

APPEARANCES OF COUNSEL (continued)

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* * * * *

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Deposition of MARY JO ALLEN

July 19, 2017

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

Thereupon--

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

(Exhibit 69 marked
for identification.)

EXAMINATION

BY MR. LAI:

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

Could you state your full name for the record.

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

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

A. Yes, sir.

Q. Have you consumed any drugs, medication or

1 alcohol within the past 24 hours?

2 A. No.

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

6 A. No.

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

9 A. No, sir.

10 Q. Your current employer is APCO Construction,
11 correct?

12 A. Yes.

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

16 A. Yes.

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

20 A. No, sir.

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

23 A. No.

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

1 A. Yes, sir.

2 Q. Have you ever seen this document before?

3 A. Yes, sir.

4 Q. Did you read this document before coming here
5 today?

6 A. Yes, sir. I read about a million documents.

7 Q. So this is one of the millions that you read?

8 A. Yes, sir.

9 Q. Do you agree to testify today on behalf of
10 APCO?

11 A. Yes, sir.

12 Q. On the topics concerning payment and payment
13 related questions, correct?

14 A. Yes, sir.

15 Q. Are you prepared to go over those topics
16 today?

17 A. Yes, sir.

18 Q. So you just testified that you reviewed about
19 a million documents for your preparation. Can you
20 describe briefly what type of documents did you review
21 for your preparation?

22 A. My job files, the documents that APCO
23 disclosed for the specific subs that are involved in
24 these depositions. The documents that they disclosed.

25 Q. When did you review these documents?

1 A. Oh, my goodness. Over the last month maybe.

2 Q. You can ballpark it.

3 A. A month.

4 Q. How long was that review approximately; was
5 it hours or days?

6 A. Hours, days. Well, I did a little here, a
7 little there. At times I spent, you know a whole day
8 doing it. I have a regular job that I have to do in
9 between all of this, so I can't just stop functioning;
10 do you know what I mean?

11 Q. I understand. Hopefully we will get you out
12 of here today as soon as possible so you can get back
13 to your real job.

14 Did you talk to anyone other than your
15 attorney?

16 A. My boss Joe Pelan, Brian Benson. Not really,
17 no, that's it.

18 Q. What did you guys generally talk about with
19 respect to this deposition?

20 A. I read Brian Benson's deposition and I asked
21 him questions about it. Joe Pelan when I was reviewing
22 documents, I would show them to him and we discussed
23 them. ManhattanWest in general. That was about it.

24 Q. When you talked to Mr. Benson about his
25 deposition testimony, did you ever have a conversation

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

3 A. No.

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

6 A. Yes.

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

9 A. Yes.

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

11 A. Not here.

12 Q. Is it back at your office?

13 A. Sure.

14 Q. Do you still have those notes?

15 A. Sure.

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

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

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

24 BY MR. LAI:

25 Q. Other than your review of those documents and

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

3 A. No.

4 (Exhibit 70 marked
5 for identification.)

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

8 MR. LAI: Sure.

9 (Off-record discussion held.)

10 BY MR. LAI:

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

14 A. Yes, sir.

15 Q. Have you ever seen that document before?

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

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

22 MR. DABBIERI: Thank you.

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

25 BY MR. LAI:

1 Q. The binder documents that you reviewed in
2 preparation?

3 A. Yes.

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

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

9 Q. Take your time.

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

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

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

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

18 A. Yes, sir.

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

23 A. Yes, sir.

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

1 A. Um-hum.

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

4 A. No.

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

7 A. No.

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

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

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

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

21 A. Yes, sir.

22 Q. And that role lasted until September 20,
23 2008, correct?

24 A. August 21st, 2008.

25 Q. And when did APCO's role as general

Exhibit C

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Las Vegas, NV 89169
(702) 257-1483

ENTERED
03/22/10

1 **DDW**

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3 Nevada Bar No. 3146

4 Wade B. Gochmour, Esq.

5 Nevada Bar No. 6314

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14 *Attorneys for APCO Construction*

11 **DISTRICT COURT**
12 **CLARK COUNTY, NEVADA**

13 APCO CONSTRUCTION, a Nevada
14 corporation,

15 Plaintiff,

16 vs.

