

81. Rather, the evidence presented was that the specific cure times were 2 days for the scratch coat and then 7 days for the brown coat (prior to installation of stone). The evidence was that this is consistent with the cure times both recommended by the manufacturer and the requirements of local building code. The evidence was that Big-D imposed quality assurance procedures to ensure that the stone contractor did not install stone work over the Padilla Work until after the 7-day cure time had elapsed.

Any of the foregoing Findings of Fact, that would more appropriately be considered to be Conclusions of Law shall be so deemed.

**From the foregoing Findings of Fact, the Court makes the following:**

## CONCLUSIONS OF LAW

### **I. Padilla's Claims for Relief against Big-D All Fail**

In the operative pleading, Padilla's First Amended Complaint, Padilla has asserted three claims for relief against Big-D: breach of contract (First Cause of Action); breach of the implied covenant of good faith and fair dealing (Second Cause of Action); negligence per se (Third Cause of Action). Padilla has also asserted a single claim for relief against F&D ("Claim against Lien Release Bond").

**A. First Cause of Action (Breach of Subcontract Agreement)**

1. Padilla's First Cause of Action for breach of the Subcontract Agreement fails because Padilla failed to demonstrate an essential element of its claim—that is performed all obligations required under the Subcontract Agreement.

2. In Nevada, there are four elements to a claim for breach of contract: “(1) formation of a valid contract; (2) performance or excuse of performance by the plaintiff; (3) material breach by the defendant; and (4) damages.” *Laguerre v. Nevada System of Higher Education*, 837 F.Supp.2d 1176, 1180 (D. Nev. 2011).

3. “If there is anything well settled, it is that the party who commits the first breach of the contract cannot maintain an action against the other for a subsequent failure to perform.” *Bradley v. Nevada-California-Oregon Railway*, 42 Nev. 411, 421, 178 P. 906, 908

**MARK R. DENTON**  
DISTRICT JUDGE  
DEPARTMENT THIRTEEN  
LAS VEGAS, NV 89155

1 (1919). "Payment of the purchase price is excused where respondent's breach was material."  
2 *Thornton v. Agassiz Constr.*, 106 Nev. 676, 678, 799 P.2d 1106, 1108 (Nev. 1990) (citing 4 A.  
3 Corbin, Corbin on Contracts § 977; *Hinckley v. Pittsburgh Bessemer Steel Co.*, 121 U.S. 264  
4 (1886)).

5 4. As a condition precedent to payment, the Subcontract Agreement  
6 required Padilla to properly complete the Padilla Work in accordance with the contract  
7 documents and in a good and workmanlike manner:

- 8
- 9 • As outlined in "the *drawings and specifications*, including all addenda and  
10 modifications issued prior to the execution of this Subcontract." Trial Exhibit  
11 1, Section 1.1 (emphasis added).
  - 12 • Including "that work generally set forth in the Subcontract, as well as all other  
13 related work, including *all work reasonably necessary for a complete Project*,  
14 and normally performed by your trade." *Id.*, Section 1.2 (emphasis added).
  - 15 • "Every part of [Padilla's] work shall be executed in accordance with the  
16 Subcontract Documents *in a workmanlike and skillful manner*." *Id.*, Section  
17 1.15 (emphasis added).
  - 18 • Padilla also agreed that, "all work shall be done in strict accordance with the  
19 Subcontract Documents, *subject to the final approval of [Big-D], the Owner,*  
20 *and Architect*." *Id.*, Section 1.1.5 (emphasis added).

21 5. Further, even if these express contractual provisions did not exist,  
22 Nevada law is clear that, "[c]ommon law imposes an *implied warranty of workmanlike manner*  
23 [on subcontractors], which has been defined as a duty to perform to a reasonably skillful  
24 standard. *Olson v. Richard*, 120 Nev. 240, 247, 89 P.3d 31, 35 (Nev. 2004). "Moreover,  
25 because contractors and subcontractors understand and accept these duties as a part of their  
26 business, they cannot claim surprise when they are sued for a failure to act in a workmanlike  
27 manner." *Id.*; see also *Daniel, Mann, Johnson & Mendenhall v. Hilton Hotels Corp.*, 98 Nev.  
28 113, 642 P.2d 1086 (Nev. 1982) (upholding instruction to jury that a contractor "had an implied  
duty to perform in a workmanlike manner").

6. The evidence is clear that the Padilla Work on both the interior and the  
exterior of the Project failed for a number of reasons. As a result, Padilla has failed to prove

1 that it properly performed all work under the Subcontract Agreement and its First Claim for  
2 Relief for breach of contract fails as a matter of law.

3 7. Because Big-D succeeded in proving that the Padilla Work did not  
4 comply with the requirements of the Subcontract Agreement or Padilla's implied warranty to  
5 perform in a workmanlike manner, Padilla is deemed to be the party who "first breached" the  
6 Subcontract Agreement, excusing Big-D from performance in the form of payment to Padilla.

7 8. Because IGT rejected the Padilla Work and it was removed and replaced,  
8 neither law nor equity require that Big-D pay Padilla *any* amount for work that was rejected  
9 and removed. As a result, Padilla's claim for payment under the Subcontract Agreement fails  
10 and judgment in favor of Big-D on Padilla's First Claim for Relief for Breach of Contract is  
11 appropriate.

12 9. Padilla contends that Big-D breached the Subcontract Agreement  
13 because Big-D failed to give Padilla written notice and an opportunity to cure prior to rejecting  
14 the Padilla Work. This argument fails for several reasons:

15 a. In the Subcontract Agreement, Padilla agreed to be subject to the  
16 Owner's decisions and actions and that Big-D "shall have all rights, remedies, powers,  
17 and privileges as to, or against You which the Owner has against us." Trial Exhibit 1,  
18 Section 1.1. Big-D, itself, was denied the opportunity to remove and replace the Padilla  
19 Work on the interior of the building. IGT refused to allow Big-D to perform that work  
20 and instead charged Big-D for the costs of such repair.

21 b. It was IGT—the Owner—not Big-D who rejected the Padilla  
22 Work. Big-D, in fact, sought to defend the Padilla Work for some time after IGT's  
23 direction to remove and replace the Work.

24 c. Further, even if the removal and replacement of the Padilla Work  
25 on the exterior of the Project had been at Big-D's own initiative (which it was not), Big-  
26 D had authority to remove and replace the Padilla Work under the emergency provision  
27  
28

1 of Section 3.5 of the Subcontract Agreement because it presented a safety risk given the  
2 large panels of stone installed over the faulty Padilla Work.

3 d. Perhaps most glaringly, any failure of Big-D to allow Padilla an  
4 opportunity to repair the Padilla Work on the exterior of the Project was without  
5 prejudice given that Padilla adamantly refused to participate in the investigation and  
6 remediation process on the interior Padilla Work—demonstrating the Padilla would not  
7 have sought to repair the Padilla Work on the exterior of the building.

8 **B. Second Cause of Action (Breach of Implied Covenant of Good Faith and**  
9 **Fair Dealing)**

10 1. Similarly, Padilla's Second Claim for Relief for breach of the implied  
11 covenant of good faith and fair dealing also fails.

12 2. In Nevada, "[e]very contract imposes upon each party a duty of good  
13 faith and fair dealing in its performance and enforcement." *A.C. Shaw Cont., Inc. v. Washoe*  
14 *Cnty.*, 105 Nev. 913, 914, 784 P.2d 9, 9 (Nev. 1989) (quoting Nevada Revised Statute  
15 ("N.R.S.") 104.1203. This implied covenant requires that parties "act in a manner that is  
16 faithful to the purpose of the contract and the justified expectations of the other party." *Morris*  
17 *v. Bank of Am. Nev.*, 110 Nev. 1274, 1278 n. 2, 886 P.2d 454, 457 n. 2 (Nev. 1994) (internal  
18 quotation marks omitted).

19 3. A breach of the implied covenant of good faith and fair dealing occurs  
20 when the terms of a contract are complied with but one party to the contract deliberately  
21 contravenes the intention of the contract. *See Hilton Hotels v. Butch Lewis Prods.*, 107 Nev.  
22 226, 232, 808 P.2d 919, 923 (Nev. 1991). To prevail on a theory of breach of the covenant of  
23 good faith and fair dealing, a plaintiff must establish: (1) plaintiff and defendants were parties  
24 to a contract; (2) defendants owed a duty of good faith to the plaintiff; (3) defendants breached  
25 that duty by performing in a manner that was unfaithful to the purpose of the contract; and (4)  
26 plaintiff's justified expectations were denied. *Perry v. Jordan*, 111 Nev. 943, 948, 900 P.2d  
27 335, 338 (Nev. 1995).



1                   4.     The Nevada Supreme Court has held that good faith is a question of fact.  
2     *Consolidated Generator-Nevada, Inc. v. Cummins Engine Co., Inc.*, 114 Nev. 1304, 1312, 971  
3     P.2d 1251, 1256 (Nev. 1998).

4                   5.     Padilla failed to present any evidence that Big-D failed to act in good  
5     faith under the Subcontract Agreement. While it is undisputed that Big-D did not pay Padilla  
6     for the rejected work, there is no evidence that this failure was in bad faith. Rather, the  
7     evidence suggested that Big-D did not pay Padilla for the Padilla Work because IGT had  
8     rejected the Padilla Work. Big-D made extensive efforts to both: (a) defend the Padilla Work  
9     and (b) to get Padilla to participate in the process. The evidence indicates that, notwithstanding  
10    the existence of a dispute, Big-D acted in good faith.

11                  6.     As a result, Padilla's Second Claim for Breach of the Implied Covenant  
12    of Good Faith and Fair Dealing in the Subcontract Agreement fails.

13                  C.     Third Cause of Action (Negligence Per Se)

14                  1.     NRS 624.624 is designed to ensure that general subcontractors promptly  
15    pay subcontractors after the general contractor receives payment from the Owner associated  
16    with work performed by the subcontractor.

17                  2.     By its own terms, NRS 624.624 yields to (a) payment schedules  
18    contained in subcontract agreements and (b) contractual rights to withhold payments from a  
19    subcontractor arising from deficient work.

20                  3.     Specifically, NRS 624.624 provides payments are due from a higher-  
21    tiered contractor under "[a] written agreement with a lower-tiered subcontractor that includes a  
22    schedule for payments," as follows:

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

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

28                         ↪ whichever is earlier

                          NRS 624.624(1)(a).

1                   4. Further, a general contractor has the right to withhold payment for  
2 "[c]osts and expenses reasonably necessary to correct or repair any work which is the subject of  
3 the request for payment ..." NRS 624.624(2)(a)(2)(II). NRS 624.624 does require that a  
4 general contractor provide written notice to the subcontractor as to the basis for withholding  
5 "on or before the date the payment is due." *Id.* at (3).

6                   5. Here, it is undisputed that the Subcontract Agreement is a written  
7 agreement between Big-D and Padilla. Accordingly, pursuant to NRS 624.624(1)(a) payment  
8 is due to Padilla on the date specified in the Subcontract Agreement.

9                   a. The Subcontract provided that Padilla was to be paid within ten  
10 (10) days after IGT paid Big-D and after IGT accepted the Padilla Work. Trial Exhibit  
11 1.<sup>3</sup>

12                   b. Specifically, "we must have first received from the Owner the  
13 corresponding periodic payment, *including the approved portion of your monthly*  
14 *billing*, unless the Owner's failure to make payment was caused exclusively by us." *Id.*  
15 , at Section 4.2.

16                   6. The Subcontract Agreement provided as follows:

17                   a. Payment would be withheld from Padilla for "defective work not  
18 remedied" and "your failure to perform any obligation made by You in this  
19 Subcontract." *Id.* at Section 4.4(2) and (5).

20                   b. "We may offset against any sums we owe You the amount of any  
21 money You owe us." *Id.* at Section 4.5.

22                   c. Padilla agreed to "indemnify and save harmless [Big-D]"  
23 associated with claims arising from "the performance of work under this Subcontract or  
24  
25  
26

27 <sup>3</sup> "Contractor will issue payment to Subcontractor by US Mail ... within ten (10) days of receiving payment from  
28 the Owner." Section D.

1 any of the obligations contained in this Subcontract." *Id.* at Section 3.6.

2 7. Here, it is undisputed that IGT never accepted the Padilla Work.  
3 Accordingly, payment to Padilla never became due. In fact, Padilla was aware on September  
4 16, 2009 that IGT had rejected its work and had directed Big-D to remove and replace it work.  
5 Notwithstanding this, Padilla submitted an Application for Payment on September 25, 2009.  
6 Padilla had no reasonable expectation that Big-D would pay the September 25, 2009  
7 application for payment given that Padilla was aware that its work had been rejected and  
8 removed from the Project for failures.

9 8. Even if the payments to Padilla for the rejected Padilla Work had  
10 become due, Big-D provided repeated written notices to Padilla of the failures in the Padilla  
11 Work that complied with the requirements of NRS 624.624 including the following:

12 a. On September 11, 2009, Big-D provided Padilla management  
13 immediate notice of the failures observed in the Padilla Work. Padilla's own project  
14 records also demonstrate that Padilla's crews were aware of the separation issue and  
15 had, themselves, advised Padilla management.

16 b. On September 15, 2009, Big-D provided Padilla additional notice  
17 of the failures and requested that Padilla have the Expo product representative visit the  
18 site to observe the work.

19 c. On September 16, 2009, Padilla was physically on the project site  
20 and involved in the meeting when IGT gave the direction that the Padilla Work on the  
21 exterior of the building was rejected as non-compliant.

22 d. On September 23, 2009, Padilla was on the site with Big-D and  
23 two representatives from the EXPO product manufacturer to test the Padilla Work on  
24 the interior of the building. Padilla was advised that day that the Padilla Work on the  
25 interior of the building was rejected by IGT.  
26  
27  
28

1 e. On September 29, 2009, Padilla participated in a telephone  
2 conference with Big-D representatives in which Padilla committed to provide additional  
3 information to Big-D to defend the Padilla Work.

4 f. In a teleconference between Padilla and Big-D in late October  
5 2009; Big-D advised Padilla that Big-D would not release payment to Padilla until  
6 issues with the Padilla Work had been resolved by IGT. Padilla confirmed that  
7 teleconference conversation in a letter dated October 28, 2009.

8 g. Big-D unequivocally advised Padilla by a letter dated November  
9 3, 2009 that Big-D (i) was requesting Padilla's help to defend the Padilla work and (ii)  
10 was withholding payment from Padilla until the issues with the Padilla Work had been  
11 resolved.

12 9. Padilla's claim under NRS 624.624 is based on the following:

13 a. Padilla submitted its Application for Payment to Big-D on  
14 September 25, 2009.

15 b. Big-D's letter repeating previous conversations regarding  
16 withholding was received on November 3, 2009.

17 c. Padilla is entitled to payment as a matter of law under NRS  
18 624.624 because Big-D's letter formally advising of the withholding was sent 39 days  
19 after Padilla submitted its application for payment.

20 d. Padilla contends that NRS 624.624 imposed a requirement that  
21 written notice of withholding be provided within 30 days and Big-D did not provide  
22 notice until 39 days after submission of the September 25, 2009 Application for  
23 Payment.

24 10. Padilla's argument fails for several reasons:

25 a. First, even if the 30-day requirement for subcontracts without a  
26 written schedule for payments were to apply, it is undisputed that Big-D advised Padilla  
27 within 30-days that the Padilla work was failing or had been rejected. Big-D notified  
28

1 Padilla via several contemporaneous project emails. This correspondence is sufficient  
2 to meet NRS 624.624's mandate to provide written notice of withholding because a  
3 subcontractor has no reasonable expectation of payment for work that it has been  
4 advised is rejected and is to be replaced.

5 b. Second, even if the only written notice that could be considered  
6 for purposes of NRS 624.624's written notice requirement were Big-D's November 3,  
7 2009 letter advising Padilla it would not be paid until the dispute over workmanship had  
8 been resolved, this letter is still sufficient to constitute required written notice to justify  
9 withholding payment.

10 i. The issues with resolving the dispute over the Padilla  
11 Work were ongoing between September 2009 and November 2009—with an  
12 active investigation and dialogue proceeding between Big-D and IGT and Big-D  
13 actively requesting participating and information from Padilla.

14 ii. Big-D formally advised Padilla unequivocally in writing  
15 that it intended to withhold payment 39 days after Padilla's submission of the  
16 Application for Payment.

17 iii. The active dialogue, combined with the November 3,  
18 2009 written notice, constitutes sufficient notice to meet the requirements of  
19 NRS 624.624.

20 11. Notably, even if this Court were to determine that NRS 624.624 did  
21 require payment from Big-D to Padilla associated with the September 25, 2009 Application for  
22 Payment (which it does not determine), the following additional factors would be required to be  
23 considered:

24 a. First, a determination that payment is due pursuant to NRS  
25 624.624 because a contractor's failure to provide timely written notice of withholding to  
26 a subcontractor does not bar the contractor from claiming backcharges or damages  
27  
28

1 against the subcontractor. As a result, Big-D's counterclaim against Padilla would  
2 remain unaffected by Padilla's Third Claim for Relief.

3 b. Second, the evidence indicates that Padilla's September 25, 2009  
4 application for payment failed to credit Big-D for the \$25,000 initial payment to Padilla.  
5 As a result, Big-D would be entitled to an offset of \$25,000 for amounts claimed in the  
6 September 25, 2009.

7 **II. Padilla Claim for Relief Against F&D Fails**

8 Although F&D's renewed Motion for Judgment as a Matter of Law at the close  
9 of the case is not meritorious as to the bases on which it is made insofar as it relates to the  
10 mechanic's lien and bond issues, Padilla's claim for relief against F&D fails because Padilla  
11 has not proved that it is entitled to any additional payment from Big-D (as discussed in Section  
12 II *supra*). In fact, because this Court is awarding damages to Big-D (rather than Padilla), there  
13 are no damages to collect against F&D under the bond.

14 **III. Big-D Is Entitled to a Judgment in the Amount of \$600,000.00 on Its Counterclaim**  
15 **against Padilla**

16 Big-D's First Claim for Relief in its Counterclaim is for Breach of Contract against  
17 Padilla. Big-D asserts that Padilla failed to properly install the Padilla Work and that Big-D  
18 incurred substantial damages associated with removing and replacing the Padilla Work. Based  
19 upon the foregoing Findings of Fact, Big-D succeeded in proving that it is entitled to damages  
20 against Padilla as follows:

21 1. First, the evidence indicates that Padilla failed to install the Padilla Work  
22 in compliance with the Plans and Specifications in several material respects, including: failing  
23 to properly hydrate the stucco product, failing to properly score the scratch coat, failing to  
24 install the brown and scratch coats at the proper thickness, and failing to properly compact the  
25 brown coat against the scratch coat.

1                   2.     The Subcontract Agreement required Padilla to perform the work in  
2 compliance with the plans and specifications and to provide a complete and functional stucco  
3 system.

4                   3.     Given that a material requirement of the Subcontract Agreement was for  
5 Padilla to install the Padilla Work in a good and workmanlike manner and in accordance with  
6 the Plans and Specifications, this failure constitutes a material breach of the Subcontract  
7 Agreement that entitles Big-D to recover damages against Padilla.

8                   4.     Second, even if these express contractual provisions did not exist,  
9 Nevada law is clear that, "[c]ommon law imposes an *implied warranty of workmanlike manner*  
10 [on subcontractors], which has been defined as a duty to perform to a reasonably skillful  
11 standard. *Olson*, 120 Nev. at 247, 89 P.3d at 35. "Moreover, because contractors and  
12 subcontractors understand and accept these duties as a part of their business, they cannot claim  
13 surprise when they are sued for a failure to act in a workmanlike manner." *Id.*; see also *Daniel,*  
14 *Mann, Johnson & Mendenhall*, 98 Nev. 113, 642 P.2d 1086, 1087 (upholding instruction to  
15 jury that a contractor "had an implied duty to perform in a workmanlike manner"). By failing  
16 to provide an acceptable stucco system, Padilla breached the Subcontract Agreement. As a  
17 result, Padilla is not entitled to payment from Big-D for work that was not compliant with the  
18 Subcontract Agreement and was ultimately rejected by the project owner, IGT.

19                  5.     Third, the Subcontract Agreement also required Padilla to "indemnify  
20 and save harmless [Big-D]" associated with claims arising from "the performance of work  
21 under this Subcontract or any of the obligations contained in this Subcontract." Trial Exhibit 1  
22 at Section 3.6.

23                  6.     It is undisputed that Padilla did not pay Big-D any amounts associated  
24 with damage caused by the Padilla Work—constituting a material breach of Padilla's obligation  
25 to indemnify Big-D.

26                  7.     This Court determines that Big-D proved that it was required by IGT to  
27 remove and replace the Padilla Work. Big-D proved that it incurred costs to replace the Padilla  
28

1 Work and to replace other work that was damaged by the Padilla Work, including portions of  
2 stone work.

3 8. Accordingly, this Court determines that Big-D proved it is entitled to  
4 recover damages against Padilla. Because the parties stipulated as to the amount of damages to  
5 be awarded to Big-D if Big-D were to prevail upon its Counterclaim, Big-D is entitled to a  
6 judgment against Padilla in the amount of \$600,000—the stipulated damage figure. *See* Joint  
7 Stipulation as to Damages (filed December 3, 2014).

8 **IV. No Spoliation Instruction Is Appropriate or Required.**

9 No spoliation remedy is appropriate for five independent reasons:

10 1. First, Nevada recognizes an “adverse inference” for negligent destruction  
11 of evidence.

12 a. An “adverse inference” “is permissible, not required, and it does  
13 not shift the burden of proof.” *Bass-Davis v. Davis*, 122 Nev. 442, 448, 134 P.3d 103,  
14 106-07 (Nev. 2006). An “adverse inference” instruction informs a jury that it is  
15 “permitted” to draw an inference that such evidence may have been unfavorable to the  
16 destroying party.

17 b. Here, Padilla, Big-D, and IGT witnesses observed the separation  
18 of the Padilla Work. Contemporaneous photographs capture the separation of the  
19 Padilla Work. Both Big-D and IGT retained expert consultants to test the Padilla Work.  
20 And, finally, there are existing samples remaining of the Padilla Work (without stone  
21 installed over top).

22 As a result, there were several pieces of admissible evidence that this Court observed at trial  
23 and testimony it consider to determine the Padilla Work failed. Even if this Court allowed  
24 itself the “permission” to infer that the portions of the Padilla Work that were discarded may  
25 have contained unfavorable evidence to Big-D, this permissible inference does not counter the  
26 large amount of evidence that the Padilla Work failed.



1                   2.     Second, Padilla is not entitled to a spoliation remedy because it failed to  
2 seasonably request or demand such a remedy. *Cf. Gault v. Nabisco Biscuit Co.*, 184 F.R.D.  
3 620, 622 (D. Nev. 1999) (a party who waits an unreasonable period of time before moving to  
4 enforce discovery waives enforcement remedies). Here, Padilla was notified in September  
5 2009 that IGT had ordered Big-D to remove and replace its work. Further, Padilla initiated this  
6 action in January 2010—at a time when portions of the Padilla Work (without stone) remained  
7 installed at the Project. Discovery in this case closed in July 2012. As a result, Padilla was  
8 provided a meaningful opportunity to participate in any testing and inspections sufficient to  
9 make a spoliation instruction inappropriate.

10                   3.     Third, it is improper to issue a spoliation sanction against Big-D for  
11 removing and destroying the portions of the Padilla Work on which stucco was installed—Big-  
12 D did not have custody and control over the evidence.

13                   a.     Spoliation sanctions are only appropriately issued to a party  
14 “controlling the evidence.” *Bass-Davis*, 122 Nev. at 450. “Obviously, the party  
15 charged with spoliation must have been in the possession, custody, or control of the  
16 evidence in order for the duty to preserve to arise. The party requesting sanctions for  
17 spoliation has the burden of proof on such a claim.” *Hammann v. 800 Ideas, Inc.*, 2010  
18 U.S. Dist. LEXIS 131097 at \*21 (D. Nev. 2010) (denying motion for spoliation related  
19 to records of certain 1-800 numbers when there was no evidence that party was in the  
20 “possession, custody, or control” of relevant documents, even when party had business  
21 relationship with party in control of such documents); *see also Rhodes v. Robinson*, 399  
22 Fed. Appx. 160, 165 (9th Cir. 2010) (discussing required proof that “the party with  
23 control over [evidence] had a duty to preserve it”) (emphasis added).

24                   b.     The evidence was clear that IGT—not Big-D—controlled the  
25 Project site and that Big-D was directed to remove and replace the Padilla Work on an  
26 expedited basis. Padilla was invited to participate in the testing that Big-D did perform  
27  
28

1 and there is no evidence that Big-D excluded Padilla from any available opportunities to  
2 inspect the Padilla Work.

3 4. Finally, and perhaps most compelling, Padilla refused to participate in  
4 testing or investigation to defend the Padilla Work to IGT—even after several requests from  
5 Big-D for Padilla's assistance. In fact, Padilla's representatives were clear that Padilla did not  
6 intend to participate in any such testing or investigation. As a result, it would be improper to  
7 order a spoliation remedy when Padilla did not intend to take additional advantage of additional  
8 inspection opportunities even if they had been available.

9 Any of the foregoing Conclusions of Law that would more appropriately be  
10 considered to be Findings of Fact should be so deemed.

11 NOW, THEREFORE, IT IS HEREBY SO FOUND AND CONCLUDED; and

12 IT IS FURTHER ORDERED that Big D shall have judgment accordingly, the  
13 same to be entered concurrently with the entry hereof.

14 DATED this 22<sup>d</sup> day of January, 2015.


15  
16   
MARK R. DENTON  
DISTRICT JUDGE

17  
18 CERTIFICATE

19 I hereby certify that on or about the date filed, and as a courtesy not comprising formal written  
20 notice of entry, this document was e-served or a copy of this document was placed in the attorney's folder in the  
21 Clerk's Office or mailed to:

22 Bruce R. Mundy, Esq.  
23 200 South Virginia Street, Eighth Floor  
24 Post Office Box 18811  
Reno, NV 89511-0811

25 HOLLAND & HART  
Attn: Melissa A. Beutler, Esq.

26   
27 LORRAINE TASHIRO  
28 Judicial Executive Assistant  
Dept. No. XIII

MARK R. DENTON  
DISTRICT JUDGE  
DEPARTMENT THIRTEEN  
LAS VEGAS, NV 89166

EXHIBIT “2”

EXHIBIT “2”

1 JUDGE

2 DISTRICT COURT

3 CLARK COUNTY, NEVADA

4 PADILLA CONSTRUCTION COMPANY OF  
5 NEVADA, a Nevada corporation,

6 Plaintiff,

7 vs.

8 BIG-D CONSTRUCTION CORP., a Utah  
9 corporation, FIDELITY & DEPOSIT  
10 COMPANY OF MARYLAND, a Maryland  
11 corporation, DOE CORPORATION I through  
12 DOE CORPORATION V, and ROE I through  
13 ROE V individuals;

11 Defendants.

12 BIG-D CONSTRUCTION CORP., a Utah  
13 corporation,

14 Counter-Claimant,

15 vs.

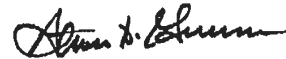
16 PADILLA CONSTRUCTION COMPANY OF  
17 NEVADA, a Nevada corporation,

18 Counter-Defendant.

CASE NO.: A-10-609048-C  
DEPT. NO.: XIII

Electronically Filed  
01/22/2015 02:49:17 PM

JUDGMENT



CLERK OF THE COURT

19 This matter having come on for a trial on the merits beginning on December 2, 2014.  
20 Plaintiff Padilla Construction Company of Nevada ("Padilla"), appearing by and through its  
21 counsel, Bruce Mundy, Esq.; Defendant/Counter-Claimant/Third Party-Plaintiff BIG D  
22 CONSTRUCTION CORP. ("Big-D") and Defendant FIDELITY & DEPOSIT COMPANY OF  
23 MARYLAND ("F&D"), appearing by and through their counsel of record, Melissa A. Beutler,  
24 Esq. of Holland & Hart LLP.

25 The Court having received the testimony of witnesses through examination and cross-  
26 examination by the Parties' counsel, received, reviewed, and considered all admissible  
27  
28

MARK R. DENTON  
DISTRICT JUDGE

DEPARTMENT THIRTEEN  
LAS VEGAS, NV 89156

1 evidence, as well as received, reviewed, and considered the Parties' pleadings and other various  
2 filings;

3 The Court having taken the matter under consideration and advisement;

4 The Court having entered Findings of Fact and Conclusions of Law;

5 The Court enters the following Judgment as to all claims in this matter:

6 IT IS ORDERED, ADJUDGED, AND DECREED that judgment is to be entered in  
7 favor of Big-D and against Padilla on Big-D's First Claim for Relief against Padilla on its  
8 Counterclaim in the principal amount of \$600,000.00 plus any interest, costs, and attorneys'  
9 fees permitted by applicable law or contract requirements, in accordance with, and subject to,  
10 the Joint Stipulation and Order thereon entered herein on December 3, 2014.

11 IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Padilla's Fourth  
12 Claim for Relief against Defendant F&D be, and the same hereby is, DISMISSED WITH  
13 PREJUDICE, and (a) the lien recorded by Padilla on November 12, 2009 (Instrument Number  
14 200911120000338) in the amount of \$164,674.15 is hereby RELEASED AND  
15 DISCHARGED; and (b) the bond issued by Defendant F&D as surety and Big-D as principal  
16 on February 24, 2010 (and recorded as Instrument Number 201002240003862) in the amount of  
17 \$247,011.22 is hereby RELEASED AND DISCHARGED; and

18 IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the following claims  
19 in Padilla's First Amended Complaint be, and the same hereby are, DISMISSED WITH  
20 PREJUDICE:

- 21 a. First Claim for Relief—Breach of Contract  
22 b. Second Claim for Relief—Breach of Implied Covenant of Good Faith  
23 c. Third Claim for Relief—Negligence Per Se  
24 d. Four Claim for Relief— Claim Against Lien Release Bond; and  
25

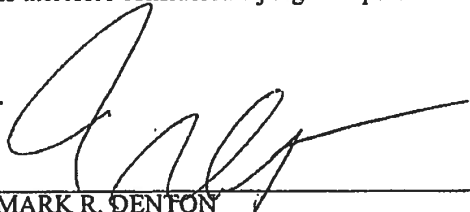
26 .....  
27 .....  
28

**MARK R. DENTON**  
DISTRICT JUDGE

DEPARTMENT THIRTEEN  
LAS VEGAS, NV 89155

1 IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the within Judgment  
2 shall be the Final Judgment in this matter and is therefore considered a judgment pursuant to  
3 NRCP 54.

4 Dated this 22<sup>d</sup> day of January, 2015.

  
MARK R. DENTON  
DISTRICT JUDGE

28  
MARK R. DENTON  
DISTRICT JUDGE

DEPARTMENT THIRTEEN  
LAS VEGAS, NV 89155

# **EXHIBIT 22**

  
CLERK OF THE COURT

**ORDER**

Melissa A. Beutler  
Nevada Bar No. 10948  
**BIG-D CONSTRUCTION CORP.**  
3030 S. Highland Drive  
Las Vegas, Nevada 89101  
Telephone: (702) 474-8233  
Facsimile: (702) 474-8133  
[Melissa.Beutler@big-d.com](mailto:Melissa.Beutler@big-d.com)

Philip J. Dabney, Esq.  
Nevada Bar No. 3391  
Nicole Lovelock, Esq.  
Nevada Bar No. 11187  
Holland & Hart LLP  
9555 Hillwood Drive, Ste. 200  
Las Vegas, Nevada 89134  
Telephone: (702) 222-2500  
[pjdabney@hollandhart.com](mailto:pjdabney@hollandhart.com)  
[nelovelock@hollandhart.com](mailto:nelovelock@hollandhart.com)

*Attorneys for Defendant/Counter-Claimant,  
Big-D Construction Corp.*

**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

**PADILLA CONSTRUCTION COMPANY OF  
NEVADA, a Nevada corporation,**

**Plaintiff,**

**vs.**

**BIG-D CONSTRUCTION CORP., a Utah  
corporation, FIDELITY & DEPOSIT  
COMPANY OF MARYLAND, a Maryland  
corporation, DOE CORPORATION I through  
DOE CORPORATION V, and ROE I through  
ROE V individuals,**

**Defendants.**

**BIG-D CONSTRUCTION CORP., a Utah  
corporation,**

**Counter-Claimant,**

Case No. A-10-609048-C

Dept.: XIII

**ORDER**

**Hearing Date: May 26, 2015  
Hearing Time: 9:00 a.m.**

RECEIVED

JUL 01 2015

STRICT COURT DEPT# 13



1 vs.

2 PADILLA CONSTRUCTION COMPANY OF  
3 NEVADA, a Nevada corporation,

4 Counter-Defendant.  
5  
6  
7  
8  
9

10 Defendant/Counterclaimant BIG-D CONSTRUCTION CORP.'s Motion for Attorneys'  
11 Fees, Costs, and Interest Pursuant to Judgment and to Amend Judgment came before this court  
12 for hearing on May 26, 2015.

13 On March 6, 2015, Big-D filed a Motion for Attorneys' Fees, Costs, and Interest  
14 Pursuant to Judgment and to Amend Judgment in the amount of \$1,234,678.55. This Motion  
15 sought to Amend the Judgment in the following amounts plus post-judgment interest on those  
16 amounts:

17

Category	Amount
Attorneys Fees	\$383,399.00
Expert Fees	\$38,882.34
Bond Fees	\$24,700.00
Other Costs	\$6,344.99
Pre-Judgment Interest	\$164,921.92

22

23 On its Reply on May 18, 2015, Big-D voluntarily removed its claim for Pre-Judgment Interest  
24 in response to Padilla's Opposition.

25 Defendant/Counterclaimant BIG-D CONSTRUCTION CORP. was present by and  
26 through its counsel of record, Melissa A. Beutler, Esq. Plaintiff/Counterclaimant PADILLA  
27

1 CONSTRUCTION COMPANY OF NEVADA was present telephonically by and through its  
2 counsel of record, Bruce R. Mundy, Esq. The Court, having fully considered the Motion, the  
3 papers on file therein, hearing oral argument, and for good cause appearing, enters the  
4 following: *having rendered its Decision filed June 16, 2015.*

5 IT IS HEREBY ORDERED THAT Big-D Construction Corp.'s Motion for Attorneys'  
6 Fees, Costs, and Interest Pursuant to Judgment and to Amend Judgment is Granted IN PART  
7 and Denied IN PART.

8 IT IS HEREBY FURTHER ORDERED THAT Big-D Corp.'s Motion for bond fees is  
9 <sup>2</sup>GRANTED and Big-D is awarded bond fees in the amount of \$24,700.00.

10 IT IS HEREBY FURTHER ORDERED THAT Big-D Corp.'s Motion for costs to  
11 depose Padilla's expert is GRANTED and Big-D is awarded costs to depose Padilla's expert in  
12 the amount of \$2,730.00.

13 IT IS HEREBY FURTHER ORDERED THAT Big-D Corp.'s Motion to recover costs  
14 incurred to maintain samples is GRANTED and Big-D is awarded costs to maintain the  
15 samples in the amount of \$ 3,614.99.

16 IT IS HEREBY FUTHER ORDERED that Big-D Corp.'s Motion for expert fees is  
17 DENIED IN PART.

18 IT IS HEREBY FURTHER ORDERED that Big-D Corp.'s Motion for attorney's fees  
19 are recoverable in whole and Big-D is awarded attorneys fees in the amount of \$383,399.00.

20 In summary, the following additional amounts are awarded to Big-D in this ORDER:

21

Category	Amount
Attorneys Fees	\$383,399.00
Fees to Depose Padilla's Expert	\$2,730.00 (fn. 1)
Bond Fees	\$24,700.00 (fn. 2)
Storage of Stucco	\$3,614.99 (fn. 3)

22  
23  
24  
25

26 <sup>1</sup> The supporting documentation for this cost was included as Exhibit B (at July 31, 2012) to the Motion.

27 <sup>2</sup> This supporting documentation for this cost was included as Exhibit C to the Motion.



# **EXHIBIT 23**

Case Nos. 67397 & 68683

---

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

---

Electronically Filed  
Jan 29 2016 11:30 a.m.  
Tracie K. Lindeman  
Clerk of Supreme Court

PADILLA CONSTRUCTION COMPANY OF NEVADA,  
A NEVADA CORPORATION,

Appellant,

vs.

BIG-D CONSTRUCTION CORP., A UTAH CORPORATION,

Respondent.

---

APPEAL FROM  
THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA  
IN AND FOR THE COUNTY OF CLARK

THE HONORABLE MARK R. DENTON, DISTRICT COURT JUDGE

A-10-609048-C

---

APPELLANT'S OPENING BRIEF

---

Bruce R. Mundy, NSB #6068  
200 South Virginia Street, Eighth Floor  
Post Office Box 18811  
Reno, Nevada 89511-0811  
reno-attorney@sbcglobal.net  
(775) 851-4228

Attorney for the Appellant

### **Rule 26.1 Disclosure**

Pursuant to NRAP 26.1, the undersigned counsel certifies that Appellant, Padilla Construction Company of Nevada, is a Nevada corporation in good standing, no parent company nor any publicly held company owns any interest in the corporation, and is and has been exclusively represented in this matter by Bruce R. Mundy, Nevada State Bar number 6068, a sole practitioner.

## Table of Contents

Rule 26.1 Disclosure .....	i
Table of Contents .....	ii
Table of Authorities .....	iii
Jurisdictional Statement .....	1
Routing Statement .....	1
Statement of Issues for Review .....	1
Statement of the Case .....	1
Statement of Facts .....	2
Summary of the Argument .....	4
Argument .....	4
I.    STANDARD OF REVIEW FOR FINDINGS AND CONCLUSIONS OF LAW .....	4
II.   BIG-D FAILED TO CARRY ITS BURDEN OF PROOF .....	4
III.  NO EVIDENCE PADILLA CAUSED DAMAGES .....	5
III.A. CURE TIMES NEVER SETTLED .....	7
III.B. BIG-D NEVER TESTED FAILED STUCCO FOR CAUSATION .....	9
III.C. CHIN'S TESTS WHILE CONSULTANT TO IGT .....	9
IV   BIG-D'S STOP PAYMENT OF CHECK BREACHED THE SUBCONTRACT .....	11
V.   BIG-D'S FAILURE TO PROVIDE PADILLA NOTICE OF DEFAULT .....	15
AND OPPORTUNITY TO CURE WAS ANOTHER BREACH .....	15
VI.  BIG-D VIOLATED NEVADA LAW .....	19
WITHOLDING PAYMENT TO PADILLA .....	19
VII. NO DUTY FOR PADILLA TO INDEMNIFY .....	23
VIII. PADILLA'S CLAIM AGAINST F&D .....	23
CONTINGENT ON AWARD OF DAMAGES .....	23
IX.  PADILLA ENTITLED TO SPOILIATION INSTRUCTION .....	23
X.   BIG-D NOT ENTITLED TO JUDGMENT .....	25
IN THE AMOUNT OF \$600,000.00 .....	25
XI.  BIG-D NOT ENTITLED TO ATTORNEY'S FEES, COSTS, INTEREST .....	27
XII. CONCLUSION .....	28
NRAP 28.2 Attorney's Certificate/NRAP 32(8)(A) .....	28

## **TABLE OF AUTHORITIES**

### **Cases**

<i>A.F. Constr. Co. v. Virgin River Casino</i> , 118 Nev. 699, 703, 56 P.3d 887 (2002).....	24
<i>Bass-Davis v. Davis</i> , 122 Nev. 442, 450, 134 P.3d 103 (2006).....	29
<i>Brown v. State</i> , 107 Nev. 164, 166, 807 P.2d 1379 (1991).....	10
<i>Canfora v. Coast Hotels &amp; Casinos, Inc.</i> , 121 Nev. 771, 776, 121 P.3d 599 (2005).....	23
<i>Clark Cty. Sch. Dist. V Richardson Constr.</i> , 123 Nev. 383, 396, 168 P.3d 87 (2007).....	10
<i>Clark Cty. Sch. Dist. V Richardson Constr.</i> , 123 Nev. 383, 396, 168 P.3d 87 (2007).....	17
<i>Cook v. Sunrise Hospital &amp; Medical Center</i> , 124 Nev. 997, 1004, 194 P.3d 1214 (2008).....	9
<i>Grosjean v. Imperial Palace</i> , 125 Nev. 349, 359, 212 P.3d 1067 (2009).....	9
<i>Hilton Hotels v. Butch Lewis Productions</i> , 107 Nev. 226, 234 808 P.2d 919 (1991).....	21
<i>Landreth v. Malik</i> , 127 Nev. Adv. Op., No. 16, pg. 4 (2011).....	33
<i>Lehrer McGovern Bovis v. Bullock Insulation</i> , 124 Nev. 1102, 1117-1118, 197 P.3d 1032 (2008).....	26
<i>Nassiri and Johnson v. Chiropractic Physicians' Board</i> , 130 Nev. Adv. Op., No. 27, pg. 4 (2014).....	10
<i>Nevada Dept. of Corrections v. York Claims Services</i> , 131 Nev. Adv. Op., No. 25, pg. 7 (2015).....	24
<i>Pink v. Busch</i> , 100 Nev. 684, 688, 691 P.2d 456 (1984).....	9
<i>Stoll v. Gottlieb</i> , 305 U.S. 165 (1938).....	33
<i>The Power Company v. Henry</i> , 130 Nev. Adv. Op., No. 21, pgs. 6-7 (2014).....	32
<i>Vega v. E. Courtyard Associates</i> , 117 Nev. 436, 440, 24 P.3d 219 (2001).....	24

### **Statutes**

Nevada Revised Statute 624.624 .....	23
NRS 624.624.....	passim
NRS 624.624(1)(a).....	24
NRS 624.624(1)(b) .....	24
NRS 624.624(2) .....	25
NRS 624.624(3)(a), (b), (c).....	25
NRS 624.624(4) .....	26
NRS 624.624(4)(b) .....	26

### **Other Authorities**

<i>Nevada Jury Instructions</i> , (2011) Instruction 13CN.1 .....	9, 16
---	-------

### **Rules**

NRAP 26.1 .....	2
NRAP 28(e)(1).....	34
NRAP 28.2.....	34
NRAP 32(8)(A).....	34
NRAP 32(a)(4).....	34
NRAP 32(a)(5).....	34
NRAP 32(a)(6).....	34
NRAP 32(a)(7).....	34
NRAP 32(a)(7)(C) .....	34
NRAP 3A(b)(1).....	6



### **Jurisdictional Statement**

This Court has jurisdiction pursuant to NRAP 3A(b)(1): “A final judgment entered in an action of proceeding commenced in the court in which the judgment is rendered.” The Judgments appealed from include the district court’s Findings of Fact and Conclusions of Law (JA Vol. VII., pg. 813) and Order Granting Attorneys’ Fees, Costs and Interest (JA Vol. VII., pg. 905).

### **Routing Statement**

This appeal is presumptively retained by the Supreme Court because it is an Appeal of a Judgment issued by the business court, Department XIII of the District Court, Clark County, Nevada and Appellant believes an issue involved in the Appeal raises a question of first impression involving the US Bankruptcy Court: Whether a state court has subject matter jurisdiction to award judgment in excess of the Bankruptcy Court’s Chapter 11 approved claim amount.

### **Statement of Issues for Review**

1. Whether Respondent met its burden to prove-up causation in a breach of contract matter?
2. Whether Respondent violated Nevada law, NRS 624.624, for failure to provide the requisite notice prior to withholding payment to Appellant?
3. Whether district court had subject matter jurisdiction to award Judgment in an amount in excess of the Bankruptcy Court Chapter 11 approved claim?

### **Statement of the Case**

The Appellant filed its First Amended Complaint March 9, 2010. Amended, solely to drop a Defendant, the construction project owner, after Respondent construction company posted a bond in lieu of the Appellant’s mechanics’ and materialmen’s Lien. The Complaint alleges Breach of Contract, Breach of Implied

Covenant of Good Faith and Fair Dealing, Negligence per se and a Claim against the lien release bond. The Respondent filed its Answer and Counterclaim April 8, 2010 citing claims for Breach of Contract and Negligence. The Respondent stipulated to dismiss its negligence claim and the district court entered Stipulation and Order to Dismiss August 10, 2015. The case proceeded to a bench trial December 2 & 3, 2014. The court entered its Findings of Facts and Conclusions of Law and Judgment January 22, 2015 for the Respondent in the amount of \$600,000.00. Subsequently, Respondent filed a Motion for Attorneys' Fees, Costs and Interest, which was granted July 22, 2015 in the amount of \$414,433.99 plus interest in the amount of \$59.61 per day starting January 22, 2015.

#### **Statement of Facts**

Respondent Big-D Construction Corp. ("Big-D") entered into a construction agreement to build a facility for IGT in Las Vegas, which included a stone façade glued to stucco both on the exterior of the building as well as some parts of the interior. Shortly after the job was finished and IGT occupied the building, stones fell off the exterior façade. IGT's consultant, Ian Chin, a Nevada licensed Architect and Structural Engineer, and Big-D investigated the falling stones and found deficiencies in the adhesive used to bond the stone to the stucco. It was further determined that the stones and underlying stucco needed to be removed and replaced. In preparation for the second stone installation, Big-D entered into a Subcontract in September<sup>1</sup> of 2009 with Appellant, Padilla Construction Company of Nevada ("Padilla").

The second stone installation project commenced with Padilla installing the stucco on the exterior and interior walls where stone panels would be glued. In mid-September, during the stone adhesion coverage process, when stones were pulled

---

<sup>1</sup> Trial Exhibit, JA Vol. 1, pg. 91

back to check the adhesive coverage, there were several events<sup>2</sup> when the stone pulled the second (brown) coat of the stucco from the first (scratch) coat. Padilla's theory of the cause of the separations was Big-D's scheduling of the stone installation did not allow its stucco to properly dry (cure)<sup>3</sup>. At that time, Big-D did not have a theory of cause.<sup>4</sup> After inspections and conferences between IGT and Big-D, it was decided to substitute a prefabricated cement board that was better suited to the stone adhesive coverage pulling and did not require a cure time.<sup>5</sup> Padilla left the job and submitted its Payment Request, which was approved<sup>6</sup>, and Big-D issued a check in payment only to stop payment due to unresolved disputes<sup>7</sup> with Padilla.

Big-D retained the services of IGT's former consultant, Ian Chin, after the conclusion of his relationship with IGT. In the absence of a settlement of the dispute between Big-D and Padilla, Padilla filed a Complaint<sup>8</sup> March 9, 2010 alleging claims for Breach of Contract, Breach of Implied Covenant of Good Faith and Fair Dealing, Negligence per se and a Claim against the lien release bond. Big-D responded with an Answer and Counterclaim<sup>9</sup> April 8, 2010 citing claims for Breach of Contract and Negligence. Big-D stipulated to dismiss its negligence claim and the district court entered Stipulation and Order to Dismiss August 10, 2015. The case proceeded to a bench trial December 2 & 3, 2014. The district court entered its Findings of Facts and Conclusions of Law and Judgment<sup>10</sup> January 22, 2015 for the Respondent in the amount of \$600,000.00. Subsequently, Respondent filed a Motion for Attorneys' Fees, Costs and Interest, which was granted<sup>11</sup> July 22, 2015 in the amount of

---

<sup>2</sup> Trial Exhibit, JA Vol. 3, pg. 261

<sup>3</sup> Lopez depo, JA Vol. V., pg. 411, lines 10-25

<sup>4</sup> TSRCP 1, JA Vol. V., pg. 469, lines 10-23.

<sup>5</sup> Lopez depo, JA Vol. V., pg. 413, lines 17-21

<sup>6</sup> TEXH 9, JA Vol. II., pg. 215

<sup>7</sup> TEXH 61, JA Vol. III., pg. 281

<sup>8</sup> Complaint, JA Vol. 1, pg. 1

<sup>9</sup> Answer and Counterclaim, JA Vol. 1, pg. 10.

<sup>10</sup> FF&CL, Judgment, JA Vol. 7, pg. 813

<sup>11</sup> Order, JA Vol. 7, pg. 905

\$414,433.99 plus interest in the amount of \$59.61 per day starting January 22, 2015.

### **Summary of the Argument**

Respondent failed to meet its burden to prove causation by a preponderance of evidence; that a Padilla commission or omission caused the complained of separations of its stucco. Appellant also argues Respondent's withholding payment to Padilla, when at the same time admitting it did not know what caused the separations, was a breach of the Subcontract as well as Nevada law, NRS 624.624. In addition, Appellant argues the district court awarded judgment and attorneys' fees, costs and interest in violation of the parties' Stipulation and in excess of the Bankruptcy Court's Chapter 11 allowed claim

### **Argument**

#### **I. STANDARD OF REVIEW FOR FINDINGS AND CONCLUSIONS OF LAW**

The district court's factual findings will be upheld if not clearly erroneous, and if supported, by substantial evidence. *Ogawa v. Ogawa*, 125 Nev. 660, 668, 231 P.3d 699 (2009). In the absence of evidence to support the trial court's findings, they are clearly erroneous. *Pink v. Busch*, 100 Nev. 684, 688, 691 P.2d 456 (1984). This Court has defined substantial evidence as evidence that a reasonable mind might accept as adequate to support a conclusion. *Cook v. Sunrise Hospital & Medical Center*, 124 Nev. 997, 1004, 194 P.3d 1214 (2008). The Court reviews conclusions of law de novo. *Grosjean v. Imperial Palace*, 125 Nev. 349, 359, 212 P.3d 1067 (2009).

