues. **(See also further clarification supplement to APCO's Answer to Interrogatory 1).**

INTERROGATORY NO. 31:

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

[18] See Footnote No. 3.

ANSWER TO INTERROGATORY NO. 31:

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

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

INTERROGATORY NO. 32:

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

ANSWER TO INTERROGATORY NO. 32:

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

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

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

INTERROGATORY NO. 33:

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

ANSWER TO INTERROGATORY NO. 33:

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

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

INTERROGATORY NO. 34:

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

ANSWER TO INTERROGATORY NO. 34:

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

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seeks to force APCO to identify any conversations that APCO may have had with a Third Party including the dates of each conversation, persons involved and the contents of the conversations. See also Response to Interrogatory No. 2 above, which is incorporated herein by this reference.

Subject to and without waiving any objections, APCO does not recall having any conversations with a "Third-Party' regarding Zitting Brothers' work or otherwise. Discovery is ongoing. APCO reserves the right to supplement or amend its response to this Interrogatory as investigation, discovery, disclosure and analysis continues. **(See also further clarification supplement to APCO's Answer to Interrogatory 1).**

INTERROGATORY NO. 35:

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

ANSWER TO INTERROGATORY NO. 35:

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

Subject to and without waiving any objections, APCO responds as follows: APCO has asserted priority over the deeds of trust that are of record against the Manhattan West Project pursuant to NRS 108.225. Priority over the deeds of trusts is based on the fact that APCO first performed work under the Grading Agreement on or about May 2007. APCO first performed work under the ManhattanWest General Construction Agreement for GMP or about September 5, 2007. The deeds of trust on the property attached after construction work commenced. APCO has further asked the Court to declare the rank of mechanic's liens pursuant to NRS 108.236. See also documents identified by Bate Stamp No. APC000000001[19] through APC000078992 and APCO104200 through 104234, which APCO has deposited into a depository established by

[19] See Footnote No. 3.

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APCO for this litigation matter with Litigation Services and/or are hereby made available for review and copying (at requestor's expense) at a mutually agreeable time and place. Discovery is ongoing; APCO reserves the right to supplement or amend its Response to this Interrogatory as investigation, discovery, disclosure and analysis continues. **(See also further clarification supplement to APCO's Answer to Interrogatory 1).**

INTERROGATORY NO. 36:

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

ANSWER TO INTERROGATORY NO. 36:

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

Original Contract Amount	$153,472,300.00
Change Orders	$14,597,570.26
Revised Contract Amount	$168,069,870.26

Contract Work Performed & Billed thur August 2008	$60,325,901.89
Change Order Work Performed thur August 2008	$9,168,116.32
Total Work Performed thur August 2008	$69,494,018.21
Less Pervious Payments	($48,711,358.26)
Final Lien Amount	$20,782,659.95

Discovery is ongoing. APCO reserves the right to supplement or amend its Response to

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

INTERROGATORY NO. 37:

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

ANSWER TO INTERROGATORY NO. 37:

Objection. APCO objects on the grounds of relevance and further objects that this Interrogatory is vague, ambiguous, overly broad, unduly burdensome and oppressive because it seeks to force APCO to describe "the work that was performed during the first three months of the Project." APCO further objects on the grounds that it is vague and ambiguous in that "construction", "work" and "first three months of the Project" are not defined. See also Response to Interrogatory No. 2 above, which is incorporated herein by this reference. Subject to and without waiving any objections, APCO responds as follows: APCO first performed work under the Grading Agreement on or about May 2007. APCO first performed work under the Manhattan West General Construction Agreement for GMP or about September 5, 2007. See also documents identified by Bate Stamp No. APC000000001[20] through APC000078992 and APCO104200 through 104234, which APCO has deposited into a depository established by APCO for this litigation matter with Litigation Services and/or are hereby made available for review and copying (at requestor's expense) at a mutually agreeable time and place. Discovery is ongoing; APCO reserves the right to supplement or amend its Response to this Interrogatory as investigation, discovery, disclosure and analysis continues. **(See also further clarification supplement to APCO's Answer to Interrogatory 1).**

INTERROGATORY NO. 38:

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

[20] See Footnote No. 3.

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ANSWER TO INTERROGATORY NO. 38:

None. APCO has not received any payments for work, materials and/or equipment furnished by Zitting Brothers at the Project for which Zitting Brother has not been paid by APCO. **(See also further clarification supplement to APCO's Answer to Interrogatory 1).**

INTERROGATORY NO. 39:

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

ANSWER TO INTERROGATORY NO. 39:

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

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in that it calls for him to provide an analysis of written data and/or law.