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

26 Defendants.

27 **AND ALL RELATED CASES AND**
28 **MATTERS**

CASE NO.: A571228

DEPT. NO.: XXV

Consolidated with: 08A574391,
08A574792, 08A577623, 09A580889,
09A583289, 09A584730, 09A584960,
09A587168, A-09-589195-C, A-09-589677-
C, A-09-590319-C, A-09-592826-C,
A-09-596924-C, and A-09-597089-C

APCO CONSTRUCTION'S
INITIAL DISCLOSURE OF WITNESSES
AND NOTICE OF IMAGED
DOCUMENTS

HOWARD & HOWARD ATTORNEYS PLLC
3800 Howard Hughes Pkwy., Suite 1400
Las Vegas, NV 89169
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WITNESSES

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

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

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

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

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

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

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

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

26 6. The Person Most Knowledgeable
27 Gemstone Development West, Inc.
28 c/o Alexander Edelstein, registered Agent
 10170 W. Tropicana Ave., Suite 156-169
 Las Vegas, Nevada 89147

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

///

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

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

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

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

9. Craig Colligan
Address unknown

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

10. The Person Most Knowledgeable
Scott Financial Services, Inc.
c/o Kemp, Jones & Coulthard
3800 Howard Hughes Pkwy., 17th Floor
Las Vegas, Nevada 89169

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

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

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

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

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

3 13. The Person Most Knowledgeable
4 Club Vista Financial Services, LLC
5 c/o Cooksey, Toolen, Gage, Duffy & Woog
6 3930 Howard Hughes Pkwy., Ste. 200
7 Las Vegas, Nevada 89169

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

10 14. The Person Most Knowledgeable
11 Tharaldson Motels II, Inc.
12 c/o Cooksey, Toolen, Gage, Duffy & Woog
13 3930 Howard Hughes Pkwy., Ste. 200
14 Las Vegas, Nevada 89169

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

17 15. Gary D. Tharaldson
18 c/o Cooksey, Toolen, Gage, Duffy & Woog
19 3930 Howard Hughes Pkwy., Ste. 200
20 Las Vegas, Nevada 89169

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

23 16. Aaron Davis
24 Insulpro Projects, Inc.
25 c/o Eric Dobberstein, Esq.
26 DOBBERSTEIN & ASSOCIATES
27 8965 S. Eastern Avenue, Suite 280
28 Las Vegas, Nevada 89123

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

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

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

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

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

APCO hereby reserves the right to add to, amend, delete or supplement any of the above witnesses. Also APCO reserves the right to call any witnesses identified and elected under provisions of NRCP 26(b) (4)-(5) by any other party to this action, whether or not such party remains a party at the time of trial.

APCO reserves the right to name and call such additional experts as deemed appropriate in accordance with the provisions of NRCP 26(b) (4)-(5), any Scheduling Order and/or Case Management Order.

APCO reserves the right to add experts as the need arises during the course of discovery and investigation in preparation of this case.

APCO does not list here, but nevertheless reserves the right to call as witnesses, on either lay or expert matters, or both, those individuals who are employees or former employees of any other party to this lawsuit and who may be called to testify at trial, either live or through competent former testimony.

APCO further reserves the right to call impeachment or rebuttal witnesses omitted from this disclosure.

1 APCO also reserves the right to call, at the time of trial, if necessary, the custodian of
2 records of the parties to this lawsuit and witnesses named by any other party to this lawsuit on
3 their respective witness lists.

4 If any witness discussed or listed herein is not available at the time of trial, APCO
5 advises all parties that it will seek introduction of competent former testimony, including
6 depositions of such witnesses, in lieu of live testimony.

7 Finally, discovery, investigation, analysis and depositing of documents is in its initial
8 stages and is therefore continuing and has not yet been completed. Depositions have not been
9 taken of any parties, witnesses or experts. APCO, therefore, reserves the right to file a
10 supplemental list of witnesses until such time as discovery, investigation, analysis or depositing
11 of documents is completed.

12 LIST OF DOCUMENTS

13 The following documents are being produced per the terms of the Case Management
14 Order entered on January 28, 2010. APCO has deposited, in electronic format, documents
15 identified by Bate Stamp No. APCO00001558¹ through APCO00078837 ("Imaged
16 Documents") into a depository established by APCO for this litigation matter with Litigation
17 Services located at 1640 W. Alta Drive, Suite 4, Las Vegas, NV 89106 and/or the Imaged
18 Documents are hereby made available for review and copying at requestor's expense).