#### **II. BIG-D FAILED TO CARRY ITS BURDEN OF PROOF**

As the Counterclaimant, it is Big-D's duty to present evidence and argument to prove its allegation that Padilla Construction breached the Subcontract. *Nassiri and Johnson v. Chiropractic Physicians' Board*, 130 Nev. Adv. Op., No. 27, pg. 4

(2014). The standard for Big-D's proof is the general civil standard: a preponderance-of-the-evidence. *Id.* at pg. 6. A preponderance of evidence is not a measurement of the greatest number of witnesses, instead, it's the persuasive weight of evidence to lead a trier of fact to find the existence of the contested fact is more probable than its nonexistence. *Brown v. State*, 107 Nev. 164, 166, 807 P.2d 1379 (1991).

The proof elements for a breach of contract claim are: (1) The existence of an enforceable agreement between the parties; (2) Plaintiff/Counter-claimant's performance; (3) Defendant/Counter-defendant's unjustified or unexcused failure to perform; and (4) Damages resulting from the unjustified or unexcused failure to perform. *Nevada Jury Instructions*, (2011) Instruction 13CN.1. A breach of contract claim for damages requires a failure to perform that is material; that the failure to perform defeats the purpose of the contract. *Id.* at Instruction 13CN.42. Integral to the proof of damages is proximate cause, causation: "That is if the damage of which the promisee [Big-D] complains would not have been avoided by the promisor's [Padilla Construction] not breaking [its] promise, the breach cannot give rise to damages." *Clark Cty. Sch. Dist. V Richardson Constr.*, 123 Nev. 383, 396, 168 P.3d 87 (2007). The existence of a valid agreement between the parties was never in dispute. Trial Exhibit<sup>12</sup> (TEXH") 1, Subcontract JA Vol. I. pg. 91.

### **III. NO EVIDENCE PADILLA CAUSED DAMAGES**

The complained of damages arise from the separation of the second (brown) coat of stucco from the first (scratch) coat during the process to check for proper stone adhesive coverage when an installed stone was pulled back from the brown coat to visually check the adhesive coverage. Padilla does not dispute the separations occurred and were observed by everyone involved with the IGT stone project.

What is not known, and the primary focus of the trial, is the causation of the

---

<sup>12</sup> As stipulated by the parties, Trial Exhibits 1-91 were admitted, JA Vol. V, pg. 456, L 9-24.

separations. Between the parties, there was no dispute the trial was about causation: (1) “the reason we are here today is why did the separations occur” (Padilla Opening, Trial Transcript Day 1 (“TSRCP 1”, JA Vol. V., pg. 440, lines 24-25); (2) “as Mr. Mundy [Padilla trial counsel] characterized this is, frankly, a trial related to causation” (Big-D Opening, TSRCP 1, JA Vol. V., pg. 445, lines 4-5); and (3) the court, “is that [trial related to causation] correct” directed to Mr. Mundy, “That is correct”, the court “All right. The record will so reflect.” TSRCP 1, JA Vol. V., pg. 445, lines 6-11.

It is Padilla’s position the separations were caused by the premature installation of the stone on the stucco before it was fully dry (cured). TSRCP 1, JA Vol. V., pg. 440, line 25 – pg. 441, line 4. According to EXPO, the stucco mix supplier to this job, “Proper curing is essential” and “Proper curing is important especially in hot or windy conditions.” It’s not unduly speculative to imagine the Las Vegas jobsite as hot, and maybe even windy in September. TEXH 26, JA Vol. II., pg. 111, CURING heading). Each stone panel measured four feet wide and thirty inches high and weighed close to forty pounds. TSRCP 1, JA Vol. VI., 597, lines 3-9. Padilla’s analogy was the cause of the separations was no different than the damage caused by parking your car on your new concrete driveway before it fully dried (cured). TSRCP 1, JA Vol. V., pg. 441, lines 2-4. According to Chin, in answer to the question of what the Architect’s plan instruction to determine the most effective procedures for curing and lapse time between coats based on climatic and job conditions, meant:

It means that it’s important to make sure that, first of all, the scratch coat is – has sufficient cure time before you apply the brown coat to it. It’s also – and it talks about making sure that the brown coat has sufficient cure time – as well as the other times involved before you apply anything to it.

So this is very important because you want to make sure that the strength of the materials are up to the point where

you can apply materials to it without causing any damage to the [stucco] system. TSRCP 2, JA Vol. VI., pg. 682, line 22 – pg. 683, line 6.

### **III. A. CURE TIMES NEVER SETTLED**

As will be evident, cure times were far from settled and an ongoing controversy. Chin testified that according to the project specifications, the parties responsible for specifying the cure time included the “contractor, the subcontractor, and the [stucco] materials supplier . . .” TSRCP 2, JA Vol. VI., pg. 29, lines 7 – 13. Lopez, Chief Operating Officer for Padilla Construction Company of Nevada, who worked in the lath and plastering business (stucco) all his adult life including 13 years with Padilla, (Lopez depo, JA Vol. V., pg. 415, lines 1-3, pg. 410, line 21), testified he told Brinkerhoff the brown coat needed to cure 28 days before installing the stone on it. Lopez depo, Vol. V., pg. 416, lines 19-25, pg. 417, lines 1 – 4. After Lopez observed some of the separations, Brinkerhoff testified Lopez’s only response was “the product should have cured for 30 days before the stone was allowed to be installed on it.” TSRCP 1, Vol. V., pg. 593, lines 22-24.

Chin, in his role as an IGT consultant (TSRCP 2, JA Vol. VI., pg. 742, line 20), informed IGT’s counsel, Ferrario, that the scratch coat should cure one day and the brown coat twenty-one days, unless the stucco mix was mixed with latex, then it would require seven to fourteen days. (T Exh 38-1) Chin testified at trial he didn’t believe latex was used in the stucco mix. (TSRCP 2, JA Vol. VI., pg. 741, line 3) Then, IGT’s counsel Ferrario reports “The stucco cure issue continues to evolve. Right now we are operating under a 2 day scratch 7 day brown cure. This is consistent with the county requirements” (verified as minimum intervals, cure time, between plaster coats in the Clark County Building Code, (TEXH 450<sup>13</sup>, JA Vol. V. pg. 400, Table 2512.6) and asks for Chin’s thoughts. TEXH 38, JA Vol. III, pg. 259 Ferrario 09/04/09 email. In response, Chin agrees the seven day cure is consistent

---

<sup>13</sup> Admitted, JA Vol., VII, pg. 784, line 2.

with the low published cure time he has reviewed so he doesn't think that it can be shortened; however, he notes that while the two day cure for the scratch coat is consistent with the high published time he has reviewed, he thinks there is a possibility to lower the scratch cure time to one day with a stucco subcontractor inspection after one day to determine if its rigid enough to install the brown coat. TEXH 38, JA Vol. III., pg. 259, Chin 09/04/09 email.

Meanwhile, Brinkerhoff, advised IGT's Stecker on August 28<sup>th</sup>: (1) "[s]tone installation on Wednesday is contingent on 48 hours cure time" (TEXH 400<sup>14</sup>, JA Vol. IV., pg. 368, paragraph four) and in the same paragraph advises he has sent the approved plaster product (EXPO MX3) data to ABB Engineers, PSI Engineering, and the product manufacturer (EXPO) for cure time recommendations. Subsequently, Brinkerhoff testified he received a reply from EXPO (TSRCP 1, JA Vol. VI, pg. 631, lines 6-13) that "normal curing and applications are required." TEXH 32, JA Vol. III., pg. 250. Although he acknowledged receiving cure time recommendations from ABB and PSI, he didn't remember what they were. T Trans D-1, pg. 190, lines 5-15. In answer to the question did he ever find out what the normal curing time was, he answered "We used two days and seven days." TSRCP 1, JA Vol. VI., pg. 631, line 24 - pg. 632, line 2.

Nowhere, is there any evidence of a 'summit' meeting between IGT, Big-D, EXPO and Padilla to resolve the obvious dispute as to the critical cure times. Instead, it appears as the person solely responsible for scheduling work, Brinkerhoff arbitrarily set the cure time to two days for the scratch coat and seven days for the brown coat. During trial, Brinkerhoff testified he had exclusive responsibility for scheduling the work of all subcontractors; Q. Would it be fair to say that, if you didn't schedule it, it was not going to happen? A. Yes, absolutely. TSRCP 1 JA Vol.

---

<sup>14</sup> Admitted, JA Vol., VI, ;g. 567, line 2



V., pg. 462, lines 12-14.

### **III. B. BIG-D NEVER TESTED FAILED STUCCO FOR CAUSATION**

Big-D never determined the cause of the separations. According to Big-D's Brinkerhoff, answering the question why Big-D didn't terminate the Subcontract with Padilla: "[W]e made a decision based on the rejection of Padilla's work by IGT. We didn't know cause." TSRCP 1, JA Vol. V., pg. 469, lines 10-23. In a letter to Padilla's Lopez dated November 3, 2009, Big-D's counsel, Hurley, stated Big-D "is looking to Padilla to assist in investigating the cause of the failure." TEXH 58, JA Vol. III., pg. 276, paragraph 3. On November 18, 2009, when questioned whether he had released the check to Padilla, Big-D's McNabb responded: "No way. Why would I? Their work is failing. We still don't know who's at fault." TSRCP 1, JA Vol. VI, pg. 650, lines 12-13, TEXH 61, JA Vol. III., pg. 281.

### **III. C. CHIN'S TESTS WHILE CONSULTANT TO IGT**

On April 8, 2010, Big-D filed its Counterclaim alleging "Padilla's Work was substandard and improperly installed and did not comply with the plans and specifications for the Project and/or ASTM Standards." Counterclaim, JA Vol. I., pg. 16, lines 27-28. Nearly seven months after Padilla was informed the project was going in a different direction (Lopez depo, JA Vol. V., pg. 413, lines 1-2) with a concrete board that didn't require a cure time and four months after finding out its payment for the work completed was being held ransom (TEXH 59, JA Vol. III., pg. 277, last paragraph, first sentence) pending Padilla's assistance to find the cause of the separations; Big-D first divulged its allegations as to why the separations occurred.

In support of the Counterclaim, Chin testified at trial about his observations of the stucco separations but failed to put forth evidence that any of the alleged deviations from the plans and specifications were material; caused the separations. For example, Chin's testimony included several references to the thickness of the

stucco coats vs. the project's plans and specifications, but then admitted "whether the brown coat was 2 inches or a quarter of an inch, scratch coat an inch or one-quarter of an inch, it did not affect the bond strength", the strength of the connection between the scratch and brown coats. TSRCP 2, JA Vol. VI., pg. 735, lines 18-21.

As to claims the scratch coats were not properly roughened; nowhere did Chin show any measurement of the grooves; determine whether they were the "approximately 1/8 inch" specified by EXPO. TEXH 37, JA Vol. III., pg. 256, paragraph 3.39B, NOTE. After admitting he never saw grooving of the scratch coat in more than one direction at the jobsite (TSRCP 2, JA Vol., pg. 712, lines 9 11) and commenting on Trial Exhibit 448 (TEXH 448<sup>15</sup>, JA Vol. V., pg. 391), three photographs of the same separation showing a minor amount of grooving in a second direction, TSRCP 2, JA Vol. VI., pg. 711, lines 13-14), Chin was unable to identify a percentage of wrong direction grooving that would cause a failure of the bond. TSRCP 2, JA Vol. VII., pg. 749, lines 10-14. He eventually admitted the wrong direction grooving only "maybe contributing to" the lack of bond between the brown coat and the scratch coat. TSRCP, JA Vol. VI., pg. 712, lines 17-19. For Trial Exhibit 438<sup>16</sup>, Chin sites no grooving of the scratch coat is evident (TSRCP 2, Vol. VI., pg. 718, lines 24-25), however, admits that he didn't use a 3D camera that can capture the depth dimension, but when questioned, he claimed to have put his hand on the scratch coat at the bottom of the three inch diameter<sup>17</sup> core hole (TSRCP 2, JA Vol. VII., pg. 750, lines 10 – 15); perhaps the grooving, dark shadows on the scratch coat, was more readily observed in (TEXH 438-4, JA Vol. V., pg. 386) with the close-up photograph of the scratch coat and the apparent more direct lighting?

In all instances, when Chin noted no bond between the scratch and brown coats,

---

<sup>15</sup> TEXH 448, Admitted for limited purpose: not for the truth of the matter asserted, JA Vol. VI., pg. 717, line 13.

<sup>16</sup> Admitted, JA Vol. VI., pg. 720, line 18.

<sup>17</sup> TSRCP 2, JA Vol. VI., pg. 717, line 20.

he admitted no knowledge of when the brown coat had been installed; where in the curing period the stucco might have been or whether sampling/testing was done before the brown coat fully cured? For Trial Exhibit 438, photos of coring/testing on the inside of the building September 17<sup>th</sup> (TSRCP 2, JA Vol. VI., pg. 720, lines 20-22) as well as trial exhibit (TEXH 15-7, JA Vol. II., pg. 232), which summarizes Chins notes for the 17<sup>th</sup> testing; Chin admitted he did not know when the brown coat had been installed. TSRCP 2, JA Vol. pg. 749, line 24 – pg. 750, line 2.

Similarly for Trial Exhibit 449<sup>18</sup>, (JA Vol. V., pg. 395), the references to the September 22<sup>nd</sup> testing, Chin admitted he did not know when either the scratch or brown were installed. TSRCP 2, Vol. VII., pg. 751, lines 17-18. Both of the admissions of no knowledge when the relevant stucco was installed also applies to (TEXH 60, JA Vol. III., pg. 279), Chin's November 17, 2009 email to IGT's counsel, Ferrario, reporting on both the September 17<sup>th</sup> and 22<sup>nd</sup> testing. Neither TEXH 406<sup>19</sup> nor TEXH 446<sup>20</sup> were admitted for the truth of the matter asserted, so neither contributed any evidence of a material breach.

In summary, Big-D failed to carry its burden to present a preponderance of evidence that Padilla's alleged deviations from the plan and specifications were material and caused the complained of damages. That the damage of which Big-D complains would not have been avoided by Padilla not breaking its promise to furnish stucco in compliance with the plans and specifications.

#### **IV BIG-D'S STOP PAYMENT OF CHECK BREACHED THE SUBCONTRACT**

The proof elements for a breach of contract claim are: (1) The existence of an enforceable agreement between the parties; (2) Plaintiff/Counter-claimant's

---

<sup>18</sup> Admitted, JA Vol. VII., pg. 717, line 13.

<sup>19</sup> Admitted for limited purpose: not for the truth of the matter asserted, JA Vol. VI., pg. 709, line 19.

<sup>20</sup> Admitted for limited purpose: not for the truth of the matter asserted, JA Vol. VI, pg. 695, line 7-9.

performance; (3) Defendant/Counter-defendant's unjustified or unexcused failure to perform; and (4) Damages resulting from the unjustified or unexcused failure to perform. *Nevada Jury Instructions*, (2011) Instruction 13CN.1. A breach of contract claim for damages requires a failure to perform that is material; that the failure to perform defeats the purpose of the contract. *Id.* at Instruction 13CN.42. Integral to the proof of damages is proximate cause, causation: "That is if the damage of which the promisee [Big-D] complains would not have been avoided by the promisor's [Padilla Construction] not breaking [its] promise, the breach cannot give rise to damages." *Clark Cty. Sch. Dist. V Richardson Constr.*, 123 Nev. 383, 396, 168 P.3d 87 (2007). The existence of a valid agreement between the parties was never in dispute. SUBCONTRACT AGREEMENT, TEXH 1, JA Vol. I., pg. 91.

After leaving the project in mid-September because "they were going in a different direction" (Lopez depo, JA Vol. V., pg. 413, lines 1-2) with a prefabricated cement "board that can handle the pressure of them [stone installers] pulling on it, plus they could install that board and immediately start installing the stone [no cure time]." (*Id.* at pg. 413, lines 17-21), Padilla submitted a Big-D Payment Request form as specified by the Subcontract (TEXH 1, JA Vol. I., pg. 92, paragraph D) for the work completed to date of the 'going in a different direction' notice. Padilla's performance was confirmed by Big-D's Brinkerhoff. Q: Describe for the Court the process of what happens from the time you receive a payment application until the time that a check goes out the door. TSRCP 1, JA Vol. V., pg. 490, lines 22-24. A: "I approved this [TEXH 9, JA Vol. II., pg. 215, Padilla's 09/25 Payment Request] at 82 percent complete, absolutely did. I felt like Padilla had installed 82 percent of the product." TSRCP 1, JA Vol. V., pg. 491 lines 8-10. Brinkerhoff approved the September 25, 2009 Payment Request in the amount of \$185,991.85 for payment

October 25, 2009. TEXH 9, JA Vol. II., pg. 215<sup>21</sup>.

Big-D failed to perform; to pay Padilla in accordance with the approved Payment Request without justification or excuse. According to the district court, Big-D's performance was excused by Padilla's breach of the Subcontract, which occurred before Big-D's alleged breach (Conclusion of Law ("CL") JA Vol. VII., pg.831, lines 5-6); that payment was excused because IGT rejected Padilla's work (CL, JA Vol. VII pg. 831, lines 7-10), and; Big-D was excused from giving the Subcontract mandated notice of default and opportunity to cure because Padilla refused to participate in the investigation of the cause of the failures and any remediation. CL, JA Vol. pg. 831, line 12, pg. 832, line 7.

Notwithstanding Big-D's failure to present a preponderance of evidence that Padilla's alleged deviations from the plans and specifications caused the complained of separations, Padilla's breach could not have been prior to Big-D's. Big-D stopped payment November 18, 2009 of the payment check for the work Brinkerhoff affirmed Padilla had completed in September (TEXH 61, JA Vol. III., pg. 281) and at a time when Big-D admittedly did not know the cause of the separations. On November 18, 2009, when questioned whether he had released the check to Padilla, Big-D's McNabb responded: "No way. Why would I? Their work is failing. We still don't know who's at fault." TSRCP 1, JA Vol. VI, pg. 650, lines 12-13.

There was no justification to withhold Padilla's payment because IGT rejected the stucco in the absence of an erroneous assumption there was only one cause of the separations, Padilla. The assumption of a single potential cause was contradicted by Brinkerhoff:

[A]t the time, we made the decision [substitute cement board in place of stucco] based on the rejection of Padilla's work by IGT. We didn't know the cause. We didn't know whether it was labor related. We didn't know whether it

---

21

was material related. We didn't know whether it was weather condition related." TSRCP, JA Vol. V., 469, lines 18-23.

Additionally, Padilla complained the cause was Big-D's scheduling the installation of the stone before its stucco properly cured<sup>22</sup>, which was never disputed until April 8, 2010 when Big-D filed its Counterclaim alleging deviations from the plans and specifications caused the damages; rejection of the stucco requiring the removal and replacement. CC, JA Vol. I., pgs. 16 & 17, paragraphs 11-13. Not when Big-D notified Padilla in mid-September 2009 that the project was going in a new direction (Lopez depo, JA Vol. V., pg. 413, lines 1-2) with a cement board that could better stand the stone pulling forces and didn't require a cure time (*Id.* at 413, lines 17-21) nor in Big-D's counsel, Hurley's November 3<sup>rd</sup> letter stating "Big-D is looking to Padilla to assist in investigating the cause of the failure." TEXH 58, JA Vol. III., pg. 276, third paragraph, last sentence. IGT's rejection of the stucco was not justification to withhold Padilla's payment in November when Big-D admittedly had no knowledge Padilla caused the separations.

Padilla neither refused to participate in the investigation of the failure or remediation. Upon receipt of Big-D's counsel, Hurley's November 3<sup>rd</sup> letter stating "Big-D is looking to Padilla to assist in investigating the cause of the failure" (TEXH 58, JA Vol. III., pg. 276, third paragraph, last sentence), Padilla responded stating that "without third party confirmation that its work is sub-standard" it expected to be paid. TEXH 59, JA Vol. III., pg. 278. Big-D never responded to the letter, including suggestions for a third party expert to verify the cause of the separations and a proposal for the fair sharing of the costs. The reason? The reality of the situation in November 2009, there was nothing for anyone to investigate. Lopez

---

<sup>22</sup> Padilla's Lopez testified he told Brinkerhoff the brown coat needed to cure 28 days before installing the stone on it. Lopez depo, Vol. V., pg. 416, lines 19-25, pg. 417, lines 1-4. After Lopez observed some of the separations, Brinkerhoff testified Lopez's only response was "the product should have cured for 30 days before the stone was allowed to be installed on it." TSRCP 1, Vol. V., pg. 593, lines 22-24

testified that the same day Brinkerhoff told him the project was going in a different direction, Big-D was “destroying the product [stucco] and ripping stone off the wall and starting over.” (Lopez depo, JA Vol. V., pg. 413, lines 1-2, pg. 412, lines 17-22). Brinkerhoff’s calendar shows “Demo Padilla Substrate” September 14-16, 2009. (TEXH 74, JA Vol. III., pg. 294). As for refusing to participate in the remedial work, installation of the cement board (Durock), Padilla was never asked. Big-D’s Brinkerhoff testified he didn’t “specifically recall that conversation” asking Padilla if they would install the Durock. (TSRCP 1, JA Vol. VI., pg. 504, lines 4-5), nor could Big-D’s McNabb produce proof that a request for proposal, standard in the construction industry for requesting work/materials beyond the terms of the contract, was issued to Padilla for the installation of the Durock. TSRCP 1, JA Vol. VI., pg. 530, lines 21-25. Big-D’s withholding Padilla’s payment at a time when it admittedly did not know the cause of the separations was a material breach of the Subcontract that caused damages to Padilla in the amount of the payment due for its services, and as approved by Big-D’s Brinkerhoff. TEXH 9, JA Vol. II., pg. 215.

**V. BIG-D’S FAILURE TO PROVIDE PADILLA NOTICE OF DEFAULT AND OPPORTUNITY TO CURE WAS ANOTHER BREACH**

Big-D’s failure to provide Padilla written notice of an alleged defect of its work and resulting opportunity to inspect and to cure the defect is a breach of the implied covenant of good faith and fair dealing. “In every contract or agreement there is an implied promise of good faith and fair dealing. This means that each party impliedly agrees not to do anything to destroy or injure the right of the other to receive the benefits of the contract. Thus, each party has the duty not to prevent or hinder performance by the other party.” *Hilton Hotels v. Butch Lewis Productions*, 107 Nev. 226, 234 808 P.2d 919 (1991). Padilla’s position is the failure of Big-D to provide Padilla written notice of an alleged defect of its work and resulting opportunity to inspect and to cure the defect as provided by the terms of the Subcontract, section

5.1 and Exhibit “Z”, prior to withholding payment, prevented Padilla’s performance and denied it the benefit (payment) of the Subcontract; a breach of the of the implied covenant of good faith and fair dealing. Joint Pre-Trial Memorandum Pursuant to EDCR 2.67. JA Vol. I., pg. 64, lines 12 – 21.

In mid-September 2009<sup>23</sup>, Padilla was informed by Big-D’s Brinkerhoff that installation of the stucco, Padilla’s work, was stopped because “they were going in a different direction” (Lopez depo, JA Vol. V., pg. 413, lines 1-2) with a prefabricated cement “board [Durock] that can handle the pressure of them [stone installers] pulling on it, plus they could install that board and immediately start installing the stone [no cure time].” (Lopez depo, JA Vol. V., pg. 413, lines 17-21) This change in material from stucco to a prefabricated cement board didn’t surprise Lopez who had been adamant to that point the only problem with the stucco was the premature installation of the stone before the stucco was allowed to properly cure. Concerned that the stucco wasn’t being allowed to cure properly, when asked who at Big- D he communicated that concern to, he replied “Everyone.” Lopez depo, JA Vol. V., pg. 411, lines 10-25. A switch to a substrate that didn’t require curing time was understandable because Lopez knew Big-D was under pressure from IGT to finish the project in time for some type of IGT event at the project site. Lopez depo, JA Vol. V., pg. 413, line 22 – pg. 414, line 3.

There was no evidence that at the time of the mid-September announcement of going in a new direction that Big-D alleged the separations were caused by a Padilla commission or omission. To the contrary, reference to the advantage of no cure time for the cement board indicated adequate cure time was an issue. Further, trial testimony made it apparent that in mid-September, Big-D couldn’t have given

---

<sup>23</sup> Lopez testified that the same day Brinkerhoff told him the project was going in a different direction, Big-D was “destroying the product [stucco] and ripping stone off the wall and starting over.” (Lopez depo, JA Vol. V., pg. 413, lines 1-2, pg. 412, lines 17-22). Brinkerhoff’s calendar shows “Demo Padilla Substrate” September 14-16, 2009. (TEXH 74, JA Vol. III., pg. 294).



Padilla notice of a defect/deficiency in their work causing the separations; Big-D was not aware of any. According to Big-D's Brinkerhoff, answering the question why Big-D didn't terminate the Subcontract with Padilla: "[W]e made a decision [substitute cement board in place of stucco] based on the rejection of Padilla's work by IGT. We didn't know cause." TSRCP 1, JA Vol. V., pg. 469, lines 10-23. In a letter to Padilla's Lopez dated November 3, 2009, Big-D's counsel, Hurley, stated Big-D "is looking to Padilla to assist in investigating the cause of the failure." TEXH 58, JA Vol. III., pg. 276, third paragraph, last sentence. On November 18, 2009, when questioned whether he had released the check to Padilla, Big-D's McNabb responded: "No way. Why would I? Their work is failing. We still don't know who's at fault." TSRCP 1, JA Vol. VI, pg. 650, lines 12-13, TEXH 61, JA Vol. III., pg. 281.

According to the pertinent language of Section 5.1 of the Subcontract titled Notice to Cure:

If you [subcontractor] are guilty of a material breach of a provision of this Subcontract, you may be deemed in default of this Subcontract. If you fail, within three (3) days after written notification, to commence and continue satisfactory correction of such default, then at your expense, we will: (a) Provide the most expeditious correction of the default . . . . (b) Supply labor, materials, equipment . . . necessary for the satisfactory correction of your default . . . (c) Withhold payment of moneys due you until the work is fully completed and accepted by the Owner. TEXH 1, JA Vol. I., pgs. 101-102, Section 5.1.

When a contract is clear on its face, it will be construed from the written language and enforced as written. *Canfora v. Coast Hotels & Casinos, Inc.*, 121 Nev. 771, 776, 121 P.3d 599 (2005). Clear on its face, Section 5.1 required Big-D provide a written notice to Padilla of a material default and three days for Padilla to commence and continue satisfactory correction of the alleged default before Big-D was entitled to withhold payment to Padilla. In addition to Padilla's Section 5.1 right to inspect, inherent in the right to commence and continue correction of an alleged default is

Nevada Exhibit “Z” right to inspect a claimed defect in its work. The fourth paragraph states in part:

There shall not be any back charge or deduction from the contract price due Padilla for expense alleged to have been caused by Padilla without prior written notice to Padilla, and Padilla having been given a reasonable opportunity to inspect the claimed defect. TEXH 1, JA Vol. I., pg. 106, 4<sup>th</sup> paragraph. Note – Brinkerhoff stipulated he initialed the Subcontract on behalf of the Big-D. TSRCP 1, JA Vol. V, pg. 464, lines 18-19.

Big-D’s failure to give the requisite written notice of a material breach/defect deceived Padilla to any need to defend its work; to have their expert inspect the failed work, and take samples necessary for laboratory analysis while the alleged failed work was available and before the six month shelf life of the EXPO MX3 expired precluding the scientifically necessary control samples. What else would Padilla believe under the circumstances that its work was being replaced with material that doesn’t require cure time and without any notice alleging a breach of the contract or that its work is defective? Padilla’s state of mind that inadequate cure time was the problem, and a problem over which Padilla had no control was unchallenged. The stone installation was exclusively scheduled by Big-D. During trial, Brinkerhoff testified he had exclusive responsibility for scheduling the work of all subcontractors; Q: “Would it be fair to say that, if you didn’t schedule it, it was not going to happen?” A: “Yes, absolutely.” TSRCP 1 JA Vol. V., pg. 462, lines 12-14.

A couple of problems arise from the lack of the Section 5.1 written notice: Padilla was denied an opportunity to cure and mitigate the damages, but this pales in comparison to the denial of Padilla’s opportunity to defend its work while the evidence of failed stucco was still available. Neither of which were fair or in good faith, therefore, Big-D breached the implied covenant of good faith and fair dealing in the Subcontract.

**VI. BIG-D VIOLATED NEVADA LAW  
WITHHOLDING PAYMENT TO PADILLA**

Nevada Revised Statute 624.624 (JA Vol. V., pg. 425) specifies the law for payments or withholding payments to subcontractors. “When the language of a statute is plain and unambiguous, a court should give that language its ordinary meaning and not go beyond it.” *Nevada Dept. of Corrections v. York Claims Services*, 131 Nev. Adv. Op., No. 25, pg. 7 (2015). This Court reviews issues of statutory construction de novo. *A.F. Constr. Co. v. Virgin River Casino*, 118 Nev. 699, 703, 56 P.3d 887 (2002). A violation of a statute constitutes negligence per se if the injured party belongs to the class of persons that the statute was intended to protect, and the injury suffered is of the type the statute was intended to prevent. *Vega v. E. Courtyard Associates*, 117 Nev. 436, 440, 24 P.3d 219 (2001).

Big-D and Padilla executed a Subcontract for the IGT project September 3, 2009. TEXH 1, JA Vol. I. pg. 93. After the mid-September “going in a new direction” notice from Big-D, Padilla submitted its Payment Request September 25<sup>th</sup> to Big-D, which Big-D’s Brinkerhoff acknowledged he signed September 30<sup>th</sup> with the notation payment was due in thirty days on October 25<sup>th</sup>. TEXH 9, JA Vol. II., pg. 215, TSRCP 1, JA Vol. V., pg. 474, line 17 – pg. 475, line 10.

NRS 624.624(1), JA Vol. V., pg. 425, pertains to written agreements between a higher-tiered contractor [Big-D] and a lower-tiered subcontractor [Padilla]. Accordingly, if the written agreement [Subcontract] includes a schedule for payments, Big-D

shall pay [Padilla] (1) On or before the date payment is due, or (2) Within 10 days after the date [Big-D] received payment for all or a portion of the work, materials, or equipment described in a request for payment . . . ,  
**Whichever is earlier.”** NRS 624.624(1)(a), Emphasis Added

If the Subcontract does not include a schedule for payments, Big-D

“shall pay [Padilla] (1) Within 30 days after the date the

[Padilla] submits a request for payment, or (2) Within 10 days after the date [Big-D] received payment for all or a portion of the work, labor, or equipment described in a request for payment . . . ;  
**Whichever is earlier.**” NRS 624.624(1)(b), Emphasis Added

The district court concluded NRS 624.624 was designed to ensure general contractors pay subcontractors after the general contractor receives payment from the Owner of the project [IGT]. CL, JA Vol. VII., pg. 833, lines 14-16, Emphasis Added. This is contrary to the plain language of the statute. The relevance of the Owner’s payment to the general contractor in either subsection 1, paragraph a. or b., is the potential to shorten the time for payment if the Owner were to pay either before the payment to the subcontractor is due, (a.), or before 30 days after the subcontractor submits a request for payment, (b). In this instance, the Subcontract did not contain a schedule for payments, therefore, as Brinkerhoff stated as standard practice (TSRCP 1, JA Vol. V., pg. 474, line 18 – pg. 475, line 7), payment was due within 30 days after the date Padilla submitted their Payment Request. TEXH 9, JA Vol. II., pg. 216.

Similarly, the district court concluded “Padilla was to be paid . . . after IGT paid Big-D” according to a term of the Subcontract. CL, JA Vol. VII., pg. 834, lines 9-10. This conclusion is contrary to this Court’s finding that “pay-if-paid provisions are unenforceable because they violate public policy.” *Lehrer McGovern Bovis v. Bullock Insulation*, 124 Nev. 1102, 1117-1118, 197. P.3d 1032 (2008). Also noted in the Subcontract, Section 4.2 (TEXH 1, JA Vol. pg. 101), paragraph above Section 4.3), which contains the statement “As an absolute condition precedent to you receiving payment . . . we must have first received from the Owner the corresponding periodic payment”, there is the handwritten notation, “Nevada Law will take precedence” and initialed by Big-D’s Brinkerhoff.<sup>24</sup>

---

<sup>24</sup> Brinkerhoff stipulated he initialed the Subcontract on behalf of the Big-D. TSRCP 1, JA Vol. V, pg. 464, lines 18-19.

Big-D had no lawful right to withhold Padilla's payment. Pursuant to NRS 624.624(2), Big-D's right to withhold Padilla's payment was contingent on compliance with subsection 3. According to NRS 624.624(3), if Big-D intended to withhold any amount from its payment to Padilla, Big-D must have given, on or before the date payment was due, a written notice to Padilla of any amount that will be withheld and give a copy of the notice to all other contractors and the Owner. The written notice must:

- (a) Identify the amount of the request for payment that will be withheld from the lower-tiered subcontractor;
- (b) Give a reasonably detailed explanation of the condition or the reason the higher-tiered contract will withhold that amount, including, without limitation, a specific reference to the provision of section of the agreement with the lower-tiered subcontractor, and any documents relating thereto, and the applicable building code, law or regulation with which the lower-tiered subcontractor has failed to comply; and
- (c) Be signed by an authorized agent of the higher-tiered contractor. NRS 624.624(3)(a), (b), (c).

Accordingly, Big-D's NRS 624.624 written notice to Padilla of its intent to withhold payment was due October 25, 2009, in accordance with Brinkerhoff's calculation of the payment due date. TSRCP 1, JA Vol. V., pg. 474, line 18 – pg. 475, line 7, TEXH 9, JA Vol. II., pg. 216. Such notice never occurred, instead, Big-D, citing "unresolved disputes with Padilla" stopped payment November 18<sup>th</sup> on its check in the amount of Padilla's requested payment. TEXH 12, JA Vol. II., pg. 222, TEXH 61, JA Vol. III., pg. 281. The district court found Big-D's counsel letter dated November 3 (TEXH 58, JA Vol. III., pg. 276) was "sufficient to constitute required written notice to justify withholding payment." CL, JA Vol. VII., pg. 837, lines 8-9. The letter does not conform substantially with the NRS 624.624 written notice requirement; notably, there is no specific reference to the provision or section of the agreement with the lower-tiered subcontractor, and any documents relating thereto, and the applicable building code, law or regulation with which the lower-tiered

subcontractor has failed to comply, which is not surprising, when the gist of the letter is “looking to Padilla to assist in investigating the cause of the failure.” TEXH 58, JA Vol. III., pg. 276, third paragraph, last sentence, Emphasis Added.

In addition to the NRS 624.624 requisite notice before withholding payment, NRS 624.624(4) provides the subcontractor an opportunity to cure alleged reasons for withholding payment. A subcontractor who receives a notice of withholding may: “Correct any condition or reason for the withholding described in the notice of withholding . . .” NRS 624.624(4)(b).

It is obvious the intent of NRS 624.624 is to protect subcontractors’ payments from irrational and undefined reasons for withholding payment and to provide a subcontractor an opportunity to cure, that in the instant matter, Padilla was denied by Big-D’s failure to provide the requisite written notice of the reasons for withholding payment and withholding payment when Big-D admitted it did not know the cause of the separations nor that Padilla was culpable for all potential causes. According to Big-D’s Brinkerhoff:

[A]t the time, we made the decision [substitute cement board in place of stucco] based on the rejection of Padilla’s work by IGT. We didn’t know the cause. We didn’t know whether it was labor related. We didn’t know whether it was material related. We didn’t know whether it was weather condition related.” TSRCP 1, JA Vol. V., pg. 469, lines 10-23.

And according to Big-D’s McNabb, when questioned whether he had released the check to Padilla, Big-D’s McNabb responded: “No way. Why would I? Their work is failing. We still don’t know who’s at fault.” TSRCP 1, JA Vol. VI , pg. 650, lines 12-13.

Big-D’s stopping Padilla’s payment was in violation of NRS 624.624 causing injury in the way of non-payment of the amount Big-D agreed was due for the work performed on the IGT Stone Replacement project. TSRCP 1, JA Vol. V., pg.491 lines 8-10. Big-D was negligent per se.

### **VII. NO DUTY FOR PADILLA TO INDEMNIFY**

According to the district court, Padilla had a duty to indemnify, defend, and hold harmless pursuant to Section 3.6 of the Subcontract. CL pg. 22, lines 22-23. Pursuant to the express language of this section, Padilla's duty arises solely from its acts or omissions, willful or negligent conduct, which as noted above, Big-D has failed to prove-up.

### **VIII. PADILLA'S CLAIM AGAINST F&D CONTINGENT ON AWARD OF DAMAGES**

Although the district court found Big-D's Motion for Judgment as a Matter of Law on the issue of Padilla's claim against the bond posted to release Padilla's lien on the IGT building was not meritorious, it found the issue was moot under the circumstances of the court's denial of Padilla's damages. CL, JA Vol. VII, pg. 838, lines 8-13. In the instance that Padilla shall prevail in this appeal and a finding it is entitled to damages, its claim against F&D should be restored.

### **IX. PADILLA ENTITLED TO SPOILIATION INSTRUCTION**

According to the district court, "it would be improper to order a spoliation remedy when Padilla did not intend to take additional advantage of additional inspection opportunities even if they had been available." CL, JA Vol. VII., pg. 842, lines 6-7. The obstacle to finding the truth in this matter, what caused the separations, is the lack of evidence, more specifically, the absence of any samples of failed stucco: stucco that cured the two and seven day periods specified by Big-D and failed during the stone installation adhesive test; that is, the stone pulled the second coat of stucco from the first coat of stucco after the stucco was properly cured. All of which was the result of Big-D's failure to obtain valid samples when they were available, and to give Padilla fair notice that it needed to obtain samples for a defense.

Big-D had a prelitigation duty to preserve samples of the failed stucco when litigation was reasonably foreseeable. *Bass-Davis v. Davis*, 122 Nev. 442, 450, 134 P.3d 103 (2006). Nothing should have been more apparent to Big-D, at the time of

the stucco separations and IGT's rejection of the stucco, that litigation was imminent and the failed stucco would be relevant. Big-D's McNabb testified that at the time of first event of a stone pulling the stucco apart "our counsel [Bill Hurley] was involved in every communication because it was such a controversial issue. They [IGT] had Mark [Ferrario], their attorney, everything was Mark and Bill and then Valerie [Higgins], their [IGT's] internal counsel. TSRCP 1, JA Vol. VI., pg. 647, lines 17-23. And, at a time when Big-D admitted it didn't know the cause of the separations, and as noted below, IGT was commanding the removal and replacement of the failed stucco, the evidence, its incomprehensible Big-D wouldn't have preserved samples of the failed stucco for both their defense and to prosecute an action if it was established the cause was a third party, such as Padilla.

According to the district court, spoliation sanctions are only appropriate to a party controlling the evidence, which Big-D didn't have because it was IGT that directed Big-D "to remove and replace the Padilla Work on an expedited basis." CL, JA Vol. VII. pg. 841, lines 24 – 26. There is no showing that IGT's order to remove and replace the Padilla Work prohibited IGT from preserving samples of failed work.

According to the district court, Padilla was invited to participate in the testing Big-D performed, and there wasn't any evidence Big-D excluded Padilla from any available opportunities to inspect the Padilla Work. CL, JA Vol. VII., pg. 841, line 26 – pg. 842, line 2. There isn't any evidence that Big-D ever tested failed work that it could have invited Padilla to participate in. As evidenced by the appearance of Chin, former IGT consultant, at trial and Big-D's exclusive reliance on him for proof of Padilla's culpability; there wasn't any Big-D's testing for causation. However, Big-D did exclude Padilla from inspecting failed work with their failure to preserve samples and to give any notice to Padilla of its culpability; alerted to the prospect Padilla would need a defense. Instead, Padilla received notice the project was "going in a different direction" (Lopez depo, JA Vol. V., pg. 413, lines 1-2) with a



prefabricated cement “board that can handle the pressure of them [stone installers] pulling on it, plus they could install that board and immediately start installing the stone [no cure time]” (Lopez depo, JA Vol. V., pg. 413, lines 1-2); nothing that even implies suspicion of Padilla’s culpability.

Brinkerhoff’s calendar shows “Demo Padilla Substrate” September 14-16, 2009. TEXH 74, JA Vol. III., pg. 294. Two weeks before Brinkerhoff approved Padilla’s Payment request (TSRCP 1, JA Vol. V., pg.491 lines 8-10) and seven weeks before Big-D’s counsel’s letter conditioning further payment to Padilla on assistance establishing Padilla met all its obligations under the Subcontract Agreement. TEXH 58, JA Vol. III., pg. 277, last paragraph. Additionally, when Padilla requested “third party confirmation that its work is sub-standard”, Big-D never responded. TEXH 59, JA Vol. III., page 278, last paragraph. In the absence of valid samples, what could be scientifically investigated by anyone? Not once in the course of discovery did Big-D put forth a sample of failed stucco with information of installation dates to confirm specified cure times.

Big-D breached its duty to preserve the failed stucco, at least valid samples, when litigation was reasonably foreseeable and samples of the failed would be relevant. Therefore, Padilla was entitled to an adverse inference instruction that the district court may draw an inference that if samples of the failed stucco were available for testing, the results would have been unfavorable to Big-D.

**X. BIG-D NOT ENTITLED TO JUDGMENT  
IN THE AMOUNT OF \$600,000.00**

The district court found Big-D proved it was entitled to recover damages against Padilla, and according to the Joint Stipulation, “judgment against Padilla in the amount of \$600,000.00.” CL, JA Vol. VII., pg. 840, lines 5-6. The district court misread the stipulation: “Padilla stipulates to entry of judgment in the amount of the Allowed Claim (\$123,091.39).” Stipulation (“STIP”), JA Vol. V., pg. 430, lines 1-

2.

Pursuant to Eighth Judicial District Court Rule 7.50, a stipulation is effective if it is in writing subscribed by the party against whom the same shall be alleged. In an effort to reduce trial time, counsel for both Big-D and Padilla discussed the futility of the time proving up alleged damages of more than \$750,000.00, when the fact was the most Big-D could recover pursuant to the Bankruptcy Court's allowed claim and approved Chapter 11 plan, was \$123,091.39<sup>25</sup>. STIP, JA Vol. V., pg. 430, lines 1-2. Accordingly, counsel for Big-D drafted a Joint Stipulation as to Damages on Big-D Construction Corporation's Counterclaim which was in writing, signed by the President of Padilla Construction Company of Nevada, announced to the court (TSRCP JA Vol. V., pg. 444, line 24 – pg. 445, lines 1-11) and filed December 3, 2014. STIP, JA Vol. V., pg. 427. A settlement agreement is a contract governed by the general principles of contract law, the interpretation of such is reviewed de novo. "We have stated that contracts will be construed from their written language and enforced as written." *The Power Company v. Henry*, 130 Nev. Adv. Op., No. 21, pgs. 6-7 (2014).

According to the Stipulation, pages 3 & 4, paragraph, 6:

Given that any recovery by Big-D against Padilla is limited to the Stipulated Payment, in the event that this Court determines Padilla is liable to Big-D for costs to remove and replace the Padilla Work, Padilla stipulates to entry of judgment in the amount of the Allowed Claim, (\$123,091.39) . . . STIP, JA Vol. V., pg. 429, line 18 – pg. 430, line 2.

The district court misstated the amount of the stipulated judgment as \$600,000.00, which must be corrected to \$123,091.39, the parties' stipulation.

---

<sup>25</sup> During the course of the instant matter, Padilla Construction Company of Nevada filed a Chapter 11 Petition October 11, 2011, after which Big-D and Padilla stipulated to a contingent claim upon Big-D prevailing in the instant manner of a maximum \$600,000.00, to be paid according to the approved plan, which parties agreed, was \$123,091.38. See following Argument, XI.

## **XI. BIG-D NOT ENTITLED TO ATTORNEY'S FEES, COSTS, INTEREST**

Post judgment, Big-D submitted a motion for Attorneys' Fees, Costs and Interest Pursuant to Judgment and to Amend Judgment to \$1,234,678.55. Motion, JA Vol. VII., pg. 854 line 13. Padilla filed an Opposition contesting the district court's jurisdiction to award a judgment in excess of the maximum amount of the Bankruptcy Court's allowed claim, \$600,000.00. Opposition, JA Vol. VII., pg. 865, lines 8-10. Big-D responded that the costs, fees and interest are post-petition debts not impacted by the bankruptcy action. REPLY, JA Vol. VII., pg. 887, lines 12-16. The district court issued an Order awarding Big-D Fees and Costs in the amount of \$414,433.99 and post judgment interest at a daily rate of \$59.61. ORDER, JA Vol. VII., pg. 908 lines 2-7.

Padilla argued the Bankruptcy Court had retained jurisdiction over any and all disputes regarding the operation and interpretation of the Plan and this Order [Confirming Debtors' First Amended Joint Plan of Reorganization, JA Vol. VII., pg. 896, lines 18-22]. TSRCP, JA Vol. VI., pg. 30, lines 23-28. Therefore, whether the fees, costs and interest sought by Big-D was post-petition or not subject to the stipulated claim, was for the Bankruptcy Court to decide, and not the Eighth Judicial District Court. Trans pg. 23, line 23 – pg. 7, line 2.

[W]here the judgment or decree of the Federal court determines a right under a Federal statute, that decision is final . . . and an adjudication under the reorganization provisions of the Bankruptcy Act, effect as res judicata is to be given the Federal order. *Stoll v. Gottlieb*, 305 U.S. 165 (1938).

In the absence of the district court's subject matter jurisdiction to determine Big-D's request for an Amended Judgment exceeding the Bankruptcy Court's allowable claim against Padilla, the district court's Order entered July 22, 2015 is void. *Landreth v. Malik*, 127 Nev. Adv. Op., No. 16, pg. 4 (2011)

## **XII. CONCLUSION**

The district court overlooked Big-D's numerous admissions, by word and conduct, that there is no evidence that a Padilla commission or omission caused the complained of separations. Equally sure, is the fact that the responsibility of no evidence of the cause of the separations is exclusively Big-D's. Big-D's failure to retain samples of the failed stucco was neither precluded nor restrained by IGT's command to remove and replace the stucco. Equally certain, is the fact that Big-D's failure to give Padilla notice required by both Subcontract and Nevada law denied Padilla critical notice of potential culpability for the separations and the need to inspect, investigate, potentially cure, and most importantly, be alerted to the need to prepare a defense. Accordingly, Padilla is entitled to judgment against Big-D for breach of the Subcontract, breach of the implied covenant of good faith and fair dealing, and violation of Nevada law. Irrespective of the Court's decision of liability, the district court's misunderstanding of the stipulated judgment must be corrected and its award of attorney's fees, costs, and interest without subject matter jurisdiction must be voided.

### **NRAP 28.2 Attorney's Certificate/NRAP 32(8)(A)**

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and type style of NRAP 32(a)(6) because:

This brief has been prepared in a proportionally spaced typeface using Microsoft 2013 Word in 14 font size and Times New Roman.

2. I further certify that this brief complies with the page limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either:

Does not exceed 30 pages.

3. Finally, I hereby certify that I have read this appellate brief, and to the best of

my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 28<sup>th</sup> day of January 2016.

/s/ Bruce R. Mundy

BRUCE R. MUNDY

NV 6068

200 South Virginia Street, Eighth Floor

Post Office Box 18811

Reno, Nevada 89511-0811

[reno-attorney@sbcglobal.net](mailto:reno-attorney@sbcglobal.net)

(775) 851-4228

FAX 851-4239

Attorney for: Appellant

# **EXHIBIT 24**

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

PADILLA CONSTRUCTION  
COMPANY OF NEVADA, A  
NEVADA CORPORATION,

Appellant,

v.

BIG-D CONSTRUCTION CORP., A  
UTAH CORPORATION,

Respondents.

Supreme Court No. 67397  
Supreme Court No. 68521  
District Court Case No.: A-10-609048

Electronically Filed  
Mar 10 2016 12:12 p.m.  
Tracie K. Lindeman  
Clerk of Supreme Court

**RESPONDENT'S ANSWERING BRIEF**

Nicole E. Lovelock, Esq.  
Nevada Bar No. 11187  
HOLLAND & HART LLP  
9555 Hillwood Drive, 2nd Floor  
Las Vegas, Nevada 89134  
(702) 669-4600  
(702) 669-4650 – fax  
[nelovelock@hollandhart.com](mailto:nelovelock@hollandhart.com)

Melissa A. Beutler, Esq.  
Nevada Bar No. 10948  
BIG-D CONSTRUCTION CORPORATION  
3030 South Highland Drive  
Las Vegas, Nevada 89107-1047  
[Melissa.Beutler@big-d.com](mailto:Melissa.Beutler@big-d.com)

*Attorneys for Respondent*

### **RULE 26.1 DISCLOSURE**

Pursuant to Nev. R. App. Proc. 26.1, the undersigned counsel certifies that Respondent Big-D Construction Corp. is a Utah Company licensed to perform construction in Nevada. The parent company is Big-D Corporation, a Wyoming Company. Big-D is represented by its in-house counsel, Melissa A. Beutler, Esq. (Bar No. 10809) and Nicole E Lovelock (Bar No. 11187) of Holland & Hart LLP.