APCO further objects to this Interrogatory on the ground that it calls for legal conclusions. See also Response to Interrogatory No. 2 above, which is incorporated herein by this reference. Subject to and without waiving any objections, APCO responds as follows: Gemstone has asserted various complaints about the quality of the work performed by APCO and its subcontractors. As of this time, Gemstone has not identified specific issues that Gemstone has with APCO's or its subcontractor's work, including that of Zitting Brothers. However, as a result of Gemstone's assertions that there are issues with the quality of the work performed on the Project, Gemstone has failed to pay APCO for the work that APCO performed, including the work that was performed by Zitting Brothers. Pursuant to the terms of the Subcontract Agreement, any payments to Zitting Brothers were specifically conditioned upon APCO' s actual receipt of payment from Gemstone for Zitting Brothers' work. Moreover, the Subcontract specifically provided that Zitting Brothers was assuming the same risk that Gemstone may become insolvent and not be paid for its work as APCO assumed in entering into prime contract with Gemstone. Zitting Brothers further agreed that APCO had no obligation to pay Zitting Brothers for any work performed by Zitting Brothers until or unless APCO had actually been paid for such work by Gemstone. To date, APCO has not been paid for the work performed, including the work performed by Zitting Brothers. In fact, due to non-payment, APCO exercised its rights pursuant to NRS Chapter 624 and terminated the prime contract with Gemstone and further terminated the Subcontract with Zitting Brothers. After APCO ceased work on the Project, Zitting Brothers may have negotiated with Camco, the replacement general contractor, and/or Gemstone and may have entered into a ratification agreement, wherein APCO was replaced as the general contractor under the Subcontract and Camco and/or Gemstone became liable for any monies due Zitting Brothers on the Project. Discovery is ongoing. APCO reserves the right to supplement or amend its response to this Interrogatory as investigation, discovery, disclosure and analysis continues. **(See also further clarification supplement to APCO's Answer to Interrogatory 1).**

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INTERROGATORY NO. 40:

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

ANSWER TO INTERROGATORY NO. 40:

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

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

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Bate Stamp No. APC000000001[21] through APC000078992 and APCO104200 through 104234, which APCO has deposited into a depository established by APCO for this litigation matter with Litigation Services and/or are hereby made available for review and copying (at requestor's expense) at a mutually agreeable time and place. Discovery is ongoing. APCO reserves the right to supplement or amend its Response to this Interrogatory as investigation, discovery, disclosure and analysis continues. **(See also further clarification supplement to APCO's Answer to Interrogatory 1).**

Dated this 7th day of November, 2017.

MARQUIS AURBACH COFFING

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[21] See Footnote No. 3.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing **APCO CONSTRUCTION'S SUPPLEMENTAL ANSWERS TO ZITTING BROTHERS CONSTRUCTIONS FIRST SET OF REQUESTS FOR INTERROGATORIES** was submitted electronically for filing and/or service with the Eighth Judicial District Court on the 7th day of November, 2017. Electronic service of the foregoing document shall be made in accordance with the E-Service List as follows:[22]

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

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EXHIBIT 9

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DISTRICT COURT

CLARK COUNTY, NEVADA

APCO CONSTRUCTION, a Nevada corporation, Plaintiff(s), vs. GEMSTONE DEVELOPMENT WEST, INC., a Nevada corporation, et al., Defendant(s). AND ALL RELATED CLAIMS.	CASE NO. A571228 DEPT. NO. XIII (Consolidated with A574391; A574792; A577623; A580889; A583289; A584730; A587168; A589195; A592826; A596924; A597089; A606730; A608717; A608718)

DECISION

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

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

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

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

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MARK R. DENTON
DISTRICT JUDGE
DEPARTMENT THIRTEEN
LAS VEGAS, NV 89155

supportive of the same.

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

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

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

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

This Decision sets forth the Court's intended disposition

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MARK R. DENTON
DISTRICT JUDGE
DEPARTMENT THIRTEEN
LAS VEGAS, NV 89155

on the subject, but it anticipates further order of the Court to make such disposition effective as an order or judgment.

DATED this 21st day of November, 2017.

MARK R. DENTON
DISTRICT JUDGE

CERTIFICATE

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

LORRAINE TASHIRO
Judicial Executive Assistant
Dept. No. XIII

MARK R. DENTON
DISTRICT JUDGE
DEPARTMENT THIRTEEN
LAS VEGAS, NV 89155

EXHIBIT 10

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DISTRICT COURT

CLARK COUNTY, NEVADA

APCO CONSTRUCTION, a Nevada corporation, Plaintiff, vs. GEMSTONE DEVELOPMENT WEST, INC., a Nevada corporation, Defendant.	CASE NO. A571228 DEPT. NO. XIII Consolidated with: A574391; A574792; A577623; A583289; A587168; A580889; A584730; A589195; A595552; A597089; A592826; A589677; A596924; A584960; A608717; A608718; and A590319
AND ALL RELATED MATTERS	

ZITTING BROTHERS CONSTRUCTION, INC.'S MOTION FOR PARTIAL SUMMARY JUDGMENT AGAINST APCO CONSTRUCTION

Under Nev. R. Civ. P. 56(b), Zitting Brothers Construction, Inc. ("Zitting"), a lien-claimant, respectfully requests that this Court grant summary judgment against APCO Construction ("APCO") on its breach of contract claim and claim under Chapter 108 of the Nevada Revised Statutes. The undisputed material facts show that APCO breached its contract with Zitting by refusing to pay the full amount owed for Zitting's work on the Manhattan West Condominiums (the "Project"). Zitting explains this further in the supporting memorandum of points and authorities, which is supported by the attached exhibits, the records of this Court, and any oral arguments that this Court may entertain at the hearing on this motion.

Case Number: 08A571228

DATED this 31st day of July, 2017

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Zitting Brothers Construction, Inc.