19 See "Manhattan West Document Production—Index Log" a copy of which is attached
20 hereto as Exhibit 1 and incorporated herein by this reference and which documents are on the
21 following discs:

- 22 1. APCO CONSTRUCTION – Manhattan West Project – 16.1 Production of
23 Documents – APCO00001558 - APCO00017072 (SECOND PRODUCTION VOL. I);
24

25
26 ¹ Documents bate stamped APCO00000001 through APCO00001557 were delivered to Gemstone Development
27 West ("Gemstone") on or about September 3, 2008, after the termination of APCO's prime contract so that
28 Gemstone could continue with the construction of the Project with its replacement general contractor, Camco
Pacific Construction Company, Inc. APCO does not have a copy of these documents as they remain in Gemstone's
possession. Furthermore, due to clerical error, the following Bate Stamp Nos. were not used, APCO00005841,
APCO00024165 and APCO00033296.

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2. APCO CONSTRUCTION – Manhattan West Project – 16.1 Production of Documents – APCO00017073 - APCO00033295 (SECOND PRODUCTION VOL. II);

3. APCO CONSTRUCTION – Manhattan West Project – 16.1 Production of Documents – APCO00033297 - APCO00051289;

4. APCO CONSTRUCTION – Manhattan West Project – 16.1 Production of Documents – APCO00051290 - APCO00060647 (THIRD PRODUCTION VOL. II);
and

5. APCO CONSTRUCTION – Manhattan West Project – 16.1 Production of Documents – APCO00060648 - APCO00078837 (THIRD PRODUCTION VOL. II).

Discovery is in the initial stages. APCO reserves the right to supplement this list of documents and provide additional documents as the discovery on this matter continues. Furthermore, APCO reserves the right to use at the time of trial, any and all documents identified and/or produced by any other party to this action.

DATED this 17th day of March 2010.

HOWARD & HOWARD ATTORNEYS PLLC

/s/ Gwen Rutar Mullins

Gwen Rutar Mullins, Esq.

Nevada Bar No. 3146

Wade B. Gochmour, Esq.

Nevada Bar No. 6314

3800 Howard Hughes Parkway

The Wells Fargo Tower, Ste. 1400

Las Vegas, Nevada 89169-5914

Attorneys for APCO CONSTRUCTION

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3800 Howard Hughes Pkwy., Suite 1400
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CERTIFICATE OF SERVICE

On the 17th day of March 2010, the undersigned served a true and correct copy of the foregoing INITIAL DISCLOSURE OF WITNESSES AND NOTICE OF IMAGED DOCUMENTS by U.S. Mail, postage prepaid, upon the following:

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

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

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

EXHIBIT “1”

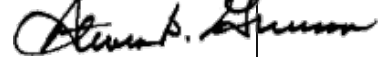
MANHATTAN WEST
Document Production - Index Log

Bate - Stamp #'s	Document
APCO00005841	NOT used
APCO00024165	NOT used
APCO00033296	NOT used
APCO00000001 - APCO00001557	DOCUMENTS TAKEN DIRECTLY TO GEMSTONE
APCO00001558 - APCO00002074	AS-BUILT Drawings
APCO00002075 - APCO00002624	Permit Drawings
APCO00002625 - APCO00002729	Dust Permit I
APCO00002730 - APCO00002793	Gemstone Development I
APCO00002794 - APCO00002889	Permit Drawings
APCO00002890 - APCO00003346	RFI - Volume I (1 - 100)
APCO00003347 - APCO00003623	RFI - Volume II (101 - 149)
APCO00003624 - APCO00003879	RFI - Volume III (150 - 200)
APCO00003880 - APCO00004367	RFI - Volume IV (201 - 299)
APCO00004368 - APCO00004832	RFI - Volume V (300 - 400)
APCO00004833 - APCO00005333	RFI - Volume VI (401 - 520)
APCO00005334 - APCO00005744	RFI - Volume VII (521 - 601)
APCO00005745 - APCO00008018	Submittals
APCO00008019 - APCO00010299	Submittals - 06000 - 08911 Part I
APCO00010300 - APCO00012500	Submittals - 0600 - 08911 Part II
APCO00012501 - APCO00012818	Submittals - PDM Millwork 08110
APCO00012819 - APCO00013914	Submittals - Drawer 3
APCO00013915 - APCO00014189	Submittals - 14240 Elevator
APCO00014190 - APCO00014716	Submittals - 15000 - 0103 HVAC
APCO00014717 - APCO00016033	Submittals - Drawer 5 (Part I)
APCO00016034 - APCO00017072	Submittals - Drawer 5 (Part II)
APCO00017073 - APCO00019074	Submittals - Drawer 4
APCO00019075 - APCO00019299	Submittals - 15401-01
APCO00019300 - APCO00019605	Submittals - 15405-01
APCO00019606 - APCO00019726	Redwine Engineering
APCO00019727 - APCO00020910	OPTIONS Binder