## TABLE OF CONTENTS

	Page
RULE 26.1 DISCLOSURE.....	i
Table of Authorities .....	iv
I. STATEMENT OF THE ISSUES .....	1
II. STATEMENT OF THE CASE.....	1
III. STATEMENT OF THE FACTS .....	3
A. The Padilla Work Was Defective; The Owner Directed Big-D to Remove and Replace the Padilla Work.....	3
B. Big-D Gave Padilla <i>Repeated</i> Notice of the Failures in the Padilla Work and Requested Padilla’s Assistance to Defend the Work. ....	9
C. Big-D Gave Padilla <i>Repeated</i> Notice of the Failures in the Padilla Work and Requested Padilla’s Assistance to Defend the Work. ....	13
D. District Court Relied on Substantial Evidence that the Padilla Work Was Defective. ....	14
E. District Court Awarded Big-D Its Attorneys Fees and Costs as Prevailing Party in the Padilla Action. ....	17
IV. SUMMARY OF ARGUMENT .....	19
V. STATEMENT OF THE STANDARD OF REVIEW .....	20
VI. ARGUMENT .....	21
A. The District Court Did Not Clearly Err Because It Based Its Determination that the Padilla Work Was Defective Upon Substantial Evidence.....	21
i. Substantial Evidence Thoroughly Demonstrated the Padilla Work Was Defective.....	21
ii. Padilla’s Counter-Argument Regarding Causation Is Supported by Minimal Evidence and No Expert Testimony.....	24
a. Substantial Evidence Supports the Finding that the Padilla Work Was Defective. ....	24

b.	Substantial Evidence Indicates the Failures in the Padilla Work Were Unrelated to Cure Time. ....	26
B.	Big-D Had No Obligation to Pay Padilla For the Padilla Work that Was Removed and Rejected; NRS 624.624 Does Not Provide Otherwise. ....	27
i.	The Subcontract Does Not Require Big-D to Pay Padilla for Defective Work that Was Rejected by the Project Owner. ....	27
ii.	Big-D Had No Obligation to Give Padilla an Opportunity to “Cure” Work. ....	27
iii.	NRS 624.624 Does Not Require Payment to a Subcontractor for Defects of which It Was Aware and Notified. ....	28
a.	Payment to Padilla Was Not “Due” on October 25, 2009. ....	28
b.	Big-D Provided Padilla Repeated Written Notice of the Defects in the Padilla Work. ....	31
iv.	Padilla’s Reliance on <i>Lehrer McGovern Bovis</i> Is Inapposite. ....	32
v.	It Is Undisputed that Padilla’s Application for Payment Is Overstated Even If Padilla Were Entitled to Payment. ....	33
C.	The District Court Did Not Abuse Its Discretion in Declining to Give Itself a Spoliation Instruction. ....	34
D.	Big-D Is Entitled to Recover Its Attorneys’ Fees, Costs, and Interest. ....	37
VII.	CONCLUSION. ....	39
VIII.	CERTIFICATE OF COMPLIANCE. ....	39

## **TABLE OF AUTHORITIES**

	<b>Page(s)</b>
<b>Cases</b>	
<i>Bass-Davis v. David</i> , 122 Nev. 442, 34 P.3d 103 (2006) .....	35, 36
<i>Cunningham v. Cunningham</i> , 61 Nev. 93 (1941) .....	21
<i>Gault v. Nabisco Biscuit Co.</i> , 184 F.R.D. 620 (D. Nev. 1999).....	36
<i>Hammann v. 800 Ideas, Inc.</i> , 2010 U.S. Dist. LEXIS 131097 (D. Nev. 2010) .....	36
<i>JOM, Inc. v. Adell Plastics, Inc.</i> , 193 F.3d 47 (1st Cir. 1999) .....	36
<i>Kockos v. Bank of Nevada</i> , 90 Nev. 140 (1974) .....	20
<i>Lehrer McGovern Bovis, Inc. v. Bullock Insulation, Inc.</i> 124 Nev. 1102 (2008) .....	32, 33
<i>In re Mariner Post Acute Network, Inc.</i> 312 B.R. 520 (Bankr. D. Del. 2004) .....	38
<i>In re Nuttall Equipment Co., Inc.</i> , 188 B.R. 732 .....	37
<i>Ormachea v. Ormachea</i> , 67 Nev. 273 (1950) .....	21
<i>Rhodes v. Robinson</i> , 399 Fed. Appx. 160 (9th Cir. 2010).....	37
<i>Sheehan &amp; Sheehan v. Nelson Mallev &amp; Co.</i> , 121 Nev. 481 (2005) .....	20, 34
<i>In re Sure-Snap Corp.</i> , 983 F.2d 1015 (11th Cir. 1993).....	38

<i>In re Texaco, Inc.</i> , 218 B.R. 1 (S.D.N.Y. 1998).....	38
--	----

<i>Thompson v. U.S. Dep't of Hous. and Urban Dev.</i> , 219 F.R.D. 93 (D. Md. 2003).....	36
---	----

## **Statutes**

11 U.S.C. Section 1141(d) .....	37
NRS 108 .....	37
NRS 624 .....	32
NRS 624.624 .....	<i>passim</i>
NRS 624.624(1)(a) .....	30
NRS 624.624(2)(b) .....	30
NRS 624.624(3).....	32

## **I. STATEMENT OF THE ISSUES<sup>1</sup>**

1. Did the District Court clearly err in determining that the stucco work performed by Padilla was defective?
2. Did the District Court clearly err in finding that Big-D gave proper notice of withholding to Padilla pursuant to NRS 624.624?
3. Did the District Court abuse its discretion in declining to give itself a spoliation instruction?
4. Did the District Court have the authority to award attorneys' fees and costs to Big-D to defend the Padilla Action?

## **II. STATEMENT OF THE CASE**

Padilla Construction Company of Nevada ("Padilla") commenced a mechanic's lien action in the Eighth Judicial District Court for Clark County (the "Padilla Action"). Padilla was a subcontractor to Big-D Construction Corp. ("Big-D"), who was acting as the general contractor for IGT to construct its office headquarters and related facilities on South Buffalo Drive in Las Vegas, Nevada (the "Project"). Padilla performed stucco work on the Project (the "Padilla Work"). IGT rejected the Padilla Work and required Big-D to remove and replace it.

---

<sup>1</sup> The defined terms set forth in the Statement of the Issues are defined in the Statement of the Case.

In January 2010, Padilla initiated the Padilla Action even though it is undisputed that the Padilla Work had been rejected by IGT and Big-D had removed and replaced the Padilla Work at IGT's direction. Big-D filed a counterclaim related to the nearly \$1 million incurred by Big-D to remove and replace the Padilla Work and the adjacent work damaged by the defective Padilla Work (the "Big-D Counterclaim").

In October 2011, Padilla filed a Chapter 11 bankruptcy action in the Central District of California (the "Padilla Bankruptcy"). Padilla continued to prosecute the Padilla Action, as it was not stayed by the Padilla Bankruptcy. Big-D filed a proof of claim in the Padilla Bankruptcy and received relief from the automatic stay to continue to prosecute the Big-D Counterclaim. Subsequently, Big-D stipulated to the reorganization plan in the Padilla Bankruptcy, which capped the maximum amount of Big-D's Counterclaim for pre-confirmation claims at \$600,000—subject to actual proof and liquidation in the Padilla Action.

Big-D and Padilla stipulated to nearly all operative facts—except causation. Padilla agrees that the Padilla Work failed but contends that the failure was not the result of workmanship. Critically, Big-D and Padilla stipulated the amount of costs incurred by Big-D to remove and replace the defective Padilla Work exceeded the \$600,000 allowed claim (in order to avoid the need for additional trial time to prove these damages). As a result of the stipulations, the only

remaining issue for trial was causation—was Padilla responsible for the failures in the Padilla Work. If yes, then pursuant to the parties’ stipulations, Big-D was entitled to damages in the principal amount of \$600,000.00.

The Padilla Action proceeded to a three-day bench trial in December 2014. Judge Denton issued detailed Findings of Fact and Conclusions of Law and a Judgment in favor of Big-D. The District Court’s factual findings were supported by substantial evidence that Padilla failed, in several independent ways, to construct the Padilla Work in compliance with the plans and specifications. Subsequently, Judge Denton awarded Big-D its post-petition costs and fees associated with defending the Padilla Action.

### **III. STATEMENT OF THE FACTS**

The parties stipulated to nearly all operative facts in the Joint Pretrial Memorandum. JA Vol. 1, pg. 45-52. Padilla’s Opening Brief mischaracterizes the context of those facts—the most material of which are explained below. Notably, the “Joint Appendix” filed by Padilla selectively omits a number of admitted trial exhibits that were included with the substantial evidence that Padilla’s Work was defective. Those exhibits are now included with Respondent’s Appendix.

#### **A. The Padilla Work Was Defective; The Owner Directed Big-D to Remove and Replace the Padilla Work.**

The Project. Between 2006 and 2008, Big-D acted as the general contractor for the Project—IGT’s corporate headquarters. JA Vol. 1, pg. 46:10-7, Pre-Trial

Memorandum, Stipulated Facts. The centerpiece of the Project was an office building constructed with large sandstone panels installed on the exterior and in the interior lobby. IGT took occupancy of the Project in the early summer of 2008. *Id.* at 46:17-22.

After deficiencies were identified with the stone work performed in the initial construction, IGT directed Big-D to remove and replace the original stone work. *Id.* Because the stone could not be removed without damaging the underlying two-coat stucco system, Big-D was required to remove the stucco system as well as the stone. *Id.* at 46: 23-25. IGT directed Big-D to perform the repair work in August and September 2009, with a firm finish deadline to enable IGT to entertain customers in town for the G2E convention in mid-October 2009. *Id.* at 46:27-47:11.

The Padilla Subcontract. Padilla was not involved in the original construction of the Project. In August 2009, Padilla contacted Big-D and requested the opportunity to submit a proposal for the stucco portion of the replacement work. JA Vol. VI, pp. 555:14-557:13 (Brinkerhoff Testimony); JA Vol. II, pp. 223-225 (Tr. Ex. 13). The stucco scope of work required an initial metal lath layer, followed by a two-coat stucco system (the “Padilla Work”). JA Vol. 1, pg. 48:10-19, Pre-Trial Memorandum, Stipulated Facts. Big-D ultimately contracted with Padilla to perform the Padilla Work and the parties executed a



subcontract agreement (the “Subcontract Agreement”). *Id.* at 46:27-47:4. JA Vol. I, pp. 91-107, (Tr. Ex. 1, Subcontract Agreement).

The Subcontract Agreement required Padilla to furnish “all labor, materials, equipment, and necessary services to install complete exterior and interior stucco (plaster) including lath, scratch, and brown coat.” JA Vol. 1, pp. 91-93 (Tr. Ex. 1, Subcontract Agreement). The Subcontract Agreement required Padilla to perform the Padilla Work in compliance with the Plans and Specifications for the Project, which included specific parameters, including the following:

- Minimum plaster thicknesses as specified [in included chart]. JA Vol. 1, pg. 456, (Tr. Ex. 4, Section 09220 at 3.4G).
- The scratch coat was to be “horizontally cross-rake[d] to provide key for second Base Coat (brown coat).” *Id.* at Section 09220 at 3.4C.
- The base coat was to be “applied so that it meets the required total thickness” and “not vary more than 1/4 in.” *Id.* at Section 09220 at 3.4D 1, 2.
- Remove and replace unacceptable plaster and base. *Id.* at Section 09220 at 3.10D.
- Comply with specified plastering standards.<sup>2</sup>

---

<sup>2</sup> The Specifications, at Section 092200 at 1.1 .A, provided that the Padilla Work was to comply with the following plastering standards: (a) ASTM-C926, [contained at JA. Vol. 4, pg. 352-61, Trial Exhibit 89]; (b) Portland Cement Association Plaster (Stucco) Manual, Trial Exhibit 90, [contained at RA. Vol II, pg. 277-325 (Tr. Ex. 90)]; and (c) per Building Code, as locally adopted,

Cure Times. As the specialty subcontractor with substantial expertise in stucco, Padilla was required to both (i) select the stucco product for approval by the Architect [JA Vol. VI, pp. 559:24-566:1 (Brinkerhoff Testimony)] and (ii) control the means and methods of the Padilla Work, including setting the required “cure” times between the stucco coats and before stone work was to be installed over the Padilla Work. JA Vol. VI, pp. 620:10-631:17 (Brinkerhoff Testimony); JA Vol. VI, pp. 682:12-683:13 (Chin Testimony).

Contrary to Padilla’s claim that “cure times were far from settled and an ongoing controversy,” [Opening Br. at 7], the record is clear that the cure times were set at (i) two days between scratch coat and brown coat and (ii) seven days between brown coat and stone installation. JA Vol. VI, pp. 620:10-631:10 (Brinkerhoff Testimony); JA Vol. VI, pp. 685:16-687:11 (Chin Testimony). In fact, IGT’s consultant testified, he was “very comfortable with [the 2-day/7-day cure times] because it was consistent with the Code and all other standards and, especially, the stucco manufacturer’s recommendation.” *Id.* at 685:4-11. Further, Padilla’s assertion that there was no “summit meeting between IGT, Big-D, EXPO and Padilla” related to cure times is inapposite. Opening Br. at 8. Rather, all

---

[contained at RA. Vol. II, pg. 326-327,(Tr. Ex. 91); JA Vol. 1, pg. 456 (Tr. Ex. 4,, Section 09220 at 1.1 .A).

parties understood that Padilla was responsible for the cure times—and no party objected to the cure times. JA Vol. VI, pp. 739:14-24 (Chin Testimony).

Although the Architect and IGT *reviewed* the proposed cure times, neither party disputed them; they allowed the means and methods to remain in Padilla's hands, as the 2-day/7 day time periods presented no concerning deviation from industry standard or local code. JA Vol. VI, pp. 620:10-631:10 (Brinkerhoff Testimony); JA Vol. VI, pp. 742:14-25 (Chin testimony). In addition, Big-D implemented quality control measures to ensure the stone contractor did not install stone over the Padilla Work until after the seven-day period expired. JA Vol. VI, pp. 583:2-584:8 (Brinkerhoff Testimony).

Failures of the Padilla Work. Shortly after Padilla commenced its work, the two layers of the Padilla Work began to separate from each other. JA Vol. 1, pg. 49:9-13, Pre-Trial Memorandum, Stipulated Facts; RA Vol. 1, pg. 137-156, Tr. Ex. 17 (Padilla's crew's daily logs); RA Vol. 1, pg. 173-202; Tr. Ex. 21 (email to Padilla management). IGT's consultant, Ian Chin, reported that Padilla's Work failed to comply with the Plans and Specification in several respects. JA Vol. VII, pp. 743-786 (Chin Testimony). The testing revealed multiple, independent causes of the failures, including (a) improper thicknesses of the stucco; (b) failure to adequately hydrate the stucco mix; (c) failure to adequately compact the brown and scratch coats; (d) contaminated materials within the stucco mix; and (e) failure to

adequately score the scratch coat to allow the brown coat to bond. *Id.*; JA Vol. IV, pp. 380-382 (Tr. Ex. 406). Any of these failures, alone, would have been a sufficient basis to reject the work.

Padilla was involved in the on-site meetings and invited to all testing sessions. Further, information regarding IGT's testing and results were communicated real-time to Padilla. Accordingly, Padilla's assertion in its Opening Brief that it first learned of the basis for IGT rejecting the stucco in Big-D's counterclaim is false.

Stucco Failures Widespread; Unrelated to Stone Installation. Contrary to Padilla's characterization, the failures in the Padilla Work were widespread. The Padilla Work failed in all of its locations. Although the failures were initially observed during the stone installation, the failures were not limited to areas in which stone was installed over the stucco. Rather, the same failures were identified throughout the entire project—including the interior of the building where it is undisputed that no stone work was installed over the Padilla Work. JA Vol. VI, pp. 722:1-728:25 (Chin Testimony); JA Vol. V, pg. 480:16-481:16 (Brinkerhoff Testimony); JA Vol. III, pp. 279-80 (Tr. Ex. 60). As Big-D's project manager testified regarding the interior stucco, "as we started taking these cores out, you could simply twist them like a mason jar and separate the brown coat from

the scratch coat....there was just no adhesion between the scratch and the brown.”  
JA Vol. V, pg. 480:16-481:16 (Brinkerhoff Testimony).

IGT Directs Big-D to Remove and Replace the Padilla Work. IGT made the decision to reject the Padilla Work both in the interior and exterior of the Project. JA. Vol. V, pg. 421-24 (IGT Deposition). The basis for IGT’s decision included the recommendation of Mr. Chin that “he didn’t believe it was installed to the standards that would give him high confidence that the system would be able to take and handle stone.” *Id.* As a result, it is undisputed that IGT made the decision to reject the Padilla Work because it determined Padilla failed to comply with the Plans and Specifications. *Id.*; JA Vol. VI, pp. 722:1-728:25 (Chin Testimony); JA Vol. V, pg. 480:16-481:16 (Brinkerhoff Testimony). The Padilla Work on the site further presented a safety concern that required immediate remove and replacement because 40 lb stone panels had been installed over the top of portions of the Padilla work that was failing. JA Vol. VI, pp. 526-27 (McNabb Testimony).

**B. Big-D Gave Padilla *Repeated* Notice of the Failures in the Padilla Work and Requested Padilla’s Assistance to Defend the Work.**

Padilla was regularly and repeatedly advised of failures of its work both during *and* after the Project. JA Vol. 1, pg. 49:9-50:13, Pre-Trial Memorandum, Stipulated Facts. In addition, Padilla’s own crew advised Padilla management of the failures in the Padilla Work. *Id.* at 49:9-27; RA Vol. 1, pg. 137-156, Tr. Ex. 17 (Daily Field Logs of Padilla’s crew).

During the Project. Both IGT and Big-D specifically and repeatedly requested Padilla to participate in testing to determine whether the Padilla Work was suitable. JA Vol. 1, pg. 50:1-28, Stipulated Facts; JA Vol. III, pg. 265, Tr. Ex. 46 (email informing Padilla “we have another area of separation between the brown and scratch coat” and requesting a telephone call to discuss). JA Vol. V, pp. 486:14-23, 487:4-15 (Brinkerhoff Testimony). Padilla was present during testing performed on-site on September 16 and 23 and was present when the demolition of the Padilla Work commenced. JA Vol. V, pg. 476:24-477:15, 480:2-25 (Brinkerhoff testimony).

These invitations were made both during the construction and after the Padilla Work was rejected. Yet, Padilla did nothing to investigate. Padilla did not investigate whether the brown coat that it was using was too stiff. RA. Vol. II, pg. 352-353 (Lopez Deposition at 129:2-9). Padilla did not investigate whether the two layers of its stucco were sufficiently compacted. *Id.* (Lopez Deposition at 129:10-13). Padilla did not investigate whether the water content of the brown coat was sufficient at the time that it was applied. *Id.* (Lopez Deposition at 132:18-22). When Padilla first became aware of the presence of chunks in its stucco work, its expert, Mr. Roberts, recommended that it investigate the product mix to identify the source of contaminants. *Id.* at 335 (Lopez Deposition at 43-45). Padilla did

not take any action to investigate the product because “*that cost money.*” *Id.* (Lopez Deposition at 44:1-2) (emphasis added).

Padilla’s executive responsible for the Project made clear “we weren’t going to participate” in testing and investigation of Padilla’s Work. *Id.* at 342 (Lopez Deposition at 84: 12-17; 82-84).

*Q. And do you recall, did Big-D in fact request Padilla to assist it to investigate the cause of the failures of the product?*

*A. Yes*

*Q. And what, if anything, did Padilla do to assist Big-D to investigate the cause of the product failure?*

*A. Ask for our money.*

*Id.* at 354 (Lopez Deposition at 135:16-23).

After the Project. Even with Padilla’s failure to assist, Big-D continued to defend the Padilla Work for a period of weeks and requested Padilla’s assistance and participation in its efforts. JA Vol. 1, pg. 50:1-7 Stipulated Facts; RA Vol. 1, pg. 237-238, Tr. Ex. 52; JA Vol. 3, pg. 272, Tr. Ex. 55; JA. Vol. III, pg. 268, Tr. Ex. 53 (email confirming teleconference between Big-D and Padilla to discuss plan to defend work); JA Vol V, pg. 469:10-24 (Brinkerhoff Testimony); JA Vol VI, pg. 497-502 (Brinkerhoff Testimony).

This included the following measures: (i) a request for a meeting immediately after IGT rejected the Padilla Work (which was scheduled for September 29, 2009); (ii) several telephone calls from Big-D to Padilla to follow up on the September 29 meeting, JA Vol. 5, pg. 473:13-18 (Brinkerhoff testimony)

and (iii) a formal letter that stated, “Big-D is looking to Padilla to assist in investigating the cause of the failure...It would be a tremendous assistance if Padilla would furnish Big-D with any documentation or other evidence at its disposal which relates to the involvement of IGT or its consultant, Ian Chin.” JA Vol. III, pg. 275- 77, Tr. Ex. 58 (letter from Big-D requesting that Padilla assist Big-D to defend the Padilla work to IGT; confirming payment to be withheld unless and until work could be defended). Padilla unequivocally declined unless it was immediately paid in full for the removed and rejected work. JA Vol. III, pg. 278 (Tr. Ex. 275); JA Vol VI, pg. 497-502 (Brinkerhoff Testimony); RA Vol. II, pp. 352-354 (Lopez Deposition at 135:16-23).

Padilla’s Crews’ Knowledge.

It was no secret that the Padilla work was failing. Even Padilla’s own crews identified the separation. RA Vol. 1, pg. 137-156, Tr. Ex. 17 (Daily Field Logs of Padilla’s crew). Padilla’s field notes indicate as follows:

Date	Notation
September 10, 2009	“The brown is pulling from the scratch on the first two columns that we scratch and brown after the mock-up.”
September 11, 2009	“We have the same problem on the brown coat on the second column when the stone installers do the bonding test the brown pulls from the scratch. Call Joe [Lopez] let him know. <b>Also, Joe [Padilla management] says for me to keep doing the production.</b> ”
September 15, 2009	“Today, 3 more areas where install stone when stone installers pull it to check bonding, brown coat came loose



Date	Notation
	from scratch coat. Joe Lopez [Padilla management] let him know what happened. <b>His response was for me to keep doing what I was doing and that nothing was wrong."</b>
September 16, 2009	"Today, two more areas came loose."

*Id.* (emphasis added). Padilla management brazenly instructed the Padilla crews to keep working, in spite of identified instances of failure in Padilla's Work. *Id.*

**C. Big-D Gave Padilla *Repeated* Notice of the Failures in the Padilla Work and Requested Padilla's Assistance to Defend the Work.**

IGT did not give Big-D the opportunity to remove and replace the Padilla Work. JA Vol. VI, pp. 525-536 (McNabb Testimony). On the outside of the building, IGT immediately directed Big-D to place an alternate system. Because there was no longer time to allow the two-coat stucco system to cure before IGT needed the project for its international client event, IGT directed Big-D to use an alternate, slightly less desirable method of construction using a cement board base for the stone instead of the stucco.<sup>3</sup> JA Vol. 1, pg. 50:7-13, Pre-Trial Memorandum, Stipulated Facts; JA. Vol. V, pg. 421-24 (IGT Deposition); JA Vol 5, pg. 489-90 (Brinkerhoff testimony); JA Vol. VI, pp. 525-536 (McNabb).

---

<sup>3</sup> Again, Padilla brazenly misrepresents the evidence on this issue. Opening Br. at 3. Contrary to Padilla's representation that Big-D and IGT determined the cement board "was better suited to the stone adhesive coverage pulling," all evidence indicates that the sole basis for the switch was timing and IGT firmly believed it was a less desirable solution than the stucco—not some sort of improvement. JA. Vol. V, pg. 421-24 (IGT Deposition); JA Vol 5, pg. 489-90 (Brinkerhoff testimony)

Months later, IGT informed Big-D that it refused to allow Big-D the opportunity to replace the Padilla Work on the interior of the building. JA Vol. VI, pp. 517-18 (McNabb Testimony); JA Vol. III, pp. 286-290. In fact, the failure of the Padilla Work formed the basis for a dispute between Big-D and IGT and resulted in Big-D paying substantial damages to IGT. JA Vol. VI, pp. 524-26 (McNabb Testimony); JA Vol. III, pp. 283-285 (Tr. Ex. 64).

By a mistaken accounting error, Big-D released a check to Padilla in October 2009. JA Vol. V, pp. 490:20-492:25 (Brinkerhoff Testimony); JA Vol. VI, pp. 494:1-498:1, 507:18-511:8 (Brinkerhoff Testimony); JA Vol. II, pp. 215-220, Tr. Ex. 9 (Payment Request); JA Vol. II, pp. 291-292, Tr. Ex. 73 (Big-D AP History). Big-D immediately stopped payment on the check and called Padilla to advise that the check was released in error and that payment was to be withheld pending further investigation into the causes of the failure of the Padilla Work. JA Vol. VI, pp. 494:1-498:1, 507:18-511:8 (Brinkerhoff Testimony); JA Vol. III, pp. 281-282, Tr. Ex. 61 (Email).

**D. District Court Relied on Substantial Evidence that the Padilla Work Was Defective.**

Based upon the presentation of the evidence, the District Court considered substantial factual evidence that the Padilla Work was defective and was not constructed in compliance with the Plans and Specifications. This included evidence from:

(i) On-site investigation: JA. Vol. 3, pg. 261-266 (Tr. Ex. 43, 44, 46); RA Vol I, pg. 231-238 (Tr. Ex. 45, 47, 48, 49, 51); ; JA Vol. 5, pg. 48-85; [Chin testimony]

(ii) Photographs of the defective work as it was observed, JA Vol. IV, pp. 374-384, Tr. Ex. 404 and 405;

(iii) Testimony of Big-D on-site project manager, Brent Brinkerhoff, JA Vol. V, pp. 480-86 (Brinkerhoff Testimony); JA Vol. VI, pp. 498-503 (Brinkerhoff Testimony);

(iv) Testimony of Big-D's principal in charge who was onsite, Forrest McNabb, JA Vol. V, pp. 527 (McNabb Testimony);

(v) Testimony of Padilla's executive responsible, Joseph Lopez, JA Vol. V, pp. 407-417 (Lopez Testimony); RA Vol. II, pp. 328-356 (Lopez testimony);

(vi) Testimony of IGT's responsible executive, Robert Stecker, JA Vol. V, pp. 418-424 (IGT Testimony); RA Vol. II, pp. 357-384 (IGT testimony);

(vii) Testimony of IGT's designated on-site expert based upon personal observation and investigation, Ian Chin, JA Vol. VII, pp. 734-784 (Chin Testimony);

(viii) testimony regarding findings of IGT's off-site petrographic analysis, *Id.* and JA. Vol. IV, pp. 380-381 (Tr. Ex. 406); and

(ix) further extensive analysis after the Padilla Work was removed and replaced. JA Vol. VI, pp. 498-503 (Brinkerhoff Testimony).

Chronologically, this included the following sequence of events relied upon by the District Court to determine that the Padilla Work was defective.

On **September 10, 2009**, visual review of the Padilla Work confirmed that the first layer of the Padilla Work was not adequately “scored” to allow bonding to the second layer; Finding of Fact 34 (citing Tr. Ex. 404<sup>4</sup>, 405<sup>5</sup>, 446-50); JA Vol. VI, pp. 696:12-697:8 (Chin Testimony).

On **September 10, 2009**, visual review of the Padilla Work confirmed that it was not properly hydrated with enough water to activate the cementitious properties of the material. Finding of Fact 34 (citing Tr. Ex. 403, 404, 405, 446-50); JA Vol. VI, pp. 702:3-704:1 (Chin Testimony). Big-D immediately contacted Padilla and asked Padilla to investigate the failures. JA. Vol. V, pp. 484:12-24.

On **September 14, 2009**, photographs of the failed work demonstrated that, in contravention of the plans and specifications, the grooving of the Padilla Work is in two directions. JA Vol. VI, pp. 711:12-712:4 (Chin Testimony).

On **September 15, 2009**, Ian Chin’s petrographer reported that microscopic examination of the Padilla Work was consistent with Mr. Chin’s conclusions based

---

<sup>4</sup> Contained at JA Vol. 4, pg. 369-73.

<sup>5</sup> Contained at JA Vol. 4, pg. 374-79.

upon on-site investigation. JA Vol. VI, pp. 702:3-704:1, 704:9-706:20 (Chin Testimony); JA Vol. IV, pp. 380-381 (Tr. Ex. 406).

On **September 16, 2009**, Mr. Chin conducted an on-site investigation of the failed conditions. JA Vol. VI, pp. 707:11-708:15.

On **September 17, 2009**, Mr. Chin analyzed, 3-inch diameter core samples of the Padilla Work. JA Vol. VI, pp. 716-720 (Chin Testimony); JA Vol. IV, pp. 383-386 (Tr. Ex. 438); JA Vol IV, pp. 395-397 (Tr. Ex. 449). Of the 11 samples, the following results were identified: (i) on eight of the samples, the brown coat had failed to bond to the scratch coat; (ii) on seven samples, the scratch coat was not properly scored to receive the brown coat; and (iii) on an eighth sample, the scratch coat was only 50% bonded to the brown coat. JA Vol. IV, pp. 383-386 (Tr. Ex. 438); JA Vol. III, pp. 279-80 (Tr. Ex. 60).

On **September 23, 2009**, Big-D performed testing of several interior areas of the building to determine whether it could defend the Padilla Work. JA Vol. VI, pp. 722:1-728:25 (Chin Testimony); JA Vol. V, pg. 480:16-481:16 (Brinkerhoff Testimony). Those investigations revealed the same types of failures as identified on the exterior of the building. JA Vol. III, pp. 279-80 (Tr. Ex. 60).

**E. District Court Awarded Big-D Its Attorneys Fees and Costs as Prevailing Party in the Padilla Action.**

On March 6, 2015, Big-D filed a Motion for Attorneys' Fees, Costs, and Interest Pursuant to Judgment and to Amend Judgment in the amount of

\$1,234,678.55. This Motion sought to Amend the Judgment in the following amounts plus post-judgment interest on those amounts:

<b>Category</b>	<b>Amount</b>
Attorneys Fees	\$383,399.00
Expert Fees	\$38,882.34
Lien Release Bond Fees	\$24,700.00
Other Costs	\$6,344.99
Pre-Judgment Interest	\$164,921.92

JA Vol. VII, pg. 849. In its Reply on May 18, 2015, Big-D voluntarily removed its claim for Pre-Judgment Interest in response to Padilla's Opposition; Big-D acknowledged the pre-judgment interest claim was barred by the Padilla Bankruptcy. JA Vol. VII, pg. 885.

The District Court entered an order awarding Big-D the following:

<b>Category</b>	<b>Amount</b>
Attorneys' Fees	\$383,399.00
Fees to Depose Padilla's Expert	\$2,730.00
Bond Fees	\$24,700.00
Storage of Stucco	\$3,614.99
<b>Subtotal</b>	<b>\$414,433.99</b>

JA Vol. VII, pp. 905. Padilla has represented that the Padilla claim was abandoned by the Padilla Bankruptcy and that Padilla, itself, is entitled to any affirmative recovery from the Padilla Action (and that such funds are not to be paid into the Padilla Bankruptcy). As a result, the District Court entered the fee award as Big-D has a contractual right to attorneys' fees in prevailing on defending against the

Padilla claim—which claim was not impacted by the Padilla Bankruptcy. JA Vol. VII, pp. 905.

#### **IV. SUMMARY OF ARGUMENT**

The District Court relied on substantial evidence in support of its determination that the Padilla Work was defective. As a result, the District Court's determination is not clearly erroneous and must be upheld. Accordingly, Padilla is not entitled to payment for defective work that Big-D was required to remove and replace immediately after it was installed. Rather, Padilla is responsible to Big-D for the costs to remove and replace the Padilla Work (in the amount stipulated by the parties prior to trial).

Because IGT rejected the Padilla Work and ordered Big-D to remove and replace it, payment to Padilla never became due. Further, even if payment had become due, Big-D complied with the mandate of NRS 624.624 by providing Padilla regular and repeated notice that the Padilla Work failed—and Padilla had actual knowledge.

Further, the District Court did not abuse its discretion in declining to give itself a spoliation instruction based upon Padilla's assertion that Big-D failed to preserve adequate samples of the Padilla Work.

Finally, as the prevailing party in defending against the Padilla Action, Big-D is contractually entitled to its costs and attorneys fees pursuant to the

Subcontract Agreement (and post-judgment interest on such amounts). These costs and fees were not barred by the Padilla bankruptcy.

## **V. STATEMENT OF THE STANDARD OF REVIEW**

As to the factual determination that the Padilla Work was defective, the District Court made specific and detailed factual findings that the Padilla Work was defective. Thus, rather than the preponderance standard proposed by Padilla, this Court must only review whether those factual findings are clearly erroneous. “Where a question of fact has been determined by the trial court, this court will not reverse unless the judgment is clearly erroneous and not based on substantial evidence.” *Kockos v. Bank of Nevada*, 90 Nev. 140, 143 (1974). Accordingly, the correct standard is whether the District Court’s own detailed and extensive factual findings were clearly erroneous.

Regarding the District Court’s evidentiary ruling in declining to give itself a spoliation instruction regarding whether Big-D preserved adequate samples of the Padilla Work, this Court should only disrupt the District Court’s ruling if the District Court abused its discretion. *Sheehan & Sheehan v. Nelson Mallev & Co.*, 121 Nev. 481, 492 (2005) (specifying that a district court’s evidentiary rulings shall not be overturned “absent an abuse of discretion”).



## VI. ARGUMENT

### A. **The District Court Did Not Clearly Err Because It Based Its Determination that the Padilla Work Was Defective Upon Substantial Evidence.**

The District Court made two distinct categories of factual conclusions that are both supported by substantial evidence—the Padilla Work was defective and Padilla failed to present reliable evidence to the contrary. The trial judge has “the opportunity to hear and perceive the witnesses,” as a result, he or she is “better able to consider and balance the equities than [is this Court] relying solely on the cold record.” *Cunningham v. Cunningham*, 61 Nev. 93 (1941). “It is not [this Court’s] province to determine the credibility of witnesses. It is the exclusive province of the trial court, sitting without a jury, to determine the facts on conflicting evidence and its finding will not be disturbed *unless it is clear that a wrong conclusion was reached*. *Ormachea v. Ormachea*, 67 Nev. 273, 280 (1950) (emphasis added). As a result, there was no clear error.

#### i. **Substantial Evidence Thoroughly Demonstrated the Padilla Work Was Defective.**

The District Court’s factual determination that the Padilla Work was defective is supported by the overwhelming weight of the evidence. Accordingly, this Court must determine there was no clear error.

First, Padilla contractually agreed to perform the Padilla Work in compliance with the Subcontract Agreement. This included an agreement to meet

the requirements of the plans and specifications, including very precise specifications regarding the thickness of the layers, the method of “scoring” of the base layer, the compaction, and the hydration. *See* §III, Statement of Facts (“SOF”) pp 3-4.

Second, visual examination on the project site indicated that the Padilla Work failed to comply with the contract provisions. SOF pp. 5-6. This evidence was further supported by the testimony of Ian Chin explaining the on-site pictures. As even an untrained eye can see from the pictures, Padilla failed to score the base layer of the stucco to a sufficient depth to create a “key” for bonding. Similarly, the variation in thicknesses is also apparent. In addition, Padilla failed to score the base layer in a single direction as required by the contract. The District Court noted these obvious nonconformities from the pictures at trial. SOF pp. 5-8.

Third, petrographic analysis of the stucco during the Project revealed that the Padilla Work has at least three independent defects: (a) incorrect thickness, (b) failure to uniformly score, and (c) inadequate hydration to activate the cement properties. This was further supported by the testimony of IGT’s consultant that he commissioned petrographic analysis of the Padilla Work; the petrographic report was consistent with his conclusions based upon visual examination; and relied upon the results to determine the Padilla Work was defective. SOF pp. 5-6, 11-12.

Fourth, persons on-site could literally peel one layer of the Padilla Work from the other with bare hands and minimal force—indicating a serious defect. Both Mr. Chin and Brent Brinkerhoff (Big-D) testified of this condition. SOF pp. 4-6, 11-13.

Fifth, the parties took several samples of the stucco work on the interior of the building to perform further tests. Of the eleven usable core samples, eight exhibited serious defects in the form of incorrect thickness of the layers and failure of the layers to bond together. SOF pp. 13.

Sixth, after IGT rejected the Big-D Work, Big-D commissioned an expert to perform further testing and analysis of the Padilla Work in attempt to defend the work as acceptable. Brent Brinkerhoff and Forrest McNabb (Big-D) both testified they were unable to identify a defensible basis to assert to IGT that the Padilla Work was acceptable. SOF pp. 11-13.

Seventh, Mr. Chin testified, unequivocally, that the reason the Padilla Work failed was because the workmanship deviated from the Plans and Specifications. He also testified unequivocally that the length of the cure times both (i) between the first and second coat of the Padilla Work and (ii) between the second coat of the Padilla Work and the exterior stone application had *no bearing* on the failures in the Padilla Work. In fact, Mr. Chin indicated that this conclusion is further reinforced by the fact that the Padilla Work on the interior of the buildings—that

was tested *weeks* after the cure period expired and *never had any stone installed over it*—exhibited the same weakness as the work over which stone was installed. The cure times—the responsibility of Padilla to determine—were, in fact, in compliance with applicable local code. SOF pp. 4-6, 11-13.

Eighth, Big-D requested that Padilla provide any information or analysis to support Padilla's position that the Padilla work failed for reasons other than workmanship. Padilla indicated that it had samples of the material that it would test to determine whether the material, itself, was defective. Padilla never provided any information or took any steps to defend the Padilla Work. SOF pp. 7-10.

ii. **Padilla's Counter-Argument Regarding Causation Is Supported by Minimal Evidence and No Expert Testimony.**

Padilla's factual assertions that, (a) the cause of the failures in the Padilla work was not known, and (b) the cause of the failures in the Padilla work was failure to cure, both mischaracterize the record.

a. **Substantial Evidence Supports the Finding that the Padilla Work Was Defective.**

Contrary to Padilla's assertion, the Padilla Work was rejected by IGT because of workmanship issues. SOF pp. 3-5, 11-13. IGT had petrographically examined the Padilla Work and had its consultant (Ian Chin) investigate the work on site. As a result, (i) IGT knew that the basis for rejecting Padilla's Work was

Padilla's failure to comply with the plans and specification and (ii) Big-D presented substantial evidence in support of this at trial.

First, Padilla's assertion that the "causation of the separations" in the Padilla Work "is not known" is false. Opening Br. at 5. The record is clear that IGT was very firm; it rejected the Padilla Work because the work failed to conform to the Plans in Specifications in several respects: (i) inadequate hydration, (ii) failure to score the first layer sufficiently, and (iii) failure to compact. SOF pp. 3-5, 11-13. At the time the work was rejected, Big-D still disputed IGT's rejection of the Padilla Work on the interior of the building and arduously requested Padilla to step up and defend its work. Later, after months of investigation, Big-D concluded that the Padilla Work was in fact defective and could not be defended to IGT. SOF pp. 11-13. Accordingly, the District Court did not clearly error.

Second, Padilla falsely asserts that Big-D "failed to put forth evidence that any of the alleged deviations from the plans and specifications were material; caused the separations." Opening Br. at 9. In fact, Big-D presented substantial evidence demonstrating that the Padilla Work's failures were caused by the failure to follow the plans and specifications. SOF pp. 7-11. Accordingly, the District Court did not clearly err.

///

///

**b. Substantial Evidence Indicates the Failures in the Padilla Work Were Unrelated to Cure Time.**

The District Court relied upon the substantial evidence to determine the cause of the failure in the Padilla work was *not* a result of cure times. While Padilla asserts, “It is Padilla’s position the separations were caused by the premature installation of the stone on the stucco before it was fully dry (cured),” this assertion is directly contrary to the weight of the evidence. SOF 3-5, 11-13.

Padilla did not present an expert to offer an opinion in support of this causation. In fact, in support of its assertion, Padilla cites not to evidence in the record but to statements of its counsel during argument to support its “failure to cure theory.” The only evidence in the trial record supporting Padilla’s “failure to cure” theory are citations to the deposition testimony of former Padilla COO, Joseph Lopez. The District Court, as the fact finder, is the proper party to weigh the evidence and determine which factual theory has the most evidence. The District Court did this exercise and relied upon the substantial evidence to make a factual finding that the Padilla Work failed because it was defective and Padilla did not construct the Padilla Work in compliance with the plans and specifications. SOF 1-5, 11-13. As a result, the District Court’s express factual finding that the failures in the Padilla Work were not caused by the cure time are not clearly erroneous and must be upheld.

**B. Big-D Had No Obligation to Pay Padilla For the Padilla Work that Was Removed and Rejected; NRS 624.624 Does Not Provide Otherwise.**

Big-D is not required by either the subcontract agreement or Nevada's prompt payment statute (NRS 624.624) to pay Padilla for defective work that the Owner rejected and directed Big-D to remove.

**i. The Subcontract Does Not Require Big-D to Pay Padilla for Defective Work that Was Rejected by the Project Owner.**

As a matter of law, Big-D's obligation to pay Padilla under the Subcontract Agreement was excused because Padilla materially breached the contract by installing defective work. Further, the District Court correctly determined that no implied covenant or equitable theory requires Big-D to pay Padilla for work that was rejected by the Project owner and which Big-D was required to remove and replace on its own dime. Again, this determination was also based upon the factual finding supported by substantial evidence that Padilla's work was defective. Accordingly, there is no basis to find that Big-D breached the express or implied obligation in the Subcontract Agreement.

**ii. Big-D Had No Obligation to Give Padilla an Opportunity to "Cure" Work.**

Padilla's argument that Big-D must pay Padilla because Padilla was not given an opportunity to cure its work also fails for four reasons. First, Big-D gave Padilla written notice and request to cure the defective Padilla work when the failures were first identified. SOF 7-8. Second, Big-D was obligated to follow the

directions of IGT who directed the Padilla stucco work be removed and replaced with a cement board system (making any further cure request impracticable). SOF 6-7, 10. Third, the safety risk posed by the stone panels on Padilla's Work further excused any required notice to cure. SOF 10. Fourth, Padilla was unwilling to take any actions to investigate or cooperate—making any additional request to cure futile. SOF 8-9. Accordingly, the District Court did not clearly err in determining that Big-D did not have an additional obligations to request Padilla to cure its defaults.

**iii. NRS 624.624 Does Not Require Payment to a Subcontractor for Defects of which It Was Aware and Notified.**

Nothing in Nevada's prompt payment statutes, NRS 624.624, requires Big-D to pay Padilla for work that the Owner rejected and required Big-D to remove and replace. Padilla argues it is entitled to payment for rejected work claim pursuant to NRS 624.624 based upon two *false* factual assertions: (i) payment to Padilla "was due on October 25, 2009" and (ii) Big-D's first notice of withholding was not provided to Padilla until November 3, 2009.

**a. Payment to Padilla Was Not "Due" on October 25, 2009.**

The District Court did not clearly err in its factual determination that payment to Padilla was not due on October 25, 2009. The Subcontract provided that Padilla was to be paid within ten (10) days after IGT paid Big-D *and* after IGT



accepted the Padilla Work. JA Vol. 1, pg. 91-104, Trial Exhibit 1.<sup>6</sup> Specifically, Big-D “must have first received from the Owner the corresponding periodic payment, *including the approved portion of your monthly billing*, unless the Owner’s failure to make payment was caused exclusively by us.” *Id.* at Section 4.2.

NRS 624.624 does not change the timing of when payment is due under a subcontract. The statute is designed to ensure that general subcontractors promptly pay subcontractors after the general contractor receives payment from the Owner associated with work performed by the subcontractor. NRS 624.624 is clear that its provisions yields to (a) payment schedules contained in subcontract agreements and (b) contractual rights to withhold payments from a subcontractor arising from deficient work. Specifically, NRS 624.624 provides payments are due to a subcontractor under “[a] written agreement with a lower-tiered subcontractor that includes a schedule for payments,” that payments are due as follows:

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

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

whichever is earlier

---

<sup>6</sup> “Contractor will issue payment to Subcontractor by US Mail ... within ten (10) days of receiving payment from the Owner.” Section D.

NRS 624.624(1)(a).

Further, even after such due date, a general contractor has the right to withhold payment for “[c]osts and expenses reasonably necessary to correct or repair any work which is the subject of the request for payment ...” NRS 624.624(2)(b). NRS 624.624 does require that a general contractor provide written notice to the subcontractor as to the basis for withholding “on or before the date the payment is due.” *Id.* at (3).

Here, it is undisputed that the Subcontract Agreement is a written agreement between Big-D and Padilla. Accordingly, pursuant to NRS 624.624(1)(a), payment is due to Padilla as specified in the Subcontract Agreement—after IGT accepted the Padilla Work.

Padilla dated its Application for Payment on September 25, 2009 and it was received by Big-D on September 30, 2009. Padilla erroneously contends that the payment was “due” on October 29, 2009. This assertion is incorrectly based upon a notation by Big-D’s project manager on an internal accounting document tracking received project payments—which Padilla misconstrues and takes out of context. Yet, the District Court did not clearly err in its factual finding that Padilla’s work had not been approved by IGT by October 29<sup>th</sup> (and, in fact, had been rejected by IGT on September 20<sup>th</sup> and replaced by Big-D by October 9, 2009). As a result, because IGT has not accepted Padilla’s work by October 29,

2009, payment to Padilla was not due at that time. As a result, there is no basis to use October 29, 2009 as a payment due date for purposes of NRS 624.624.

**b. Big-D Provided Padilla Repeated Written Notice of the Defects in the Padilla Work.**

The District Court did not clearly err in determining that Padilla received repeated written notice that its work was defective. Rather, the District Court relied on substantial evidence that Padilla had actual and direct notice of the potential defects in the Padilla Work including the following:

- Real-time notice by Padilla's own crews that the work was separating from itself, SOF 9-10;
- Written notice from Big-D to Padilla requesting that Padilla immediately investigate its work on several occasions, SOF 7-8;
- Telephone notice from Big-D to Padilla following up on Big-D's requests that Padilla investigate the failures in the Padilla Work, SOF 11-13;
- Meetings on-site with the product manufacturer and IGT's consultants discussing the failures in the Padilla Work, SOF 11-13;
- Real-time information that IGT had rejected the Padilla Work and directed Big-D to remove and replace it, SOF 11-13; and
- Finally, formal written notice from Big-D on November 3, 2009 informing Padilla that no payment would be processed unless and until Padilla could assist Big-D to demonstrate that the failures in Padilla's work were caused by factors other than Padilla (which Padilla took no efforts to do), SOF 8-9.

Assuming *arguendo* that payments to Padilla for the rejected Padilla Work had become due, Big-D provided repeated written notices to Padilla of the failures in the Padilla Work. Further, Big-D was authorized by the Subcontract Agreement to withhold payment from Padilla for "defective work not remedied" and "your

failure to perform any obligation made by You in this Subcontract.” JA Vol. 1, pg. 91-104, Trial Exhibit 1, at Section 4.4(2) and (5). As a result, NRS 624.624(3) authorizes Big-D to withhold sums due to Padilla amounts to remove and replace the Padilla Work. Accordingly, NRS 624.624 does not override the subcontract terms to impose any affirmative payment obligations upon Big-D to pay Padilla for work that was rejected and removed.

**iv. Padilla’s Reliance on *Lehrer McGovern Bovis* Is Inapposite.**

Padilla’s reliance on dicta in *Lehrer McGovern Bovis* is inapposite—it had no bearing on determining whether Big-D gave time notice of withholding to Padilla pursuant to NRS 624.624. *See* Opening Br. at 20. First, NRS 624 was not in effect or being interpreted in *Lehrer McGovern Bovis, Inc. v. Bullock Insulation, Inc.* 124 Nev. 1102, 1117 (2008). Second, the issue here is not whether the payment schedule in the Big-D subcontract is a pay-if-paid clause that would excuse Big-D’s obligation to pay Padilla *if* the owner failed to pay Big-D for Padilla’s work. Rather, the issue is, for the purposes of NRS 624.624 notice of withholding, when was the payment from Big-D to Padilla due. The Subcontract Agreement contained a schedule for payments—payment to Padilla was due after IGT approved Padilla’s work *and* after Big-D received payment attributable to Padilla’s work.

This is not a “pay-if-paid case.” Rather, this is a case where payment to a subcontractor is excused when the subcontractor performs defective work that is rejected by the Owner and which the general contractor is required to remove and replace. The legal rights and obligations in such a circumstance are governed by clear contract provisions and case law interpreting when obligations for payment under a subcontract are excused. Nothing in NRS 624.624 or *Lehrer McGovern Bovis* determine that payment is required when an Owner rejects a subcontractor’s work and requires it to be removed and replaced. This is a contract compliance issue not a prompt payment issue.

**v. It Is Undisputed that Padilla’s Application for Payment Is Overstated Even If Padilla Were Entitled to Payment.**

Further, even if Padilla were entitled to payment (which it is not), it is undisputed that Padilla’s Application for Payment dated September 25, 2015 is overstated. The Application for Payment fails to credit Big-D for the initial \$25,000.00 deposit made to Padilla prior to starting work. JA Vol. 6, pp. 494-497 (Brinkerhoff testimony). Further, it is undisputed that Big-D was required to pay one of Padilla’s material suppliers directly after the material supplier filed a mechanic’s lien against the Project. Nothing in NRS 624.624 provides that Padilla is entitled to payment for an overstated application for payment. Accordingly, even if Padilla were entitled to payment for the defective and rejected work (which it is not), the amount of damages would be reduced by amounts that Padilla had

previously been paid and amounts that Big-D was required to pay Padilla's subcontractors.

**C. The District Court Did Not Abuse Its Discretion in Declining to Give Itself a Spoliation Instruction.**

The District Court did not abuse its discretion in electing not to give itself a spoliation instruction. *Sheehan & Sheehan v. Nelson Mallev & Co.*, 121 Nev. 481, 492 (2005) (specifying that a district court's evidentiary rulings shall not be overturned "absent an abuse of discretion"). Padilla asserts it is entitled to a spoliation instruction based on Padilla's contention that Big-D did not retain enough samples of the rejected Padilla Work. For five reasons, the District Court did not abuse its discretion.