NOTICE OF HEARING ON ZITTING BROTHERS CONSTRUCTION, INC.'S MOTION FOR PARTIAL SUMMARY JUDGMENT

Please take notice that Zitting will bring its Motion for Partial Summary Judgment for hearing in Department XIII of the above-captioned court on September 5 , 2017, at 9:00 a.m., or as soon thereafter as this matter may be heard.

DATED this 31st day of July, 2017.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

This case involves the construction of the Project, which was owned and developed by Gemstone Development West, Inc. ("Gemstone"). Zitting was one of the many sub-contractors hired by APCO to provide material and labor for the Project. After Zitting completed its approved scope of work on two buildings for the Project, but before Zitting received full payment for that work, Gemstone stopped construction on the Project due to its purported loss of financing for the construction.

Although APCO does not dispute the unpaid balance owed for Zitting's work on the Project, APCO has repeatedly refused to pay Zitting that balance. This refusal arises solely from APCO's misplaced reliance on the "pay-if-paid" provisions in the subcontract between APCO and Zitting. Those provisions only require APCO's payment to Zitting when APCO receives actual payment from Gemstone. The provisions relied upon by APCO, however, are void and unenforceable under Nevada law. Therefore, there is no triable issue of APCO's breach of the subcontract, and Zitting is entitled to judgment on its breach of contract claim and claim under Chapter 108 of the Nevada Revised Statutes as a matter of law.

II. STATEMENT OF UNDISPUTED MATERIAL FACTS

On September 6, 2007, Gemstone entered into a written contract with APCO for APCO to serve as the prime contractor for the Project. (Ex. C at ZBCI002103.) About two months later, APCO and Zitting entered into a written subcontract for Zitting to provide framing materials and labor for the Project. (Ex. D at APCO00044592, APCO0044607.) Under the terms of the subcontract, APCO would pay Zitting 90% of the amount owed for satisfactory work completed on a periodic basis. (*Id.* at APCO00044593-APCO00044595.) The remaining 10% of the amount owed to Zitting would be withheld as the "retention amount." (*Id.* at APCO00044595.) APCO would pay Zitting the retention amount for work on a building once the building is "complete." (*Id.*) The subcontract deemed Zitting's work on a building to be "complete" as soon as "drywall [for the building] is completed." (*Id.*) Nevertheless, in the event that APCO's contract with Gemstone is terminated, APCO would pay Zitting the entire amount owed for the work completed. (*Id.* at

APCO00044601.) APCO could only terminate its subcontract with Zitting for cause upon written notice. (*Id.* at APCO00044600.)

Zitting began its work under the subcontract around November 19, 2007, and continued its work until approximately December 15, 2008, when Zitting received notice that the Project was shutting down. (Ex. A (Zitting Decl.) at ¶ 6.) By the time the Project shut down, Zitting completed its contracted work that cost $4,033,654.85, including $423,654.85 in owner-requested change orders that was approved by operation of law. (*Id.* at ¶ 10.) The completed work included Zitting's entire scope of work for Buildings 8 and 9 of the Project. (*Id.* at ¶ 7.) The drywall was completed in those two buildings, and Zitting had submitted close-out documents for its work, including as-built drawings. (*Id.* at ¶¶ 7-8.)

To date, Zitting only received $3,282,849.00 in payment. (*Id.* ¶ 14.) APCO refused to pay Zitting $750,807.16 of the amount remaining owed for Zitting's work completed prior to APCO's departure from the Project, including $347,441.67 in unpaid change orders and $403,365.49 in unpaid retention amount. (*Id.* ¶¶ 12-13, 15; Ex. F at ZBCI002037; Ex. G at ZBCI002032.)

Gemstone had terminated its contract with APCO for cause in August 2008. (Ex. B (Benson Dep.) at 34:7-36:13.) Zitting never received a written notice of termination for cause from APCO. (Ex. A at ¶ 16.)

Zitting took steps to comply with all requirement of Chapter 108 of the Nevada Revised Statutes for the perfection of its lien:

- On January 14, 2008, Zitting served its Notice of Right to Lien to APCO and Gemstone via certified mail. (Ex. J; Ex. U at 9:1-24.)
- On December 4, 2008, Zitting served its Notice of Intent to Lien to APCO and Gemstone via certified mail. (Ex. K; Ex. U at 9:1-24.)
- On December 23, 2008, Zitting recorded its Notice of Lien on the Project and served the document on APCO and Gemstone via certified mail on December 24, 2008. (Ex. L; Ex. U at 9:1-24.)

- On April 30, 2009, Zitting filed its complaint for foreclosure and a Notice of Lis Pendens—approximately five months after recording the notice of lien. (Ex. M; Ex. N; Ex. U at 9:1-24.)
- Around June 16, 2009, Zitting provided a Notice of Foreclosure, and this notice was published in accordance in accordance with Nev. Rev. Stat. 108.239. (Ex. O; Ex. U at 9:1-24.)
- On April 7, 2010, Zitting recorded its Amended Notice of Lien and served the same on APCO and Gemstone via certified mail. (Ex. P; Ex. U at 9:1-24.)

III. STANDARD FOR SUMMARY JUDGMENT

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law" on any issues. Nev. R. Civ. P. 56(b), (c). The purpose of summary judgment is to obviate the need for trials when they would serve no useful purpose. *Short v. Hotel Riviera, Inc.*, 79 Nev. 94, 96, 378 P.2d 979, 980 (1963). Similarly, the United States Supreme Court, citing Nev. R. Civ. P. 56's federal equivalent,[1] has explained that "[s]ummary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the federal rules as a whole, which are designed to secure the just, speedy and inexpensive determination of every action." *Celotex Corp. v. Catrett*, 477 U.S. 317, 327, 106 S. Ct. 2548, 2555 (1986) (internal quotations omitted).