APCO00020911 – APCO00021566.6	ASI LOG
APCO00021567 – APCO00021709	OPTIONS II
APCO00021710 – APCO00021769	PERMITS II
APCO00021769.1 – APCO00022418	SAFETY NOTES / SAFETY LOGS
APCO00022418.1 – APCO00022887	EXTRA WORK TICKETS
APCO00022888 – APCO00023317	PCI Group I
APCO00023318 – APCO00023742	Project Specifications Book dated 2/23/07
APCO00023743 – APCO00024157	SPEC SHEETS, SUBCONTRACTS, COST CODES
APCO00024158 – APCO00024870	INSPECTION REPORTS
APCO00024871 – APCO00025312	DAILY REPORTS (VOL 1)
APCO00025313 – APCO00025770	DAILY REPORTS (VOL 2)
APCO00025771 – APCO00025775	EMBARQ PLANS
APCO00025776 – APCO00025805	PERMIT Drawings – Civil's
APCO00025806 – APCO00025970	PERMIT Drawings – VOLUME I
APCO00025971 – APCO00026164	PERMIT Drawings – VOLUME II
APCO00026165 – APCO00026667	NOTICE OF LIENS
APCO00026668 – APCO00026678.2	Nevada Construction Services II
APCO00026679 – APCO00027210	CONTRACT Schedules – VOLUME I
APCO00027211 – APCO00027754	CONTRACT Schedules – VOLUME II
APCO00027755 – APCO00028288	CONTRACT Schedules – VOLUME III
APCO00028289 – APCO00028842	DAILY REPORTS (VOL 3)
APCO00028843 – APCO00029455	DAILY REPORTS (VOL 4)
APCO00029456 – APCO00030198	DAILY REPORTS (VOL 5)
APCO00030199 – APCO00030930	DAILY REPORTS (VOL 6)
APCO00030931 – APCO00031598	DAILY REPORTS (VOL 7)
APCO00031599 – APCO00032335	DAILY REPORTS (VOL 8)
APCO00032336 – APCO00032701	DAILY REPORTS (VOL 9)
APCO00032702 – APCO00033295	REQUEST FOR PROPOSAL's
APCO00033297 – APCO00033493	General Construction Agreement
APCO00033494 – APCO00033538	Grading Agreement
APCO00033539 – APCO00033553	Nevada Construction Services Agreement
APCO00033554 – APCO00035651	(ALL) (1 – 11) Pay Applications w/ Backup
APCO00035652 – APCO00036828	(ALL) (1 – 74) Request for Change Orders w/ Backup

APCO00036829 – APCO00044784	(ALL) Subcontract Accounting/Contract Files
APCO00044785 – APCO00051289	(ALL) Subcontractor Field Files
APCO00051290 – APCO00052152	Project Manual (Dated 5-25-07)
APCO00052153 – APCO00052407	Red Line Drawings – Volume 1 Architectural
APCO00052408 – APCO00052435	Red Line Drawings – Volume 1 Civils
APCO00052436 – APCO00052472	Red Line Drawings – Volume 1 Landscape
APCO00052473 – APCO00052537	Red Line Drawings – Volume 2 Structural
APCO00052538 – APCO00052575	Red Line Drawings – Volume 2 Mechanical
APCO00052576 – APCO00052610	Red Line Drawings – Volume 2 Plumbing
APCO00052611 – APCO00052666	Red Line Drawings – Volume 2 Electrical
APCO00052667 – APCO00052926	Submittals – 16000-01 Electrical Switchgear
APCO00052927 – APCO00053101	Submittals – 16000-02 Electrical Switchgear
APCO00053102 – APCO00053598	APCO Job File – Part 1
APCO00053599 – APCO00053877	APCO Job File – Part 2
APCO00053878 – APCO00053947	PCI Group / Hill International – File 2
APCO00053948 – APCO00054067	Acceleration Recovery Schedule
APCO00054068 – APCO00054143	Monthly Update 3/5/08
APCO00054144 – APCO00054258	Monthly Update 6/2/08
APCO00054259 – APCO00054425	TIA – Bldg. 8 & 9 Delays
APCO00054426 – APCO00054462	TIA – Bldg. 7 Steel Delays
APCO00054463 – APCO00054603	TIA – Bldg. 2 & 3 Delays
APCO00054604 – APCO00055516	Atica – Plan Comparison's
APCO00055517 – APCO00055909	Drawing Change Study
APCO00055910 – APCO00055923	Jordan & Skala
APCO00055924 – APCO00056087	OZ Architecture
APCO00056088 – APCO00056165	ASI's – Part 2
APCO00056166 – APCO00056232	Clark County Building Dept.
APCO00056233 – APCO00056250	SCS Engineers
APCO00056251 – APCO00058101	Brian Benson Field Copy Drawings
APCO00058102 – APCO00059044	MISC. Revision Drawings – Part 1
APCO00059045 – APCO00059091	NV Power & Framing Drwgs.
APCO00059092 – APCO00060647	MISC. Revision Drawings – Part 2
APCO00060648 – APCO00060728	Chin C Chen – Las Vegas Engineering