First, Padilla does not contend that Big-D failed to preserve stucco samples of Padilla's Work for its testing and investigation. It is undisputed that several stucco samples were preserved and provided to Padilla. Rather, Padilla contends that Big-D failed to retain portions of the stucco over which stone was installed. This argument is a red herring because it is premised upon Padilla's incorrect argument that only the stucco over which stone installation had commenced failed. This is incorrect. IGT was clear that its basis to reject the Padilla Work related to its testing and inspection of Padilla Work over which no stone was installed—including on the interior of the building where no stone was installed. The failures in the Padilla Work were widespread and there is no evidence of any kind that the

Padilla stucco over which stone was installed performed any differently than the stucco (over which no stone was installed) that was rejected by IGT.

Second, the remedy that Padilla requests—tantamount to a direction by the Court that the Padilla Work is not defective—is not supported by Nevada law. Rather, Nevada recognizes an “adverse inference” for negligent destruction of evidence. An “adverse inference” “is permissible, not required, and it does not shift the burden of proof.” *Bass-Davis v. David*, 122 Nev. 442, 449, 34 P.3d 103, 107 (2006). An “adverse inference” instruction informs a jury that it is “permitted” to draw an inference that such evidence may have been unfavorable to the destroying party. Here, Padilla, Big-D, and IGT witnesses observed the separation of the Padilla Work. Contemporaneous photographs demonstrate the separation of the Padilla Work. Both Big-D and IGT retained expert consultants to test the Padilla Work. And, there are existing samples remaining of the Padilla Work that were provided to Padilla during discovery. Even if the district court allowed itself the “permission” to infer that the portions of the Padilla Work that were discarded may have contained unfavorable evidence to Big-D, this permissible inference does not counter the mountain of evidence relied upon by the District Court that the Padilla Work failed.

Third, the concept of an adverse inference instruction is to provide evidentiary balance to a proceeding and ensure the jury understands the scope of

inferences it is permitted to draw based upon the availability of evidence. Such an explanation is not necessary when the fact finder is a sophisticated district court judge—who is well equipped to make such determinations himself. “Adverse inference instructions generally are not appropriate sanctions in bench trials.” *See Thompson v. U.S. Dep’t of Hous. and Urban Dev.*, 219 F.R.D. 93, 105 (D. Md. 2003) (holding the district judge was sophisticated enough to factor in any spoliation issues in its own factual findings).

Fourth, Padilla failed to timely request or demand such a spoliation remedy. When a party waits until trial to seek a remedy that equates to a declaration of victory on an issue, it is appropriate to deny the request. *See JOM, Inc. v. Adell Plastics, Inc.*, 193 F.3d 47, 49-50 (1st Cir. 1999); *Gault v. Nabisco Biscuit Co.*, 184 F.R.D. 620, 622 (D. Nev. 1999).

Fifth, Big-D did not have custody and control over the evidence and had the same access to such evidence as did Padilla. Spoliation sanctions are only appropriately issued to a party “controlling the evidence.” *Bass-Davis*, 122 Nev. at 450.<sup>7</sup> IGT was the Owner of the Project and required Big-D to remove and replace

---

<sup>7</sup> “Obviously, the party charged with spoliation must have been in the possession, custody, or control of the evidence in order for the duty to preserve to arise. The party requesting sanctions for spoliation has the burden of proof on such a claim.” *Hammann v. 800 Ideas, Inc.*, 2010 U.S. Dist. LEXIS 131097 at \*21 (D. Nev. 2010) (denying motion for spoliation related to records of certain 1-800 numbers when there was no evidence that party was in the “possession, custody, or control” of relevant documents, even when party had business relationship with party in



the Padilla Work on an expedited basis. Both Big-D and Padilla were on the project site at the time that the order was issued. Had Big-D not removed and replaced the Work, IGT would have inevitably done so. Big-D did not have the option to leave Padilla Work on the exterior of the building for an extended period—meaning that it is not proper to issue a spoliation sanction against Big-D.

As a result, for these five reasons, the District Court did not abuse its discretion in failing to give itself a spoliation instruction.

**D. Big-D Is Entitled to Recover Its Attorneys’ Fees, Costs, and Interest.**

The District Court had jurisdiction to award Big-D attorneys’ fees and costs related to post-petition matters and costs to defend against Padilla’s affirmative claim. Padilla’s bankruptcy action did not, as a matter of law, impact Big-D’s right to post-petition attorney’s fees and costs to defend Padilla’s affirmative claim or post-petition costs to maintain an NRS 108 bond related to Padilla’s mechanic’s lien.

Post-confirmation “debts” are liabilities of reorganized Chapter 11 debtor and are not affected by the bankruptcy proceeding. 11 U.S.C. Section 1141(d); *In re Nuttall Equipment Co., Inc.*, 188 B.R. 732 (Bkrtcy.W.D.N.Y.1995); *Rozel*, 120 B.R. at 949 (“Generally, a claim or debt must be found to be absolutely owing at

---

control of such documents). *See also Rhodes v. Robinson*, 399 Fed. Appx. 160, 166 (9th Cir. 2010) (discussing required proof that “the party *with control* over [evidence] had a duty to preserve it”) (emphasis added).

the time of the filing of the petition to be considered a pre-petition item.”). A Chapter 11 plan and confirmation order does not preclude a claimant from seeking post-petition attorneys’ fees. *In re Mariner Post Acute Network, Inc.* 312 B.R. 520 (Bankr. D. Del. 2004). For example, confirmation of a debtor’s chapter 11 plan did not terminate a mortgage agreement or impact the mortgagee’s contractual right to recover attorney fees incurred in litigating its rights under agreement. *In re Sure-Snap Corp.*, 983 F.2d 1015 (11<sup>th</sup> Cir. 1993). Rather, the effect of the Chapter 11 plan was only to prevent the mortgagee from enforcing the terms of the mortgage agreement against the debtor to collect a pre-confirmation debt. *Id.* Similarly, a creditors post-petition claim against a Chapter 11 debtor was not impacted by plan confirmation when the actions that formed the basis for the claim occurred post-petition, even though the contract was executed pre-petition. *In re Texaco, Inc.*, 218 B.R. 1 (S.D.N.Y. 1998).

Here, the attorneys’ fees and costs that Big-D seeks are post-petition fees not impacted by the bankruptcy action. The bankruptcy petition did not modify Big-D’s contractual right to its attorneys’ fees in defending against Padilla’s claim. *See e.g., In re Sure-Snap Corp.*, 983 F.2d 1015 (11<sup>th</sup> Cir. 1993). Attorneys’ fees incurred by Big-D post-petition to defend Padilla’s affirmative claim for relief are not impacted by the bankruptcy petition, which only impacts pre-confirmation debts. Padilla prosecuted a mechanic’s lien claim against Big-D.

Further, Big-D was required by IGT to procure a bond to prevent the Padilla lien from being a cloud on the title to the Project. This bond incurred an annual fee of approximately \$5,000—which Big-D was required to pay each year between 2010 and 2015 during the duration of the case. This bond cost has no relation to the Big-D Counterclaim—it arises exclusively from the Padilla mechanic’s lien claim. Further, Big-D did not incur any attorneys’ fees or costs in support of the Big-D Counterclaim that were not necessary to defend the Padilla Action.

As a result, Big-D is entitled to collect its fees and costs against the reorganized Padilla.

## **VII. CONCLUSION**

Accordingly, for the foregoing reasons, this Court should uphold the District Court’s decision and affirm the judgment entered in favor of Big-D.

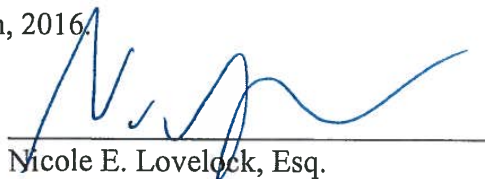
## **VIII. CERTIFICATE OF COMPLIANCE**

I certify that I have read this Answering Brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this Brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found. The Brief complies with the formatting requirements of NRAP 32(a)(4)-

(6) and the type-volume limitation stated in NRAP 32(a)(7) because it is presented in a 14-point Times New Roman font, contains 1,071 lines and 10,024 words, including headings and footnotes, as counted by Microsoft Word—the program used to prepare this brief.

I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 10th day of March, 2016.



Nicole E. Lovelock, Esq.  
HOLLAND & HART LLP  
9555 Hillwood Drive, 2nd Floor  
Las Vegas, Nevada 89134  
(702) 669-4600  
(702) 669-4650 – fax

Melissa A. Beutler, Esq.  
Big-D Construction Corporation  
3030 South Highland Drive  
Las Vegas, Nevada 89107-1047

*Attorneys for Respondent*











PLUMBING FOURTH FLOOR										
AG WASTE & VENT	\$ 73,093	\$ 73,093	\$ 2,192.79	\$ 219.28	\$ 1,973.51	\$ 71,931	\$ 7,193.11	\$ 8,624.97	88.00%	100.00%
DRAINS/CARRIERS	\$ 7,233	\$ 7,233	\$ 216.06	\$ 21.70	\$ 195.28	\$ 7,088	\$ 708.79	\$ 853.43	88.00%	100.00%
AG STORM PIPING	\$ 18,478	\$ 18,478	\$ 554.28	\$ 55.43	\$ 498.85	\$ 18,108	\$ 1,810.85	\$ 2,180.17	90.00%	100.00%
AG DOMESTIC WATER	\$ 78,331	\$ 78,331	\$ 2,378.95	\$ 237.89	\$ 2,141.04	\$ 77,744	\$ 7,774.44	\$ 9,361.08	88.00%	100.00%
AG GAS PIPING	\$ 31,071	\$ 31,071	\$ 932.13	\$ 93.21	\$ 838.92	\$ 28,888	\$ 2,888.80	\$ 5,084.57	88.00%	100.00%
TUBS & HOOKUPS	\$ 37,040	\$ 37,040	\$ 1,852.00	\$ 185.20	\$ 1,666.80	\$ 35,168	\$ 3,516.80	\$ 5,370.80	88.00%	100.00%
PLUMBING FIXTURES	\$ 55,613	\$ 55,613	\$ -	\$ -	\$ -	\$ 11,103	\$ 1,110.26	\$ 45,520.68	20.00%	50.00%
PLUMBING EQUIPMENT	\$ 15,976	\$ 15,976	\$ 3,195.00	\$ 319.50	\$ 2,875.50	\$ 7,988	\$ 798.75	\$ 6,788.26	50.00%	60.00%
CONDENSATE PIPING	\$ 5,584	\$ 5,584	\$ -	\$ -	\$ -	\$ 5,472	\$ 547.23	\$ 658.91	98.00%	100.00%
PLUMBING TESTING	\$ 8,568	\$ 8,568	\$ 856.80	\$ 85.68	\$ 770.94	\$ 7,709	\$ 770.94	\$ 1,827.54	80.00%	85.00%
PLUMBING IDENTIFICATION	\$ 2,112	\$ 2,112	\$ -	\$ -	\$ -	\$ -	\$ -	\$ 2,112.00	0.00%	0.00%
INSULATION - FIRESTOP	\$ 10,120	\$ 97,620	\$ 1,012.00	\$ 101.20	\$ 910.80	\$ 89,568	\$ 8,956.80	\$ 17,017.80	91.74%	100.00%
ELECTRICAL										
ELECTRICAL ENGINEERING	\$ 28,450	\$ 28,450	\$ -	\$ -	\$ -	\$ 22,097	\$ 2,209.68	\$ 9,582.88	75.00%	75.00%
ELECTRICAL MOBILIZATION	\$ 32,300	\$ 16,840	\$ -	\$ -	\$ -	\$ 16,840	\$ 1,684.00	\$ 1,684.00	100.00%	100.00%
OFFICE TRAILER/ADMIN 24 Mos.	\$ 22,800	\$ 22,800	\$ -	\$ -	\$ -	\$ 12,403	\$ 1,240.30	\$ 11,597.30	54.40%	54.40%
PRJT. ENG. CAD. PRJT. ASST.	\$ 14,250	\$ 14,250	\$ 4,000.00	\$ 400.00	\$ 3,600.00	\$ 12,735	\$ 1,273.50	\$ 2,788.50	88.37%	88.37%
ELECTRICAL PERMITS	\$ 12,350	\$ 12,350	\$ -	\$ -	\$ -	\$ 9,930	\$ 993.00	\$ 8,113.00	58.11%	58.11%
SUBMITTALS	\$ 1,900	\$ 1,900	\$ -	\$ -	\$ -	\$ 1,900	\$ 190.00	\$ 190.00	100.00%	100.00%
SUPERVISION/PLANNING/COORD	\$ 22,800	\$ 22,800	\$ -	\$ -	\$ -	\$ 21,000	\$ 2,100.00	\$ 3,300.00	94.74%	94.74%
LIGHT FIXTURE PACKAGE	\$ 100,000	\$ 100,000	\$ 45,000.00	\$ 4,500.00	\$ 40,500.00	\$ 98,436	\$ 9,843.60	\$ 17,407.80	92.86%	95.00%
DISTRIBUTION PACKAGE	\$ 83,000	\$ 83,000	\$ 4,000.00	\$ 400.00	\$ 3,600.00	\$ 78,000	\$ 7,800.00	\$ 11,900.00	95.18%	95.00%
LOW VOLT SVCS FA, CCTV, CA	\$ 50,000	\$ 93,928	\$ 10,000.00	\$ 1,000.00	\$ 9,000.00	\$ 62,744	\$ 6,274.40	\$ 37,458.40	88.88%	75.00%
UNDERLAB BRANCH CONDUIT	\$ 85,000	\$ 85,000	\$ -	\$ -	\$ -	\$ 78,500	\$ 7,850.00	\$ 16,150.00	90.00%	100.00%
GARAGE & 1st FLR CONDUIT &	\$ 400,000	\$ 400,000	\$ -	\$ -	\$ -	\$ 380,000	\$ 38,000.00	\$ 58,000.00	95.00%	100.00%
1st FLR RGH WALLS/Ceilings	\$ 75,000	\$ 75,000	\$ 3,600.00	\$ 350.00	\$ 3,150.00	\$ 71,250	\$ 7,125.00	\$ 10,875.00	95.00%	100.00%
1st FLR DEVICE & FIXTURE TRIM	\$ 10,000	\$ 10,000	\$ -	\$ -	\$ -	\$ -	\$ -	\$ 10,000.00	0.00%	0.00%
2nd FLR RGH WALLS/Ceilings	\$ 75,000	\$ 75,000	\$ 3,500.00	\$ 350.00	\$ 3,150.00	\$ 71,250	\$ 7,125.00	\$ 10,875.00	95.00%	100.00%
2nd FLR DEVICE & FIXTURE TRIM	\$ 10,000	\$ 10,000	\$ -	\$ -	\$ -	\$ -	\$ -	\$ 10,000.00	0.00%	0.00%
3rd FLR RGH WALLS/Ceilings	\$ 75,000	\$ 75,000	\$ -	\$ -	\$ -	\$ 67,750	\$ 6,775.00	\$ 14,025.00	90.33%	100.00%
3rd FLR DEVICE & FIXTURE TRIM	\$ 10,000	\$ 10,000	\$ -	\$ -	\$ -	\$ -	\$ -	\$ 10,000.00	0.00%	0.00%
4th FLR RGH WALLS/Ceilings	\$ 75,000	\$ 75,000	\$ -	\$ -	\$ -	\$ 67,750	\$ 6,775.00	\$ 14,025.00	90.33%	100.00%
4th FLR DEVICE & FIXTURE TRIM	\$ 10,000	\$ 10,000	\$ -	\$ -	\$ -	\$ -	\$ -	\$ 10,000.00	0.00%	0.00%
APCO CONTRACTOR FEE	\$ 874,316	\$ 874,316	\$ 76,507.71	\$ 7,650.77	\$ 68,856.94	\$ 615,930	\$ 61,593.05	\$ 320,067.88	70.44%	70.44%
SUBTOTAL BUILDING 9	\$ 13,142,910	\$ 13,246,954	\$ 1,228,999.64	\$ 122,899.64	\$ 1,104,269.59	\$ 9,772,085	\$ 977,208.48	\$ 4,452,077.16	73.77%	74.12%
GRADING CHANGE ORDERS										
GRADING CO 00001	\$ -	\$ 59,368	\$ -	\$ -	\$ -	\$ 53,377	\$ 5,337.70	\$ 8,659.87	90.00%	90.00%
GRADING CO 00002	\$ -	\$ 447	\$ -	\$ -	\$ -	\$ 447	\$ 44.70	\$ 22.34	100.00%	100.00%
GRADING CO 00003	\$ -	\$ 88,339	\$ -	\$ -	\$ -	\$ 70,871	\$ 7,087.10	\$ 21,201.28	80.00%	80.00%
GRADING CO 00004	\$ -	\$ 453	\$ -	\$ -	\$ -	\$ 453	\$ 45.30	\$ 22.64	100.00%	100.00%
GRADING CO 00005.1	\$ -	\$ 394,330	\$ -	\$ -	\$ -	\$ 307,578	\$ 30,757.80	\$ 102,131.51	78.00%	78.00%
SUBTOTAL GRADING CHANGE ORDERS	\$ -	\$ 542,877	\$ -	\$ -	\$ -	\$ 432,626	\$ 43,262.60	\$ 131,977.45	78.67%	80.00%
BUILDING CHANGE ORDERS										
BUILDING CO 00001.1	\$ -	\$ 14,247	\$ -	\$ -	\$ -	\$ 13,028	\$ 1,302.80	\$ 1,362.75	100.00%	100.00%
BUILDING CO 00002	\$ -	\$ 108,514	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	RCV/DI	0.00%
BUILDING CO 00005	\$ -	\$ 72,877	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	RCV/DI	0.00%
BUILDING CO 00006	\$ -	\$ 123,988	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	RCV/DI	0.00%
BUILDING CO 00007.1	\$ -	\$ 318,499	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	RCV/DI	0.00%
BUILDING CO 00008	\$ -	\$ 27,573	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	RCV/DI	0.00%
BUILDING CO 00010.1	\$ -	\$ 391,487	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	RCV/DI	0.00%
BUILDING CO 00011	\$ -	\$ 736,852	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	RCV/DI	0.00%
BUILDING CO 00012.3	\$ -	\$ 315,611	\$ 22,876	\$ 1,448.78	\$ 10,339.05	\$ 17,232	\$ 1,723.18	\$ 7,487.10	75.00%	75.00%
BUILDING CO 00013.3	\$ -	\$ 582,978	\$ 328,275	\$ 48,241.28	\$ 44,317.15	\$ 131,310	\$ 13,131.01	\$ 210,098.11	40.00%	40.00%

BUILDING CO 00014	\$	-	\$	10,864	\$	-	\$	-	\$	-	\$	-	\$	-	\$	-	\$	-	\$	-	#DIV/0!	0.00%
BUILDING CO 00015	\$	-	\$	10,841	\$	-	\$	-	\$	-	\$	-	\$	-	\$	-	\$	-	\$	-	#DIV/0!	0.00%
BUILDING CO 00016	\$	-	\$	17,757	\$	-	\$	-	\$	-	\$	-	\$	-	\$	-	\$	-	\$	-	#DIV/0!	0.00%
BUILDING CO 00018	\$	-	\$	2,825	\$	-	\$	-	\$	-	\$	-	\$	-	\$	-	\$	-	\$	-	#DIV/0!	0.00%
BUILDING CO 00020	\$	-	\$	23,678	\$	-	\$	-	\$	-	\$	-	\$	-	\$	-	\$	-	\$	-	#DIV/0!	0.00%
BUILDING CO 00021	\$	-	\$	9,764	\$	-	\$	-	\$	-	\$	-	\$	-	\$	-	\$	-	\$	-	#DIV/0!	0.00%
BUILDING CO 00023 rev to 65	\$	-	\$	10,500	\$	12,993	\$	-	\$	-	\$	-	\$	-	\$	-	\$	-	\$	-	#DIV/0!	0.00%
BUILDING CO 00025	\$	-	\$	73,305	\$	-	\$	-	\$	-	\$	-	\$	-	\$	-	\$	-	\$	-	#DIV/0!	0.00%
BUILDING CO 00026	\$	-	\$	127,908	\$	-	\$	-	\$	-	\$	-	\$	-	\$	-	\$	-	\$	-	#DIV/0!	0.00%
BUILDING CO 00027	\$	-	\$	127,908	\$	-	\$	-	\$	-	\$	-	\$	-	\$	-	\$	-	\$	-	#DIV/0!	0.00%
BUILDING CO 00028	\$	-	\$	489,735	\$	-	\$	-	\$	-	\$	-	\$	-	\$	-	\$	-	\$	-	#DIV/0!	0.00%
BUILDING CO 00029.2	\$	-	\$	44,459	\$	45,160	\$	-	\$	-	\$	-	\$	-	\$	-	\$	-	\$	-	#DIV/0!	0.00%
BUILDING CO 00032.2	\$	-	\$	47,054	\$	43,803	\$	-	\$	-	\$	-	\$	-	\$	-	\$	-	\$	-	#DIV/0!	0.00%
BUILDING CO 00033.3	\$	-	\$	44,018	\$	54,100	\$	-	\$	-	\$	-	\$	-	\$	-	\$	-	\$	-	#DIV/0!	0.00%
BUILDING CO 00034.1	\$	-	\$	42,545	\$	64,903	\$	-	\$	-	\$	-	\$	-	\$	-	\$	-	\$	-	#DIV/0!	0.00%
BUILDING CO 00036.1	\$	-	\$	57,860	\$	56,444	\$	-	\$	-	\$	-	\$	-	\$	-	\$	-	\$	-	#DIV/0!	0.00%
BUILDING CO 00037.1	\$	-	\$	18,528	\$	18,008	\$	-	\$	-	\$	-	\$	-	\$	-	\$	-	\$	-	#DIV/0!	0.00%
BUILDING CO 00038.1	\$	-	\$	17,233	\$	21,921	\$	-	\$	-	\$	-	\$	-	\$	-	\$	-	\$	-	#DIV/0!	0.00%
BUILDING CO 00039.1	\$	-	\$	16,581	\$	16,581	\$	-	\$	-	\$	-	\$	-	\$	-	\$	-	\$	-	#DIV/0!	0.00%
BUILDING CO 00042.1	\$	-	\$	99,728	\$	96,723	\$	-	\$	-	\$	-	\$	-	\$	-	\$	-	\$	-	#DIV/0!	0.00%
BUILDING CO 00043.2	\$	-	\$	189,594	\$	88,740	\$	-	\$	-	\$	-	\$	-	\$	-	\$	-	\$	-	#DIV/0!	0.00%
BUILDING CO 00047	\$	-	\$	60,894	\$	60,894	\$	15,223.56	\$	1,522.36	\$	13,701.20	\$	15,224	\$	1,522.35	\$	18,682.09	\$	0.00%	#DIV/0!	0.00%
BUILDING CO 00048	\$	-	\$	16,852	\$	19,682	\$	-	\$	-	\$	-	\$	-	\$	-	\$	-	\$	-	#DIV/0!	0.00%
BUILDING CO 00050	\$	-	\$	26,535	\$	26,535	\$	-	\$	-	\$	-	\$	-	\$	-	\$	-	\$	-	#DIV/0!	0.00%
BUILDING CO 00052	\$	-	\$	19,741	\$	19,741	\$	-	\$	-	\$	-	\$	-	\$	-	\$	-	\$	-	#DIV/0!	0.00%
SUBTOTAL BUILDING CHANGE ORDERS	\$	-	\$	4,073,787	\$	1,020,250	\$	76,952.67	\$	7,585.27	\$	68,357.40	\$	373,822	\$	37,382.17	\$	683,680.20	\$	38.82%	#DIV/0!	38.82%
GRAND TOTAL OF COSTS	\$	15,720,566	\$	16,002,271	\$	16,002,271	\$	7,008,319	\$	700,832	\$	6,307,487	\$	55,576,937	\$	5,262,138	\$	30,414,487	\$	68.53%	#DIV/0!	68.53%

Items highlighted in this shade are soft costs shown for reference only and are not used in calculating overall percentage complete (only hard costs used for calculating overall percentage complete). Percentages observed for these line items will match draw request percentages.

Document C: Contractor Costs Detail						
Gemstone Development West, Inc. Manhattan West Condominiums						
General Contractor Cost Detail-APCO						
LINE NO.	DESCRIPTION	BUDGET	CONTRACT DRAW JULY Invoices	EXPENSE BY BUDGET DATE	% OF BUDGET	REMAINING BUDGET
<b>General Conditions</b>						
1000	GENERAL CONDITIONS					
1000	APCO Contractor Fee	\$ 4,996,086.00	\$ 432,257.25	\$ 3,225,614.25	64.56%	\$ 1,770,471.75
1310	General Conditions	\$ 7,095.00		\$ 5,452.53	76.85%	\$ 1,642.47
1330	Submittals	\$ 4,500.00		\$ 3,872.07	86.05%	\$ 627.93
1500	Mobilization	\$ 50,000.00		\$ 47,500.00	95.00%	\$ 2,500.00
1780	Closeout Documents	\$ 4,000.00		\$ -	0.00%	\$ 4,000.00
	<b>TOTAL BUDGET AMOUNT</b>	<b>\$ 5,061,681.00</b>	<b>\$ 432,257.25</b>	<b>\$ 3,282,438.85</b>	<b>64.83%</b>	<b>\$ 1,779,242.15</b>
<b>Site Improvements</b>						
2000	SITEWORK					
2200	Site Prep & Mass Excavation	\$ 2,754,700.00		\$ 2,914,650.00	105.81%	\$ (159,950.00)
2300	Mass Excavation	\$ -		\$ -	#DIV/0!	\$ -
2510	Site Water	\$ 647,000.00		\$ 476,770.00	73.69%	\$ 170,230.00
2530	Site Sanitary Sewer	\$ 615,000.00		\$ 590,400.00	96.00%	\$ 24,600.00
2580	Site electric	\$ -		\$ -	#DIV/0!	\$ -
2600	Storm Sewer	\$ 511,000.00		\$ 500,780.00	98.00%	\$ 10,220.00
2740	Asphaltic concrete Paving	\$ 512,350.00	\$ 8,500.00	\$ 43,927.50	8.57%	\$ 468,422.50
2750	Concrete Paving and Approaches	\$ -		\$ -	#DIV/0!	\$ -
2770	Curbs and Gutters	\$ 190,020.00		\$ -	0.00%	\$ 190,020.00
2775	Sidewalks	\$ 230,000.00		\$ -	0.00%	\$ 230,000.00
2780	Unit Pavers	\$ 221,844.00		\$ -	0.00%	\$ 221,844.00
2800	Irrigation System	\$ -		\$ -	#DIV/0!	\$ -
2820	Fencing	\$ -		\$ -	#DIV/0!	\$ -
2870	Site furnishings	\$ 100,000.00		\$ -	0.00%	\$ 100,000.00
2900	Landscaping	\$ 345,000.00		\$ -	0.00%	\$ 345,000.00
	<b>TOTAL BUDGET AMOUNT</b>	<b>\$ 6,138,814.00</b>	<b>\$ 8,500.00</b>	<b>\$ 4,528,527.50</b>	<b>73.68%</b>	<b>\$ 1,610,286.50</b>
<b>Clubhouse/Pool/Pool House/ Guard House</b>						
18000	ALLOWANCES					
18000	Pools	\$ 460,000.00		\$ -	0.00%	\$ 460,000.00
	<b>TOTAL BUDGET AMOUNT</b>	<b>\$ 460,000.00</b>	<b>\$ -</b>	<b>\$ -</b>	<b>0.00%</b>	<b>\$ 460,000.00</b>
<b>Framing Contract</b>						
6100	Rough Framing	\$ 3,610,000.00		\$ 3,609,996.98	100.00%	\$ 3.02
	<b>TOTAL BUDGET AMOUNT</b>	<b>\$ 3,610,000.00</b>	<b>\$ -</b>	<b>\$ 3,609,996.98</b>	<b>100.00%</b>	<b>\$ 3.02</b>
<b>Condo Construction</b>						
3000	CONCRETE					
3300	Cast in Place Concrete	\$ 9,277,108.00	\$ 54,116.00	\$ 8,979,940.50	96.80%	\$ 297,167.50
3450	Precast Concrete	\$ 1,000,000.00	\$ 258,290.00	\$ 516,500.00	51.65%	\$ 483,500.00
4000	MASONRY					
4100	CMU	\$ 1,531,600.00		\$ 583,509.00	38.09%	\$ 948,291.00
5000	METALS					
5100	Structural Steel	\$ 13,656,981.50	\$ 968,592.13	\$ 13,072,063.21	95.72%	\$ 584,918.29
5500	Miscellaneous Metals (Inc)	\$ -		\$ -	#DIV/0!	\$ -
6000	CARPENTRY					
6200	Millwork	\$ 1,900,000.00	\$ 597,870.47	\$ 647,068.72	34.06%	\$ 1,252,931.28
6400	Architectural Woodwork	\$ -		\$ -	#DIV/0!	\$ -
7000	THERMAL / MOISTURE PROTECTION					
7100	Waterproofing	\$ 557,293.00	\$ 104,005.22	\$ 440,713.00	79.08%	\$ 116,580.00
7220	Insulation	\$ 359,840.00	\$ 71,790.00	\$ 156,060.00	43.37%	\$ 203,780.00
7240	EIFS/Stucco	\$ 1,455,600.00	\$ 502,497.80	\$ 580,807.80	39.90%	\$ 874,792.20
7530	EPDM Roofing 60 mil	\$ -		\$ -	#DIV/0!	\$ -
7650	Flashing	\$ -		\$ -	#DIV/0!	\$ -
7720	Roof Hatches w/ladder	\$ 876,596.00	\$ 436,897.08	\$ 736,599.28	84.03%	\$ 139,996.72
7810	Sprayed on Fireproofing	\$ 260,000.00	\$ 28,740.00	\$ 240,840.00	92.63%	\$ 19,160.00
7900	Caulking and Sealants	\$ -		\$ -	#DIV/0!	\$ -
8000	DOORS & WINDOWS					
8100	HM doors and Frames	\$ -		\$ -	#DIV/0!	\$ -
8200	Wood Doors and Frames	\$ -		\$ -	#DIV/0!	\$ -
8310	Access Panels	\$ -		\$ -	#DIV/0!	\$ -
8360	Overhead Doors	\$ -		\$ -	#DIV/0!	\$ -
8400	Storefront	\$ 183,000.00	\$ 54,450.00	\$ 127,115.00	69.46%	\$ 55,885.00
8560	Vinyl Windows	\$ 1,052,375.00		\$ 992,844.00	94.34%	\$ 59,531.00

04314

AA 004071

PHASE	DESCRIPTION	BUDGET	CONST.DRAW JULY Invoiced	EXPENSES YEAR TO DATE	% OF BUDGET	REMAINING BUDGET
8700	Door Hardware	\$ -	\$ -	\$ -	#DIV/0!	\$ -
8800	Glass and glazing	\$ 5,100,000.00	\$ 807,500.00	\$ 952,500.00	18.68%	\$ 4,147,500.00
9000	FINISHES					
6415	Granite	\$ 332,000.00	\$ 2,755.00	\$ 15,545.00	4.68%	\$ 315,455.00
9200	LGWF and Drywall	\$ 4,332,100.50	\$ 648,107.50	\$ 2,547,857.50	58.81%	\$ 1,784,243.00
9250	GWB w/light gauge metal framing	\$ -	\$ -	\$ -	#DIV/0!	\$ -
9300	Ceramic Tile	\$ -	\$ -	\$ -	#DIV/0!	\$ -
9520	ACT	\$ -	\$ -	\$ -	#DIV/0!	\$ -
9600	Flooring	\$ 1,650,000.00	\$ -	\$ -	0.00%	\$ 1,650,000.00
9680	Carpet	\$ -	\$ -	\$ -	#DIV/0!	\$ -
9720	Walkcovering @22.00 sq.	\$ -	\$ -	\$ -	#DIV/0!	\$ -
9900	Painting	\$ 1,111,236.00	\$ -	\$ -	0.00%	\$ 1,111,236.00
10000	SPECIALTIES					
10180	Toilet Partitions	\$ -	\$ -	\$ -	#DIV/0!	\$ -
10440	Interior Signage	\$ -	\$ -	\$ -	#DIV/0!	\$ -
10520	Fire extinguishers and Cabinets	\$ -	\$ -	\$ -	#DIV/0!	\$ -
10550	Nail Boxes	\$ -	\$ -	\$ -	#DIV/0!	\$ -
10800	Bathroom Accessories	\$ -	\$ -	\$ -	#DIV/0!	\$ -
11000	EQUIPMENT					
11000	APPLIANCES	\$ 336,000.00	\$ -	\$ -	0.00%	\$ 336,000.00
14000	CONVEYING SYSTEMS					
14200	HYDRAULIC ELEVATORS	\$ 1,729,979.00	\$ 267,287.00	\$ 1,119,871.32	64.73%	\$ 610,107.68
18000	MECHANICAL					
15000	FIRE PROTECTION	\$ -	\$ -	\$ -	#DIV/0!	\$ -
15010	PLUMBING	\$ 8,272,200.00	\$ 711,159.77	\$ 5,372,550.83	64.95%	\$ 2,899,649.17
15020	H.V.A.C.	\$ 2,395,100.00	\$ 396,769.16	\$ 1,324,884.04	55.32%	\$ 1,070,215.96
16000	ELECTRICAL					
16000	ELECTRICAL	\$ 6,310,356.00	\$ 580,822.00	\$ 4,745,557.00	75.20%	\$ 1,564,799.00
TOTAL BUDGET AMOUNT		\$ 63,678,868.00	\$ 8,491,609.13	\$ 43,183,258.20	67.77%	\$ 20,495,609.80
SUBTOTAL OF GENERAL CONTRACTOR COSTS		\$ 78,938,168.00	\$ 9,832,386.28	\$ 64,572,789.53	0.00%	\$ 24,365,378.47
Unit Upgrade Expenses						
18000	Building CO 00029 Electrical Options B8	\$ 45,180.18	\$ -	\$ 27,096.10	60.00%	\$ 18,084.08
18000	Building CO 00032 Electrical Options B9	\$ 43,803.27	\$ -	\$ 26,281.96	60.00%	\$ 17,521.31
18010	Building CO 00033 Plumbing Options B9	\$ 54,100.48	\$ -	\$ 13,525.12	25.00%	\$ 40,575.37
18010	Building CO 00034 Plumbing Options B8	\$ 64,983.36	\$ -	\$ 16,240.84	25.00%	\$ 48,742.52
8100	Building CO 00037 B8 & B9 Option Changes	\$ 18,009.00	\$ -	\$ 18,009.00	100.00%	\$ -
8100	Building CO 00038.1 Cable Hand Rail Opt B8 & B9	\$ 21,821.20	\$ -	\$ -	0.00%	\$ 21,821.20
11000	Building CO 00038.1 Building 8 & 9 Fireplaces	\$ 16,580.70	\$ -	\$ -	0.00%	\$ 16,580.70
16000	Building CO 00047 Building 8 & 9 Low Voltage	\$ 80,884.23	\$ 15,223.56	\$ 15,223.56	25.00%	\$ 45,660.67
6200	Building CO 00049 Building 8 & 9 Closet Organizers	\$ 18,882.08	\$ -	\$ -	0.00%	\$ 18,882.08
16000	Building CO 00050 Building 8 & 9 Electrical Upgrades	\$ 26,838.38	\$ -	\$ -	0.00%	\$ 26,838.38
10800	Building CO 00052 Building 8 & 9 Shower Doors & Mirrors	\$ 19,740.58	\$ -	\$ -	0.00%	\$ 19,740.58
TOTAL BUDGET AMOUNT		\$ 380,371.58	\$ 15,223.56	\$ 118,374.58	#DIV/0!	\$ 273,996.99
TOTAL GC COSTS INCLUDING UPGRADES		\$ 79,328,539.58	\$ 9,847,609.84	\$ 64,691,164.11	0.00%	\$ 24,637,378.47
Approved Change Orders (Approved AIA 702)						
2830	Grading CO 00001 - Bladde Chem Feed & Star Tank	\$ 68,308.20	\$ -	\$ 53,377.40		\$ 5,930.80
2810	Grading CO 00002 - Fire Hydrant Permit	\$ 448.78	\$ -	\$ 448.78		\$ -
2830	Grading CO 00003 - Revisions Utility Sheets 1/11/07	\$ 68,338.72	\$ -	\$ 70,670.98		\$ 17,667.74
2200	Grading CO 00004 - Encroachment Permit	\$ 452.81	\$ -	\$ 452.81		\$ -
2830	Grading CO 00005 - WRG Plans 11-01-07	\$ 294,330.13	\$ -	\$ 307,877.50		\$ 86,752.63
7810	Building CO 00001 Additional Fireproofing B7	\$ 12,628.00	\$ -	\$ 15,628.00		\$ -
18020	Building CO 00012 HVAC Thru Delta 5 B4	\$ 22,876.67	\$ 11,487.83	\$ 17,334.75		\$ 5,743.92
18020	Building CO 00013.1 HVAC Thru Delta 6 B2C3	\$ 328,278.17	\$ 49,241.28	\$ 134,310.07		\$ 198,985.10
4100	Building CO 00023 Masonry Delta 5 B8/9	\$ 12,683.00	\$ -	\$ 12,683.00		\$ -
18000	Building CO 00038 Electrical C2 Split B8/9	\$ 68,444.00	\$ -	\$ 33,866.40		\$ 22,577.60
16000	Building CO 00042 Electrical Changes Delta 3	\$ 96,723.00	\$ -	\$ 24,180.79		\$ 72,542.21
16000	Building CO 00043 Electrical Changes Delta 6	\$ 98,740.00	\$ -	\$ 24,935.00		\$ 74,805.00
TOTAL BUDGET AMOUNT		\$ 1,172,758.48	\$ 60,728.11	\$ 689,770.44	#DIV/0!	\$ 482,988.04
GRAND TOTAL OF GENERAL CONTRACTOR COSTS		\$ 80,501,287.04	\$ 7,908,319.08	\$ 65,379,828.58	68.78%	\$ 25,121,458.46
TOTAL RETENTION		\$ -	\$ (780,631.91)	\$ (5,292,137.38)	#DIV/0!	\$ 6,283,137.38
NET CASH ADVANCES		\$ 80,501,287.04	\$ 8,307,487.15	\$ 80,084,799.18		\$ 36,414,487.55

04315

AA 004072



**NEVADA  
CONSTRUCTION  
SERVICES**

October 20, 2008

**Scott Financial Corporation  
15010 Sundown Drive  
Bismarck, ND 58503  
Attn: Brad J. Scott**

**RE: DRAW REQUEST ON THE FOLLOWING PROJECT:**

<b>**MANHATTANWEST CONDOS PHASE I</b>	<b>Gross</b>	<b>\$4,991,752.48</b>
<b>NCS PROJECT# 07-10-11Y-JO</b>	<b>Retention</b>	<b>\$470,719.24</b>
<b>Senior Construction Draw #10</b>	<b>Net</b>	<b>\$4,521,033.24</b>

**Less funds returned to SFC that were not disbursed by NCS** **\$1,375,440.75**  
**(Please see attached document and detail on document C)**

**\*\*Please request additional funding of \$3,145,592.49**

**\*\*Please note: NCS will need the full net amount of \$4,521,033.24 sent by wire to fund the current draw request.**

Please find enclosed the most recent draw request and inspection report for your review. In addition, any pending reallocations are attached for your review. NCS accepts that these reallocations are approved when this draw is funded.

The amount of the draw has been approved for payment as the work completed meets or exceeds the amount requested.

Please make note of the available construction loan balances and notify us immediately of any discrepancies.

If you have any questions, please do not hesitate to give our office a call.

Sincerely,

  
Jennifer Olivares  
Disbursement Agent

2500 N. Buffalo, Suite 140 • Las Vegas, NV 89128  
Office (702) 251-1150 • Fax (702) 251-5918

160 Country Estates Circle, Suite 3 • Reno, NV 89511  
Office (775) 324-7733 • Fax (775) 324-5212

00372

AA 004073

## ManhattanWest

### Apco June Payment

Reason		Amount
Reimbursement for Containment Solutions/Las Vegas Pipeline	\$	15,000.00
Reimbursement for Enco Southwest/Las Vegas Pipeline	\$	29,923.00
Apco self-performed work	\$	45,124.65
Apco Contractor Fees	\$	330,187.81
Advance to Accuracy Glass from Apco Contractor Fees	\$	(90,000.00)
Total remaining to disburse to Apco for June	\$	330,235.46

### Apco July Payment

Reason		Amount
Reimbursement for Accuracy advance in June	\$	90,000.00
Apco self-performed work	\$	38,308.05
Apco Contractor Fees	\$	371,716.05
Payment to WRG from Apco Contractor Fees	\$	(11,396.00)
Total remaining to disburse to Apco for July	\$	488,628.10

### Other funds remaining

		Amount
June Jeff Heit - check on hold per Owner	\$	306,461.20
July Jeff Heit - check on hold per Owner	\$	224,091.99
July Jeff Heit/Apco reimbursement - check on hold per Owner	\$	26,024.00
Total funds on hold	\$	556,577.19

<b>TOTAL FUNDS WIRED BACK TO SFC</b>	<b>\$</b>	<b>1,375,440.75</b>
--------------------------------------	-----------	---------------------

00373

AA 004074



**Scott Financial Corporation**  
**15010 Sundown Drive**  
**Bismarck, ND 58503**  
**Attn: Brad J. Scott**

**\*\*MANHATTANWEST CONDOS PHASE I  
NCS PROJECT# 07-10-11Y-JO  
Senior Construction Draw #10**

Gross	\$4,991,752.48
<u>Retention</u>	<u>\$470,719.24</u>
Net	\$4,521,033.24

**Jennifer Olivares**  
**Disbursement Agent**

**160 Country Estates Circle, Suite 3 • Reno, NV 89511**  
**Office (775) 324-7733 • Fax (775) 324-5212**

AA 004075

## APPLICATION AND CERTIFICATE FOR PAYMENT

TO OWNER: Manhattan West  
9121 W. Russell Rd.  
Las Vegas, NV 89148FROM CONTRACTOR: Quincy Pacific Construction  
2835 E. Paradise Ave., Suite 40  
Las Vegas, Nevada 89119PROJECT: Manhattan West  
Phase 1

VA ARCHITECT: OZ Architects

OWNER DRAWING NO: 11  
APPLICATION NO: 11  
PERIOD: 08/12/08  
PROJECT: 118  
CONTRACT DATE: 08/15/08  
Drawn By: [Signature]  
Checked By: [Signature]  
Reviewed By: [Signature]  
Approved By: [Signature]

## CONTRACT FOR MANHATTAN WEST PHASE 1

Application to make payment, as shown below, is predicated upon the Contractor's compliance with the following conditions:

1. ORIGINAL CONTRACT BILL

78,508,100.00

2. NEW CONTRACTOR CHANGE ORDER

2,677,289.22

3. CONTRACT BILL TO DATE

81,185,389.22

4. TOTAL AMOUNT STORED TO DATE

81,185,389.22

5. TOTAL AMOUNT STORED TO DATE

81,185,389.22

6. TOTAL AMOUNT STORED TO DATE

81,185,389.22

7. TOTAL AMOUNT STORED TO DATE

81,185,389.22

8. TOTAL AMOUNT STORED TO DATE

81,185,389.22

9. TOTAL AMOUNT STORED TO DATE

81,185,389.22

10. TOTAL AMOUNT STORED TO DATE

81,185,389.22

11. TOTAL AMOUNT STORED TO DATE

81,185,389.22

12. TOTAL AMOUNT STORED TO DATE

81,185,389.22

13. TOTAL AMOUNT STORED TO DATE

81,185,389.22

14. TOTAL AMOUNT STORED TO DATE

81,185,389.22

15. TOTAL AMOUNT STORED TO DATE

81,185,389.22

16. TOTAL AMOUNT STORED TO DATE

81,185,389.22

17. TOTAL AMOUNT STORED TO DATE

81,185,389.22

18. TOTAL AMOUNT STORED TO DATE

81,185,389.22

19. TOTAL AMOUNT STORED TO DATE

81,185,389.22

20. TOTAL AMOUNT STORED TO DATE

81,185,389.22

21. TOTAL AMOUNT STORED TO DATE

81,185,389.22

22. TOTAL AMOUNT STORED TO DATE

81,185,389.22

23. TOTAL AMOUNT STORED TO DATE

81,185,389.22

24. TOTAL AMOUNT STORED TO DATE

81,185,389.22

25. TOTAL AMOUNT STORED TO DATE

81,185,389.22

26. TOTAL AMOUNT STORED TO DATE

81,185,389.22

27. TOTAL AMOUNT STORED TO DATE

81,185,389.22

28. TOTAL AMOUNT STORED TO DATE

81,185,389.22

29. TOTAL AMOUNT STORED TO DATE

81,185,389.22

30. TOTAL AMOUNT STORED TO DATE

81,185,389.22

31. TOTAL AMOUNT STORED TO DATE

81,185,389.22

32. TOTAL AMOUNT STORED TO DATE

81,185,389.22

2,677,289.22

The undersigned hereby certifies that the work shown on the Contractor's invoice, bill, or statement of work is complete and ready for payment, and that the Contractor is entitled to receive the amount shown on the invoice, bill, or statement of work, and that the Contractor is not aware of any liens or claims against the work shown on the invoice, bill, or statement of work.