Once the moving party meets its burden of demonstrating an absence of evidence to support the non-moving party's case, the burden shifts to the non-moving party to set forth specific facts demonstrating that there exists a genuine issue of material fact for trial. *Id.* at 325, 106 S. Ct. at 2554. Moreover, the non-moving party must raise factual disputes which are material—defined as those required to prove a basic element of a claim. *Id.* A failure to show that a dispute of material fact exists as to any of the basic elements of the non-moving party's claim effectively "renders all other facts immaterial." *Id.* at 323, 106 S. Ct. at 2552.

[1] The Nevada Supreme Court has adopted the federal standard for summary judgment as Nevada's standard. *See Wood v. Safeway, Inc.*, 121 Nev. 724, 731, 121 P.3d 1026, 1031 (2005).

A "genuine issue of material fact is one where the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Posadas v. City of Reno*, 109 Nev. 448, 452, 851 P.2d 438, 441-42 (1993). But the non-moving party cannot build its case on "gossamer threads of whimsy, speculation and conjecture." *Id.* at 452; *see also Garvey v. Clark County*, 91 Nev. 127, 130, 532 P.2d 269, 271 (1975) (holding that mere allegations are insufficient to defeat summary judgment). Thus, "[a]lthough evidence presented in support of a motion for summary judgment is to be construed in the light most favorable to the nonmoving party, [the non-moving] party must set forth facts demonstrating the existence of a genuine issue in order to withstand a disfavorable summary judgment." *Sustainable Growth Initiative Committee v. Jumpers, LLC*, 122 Nev. 53, 61, 128 P.3d 452, 458 (2006).

IV. ARGUMENT

A. APCO breached its contract with Zitting by refusing to pay the full amount owed for Zitting's work on the Project.

There is no triable issue that APCO breached its contract with Zitting. To establish a breach of contract under Nevada law, there must be (1) the existence of a valid contract, (2) a breach by the defendant, and (3) damage as a result of the breach. *Richardson v. Jones*, 1 Nev. 405, 408 (1865). In this case, all of these elements are present.

1. Zitting had a valid and enforceable contract with APCO from about November 19, 2007 to about December 15, 2008.

The undisputed evidence establishes a contract between APCO and Zitting. Exhibit D is the written subcontract executed by APCO and Zitting on November 17, 2007. (Ex. A at ¶ 5; Ex. D.) Under the subcontract, APCO could only terminate it for cause upon written notice. (Ex. D at APCO00044598-44601.) Prior to the Project's shutdown, Zitting did not receive a written notice for termination of its contract for cause. (Ex. A at ¶ 16.) Although APCO's contract with Gemstone ended around August 2008 and the Project completely shut down in December 2008, (*Id.*; Ex. B at 34:7-36:13, 40:13-15), the subcontract between Zitting and APCO is still valid and enforceable.

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2. APCO's failure to pay the amount owed for Zitting's work on the Project constitutes a breach of contract.

APCO breached its subcontract with Zitting by refusing to pay Zitting all amounts owed under the subcontract. Under the subcontract, Zitting was required to provide framing materials and labor for certain buildings of the Project, and APCO was required to pay Zitting on a periodic basis for satisfactory work. (Ex. D at APCO00044593-APCO00044595, APCO00044607.) Zitting completed its scope of work on two buildings—Buildings 8 and 9 of the Project—without any issues with the timing or quality of the work. (Ex. A. at ¶¶ 7-9; Ex. B at 28:15-29:1.) However, as of today, APCO has not paid Zitting for the work completed on the owner-requested change orders before APCO left the Project and continues to withhold the retention amount. (Ex. A at ¶ 15; Ex. I.)

First, Zitting had requested payment of $347,441.67 for satisfactory work on owner-requested change order completed before APCO left the Project. (Ex. A at ¶ 12; Ex. F.) This arose from Zitting's previous request for change orders from Gemstone and APCO to address owner-requested changes to the plans. (Ex. A at ¶¶ 10-12; Ex. E; Ex. F.) APCO and Gemstone failed to submit a written notice rejecting the change order after Zitting's request for the change orders. (Ex. A at ¶ 11; Ex. H at ZBCI001153.) As APCO must concede, by operation of law, its failure to reject the change order resulted in the approval of the change orders. (*See* Ex. H at ZBCI001153 (discussing Nev. Rev. 624.626).) With statutory approval of the change orders, APCO owed Zitting $347,441.67 for Zitting's completed work on the change orders.