APCO00060729 – APCO00060819	Inspections II
APCO00060820 – APCO00061089	Meeting Minutes
APCO00061090 – APCO00061117	CCD's
APCO00061118 – APCO00061159	Elevator & Floor Penetrations
APCO00061160 – APCO00063402	Files from P.M. Joe Dehaas's Office
APCO00063403 – APCO00063518	Lloyd's Policy
APCO00063519 – APCO00064949	Structural Clarifications – Part 1
APCO00064950 – APCO00065463	Structural Clarifications – Part 2
APCO00065464 – APCO00065697	SWPPP
APCO00065698 – APCO00065893	BLDG. 8 Options & Flooring
APCO00065894 – APCO00066082	BLDG. 9 Options & Flooring
APCO00066083 – APCO00066234	BLDG. 9 Options & Upgrades
APCO00066235 – APCO00066981	Option Proposals
APCO00066982 – APCO00067090	Soils Report
APCO00067091 – APCO00067923	Steel Drwgs – HA Fabricators
APCO00067924 – APCO00068864	Steel Drwgs – HI TECH
APCO00068865 – APCO00069069	Structural Calculations – BLDG Type III #7 – Part 1
APCO00069070 – APCO00069227	Structural Calculations – BLDG Type III #7 – Part 2
APCO00069228 – APCO00069703	Structural Calculations – BLDG Type II #2 & 3 – Part 1
APCO00069704 – APCO00070142	Structural Calculations – BLDG Type II #2 & 3 – Part 2
APCO00070143 – APCO00070364	Structural Calculations – BLDG Type III #7 – Part 3
APCO00070365 – APCO00070587	Structural Calculations – BLDG Type III #7 – Part 4
APCO00070588 – APCO00071002	Structural Calculations – BLDG Type II #2 & 3 – Part 3
APCO00071003 – APCO00072519	Submittals – Drawer 4 (Steel Shop Drawings)
APCO00072520 – APCO00073344	Submittals – Drawer 5 (Steel Shop Drawings)
APCO00073345 – APCO00073755	Submittals – HI TECH Bldg. 2 Drawings
APCO00073756 – APCO00074257	Submittals – HI TECH Bldg. 3 Drawings
APCO00074258 – APCO00074459	Submittals – Jeff Heit Fire Sprinkler Drwgs
APCO00074460 – APCO00076640	Steel Shop Drawings
APCO00076641 – APCO00077424	Steel Shop Drwgs - BLDG. 7
APCO00077425 – APCO00078837	Wet Stamps, NCR's



1 RTRAN

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4
5 DISTRICT COURT
6 CLARK COUNTY, NEVADA

7 APCO CONSTRUCTION,
8 Plaintiff,

CASE NO: 08A571228

DEPT. XIII

9 vs.

10 GEMSTONE DEVELOPMENT
11 WEST, INC.,

12 Defendant.

13 BEFORE THE HONORABLE MARK R. DENTON, DISTRICT COURT JUDGE
14 THURSDAY, JANUARY 11, 2018

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

17 APPEARANCES:

18 For the Plaintiff:

MARY E. BACON, ESQ.
CODY S. MOUNTEER, ESQ.

19
20 For the Counter Defendant:

I-CHE LAI, ESQ.