CONTRACTOR

By: [Signature]

Date: 10/13/08

Notary Public

My Commission Expires: 11-5-11

Notary Public

My Commission Expires: 11-5-11

Notary Public

My Commission Expires: 11-5-11

Notary Public

My Commission Expires: 11-5-11

Notary Public

My Commission Expires: 11-5-11

Notary Public

My Commission Expires: 11-5-11

Notary Public

My Commission Expires: 11-5-11

Notary Public

My Commission Expires: 11-5-11

Notary Public

My Commission Expires: 11-5-11

Notary Public

My Commission Expires: 11-5-11

Notary Public

My Commission Expires: 11-5-11

Notary Public

My Commission Expires: 11-5-11

Notary Public

My Commission Expires: 11-5-11

Notary Public

My Commission Expires: 11-5-11

Notary Public

10/13/08

10/13/08

10/13/08

10/13/08

10/13/08

10/13/08

10/13/08

10/13/08

10/13/08

10/13/08

10/13/08

10/13/08

10/13/08

10/13/08

10/13/08

10/13/08

10/13/08

10/13/08

10/13/08

10/13/08

10/13/08

10/13/08

10/13/08

10/13/08

10/13/08

10/13/08

10/13/08

10/13/08





00381

AA 004078

APPROPRIATION AND COMMITMENT FOR FISCAL YEAR 2000											
The following Committee report reflects the estimated amounts for the fiscal year 2000. The amounts are subject to change without notice and are not to be used for budgetary purposes.											
Budget of Values: Phase 1: Mainframe Unit											
Commitment Limit: \$1,100,000.00											
Budget Number: 001/0000											
Commitment Limit: \$1,100,000.00											
Budget Number: 001/0000											
Commitment Limit: \$1,100,000.00											
Budget Number: 001/0000											
Commitment Limit: \$1,100,000.00											
Budget Number: 001/0000											
Commitment Limit: \$1,100,000.00											
Budget Number: 001/0000											
Commitment Limit: \$1,100,000.00											
Budget Number: 001/0000											
Commitment Limit: \$1,100,000.00											
Budget Number: 001/0000											
Commitment Limit: \$1,100,000.00											
Budget Number: 001/0000											
Commitment Limit: \$1,100,000.00											
Budget Number: 001/0000											
Commitment Limit: \$1,100,000.00											
Budget Number: 001/0000											
Commitment Limit: \$1,100,000.00											
Budget Number: 001/0000											
Commitment Limit: \$1,100,000.00											
Budget Number: 001/0000											
Commitment Limit: \$1,100,000.00											
Budget Number: 001/0000											
Commitment Limit: \$1,100,000.00											
Budget Number: 001/0000											
Commitment Limit: \$1,100,000.00											
Budget Number: 001/0000											
Commitment Limit: \$1,100,000.00											
Budget Number: 001/0000											
Commitment Limit: \$1,100,000.00											
Budget Number: 001/0000											
Commitment Limit: \$1,100,000.00											
Budget Number: 001/0000											
Commitment Limit: \$1,100,000.00											
Budget Number: 001/0000											
Commitment Limit: \$1,100,000.00											
Budget Number: 001/0000											
Commitment Limit: \$1,100,000.00											
Budget Number: 001/0000											
Commitment Limit: \$1,100,000.00											
Budget Number: 001/0000											
Commitment Limit: \$1,100,000.00											
Budget Number: 001/0000											
Commitment Limit: \$1,100,000.00											
Budget Number: 001/0000											
Commitment Limit: \$1,100,000.00											
Budget Number: 001/0000											
Commitment Limit: \$1,100,000.00											
Budget Number: 001/0000											
Commitment Limit: \$1,100,000.00											
Budget Number: 001/0000											
Commitment Limit: \$1,100,000.00											
Budget Number: 001/0000											
Commitment Limit: \$1,100,000.00											
Budget Number: 001/0000											
Commitment Limit: \$1,100,000.00											
Budget Number: 001/0000											
Commitment Limit: \$1,100,000.00											
Budget Number: 001/0000											
Commitment Limit: \$1,100,000.00											
Budget Number: 001/0000											
Commitment Limit: \$1,100,000.00											
Budget Number: 001/0000											
Commitment Limit: \$1,100,000.00											
Budget Number: 001/0000											
Commitment Limit: \$1,100,000.00											
Budget Number: 001/0000											
Commitment Limit: \$1,100,000.00											
Budget Number: 001/0000											
Commitment Limit: \$1,100,000.00											
Budget Number: 001/0000											
Commitment Limit: \$1,100,000.00											
Budget Number: 001/0000											
Commitment Limit: \$1,100,000.00											
Budget Number: 001/0000											
Commitment Limit: \$1,100,000.00											
Budget Number: 001/0000											
Commitment Limit: \$1,100,000.00											
Budget Number: 001/0000											
Commitment Limit: \$1,100,000.00											
Budget Number: 001/0000											
Commitment Limit: \$1,100,000.00											
Budget Number: 001/0000											
Commitment Limit: \$1,100,000.00											
Budget Number: 001/0000											
Commitment Limit: \$1,100,000.00											
Budget Number: 001/0000											
Commitment Limit: \$1,100,000.00											
Budget Number: 001/0000											
Commitment Limit: \$1,100,000.00											
Budget Number: 001/0000											
Commitment Limit: \$1,100,000.00											
Budget Number: 001/0000											
Commitment Limit: \$1,100,000.00											
Budget Number: 001/0000											
Commitment Limit: \$1,100,000.00											
Budget Number: 001/0000											
Commitment Limit: \$1,100,000.00											
Budget Number: 001/0000											
Commitment Limit: \$1,100,000.00											
Budget Number: 001/0000											
Commitment Limit: \$1,100,000.00											
Budget Number: 001/0000											
Commitment Limit: \$1,100,000.00											
Budget Number: 001/0000											
Commitment Limit: \$1,100,000.00											
Budget Number: 001/0000											
Commitment Limit: \$1,100,000.00											
Budget Number: 001/0000											
Commitment Limit: \$1,100,000.00											
Budget Number: 001/0000											
Commitment Limit: \$1,100,000.00											
Budget Number: 001/0000											
Commitment Limit: \$1,100,000.00											
Budget Number: 001/0000											
Commitment Limit: \$1,100,000.00											
Budget Number: 001/0000											
Commitment Limit: \$1,100,000.00											
Budget Number: 001/0000											
Commitment Limit: \$1,100,000.00											
Budget Number: 001/0000											
Commitment Limit: \$1,100,000.00											
Budget Number: 001/0000											
Commitment Limit: \$1,100,000.00											
Budget Number: 001/0000											
Commitment Limit: \$1,100,000.00											
Budget Number: 001/0000											
Commitment Limit: \$1,100,000.00											
Budget Number: 001/0000											
Commitment Limit: \$1,100,000.00											
Budget Number: 001/0000											
Commitment Limit: \$1,100,000.00											
Budget Number: 001/0000											
Commitment Limit: \$1,100,000.00											
Budget Number: 001/0000											
Commitment Limit: \$1,100,000.00											
Budget Number: 001/0000											
Commitment Limit: \$1,100,000.00											
Budget Number: 001/0000											
Commitment Limit: \$1,100,000.00											
Budget Number: 001/0000											
Commitment Limit: \$1,100,000.00											
Budget Number: 001/0000											
Commitment Limit: \$1,100,000.00											
Budget Number: 001/0000											
Commitment Limit: \$1,100,000.00											
Budget Number: 001/0000											
Commitment Limit: \$1,100,000.00											
Budget Number: 001/0000											
Commitment Limit: \$1,100,000.00											
Budget Number: 001/0000											
Commitment Limit: \$1,100,000.00											
Budget Number: 001/0000											
Commitment Limit: \$1,100,000.00											
Budget Number: 001/0000											
Commitment Limit: \$1,100,000.00											
Budget Number: 001/0000											
Commitment Limit: \$1,100,000.00											
Budget Number: 001/0000											
Commitment Limit: \$1,100,000.00											
Budget Number: 001/0000											
Commitment Limit: \$1,100,000.00											
Budget Number: 001/0000											
Commitment Limit: \$1,100,000.00											
Budget Number: 001/0000											
Commitment Limit: \$1,100,000.00											
Budget Number: 001/0000											
Commitment Limit: \$1,100,000.00											
Budget Number: 001/0000											
Commitment Limit: \$1,100,000.00											
Budget Number: 001/0000											
Commitment Limit: \$1,100,000.00											
Budget Number: 001/0000											
Commitment Limit: \$1,100,000.00											
Budget Number: 001/0000											
Commitment Limit: \$1,100,000.00											
Budget Number: 001/0000											
Commitment Limit: \$1,100,000.00											
Budget Number: 001/0000											
Commitment Limit: \$1,100,000.00											
Budget Number: 001/0000											
Commitment Limit: \$1,100,000.00											
Budget Number: 001/0000											
Commitment Limit: \$1,100,000.00											
Budget Number: 001/0000											
Commitment Limit: \$1,100,000.00											
Budget Number: 001/0000											
Commitment Limit: \$1,100,000.00											
Budget Number: 001/0000											
Commitment Limit: \$1,100,000.00											
Budget Number: 001/0000											
Commitment Limit: \$1,100,000.00											
Budget Number: 001/0000											
Commitment Limit: \$1,100,000.00											
Budget Number: 001/0000											
Commitment Limit: \$1,100,000.00											
Budget Number: 001/0000											
Commitment Limit: \$1,100,000.00											
Budget Number: 001/0000											
Commitment Limit: \$1,100,000.00											
Budget Number: 001/0000											
Commitment Limit: \$1,100,000.00											
Budget Number: 001/0000											
Commitment Limit: \$1,100,000.00											
Budget Number: 001/0000											
Commitment Limit: \$1,100,000.00											
Budget Number: 001/0000											
Commitment Limit: \$1,											



[illegible]

164	165	166	167	168	169	170	171	172	173	174	175	176	177	178	179	180	181	182	183	184	185	186	187	188	189	190	191	192	193	194	195	196	197	198	199	200	201	202	203	204	205	206	207	208	209	210	211	212	213	214	215	216	217	218	219	220	221	222	223	224	225	226	227	228	229	230	231	232	233	234	235	236	237	238	239	240	241	242	243	244	245	246	247	248	249	250	251	252	253	254	255	256	257	258	259	260	261	262	263	264	265	266	267	268	269	270	271	272	273	274	275	276	277	278	279	280	281	282	283	284	285	286	287	288	289	290	291	292	293	294	295	296	297	298	299	300	301	302	303	304	305	306	307	308	309	310	311	312	313	314	315	316	317	318	319	320	321	322	323	324	325	326	327	328	329	330	331	332	333	334	335	336	337	338	339	340	341	342	343	344	345	346	347	348	349	350	351	352	353	354	355	356	357	358	359	360	361	362	363	364	365	366	367	368	369	370	371	372	373	374	375	376	377	378	379	380	381	382	383	384	385	386	387	388	389	390	391	392	393	394	395	396	397	398	399	400	401	402	403	404	405	406	407	408	409	410	411	412	413	414	415	416	417	418	419	420	421	422	423	424	425	426	427	428	429	430	431	432	433	434	435	436	437	438	439	440	441	442	443	444	445	446	447	448	449	450	451	452	453	454	455	456	457	458	459	460	461	462	463	464	465	466	467	468	469	470	471	472	473	474	475	476	477	478	479	480	481	482	483	484	485	486	487	488	489	490	491	492	493	494	495	496	497	498	499	500	501	502	503	504	505	506	507	508	509	510	511	512	513	514	515	516	517	518	519	520	521	522	523	524	525	526	527	528	529	530	531	532	533	534	535	536	537	538	539	540	541	542	543	544	545	546	547	548	549	550	551	552	553	554	555	556	557	558	559	560	561	562	563	564	565	566	567	568	569	570	571	572	573	574	575	576	577	578	579	580	581	582	583	584	585	586	587	588	589	590	591	592	593	594	595	596	597	598	599	600	601	602	603	604	605	606	607	608	609	610	611	612	613	614	615	616	617	618	619	620	621	622	623	624	625	626	627	628	629	630	631	632	633	634	635	636	637	638	639	640	641	642	643	644	645	646	647	648	649	650	651	652	653	654	655	656	657	658	659	660	661	662	663	664	665	666	667	668	669	670	671	672	673	674	675	676	677	678	679	680	681	682	683	684	685	686	687	688	689	690	691	692	693	694	695	696	697	698	699	700	701	702	703	704	705	706	707	708	709	710	711	712	713	714	715	716	717	718	719	720	721	722	723	724	725	726	727	728	729	730	731	732	733	734	735	736	737	738	739	740	741	742	743	744	745	746	747	748	749	750	751	752	753	754	755	756	757	758	759	760	761	762	763	764	765	766	767	768	769	770	771	772	773	774	775	776	777	778	779	780	781	782	783	784	785	786	787	788	789	790	791	792	793	794	795	796	797	798	799	800	801	802	803	804	805	806	807	808	809	810	811	812	813	814	815	816	817	818	819	820	821	822	823	824	825	826	827	828	829	830	831	832	833	834	835	836	837	838	839	840	841	842	843	844	845	846	847	848	849	850	851	852	853	854	855	856	857	858	859	860	861	862	863	864	865	866	867	868	869	870	871	872	873	874	875	876	877	878	879	880	881	882	883	884	885	886	887	888	889	890	891	892	893	894	895	896	897	898	899	900	901	902	903	904	905	906	907	908	909	910	911	912	913	914	915	916	917	918	919	920	921	922	923	924	925	926	927	928	929	930	931	932	933	934	935	936	937	938	939	940	941	942	943	944	945	946	947	948	949	950	951	952	953	954	955	956	957	958	959	960	961	962	963	964	965	966	967	968	969	970	971	972	973	974	975	976	977	978	979	980	981	982	983	984	985	986	987	988	989	990	991	992	993	994	995	996	997	998	999	1000
164	165	166	167	168	169	170	171	172	173	174	175	176	177	178	179	180	181	182	183	184	185	186	187	188	189	190	191	192	193	194	195	196	197	198	199	200	201	202	203	204	205	206	207	208	209	210	211	212	213	214	215	216	217	218	219	220	221	222	223	224	225	226	227	228	229	230	231	232	233	234	235	236	237	238	239	240	241	242	243	244	245	246	247	248	249	250	251	252	253	254	255	256	257	258	259	260	261	262	263	264	265	266	267	268	269	270	271	272	273	274	275	276	277	278	279	280	281	282	283	284	285	286	287	288	289	290	291	292	293	294	295	296	297	298	299	300	301	302	303	304	305	306	307	308	309	310	311	312	313	314	315	316	317	318	319	320	321	322	323	324	325	326	327	328	329	330	331	332	333	334	335	336	337	338	339	340	341	342	343	344	345	346	347	348	349	350	351	352	353	354	355	356	357	358	359	360	361	362	363	364	365	366	367	368	369	370	371	372	373	374	375	376	377	378	379	380	381	382	383	384	385	386	387	388	389	390	391	392	393	394	395	396	397	398	399	400	401	402	403	404	405	406	407	408	409	410	411	412	413	414	415	416	417	418	419	420	421	422	423	424	425	426	427	428	429	430	431	432	433	434	435	436	437	438	439	440	441	442	443	444	445	446	447	448	449	450	451	452	453	454	455	456	457	458	459	460	461	462	463	464	465	466	467	468	469	470	471	472	473	474	475	476	477	478	479	480	481	482	483	484	485	486	487	488	489	490	491	492	493	494	495	496	497	498	499	500	501	502	503	504	505	506	507	508	509	510	511	512	513	514	515	516	517	518	519	520	521	522	523	524	525	526	527	528	529	530	531	532	533	534	535	536	537	538	539	540	541	542	543	544	545	546	547	548	549	550	551	552	553	554	555	556	557	558	559	560	561	562	563	564	565	566	567	568	569	570	571	572	573	574	575	576	577	578	579	580	581	582	583	584	585	586	587	588	589	590	591	592	593	594	595	596	597	598	599	600	601	602	603	604	605	606	607	608	609	610	611	612	613	614	615	616	617	618	619	620	621	622	623	624	625	626	627	628	629	630	631	632	633	634	635	636	637	638	639	640	641	642	643	644	645	646	647	648	649	650	651	652	653	654	655	656	657	658	659	660	661	662	663	664	665	666	667	668	669	670	671	672	673	674	675	676	677	678	679	680	681	682	683	684	685	686	687	688	689	690	691	692	693	694	695	696	697	698	699	700	701	702	703	704	705	706	707	708	709	710	711	712	713	714	715	716	717	718	719	720	721	722	723	724	725	726	727	728	729	730	731	732	733	734	735	736	737	738	739	740	741	742	743	744	745	746	747	748	749	750	751	752	753	754	755	756	757	758	759	760	761	762	763	764	765	766	767	768	769	770	771	772	773	774	775	776	777	778	779	780	781	782	783	784	785	786	787	788	789	790	791	792	793	794	795	796	797	798	799	800	801	802	803	804	805	806	807	808	809	810	811	812	813	814	815	816	817	818	819	820	821	822	823	824	825	826	827	828	829	830	831	832	833	834	835	836	837	838	839	840	841	842	843	844	845	846	847	848	849	850	851	852	853	854	855	856	857	858	859	860	861	862	863	864	865	866	867	868	869	870	871	872	873																																																																																																																															















[illegible]







00395

1990	Full-time CD-ROMs Acquired All Budget	-	-	-	-
1991	Full-time CD-ROMs Acquired All Budget	-	-	-	-
1992	Full-time CD-ROMs Acquired All Budget	-	-	-	-
1993	Full-time CD-ROMs Acquired All Budget	-	-	-	-
1994	Full-time CD-ROMs Acquired All Budget	-	-	-	-
1995	Full-time CD-ROMs Acquired All Budget	-	-	-	-
1996	Full-time CD-ROMs Acquired All Budget	-	-	-	-
1997	Full-time CD-ROMs Acquired All Budget	-	-	-	-
1998	Full-time CD-ROMs Acquired All Budget	-	-	-	-
1999	Full-time CD-ROMs Acquired All Budget	-	-	-	-
2000	Full-time CD-ROMs Acquired All Budget	-	-	-	-
2001	Full-time CD-ROMs Acquired All Budget	-	-	-	-
2002	Full-time CD-ROMs Acquired All Budget	-	-	-	-
2003	Full-time CD-ROMs Acquired All Budget	-	-	-	-
2004	Full-time CD-ROMs Acquired All Budget	-	-	-	-
2005	Full-time CD-ROMs Acquired All Budget	-	-	-	-
2006	Full-time CD-ROMs Acquired All Budget	-	-	-	-
2007	Full-time CD-ROMs Acquired All Budget	-	-	-	-
2008	Full-time CD-ROMs Acquired All Budget	-	-	-	-
2009	Full-time CD-ROMs Acquired All Budget	-	-	-	-
2010	Full-time CD-ROMs Acquired All Budget	-	-	-	-
2011	Full-time CD-ROMs Acquired All Budget	-	-	-	-
2012	Full-time CD-ROMs Acquired All Budget	-	-	-	-
2013	Full-time CD-ROMs Acquired All Budget	-	-	-	-
2014	Full-time CD-ROMs Acquired All Budget	-	-	-	-
2015	Full-time CD-ROMs Acquired All Budget	-	-	-	-
2016	Full-time CD-ROMs Acquired All Budget	-	-	-	-
2017	Full-time CD-ROMs Acquired All Budget	-	-	-	-
2018	Full-time CD-ROMs Acquired All Budget	-	-	-	-
2019	Full-time CD-ROMs Acquired All Budget	-	-	-	-
2020	Full-time CD-ROMs Acquired All Budget	-	-	-	-
2021	Full-time CD-ROMs Acquired All Budget	-	-	-	-
2022	Full-time CD-ROMs Acquired All Budget	-	-	-	-
2023	Full-time CD-ROMs Acquired All Budget	-	-	-	-
2024	Full-time CD-ROMs Acquired All Budget	-	-	-	-
2025	Full-time CD-ROMs Acquired All Budget	-	-	-	-
2026	Full-time CD-ROMs Acquired All Budget	-	-	-	-
2027	Full-time CD-ROMs Acquired All Budget	-	-	-	-
2028	Full-time CD-ROMs Acquired All Budget	-	-	-	-
2029	Full-time CD-ROMs Acquired All Budget	-	-	-	-
2030	Full-time CD-ROMs Acquired All Budget	-	-	-	-
2031	Full-time CD-ROMs Acquired All Budget	-	-	-	-
2032	Full-time CD-ROMs Acquired All Budget	-	-	-	-
2033	Full-time CD-ROMs Acquired All Budget	-	-	-	-
2034	Full-time CD-ROMs Acquired All Budget	-	-	-	-
2035	Full-time CD-ROMs Acquired All Budget	-	-	-	-
2036	Full-time CD-ROMs Acquired All Budget	-	-	-	-
2037	Full-time CD-ROMs Acquired All Budget	-	-	-	-
2038	Full-time CD-ROMs Acquired All Budget	-	-	-	-
2039	Full-time CD-ROMs Acquired All Budget	-	-	-	-
2040	Full-time CD-ROMs Acquired All Budget	-	-	-	-
2041	Full-time CD-ROMs Acquired All Budget	-	-	-	-
2042	Full-time CD-ROMs Acquired All Budget	-	-	-	-
2043	Full-time CD-ROMs Acquired All Budget	-	-	-	-
2044	Full-time CD-ROMs Acquired All Budget	-	-	-	-
2045	Full-time CD-ROMs Acquired All Budget	-	-	-	-
2046	Full-time CD-ROMs Acquired All Budget	-	-	-	-
2047	Full-time CD-ROMs Acquired All Budget	-	-	-	-
2048	Full-time CD-ROMs Acquired All Budget	-	-	-	-
2049	Full-time CD-ROMs Acquired All Budget	-	-	-	-
2050	Full-time CD-ROMs Acquired All Budget	-	-	-	-
2051	Full-time CD-ROMs Acquired All Budget	-	-	-	-
2052	Full-time CD-ROMs Acquired All Budget	-	-	-	-
2053	Full-time CD-ROMs Acquired All Budget	-	-	-	-
2054	Full-time CD-ROMs Acquired All Budget	-	-	-	-
2055	Full-time CD-ROMs Acquired All Budget	-	-	-	-
2056	Full-time CD-ROMs Acquired All Budget	-	-	-	-
2057	Full-time CD-ROMs Acquired All Budget	-	-	-	-
2058	Full-time CD-ROMs Acquired All Budget	-	-	-	-
2059	Full-time CD-ROMs Acquired All Budget	-	-	-	-
2060	Full-time CD-ROMs Acquired All Budget	-	-	-	-





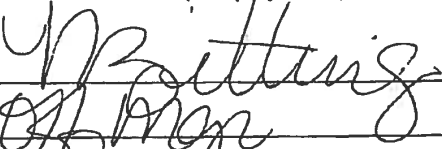
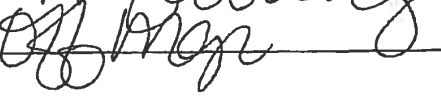
# EXHIBIT 19

CONDITIONAL WAIVER AND RELEASE  
UPON PROGRESS PAYMENT

Property Name: MANHATTAN WEST  
Property Location: RUSSEL RD  
Undersigned's Customer: APCO CONSTRUCTION  
Invoice/Payment Application Number: \_\_\_\_\_  
Payment Amount: \$18450.00

Upon receipt by the undersigned of a check in the above referenced Payment Amount payable to the undersigned, and when the check has been properly endorsed and has been paid by the bank on which it is drawn, this document becomes effective to release and the undersigned shall be deemed to waive any notice of lien, any private bond right, any claim for payment and any rights under any similar ordinance, rule or statute related to payment rights that the undersigned has on the above described Property to the following extent:

This release covers a progress payment for the work, materials or equipment furnished by the undersigned to the Property or to the Undersigned's Customer which are the subject of the Invoice or Payment Application, but only to the extent of the Payment Amount or such portion of the Payment Amount as the undersigned is actually paid, and does not cover any retention withheld, any items, modifications or changes pending approval, disputed items and claims, or items furnished that are not paid. Before any recipient of this document relies on it, he should verify evidence of payment to the undersigned. The undersigned warrants that he either has already paid or will use the money he receives from this progress payment promptly to pay in full all his laborers, subcontractors, materialmen and suppliers for all work, materials or equipment that are the subject of this waiver and release.

Dated: 7/14/08 ZITTING BROTHERS CONSTRUCTION  
(Company Name)  
By:   
Its: 

CONDITIONAL WAIVER AND RELEASE  
UPON PROGRESS PAYMENT

Property Name: MANHATTAN WEST  
Property Location: RUSSEL RD. LAS VEGAS  
Undersigned's Customer: APCO CONSTRUCTION  
Invoice/Payment Application Number: 73828  
Payment Amount: \$180231.35

Upon receipt by the undersigned of a check in the above referenced Payment Amount payable to the undersigned, and when the check has been properly endorsed and has been paid by the bank on which it is drawn, this document becomes effective to release and the undersigned shall be deemed to waive any notice of lien, any private bond right, any claim for payment and any rights under any similar ordinance, rule or statute related to payment rights that the undersigned has on the above described Property to the following extent:

This release covers a progress payment for the work, materials or equipment furnished by the undersigned to the Property or to the Undersigned's Customer which are the subject of the Invoice or Payment Application, but only to the extent of the Payment Amount or such portion of the Payment Amount as the undersigned is actually paid, and does not cover any retention withheld, any items, modifications or changes pending approval, disputed items and claims, or items furnished that are not paid. Before any recipient of this document relies on it, he should verify evidence of payment to the undersigned. The undersigned warrants that he either has already paid or will use the money he receives from this progress payment promptly to pay in full all his laborers, subcontractors, materialmen and suppliers for all work, materials or equipment that are the subject of this waiver and release.

Dated: 6/30/08

Zitting Bros  
(Company Name)  
By: [Signature]  
Its: Office Manager



# APCO CONSTRUCTION

3432 N. 5th Street • North Las Vegas, NV 89032  
Phone: (702) 734-0198 • Fax: (702) 734-0398  
E-mail: apcoconstruction.com • NCL: 14583

## UNCONDITIONAL WAIVER AND RELEASE UPON PROGRESS PAYMENT

Property Name:	<u>Manhattan West</u>
Property Location:	<u>Russell Road &amp; I-215, Las Vegas, Nevada</u>
Undersigned's Customer:	<u>APCO Construction</u>
Inv./Pmt Application No:	<u>Payment Application #7 (May 2008)</u>
Payment Amount:	<u>\$27,973.80</u>

The undersigned has been paid and has received a progress payment in the above referenced Payment Amount for all work, materials and equipment the undersigned furnished to his Customer for the above described Property and does hereby waive any notice of lien, any private bond right, any claim for payment and any rights under any similar ordinance, rule or statute related to payment rights that the undersigned has on the above described Property to the following extent:

This release covers a progress payment for the work, materials or equipment furnished by the undersigned to the Property or to the Undersigned's Customer which are the subject of the Invoice or Payment Application, but only to the extent of the Payment Amount or such portion of the Payment Amount as the undersigned is actually paid, and does not cover any retention withheld, any items, modifications or changes pending approval, disputed items and claims, or items furnished that are not paid. The undersigned warrants that he either has already paid or will use the money he receives from this progress payment promptly to pay in full all laborers, subcontractors, materialmen and suppliers for all work, materials or equipment that are the subject of the waiver and release.

Dated: 03/03/08

Zitting Brothers Construction Inc.

Signature: 

Print: Sam Zitting

Title: pres.

Notice: This document waives rights unconditionally and states that you have been paid for giving up those rights. This document is enforceable against you if you sign it to the extent of the Payment Amount or the amount received. If you have not been paid, use a Conditional Release form.

APCO00044636



3432 N. 5th Street • North Las Vegas, NV 89032  
Phone: (702) 734-0198 • Fax: (702) 734-0396  
E-mail: apcoconstruction.com • NCL: 14563

**UNCONDITIONAL WAIVER AND RELEASE  
UPON PROGRESS PAYMENT**

Property Name: Manhattan West Buildings 8+9  
Property Location: Russell Road & I-215, Las Vegas, Nevada  
Undersigned's Customer: Zitting Bros.  
Inv./Pmt Application No: May 2008 Invoices  
Payment Amount: Paid In Full through May 31, 2008

The undersigned has been paid and has received a progress payment in the above referenced Payment Amount for all work, materials and equipment the undersigned furnished to his Customer for the above described Property and does hereby waive any notice of lien, any private bond right, any claim for payment and any rights under any similar ordinance, rule or statute related to payment rights that the undersigned has on the above described Property to the following extent:

This release covers a progress payment for the work, materials or equipment furnished by the undersigned to the Property or to the Undersigned's Customer which are the subject of the Invoice or Payment Application, but only to the extent of the Payment Amount or such portion of the Payment Amount as the undersigned is actually paid, and does not cover any retention withheld, any items, modifications or changes pending approval, disputed items and claims, or items furnished that are not paid. The undersigned warrants that he either has already paid or will use the money he receives from this progress payment promptly to pay in full all laborers, subcontractors, materialmen and suppliers for all work, materials or equipment that are the subject of the waiver and release.

Dated: 8/20/08 Stock Building Supply  
Signature: Greg Wall  
Print: Greg Wall  
Title: Asst. Mgr. Cedar City, UT

**Notice:** This document waives rights unconditionally and states that you have been paid for giving up those rights. This document is enforceable against you if you sign it to the extent of the Payment Amount or the amount received. If you have not been paid, use a Conditional Release form.

APCO00044637

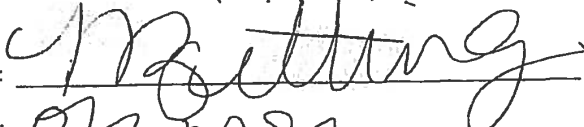

APC000044650

CONDITIONAL WAIVER AND RELEASE  
UPON PROGRESS PAYMENT

Property Name: MANHATTAN WEST  
Property Location: RUSSELL RD  
Undersigned's Customer: APCO CONSTRUCTION  
Invoice/Payment Application Number: \_\_\_\_\_  
Payment Amount: \$27971.00

Upon receipt by the undersigned of a check in the above referenced Payment Amount payable to the undersigned, and when the check has been properly endorsed and has been paid by the bank on which it is drawn, this document becomes effective to release and the undersigned shall be deemed to waive any notice of lien, any private bond right, any claim for payment and any rights under any similar ordinance, rule or statute related to payment rights that the undersigned has on the above described Property to the following extent:

This release covers a progress payment for the work, materials or equipment furnished by the undersigned to the Property or to the Undersigned's Customer which are the subject of the Invoice or Payment Application, but only to the extent of the Payment Amount or such portion of the Payment Amount as the undersigned is actually paid, and does not cover any retention withheld, any items, modifications or changes pending approval, disputed items and claims, or items furnished that are not paid. Before any recipient of this document relies on it, he should verify evidence of payment to the undersigned. The undersigned warrants that he either has already paid or will use the money he receives from this progress payment promptly to pay in full all his laborers, subcontractors, materialmen and suppliers for all work, materials or equipment that are the subject of this waiver and release.

Dated: 6/12/08 ZITTING BROTHERS CONSTRUCTION  
(Company Name)  
By:   
Its: 



3432 N. 5th Street • North Las Vegas, NV 89032  
Phone: (702) 734-0198 • Fax: (702) 734-0396  
E-mail: apcoconstruction.com • NCL: 14563

**UNCONDITIONAL WAIVER AND RELEASE  
UPON PROGRESS PAYMENT**

Property Name:	Manhattan West
Property Location:	Russell Road & I-215, Las Vegas, Nevada
Undersigned's Customer:	APCO Construction
Inv./Pmt Application No:	Payment Application #6 (April 2008)
Payment Amount:	\$156,574.60

The undersigned has been paid and has received a progress payment in the above referenced Payment Amount for all work, materials and equipment the undersigned furnished to his Customer for the above described Property and does hereby waive any notice of lien, any private bond right, any claim for payment and any rights under any similar ordinance, rule or statute related to payment rights that the undersigned has on the above described Property to the following extent:

This release covers a progress payment for the work, materials or equipment furnished by the undersigned to the Property or to the Undersigned's Customer which are the subject of the Invoice or Payment Application, but only to the extent of the Payment Amount or such portion of the Payment Amount as the undersigned is actually paid, and does not cover any retention withheld, any items, modifications or changes pending approval, disputed items and claims, or items furnished that are not paid. The undersigned warrants that he either has already paid or will use the money he receives from this progress payment promptly to pay in full all laborers, subcontractors, materialmen and suppliers for all work, materials or equipment that are the subject of the waiver and release.

Dated: 6/24/08Zitting Brothers Construction Inc.Signature: [Signature]Print: Natalie ZittingTitle: Manager

**Notice:** This document waives rights unconditionally and states that you have been paid for giving up those rights. This document is enforceable against you if you sign it to the extent of the Payment Amount or the amount received. If you have not been paid, use a Conditional Release form.

APCO00044651



APCO000044674

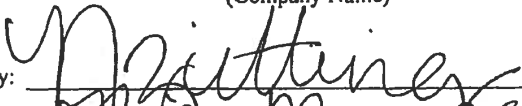
CONDITIONAL WAIVER AND RELEASE  
UPON PROGRESS PAYMENT

Property Name: MANHATTAN WEST  
Property Location: LAS VEGAS NV  
Undersigned's Customer: APCO CONSTRUCTION  
Invoice/Payment Application Number: 502  
Payment Amount: \$156,574.24

Upon receipt by the undersigned of a check in the above referenced Payment Amount payable to the undersigned, and when the check has been properly endorsed and has been paid by the bank on which it is drawn, this document becomes effective to release and the undersigned shall be deemed to waive any notice of lien, any private bond right, any claim for payment and any rights under any similar ordinance, rule or statute related to payment rights that the undersigned has on the above described Property to the following extent:

This release covers a progress payment for the work, materials or equipment furnished by the undersigned to the Property or to the Undersigned's Customer which are the subject of the Invoice or Payment Application, but only to the extent of the Payment Amount or such portion of the Payment Amount as the undersigned is actually paid, and does not cover any retention withheld, any items, modifications or changes pending approval, disputed items and claims, or items furnished that are not paid. Before any recipient of this document relies on it, he should verify evidence of payment to the undersigned. The undersigned warrants that he either has already paid or will use the money he receives from this progress payment promptly to pay in full all his laborers, subcontractors, materialmen and suppliers for all work, materials or equipment that are the subject of this waiver and release.

Dated: 4/21/08 ZITTING BROTHERS CONSTRUCTION  
(Company Name)

By:   
Its: Office Manager



**UNCONDITIONAL WAIVER AND RELEASE  
UPON PROGRESS PAYMENT**

Property Name:	<u>Manhattan West</u>
Property Location:	<u>Russell Road &amp; I-215, Las Vegas, Nevada</u>
Undersigned's Customer:	<u>APCO Construction</u>
Inv./Pmt Application No:	<u>Payment Application #5 (Mar. 2008)</u>
Payment Amount:	<u>\$424,688.70</u>

The undersigned has been paid and has received a progress payment in the above referenced Payment Amount for all work, materials and equipment the undersigned furnished to his Customer for the above described Property and does hereby waive any notice of lien, any private bond right, any claim for payment and any rights under any similar ordinance, rule or statute related to payment rights that the undersigned has on the above described Property to the following extent:

This release covers a progress payment for the work, materials or equipment furnished by the undersigned to the Property or to the Undersigned's Customer which are the subject of the Invoice or Payment Application, but only to the extent of the Payment Amount or such portion of the Payment Amount as the undersigned is actually paid, and does not cover any retention withheld, any items, modifications or changes pending approval, disputed items and claims, or items furnished that are not paid. The undersigned warrants that he either has already paid or will use the money he receives from this progress payment promptly to pay in full all laborers, subcontractors, materialmen and suppliers for all work, materials or equipment that are the subject of the waiver and release.

Dated: 5/21/08

Zitting Brothers Construction Inc.

Signature: [Signature]

Print: Daniel Zitting

Title: Office Manager

**Notice: This document waives rights unconditionally and states that you have been paid for giving up those rights. This document is enforceable against you if you sign it to the extent of the Payment Amount or the amount received. If you have not been paid, use a Conditional Release form.**

APCO00044675

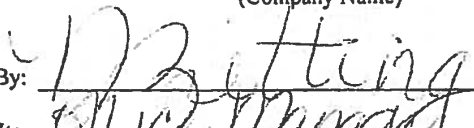
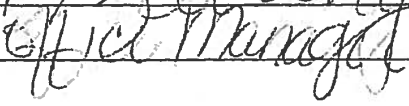
CONDITIONAL WAIVER AND RELEASE  
UPON PROGRESS PAYMENT

Property Name: MANHATTAN WEST  
Property Location: RUSSEL RD, LAS VEGAS  
Undersigned's Customer: APCO CONSTRUCTION  
Invoice/Payment Application Number: 502  
Payment Amount: \$424,689.03

Upon receipt by the undersigned of a check in the above referenced Payment Amount payable to the undersigned, and when the check has been properly endorsed and has been paid by the bank on which it is drawn, this document becomes effective to release and the undersigned shall be deemed to waive any notice of lien, any private bond right, any claim for payment and any rights under any similar ordinance, rule or statute related to payment rights that the undersigned has on the above described Property to the following extent:

This release covers a progress payment for the work, materials or equipment furnished by the undersigned to the Property or to the Undersigned's Customer which are the subject of the Invoice or Payment Application, but only to the extent of the Payment Amount or such portion of the Payment Amount as the undersigned is actually paid, and does not cover any retention withheld, any items, modifications or changes pending approval, disputed items and claims, or items furnished that are not paid. Before any recipient of this document relies on it, he should verify evidence of payment to the undersigned. The undersigned warrants that he either has already paid or will use the money he receives from this progress payment promptly to pay in full all his laborers, subcontractors, materialmen and suppliers for all work, materials or equipment that are the subject of this waiver and release.

Dated: 4/8/08 ZITTING BROTHERS CONSTRUCTION  
(Company Name)

By:   
Its: 



**UNCONDITIONAL WAIVER AND RELEASE  
UPON PROGRESS PAYMENT**

Property Name:	<u>Manhattan West</u>
Property Location:	<u>Russell Road &amp; I-215, Las Vegas, Nevada</u>
Undersigned's Customer:	<u>APCO Construction</u>
Inv./Pmt Application No:	<u>Payment Application #4 (Feb. 2008)</u>
Payment Amount:	<u>\$495,604.60</u>

The undersigned has been paid and has received a progress payment in the above referenced Payment Amount for all work, materials and equipment the undersigned furnished to his Customer for the above described Property and does hereby waive any notice of lien, any private bond right, any claim for payment and any rights under any similar ordinance, rule or statute related to payment rights that the undersigned has on the above described Property to the following extent:

This release covers a progress payment for the work, materials or equipment furnished by the undersigned to the Property or to the Undersigned's Customer which are the subject of the Invoice or Payment Application, but only to the extent of the Payment Amount or such portion of the Payment Amount as the undersigned is actually paid, and does not cover any retention withheld, any items, modifications or changes pending approval, disputed items and claims, or items furnished that are not paid. The undersigned warrants that he either has already paid or will use the money he receives from this progress payment promptly to pay in full all laborers, subcontractors, materialmen and suppliers for all work, materials or equipment that are the subject of the waiver and release.

Dated: 4/23/08

Zitting Brothers Construction Inc.

Signature: [Signature]  
Print: Roy Zitting  
Title: owner

**Notice:** This document waives rights unconditionally and states that you have been paid for giving up those rights. This document is enforceable against you if you sign it to the extent of the Payment Amount or the amount received. If you have not been paid, use a Conditional Release form.

APCO00044684

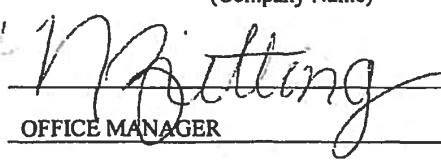
**ZITTING BROTHERS CONSTRUCTION, INC.  
CONDITIONAL WAIVER AND RELEASE  
UPON PROGRESS PAYMENT**

Property/Project Name: MANHATTAN WEST  
Property Location: RUSSEL RD  
Undersigned's Customer: APCO CONSTRUCTION  
Invoice/Payment Application Number: 4  
Payment Amount: \$495,604.44

Upon receipt by the undersigned of a check in the above referenced Payment Amount payable to the undersigned, and when the check has been properly endorsed and has been paid by the bank on which it is drawn, this document becomes effective to release and the undersigned shall be deemed to waive any notice of lien right under U.C.A. §38-1, any private bond right under U.C.A. §14, any claim for payment and any rights under any similar ordinance, rule or statute related to payment rights that the undersigned has on the above described Property to the following extent:

This release covers a progress payment for the work, materials or equipment furnished by the undersigned to the Property/Project or to Zitting Brothers Construction, Inc., the Owner or any other person or entity that does or may claim an interest in the project or property which are the subject of the Invoice or Payment Application, and does not cover any retention withheld. The undersigned warrants that he either has already paid or will use the money he receives from this progress payment promptly to pay in full all his laborers, subcontractors, materialmen and suppliers for all work, materials or equipment that are the subject of this waiver and release. The undersigned shall indemnify and hold harmless Zitting Brothers Construction, Inc., the Owner or any other person or entity that does or may claim an interest in the project and or property from any and all losses, fines, suits, damages, expenses, claims, demands and actions of any kind resulting from the undersigned's failure to pay in full all its/his/her laborers, subcontractors, materialmen and suppliers for all work, materials or equipment that were supplied or used on the project/property through the date of this waiver and release.

Dated: 2/19/08 ZITTING BROTHERS CONSTRUCTION  
(Company Name)

By:   
Its: OFFICE MANAGER

APCO00044698



# APCO CONSTRUCTION

3432 N. 5th Street • North Las Vegas, NV 89032  
Phone: (702) 734-0198 • Fax: (702) 734-0396  
E-mail: apcoconstruction.com • NCL: 14563

## UNCONDITIONAL WAIVER AND RELEASE UPON PROGRESS PAYMENT

Property Name:	<u>Manhattan West</u>
Property Location:	<u>Russell Road &amp; I-215, Las Vegas, Nevada</u>
Undersigned's Customer:	<u>APCO Construction</u>
Inv./Pmt Application No:	<u>Payment Application #003 (Jan. 2008)</u>
Payment Amount:	<u>\$408,225.70</u>

The undersigned has been paid and has received a progress payment in the above referenced Payment Amount for all work, materials and equipment the undersigned furnished to his Customer for the above described Property and does hereby waive any notice of lien, any private bond right, any claim for payment and any rights under any similar ordinance, rule or statute related to payment rights that the undersigned has on the above described Property to the following extent:

This release covers a progress payment for the work, materials or equipment furnished by the undersigned to the Property or to the Undersigned's Customer which are the subject of the Invoice or Payment Application, but only to the extent of the Payment Amount or such portion of the Payment Amount as the undersigned is actually paid, and does not cover any retention withheld, any items, modifications or changes pending approval, disputed items and claims, or items furnished that are not paid. The undersigned warrants that he either has already paid or will use the money he receives from this progress payment promptly to pay in full all laborers, subcontractors, materialmen and suppliers for all work, materials or equipment that are the subject of the waiver and release.

Dated: 3/18/08

Zitting Brothers Construction Inc.

Signature: 

Print: Natalie Zitting

Title: Office Manager

**Notice:** This document waives rights unconditionally and states that you have been paid for giving up those rights. This document is enforceable against you if you sign it to the extent of the Payment Amount or the amount received. If you have not been paid, use a Conditional Release form.

APCO00044699


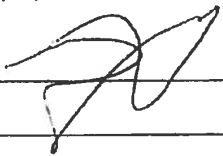
CONDITIONAL WAIVER AND RELEASE  
UPON PROGRESS PAYMENT

Property Name: MANHATTAN WEST  
Property Location: WEST LAS VEGAS  
Undersigned's Customer: APCO CONSTRUCTION  
Invoice/Payment Application Number: \_\_\_\_\_  
Payment Amount: \$408,225.33

Upon receipt by the undersigned of a check in the above referenced Payment Amount payable to the undersigned, and when the check has been properly endorsed and has been paid by the bank on which it is drawn, this document becomes effective to release and the undersigned shall be deemed to waive any notice of lien, any private bond right, any claim for payment and any rights under any similar ordinance, rule or statute related to payment rights that the undersigned has on the above described Property to the following extent:

This release covers a progress payment for the work, materials or equipment furnished by the undersigned to the Property or to the Undersigned's Customer which are the subject of the Invoice or Payment Application, but only to the extent of the Payment Amount or such portion of the Payment Amount as the undersigned is actually paid, and does not cover any retention withheld, any items, modifications or changes pending approval, disputed items and claims, or items furnished that are not paid. Before any recipient of this document relies on it, he should verify evidence of payment to the undersigned. The undersigned warrants that he either has already paid or will use the money he receives from this progress payment promptly to pay in full all his laborers, subcontractors, materialmen and suppliers for all work, materials or equipment that are the subject of this waiver and release.

Dated: 1/20/08 ZITTING BROTHERS CONSTRUCTION  
(Company Name)

By:   
Its: 



**UNCONDITIONAL WAIVER AND RELEASE  
UPON PROGRESS PAYMENT**

Property Name:	<u>Manhattan West</u>
Property Location:	<u>Russell Road &amp; I-215, Las Vegas, Nevada</u>
Undersigned's Customer:	<u>APCO Construction</u>
Inv./Pmt Application No:	<u>Payment Application #002 (Dec. 2007)</u>
Payment Amount:	<u>\$567,148.60</u>

The undersigned has been paid and has received a progress payment in the above referenced Payment Amount for all work, materials and equipment the undersigned furnished to his Customer for the above described Property and does hereby waive any notice of lien, any private bond right, any claim for payment and any rights under any similar ordinance, rule or statute related to payment rights that the undersigned has on the above described Property to the following extent:

This release covers a progress payment for the work, materials or equipment furnished by the undersigned to the Property or to the Undersigned's Customer which are the subject of the Invoice or Payment Application, but only to the extent of the Payment Amount or such portion of the Payment Amount as the undersigned is actually paid, and does not cover any retention withheld, any items, modifications or changes pending approval, disputed items and claims, or items furnished that are not paid. The undersigned warrants that he either has already paid or will use the money he receives from this progress payment promptly to pay in full all laborers, subcontractors, materialmen and suppliers for all work, materials or equipment that are the subject of the waiver and release.

Dated: 2-29-08

Zitting Brothers Construction Inc.

Signature: 

Print: WILLIAM ZITTING

Title: V.P.

**Notice: This document waives rights unconditionally and states that you have been paid for giving up those rights. This document is enforceable against you if you sign it to the extent of the Payment Amount or the amount received. If you have not been paid, use a Conditional Release form.**

APCO00044714





3432 N. 5th Street • North Las Vegas, NV 89032  
Phone: (702) 734-0198 • Fax: (702) 734-0396  
E-mail: apcoconstruction.com • NCL: 14563

**UNCONDITIONAL WAIVER AND RELEASE  
UPON PROGRESS PAYMENT**

Property Name:	<u>Manhattan West</u>
Property Location:	<u>Russell Road &amp; I-215, Las Vegas, Nevada</u>
Undersigned's Customer:	<u>APCO Construction</u>
Inv./Pmt Application No:	<u>Payment Application #001.1 (Nov. 2007)</u>
Payment Amount:	<u>\$368,785.00</u>

The undersigned has been paid and has received a progress payment in the above referenced Payment Amount for all work, materials and equipment the undersigned furnished to his Customer for the above described Property and does hereby waive any notice of lien, any private bond right, any claim for payment and any rights under any similar ordinance, rule or statute related to payment rights that the undersigned has on the above described Property to the following extent:

This release covers a progress payment for the work, materials or equipment furnished by the undersigned to the Property or to the Undersigned's Customer which are the subject of the Invoice or Payment Application, but only to the extent of the Payment Amount or such portion of the Payment Amount as the undersigned is actually paid, and does not cover any retention withheld, any items, modifications or changes pending approval, disputed items and claims, or items furnished that are not paid. The undersigned warrants that he either has already paid or will use the money he receives from this progress payment promptly to pay in full all laborers, subcontractors, materialmen and suppliers for all work, materials or equipment that are the subject of the waiver and release.

Dated: 02/07/08

Zitting Brothers Construction Inc.

Signature: \_\_\_\_\_

Print: \_\_\_\_\_

Title: \_\_\_\_\_

**Notice: This document waives rights unconditionally and states that you have been paid for giving up those rights. This document is enforceable against you if you sign it to the extent of the Payment Amount or the amount received. If you have not been paid, use a Conditional Release form.**

APCO00044728

## CONDITIONAL WAIVER AND RELEASE UPON PROGRESS PAYMENT

Property Name:	<u>MANHATTAN WEST</u>
Property Location:	<u>9121 WEST RUSSELL RD, LAS VEGAS</u>
Undersigned's Customer:	<u>APCO CONSTRUCTION</u>
Invoice/Payment Application Number:	<u>73663</u>
Payment Amount:	<u>\$368,785.00</u>

Upon receipt by the undersigned of a check in the above referenced Payment Amount payable to the undersigned, and when the check has been properly endorsed and has been paid by the bank on which it is drawn, this document becomes effective to release and the undersigned shall be deemed to waive any notice of lien, any private bond right, any claim for payment and any rights under any similar ordinance, rule or statute related to payment rights that the undersigned has on the above described Property to the following extent:

This release covers a progress payment for the work, materials or equipment furnished by the undersigned to the Property or to the Undersigned's Customer which are the subject of the Invoice or Payment Application, but only to the extent of the Payment Amount or such portion of the Payment Amount as the undersigned is actually paid, and does not cover any retention withheld, any items, modifications or changes pending approval, disputed items and claims, or items furnished that are not paid. Before any recipient of this document relies on it, he should verify evidence of payment to the undersigned. The undersigned warrants that he either has already paid or will use the money he receives from this progress payment promptly to pay in full all his laborers, subcontractors, materialmen and suppliers for all work, materials or equipment that are the subject of this waiver and release.

Dated: 2/16/08 ZITTING BROTHERS CONSTRUCTION  
(Company Name)  
By: Natalie Zitting  
Its: Office Manager



# APCO CONSTRUCTION

3432 N. 5th Street • North Las Vegas, NV 89032  
Phone: (702) 734-0198 • Fax: (702) 734-0396  
E-mail: apcoconstruction.com • NCL: 14563

## UNCONDITIONAL WAIVER AND RELEASE UPON PROGRESS PAYMENT

Property Name:	<u>Manhattan West</u>
Property Location:	<u>Russell Road &amp; I-215, Las Vegas, Nevada</u>
Undersigned's Customer:	<u>APCO Construction</u>
Inv./Pmt Application No:	<u>Payment Application #001 (Partial)</u>
Payment Amount:	<u>\$800,000.00</u>

The undersigned has been paid and has received a progress payment in the above referenced Payment Amount for all work, materials and equipment the undersigned furnished to his Customer for the above described Property and does hereby waive any notice of lien, any private bond right, any claim for payment and any rights under any similar ordinance, rule or statute related to payment rights that the undersigned has on the above described Property to the following extent:

This release covers a progress payment for the work, materials or equipment furnished by the undersigned to the Property or to the Undersigned's Customer which are the subject of the Invoice or Payment Application, but only to the extent of the Payment Amount or such portion of the Payment Amount as the undersigned is actually paid, and does not cover any retention withheld, any items, modifications or changes pending approval, disputed items and claims, or items furnished that are not paid. The undersigned warrants that he either has already paid or will use the money he receives from this progress payment promptly to pay in full all laborers, subcontractors, materialmen and suppliers for all work, materials or equipment that are the subject of the waiver and release.

Dated: 02/01/08

Zitting Brothers Construction Inc.

Signature: \_\_\_\_\_

Print: \_\_\_\_\_

Title: \_\_\_\_\_

**Notice:** This document waives rights unconditionally and states that you have been paid for giving up those rights. This document is enforceable against you if you sign it to the extent of the Payment Amount or the amount received. If you have not been paid, use a Conditional Release form.

APCO00044744

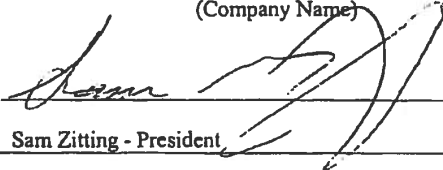
AA 004111

**CONDITIONAL WAIVER AND RELEASE  
UPON PROGRESS PAYMENT**

Property Name: Manhattan West  
Property Location: 3432 North 5<sup>th</sup> street Las Vegas  
Undersigned's Customer: APCO construction  
Invoice/Payment Application Number: 1  
Payment Amount: \$800,000

Upon receipt by the undersigned of a check in the above referenced Payment Amount payable to the undersigned, and when the check has been properly endorsed and has been paid by the bank on which it is drawn, this document becomes effective to release and the undersigned shall be deemed to waive any notice of lien, any private bond right, any claim for payment and any rights under any similar ordinance, rule or statute related to payment rights that the undersigned has on the above described Property to the following extent:

This release covers a progress payment for the work, materials or equipment furnished by the undersigned to the Property or to the Undersigned's Customer which are the subject of the Invoice or Payment Application, but only to the extent of the Payment Amount or such portion of the Payment Amount as the undersigned is actually paid, and does not cover any retention withheld, any items, modifications or changes pending approval, disputed items and claims, or items furnished that are not paid. Before any recipient of this document relies on it, he should verify evidence of payment to the undersigned. The undersigned warrants that he either has already paid or will use the money he receives from this progress payment promptly to pay in full all his laborers, subcontractors, materialmen and suppliers for all work, materials or equipment that are the subject of this waiver and release.

Dated: 1/28/08 Zitting Brothers Construction  
(Company Name)  
By:   
Its: Sam Zitting - President

# **EXHIBIT 20**



1 RTRAN

2

3

4

5

DISTRICT COURT

6

CLARK COUNTY, NEVADA

7

APCO CONSTRUCTION,

8

Plaintiffs,

9

vs.

10

GEMSTONE DEVELOPMENT  
WEST, INC.,

11

12

Defendants.