Second, Zitting had requested payment of its retention amount—$403,365.49—for its work on the completed Buildings 8 and 9. (Ex. A at ¶ 13; Ex. G.) Under Zitting's subcontract, Zitting would only receive 90% of the payment for its satisfactory work on the Project. (Ex. D at APCO00044594.) The subcontract called for the payment of the remaining 10%—the retention amount—upon completion of the building for which the work was done. (*Id.* at APCO00044595.) The contract considered work on a building to be "complete" as soon as "drywall [for the building] is completed." (*Id.*)

Before the Project shut down, Zitting provided work that qualified for $4,033,654.85 in payment, and $403,365.49 of that amount was withheld as the retention amount for work on

Buildings 8 and 9 of the Project. (Ex. A at ¶ 10; Ex. G.) However, Zitting completed its scope of work on Buildings 8 and 9 and submitted its closeout documents to APCO. (Ex. A at ¶¶ 7-8.) The drywall was also completed for those buildings. (*Id.* at ¶ 7.) Zitting was therefore entitled to payment of the retention amount because they never received notice that the work done was not satisfactory. To the contrary, Zitting's "satisfactory" work was utilized for the completion of the drywall work. (*See* Ex. A at ¶¶ 5, 7.)

In any event, the termination of APCO's contract with Gemstone entitles Zitting to the payment of the retention amount. The contract was terminated in August 2008, and by that time, Zitting had completed its scope of work on Buildings 8 and 9. (Ex. A at ¶¶ 6-8.) Moreover, Section 9.4 of Zitting's subcontract expressly requires payment for Zitting's completed work on the Project if there was a termination of the contract between Gemstone and APCO. (Ex. D at APCO00044601.) APCO therefore owes Zitting $403,365.49 in retention amount.

3. Zitting has suffered damages due to APCO's refusal to pay the amount owed under the contract.

As a result of APCO's refusal to pay the amount owed for Zitting's work on the Project, Zitting has suffered damages. There is no dispute that $750,807.16 remained unpaid for Zitting's work on the Project prior to APCO's departure from the Project. (Ex. A at ¶¶ 6-15; Ex. I.) APCO has compounded Zitting's damages by forcing Zitting to commence this action to recover the amount owed. Now, the damages suffered include attorney fees, cost, and interest.

4. APCO's attempt to use the "pay-if-paid" provision of its contract with Zitting is disingenuous because it because it violates Nevada law.

APCO relies on the "pay-if-paid" provision in its subcontract with Zitting as the sole basis for refusing the pay the amount owed for Zitting's work on the Project. (Ex. B at 40:16-41:4; Ex. T at 10:14-11:5.) This provision conditions APCO's payments to Zitting only "upon receipt of the actual payments by [APCO] from [Gemstone]." (Ex. D at APCO00044594.) But this provision is void by operation of Nevada law.

Nevada Supreme Court has held that "pay-if-paid" provisions are valid and "enforceable only in [the] limited circumstances" set forth in Nev. Rev. Stat. 624.624 through 624.626. *Lehrer McGovern Bovis v. Bullock Insulation, Inc.* ("*Lehrer II*"), 124 Nev. 1102, 1117 n. 50, 197 P.3d 1032,

1042 n. 50 (2008). This restriction arises from the strong public policy favoring "securing payment for labor and material contractors." *Id.* at 1117, 197 P.3d at 1042. "Because a pay-if-paid provision limits a subcontractor's ability to be paid for work already performed, such a provision impairs the subcontractor's statutory right to place a mechanic's lien on the construction project" and therefore violate public policy. *Id.* at 1117-18, 197 P.3d at 1042.

For a "written agreement with a lower-tiered subcontractor that does not contain a schedule for payments," Nev. Rev. Stat. 624.626 requires the "higher-tiered contractor" to pay the "lower-tiered subcontractor"

> (1) [w]ithin 30 days after the date the lower-tiered subcontractor submits a request for payment; or
>
> (2) [w]ithin 10 days after the date the higher-tiered contractor receives payment for all or a portion of the work, labor, materials, equipment or services described in a request for payment submitted by the lower-tiered subcontractor, ***whichever is earlier***.

Nev. Rev. Stat. 624.626(1)(b) (emphasis added). Any attempts to impair or waive such rights "is void and unenforceable." Nev. Rev. Stat. 624.628(3).

Here, because APCO's "pay-if-paid" provision fails to provide payment within the statutory period after a request for payment, the provision violates Nev. Rev. Stat. 624.624. This Court must therefore void the provision. Contrary to the contractual provision, APCO should have paid Zitting no later than 30 days after Zitting's request for payment. *See* Nev. Rev. Stat. 624.624(1)(b). Since Zitting has yet to receive the payment owed, it is entitled to summary judgment on its breach of contract claim.

B. Zitting is entitled to summary judgment on its claim under Chapter 108 of the Nevada Revised Statutes.

Zitting's claim under Chapter 108 of the Nevada Revised Statutes seeks to foreclose on Zitting's lien against the Property and to recover "reasonable attorney's fees, costs[,] and interest on the unpaid amount owed for Zitting's work on the improvement to the Property. (Ex. M at ¶¶ 28-35.) APCO does not dispute that Zitting complied with all requirements to create, perfect, and foreclose on its lien under Chapter 108. (*See* Ex. Q at 4:19-8:8.) APCO only disputes that the Property subject

to the lien has already been foreclosed upon and therefore Chapter 108 is inapplicable. This argument is misguided and falls short of a comprehensible reading of lien foreclosure law.