21 For Lien Claimants:
22 (Appearing telephonically)

ERIC B. ZIMBELMAN, ESQ.

23 For the Intervenor:

JOHN B. TAYLOR, ESQ.
RICHARD L. TOBLER, ESQ.

24
25 RECORDED BY: JENNIFER GEROLD, COURT RECORDER

1 **Las Vegas, Nevada; Thursday, January 11, 2018**

2 [Proceeding commenced at 9:59 a.m.]

3
4 THE COURT: Okay. Now, I go to page 28, APCO
5 Construction versus Gemstone Development. It starts on page 28 and
6 with the caption and the caption goes to page 45, okay.

7 THE MARSHAL: I need to get Mr. Zimbelman on the phone,
8 Judge.

9 THE COURT: Are you getting Mr. Zimbelman on the phone?
10 All right. APCO Construction versus Gemstone Development
11 West, Inc. Please state appearances of counsel.

12 MR. MOUNTEER: Good morning, Your Honor, Cody
13 Mounteer on behalf of APCO Construction.

14 MS. BACON: Mary Bacon on behalf of APCO Construction.

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

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

18 MR. TOBLER: Rich Tobler on behalf of National Wood
19 Products.

20 THE COURT: And on the telephone.

21 MR. ZIMBELMAN: Your Honor, Eric Zimbelman on behalf of
22 the Peel Brimley lien claimants and thank you for accommodating my
23 need to appear by telephone today.

24 THE COURT: All right. That's fine. All right. It's -- we've got
25 Plaintiff's motion for reconsideration of Court's order granting Peel

1 Brimley lien claimants partial motion for summary judgment to preclude
2 defenses based on pay-if-paid provisions; it's Camco's joinder to that
3 motion; and it's Plaintiff's motion for reconsideration of Court's order
4 granting Zitting Brothers Construction, Inc.'s partial motion for summary
5 judgment. All right. Go ahead.

6 MS. BACON: Good morning, Your Honor. I'll take -- can I
7 take the Peel Brimley motion first?

8 THE COURT: Sure.

9 MS. BACON: Okay. Essentially, the motion is really boiled
10 down to one key case in that we argue that in the Peel Brimley motion
11 and in this Court's decision, in erred on relying on the *Lehrer* case. In the
12 *Lehrer* case, the Nevada Supreme Court specifically decided mechanic's
13 lien waivers and pay-if-paid language in conjunction with the mechanic's
14 lien waiver, the *Lehrer* Court did not decide a simply pay-if-paid language
15 without a mechanic's lien waiver.

16 The only case that we have found or the Nevada Supreme
17 Court addresses pay-if-paid language is the *Padilla* case. And in that
18 case, which was very similar to our case, there was an owner payment
19 condition precedent in which the subcontractor would not -- sorry, the
20 general contractor's payment to the subcontractor was not triggered until
21 the owner paid the general contractor. And so for those reasons, we're
22 seeking reconsideration.

23 Essentially, it is our opinion that in a labor or mechanic's lien
24 the Nevada Supreme Court has decided that that has to be decided on a
25 case-by-case basis. And in those cases, a mechanic's lien -- well, when

1 a mechanic's lien waiver is contained in a contract, the subcontractor still
2 has a remedy, that would be to pursue the general. In the instance of the
3 pay-if-paid language combined with the waiver of mechanic's lien, the
4 sub has no remedy. They cannot leave the property. They cannot
5 pursue the general.

6 But in the event of the pay-if-paid language, which is really the
7 owner payment precondition, the subcontractor still has the ability to lien
8 the property which is a remedy. And so in this case, the parties have
9 agreed, they're sophisticated parties, they agreed to --

10 THE COURT: What effect does a lien have if the agreement
11 that it secures is unenforceable?

12 MS. BACON: It was not immediately unenforceable and,
13 obviously, not within contemplation of the parties. The lien -- they were
14 still allowed to pursue their lien rights. And I think what's important to
15 note in this case is, those parties did pursue those lien rights and the
16 general contractor, APCO, spearheaded and financed those rights. So it
17 shows good faith on all behalf.

18 APCO was not in any instance trying to prohibit these lien
19 claimants from getting paid. It wanted to; it helped them; it wanted to get
20 paid as well. Within the subcontract, it was merely allocating the risk and
21 protecting itself from being the owner's lender which is not a general
22 contractor's job.