13

14

BEFORE THE HONORABLE MARK R. DENTON, DISTRICT COURT JUDGE

15

THURSDAY, NOVEMBER 16, 2017

16

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

17

18

19

20

(Appearances on Page 2)

21

22

23

24

25

RECORDED BY: JENNIFER GEROLD, COURT RECORDER

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

APPEARANCES:

For the Plaintiffs:	JOHN JEFFERIES, ESQ. CODY S. MOUNTEER, ESQ.
For Camco Pacific Construction Co., Inc.:	STEVEN L. MORRIS, ESQ.
For various Lien Claimants:	ERIC B. ZIMBELMAN, ESQ.
For Zitting Brothers Construction, Inc.:	I-CHE LAI, ESQ. JORGE A. RAMIREZ, ESQ.
For various Counter Defendants:	MICHAEL R. ERNST, ESQ.
For E&E Fire Protection, LLC:	JAMES T. TRUMAN, ESQ.
For National Wood Products, Inc.:	JOHN B. TAYLOR, ESQ. RICHARD L. TOBLER, ESQ.

1 Las Vegas, Nevada; Thursday, November 16, 2017

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

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

6 MR. MORRIS: Good morning, Your Honor, Steven Morris on behalf  
7 of Camco Pacific Construction Company, Inc.

8 MR. JEFFERIES: John Jefferies, Spencer Fane, on behalf of Apco.

9 MR. MOUNTEER: Good morning, Your Honor, Cody Munteer on  
10 behalf of Apco.

11 MR. ZIMBELMAN: Morning, Your Honor, Eric Zimbelman on behalf  
12 of the Peel Brimley lien claimants, Helix, Fast Glass, Buchele, Heinaman, and I  
13 always forget, several others -- couple others.

14 MR. TOBLER: Rich Tobler on behalf of Third-Party Intervenor,  
15 National Wood Products.

16 MR. TAYLOR: John Taylor also on behalf of National Wood  
17 Products.

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

19 MR. ERNST: Morning, Your Honor, Michael Ernst on behalf of Steel  
20 Structures, Nevada Prefab Engineers and Gerdau Steel Reinforcing. Also with  
21 me is our newest admin to the bar, Kyle Wayan [phonetic].

22 MR. RAMIREZ: Jorge Ramirez also on behalf of Zitting Brothers.

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

24 THE COURT: All right. The first item I'll take up is the motion to  
25 withdraw. That's Peel Brimley firm; correct?



1 MR. ZIMBELMAN: Yes, Your Honor. That's me. It's with regard to  
2 Buchele. It appears that Mr. Buchele has passed away. Buchele, the entity, is  
3 long gone and we've had no contact with them for some time. There's really  
4 nothing I can do for them at this point.

5 THE COURT: All right. I've received no written opposition to it.  
6 Apparently, there is no opposition to it. Cause appearing that motion's granted.

7 MR. ZIMBELMAN: Thank you, Your Honor.

8 THE COURT: Okay. Thank you. Now, let me tell you what's going to  
9 have to happen here. You have two alternatives. One, you can just briefly argue  
10 the matters, because I'm in the middle of a jury trial -- I'm at the end of a jury trial,  
11 we're settling jury instructions at 10 o'clock. We're behind on it. So I have very  
12 little time here.

13 So the idea would be you just emphasize the things you want me to  
14 take into account and I'll -- I'm going to have to take the case under advisement,  
15 okay, and issue a ruling -- rulings. The alternative is that I pass this to Tuesday,  
16 next Tuesday at 10 o'clock in the morning. I know we have calendar call on  
17 Monday, I believe, but you know, I can hear from you longer on Tuesday than I  
18 can today. Today's got to be very brief. Okay? It's well -- the case is well  
19 briefed, so, I mean --

20 MR. ZIMBELMAN: Yeah.

21 THE COURT: -- if you want to just deem it submitted, I'll --

22 MR. ZIMBELMAN: I think we -- very brief comments and deem it  
23 submitted.

24 THE COURT: Just emphasize the things you want me to pay  
25 particular attention to because I --

1 MR. ZIMBELMAN: That would work for me.

2 THE COURT: -- you know, I don't have a law clerk in this case, you  
3 understand that. I'm, you know, working on it without that assistance because  
4 my law clerk's been screened off of it, so. Okay?

5 MR. ZIMBELMAN: Which would you like to take? Are you guys okay  
6 with that?

7 MR. MOUNTEER: I think we're okay with that, Your Honor, and  
8 maybe just brief oral arguments. I don't know if you want to set a time limit or  
9 something, but just to mention on each motion would be fine.

10 THE COURT: Yeah. I want to have you finished with this case by  
11 say, 25 after 9:00. Okay? Because I've got some other things I've got here.

12 MR. ZIMBELMAN: By what time, I'm sorry?

13 THE COURT: 25 after 9:00.

14 MR. ZIMBELMAN: I can do my part in, you know, five minutes.

15 THE COURT: Okay.

16 MR. ZIMBELMAN: Okay. Do you want to go motion by motion or do  
17 you want to hear from one party or all --

18 THE COURT: Well, they're -- a lot of them are joinders, so.

19 MR. ZIMBELMAN: Some of them, yeah.

20 THE COURT: Again, I can give you more time on Tuesday if you  
21 want to do that.

22 MR. ZIMBELMAN: Yeah, again, Your Honor's familiar with these  
23 issues. To me, it's relatively straight forward.

24 THE COURT: Okay. Well, let's go then. I'm going to have to cut you  
25 off if you're not done by --

1 MR. ZIMBELMAN: I understand.

2 THE COURT: Okay.

3 MR. ZIMBELMAN: Can I do the motion for summary judgment  
4 regarding pay-if-paid?

5 THE COURT: Okay. Is that okay with everybody?

6 MR. ZIMBELMAN: It might be the most pressing.

7 MR. MOUNTEER: Sure.

8 THE COURT: Okay.

9 MR. ZIMBELMAN: Thank you, Your Honor. So the only thing I would  
10 like that -- obviously, we briefed this well, but I'd like you to focus on two things.  
11 One is the *Bullock* decision. It's extremely clear the Supreme Court has spoken  
12 on the fact that pay-if-paid is void and unenforceable. While there's a reference  
13 in a footnote to a limited exception, that just doesn't apply, right. And If you read  
14 the actual statute, NRS 624.624, that limited exception is simply talking about the  
15 remedy for stopping work. It's at 626. And that extends to 45 days, right.

16 The subcontractors that go need to actually issue a notice of intent to  
17 stop work, stop work on the project, terminate the contract, and you know, and be  
18 entitled to some of the other remedies that 626 entitles it to. Including, you know,  
19 to have its change orders be deemed approved, to have its pay application be  
20 deemed approved, to be immune from defenses that might come back to it.  
21 624.624 spells out exactly when the general contractor can withhold money and  
22 the only times it can withhold money. And the only times it can do that is by  
23 issuing a notice of withholding.

24 None of that has happened. It's never happened. It's been nine  
25 years. My clients are entitled to be paid and it's as simple as that. You can't just

1 hide behind this agreement that says, you'll look to the owner, because that's  
2 pay-if-paid. And that is what's prohibited expressly by the Supreme Court.

3 THE COURT: Is that the *Manhattan West* -- is that the case you're  
4 referring to? Which case were you referring to a minute ago?

5 MR. ZIMBELMAN: The *Bullock* decision.

6 THE COURT: The *Bullock* decision.

7 MR. ZIMBELMAN: Yeah. *Lehrer McGovern Bovis versus Bullock*.

8 THE COURT: Okay.

9 MR. ZIMBELMAN: Right. And there were a couple of decisions, the  
10 second one, the Supreme Court sort of amended it by putting in a footnote that,  
11 you know, everybody wants to rely on now and say oh, there might be a limited  
12 exception for pay-if-paid, but the statute 624.624 is extremely clear that there  
13 really isn't an exception, anytime. It works in favor of the lower tiered  
14 subcontractor, right, because it says exactly when they have to be paid.

15 And the absolute outside is 30 days after submitting a request for  
16 payment if there's no schedule of payments . And one of the arguments that's  
17 been made is that the schedule of payments is you'll get when we get paid, right.  
18 That that's -- that's just the same thing. That's a completely circular argument.  
19 So if you're -- if you have an obligation to pay, you can't avoid it and the statute  
20 says you can't have provisions -- conditions, stipulations, or provisions that avoid  
21 the obligations of the statute.

22 THE COURT: Okay.

23 MR. ZIMBELMAN: So I think -- I think the legislature and the  
24 Supreme Court have been very clear and have made it extremely difficult to get  
25 around that provision. Thank you.

1 THE COURT: All right. Thank you. We're -- okay. Are there any of  
2 the joinders want to say anything very briefly? Okay.

3 MR. LAI: Zitting Brothers actually submitted a separate motion for  
4 summary judgment that sort of followed along what Eric Zimbelman had said in  
5 his and I can briefly summarize those arguments, if you'd like.

6 THE COURT: Well, is that okay with you?

7 MR. MOUNTEER: That's fine with me, Your Honor.

8 THE COURT: Go ahead.

9 MR. LAI: Kind of tagging on, Zitting also asserted the avoidance of  
10 the pay-if-paid provision, but more importantly in its motion for summary  
11 judgment, Zitting has also asserted the fact that Apco, at this stage of the  
12 litigation, cannot assert any other defenses besides the enforceability of the pay-  
13 if-paid provision because under Rule 37 subsection (c) subsection (1), there's an  
14 automatic preclusion unless Apco can show that this nondisclosure and other  
15 defenses was substantially justified or that the late disclosure at this end of the  
16 game did not harm Zitting. And they can't show that based on the briefing. And  
17 the Court can look at the briefing for a detailed explanation for that purpose.

18 But moving on to the actual merits of the breach of contract claim,  
19 which we discussed in our motion, was that there's a strict legal issue on the  
20 liability for breach of contract that this Court can resolve as a matter of law. For  
21 example, under the contracts sections 9.4 specifically, indicates that if there's a  
22 termination of the prime contract between the owner and Apco, it provides an  
23 automatic payment for all the work completed by Zitting. And more importantly,  
24 under section NRS 624.626, if Apco's right that the contract between Zitting and  
25 Apco are terminated, that statute also provides for automatic payment for all the

1 work completed to date. These are automatic payments. Zitting doesn't need to  
2 submit any request for payment. These are amount that are due and payable as  
3 of date of termination. And Apco's never refuted that the contracts were  
4 terminated so on that specific issue alone, it warrants a liability finding by this  
5 Court on breach of contract.

6 THE COURT: All right.

7 MR. MOUNTEER: Good morning, Your Honor, Cody Mounteer on  
8 behalf of Apco. Let me touch on Zitting's motion first. With all due respect,  
9 counsel's argued issues that have not been briefed in the pleadings, so we'd like  
10 to reserve our right to address those contractual defenses. And I wanted to  
11 specifically discuss these contractual defenses because we did, in fact, through  
12 our 30(b)(6) witness testify to the defenses that we have. Zitting was at the  
13 deposition, took over a hundred pages of deposition of Ms. Mary Jo Allen  
14 regarding payment, regarding the contract clauses, and it was clear what the  
15 defenses are.

16 This was also six months before we even had the opportunity to take  
17 Mr. Zitting's deposition. And Mr. Zitting's deposition, you could see, Your Honor,  
18 has completely and 100 percent contradicting statements from the declaration  
19 that he provided to this Court. And with the short time that I have before this  
20 Court, I want to draw attention to that because for the very reason alone that Mr.  
21 Sam Zitting testified to this Court on July 31<sup>st</sup>, that we had drywall complete in  
22 Buildings 8 and 9 and then testified during his deposition that he was not aware if  
23 drywall was completed and that he didn't know or have any documents to  
24 support the drywall was completed. When in fact, we have provided evidence in  
25 our moving papers to show that Buildings 8 and 9 were in fact anywhere between

1 60 to 80 percent complete; creates an issue of material fact for this Court to hear  
2 and to reserve over for trial to deny Zitting's motion in its entirety.

3 Moving onto the pay-if-paid. Your Honor, I'm going to refer to Helix in  
4 general, I know there's been a lot of moving parties, but they're the ones that  
5 primarily brought the motion and there's been joinders and also will apply to  
6 Zitting too. What they're asking the Court to do is give an advisory opinion.  
7 What we've shown in our moving papers is that the pay-if-paid clause is not clear  
8 and that's through, if you want to call it *Bullock* or *Lehrer*, I call it the *Lehrer* case.  
9 *Lehrer* one was clarified by *Lehrer* two. There was a lot of confusion between  
10 the two cases. That's why we had to have *Lehrer* two come out only a few short  
11 months later. The revised opinion in *Lehrer* two attempted to clarify portions of  
12 the decision regarding the inconsistent verdicts.

13 Now, without explanation, the new decision actually removed the  
14 language that the pay-if-paid provisions are per se unenforceable and replaced it  
15 with this. Pay-if-paid provisions entered into subsequent to the legislature's  
16 amendment are enforceable only in limited circumstances and are subject to the  
17 restrictions laid out in the statute. The restrictions laid out in the statute are in our  
18 brief, but specifically, Your Honor, I want to touch on three of them, two, three, and  
19 four. The Court needs to consider factors that are laid out in the statute whether  
20 the clause is unreasonable under the circumstances, was not within the  
21 contemplation of the parties at the time the agreement was entered into or for  
22 which the lower-tier subcontractor is not responsible. Those are factors in fact  
23 that need facts applied. We have to have facts.

24 The payment schedule in the contracts that was spoken of by Helix  
25 have specific pre-conditions that have to be met. During Mr. Zitting's deposition

1 he admitted those pre-conditions weren't met. The fact of the matter is, we have  
2 to know whether Helix even met those pre-conditions because if those pre-  
3 conditions in the contract were not met, that brings us all back to a famous case  
4 that was decided by this Court, *Padilla*. I'm sure Your Honor's familiar with it.  
5 Where the Supreme Court came down and Your Honor had held that if we have  
6 pre-conditions in a contract for payment, and those pre-conditions are not met so  
7 payment's not due, we don't even get to the pay-if-paid clause.

8 So there are a number of factors. One, we have inconsistent  
9 testimony by Zitting that should deny their entire motion so the Court can actually  
10 have Mr. Zitting on the stand and test his voracity to the statements that he's  
11 already provided this Court. And two, we have to have facts to be able to apply it  
12 to NRS 624 statute in order to grant these motions. And without those, granting  
13 would be nothing more than an advisory opinion by the Court so we respectfully  
14 request both those two motions be denied. Thank you, Your Honor.

15 THE COURT: Okay.

16 MR. MORRIS: Very quickly, Your Honor. Steven Morris on behalf of  
17 Camco. We would join in the arguments presented by Apco's counsel. We'd  
18 also draw the Court's attention to Camco's proposition, specifically Exhibit B,  
19 Your Honor, and this is Bates labeled Camco-MW00030. Camco was in a  
20 somewhat of a different situation as Your Honor will recall from these facts.  
21 Camco was the follow-on general contractor on this project after the Apco  
22 contract was terminated in or about August 2008. Camco was on the project  
23 approximately four months before funding was pulled.

24 Camco's dealings with the various subcontractors were different and  
25 the differences are pointed out in -- in the Exhibit B, the Bates number that I just



1 presented Your Honor. So again, we would join with the arguments made with  
2 respect to the pay-if-paid and Camco is in a different position. Your Honor, we  
3 respectfully request this. This trial can be streamlined as it pertains to Camco,  
4 essentially, these lien claimants, some of which don't even have contracts with  
5 Camco are alleging that Camco should be the de facto lender and owner of the  
6 project and guarantor for the amounts that they claim to be due and owing when  
7 those amounts never came through Camco and that is pointed out in the exhibit  
8 that I presented. I'll submit on that, Your Honor.

9 THE COURT: All right. Thank you.

10 MR. ZIMBELMAN: May I have one minute to reply on the *Padilla*  
11 issue?

12 THE COURT: Yes.

13 MR. ZIMBELMAN: As the Court probably knows, *Padilla* is not a  
14 published decision and it was referred to by counsel as that famous -- it's  
15 probably famous to Your Honor because you were the trial judge, but it's not  
16 famous to me. I am, however, familiar with it and from what I can tell from the  
17 Supreme Court's own published decision, nobody ever raised the pay-if-paid  
18 question in that case. And it certainly wasn't addressed by the Supreme Court's  
19 decision.

20 And furthermore, as I understand *Padilla*, there was an allegation that  
21 *Padilla* had done shoddy work and that that had been brought to *Padilla's*  
22 attention by the general contractor. *Padilla* ignored those concerns and never  
23 satisfied the owner as to the quality of its work. We don't know if a notice of  
24 withholding had been made or what conditions had occurred there. None of that  
25 is apparent from the Supreme Court's unpublished decision.

1           So I can tell you here, and you'll see it in one of our motions in limine,  
2 there is no evidence, zero evidence of -- of improper work, of defective work, of  
3 work that failed to comply or to conform to contract. So that's clearly not the  
4 same factual situation and again, legally, pay-if-paid wasn't apparently  
5 addressed. Maybe it was in your court, it certainly isn't in the Supreme Court's  
6 decision, so. Thank you.

7           THE COURT: All right. Thank you.

8           MR. LAI: Your Honor, if I could respond.

9           THE COURT: Real quickly.

10          MR. LAI: Just going to put some comments about the Rule 37  
11 conclusion. Apco's relying on a 30(b)(6) deposition that occurred in 2017, seven  
12 years after they swore up-and-down that the only defense that they're relying on  
13 was the pay-if-paid provision. We actually sent specific interrogatories back in  
14 2010 asking them to provide all factual basis for the fact that Zitting did not  
15 comply with the condition precedent to the contract, their specifically -- their 12<sup>th</sup>  
16 affirmative defense. And Apco in their response mentioned only the pay-if-paid  
17 provision.

18          We crafted a very limited discovery plan to explore solely that issue  
19 and prepare motions for summary judgment solely on that specific issue and they  
20 raise a defense seven years later on a 30(b)(6) deposition that wasn't even a  
21 30(b)(6) witness for the affirmative defenses. Their 30(b)(6) witness on  
22 affirmative defenses actually testified under oath that they're still relying on the  
23 pay-if-paid provision and that was also taken place one month before their  
24 deposition testimony that they're relying on right there.

25          So Zitting and the rest of the subcontractors have been misled for

1 seven years by this defense that they're asserting on. Now, they're  
2 [indiscernible] at the 11<sup>th</sup> hour and that's fundamentally unfair, Your Honor.

3 THE COURT: All right. Thank you.

4 MR. MOUNTEER: You -- briefly, just 30 seconds. Your Honor, if  
5 you'll recall for the first time that we want to talk about any prejudice, they've had  
6 our 30(b)(6) deposition for six months. We testified to many defenses. We were  
7 able to get our discovery plan and everything figured out exactly what Mr. Zitting  
8 was testified to not even 30 days ago. There's no prejudice here. The case must  
9 be tried on its merits.

10 MR. ZIMBELMAN: Can I give the Court one citation on that *Padilla* --

11 THE COURT: Quickly.

12 MR. ZIMBELMAN: -- question? There actually is a published  
13 Supreme Court decision from 2016 that affirmed the pay-if-paid provisions in  
14 *Bullock* and that is the *Cashman Equipment* decision and it's 380 P.3<sup>rd</sup> 844 132  
15 Nevada Advanced Opinion 69.

16 THE COURT: All right.

17 MR. ZIMBELMAN: Thank you, Your Honor.

18 THE COURT: I got a slew of -- yeah what are you going to address?

19 MR. TAYLOR: Just one really quick comment on one of the motions  
20 in limine before we close up. National Wood, in our complaint we said that we  
21 found Apco and Camco to be jointly and separately liable for our claims. The  
22 special master asked us to allocate between one and the other and it said that  
23 that was for budgeting purposes only, it wouldn't be held against us.

24 So we did allocate between the portion of our claim that related to the  
25 time before Camco and the portion that related after. But at no point in time did

1 we ever say we were backing off of our complaint saying joint and several  
2 liability. Recently, Apco said well, we didn't understand that you meant joint and  
3 several when you said joint and several so we clarified that later, but clarifying it  
4 later shouldn't -- has not prejudiced Apco. They could have prepared their  
5 defense entirely totally from day one based on our language of our complaint.

6 Thank you.

7 THE COURT: All right. Did you want to address that?

8 MR. JEFFERIES: Your Honor, Randy Jefferies. We filed a motion in  
9 limine that has seven motions subsumed in one. I just want to address our  
10 motion number seven given the time constraints.

11 THE COURT: I thought you were going to respond to what he just  
12 said.

13 MR. JEFFERIES: I -- I am because he essentially addressed my  
14 motion in limine on September 30, 2016, National disclosed specifically to Apco  
15 \$30,110. On March 3, 2017, again confirmed the damages they were seeking  
16 against Apco was \$30,110. And then six days ago we get a disclosure of 1. --  
17 approximately 1.2 million dollars. And that is clearly improper under any set of  
18 circumstances and they were making those \$30,000 disclosures and  
19 designations within their joint and severable context. Secondly, within our motion  
20 in limine number seven is we're asking the Court to restrict Helix to the damages  
21 that its PMK testified to.

22 THE COURT: Okay. This is all briefed, right?

23 MR. JEFFERIES: It is.

24 THE COURT: Okay. Thanks.

25 MR. ZIMBELMAN: Just briefly on the Helix part --

1 THE COURT: Okay.

2 MR. ZIMBELMAN: -- of the motion in limine seven. You know, their  
3 motion was based in part upon the special master questionnaires which, of  
4 course, were, you know, were intended to be informative only. But nonetheless,  
5 it's out there and that special master questionnaire from Helix clearly identified  
6 Helix's damages of about 2.9 million and we've subsequently reduced that.

7 THE COURT: Right.

8 MR. ZIMBELMAN: But those were intended against both Apco and  
9 Camco together. That was our position. It's always been our position.

10 THE COURT: All right. Thank you very much. That's all the time I've  
11 got so the matter stands submitted. It's been briefed. I'll issue my rulings as  
12 soon as I can. I'll see you Monday at the calendar call at 2 o'clock.

13 ALL COUNSEL: Thank you, Your Honor.

14 [Hearing concluded at 9:27 a.m.]

15 \* \* \* \* \*

16

17

18

19

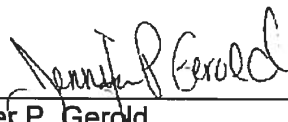
20

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

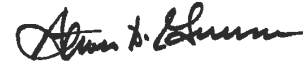
23

24

25

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

# **EXHIBIT 21**



CLERK OF THE COURT

1 **NJUD**  
Melissa A. Beutler, Esq. (10948)  
2 **HOLLAND & HART LLP**  
9555 Hillwood Drive, 2nd Floor  
3 Las Vegas, Nevada 89134  
Phone: (702) 669-4600  
4 Facsimile: (702) 669-4650  
[mabeutler@hollandhart.com](mailto:mabeutler@hollandhart.com)  
5 *Attorneys for Defendant/Counterclaimant*  
*Big-D Construction Corp.*

7 **DISTRICT COURT**

8 **CLARK COUNTY, NEVADA**

9 **PADILLA CONSTRUCTION COMPANY OF**  
NEVADA, a Nevada corporation,

CASE NO.: A-10-609048-C  
DEPT. NO.: XIII

10 Plaintiff,

11 vs.

12 **BIG-D CONSTRUCTION CORP.**, a Utah  
corporation, **FIDELITY & DEPOSIT**  
13 **COMPANY OF MARYLAND**, a Maryland  
corporation, **DOE CORPORATION I** through  
14 **DOE CORPORATION V**, and **ROE I** through  
**ROE V** individuals;

**NOTICE OF ENTRY OF FINDINGS OF  
FACT AND CONCLUSIONS OF LAW  
AND  
JUDGMENT**

15 Defendants.

16 **BIG-D CONSTRUCTION CORP.**, a Utah  
corporation,

17 Counter-Claimant,

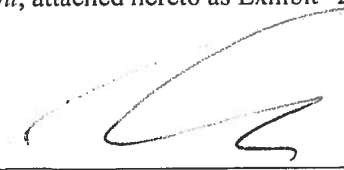
18 vs.

19 **PADILLA CONSTRUCTION COMPANY OF**  
NEVADA, a Nevada corporation,

20 Counter-Defendant.  
21

22 PLEASE TAKE NOTICE that the Court entered a *Findings of Fact and Conclusions of*  
23 *Law*, attached hereto as Exhibit "1," and a *Judgment*, attached hereto as Exhibit "2," on the 22nd  
24 day of January, 2015.

25 DATED: January 23, 2015.

26   
27 \_\_\_\_\_  
Melissa A. Beutler, Esq. (10948)  
9555 Hillwood Drive, 2nd Floor  
Las Vegas, Nevada 89134  
28 *Attorneys for Big-D Construction*

HOLLAND & HART LLP  
9555 Hillwood Drive, 2nd Floor  
Las Vegas, NV 89134

**CERTIFICATE OF MAILING**

I hereby certify that on the 23rd day of January, 2015, I served a true and correct copy of the attached **NOTICE OF ENTRY OF FINDINGS OF FACT AND CONCLUSIONS OF LAW AND JUDGMENT** by placing a true and correct copy of the aforementioned in the U.S. mail, postage prepaid in full, addressed to the following:

Bruce R. Mundy, Esq. (6068)  
200 South Virginia St., Eighth Fl.  
Reno, Nevada 89511  
*Attorneys for Padilla Construction Co. of Nevada*



\_\_\_\_\_  
An Employee of Holland and Hart, LLP

7472250\_1



EXHIBIT “1”

EXHIBIT “1”

**DISTRICT COURT  
CLARK COUNTY, NEVADA**

  
CLERK OF THE COURT

PADILLA CONSTRUCTION COMPANY OF  
NEVADA, a Nevada corporation,

Plaintiff,

vs.

BIG-D CONSTRUCTION CORP., a Utah  
corporation, FIDELITY & DEPOSIT  
COMPANY OF MARYLAND, a Maryland  
corporation, DOE CORPORATION I through  
DOE CORPORATION V, and ROE I through  
ROE V individuals;

Defendants.

BIG-D CONSTRUCTION CORP., a Utah  
corporation,

Counter-Claimant,

vs.

PADILLA CONSTRUCTION COMPANY OF  
NEVADA, a Nevada corporation,

Counter-Defendant.

CASE NO.: A-10-609048-C  
DEPT. NO.: XIII

**FINDINGS OF FACT AND  
CONCLUSIONS OF LAW**

THIS MATTER having come on for non-jury trial on December 2 and 3, 2014,  
Plaintiff, PADILLA CONSTRUCTION COMPANY OF NEVADA, appearing by and through  
BRUCE R. MUNDY, ESQ., and Defendants, BIG-D CONSTRUCTION CORP. and  
FIDELITY & DEPOSIT COMPANY OF MARYLAND, appearing by and through, MELISSA  
BEUTLER, ESQ. of the Law Firm, HOLLAND & HART, LLP;

AND, the Court having heard the testimony of witnesses, having reviewed the evidence  
provided by the Parties, having heard the arguments of counsel, and having read and considered  
the briefs of counsel and good cause appearing;

**MARK R. DENTON**  
DISTRICT JUDGE  
DEPARTMENT THIRTEEN  
LAS VEGAS, NV 89155

1 NOW, therefore, the Court hereby enters the following

2 **FINDINGS OF FACT**

3 **A. The Project**

4 1. International Game Technology ("IGT") constructed a show place  
5 international headquarters in Las Vegas, Nevada (the "Project"). Pretrial Order, Stipulated Fact  
6 ¶ 1.

7 2. In June 2006, Big-D entered into a construction agreement with IGT (the  
8 "Construction Agreement") to act as the general contractor on the Project. *Id.* at ¶ 2.

9 3. The Project's design called for a significant portion of the exterior and  
10 the interior lobby to be finished with large sandstone panels to be installed over a two-coat  
11 stucco system. *Id.* at ¶ 3.

12 4. IGT occupied the nearly completed Project in the summer of 2008. *Id.* at  
13 ¶ 4.

14 5. After a piece of large stone tile fell from a high elevation on the exterior  
15 of the Project in December 2008, IGT initiated an investigation into the installation of the stone  
16 work during the spring of 2009. *Id.* at ¶ 5.

17 6. IGT determined the original stone installation was unsafe and rejected  
18 the work. IGT required Big-D to remove and replace all of the interior and exterior stone work  
19 (with the exception of a few isolated areas of low-elevation, interior stone). IGT prepared  
20 design documents from the stone replacement project in June 2009. *Id.* at ¶ 6.

21 7. However, because the stone could not be removed without damaging the  
22 underlying stucco substrate, IGT also directed Big-D to remove and replace the original, two-  
23 coat stucco system in addition to replacing the stone installation (the "Stone Replacement  
24 Project"). *Id.* at ¶ 7.

25 **B. Padilla Subcontract Agreement**

26 8. In August, 2009, prior to receiving confirmation that Big-D would  
27 perform the Stone Replacement Project, IGT contacted Padilla Construction Company of  
28

1 Nevada ("Padilla") about performing the stucco work for the Stone Replacement Project. In  
2 early August 2009, after Big-D agreed to perform the Stone Replacement Project, Padilla  
3 contacted Big-D directly to inquire about performing the stucco portion of the Stone  
4 Replacement Project. Testimony of Brent Brinkerhoff (Big-D).

5 9. On August 13, 2009, Padilla provided Big-D written information on its  
6 company, including a description of its experience and references. Trial Exhibit 13. Big-D  
7 reviewed the information, checked the references, and determined that Padilla was qualified to  
8 complete the Work. Testimony of Brent Brinkerhoff (Big-D).

9 10. On August 18, 2009, Padilla, IGT, Ian Chin (IGT's expert consultant),  
10 HDR (the architect), and Big-D attended a meeting on the Project site to discuss the  
11 replacement project, including its schedule and quality control requirements. Trial Exhibit 15.

12 11. Subsequent to the meeting, on August 19, 2009, Big-D issued a notice to  
13 proceed with the work to Padilla and further advised Padilla that it intended to issue it a  
14 subcontract agreement. Trial Exhibit 23.

15 12. On August 24, 2009, Padilla entered into the Subcontract Agreement  
16 with Big-D to furnish all labor, materials, equipment, and necessary services to install complete  
17 exterior and interior stucco (Plaster) including, lath, scratch, and brown coat (the "Padilla  
18 Work") for the Stone Replacement Project. Trial Exhibit 1, Subcontract Agreement; Pretrial  
19 Order, Stipulated Facts ¶ 8.

20 13. The Padilla Work was required to conform to the Plans and  
21 Specifications which are included as Trial Exhibit 3, Plans and Trial Exhibit 4, Specifications.  
22 Pretrial Order, Stipulated Facts ¶ 9.

23 14. Under the terms of the Subcontract Agreement, Big-D was to pay Padilla  
24 \$214,868 for the completion of the Padilla Work. Pretrial Order, Stipulated Fact ¶ 10; Trial  
25 Exhibit 1.

26 15. On August 25, 2009, Big-D paid Padilla a \$25,000 initial payment prior  
27 to Padilla commencing the Padilla Work. Pretrial Order, Stipulated Fact ¶ 11; Trial Exhibit 5.

1                   16. Big-D was required to complete the Stone Replacement Project by the  
2 beginning of October 2009—in time for IGT to host a large customer event at the Project. The  
3 schedule was aggressive but achievable and all parties, including Padilla, were aware of the  
4 schedule requirements. Testimony of Brent Brinkerhoff (Big-D).

5           **C. Stucco Installation Process**

6                   17. The two-coat stucco system in the Padilla Work involved an initial coat  
7 (called the scratch coat) and a second coat (called the brown coat). Pretrial Order, Stipulated  
8 Fact ¶ 18.

9                   18. A metal lath system was to be installed underneath the two-coats of  
10 stucco material. *Id.* at 19.

11                   19. The stucco material was to be purchased as a preblended cement + sand  
12 mixture provided in bag form from a supplier. *Id.* at 20.

13                   20. After the scratch coat was installed, it was to cure (properly dry) before  
14 the brown coat was installed. *Id.* at 21.

15                   21. To adhere the brown coat to the scratch coat, the scratch coat was to be  
16 scored with grooves, and then the brown coat was to be installed on top of the scratch coat and  
17 pressed firms into the grooves. *Id.* at 22.

18                   22. Once the brown coat was installed, it was to cure before the stone  
19 veneer was installed. *Id.* at 23.

20                   23. The Specifications included specific requirements regarding the  
21 installation of the Padilla Work, including the following:

22                   a. Minimum plaster thicknesses as specified [in included chart].  
23 Trial Exhibit 4, Section 09220 at 3.4G.

24                   b. The scratch coat was to be “[h]orizontally cross-rake[d] to  
25 provide key for second Base Coat (brown coat).” *Id.* at Section 09220 at 3.4C.

26                   c. The base coat was to be “[a]pplied so that it meets the required  
27 total thickness” and “not vary more than 1/4 IN.” *Id.* at Section 09220 at 3.4D 1, 2.  
28

1 d. Remove and replace unacceptable plaster and base. *Id.* at Section  
2 09220 at 3.10D.

3 24. The Specifications, at Section 092200 at 1.1.A, provided that the Padilla  
4 Work was to comply with the following plastering standards: (a) ASTM-C926, Trial Exhibit  
5 89; (b) Portland Cement Association Plaster (Stucco) Manual, Trial Exhibit 90; and (c) per  
6 Building Code, as locally adopted, Trial Exhibit 91. *Trial Exhibit 4*, Section 09220 at 1.1.A.  
7 D. **Stucco Mix Selection/Determination of Cure Time.**

8 25. On August 26, 2009, Padilla requested approval for the stucco mix  
9 identified as Expo MX<sup>3</sup>. Pretrial Order, Stipulated Fact ¶ 25; Trial Exhibit 26.

10 26. That same day, HDR, IGT's architect approved use of the EXPO MX3  
11 stucco mix product. Pretrial Order, Stipulated Fact ¶ 26; Trial Exhibit 28.

12 27. Pursuant to both the Subcontract Agreement and industry practice,  
13 Padilla was responsible for determining the appropriate cure time to be allowed between the  
14 two coats of the stucco and prior to installation of stone. Testimony of Ian Chin (IGT);  
15 Testimony of Brent Brinkerhoff (Big-D).

16 28. As part of the Architect's approval of the product, the Architect (HDR)  
17 directed that Padilla install the stucco product in accordance with the manufacturer's cure  
18 instructions. Trial Exhibit 31. On or about August 26, 2009, Padilla consulted with the EXPO  
19 representative. In response, the EXPO representative provided information to Padilla on  
20 August 26, , 2009, that specified that "standard cure times" applied. Trial Exhibit 32. Standard  
21 cure times were at least 1 day for the scratch coat and 7 days for the brown coat. Trial Exhibit  
22 37; 38-2.

23 29. IGT further requested Mr. Chin review the proposed cure times to  
24 confirm they were appropriate. Trial Exhibit 38-2. On September 2, 2009, Mr. Chin confirmed  
25 that the standard cure times were consistent with published industry materials and compliant  
26 with local building codes. *Id.*

1 **E. Performance of the Work.**

2 30. Padilla started onsite work on August 31, 2009, at 1:00 p.m., with lath  
3 installation. Pretrial Order, Stipulated Fact ¶ 27; Trial Exhibit 17, (PADILLA000100).

4 31. Padilla's on-site superintendent prepared and maintained daily logs of  
5 the progress of Padilla's work. Pretrial Order, Stipulated Fact ¶ 29; Trial Exhibit 17,  
6 (PADILLA000083-102).

7 32. After Padilla installed the brown coat on each area of the exterior, Big-D  
8 caused the brown coat to be marked with the date and time so that it could ensure that the  
9 brown coat was allowed to cure for the full seven day period. Testimony of Brent Brinkerhoff.

10 **F. Padilla Work on Exterior Separates.**

11 33. On September 10, 2009, project representatives observed separation  
12 between the brown and scratch coats during installation of stone on two exterior columns  
13 (XC@X4 and XC@X3). Pretrial Order, Stipulated Fact ¶ 30. In addition, Padilla's on-site  
14 superintendent reported separation to Padilla management. *Id.*; Trial Exhibit 17  
15 (PADILLA000090).

16 34. On September 10, 2009, IGT informed Ian Chin of Wiss Janey, its  
17 consultant, of the separation and requested his professional opinion as to how to proceed. Trial  
18 Exhibit 403. Mr. Chin reviewed photographs of the work and observed the following visual  
19 deficiencies in the Padilla Work: (a) the Padilla Work was not appropriately "scored" in a  
20 manner that would allow proper bonding between the brown coat and the scratch coat as  
21 required by the Plans and Specifications; and (b) the Padilla Work did not appear to be properly  
22 hydrated for the brown coat to become cementitious. Trial Exhibits 403, 404, 405, 446-450.

23 35. Mr. Chin further requested that IGT provide him samples of the installed  
24 product for testing. Pursuant to his request, IGT removed portions of the Padilla Work and  
25 overnighted them to Mr. Chin's laboratory for testing. Testimony of Ian Chin (IGT).

26 36. On September 11, 2009, Padilla's on-site superintendent reported  
27 separation issues to Padilla management. Pretrial Order, Stipulated Fact ¶ 31; Trial Exhibit 21.  
28

1 37. That same day, IGT provided Mr. Chin with photographs of the  
2 separations. Testimony of Ian Chin (IGT).

3 38. Even though IGT, Big-D and Padilla were all aware of the separation, as  
4 of the morning of September 14, 2009, both Padilla and Big-D believed that any issues with  
5 separation were only incidental issues and did not indicate a wide-spread problem with the  
6 Padilla Work. Testimony of Brent Brinkerhoff (Big-D); Trial Exhibit 400.

7 39. As the stone work continued over the Padilla Work on September 14,  
8 2014, it became evidence that there was a global failure in the Padilla Work.

9 40. It is undisputed that Padilla was actively aware of the separation issues  
10 as they were occurring. In fact, field notes by Padilla's superintendent show that Padilla's  
11 crews reported the separation to Padilla management. Rather than investigate and seek to  
12 remediate, Padilla management simply instructed its crews to keep working. Trial Exhibit 17,  
13 PADILLA000090 to 96. Padilla's field notes indicate as follows:

Date	Notation
September 10, 2009	"The brown is pulling from the scratch on the first two columns that we scratch and brown after the mock-up."
September 11, 2009	"We have the same problem on the brown coat on the second column when the stone installers do the bonding test the brown pulls from the scratch. Call Joe [Lopez] let him know. Also, Joe [Padilla management] says for me to keep doing the production."
September 15, 2009	"Today, 3 more areas where install stone when stone installers pull it to check bonding, brown coat came loose from scratch coat. Joe Lopez [Padilla management] let him know what happened. His response was for me to keep doing what I was doing and that nothing was wrong."
September 16, 2009	"Today, two more areas came loose."

24 *Id.* (emphasis added). Padilla management instructed the Padilla crews to keep working,  
25 despite the indications of failure in Padilla's Work. *Id.* at PADILLA000091 and 95.

26 41. On September 15, 2009, in addition to the dialogue at the project site  
27 regarding the separation, Big-D's management informed Padilla's management of the then  
28



1 wide spread failure of the Padilla Work. Big-D requested Padilla to investigate and enlist the  
2 support of the manufacturer of the product. (forward IGT's report of separation). Pretrial  
3 Order, Stipulated Fact ¶ 32; Trial Exhibit 44. Padilla placed a telephone call to the EXPO  
4 representative Mark Arriolla to discuss the issues. Pretrial Order, Stipulated Fact ¶ 32; Trial  
5 Exhibit 47.

6 42. Mr. Chin received the results of laboratory testing, evaluating the  
7 installed Padilla Work on September 15, 2009. Testimony of Ian Chin; Trial Exhibit 406. The  
8 laboratory testing results provided technical support for the failures in the Padilla Work that  
9 were readily visible on the Project site and identified the following deficiencies in the Padilla  
10 Work:

11 a. Hydration. Padilla failed to properly hydrate its stucco mix.  
12 Without adequate water, the Padilla stucco failed to activate the cement. In turn, the  
13 cement did not turn into a paste to bind all of the components –i.e., the sand and other  
14 aggregate components in the stucco- to form a solid mass. Testimony of Ian Chin  
15 (IGT).

16 b. Compaction. Padilla failed to properly compact the Padilla  
17 Work. The second coat of stucco must be applied with sufficient pressure against the  
18 first coat. Padilla did not install the brown coat with sufficient pressure against a scratch  
19 coat to make sure that it was properly bonded to the scratch coat.

20 c. Scoring. Padilla failed to properly “score” the first layer of  
21 stucco. The first layer of stucco should have created a “key” for the second layer of  
22 stucco to bond firmly to. The scoring on the first layer of stucco was insufficient to  
23 create such a “key” and therefore, the second layer of stucco could not bond to it.  
24 Testimony of Ian Chin (IGT).

25 d. Contamination. Padilla conceded that the Padilla Work  
26 contained contaminants in the form of “raisin-like” particles that adhered to the Other  
27  
28

1 Subcontractor Work. Pretrial Order at 14:11,18-20, Designated Testimony, Lopez  
2 Deposition at 32:5-37:7<sup>1</sup>; 43:1-45:20.

3 The failure to properly hydrate the mixture and properly score the scratch coat were so  
4 apparent they can be confirmed by visual inspection of the photographs of the Padilla Work.  
5 Exhibits 402, 403, and 404.

6 43. The separate issue culminated with a meeting on site on September 16,  
7 2009, at 11:00 a.m.. Pretrial Order, Stipulated Fact ¶ 34; Trial Exhibit 46. IGT, HDR (the  
8 Architect); Mr. Chin; Big-D; and Padilla representatives were all on site for the meeting. Trial  
9 Exhibit 15.

10 44. Based upon his visual observations and the results of the laboratory  
11 testing, Mr. Chin advised IGT that the Padilla Work on the exterior of the building should be  
12 rejected. Testimony of Ian Chin. IGT rejected the Padilla Work on the exterior of the building  
13 pursuant to Mr. Chin's advice, including but not limited to Mr. Chin's belief that if the exterior  
14 of the building was not installed to the standards, there should be diminished confidence in the  
15 system's ability to take and handle future application of stone. Pretrial Order at 18:16-19;  
16 Designated Testimony, IGT Deposition at pp. 85-88.<sup>2</sup>

17 45. Padilla was present at the Project site on September 16, 2009 when IGT  
18 rejected the Padilla Work on the exterior of the building. Therefore, it is undisputed that  
19 Padilla was immediately aware that IGT had rejected its work. That same day, Big-D  
20 requested that IGT allow testing of the interior Padilla Work prior to rejecting it. Big-D made  
21

22  
23  
24 <sup>1</sup> "A: I saw in the cement what appeared to be chunks of brown clay....The speculation was that  
25 when they mixed the cement for this project, this pre-sanded cement, they had left in the barrel  
26 for the mixing process some leftover stucco in that barrel and that is what we were seeking, was  
27 the remnants of them not having a clean bowl." Id. at 32:5-35:10.

28 <sup>2</sup> Mr. Stecker was designated by IGT as a Rule 30(b)(6) witness and provided deposition testimony. Portions of  
that deposition testimony have been designated to be included with the trial record. *Exhibit D*, IGT Deposition  
(excerpts) (Stipulated Designation, Pretrial Memorandum at pp 17-19).

1 arrangements for the testing to occur on September 23, 2009 and Padilla requested the  
2 manufacturer of the stucco product to send representatives to participate in and observe the  
3 testing.

4 **G. IGT Directs Different Exterior System After Rejection of Padilla Work.**

5 46. Because the IGT Stone Repair was required to be completed by October  
6 2009, IGT determined on September 17, 2009 that there was insufficient time to replace the  
7 rejected Padilla Work on the exterior of the building with a similar two-coat stucco system. As  
8 a result, IGT decided to replace the Padilla Work with a cement board product instead. The  
9 cement board product would not require cure time prior to installation of the exterior stone.

10 47. At IGT's direction, Big-D and its subcontractors immediately  
11 demolished the rejected Padilla Work on the exterior of the building on September 17, 2009.

12 **H. Big-D Defends Padilla Work on Interior of Building.**

13 48. On September 16, 2009, when IGT rejected the Padilla Work on the  
14 exterior of the Project, Big-D defended the Padilla Work on the interior of the Project. Big-D  
15 maintained that it believed that the interior Padilla Work was compliant with the Plans and  
16 Specifications. IGT and Big-D agreed to perform testing on the interior of the Project to  
17 determine whether the interior Padilla Work was in fact suitable. They scheduled the testing  
18 for September 23, 2009. Pretrial Order, Stipulated Fact ¶ 36; Trial Exhibit 55.

19 49. On September 17, 2009, Ian Chin performed various tests on the interior  
20 of the Project to evaluate the Padilla Work. The testing revealed that the interior Padilla Work  
21 was also insufficient and failed to comply with the Plans and Specifications.

22 a. Mr. Chin took 14, 3-inch diameter core samples of the Padilla  
23 Work.

24 b. Of those samples, 3 were un-usable.

25 c. Of the 11 usable samples, on 8 samples, the brown coat was not  
26 properly bonded to the scratch coat. The brown coat was only bonded to the scratch  
27 coat on 3 of the usable samples.

1 d. In addition, on 7 of those samples, the scratch coat was not  
2 properly roughened to receive the brown coat.

3 e. On 1 sample, only 50% of the brown coat was bonded to the  
4 scratch coat.

5 In addition, on nearly all samples the thickness of the brown coat and the scratch coat failed to  
6 conform to the thickness required by the Plans and Specifications.

7 50. On September 23, 2009, Big-D performed various additional pull tests  
8 on the interior Padilla Work. HDR, IGT, Padilla, Big-D, Mr. Chin, two representatives from  
9 EXPO (the stucco product manufacturer), and the experts retained by Big-D to perform the  
10 testing were all present.

11 51. Based on these further tests, Mr. Chin further determined that the interior  
12 Padilla Work also failed to comply with the Plans and Specifications. Mr. Chin further advised  
13 IGT to reject the interior Padilla Work. Pretrial Order, Stipulated Fact ¶ 37; Trial Exhibit 52.  
14 IGT followed Mr. Chin's advice and rejected the Padilla Work on the interior of the building  
15 that same day. Padilla was on the Project site at the time IGT rejected the Padilla Work on the  
16 interior of the building and it is undisputed that Padilla was aware that the work had been  
17 rejected.

18 52. Given the relevant time constraints, IGT became concerned that the work  
19 could impact its upcoming customer meetings. IGT believed there was not sufficient time for  
20 the Padilla Work on the interior of the Project to be removed and replaced before the customer  
21 meetings. As a result, the parties developed a temporary installation solution by which Big-D  
22 would place a decorative colored solution over the Padilla Work on the interior of the building  
23 in lieu of the stone that was specified under the Construction Agreement. Pretrial Order,  
24 Stipulated Fact ¶ 38; Trial Exhibit 51.

25 53. Big-D completed of the modified Stone Repair Project in October 10,  
26 2009.

1 **I. Big-D Requests Padilla to Assist in Defending Interior Work**

2 54. Both IGT and Big-D specifically and repeatedly requested Padilla to  
3 participate in testing to determine whether the Padilla Work was suitable. Trial Exhibits 44-46.  
4 These invitations were made both *during the construction and after the Padilla Work was*  
5 *rejected.*

6 55. Yet, Padilla did nothing to investigate. Padilla concedes it did not  
7 investigate whether the brown coat mixture was too stiff, Pretrial Order at 16:13, Designated  
8 Testimony, Lopez Deposition at 129:2-9; Padilla concedes it did nothing to investigate whether  
9 the two layers of its stucco were sufficiently compacted., *Id.* at 129:10-13, and Padilla concedes  
10 it did not investigate whether the water content of the brown coat was sufficient at the time that  
11 it was applied. *Id.* at 132:18-22.

12 56. Big-D requested that Padilla assist it in convincing IGT that the interior  
13 Padilla Work was suitable. To this end, Big-D and Padilla participated in a conference call on  
14 September 29, 2009. Trial Exhibit 53.

15 57. Big-D's project manager testified that the call was postponed for a week  
16 after IGT's initial rejection of the interior Padilla Work on September 23, 2009 until September  
17 29, 2009 specifically so that Ralph Padilla, the president of Padilla, could be participate. (Mr.  
18 Padilla had been out of the country hunting birds in the previous weeks). Testimony of Brent  
19 Brinkerhoff (Big-D). Big-D's project manager testified that during the conference call, Padilla  
20 committed to get the EXPO product tested to determine whether the product was the cause of  
21 the failure in the Padilla Work. Padilla committed to follow-up with Big-D once the tests were  
22 completed and it had additional information.

23 58. In November 2009, Big-D again requested that Padilla assist Big-D to  
24 defend its work. Big-D further advised Padilla that it was withholding payment until the issues  
25 with the Padilla Work had been resolved with IGT. Trial Exhibit 58.

26 59. In response, Padilla stated that it unequivocally refused to participate  
27 with Big-D in either providing additional information or participating in testing. Trial Exhibit  
28

1 59. Rather, Padilla demanded that it receive immediate payment for the Padilla Work even  
2 though IGT had rejected the work. Pretrial Order at 14:18, Designated Testimony, Lopez at  
3 43-45. Padilla did not take any action to investigate the product because "*that cost money.*"  
4 *Id.* at 44:1-2 (emphasis added).

5 60. Padilla's executive responsible for the Project made clear "we weren't  
6 going to participate" in the testing and investigation of Padilla's Work. Pretrial Order at 15:14,  
7 Designated Testimony, Lopez at 84: 12-17; *Id.* at 82-84; *Id.* at Exhibit 5.

8 Q. And do you recall, did Big-D in fact request Padilla to assist it to investigate the cause  
9 of the failures of the product?