This Court previously ordered the sale of the Property, which precludes Zitting from continuing its foreclosure of the Property, and the distribution of the entire proceeds from the sale to Scott Financial Corporation. (*See* Ex. R at 3:18-20, 4:10-19; Ex. S at 2:7-16, 3:1-4.) In other words, Zitting did not receive any of the sale proceeds, so it cannot apply such proceeds towards the amount owed under its contract with APCO. Nevertheless, Nev. Rev. Stat. 108.239(12) allows Zitting to pursue a "personal judgment for the residue against the party legally liable for it." Therefore, Zitting is entitled to a personal judgment against APCO under Chapter 108 for the residual amount owed including those statutory provisions granting attorney fees, costs and interest.

C. Zitting is entitled to judgment against APCO in the amount of the unpaid balance of $750,807.16, interest, attorney's fees, and costs incurred to obtain the amount owed.

This Court should award Zitting the amount owed for its completed work on the Project in the amount of $750,807.16 plus interest, attorney's fees, and costs incurred to obtain the amount owed. Both Zitting's contract and Nevada law allow an award of interest and reasonable attorney's fees and costs in addition to the $750,807.16 in unpaid work. Under the contract, "the prevailing party [in a lawsuit for any cause arising out of the subcontract is] entitled to all costs, attorney's fees[,] and any other reasonable expenses incurred therein." (Ex. D at APCO00044606.) Likewise, Nev. Rev. Stat. 108.237(1) awards the prevailing lien claimant "the cost of preparing and recording the notice of lien" and "the costs of the proceedings," including attorney's fees and interest. Courts calculate the interest based on

> (a) The rate of interest agreed upon in the lien claimant's contract; or
>
> (b) If a rate of interest is not provided in the lien claimant's contract, interest at a rate equal to the prime rate at the largest bank in Nevada, as ascertained by the Commissioner of Financial Institutions, on January 1 or July 1, as the case may be, immediately preceding the date of judgment, plus 4 percent, on the amount of the lien found payable. The rate of interest must be adjusted accordingly on each January 1 and July 1 thereafter until the amount of the lien is paid. Interest is payable from the date on which the payment is found to have been due, as determined by the court.

Nev. Rev. Stat. 108.237(2).

Although Zitting can successfully argue that the amount owed by APCO was due by the time APCO departed the Project, it is indisputable that the full unpaid balance—the lien amount—was due by the Project's shutdown date of December 15, 2008. Consequently, in order to simplify the analysis, Zitting uses this date by which interest is calculated under the statute. Judicial notice is requested of the fact that the prime rate has as determined by the Commissioner of Financial Institutions for the time period from December 15, 2008, to the present to be 3.75%.[2] *See* Nev. Rev. Stat. 47.130, 47,140, 47.170. As such, the rate to be used for the calculation of the applicable interest is 4% plus 7.75% or 7.75%. Based on this rate, the amount of interest accrued per day on the $750,807.16 due to Zitting is $159.31. Additionally, Zitting has incurred attorney's fees and costs. Thus, Zitting hereby requests a judgment against APCO in this amount plus $159.31 per day in interest from December 15, 2008 until the lien is paid as well as all attorney's fees and costs incurred after that date.[3]

V. CONCLUSION

For the foregoing reasons, this Court should grant Zitting's motion in its entirety and enter summary judgment in Zitting's favor on its breach of contract claim and Chapter 108 claim.

DATED this 31st day of July, 2017

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[2] See This Nevada State Bar Website at http://fid.nv.gov/uploadedFiles/fidnvgov/content/Resources/Prime%20Interest%20Rate%20January%201,%202017-PDF.pdf

[3] Zitting requests leave to submit a memorandum of fees and costs if this Court grants summary judgment in favor of Zitting.

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of Wilson Elser Moskowitz Edelman & Dicker LLP, and that on this 31st day of July, 2017, I served a true and correct copy of the foregoing **ZITTING BROTHERS CONSTRUCTION, INC.'S MOTION FOR PARTIAL SUMMARY JUDGMENT AGAINST APCO CONSTRUCTION** document as follows:

☐ by placing same to be deposited for mailing in the United States Mail, in a sealed envelope upon which first class postage was prepaid in Las Vegas, Nevada;

☒ via electronic means by operation of the Court's electronic filing system, upon each party in this case who is registered as an electronic case filing user with the Clerk;

☐ via hand-delivery to the addressees listed below;

☐ via facsimile;

☐ by transmitting via email the document listed above to the email address set forth below on this date before 5:00 p.m.