23 THE COURT: Yeah, I think you made the point in your paper
24 that it was, in effect, they were guaranteeing the obligation that -- but they
25 actually have a contract directly with the -- it's not a guarantee contract,

1 it's a direct contract between the subcontractor and the contractor, so. I
2 don't think they're stepping into the shoes of being a guarantor.

3 MS. BACON: Correct. Correct. But it would make them the
4 effective guarantor of the lender if they were the only party held
5 responsible. And within the subcontracts, at least at issue in this case,
6 the very sophisticated business parties agreed to these conditions.
7 APCO specifically agreed to these provisions, in the event that something
8 happened where the owner wasn't paying.

9 So this was not a waiver that said, look, regardless of
10 whatever happens on the job, if it's APCO's fault, if something else
11 doesn't come in, there's no remedy. It's saying if the owner doesn't pay
12 us, we can't pay you and they agreed to that. And so when the Nevada
13 Supreme Court and this Court has analyzed that situation --

14 THE COURT: Well, I don't think *Padilla* was even close to a
15 pay-if-paid scenario.

16 MS. BACON: In that case, I believe, the subcontract said that
17 the general would get -- I'm sorry, the subcontractor would get paid ten
18 days after the general was paid for the -- sorry, the owner paid the
19 general for the subcontractor's work.

20 In this case, the subcontract does not say we're going to pay
21 you if we get paid. It says, as a condition precedent to payment, we have
22 to first receive your payment from the owner, then we will pay you. So
23 it's very similar in that the owner's payment was a precondition. So
24 regardless if that was ten days or undefined in that context, it was simply,
25 we need to receive the owner's check before we have the money to pay

1 you.

2 THE COURT: But in that case, the fact of non-payment had to
3 do with the fact that the construction was defective. They didn't, I mean,
4 it had -- didn't have anything to do with pay-if-paid.

5 MS. BACON: So in -- in that case, there was also the issue of
6 whether or not the work was defective, but the Supreme Court, when it
7 affirmed your decision said, because the owner never accepted the work
8 and because payment was never made to the subcontractor --

9 THE COURT: Well, if payment had been made that would
10 have been an indication that the owner had accepted the work.

11 MS. BACON: Absolutely. But the Supreme Court found on
12 two separate basis as two conditions precedent to payment and made
13 the point to say then payment never became due under 624 or under the
14 subcontract. So it didn't say just because the work was deficient and the
15 owner didn't accept it, it said for these two reasons; and so our argument
16 is that this case is the exact same as *Padilla*. There was owner condition
17 -- sorry, owner payment precondition to the subcontractor receiving
18 payment and it was not met.

19 THE COURT: All right.

20 MS. BACON: And at this point -- in other briefing, and I'm
21 sure at trial, we'll be able to argue that the owner couldn't accept the
22 work because the project was shut down and other things, but as
23 relevant to today's pay-if-paid provisions, I believe that it would be correct
24 for this Court to analyze our situation under the *Padilla* analysis as
25 compared to the pay-if-paid learner analysis which did not account for

1 this situation.

2 THE COURT: Okay.

3 MS. BACON: Thank you, Your Honor.

4 THE COURT: So should I also hear the Zitting Brothers'
5 motion before I hear from Defendant or should I take these piecemeal?

6 MS. BACON: I was thinking, it might be easier to keep them
7 separate and then also Eric, oh, sorry, Mr. Zimbelman and National
8 Wood might be able to leave 'cause they're not really involved in the
9 Zitting motion.

10 THE COURT: Okay. Response.

11 MR. ZIMBELMAN: Your Honor, Eric Zimbelman here. Would
12 you like me to proceed?

13 THE COURT: All right. Go ahead.

14 MR. ZIMBELMAN: So on behalf of the Peel Brimley lien
15 claimants -- and I -- just listening to Your Honor's reaction to argument by
16 APCO's counsel, it doesn't seem you're inclined to grant reconsideration
17 or should you, but if you are and I'll respond, really, to it this way. We've
18 had this exact same oral argument not long ago in front of you, before
19 you granted the motion. They brought up the *Padilla* case at that time. I
20 responded at that time.

21 *Padilla* is clearly not the same case as we have here. There
22 are no allegations pertaining to defective work or nonconforming work. In
23 fact, there's motions in limine that have been granted with respect to
24 those issues. The simple fact is is that NRS 624.624 requires payment to
25 be made promptly pursuant to the statute. If you say the payment is not

1 due until we get paid, that's pay-if-paid. And therefore, you can
2 effectively avoid the intent purpose of 624.624 by making your payment
3 always due when payment is made.