10 A. Yes

11 Q. And what, if anything, did Padilla do to assist Big-D to investigate the cause of the  
12 product failure?

13 A. Ask for our money.

14 *Id.*, Lopez at 135:16-23.

15 61. Big-D continued to defend the Padilla Work for weeks after Padilla  
16 refused to participate.

17 62. Ultimately, Big-D determined it had not identified any basis on which to  
18 convince IGT that the Padilla Work on the interior of the building was suitable and proceeded  
19 to resolve its dispute with IGT.

20 **J. IGT Settlement.**

21 63. After the removal and replacement of the Padilla Work, there was a  
22 dispute between IGT and Big-D regarding amounts owed to Big-D for the Project. IGT  
23 claimed it was entitled to backcharge Big-D for costs incurred, including costs related to the  
24 rejected Padilla Work. As a result of the dispute, IGT withheld nearly \$2 million due to Big-D  
25 under the Construction Agreement. Pretrial Order, Stipulated Fact ¶ 52.

26 64. In January 2011, Big-D and IGT agreed to settle their dispute and the  
27 settlement was memorialized in a settlement agreement (the "IGT Settlement"). Pretrial Order,  
28 Stipulated Fact ¶ 53; Exhibit 78

1                   65. The IGT Settlement provided that Big-D would be paid amounts due for  
2 the Project and IGT would back-charge Big-D for costs in the amount of \$945,054.00, which  
3 amount included costs associated with the original failed stone work and the rejected Padilla  
4 Work (the "IGT Backcharges"). Pretrial Order, Stipulated Fact ¶ 54.

5                   66. The IGT Backcharges included the costs to remove and replace the  
6 Interior Temporary Work with the work that was specified under the Construction Agreement.  
7 IGT removed and replaced the Interior Temporary Work months after it was completed.  
8 Pretrial Order, Stipulated Fact ¶ 55.

9 **K. Big-D Stops Payment.**

10                  67. On September 25, 2009, Padilla prepared a payment request for  
11 \$185,991.85. Pretrial Order, Stipulated Fact ¶ 39; Trial Exhibit 9. The payment request  
12 indicated that Padilla had completed 85% of the Padilla Work and requested corresponding  
13 payment from Big-D.

14                  68. On September 29, 2009, Big-D's project manager (Brent Brinkerhoff)  
15 signed the payment application in the approved box as he agreed that Padilla had in fact  
16 completed 85% of the work. Trial Exhibit 9; Testimony of Brent Brinkerhoff. This was an  
17 internal approval that allowed for Big-D's accounting department to "post" the cost of the work  
18 completed by Padilla so that Big-D could internally track project cost incurred as of that date.

19                  69. Upon this internal approval, Big-D's accounting department was to  
20 verify that Padilla's payment application had properly credited amounts previously paid. In  
21 mid-October, Big-D's accounting department identified that Padilla's payment application had  
22 failed to credit Big-D for the \$25,000 initial payment to Padilla and would require correction.  
23 Trial Exhibit 9 (see handwritten note); Testimony of Brent Brinkerhoff (Big-D). At that time,  
24 Brent Brinkerhoff advised Big-D accounting department to hold on processing a correction to  
25 the payment application amount as outstanding issues still remained with the Padilla Work.

26                  70. Big-D placed several telephone calls to Padilla to inquire into the status  
27 of testing on the interior Padilla Work that Padilla had committed to provide during the  
28

1 September 29, 2009 teleconference. Several of these calls went unreturned and Padilla did not  
2 otherwise respond with any update. At the end of October 2009, Big-D spoke with Padilla and  
3 indicated that it was holding payment until the issues with the Padilla Work had been resolved.  
4 See Trial Exhibit 57.

5 71. On October 28, 2009, Padilla sent Big-D a letter demanding payment of  
6 \$174,657.00. Pretrial Order, Stipulated Fact ¶ 40; Trial Exhibit 57.

7 72. Big-D responded to the letter on November 3, 2009. Big-D advised  
8 Padilla that IGT was taking the position that the Padilla Work had failed. As a result, Big-D  
9 requested from Padilla information to defend the Padilla Work. Big-D indicated that it would  
10 not release "any further" payment to Padilla until Padilla "assist[ed] Big-D in establishing that  
11 Padilla met all of its obligations under the Subcontract Agreement and that the failure of the  
12 product furnished and installed by Padilla was due to factors outside of Padilla's contractual  
13 obligations." Pretrial Order, Stipulated Fact ¶ 41; Trial Exhibit 58.

14 73. On November 11, 2009, Padilla responded to Big-D's request for  
15 information by stating, "it is Padilla Construction Company of Nevada's position that without  
16 third party confirmation that its' [sic] work is sub-standard, Padilla Construction Company of  
17 Nevada expects to be paid for its' [sic] work." Trial Exhibit 59. Padilla further stated:  
18 "Without proper documentation supporting the allegations, Padilla Construction Company of  
19 Nevada must decline [to participate in investigation or testing]." Pretrial Order, Stipulated Fact  
20 ¶ 42; Trial Exhibit 59.

21 74. Brent Brinkerhoff testified that in early November, when reviewing his  
22 weekly report to mark payments for subcontractors, he inadvertently marked for a check to be  
23 released to Padilla. As a result, Big-D prepared a check in the amount of the invoice of  
24 \$185,991.95. Pretrial Order, Stipulated Fact ¶ 43; Trial Exhibit 11.

25 75. During a subsequent teleconference between Big-D and Padilla  
26 regarding the status of the Padilla work, Padilla referenced the payment received for the  
27  
28



1 Project. Mr. Brinkerhoff immediately investigated how payment was released to Padilla  
2 because he had not intended for a check to be released.

3 76. On November 18, 2009, Big-D advised Padilla, both via electronic mail  
4 and voicemail, that it inadvertently mailed the check and further advised that Big-D would be  
5 putting a stop payment on the check. Pretrial Order, Stipulated Fact ¶ 44; Trial Exhibit 61.

6 77. Big-D stopped payment on the check prior to it clearing the bank. The  
7 check was returned by Padilla's bank marked: "Return Reason -C Stop Payment." Pretrial  
8 Order, Stipulated Fact ¶ 45; Trial Exhibit 12.

9 78. The evidence indicated that the release of the payment to Padilla was in  
10 fact a mistake because:

11 a. The check drawn to Padilla failed to correct for the \$25,000  
12 initial payment made to Padilla, causing an overpayment to Padilla;

13 b. The correspondence of October 28 and November 3, 2009 made  
14 clear that Big-D was withholding payment to Padilla until issues with the Padilla Work  
15 had been resolved; and

16 c. Both Brent Brinkerhoff (Project Manager) and Forrest McNabb  
17 (Senior Vice President) adamantly testified that they had not intended to release  
18 payment, were very surprised when they learned a check had been released,  
19 immediately notified Padilla of the mistake, and immediately cancelled the check.

20 **L. Evidence Regarding Padilla Work.**

21 79. There was no evidence presented that there was a design flaw or other  
22 design issues in the Plans and Specifications for the Padilla Work.

23 80. There is no evidence that any party imposed improper cure times upon  
24 Padilla. Further, there was no credible evidence presented that the failures in the Padilla Work  
25 were in any part caused by inadequate accommodation of cure times by Big D or that Big D did  
26 anything after application of the brown coat in defiance of any clear admonition from Padilla to  
27 the effect that anything that Big D was doing was inconsistent with the proper cure time.  
28

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

APCO CONSTRUCTION, INC., A  
NEVADA CORPORATION,

Appellant,

vs.

ZITTING BROTHERS CONSTRUCTION,  
INC.,

Respondent.

Electronically Filed  
Case No.: 75197 Apr 15 2019 03:00 p.m.  
Elizabeth A. Brown  
Clerk of Supreme Court

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

**APPELLANT'S APPENDIX**  
**(Volume 18, Bates Nos. 4014–4253)**

**Marquis Aurbach Coffing**

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

**Spencer Fane LLP**

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

*Attorneys for Appellant, APCO Construction, Inc.*

MAC:05161-019 3698575\_1

**INDEX TO APPELLANT'S APPENDIX**

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

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

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

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

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

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



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

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

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

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

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

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

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

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



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

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

DEPOSITION ERRATA SHEET

Assignment No. J0585160

Case Caption: APCO Construction vs. Gemstone

DECLARATION UNDER PENALTY OF PERJURY

I declare under penalty of perjury that I have read the entire transcript of my deposition taken in the captioned matter or the same has been read to me, and the same is true and accurate, save and except for changes and/or corrections, if any, as indicated by me on the DEPOSITION ERRATA SHEET hereof, with the understanding that I offer these changes as if still under oath.

Signed on the \_\_\_\_\_ day of

\_\_\_\_\_, 20\_\_.

\_\_\_\_\_  
MARY JO ALLEN

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

DEPOSITION ERRATA SHEET

Page No. \_\_\_\_\_ Line No. \_\_\_\_\_ Change to: \_\_\_\_\_

Reason for change: \_\_\_\_\_

Page No. \_\_\_\_\_ Line No. \_\_\_\_\_ Change to: \_\_\_\_\_

Reason for change: \_\_\_\_\_

Page No. \_\_\_\_\_ Line No. \_\_\_\_\_ Change to: \_\_\_\_\_

Reason for change: \_\_\_\_\_

Page No. \_\_\_\_\_ Line No. \_\_\_\_\_ Change to: \_\_\_\_\_

Reason for change: \_\_\_\_\_

Page No. \_\_\_\_\_ Line No. \_\_\_\_\_ Change to: \_\_\_\_\_

Reason for change: \_\_\_\_\_

Page No. \_\_\_\_\_ Line No. \_\_\_\_\_ Change to: \_\_\_\_\_

SIGNATURE \_\_\_\_\_ DATE: \_\_\_\_\_

MARY JO ALLEN



1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

DEPOSITION ERRATA SHEET

Page No. \_\_\_\_\_ Line No. \_\_\_\_\_ Change to: \_\_\_\_\_

Reason for change: \_\_\_\_\_

Page No. \_\_\_\_\_ Line No. \_\_\_\_\_ Change to: \_\_\_\_\_

Reason for change: \_\_\_\_\_

Page No. \_\_\_\_\_ Line No. \_\_\_\_\_ Change to: \_\_\_\_\_

Reason for change: \_\_\_\_\_

Page No. \_\_\_\_\_ Line No. \_\_\_\_\_ Change to: \_\_\_\_\_

Reason for change: \_\_\_\_\_

Page No. \_\_\_\_\_ Line No. \_\_\_\_\_ Change to: \_\_\_\_\_

Reason for change: \_\_\_\_\_

Page No. \_\_\_\_\_ Line No. \_\_\_\_\_ Change to: \_\_\_\_\_

SIGNATURE \_\_\_\_\_ DATE: \_\_\_\_\_

MARY JO ALLEN



# **EXHIBIT 17**

MARQUIS AURBACH COFFING

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

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

DISTRICT COURT

CLARK COUNTY, NEVADA

13 APCO CONSTRUCTION, a Nevada  
14 corporation,

15 Plaintiff,

16 vs.

17 GEMSTONE DEVELOPMENT WEST, INC., A  
18 Nevada corporation,

19 Defendant.

Case No.: A571228  
Dept. No.: 13

Consolidated with:

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

20 AND ALL RELATED MATTERS

21 **NOTICE OF TAKING NRCP RULE 30(B)(6) DEPOSITION OF PERSON MOST**  
22 **KNOWLEDGEABLE FOR ZITTING BROTHERS CONSTRUCTION, INC.**

23 PLEASE TAKE NOTICE that pursuant to Rule 30(b)(6) of the Nevada Rules of Civil  
24 Procedure, Plaintiff, APCO Construction, by and through its attorneys, Marquis Aurbach  
25 Coffing, will take the deposition of Zitting Brothers Construction, Inc. upon oral examination on  
26 the TBD (please contact counsel for APCO for availability) day of April, 2017 at the hour  
27 of TBD a.m., before a Notary Public, or before some other officer authorized by law to  
28 administer oaths. The deposition will take place at Marquis Aurbach Coffing located at 10001  
Park Run Drive, Las Vegas, Nevada 89145.

//

//

**MARQUIS AURBACH COFFING**

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

1 Pursuant to NRCP 30(b)(6), Plaintiffs are to required to designate one or more officers,  
2 directors, managing agents or other consenting persons most knowledgeable to testify on its  
3 behalf with respect to the topics set forth in the attached **Exhibit A**.

4 The deposition will be recorded by stenographic means, and oral examination will  
5 continue from day to day until completed. You are invited to attend and cross-examine.

6 Dated this 29th day of March, 2017.

7  
8 MARQUIS AURBACH COFFING

9  
10 By /s/Cody Mounteer, Esq.  
11 Jack Chen Min Juan, Esq.  
12 Nevada Bar No. 6367  
13 Cody S. Mounteer, Esq.  
14 Nevada Bar No. 11220  
15 10001 Park Run Drive  
16 Las Vegas, Nevada 89145  
17 Attorney(s) for APCO  
18 CONSTRUCTIONAPCO CONSTRUCTION  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**EXHIBIT A****RULE 30. DEPOSITIONS BY ORAL EXAMINATION****(B) NOTICE OF EXAMINATION: GENERAL REQUIREMENTS; SPECIAL NOTICE; METHOD OF PRODUCTION OF DOCUMENTS AND THINGS; DEPOSITION OF ORGANIZATION; DEPOSITION BY TELEPHONE.**

(6) A party may in the party's notice and in a subpoena name as the deponent a public or private corporation or a partnership or association or governmental agency and describe with reasonable particularity the matters on which examination is requested. In that event, the organization so named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. A subpoena shall advise a nonparty organization of its duty to make such a designation. The persons so designated shall testify as to matters known or reasonably available to the organization. This subdivision (b)(6) does not preclude taking a deposition by any other procedure authorized in these rules.

[As amended; effective January 1, 2005.]

**TOPICS**

1. Your claims and facts as alleged against APCO;
2. Documents that you have disclosed in support of your claims against APCO;
3. Your assertion that APCO is liable for any portions of your general and/or lien claims;
4. The percentage/allocation of your general and/or lien claims against APCO versus CAMCO;
5. The payment process, payment details, scope of payments, parties involved, and standard practices of payment, including, but not limited to, all payment applications, approvals, amounts, checks, and releases;
6. Each fact related to your contract agreement with APCO in regard to the Manhattan West Project ("Project") at issue in this matter, including, but not limited to original contact(s), change orders, and ratification agreement(s);
7. Each fact related to your scope of work at the Project;
8. The structure of your business; and
9. Your viability and business status from the time you entered into the subject contract until the date of your deposition, including, but not limited to, whether your company has been sold, transferred control, wound down, and/or claimed bankruptcy.



**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing **NOTICE OF TAKING NRCP RULE 30(b)(6) DEPOSITION OF PERSON MOST KNOWLEDGEABLE FOR ZITTING BROTHERS CONSTRUCTION, INC.** was submitted electronically for service with the Eighth Judicial District Court on the 29th day of March, 2017. Electronic service of the foregoing document shall be made in accordance with the E-Service List as follows:<sup>1</sup>

Wilson, Elser, Moskowitz, Edelman & Dicker LLP  
300 S. 4th St., 11th Floor  
Las Vegas, NV 89101

<b>Select All    Select None</b>			
<b>Bennett Tueller Johnson &amp; Deere</b>			
<b>Name</b>	<b>Email</b>	<input type="checkbox"/>	<b>Select</b>
Benjamin D. Johnson	<a href="mailto:ben.johnson@btjd.com">ben.johnson@btjd.com</a>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
Kerzie Dunn	<a href="mailto:kdunn@btjd.com">kdunn@btjd.com</a>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
<b>Cadden &amp; Fuller LLP</b>			
<b>Name</b>	<b>Email</b>	<input type="checkbox"/>	<b>Select</b>
Dana Y. Kim	<a href="mailto:dkim@caddenfuller.com">dkim@caddenfuller.com</a>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
S. Judy Hirahara	<a href="mailto:jhirahara@caddenfuller.com">jhirahara@caddenfuller.com</a>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
Tammy Cortez	<a href="mailto:tcortez@caddenfuller.com">tcortez@caddenfuller.com</a>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
<b>David J. Merrill P.C.</b>			
<b>Name</b>	<b>Email</b>	<input type="checkbox"/>	<b>Select</b>
David J. Merrill	<a href="mailto:david@djmerrillpc.com">david@djmerrillpc.com</a>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
<b>Dickinson Wright, PLLC</b>			
<b>Name</b>	<b>Email</b>	<input type="checkbox"/>	<b>Select</b>
Cheri Vandermeulen	<a href="mailto:cvandermeulen@dickinsonwright.com">cvandermeulen@dickinsonwright.com</a>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
Christine Spence	<a href="mailto:cspace@dickinsonwright.com">cspace@dickinsonwright.com</a>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
Donna Wolfbrandt	<a href="mailto:dwolfbrandt@dickinsonwright.com">dwolfbrandt@dickinsonwright.com</a>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
Eric Dobberstein	<a href="mailto:edobberstein@dickinsonwright.com">edobberstein@dickinsonwright.com</a>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
<b>Durham Jones &amp; Pinegar</b>			
<b>Name</b>	<b>Email</b>	<input type="checkbox"/>	<b>Select</b>
Brad Sighting	<a href="mailto:bsighting@djplaw.com">bsighting@djplaw.com</a>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
Cindy Simmons	<a href="mailto:csimmons@djplaw.com">csimmons@djplaw.com</a>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
<b>Fennimore Craig Jones Vargas</b>			
<b>Name</b>	<b>Email</b>	<input type="checkbox"/>	<b>Select</b>
Patrick J. Sheehan	<a href="mailto:psheehan@fcjlaw.com">psheehan@fcjlaw.com</a>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>

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

**MARQUIS AURBACH COFFING**

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

1	<b>Fennemore Craig, P.C.</b>			
2	<b>Name</b>	<b>Email</b>	<input checked="" type="checkbox"/>	<b>Select</b>
	Adam Miller	<a href="mailto:amiller@fdaw.com">amiller@fdaw.com</a>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
3	<b>Fox Rothschild</b>			
4	<b>Name</b>	<b>Email</b>	<input checked="" type="checkbox"/>	<b>Select</b>
	Jineen DeAngelis	<a href="mailto:jdeangelis@foxrothschild.com">jdeangelis@foxrothschild.com</a>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
	Richard I. Dreitzer	<a href="mailto:rdreitzer@foxrothschild.com">rdreitzer@foxrothschild.com</a>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
5	<b>G.E. Robinson Law</b>			
6	<b>Name</b>	<b>Email</b>	<input checked="" type="checkbox"/>	<b>Select</b>
	George Robinson	<a href="mailto:grobison@pezzillofyd.com">grobison@pezzillofyd.com</a>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
7	<b>GERRARD COX &amp; LARSEN</b>			
8	<b>Name</b>	<b>Email</b>	<input checked="" type="checkbox"/>	<b>Select</b>
	Aaron D. Lancaster	<a href="mailto:alanlaster@gerrard-cox.com">alanlaster@gerrard-cox.com</a>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
	Douglas D. Gerrard	<a href="mailto:dgerrard@gerrard-cox.com">dgerrard@gerrard-cox.com</a>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
9			<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
	Kaytlyn Bassett	<a href="mailto:kbassett@gerrard-cox.com">kbassett@gerrard-cox.com</a>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
10	<b>Gibbs, Giden, Locher, Turner &amp; Senet LLP</b>			
11	<b>Name</b>	<b>Email</b>	<input checked="" type="checkbox"/>	<b>Select</b>
	Becky Pintar	<a href="mailto:bpintar@ggit.com">bpintar@ggit.com</a>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
12			<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
	Linda Compton	<a href="mailto:lcompton@ggls.com">lcompton@ggls.com</a>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
13	<b>Gordon &amp; Rees</b>			
14	<b>Name</b>	<b>Email</b>	<input checked="" type="checkbox"/>	<b>Select</b>
	Robert Schumacher	<a href="mailto:rschumacher@gordonrees.com">rschumacher@gordonrees.com</a>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
15	<b>Gordon &amp; Rees LLP</b>			
16	<b>Name</b>	<b>Email</b>	<input checked="" type="checkbox"/>	<b>Select</b>
	Andrea Montero	<a href="mailto:amontero@gordonrees.com">amontero@gordonrees.com</a>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
17			<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
	Brian Walters	<a href="mailto:bwalters@gordonrees.com">bwalters@gordonrees.com</a>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
	Marie Ogella	<a href="mailto:mogella@gordonrees.com">mogella@gordonrees.com</a>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
18	<b>GRANT MORRIS DODDS</b>			
19	<b>Name</b>	<b>Email</b>	<input checked="" type="checkbox"/>	<b>Select</b>
	Steven Morris	<a href="mailto:steve@omlegal.com">steve@omlegal.com</a>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
20	<b>Greenberg Traurig, LLP</b>			
21	<b>Name</b>	<b>Email</b>	<input checked="" type="checkbox"/>	<b>Select</b>
	6085 Joyce Heilich	<a href="mailto:heilich@gtlaw.com">heilich@gtlaw.com</a>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
22			<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
	7132 Andrea Rosehill	<a href="mailto:rosehill@gtlaw.com">rosehill@gtlaw.com</a>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
23			<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
	CNN Cynthia Ney	<a href="mailto:neyc@gtlaw.com">neyc@gtlaw.com</a>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
24			<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
	IGH Bethany Rabe	<a href="mailto:rabe@gtlaw.com">rabe@gtlaw.com</a>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
25			<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
	IDM Mark Ferrario	<a href="mailto:mferrario@gtlaw.com">mferrario@gtlaw.com</a>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
26			<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
	LVGTDocketing	<a href="mailto:lvtdock@gtlaw.com">lvtdock@gtlaw.com</a>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
27			<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
	WTM Tami Cowden	<a href="mailto:tcowden@gtlaw.com">tcowden@gtlaw.com</a>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
28	<b>HOLLEY DRIGGS WALCH FINE WRAY PUZEY &amp; THOMPSON</b>			
	<b>Name</b>	<b>Email</b>	<input checked="" type="checkbox"/>	<b>Select</b>
	Glenn F. Meier	<a href="mailto:gmeier@nevadafirm.com">gmeier@nevadafirm.com</a>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
	Renee Hoban	<a href="mailto:rhoban@nevadafirm.com">rhoban@nevadafirm.com</a>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
	Holley Driggs Walch Fine Wray Puzey & Thompson			

# MARQUIS AURBACH COFFING

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

1	<b>Name</b>	<b>Email</b>	<b>Select</b>
2	Cynthia Kelley	<a href="mailto:ckelley@nevadafirm.com">ckelley@nevadafirm.com</a>	<input checked="" type="checkbox"/>
3	Rachel E. Donn	<a href="mailto:rdonn@nevadafirm.com">rdonn@nevadafirm.com</a>	<input checked="" type="checkbox"/>
4	<b>Howard &amp; Howard</b>		
5	<b>Name</b>	<b>Email</b>	<b>Select</b>
6	Gwen Rutar Mullins	<a href="mailto:grm@h2law.com">grm@h2law.com</a>	<input checked="" type="checkbox"/>
7	Wade B. Gochmour	<a href="mailto:wbg@h2law.com">wbg@h2law.com</a>	<input checked="" type="checkbox"/>
8	<b>Jolley Urga Woodbury &amp; Little</b>		
9	<b>Name</b>	<b>Email</b>	<b>Select</b>
10	Agnes Wong	<a href="mailto:aw@juww.com">aw@juww.com</a>	<input checked="" type="checkbox"/>
11	Debbie Rosewall	<a href="mailto:dr@juww.com">dr@juww.com</a>	<input checked="" type="checkbox"/>
12	Kelly McGee	<a href="mailto:kmg@juww.com">kmg@juww.com</a>	<input checked="" type="checkbox"/>
13	Martin A. Little, Esq.	<a href="mailto:mal@juww.com">mal@juww.com</a>	<input checked="" type="checkbox"/>
14	Martin A. Little, Esq.	<a href="mailto:mal@juww.com">mal@juww.com</a>	<input checked="" type="checkbox"/>
15	Michael R. Ernst	<a href="mailto:mre@juww.com">mre@juww.com</a>	<input checked="" type="checkbox"/>
16	Sarah A. Mead	<a href="mailto:sam@juww.com">sam@juww.com</a>	<input checked="" type="checkbox"/>
17	<b>Kemp, Jones &amp; Coulthard</b>		
18	<b>Name</b>	<b>Email</b>	<b>Select</b>
19	Erica Bennett	<a href="mailto:e.bennett@kempjones.com">e.bennett@kempjones.com</a>	<input checked="" type="checkbox"/>
20	Mark M. Jones	<a href="mailto:mmj@kempjones.com">mmj@kempjones.com</a>	<input checked="" type="checkbox"/>
21	Matt Carter	<a href="mailto:mcc@kempjones.com">mcc@kempjones.com</a>	<input checked="" type="checkbox"/>
22	Matthew Carter	<a href="mailto:m.carter@kempjones.com">m.carter@kempjones.com</a>	<input checked="" type="checkbox"/>
23	Pamela Montgomery	<a href="mailto:pym@kempjones.com">pym@kempjones.com</a>	<input checked="" type="checkbox"/>
24	<b>Law Offices of Floyd Hale</b>		
25	<b>Name</b>	<b>Email</b>	<b>Select</b>
26	Debbie Holoman	<a href="mailto:dholloman@jamsadr.com">dholloman@jamsadr.com</a>	<input checked="" type="checkbox"/>
27	Floyd Hale	<a href="mailto:fhale@floydhale.com">fhale@floydhale.com</a>	<input checked="" type="checkbox"/>
28	<b>Law Offices of Sean P. Hillin, P.C.</b>		
29	<b>Name</b>	<b>Email</b>	<b>Select</b>
30	Caleb Langsdale, Esq.	<a href="mailto:caleb@langsdalelaw.com">caleb@langsdalelaw.com</a>	<input checked="" type="checkbox"/>
31	<b>Litigation Services &amp; Technologies</b>		
32	<b>Name</b>	<b>Email</b>	<b>Select</b>
33	Calendar	<a href="mailto:calendar@litigation-services.com">calendar@litigation-services.com</a>	<input checked="" type="checkbox"/>
34	Depository	<a href="mailto:depository@litigation-services.com">depository@litigation-services.com</a>	<input checked="" type="checkbox"/>
35	<b>Marquis Aurbach Coffing</b>		
36	<b>Name</b>	<b>Email</b>	<b>Select</b>
37	Cody Munteer, Esq.	<a href="mailto:cmunteer@marquisaurbach.com">cmunteer@marquisaurbach.com</a>	<input checked="" type="checkbox"/>
38	Courtney Peterson	<a href="mailto:cpeterson@maclaw.com">cpeterson@maclaw.com</a>	<input checked="" type="checkbox"/>
39	Jack Juan	<a href="mailto:jjuan@marquisaurbach.com">jjuan@marquisaurbach.com</a>	<input checked="" type="checkbox"/>
40	Jennifer Case	<a href="mailto:jcase@maclaw.com">jcase@maclaw.com</a>	<input checked="" type="checkbox"/>
41	Phillip Aurbach	<a href="mailto:paurbach@maclaw.com">paurbach@maclaw.com</a>	<input checked="" type="checkbox"/>
42	Taylor Fong	<a href="mailto:tfong@marquisaurbach.com">tfong@marquisaurbach.com</a>	<input checked="" type="checkbox"/>

**MARQUIS AURBACH COFFING**

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

<b>McQuillough, Dobberstein &amp; Evans, Ltd.</b>			
<b>Name</b>	<b>Email</b>	<input type="checkbox"/>	<b>Select</b>
Christine Spencer	<a href="mailto:cspencer@mcqalaw.com">cspencer@mcqalaw.com</a>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
Eric Dobberstein, Esq.	<a href="mailto:edobberstein@mcqalaw.com">edobberstein@mcqalaw.com</a>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
<b>McDonald Carano Wilson, LLP</b>			
<b>Name</b>	<b>Email</b>	<input type="checkbox"/>	<b>Select</b>
Kathleen Morris	<a href="mailto:kmorris@mcdonaldcarano.com">kmorris@mcdonaldcarano.com</a>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
Ryan Bellows	<a href="mailto:rbellows@mcdonaldcarano.com">rbellows@mcdonaldcarano.com</a>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
<b>Meier Fine &amp; Wray, LLC</b>			
<b>Name</b>	<b>Email</b>	<input type="checkbox"/>	<b>Select</b>
Receptionist	<a href="mailto:Reception@mybusinesslawyers.com">Reception@mybusinesslawyers.com</a>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
<b>Morrill &amp; Aronson</b>			
<b>Name</b>	<b>Email</b>	<input type="checkbox"/>	<b>Select</b>
Christine Taradash	<a href="mailto:CTaradash@maazlaw.com">CTaradash@maazlaw.com</a>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
<b>Morrill &amp; Aronson P.L.C.</b>			
<b>Name</b>	<b>Email</b>	<input type="checkbox"/>	<b>Select</b>
Debra Hitchens	<a href="mailto:dhitchens@maazlaw.com">dhitchens@maazlaw.com</a>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
<b>Peel Brimley LLP</b>			
<b>Name</b>	<b>Email</b>	<input type="checkbox"/>	<b>Select</b>
Amanda Armstrong	<a href="mailto:aarmstrong@peelbrimley.com">aarmstrong@peelbrimley.com</a>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
Eric Zimbelman	<a href="mailto:ezimbelman@peelbrimley.com">ezimbelman@peelbrimley.com</a>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
Rosey Jeffrey	<a href="mailto:rieffrey@peelbrimley.com">rieffrey@peelbrimley.com</a>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
<b>Pezzillo Lloyd</b>			
<b>Name</b>	<b>Email</b>	<input type="checkbox"/>	<b>Select</b>
Jennifer R. Lloyd	<a href="mailto:jlloyd@pezzilloloyd.com">jlloyd@pezzilloloyd.com</a>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
Marisa L. Maskas, Esq.	<a href="mailto:mmaskas@pezzilloloyd.com">mmaskas@pezzilloloyd.com</a>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
<b>Procopio Cory</b>			
<b>Name</b>	<b>Email</b>	<input type="checkbox"/>	<b>Select</b>
Timothy E. Salter	<a href="mailto:tm.salter@procopio.com">tm.salter@procopio.com</a>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
<b>Procopio Cory Hargreaves &amp; Savitch</b>			
<b>Name</b>	<b>Email</b>	<input type="checkbox"/>	<b>Select</b>
Andrew J. Kessler	<a href="mailto:andrew.kessler@procopio.com">andrew.kessler@procopio.com</a>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
Rebecca Chapman	<a href="mailto:rebecca.chapman@procopio.com">rebecca.chapman@procopio.com</a>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
<b>Procopio Cory Hargreaves &amp; Savitch LLP</b>			
<b>Name</b>	<b>Email</b>	<input type="checkbox"/>	<b>Select</b>
Cori Mandy, Legal Secretary	<a href="mailto:cori.mandy@procopio.com">cori.mandy@procopio.com</a>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
<b>Richard L. Tobler, Ltd.</b>			
<b>Name</b>	<b>Email</b>	<input type="checkbox"/>	<b>Select</b>
Richard Tobler	<a href="mailto:rttdck@hotmail.com">rttdck@hotmail.com</a>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
<b>Rooker Rawlins</b>			
<b>Name</b>	<b>Email</b>	<input type="checkbox"/>	<b>Select</b>
Legal Assistant	<a href="mailto:mlegalassistant@rookerlaw.com">mlegalassistant@rookerlaw.com</a>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
Michael Rawlins	<a href="mailto:mrawlins@rookerlaw.com">mrawlins@rookerlaw.com</a>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
<b>T. James Truman &amp; Associates</b>			
<b>Name</b>	<b>Email</b>		<b>Select</b>

**MARQUIS AURBACH COFFING**

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

Beverly Roberts	<a href="mailto:broberts@trumanlegal.com">broberts@trumanlegal.com</a>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
District filings	<a href="mailto:district@trumanlegal.com">district@trumanlegal.com</a>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
<b>The Langsdale Law Firm</b>	<b>Email</b>		<b>Select</b>
Name		<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
Caleb Langsdale	<a href="mailto:Caleb@Langsdalelaw.com">Caleb@Langsdalelaw.com</a>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
<b>Watt, Tieder, Hoffar &amp; Fitzgerald, L.L.P.</b>	<b>Email</b>		<b>Select</b>
Name		<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
David R. Johnson	<a href="mailto:djohnson@watttieder.com">djohnson@watttieder.com</a>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
Jennifer MacDonald	<a href="mailto:jmacdonald@watttieder.com">jmacdonald@watttieder.com</a>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
<b>Williams &amp; Associates</b>	<b>Email</b>		<b>Select</b>
Name		<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
Donald H. Williams, Esq.	<a href="mailto:dwilliams@dhwlawlv.com">dwilliams@dhwlawlv.com</a>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
<b>Wilson Elser Moskowitz Edelman &amp; Dicker</b>	<b>Email</b>		<b>Select</b>
Name		<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
E-File Desk	<a href="mailto:EfileLasVegas@wilsonelser.com">EfileLasVegas@wilsonelser.com</a>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
Hrustyk Nicole	<a href="mailto:Nicole.Hrustyk@wilsonelser.com">Nicole.Hrustyk@wilsonelser.com</a>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
Jorge Ramirez	<a href="mailto:Jorge.Ramirez@wilsonelser.com">Jorge.Ramirez@wilsonelser.com</a>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
<b>Wilson Elser Moskowitz Edelman &amp; Dicker LLP</b>	<b>Email</b>		<b>Select</b>
Name		<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
Lani Maile	<a href="mailto:Lani.Maile@wilsonelser.com">Lani.Maile@wilsonelser.com</a>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
<b>Wilson, Elser</b>	<b>Email</b>		<b>Select</b>
Name		<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
I-Che Lai	<a href="mailto:I-Che.Lai@wilsonelser.com">I-Che.Lai@wilsonelser.com</a>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>

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

N/A

J. Case

J. Case, an employee of  
Marquis Aurbach Coffing

# **EXHIBIT 18**

<b>BUILDING 8</b>	
LANDSCAPING	Not started
REINFORCING STEEL LABOR	Complete
REINFORCING STEEL MATERIAL	Complete
EXCAVATE FOOTINGS	Complete
PLACE FOOTINGS	Complete
FORM/PLACE WALLS	Complete
FORM/PLACE COLUMNS	Complete
PLACE SLAB ON GRADE	Complete
FORM/PLACE DECK	Complete
LTWEIGHT CONCRETE	Not started
PRECAST FLOOR 1	Not started
PRECAST FLOOR 2	Not started
PRECAST FLOOR 3	Not started
PRECAST FLOOR 4	Not started
MASONRY CMU	Not started
THIN BRICK VENEER	Not started
GRANITE	Not started
MISC. STEEL	Not started
WOOD FRAMING L1 LABOR/EQ	Complete
WOOD FRAMING L1 MATERIAL	Complete
WOOD FRAMING L2 LABOR/EQ	Complete
WOOD FRAMING L2 MATERIAL	Complete
WOOD FRAMING L3 LABOR/EQ	Complete
WOOD FRAMING L3 MATERIAL	Complete
WOOD FRAMING L4 LABOR/EQ	Complete
WOOD FRAMING L4 MATERIAL	Complete
WOOD FRAMING RF LABOR/EQ	Complete
WOOD FRAMING RF MATERIAL	Complete
FINISH CARPENTRY	Not started
INSULATION	Substantially complete
ROOFING	Substantially complete
WATERPROOFING	Below grade perimeter walls substantially complete and backfilled
STUCCO	Scratch and brown coat in progress
WINDOWS	Substantially complete
DRYWALL	Wall and ceiling drywall hanging in progress
FLOORING	Not started
PAINTING	Not started
APPLIANCES	Not started
ELEVATORS	Not started
MECH. MOBILIZATION	As progress requires/justifies
MECH. SUBMITTALS	As progress requires/justifies
MECH. GENERAL CONDITIONS	As progress requires/justifies
MECH. CLOSEOUT DOCUMENTS	As progress requires/justifies



<b>PLUMBING BELOW PODIUM</b>	
PERMIT	As progress requires/justifies
EXCAVATION/BACKFILL	Substantially complete
U/G SANITARY PIPING	Substantially complete
U/G STORM PIPING	Substantially complete
PRECAST STRUCTURES	Not started
<b>PLUMBING FIRST FLOOR</b>	
A/G WASTE & VENT	Substantially complete
DRAINS/CARRIERS	Substantially complete
SLEEVES/INSERTS	Substantially complete
A/G STORM PIPING	Substantially complete
A/G DOMESTIC WATER	Substantially complete
A/G GAS PIPING	Substantially complete
TUBS & HOOKUPS	Substantially complete
PLUMBING FIXTURES	Not started
PLUMBING EQUIPMENT	Not started
CONDENSATE PIPING	Substantially complete
PLUMBING TESTING	In progress
PLUMBING IDENTIFICATION	Not started
INSULATION - FIRESTOP	In progress
<b>PLUMBING SECOND FLOOR</b>	
A/G WASTE & VENT	Substantially complete
DRAINS/CARRIERS	Substantially complete
A/G STORM PIPING	Substantially complete
A/G DOMESTIC WATER	Substantially complete
A/G GAS PIPING	Substantially complete
TUBS & HOOKUPS	Substantially complete
PLUMBING FIXTURES	Not started
PLUMBING EQUIPMENT	Not started
CONDENSATE PIPING	Substantially complete
PLUMBING TESTING	In progress
PLUMBING IDENTIFICATION	Not started
INSULATION - FIRESTOP	In progress
<b>PLUMBING THIRD FLOOR</b>	
A/G WASTE & VENT	Substantially complete
DRAINS/CARRIERS	Substantially complete
A/G STORM PIPING	Substantially complete
A/G DOMESTIC WATER	Substantially complete
A/G GAS PIPING	Substantially complete
TUBS & HOOKUPS	Substantially complete
PLUMBING FIXTURES	Not started
PLUMBING EQUIPMENT	Not started
CONDENSATE PIPING	Substantially complete
PLUMBING TESTING	In progress
PLUMBING IDENTIFICATION	Not started
INSULATION - FIRESTOP	In progress









## CONSTRUCTION PROGRESS REPORT

Project Name: Manhattan West Condominiums  
Project Address: Las Vegas, NV

Date: 9/4/2008

Site Visit No.: 10  
ManhattanWest Senior Construction Draw No.: 9  
Contractor Pay Application No.: 10  
For The Period: 7/1/2008 to 7/31/2008

Date: 9/4/2008

Date: 7/31/2008

### FUNDING STATEMENT

This analysis is based on a review of the documentation provided, conditions of the project observed on the date of the field inspection and/or verbal communications. See attached schedule of values, percentages of completion, loan budget line item comments and photographs.

The work and progress appear to be adequate and sufficient and Nevada Construction Services recommends funding ManhattanWest Senior Construction Draw # 9 (Contractor Pay Application #10), dated, July 31, 2008, for the amount approved by the borrower of \$6,307,487.13.

### EXECUTIVE SUMMARY

Building 2 has the first, second and third level concrete slabs poured, the concrete elevator/stair shaft walls complete, the fireproofing complete for the third level, the perimeter framing and exterior drywall complete, the window frames and glass near completion, the common area HVAC, plumbing, electrical and fire sprinkler rough-ins in progress, the common area partition wall framing near complete, the common area drywall hung and the taping substantially complete, the roofing complete, the rooftop units' curbs installed and the stucco finish coat in progress. Building 3 has the first, second and third level concrete slabs poured, the concrete elevator/stair shaft walls poured, the fireproofing complete for the third level, the roofing substantially complete, the perimeter steel stud framing and exterior drywall complete, the aluminum window frames and glass near completion, the stucco lath in progress, the common area steel stud framing and drywall started. Building 7 has the first and second level concrete poured, the structural steel erection near completion, the fireproofing complete through the eighth level, the partition wall framing in progress through the ninth level, all rough-ins in progress through the eighth level and the drywall hanging started. Building 9 has the roofing complete, the stucco lath substantially complete, the stucco scratch, brown and finish coats in progress at varying stages of completion in different sections, the concealed rough-ins complete, the wall drywall hung and the taping and ceiling drywall hanging in progress. Building 8 has the roofing substantially complete, the exterior drywall hung, the stucco in progress, the concealed rough-ins complete and the drywall hanging and taping in progress.

Conformance to Original Specifications Statement: All work completed as of date of inspection appears to conform to current plans, specifications and addenda.

  
Keith Schleichardt  
Inspector

### A. Budget

- The project appears to be within the contract budget.
- 
- The project should be completed within the contract budget.
- 
- Pay Applications (Draw Request)
  - The amounts requested are consistent with the value and types of completed construction work in place.
  - Materials stored on site are stored in protected and secure environment to prevent any damage or loss.
  - Materials stored off site are/are not stored in accordance with contract documents requirements.
  - Not applicable at this time.
- Project Changes
  - The proposed change orders should not adversely impact the budget.
  - The costs of the proposed change orders appear to be fair and reasonable.
  - The budget set aside (contingency) for changes appears adequate.
- 

### B. Schedule

- The revised project schedule has been submitted to the owner for approval
  - this statement is assuming the pending change orders revising the contract amount and duration are approved
- The project should be completed by the revised schedule.
  - the project should be completed by the pending change orders adjusted time allowances
- Project Changes
  - The proposed changes should not adversely impact the schedule.
  - the proposed change orders request additional contract duration for delays
  - The time requests for proposed changes appear reasonable.
- Recent Milestones and Activities
  - Buildings 2, 8 & 9 stucco in progress; Building 3 stucco lath started
- Upcoming Milestones and Activities
  - Completion of Building 7 structural steel erection
  - Exterior stucco on Buildings 2, 8 and 9
- Project Documentation
  - The contractor is updating (revising) the project schedule accurately and on a regular basis.

### C. Quality

- In-place construction work
  - The quality of the work in place construction work appears to be in compliance with the project plans and specifications.
- 
- Contractor-Subcontractor Coordination
  - The project is sufficiently manned.
  - The Contractor/Subcontractor job site coordination meetings are being held.
  - Sufficient pre-work instructions are being given to the job site subcontractors, by the A/E and/or CM.
- 
- Project Inspections
  - All required code, quality assurance, manufacturers', A/E and CM inspections are being performed. These inspections have been within codes and guidelines required.
  - The project milestones/critical interfaces/systems integration events and activities have been identified. The required/necessary inspections have been coordinated with same.
- 
- Project Changes
  - The proposed changes appear to be consistent with the scope and nature of the project.
  - The proposed changes should not adversely impact the quality of the project.
- 
- Project Documentation
  - The project's record drawings are being regularly updated.
  - All addenda, change documentation, RFIs, ASIs, etc. are being regularly posted into the project's working and record set of plans and specifications.
  - The project's closeout documentation and instructions are adequate to ensure an efficient closeout.

## D. Issues

Issues which could adversely impact either the baseline budget, schedule or quality, if they are not resolved properly, are described discussed and evaluated below. Where helpful or useful, photos accompany the text.

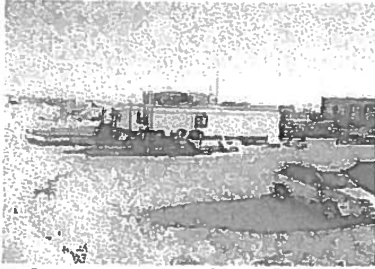
- There were no adverse effect issues noted during this inspection.