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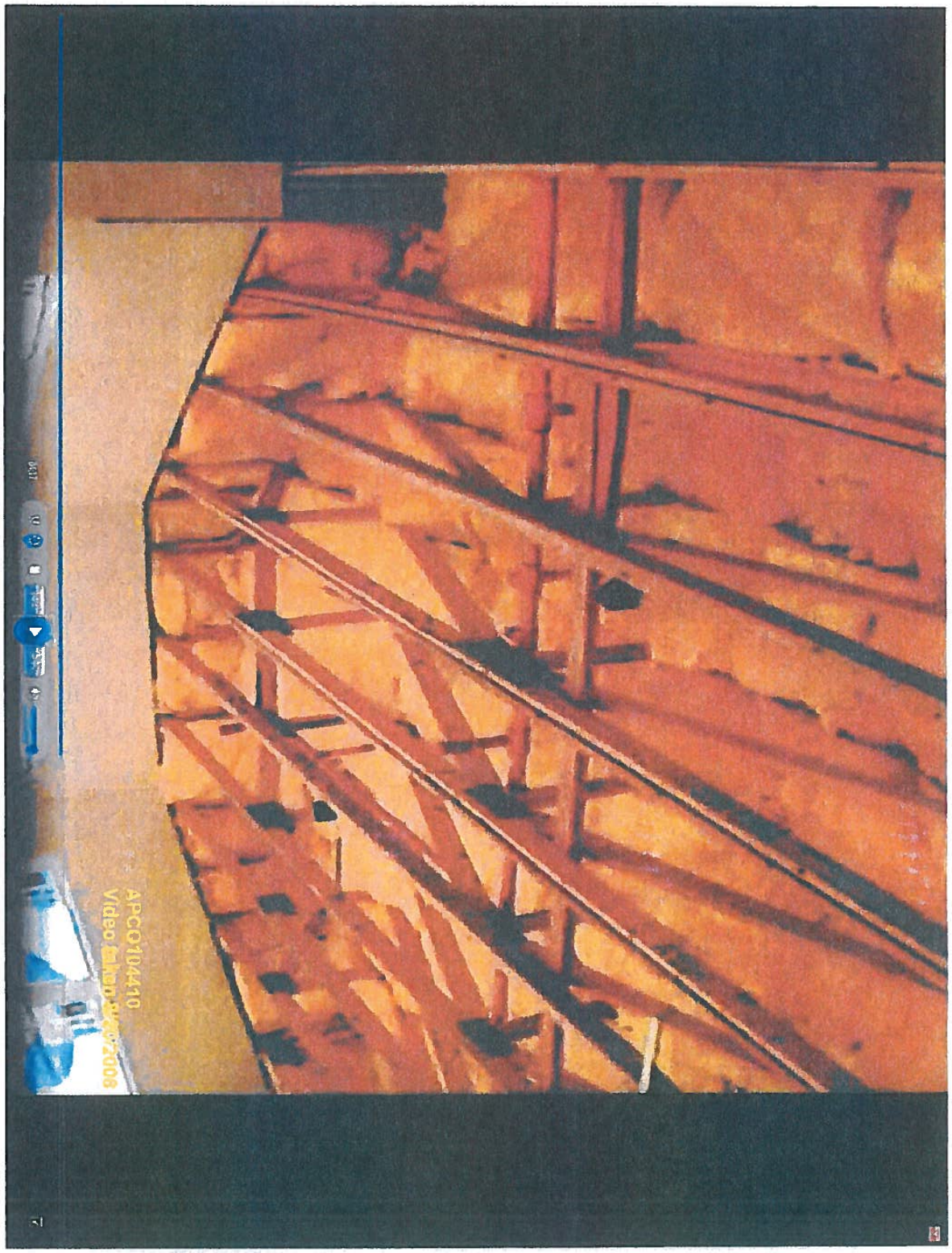
EXHIBIT 11

APCO104410
Video taken 8/20/2008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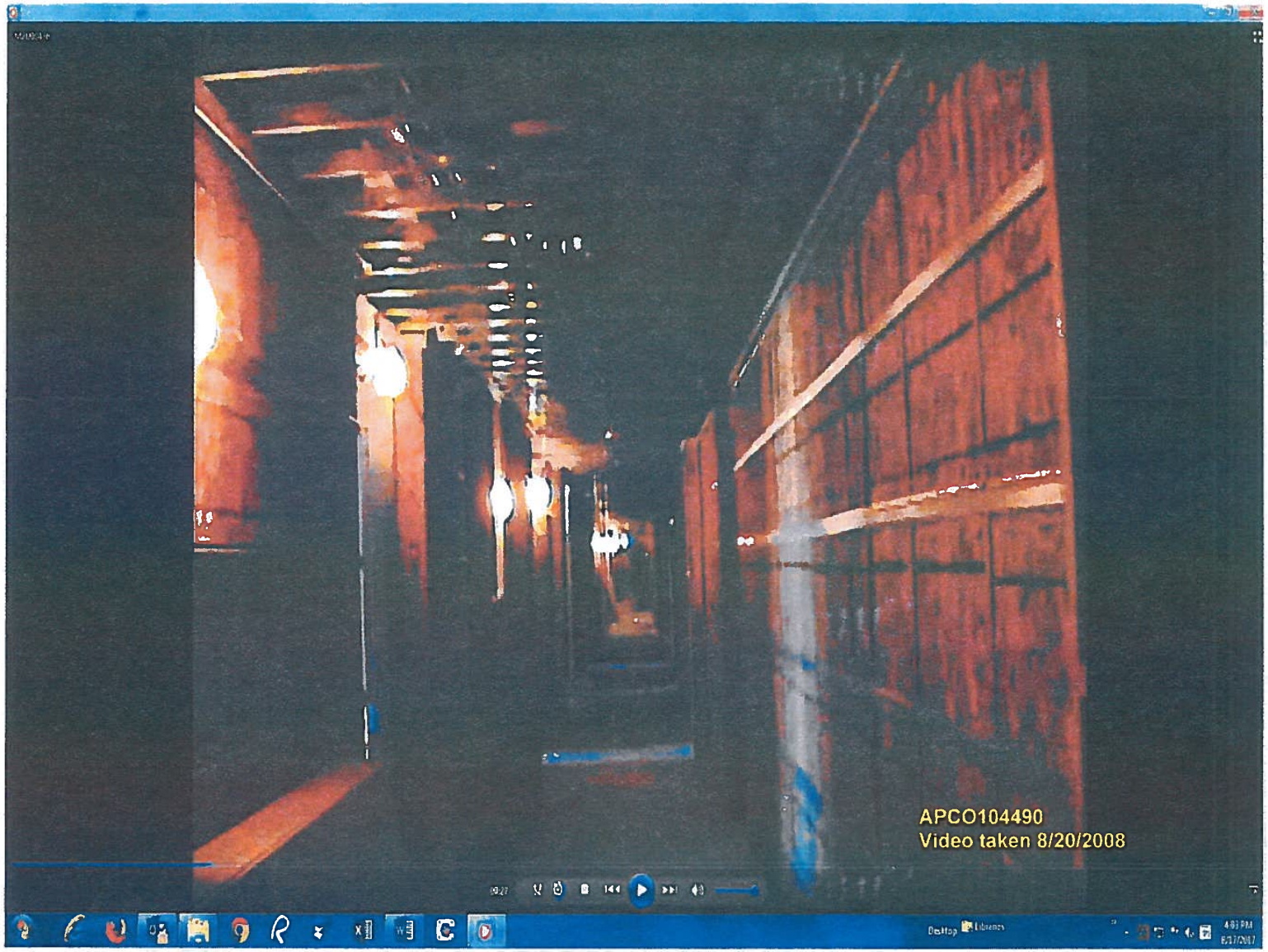
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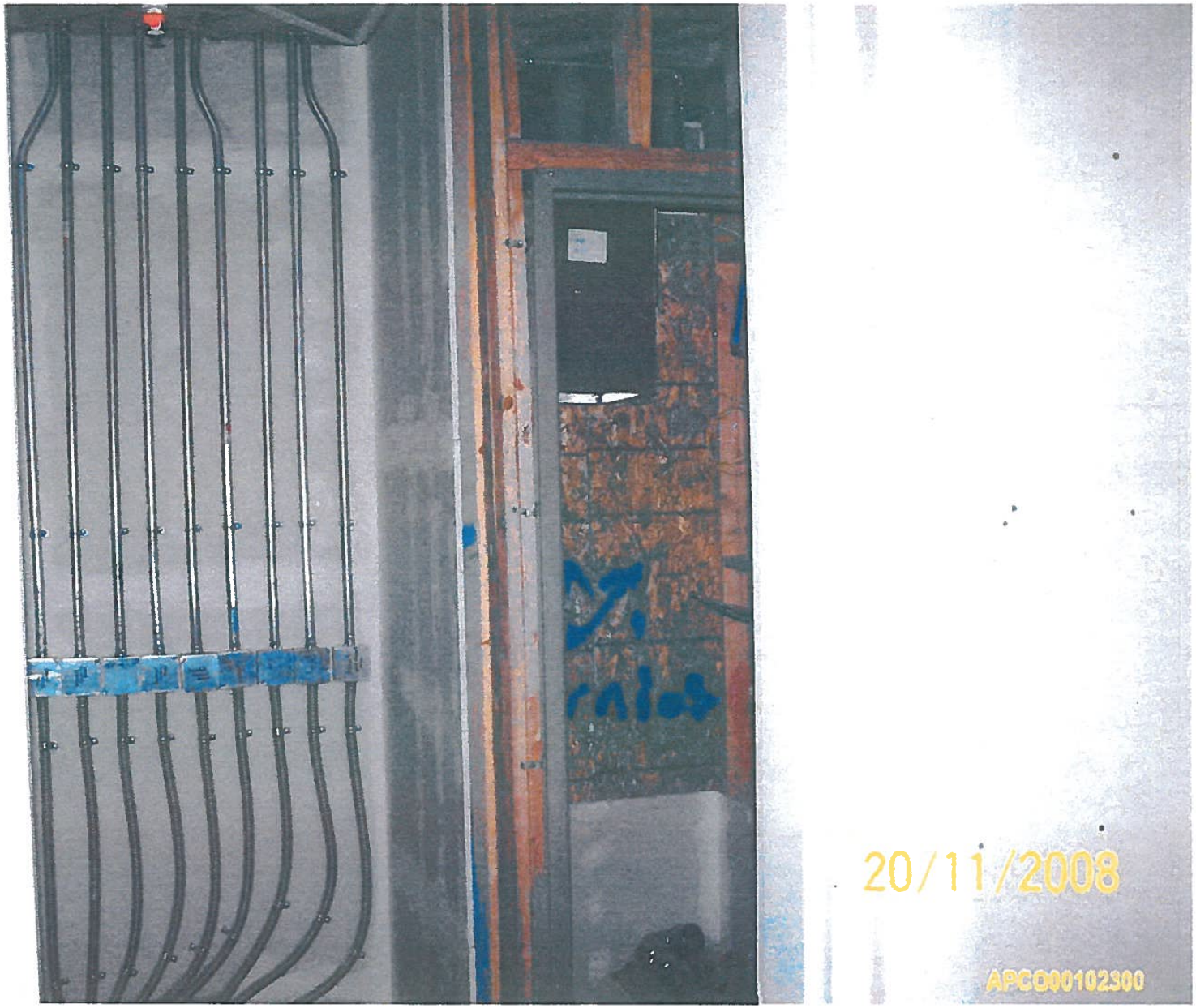

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