### ■ Issue 1

- Identification: Owner / Developer has discharged and replaced the original General Contractor

- Impact: None apparent at this time

- Resolution: New General Contractor has mobilized and assumed project General Contractor responsibilities



### ■ Issue 2

- Identification:

- Impact:

- Resolution:

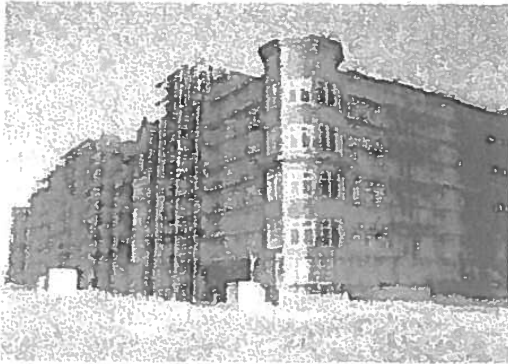
### ■ Issue 3

- Identification

- Impact:

- Resolution:

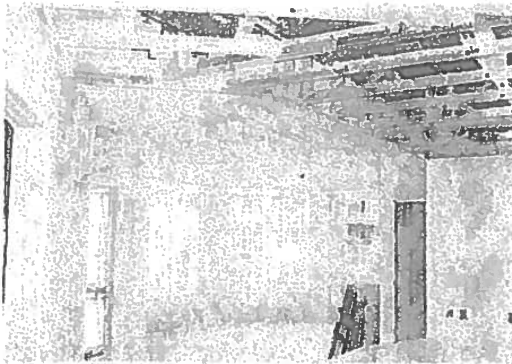
## Project Photos



Building 9 south elevation - stucco scratch, brown and finish in progress



Building 9 north elevation



Building 9 second floor typical unit interior elevation



Building 8 second floor corridor interior elevation



Building #8 north elevation



Building 8 third floor typical unit interior elevation

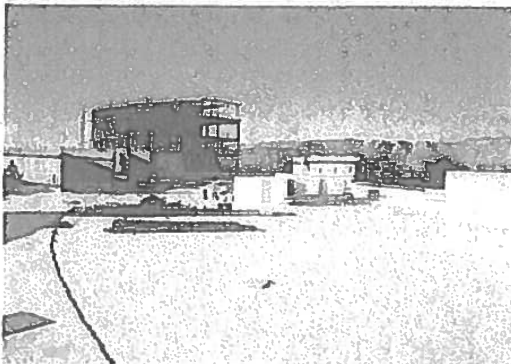
## Project Photos



Building #2 west elevation - stucco lath and stucco scratch, brown and finish in progress



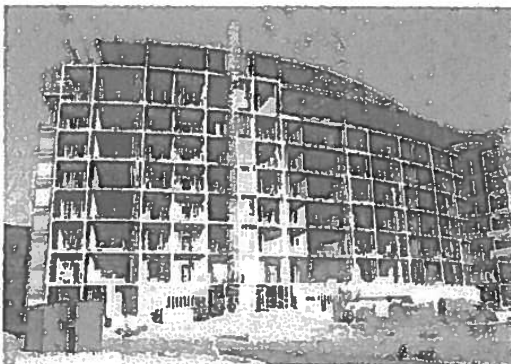
Building 3 first floor south half interior elevation



Building 3 roof - membrane roofing substantially complete, screen and parapit walls' stucco lath in progress



Building 3 west elevation



Building 7 east elevation



Building #7 north and west elevations



### Budget Line Item Comments

Loan Budget Line Item	Comment
<b>GRADING</b>	
MOBILIZATION	Substantially complete
SITE PREP/MASS EXCAVATION	Substantially complete
SITE WATER	Substantially complete
SITE STORM SEWER	Substantially complete
SITE SANITARY SEWER	Substantially complete
INSURANCE	As progress requires/justifies
<b>ON/OFFSITE IMPROVEMENTS</b>	
OFFSITES RUSSELL PAVING	Not started
OFFSITES RUSSELL CURB/GUT	Not started
OFFSITES SIDEWALKS RUSSEL	Not started
ASPHALT PAVING PHASE I	Not started
CURB/GUTTER PHASE 1	In progress
SIDEWALKS PHASE 1	Not started
BRICK PAVERS PHASE 1	Not started
SITE FURNISHINGS PHASE 1	Not started
POOLS	Not started
ELECTRICAL ENGINEERING	As progress requires/justifies
MOBILIZATION	As progress requires/justifies
OFFICE TRAILER/ADMIN 24 Mo	As progress requires/justifies
PRJT. ENG. CAD, PRJT. ASST.	As progress requires/justifies
ELECTRICAL PERMITS	As progress requires/justifies
SUBMITTALS	As progress requires/justifies
SUPERVISION/PLANNING/COOR	As progress requires/justifies
FURNISH LANDSCAPE LIGHTING	Not started
FURNISH COURTYARD LIGHTING	Not started
FURNISH SPORTS LIGHTING	Not started
FURNISH PARKING POLE LIGHT	Not started
APCO CONTRACTOR FEE	As progress requires/justifies



<b>BUILDING 2</b>	
LANDSCAPING	Not started
REINFORCING STEEL LABOR	Complete
REINFORCING STEEL MATERIAL	Complete
EXCAVATE FOOTINGS	Complete
PLACE FOOTINGS	Complete
FORM/PLACE LOWER WALLS	Complete
FORM/PLACE LOWER COLUMNS	Complete
PLACE/FINISH SLAB ON GRADE	Complete
FORM/PLACE MID DECK	Complete
FORM/PLACE MID WALLS	Complete
FORM/PLACE MID COLUMNS	Complete
FORM/PLACE UPPER DECK	Complete
PRECAST FLOOR 1	In progress
PRECAST FLOOR 2	In progress
PRECAST FLOOR 3	In progress
PRECAST FLOOR 4	In progress
MASONRY CMU	Substantially complete
THIN BRICK VENEER	Not started
GRANITE	Not started
STEEL	Complete
FINISH CARPENTRY	Not started
FIREPROOFING	Complete
INSULATION	Substantially complete
ROOFING	Substantially complete
WATERPROOFING	Substantially complete
STUCCO	Brown and finish in progress at varying areas of the exterior
WINDOWS	Frames installed; glass in progress and near completion
STOREFRONT DOORS	In progress
LGMF/DRYWALL	Exterior board complete; Interior board near completion, with common area drywall taping near completion
FLOORING	Not started
PAINTING	Not started
ELEVATORS	Not started
MECH. MOBILIZATION	As progress requires/justifies
MECH. SUBMITTALS	As progress requires/justifies
MECH. GENERAL CONDITIONS	As progress requires/justifies
MECH. CLOSEOUT DOCUMENTS	As progress requires/justifies
HVAC PERMIT	As progress requires/justifies
HVAC PRE-ROCK/LINE SET PIPING	Substantially complete
HVAC EQUIP/FSD MATERIALS	In progress
HVAC ROUGH DUCT	In progress
HVAC SET EQUIPMENT	Not started
HVAC SET TRIM	Not started
HVAC FSD - DD TESTING	Not started
HVAC START UP	Not started

PLUMBING PERMIT	As progress requires/justifies
EXCAVATION/BACKFILL	Substantially complete
UG SANITARY PIPING	Substantially complete
UG STORM PIPING	Substantially complete
PRECAST STRUCTURES	Not started
BLDG. WATER SERVICE	Substantially complete
SLEEVES/INSERTS	Substantially complete
A/G WASTE & VENT	Substantially complete
DRAINS/CARRIERS	Substantially complete
A/G STORM PIPING	Substantially complete
A/G DOMESTIC WATER	Substantially complete
PLUMBING TESTING	In progress
PLUMBING FIXTURES	Not started
PLUMBING EQUIPMENT	In progress
PLBG. INSULATION - FIRESTOP	Substantially complete
ELECTRICAL ENGINEERING	As progress requires/justifies
ELECTRICAL MOBILIZATION	As progress requires/justifies
OFFICE TRAILER/ADMIN 24 Mos	As progress requires/justifies
PRJT. ENG. CAD, PRJT. ASST.	As progress requires/justifies
ELECTRICAL PERMITS	As progress requires/justifies
SUBMITTALS	As progress requires/justifies
SUPERVISION/PLANNING/COORD	As progress requires/justifies
LIGHT FIXTURE PACKAGE	Stored
DISTRIBUTION PACKAGE	Rough-in substantially complete
LOW VOLT SYS FA, CCTV, CA	Rough-in substantially complete
2nd SUBLEVEL GAR UG & DECK	Substantially complete
1st SUBLEVEL GAR UG & DECK	Substantially complete
1st FLOOR ROUGH & TRIM	In progress
2nd FLOOR ROUGH & TRIM	In progress
3rd FLOOR ROUGH & TRIM	In progress
4th FLOOR ROUGH & TRIM	In progress
ROOF PLAN	In progress
APCO CONTRACTOR FEE	As progress requires/justifies

<b>BUILDING 3</b>	
LANDSCAPING	Not started
REINFORCING STEEL LABOR	Substantially complete
REINFORCING STEEL MATERIAL	Substantially complete
EXCAVATE FOOTINGS	Complete
PLACE FOOTINGS	Complete
FORM/PLACE LOWER WALLS	Complete
FORM/PLACE LOWER COLUMNS	Complete
PLACE/FINISH SLAB ON GRADE	Complete
FORM/PLACE MID DECK	Complete
FORM/PLACE MID WALLS	Complete
FORM/PLACE MID COLUMNS	Complete
FORM/PLACE UPPER DECK	Complete
PRECAST FLOOR 1	Not started
PRECAST FLOOR 2	Not started
PRECAST FLOOR 3	Not started
PRECAST FLOOR 4	Not started
MASONRY CMU	Not started
THIN BRICK VENEER	Not started
GRANITE	Not started
STEEL	Complete
FINISH CARPENTRY	Not started
FIREPROOFING	Complete
INSULATION	In progress
ROOFING	Substantially complete
WATERPROOFING	Below grade perimeter walls substantially complete; backfilling in progress
STUCCO	Lath started
WINDOWS	Frames substantially complete and glass in progress; additional materials stored and in progress
STOREFRONT DOORS	Frames substantially complete and glass in progress; additional materials stored and in progress
LGMF/DRYWALL	In progress
FLOORING	Not started
PAINTING	Not started
ELEVATORS	Not started
MECH. MOBILIZATION	As progress requires/justifies
MECH. SUBMITTALS	As progress requires/justifies
MECH. GENERAL CONDITIONS	As progress requires/justifies
MECH. CLOSEOUT DOCUMENTS	As progress requires/justifies
HVAC PERMIT	As progress requires/justifies
HVAC PRE-ROCK/LINE SET PIPE	In progress
HVAC EQUIP/FSD MATERIALS	In progress
HVAC ROUGH DUCT	In progress
HVAC SET EQUIPMENT	Not started
HVAC SET TRIM	Not started
HVAC FSD - DD TESTING	Not started
HVAC START UP	Not started

PLUMBING PERMIT	As progress requires/justifies
EXCAVATION/BACKFILL	Substantially complete
U/G SANITARY PIPING	Substantially complete
U/G STORM PIPING	Substantially complete
PRECAST STRUCTURES	Not started
BLDG. WATER SERVICE	Substantially complete
SLEEVES/INSERTS	Substantially complete
A/G WASTE & VENT	In progress
DRAINS/CARRIERS	In progress
A/G STORM PIPING	Substantially complete
A/G DOMESTIC WATER	In progress
PLUMBING TESTING	In progress
PLUMBING FIXTURES	Not started
PLUMBING EQUIPMENT	In progress
INSULATION - FIRESTOP	In progress
ELECTRICAL ENGINEERING	As progress requires/justifies
ELECTRICAL MOBILIZATION	As progress requires/justifies
OFFICE TRAILER/ADMIN 24 Mos	As progress requires/justifies
PRJT. ENG. CAD, PRJT. ASST.	As progress requires/justifies
ELECTRICAL PERMITS	As progress requires/justifies
SUBMITTALS	As progress requires/justifies
SUPERVISION/PLANNING/COORD	As progress requires/justifies
LIGHT FIXTURE PACKAGE	Stored on site
DISTRIBUTION PACKAGE	Rough-in In progress
LOW VOLT SYS FA, CCTV, CA	Rough-in In progress
2nd SUBLEVEL GAR UG & DECK	Substantially complete
1st SUBLEVEL GAR UG & DECK	Substantially complete
1st FLOOR ROUGH & TRIM	In progress
2nd FLOOR ROUGH & TRIM	In progress
3rd FLOOR ROUGH & TRIM	In progress
4th FLOOR ROUGH & TRIM	Not started
ROOF PLAN	Not started
APCO CONTRACTOR FEE	As progress requires/justifies

<b>BUILDING 7</b>	
LANDSCAPE	Not started
REINFORCING STEEL LABOR	Complete through the ninth level and tenth level in progress
REINFORCING STEEL MATERIAL	Complete through the ninth level and tenth level in progress
EXCAVATE FOOTINGS	Substantially complete
PLACE FOOTINGS	Substantially complete
FORM/PLACE WALLS	Substantially complete
FORM/PLACE COLUMNS	Substantially complete
PLACE SLAB ON GRADE	Substantially complete
FORM/PLACE DECK	Substantially complete
PLACE 2ND FLOOR	Substantially complete
PLACE 3RD FLOOR	Substantially complete
PLACE 4TH FLOOR	Substantially complete
PLACE 5TH FLOOR	Substantially complete
PLACE 6TH FLOOR	Substantially complete
PLACE 7TH FLOOR	Substantially complete
PLACE 8TH FLOOR	Substantially complete
PLACE 9TH FLOOR/ROOF	Substantially complete
MASONRY CMU	Not started
GRANITE	Not started
STEEL	Near completion - roof trusses and decking in progress
MISC. STEEL	Fabricated steel stairs, landings, railings stored on site; installation in progress
FINISH CARPENTRY	Not started
FIREPROOFING	Complete through the ninth level; tenth in progress
INSULATION	Not started
ROOFING	Not started
WATERPROOFING	Below grade perimeter walls substantially complete and backfilled
GLASS/GLAZING	Draw for deposit/stored/fabricated materials?
LGMF/DRYWALL	Framing in progress through ninth floor; fire separation drywall and taping in progress on second, third and fourth floors
FLOORING	Not started
PAINTING	Not started
APPLIANCES	Not started
ELEVATORS	Not started
MECH. MOBILIZATION	As progress requires/justifies
MECH. SUBMITTALS	As progress requires/justifies
MECH. GENERAL CONDITIONS	As progress requires/justifies
MECH. CLOSEOUT DOCUMENTS	As progress requires/justifies
<b>HVAC FIRST FLOOR</b>	
PERMIT	As progress requires/justifies
PRE-ROCK/LINE SET PIPING	In progress
FAU MATERIALS	In progress
ROUGH DUCT	In progress
CONDENSER MATERIALS	Not started
SET CONDENSERS	Not started
SET TRIM	Not started
START UP	Not started

<b>HVAC SECOND FLOOR</b>	
PRE-ROCK/LINE SET PIPING	In progress
FAU MATERIALS	In progress
ROUGH DUCT	In progress
CONDENSER MATERIALS	Not started
SET CONDENSERS	Not started
SET TRIM	Not started
START UP	Not started
<b>HVAC THIRD FLOOR</b>	
PRE-ROCK/LINE SET PIPING	In progress
FAU MATERIALS	In progress
ROUGH DUCT	In progress
CONDENSER MATERIALS	Not started
SET CONDENSERS	Not started
SET TRIM	Not started
START UP	Not started
<b>HVAC FOURTH FLOOR</b>	
PRE-ROCK/LINE SET PIPING	In progress
FAU MATERIALS	In progress
ROUGH DUCT	In progress
CONDENSER MATERIALS	Not started
SET CONDENSERS	Not started
SET TRIM	Not started
START UP	Not started
<b>HVAC FIFTH FLOOR</b>	
PRE-ROCK/LINE SET PIPING	In progress
FAU MATERIALS	In progress
ROUGH DUCT	In progress
CONDENSER MATERIALS	Not started
SET CONDENSERS	Not started
SET TRIM	Not started
START UP	Not started
<b>HVAC SIXTH FLOOR</b>	
PRE-ROCK/LINE SET PIPING	In progress
FAU MATERIALS	In progress
ROUGH DUCT	In progress
CONDENSER MATERIALS	Not started
SET CONDENSERS	Not started
SET TRIM	Not started
START UP	Not started
<b>HVAC SEVENTH FLOOR</b>	
PRE-ROCK/LINE SET PIPING	In progress
FAU MATERIALS	In progress
ROUGH DUCT	In progress
CONDENSER MATERIALS	Not started
SET CONDENSERS	Not started
SET TRIM	Not started
START UP	Not started

<b>HVAC EIGHTH FLOOR</b>	
PRE-ROCK/LINE SET PIPING	In progress
FAU MATERIALS	In progress
ROUGH DUCT	In progress
CONDENSER MATERIALS	Not started
SET CONDENSERS	Not started
SET TRIM	Not started
START UP	Not started
<b>HVAC NINTH FLOOR</b>	
PRE-ROCK/LINE SET PIPING	In progress
FAU MATERIALS	In progress
ROUGH DUCT	In progress
CONDENSER MATERIALS	Not started
SET CONDENSERS	Not started
SET TRIM	Not started
START UP	Not started
<b>HVAC COMMON AREA/ROOF</b>	
PRE-ROCK/LINE SET PIPING	In progress
FAU-RTU MATERIALS	In progress
ROUGH DUCT	In progress
RTU MATERIALS	Deposit/stored/fabrication
SET EQUIPMENT	Not started
SET TRIM	Not started
START UP	Not started
<b>PLUMBING BELOW PODIUM</b>	
PERMIT	As progress requires/justifies
EXCAVATION/BACKFILL	Substantially complete
U/G SANITARY PIPING	Substantially complete
U/G STORM PIPING	Substantially complete
PRECAST STRUCTURES	Not started
BLDG WATER SERVICE	Substantially complete
<b>PLUMBING FIRST FLOOR</b>	
A/G WASTE & VENT	In progress
DRAINS/CARRIERS	In progress
SLEEVES/INSERTS	Substantially complete
A/G STORM PIPING	In progress
A/G DOMESTIC WATER	In progress
A/G GAS PIPING	In progress
TUBS & HOOKUPS	In progress
PLUMBING FIXTURES	In progress
PLUMBING EQUIPMENT	Not started
CONDENSATE PIPING	Not started
PLUMBING TESTING	Not started
PLUMBING IDENTIFICATION	Not started
INSULATION - FIRESTOP	In progress

<b>PLUMBING SECOND FLOOR</b>	
A/G WASTE & VENT	In progress
DRAINS/CARRIERS	In progress
SLEEVES/INSERTS	Substantially complete
A/G STORM PIPING	In progress
A/G DOMESTIC WATER	In progress
A/G GAS PIPING	In progress
TUBS & HOOKUPS	In progress
PLUMBING FIXTURES	In progress
PLUMBING EQUIPMENT	Not started
CONDENSATE PIPING	Not started
PLUMBING TESTING	Not started
PLUMBING IDENTIFICATION	Not started
INSULATION - FIRESTOP	In progress
<b>PLUMBING THIRD FLOOR</b>	
A/G WASTE & VENT	In progress
DRAINS/CARRIERS	In progress
SLEEVES/INSERTS	Substantially complete
A/G STORM PIPING	In progress
A/G DOMESTIC WATER	In progress
A/G GAS PIPING	In progress
TUBS & HOOKUPS	In progress
PLUMBING FIXTURES	In progress
PLUMBING EQUIPMENT	Not started
CONDENSATE PIPING	Not started
PLUMBING TESTING	Not started
PLUMBING IDENTIFICATION	Not started
INSULATION - FIRESTOP	In progress
<b>PLUMBING FOURTH FLOOR</b>	
A/G WASTE & VENT	In progress
DRAINS/CARRIERS	In progress
SLEEVES/INSERTS	Substantially complete
A/G STORM PIPING	In progress
A/G DOMESTIC WATER	In progress
A/G GAS PIPING	In progress
TUBS & HOOKUPS	In progress
PLUMBING FIXTURES	In progress
PLUMBING EQUIPMENT	Not started
CONDENSATE PIPING	Not started
PLUMBING TESTING	Not started
PLUMBING IDENTIFICATION	Not started
INSULATION - FIRESTOP	In progress



<b>PLUMBING FIFTH FLOOR</b>	
A/G WASTE & VENT	In progress
DRAINS/CARRIERS	In progress
SLEEVES/INSERTS	Substantially complete
A/G STORM PIPING	In progress
A/G DOMESTIC WATER	In progress
A/G GAS PIPING	In progress
TUBS & HOOKUPS	In progress
PLUMBING FIXTURES	In progress
PLUMBING EQUIPMENT	Not started
CONDENSATE PIPING	Not started
PLUMBING TESTING	Not started
PLUMBING IDENTIFICATION	Not started
INSULATION - FIRESTOP	In progress
<b>PLUMBING SIXTH FLOOR</b>	
A/G WASTE & VENT	In progress
DRAINS/CARRIERS	In progress
SLEEVES/INSERTS	Substantially complete
A/G STORM PIPING	In progress
A/G DOMESTIC WATER	In progress
A/G GAS PIPING	In progress
TUBS & HOOKUPS	In progress
PLUMBING FIXTURES	In progress
PLUMBING EQUIPMENT	Not started
CONDENSATE PIPING	Not started
PLUMBING TESTING	Not started
PLUMBING IDENTIFICATION	Not started
INSULATION - FIRESTOP	In progress
<b>PLUMBING SEVENTH FLOOR</b>	
A/G WASTE & VENT	In progress
DRAINS/CARRIERS	In progress
SLEEVES/INSERTS	Substantially complete
A/G STORM PIPING	In progress
A/G DOMESTIC WATER	In progress
A/G GAS PIPING	In progress
TUBS & HOOKUPS	In progress
PLUMBING FIXTURES	In progress
PLUMBING EQUIPMENT	Not started
CONDENSATE PIPING	Not started
PLUMBING TESTING	Not started
PLUMBING IDENTIFICATION	Not started
INSULATION - FIRESTOP	In progress
<b>PLUMBING EIGHTH FLOOR</b>	
A/G WASTE & VENT	In progress
DRAINS/CARRIERS	In progress
SLEEVES/INSERTS	Substantially complete
A/G STORM PIPING	In progress
A/G DOMESTIC WATER	In progress
A/G GAS PIPING	In progress
TUBS & HOOKUPS	In progress
PLUMBING FIXTURES	In progress
PLUMBING EQUIPMENT	Not started
CONDENSATE PIPING	Not started
PLUMBING TESTING	Not started
PLUMBING IDENTIFICATION	Not started
INSULATION - FIRESTOP	In progress

<b>PLUMBING NINTH FLOOR</b>	
A/G WASTE & VENT	In progress
DRAINS/CARRIERS	In progress
SLEEVES/INSERTS	Substantially complete
A/G STORM PIPING	In progress
A/G DOMESTIC WATER	Not started
A/G GAS PIPING	Not started
TUBS & HOOKUPS	Not started
PLUMBING FIXTURES	Not started
PLUMBING EQUIPMENT	Not started
CONDENSATE PIPING	Not started
PLUMBING TESTING	Not started
PLUMBING IDENTIFICATION	Not started
INSULATION - FIRESTOP	Not started
<b>ELECTRICAL</b>	
ELECTRICAL ENGINEERING	As progress requires/justifies
ELECTRICAL MOBILIZATION	As progress requires/justifies
OFFICE TRAILER/ADMIN 24 Mos	As progress requires/justifies
PRJT. ENG. CAD, PRJT. ASST.	As progress requires/justifies
ELECTRICAL PERMITS	As progress requires/justifies
SUBMITTALS	As progress requires/justifies
SUPERVISION/PLANNING/COORD	As progress requires/justifies
LIGHT FIXTURE PACKAGE	Stored on site
DISTRIBUTION PACKAGE	Rough-in in progress
LOW VOLT SYS FA, CCTV, CA	Rough-in in progress
GENERATOR	Not started
UNDERSLAB BRANCH CONDUIT	Substantially complete
GARAGE & 1st FLR CONDUIT &	Substantially complete
1st FLR RGH WALLS/CEILINGS	In progress
1st FLR DEVICE & FIXTURE TRIM	Not started
2nd FLR RGH WALLS/CEILINGS	In progress
2nd FLR DEVICE & FIXTURE TRIM	Not started
3rd FLR RGH WALLS/CEILINGS	In progress
3rd FLR DEVICE & FIXTURE TRIM	Not started
4th FLR RGH WALLS/CEILINGS	In progress
4th FLR DEVICE & FIXTURE TRIM	Not started
5th FLR RGH WALLS/CEILINGS	In progress
5th FLR DEVICE & FIXTURE TRIM	Not started
6th FLR RGH WALLS/CEILINGS	In progress
6th FLR DEVICE & FIXTURE TRIM	Not started
7th FLR RGH WALLS/CEILINGS	In progress
7th FLR DEVICE & FIXTURE TRIM	Not started
8th FLR RGH WALLS/CEILINGS	In progress
8th FLR DEVICE & FIXTURE TRIM	Not started
9th FLR RGH WALLS/CEILINGS	Not started
9th FLR DEVICE & FIXTURE TRIM	Not started
APCO CONTRACTOR FEE	As progress requires/justifies

<b>BUILDING 8</b>	
LANDSCAPING	Not started
REINFORCING STEEL LABOR	Complete
REINFORCING STEEL MATERIAL	Complete
EXCAVATE FOOTINGS	Complete
PLACE FOOTINGS	Complete
FORM/PLACE WALLS	Complete
FORM/PLACE COLUMNS	Complete
PLACE SLAB ON GRADE	Complete
FORM/PLACE DECK	Complete
LTWEIGHT CONCRETE	Not started
PRECAST FLOOR 1	Not started
PRECAST FLOOR 2	Not started
PRECAST FLOOR 3	Not started
PRECAST FLOOR 4	Not started
MASONRY CMU	Not started
THIN BRICK VENEER	Not started
GRANITE	Not started
MISC. STEEL	Not started
WOOD FRAMING L1 LABOR/EQUIP	Complete
WOOD FRAMING L1 MATERIAL	Complete
WOOD FRAMING L2 LABOR/EQUIP	Complete
WOOD FRAMING L2 MATERIAL	Complete
WOOD FRAMING L3 LABOR/EQUIP	Complete
WOOD FRAMING L3 MATERIAL	Complete
WOOD FRAMING L4 LABOR/EQUIP	Complete
WOOD FRAMING L4 MATERIAL	Complete
WOOD FRAMING RF LABOR/EQUIP	Complete
WOOD FRAMING RF MATERIAL	Complete
FINISH CARPENTRY	Not started
INSULATION	Substantially complete
ROOFING	Substantially complete
WATERPROOFING	Below grade perimeter walls substantially complete and backfilled
STUCCO	Scratch and brown coat in progress
WINDOWS	Substantially complete
DRYWALL	Wall and ceiling drywall hanging in progress
FLOORING	Not started
PAINTING	Not started
APPLIANCES	Not started
ELEVATORS	Not started
MECH. MOBILIZATION	As progress requires/justifies
MECH. SUBMITTALS	As progress requires/justifies
MECH. GENERAL CONDITIONS	As progress requires/justifies
MECH. CLOSEOUT DOCUMENTS	As progress requires/justifies

<b>HVAC FIRST FLOOR</b>	
PERMIT	As progress requires/justifies
PRE-ROCK/LINE SET PIPING	Substantially complete
FAU MATERIALS	Not started
ROUGH DUCT	In progress
CONDENSER MATERIALS	Rooftop units substantially installed
SET CONDENSERS	Rooftop units substantially installed
SET TRIM	Not started
START UP	Not started
<b>HVAC SECOND FLOOR</b>	
PRE-ROCK/LINE SET PIPING	Substantially complete
FAU MATERIALS	Not started
ROUGH DUCT	In progress
CONDENSER MATERIALS	Rooftop units substantially installed
SET CONDENSERS	Rooftop units substantially installed
SET TRIM	Not started
START UP	Not started
<b>HVAC THIRD FLOOR</b>	
PRE-ROCK/LINE SET PIPING	Substantially complete
FAU MATERIALS	Not started
ROUGH DUCT	In progress
CONDENSER MATERIALS	Rooftop units substantially installed
SET CONDENSERS	Rooftop units substantially installed
SET TRIM	Not started
START UP	Not started
<b>HVAC FOURTH FLOOR</b>	
PRE-ROCK/LINE SET PIPING	Substantially complete
FAU MATERIALS	Not started
ROUGH DUCT	In progress
CONDENSER MATERIALS	Rooftop units substantially installed
SET CONDENSERS	Rooftop units substantially installed
SET TRIM	Not started
START UP	Not started
<b>HVAC COMMON AREA/ROOF</b>	
PRE-ROCK/LINE SET PIPING	In progress
FAU MATERIALS	Not started
ROUGH DUCT	In progress
RTU MATERIALS	In progress
SET EQUIPMENT	In progress
SET TRIM	Not started
START UP	Not started

<b>PLUMBING BELOW PODIUM</b>	
PERMIT	As progress requires/justifies
EXCAVATION/BACKFILL	Substantially complete
U/G SANITARY PIPING	Substantially complete
U/G STORM PIPING	Substantially complete
PRECAST STRUCTURES	Not started
<b>PLUMBING FIRST FLOOR</b>	
A/G WASTE & VENT	Substantially complete
DRAINS/CARRIERS	Substantially complete
SLEEVES/INSERTS	Substantially complete
A/G STORM PIPING	Substantially complete
A/G DOMESTIC WATER	Substantially complete
A/G GAS PIPING	Substantially complete
TUBS & HOOKUPS	Substantially complete
PLUMBING FIXTURES	Not started
PLUMBING EQUIPMENT	Not started
CONDENSATE PIPING	Substantially complete
PLUMBING TESTING	In progress
PLUMBING IDENTIFICATION	Not started
INSULATION - FIRESTOP	In progress
<b>PLUMBING SECOND FLOOR</b>	
A/G WASTE & VENT	Substantially complete
DRAINS/CARRIERS	Substantially complete
A/G STORM PIPING	Substantially complete
A/G DOMESTIC WATER	Substantially complete
A/G GAS PIPING	Substantially complete
TUBS & HOOKUPS	Substantially complete
PLUMBING FIXTURES	Not started
PLUMBING EQUIPMENT	Not started
CONDENSATE PIPING	Substantially complete
PLUMBING TESTING	In progress
PLUMBING IDENTIFICATION	Not started
INSULATION - FIRESTOP	In progress
<b>PLUMBING THIRD FLOOR</b>	
A/G WASTE & VENT	Substantially complete
DRAINS/CARRIERS	Substantially complete
A/G STORM PIPING	Substantially complete
A/G DOMESTIC WATER	Substantially complete
A/G GAS PIPING	Substantially complete
TUBS & HOOKUPS	Substantially complete
PLUMBING FIXTURES	Not started
PLUMBING EQUIPMENT	Not started
CONDENSATE PIPING	Substantially complete
PLUMBING TESTING	In progress
PLUMBING IDENTIFICATION	Not started
INSULATION - FIRESTOP	In progress

<b>PLUMBING FOURTH FLOOR</b>	
A/G WASTE & VENT	Substantially complete
DRAINS/CARRIERS	Substantially complete
A/G STORM PIPING	Substantially complete
A/G DOMESTIC WATER	Substantially complete
A/G GAS PIPING	Substantially complete
TUBS & HOOKUPS	Substantially complete
PLUMBING FIXTURES	Not started
PLUMBING EQUIPMENT	Not started
CONDENSATE PIPING	Substantially complete
PLUMBING TESTING	In progress
PLUMBING IDENTIFICATION	Not started
INSULATION - FIRESTOP	In progress
<b>ELECTRICAL</b>	
ELECTRICAL ENGINEERING	As progress requires/justifies
ELECTRICAL MOBILIZATION	As progress requires/justifies
OFFICE TRAILER/ADMIN 24 Mon	As progress requires/justifies
PRJT. ENG, CAD, PRJT. ASST.	As progress requires/justifies
ELECTRICAL PERMITS	As progress requires/justifies
SUBMITTALS	As progress requires/justifies
SUPERVISION/PLANNING/COORD	As progress requires/justifies
LIGHT FIXTURE PACKAGE	In progress
DISTRIBUTION PACKAGE	Rough-ins complete
LOW VOLT SYS FA, CCTV, CA	Rough-ins complete
UNDERSLAB BRANCH CONDUIT	Substantially complete
GARAGE & 1st FLR CONDUIT &	Substantially complete
1st FLR RGH WALLS/CEILINGS	Complete
1st FLR DEVICE & FIXTURE TRIM	Not started
2nd FLR RGH WALLS/CEILINGS	Complete
2nd FLR DEVICE & FIXTURE TRIM	Not started
3rd FLR RGH WALLS/CEILINGS	Complete
3rd FLR DEVICE & FIXTURE TRIM	Not started
4th FLR RGH WALLS/CEILINGS	Complete
4th FLR DEVICE & FIXTURE TRIM	Not started
APCO CONTRACTOR FEE	As progress requires/justifies

<b>BUILDING 9</b>	
LANDSCAPING	Not started
REINFORCING STEEL LABOR	Complete
REINFORCING STEEL MATERIAL	Complete
EXCAVATE FOOTINGS	Complete
PLACE FOOTINGS	Complete
FORM/PLACE WALLS	Complete
FORM/PLACE COLUMNS	Complete
PLACE SLAB ON GRADE	Complete
FORM/PLACE DECK	Complete
LTWT CONCRETE	Not started
PRECAST FLOOR 1	Not started
PRECAST FLOOR 2	Not started
PRECAST FLOOR 3	Not started
PRECAST FLOOR 4	Not started
MASONRY CMU	Not started
THIN BRICK VENEER	Not started
GRANITE	Not started
MISC. STEEL	Not started
WOOD FRAMING L1 LABOR/EQ	Complete
WOOD FRAMING L1 MATERIAL	Complete
WOOD FRAMING L2 LABOR/EQ	Complete
WOOD FRAMING L2 MATERIAL	Complete
WOOD FRAMING L3 LABOR/EQ	Complete
WOOD FRAMING L3 MATERIAL	Complete
WOOD FRAMING L4 LABOR/EQ	Complete
WOOD FRAMING L4 MATERIAL	Complete
WOOD FRAMING RF LABOR/EQ	Complete
WOOD FRAMING RF MATERIAL	Complete
FINISH CARPENTRY	Not started
INSULATION	Substantially complete
ROOFING	Substantially complete
WATERPROOFING	Below grade perimeter walls substantially complete and backfilled
STUCCO	Scratch and brown coat in progress
WINDOWS	Substantially complete
DRYWALL	Wall and ceiling drywall hanging in progress
FLOORING	Not started
PAINTING	Not started
APPLIANCES	Not started
ELEVATORS	Not started
MECH. MOBILIZATION	As progress requires/justifies
MECH. SUBMITTALS	As progress requires/justifies
MECH. GENERAL CONDITIONS	As progress requires/justifies
MECH. CLOSEOUT DOCUMENTS	As progress requires/justifies

<b>HVAC FIRST FLOOR</b>	
PERMIT	As progress requires/justifies
PRE-ROCK/LINE SET PIPING	Substantially complete
FAU MATERIALS	Not started
ROUGH DUCT	In progress
CONDENSER MATERIALS	Rooftop units substantially installed
SET CONDENSERS	Rooftop units substantially installed
SET TRIM	Not started
START UP	Not started
<b>HVAC SECOND FLOOR</b>	
PRE-ROCK/LINE SET PIPING	Substantially complete
FAU MATERIALS	Not started
ROUGH DUCT	In progress
CONDENSER MATERIALS	Rooftop units substantially installed
SET CONDENSERS	Rooftop units substantially installed
SET TRIM	Not started
START UP	Not started
<b>HVAC THIRD FLOOR</b>	
PRE-ROCK/LINE SET PIPING	Substantially complete
FAU MATERIALS	Not started
ROUGH DUCT	In progress
CONDENSER MATERIALS	Rooftop units substantially installed
SET CONDENSERS	Rooftop units substantially installed
SET TRIM	Not started
START UP	Not started
<b>HVAC FOURTH FLOOR</b>	
PRE-ROCK/LINE SET PIPING	Substantially complete
FAU MATERIALS	Not started
ROUGH DUCT	In progress
CONDENSER MATERIALS	Rooftop units substantially installed
SET CONDENSERS	Rooftop units substantially installed
SET TRIM	Not started
START UP	Not started
<b>HVAC COMMON AREA/ROOF</b>	
PRE-ROCK/LINE SET PIPING	In progress
FAU-RTU MATERIALS	Not started
ROUGH DUCT	In progress
RTU MATERIALS	In progress
SET EQUIPMENT	In progress
SET TRIM	Not started
START UP	Not started



<b>PLUMBING BELOW PODIUM</b>	
PERMIT	As progress requires/justifies
EXCAVATION/BACKFILL	Substantially complete
U/G SANITARY PIPING	Substantially complete
U/G STORM PIPING	Substantially complete
PRECAST STRUCTURES	Not started
<b>PLUMBING FIRST FLOOR</b>	
A/G WASTE & VENT	Substantially complete
DRAINS/CARRIERS	Substantially complete
SLEEVES/INSERTS	Substantially complete
A/G STORM PIPING	Substantially complete
A/G DOMESTIC WATER	Substantially complete
A/G GAS PIPING	Substantially complete
TUBS & HOOKUPS	Substantially complete
PLUMBING FIXTURES	Not started
PLUMBING EQUIPMENT	Not started
CONDENSATE PIPING	Substantially complete
PLUMBING TESTING	In progress
PLUMBING IDENTIFICATION	Not started
INSULATION - FIRESTOP	In progress
<b>PLUMBING SECOND FLOOR</b>	
A/G WASTE & VENT	Substantially complete
DRAINS/CARRIERS	Substantially complete
A/G STORM PIPING	Substantially complete
A/G DOMESTIC WATER	Substantially complete
A/G GAS PIPING	Substantially complete
TUBS & HOOKUPS	Substantially complete
PLUMBING FIXTURES	Not started
PLUMBING EQUIPMENT	Not started
CONDENSATE PIPING	Substantially complete
PLUMBING TESTING	In progress
PLUMBING IDENTIFICATION	Not started
INSULATION - FIRESTOP	In progress
<b>PLUMBING THIRD FLOOR</b>	
A/G WASTE & VENT	Substantially complete
DRAINS/CARRIERS	Substantially complete
A/G STORM PIPING	Substantially complete
A/G DOMESTIC WATER	Substantially complete
A/G GAS PIPING	Substantially complete
TUBS & HOOKUPS	Substantially complete
PLUMBING FIXTURES	Not started
PLUMBING EQUIPMENT	Not started
CONDENSATE PIPING	Substantially complete
PLUMBING TESTING	In progress
PLUMBING IDENTIFICATION	Not started
INSULATION - FIRESTOP	In progress

<b>PLUMBING FOURTH FLOOR</b>	
A/G WASTE & VENT	Substantially complete
DRAINS/CARRIERS	Substantially complete
A/G STORM PIPING	Substantially complete
A/G DOMESTIC WATER	Substantially complete
A/G GAS PIPING	Substantially complete
TUBS & HOOKUPS	Substantially complete
PLUMBING FIXTURES	Not started
PLUMBING EQUIPMENT	Not started
CONDENSATE PIPING	Substantially complete
PLUMBING TESTING	In progress
PLUMBING IDENTIFICATION	Not started
INSULATION - FIRESTOP	In progress
<b>ELECTRICAL</b>	
ELECTRICAL ENGINEERING	As progress requires/justifies
ELECTRICAL MOBILIZATION	As progress requires/justifies
OFFICE TRAILER/ADMIN 24 Mos	As progress requires/justifies
PRJT. ENG, CAD, PRJT. ASST.	As progress requires/justifies
ELECTRICAL PERMITS	As progress requires/justifies
SUBMITTALS	As progress requires/justifies
SUPERVISION/PLANNING/COORD	As progress requires/justifies
LIGHT FIXTURE PACKAGE	In progress
DISTRIBUTION PACKAGE	Rough-ins complete
LOW VOLT SYS FA, CCTV, CA	Rough-ins complete
UNDERSLAB BRANCH CONDUIT	Substantially complete
GARAGE & 1st FLR CONDUIT &	Substantially complete
1st FLR RGH WALLS/CEILINGS	Complete
1st FLR DEVICE & FIXTURE TRIM	Not started
2nd FLR RGH WALLS/CEILINGS	Complete
2nd FLR DEVICE & FIXTURE TRIM	Not started
3rd FLR RGH WALLS/CEILINGS	Complete
3rd FLR DEVICE & FIXTURE TRIM	Not started
4th FLR RGH WALLS/CEILINGS	Complete
4th FLR DEVICE & FIXTURE TRIM	Not started
APCO CONTRACTOR FEE	As progress requires/justifies

# NCS Loan Budget Item Status/Activity

Loan Budget Item	Original Loan Budget Amount	APOD Request Change Order Amount	Revised Budget Amount	Borrower's Requested Gross This Draw	Retention Withheld This Draw	Borrower's Requested Net This Draw	Borrower's Requested Gross To Date	Retention Withheld To Date	Line Item Balance Remaining Including Retention	Total Percentage Requested	Inspection Percentage Observed
<b>GRADING</b>											
MOBILIZATION	\$ 45,000	\$ -	\$ 45,000	\$ -	\$ -	\$ -	\$ 45,000	\$ 2,250.00	\$ 2,250.00	100.00%	100.00%
SITE PREPARESS EXCAVATION	\$ 2,559,000	\$ -	\$ 2,559,000	\$ -	\$ -	\$ -	\$ 2,559,000	\$ 127,950.00	\$ 127,950.00	100.00%	100.00%
SITE WATER	\$ 647,000	\$ -	\$ 647,000	\$ -	\$ -	\$ -	\$ 647,000	\$ 31,836.00	\$ 42,116.00	98.41%	99.00%
SITE STORM SEWER	\$ 511,000	\$ -	\$ 511,000	\$ -	\$ -	\$ -	\$ 511,000	\$ 25,039.00	\$ 35,259.00	98.00%	100.00%
SITE SANITARY SEWER	\$ 815,000	\$ -	\$ 815,000	\$ -	\$ -	\$ -	\$ 815,000	\$ 54,120.00	\$ 54,120.00	98.00%	98.00%
INSURANCE	\$ 150,700	\$ -	\$ 150,700	\$ -	\$ -	\$ -	\$ 150,700	\$ 7,535.00	\$ 7,535.00	100.00%	100.00%
<b>SUBTOTAL GRADING</b>	<b>\$ 4,527,700</b>	<b>\$ -</b>	<b>\$ 4,527,700</b>	<b>\$ -</b>	<b>\$ -</b>	<b>\$ -</b>	<b>\$ 4,402,600</b>	<b>\$ 224,130.00</b>	<b>\$ 268,230.00</b>	<b>99.00%</b>	<b>99.71%</b>
<b>ON/OFFSITE IMPROVEMENTS</b>											
OFFSITES RUSSELL PAVING	\$ 222,750	\$ -	\$ 222,750	\$ -	\$ -	\$ -	\$ -	\$ -	\$ 222,750.00	0.00%	0.00%
OFFSITES RUSSELL CURB/GUTTER	\$ 92,000	\$ -	\$ 92,000	\$ -	\$ -	\$ -	\$ -	\$ -	\$ 77,000.00	0.00%	0.00%
OFFSITES SIDEWALKS RUSSELL	\$ 210,000	\$ -	\$ 210,000	\$ -	\$ -	\$ -	\$ -	\$ -	\$ 10,000.00	0.00%	0.00%
ASPHALT PAVING PHASE 1	\$ 289,800	\$ -	\$ 289,800	\$ 8,500.00	\$ 850.00	\$ 7,650.00	\$ 43,928	\$ 4,392.75	\$ 250,065.25	15.17%	20.00%
CURB/GUTTER PHASE 1	\$ 113,020	\$ -	\$ 113,020	\$ -	\$ -	\$ -	\$ -	\$ -	\$ 113,020.00	0.00%	0.00%
SIDEWALKS PHASE 1	\$ 220,000	\$ -	\$ 220,000	\$ -	\$ -	\$ -	\$ -	\$ -	\$ 220,000.00	0.00%	0.00%
BRICK PAVING PHASE 1	\$ 255,000	\$ -	\$ 255,000	\$ -	\$ -	\$ -	\$ -	\$ -	\$ 221,844.00	0.00%	0.00%
SITE FURNISHINGS PHASE 1	\$ 100,000	\$ -	\$ 100,000	\$ -	\$ -	\$ -	\$ -	\$ -	\$ 100,000.00	0.00%	0.00%
POOLS	\$ 480,000	\$ -	\$ 480,000	\$ -	\$ -	\$ -	\$ -	\$ -	\$ 480,000.00	0.00%	0.00%
ELECTRICAL ENGINEERING	\$ 6,200	\$ -	\$ 6,200	\$ -	\$ -	\$ -	\$ -	\$ -	\$ 6,200.00	0.00%	0.00%
MOBILIZATION	\$ 6,800	\$ -	\$ 6,800	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	0.00%	0.00%
OFFICE TRAILER/ADMIN 24 Hour	\$ 4,800	\$ -	\$ 4,800	\$ -	\$ -	\$ -	\$ -	\$ -	\$ 4,800.00	0.00%	0.00%
PRJT. ENG. CAD. PRJT. ASST.	\$ 3,000	\$ -	\$ 3,000	\$ -	\$ -	\$ -	\$ -	\$ -	\$ 3,000.00	0.00%	0.00%
ELECTRICAL PERMITS	\$ 2,600	\$ -	\$ 2,600	\$ -	\$ -	\$ -	\$ -	\$ -	\$ 2,600.00	0.00%	0.00%
SUBMITTALS	\$ 400	\$ -	\$ 400	\$ -	\$ -	\$ -	\$ 400	\$ 40.00	\$ 40.00	100.00%	100.00%
SUPERVISION/PLANNING/COORD	\$ 4,800	\$ -	\$ 4,800	\$ -	\$ -	\$ -	\$ -	\$ -	\$ 4,800.00	0.00%	0.00%
FURNISH LANDSCAPE LIGHTING	\$ 157,000	\$ -	\$ 157,000	\$ -	\$ -	\$ -	\$ -	\$ -	\$ 157,000.00	0.00%	0.00%
FURNISH COURTYARD LIGHTING	\$ 40,000	\$ -	\$ 40,000	\$ -	\$ -	\$ -	\$ -	\$ -	\$ 40,000.00	0.00%	0.00%
FURNISH SPORTS LIGHTING	\$ 6,000	\$ -	\$ 6,000	\$ -	\$ -	\$ -	\$ -	\$ -	\$ 6,000.00	0.00%	0.00%
FURNISH PARKING POLE LIGHT	\$ 32,000	\$ -	\$ 32,000	\$ -	\$ -	\$ -	\$ -	\$ -	\$ 32,000.00	0.00%	0.00%
APOD CONTRACTOR FEE	\$ 149,883	\$ -	\$ 149,883	\$ 865.25	\$ 86.53	\$ 608.72	\$ 4,398	\$ 438.87	\$ 145,824.20	2.83%	2.93%
<b>SUBTOTAL ON/OFFSITES</b>	<b>\$ 2,376,653</b>	<b>\$ -</b>	<b>\$ 2,376,653</b>	<b>\$ 9,065.25</b>	<b>\$ 906.53</b>	<b>\$ 8,158.72</b>	<b>\$ 48,726</b>	<b>\$ 4,872.82</b>	<b>\$ 2,077,043.45</b>	<b>2.30%</b>	<b>2.97%</b>
<b>BUILDING 2</b>											
LANDSCAPING	\$ 90,000	\$ -	\$ 90,000	\$ -	\$ -	\$ -	\$ -	\$ -	\$ 90,000.00	0.00%	0.00%
REINFORCING STEEL LABOR	\$ 340,000	\$ -	\$ 340,000	\$ 10,200.00	\$ 1,020.00	\$ 9,180.00	\$ 340,000	\$ 34,000.00	\$ 34,000.00	100.00%	100.00%
REINFORCING STEEL MATERIAL	\$ 360,000	\$ -	\$ 360,000	\$ -	\$ -	\$ -	\$ 508,613	\$ 50,861.25	\$ 50,861.25	100.00%	100.00%
EXCAVATE FOOTINGS	\$ 248,500	\$ -	\$ 248,500	\$ -	\$ -	\$ -	\$ 248,500	\$ 24,850.00	\$ 24,850.00	100.00%	100.00%
PLACE FOOTINGS	\$ 200,000	\$ -	\$ 200,000	\$ -	\$ -	\$ -	\$ 200,000	\$ 20,000.00	\$ 20,000.00	100.00%	100.00%
FORM/PLACE LOWER WALLS	\$ 300,000	\$ -	\$ 300,000	\$ -	\$ -	\$ -	\$ 300,000	\$ 30,000.00	\$ 30,000.00	100.00%	100.00%
FORM/PLACE LOWER COLUMNS	\$ 85,000	\$ -	\$ 85,000	\$ -	\$ -	\$ -	\$ 85,000	\$ 8,500.00	\$ 8,500.00	100.00%	100.00%
FORM/PLACE SLAB ON GRADE	\$ 130,000	\$ -	\$ 130,000	\$ -	\$ -	\$ -	\$ 130,000	\$ 13,000.00	\$ 13,000.00	100.00%	100.00%
FORM/PLACE MID DECK	\$ 450,000	\$ -	\$ 450,000	\$ -	\$ -	\$ -	\$ 450,000	\$ 45,000.00	\$ 45,000.00	100.00%	100.00%
FORM/PLACE MID WALLS	\$ 300,000	\$ -	\$ 300,000	\$ -	\$ -	\$ -	\$ 300,000	\$ 30,000.00	\$ 30,000.00	100.00%	100.00%
FORM/PLACE MID COLUMNS	\$ 85,000	\$ -	\$ 85,000	\$ -	\$ -	\$ -	\$ 85,000	\$ 8,500.00	\$ 8,500.00	100.00%	100.00%
FORM/PLACE UPPER DECK	\$ 450,000	\$ -	\$ 450,000	\$ -	\$ -	\$ -	\$ 450,000	\$ 45,000.00	\$ 45,000.00	100.00%	100.00%
PRECAST FLOOR 1	\$ 25,000	\$ -	\$ 25,000	\$ 8,350.00	\$ 835.00	\$ 5,715.00	\$ 12,700	\$ 1,270.00	\$ 13,570.00	50.80%	50.00%
PRECAST FLOOR 2	\$ 25,000	\$ -	\$ 25,000	\$ 8,350.00	\$ 835.00	\$ 5,715.00	\$ 12,700	\$ 1,270.00	\$ 13,570.00	50.80%	50.00%
PRECAST FLOOR 3	\$ 25,000	\$ -	\$ 25,000	\$ 8,350.00	\$ 835.00	\$ 5,715.00	\$ 12,700	\$ 1,270.00	\$ 13,570.00	50.80%	50.00%
PRECAST FLOOR 4	\$ 25,000	\$ -	\$ 25,000	\$ 8,350.00	\$ 835.00	\$ 5,715.00	\$ 12,700	\$ 1,270.00	\$ 13,570.00	50.80%	50.00%









		\$	76,400	\$	-	\$	-	\$	-	\$	-	\$	-	\$	-	\$	75,400.00	0.00%
ROOFING		\$	89,443	\$	1,950.53	\$	185.05	\$	1,755.48	\$	64,123	\$	8,412.27	\$	-	\$	31,732.56	71.89%
WATERPROOFING		\$	180,000	\$	807,500.00	\$	80,750.00	\$	726,750.00	\$	952,500	\$	86,250.00	\$	-	\$	4,242,750.00	10.00%
GLASS/GLAZING		\$	5,100,000	\$	213,976.00	\$	21,397.60	\$	192,577.50	\$	788,726	\$	76,872.50	\$	-	\$	910,148.00	48.68%
GUMFIRY WALL		\$	3,400,000	\$	-	\$	-	\$	-	\$	-	\$	-	\$	-	\$	450,000.00	0.00%
FLOORING		\$	450,000	\$	-	\$	-	\$	-	\$	-	\$	-	\$	-	\$	235,000.00	0.00%
PAINTING		\$	520,000	\$	-	\$	-	\$	-	\$	-	\$	-	\$	-	\$	112,000.00	0.00%
APPLIANCES		\$	112,000	\$	-	\$	-	\$	-	\$	-	\$	-	\$	-	\$	32,035.70	0.00%
ELEVATORS		\$	280,000	\$	150,266.00	\$	16,026.60	\$	135,230.40	\$	17,500	\$	1,750.00	\$	-	\$	278,881.70	56.50%
MACH. MOBILIZATION		\$	17,600	\$	-	\$	-	\$	-	\$	-	\$	-	\$	-	\$	1,750.00	100.00%
MACH. SUBMITTALS		\$	1,575	\$	-	\$	-	\$	-	\$	-	\$	-	\$	-	\$	121.21	78.88%
MACH. GENERAL CONDITIONS		\$	2,483	\$	-	\$	-	\$	-	\$	-	\$	-	\$	-	\$	398.34	93.25%
MACH. CLOSEOUT DOCUMENTS		\$	1,400	\$	-	\$	-	\$	-	\$	-	\$	-	\$	-	\$	231.68	0.00%
HVAC FIRST FLOOR		\$	10,483	\$	-	\$	-	\$	-	\$	-	\$	-	\$	-	\$	1,048.30	100.00%
PERMIT		\$	4,202	\$	2,101.13	\$	210.11	\$	1,891.02	\$	3,152	\$	315.17	\$	-	\$	1,359.73	75.00%
PRE-ROCKLINE SET PIPING		\$	3,362	\$	-	\$	-	\$	-	\$	-	\$	-	\$	-	\$	336.16	100.00%
FAU MATERIALS		\$	3,362	\$	672.38	\$	67.24	\$	605.12	\$	3,362	\$	336.18	\$	-	\$	336.18	100.00%
ROUGH DUCT		\$	3,362	\$	-	\$	-	\$	-	\$	-	\$	-	\$	-	\$	3,361.89	0.00%
CONDENSER MATERIALS		\$	840	\$	-	\$	-	\$	-	\$	-	\$	-	\$	-	\$	840.45	0.00%
SET CONDENSERS		\$	840	\$	-	\$	-	\$	-	\$	-	\$	-	\$	-	\$	840.45	0.00%
SET TRIM		\$	840	\$	-	\$	-	\$	-	\$	-	\$	-	\$	-	\$	840.45	0.00%
START UP		\$	840	\$	-	\$	-	\$	-	\$	-	\$	-	\$	-	\$	840.45	0.00%
HVAC SECOND FLOOR		\$	14,008	\$	7,003.75	\$	700.38	\$	6,303.38	\$	10,506	\$	1,050.56	\$	-	\$	4,552.43	75.00%
PRE-ROCKLINE SET PIPING		\$	11,203	\$	-	\$	-	\$	-	\$	-	\$	-	\$	-	\$	1,120.30	100.00%
FAU MATERIALS		\$	11,203	\$	2,241.20	\$	224.12	\$	2,017.08	\$	11,206	\$	1,120.60	\$	-	\$	1,120.60	100.00%
ROUGH DUCT		\$	11,206	\$	-	\$	-	\$	-	\$	-	\$	-	\$	-	\$	11,206.00	0.00%
CONDENSER MATERIALS		\$	2,802	\$	-	\$	-	\$	-	\$	-	\$	-	\$	-	\$	2,801.50	0.00%
SET CONDENSERS		\$	2,802	\$	-	\$	-	\$	-	\$	-	\$	-	\$	-	\$	2,801.50	0.00%
SET TRIM		\$	2,802	\$	-	\$	-	\$	-	\$	-	\$	-	\$	-	\$	2,801.50	0.00%
START UP		\$	2,802	\$	-	\$	-	\$	-	\$	-	\$	-	\$	-	\$	2,801.50	0.00%
HVAC THIRD FLOOR		\$	14,008	\$	7,003.75	\$	700.38	\$	6,303.38	\$	10,506	\$	1,050.56	\$	-	\$	4,552.43	7