4 In other words, incorporate pay-if-paid into your agreement.
5 This is plainly not the intent or purpose of the Supreme Court's decision
6 in what they're calling the *Lehrer* case, I like to call the *Bullock* case and
7 that is very good law as indicated in my opposition brief based upon the
8 *Cashman* case which is also a recent and published Supreme Court
9 decision. So the simple fact is they want to rely on pay-if-paid, you have
10 ruled properly that it isn't a valid defense and you should not reconsider
11 your decision. Thank you.

12 MR. TAYLOR: Yes, Your Honor, just briefly to add to Mr.
13 Zimbelman's comments. In the *Padilla* case, the Supreme Court first
14 looked at the breach of contract claim and determined that there was no
15 breach of contract because the work was defective and it affirmed the
16 imminent trial judge in -- in that regard. There's no mention in the breach
17 of contract analysis of the pay-if-paid language. It's in the next section
18 where it's talking about the negligence per se claim that there's a
19 tangential reference to the pay-if-paid issue.

20 Basically, what the Supreme Court said was, since you
21 already lost on the contract claim, with no mention of pay-if-paid, there
22 could be no negligence per se and the reference to the language in the
23 contract is basically throwaway language that wasn't the reason for the
24 Supreme Court's decision. *Padilla* is not applicable here. It shouldn't
25 warrant reconsideration or a change of the prior ruling. Thank you.

1 THE COURT: All right. Thank you.

2 MS. BACON: First, Your Honor, the *Cashman* case that Mr.
3 Zimbelman alluded to in the three categories of cases I mentioned
4 earlier, the mechanic's lien case, the case of opinion of the mechanic's
5 lien waiver with pay-if-paid, and a pay-if-paid language as a third
6 category, that was in the first category. It was a mechanic's lien waiver
7 case and -- and it doesn't -- the situation is not similar to this case at all.
8 If the Court is to decide this case, it should be under the only similar case
9 any of the parties have presented to this Court where it was just the
10 quote/unquote pay-if-paid language, I like to call it a owner payment
11 precondition; regardless, the *Cashman* case is inapposite for that reason;
12 it didn't even have pay-if-paid language in it.

13 There was a reference to -- and this is unenforceable, but it
14 was solely a mechanic's lien waiver case. And that case was decided
15 before *Padilla*, so to the extent that -- the Court had the benefit of that
16 case before it decided the *Padilla* case and still decided the *Padilla* case
17 as payment never became due under either 624.624 or the subcontract.
18 To the extent that there were arguments regarding that, you know, that
19 wouldn't be relevant because it's not a negligence per se case, those
20 arguments would have no merit.

21 Additionally, this Court found in the *Padilla* case at the trial
22 court level, contrary to Mr. Zimbelman's argument that 624.624 is
23 designed to ensure that the general pays sub -- pays subcontractors
24 promptly after the general contractor receives payment from the owner
25 associated with the work performed on the subcontract. So that goes to

1 our earlier position that 624.624 is not to turn general contractors into the
2 owner's lender or the owner's guarantor as this Court has previously
3 found; 624.624 was designed to ensure that its subcontractors are
4 promptly paid after the general receives payment for their work.

5 And to National Wood's point, he said it was more than a two-
6 step analysis that first they decided that -- that the work was deficient,
7 that the owner never accepted it so they didn't hit the second subject of
8 whether or not the owner precondition was that owner payment
9 precondition was valid. That analysis or argument is not supported in the
10 text or the decision at all.

11 The Court -- if it was not deciding the decision on two reasons,
12 it certainly would not have stated the second one. It, instead, said,
13 because the party's subcontract contained the scheduled payments that
14 required *Padilla* to be paid within ten days after the owner accepted
15 *Padilla's* work and paid *Big-D* for the work, it is undisputed that the owner
16 never accepted *Padilla's* work and never paid *Big-D* for *Padilla's* work.
17 The district court correctly found the payment never became due to
18 *Padilla* under the subcontract or under NRS 24 -- sorry, 624.624.

19 THE COURT: Okay. Thank you. I'll now hear the Zitting
20 motion.

21 MS. BACON: I'll take one second. Your Honor, this motion
22 was 39 pages, is there something in particular that you wanted me to
23 address or should I just run through it?

24 THE COURT: No, it's well-briefed. I think I understand what
25 your intentions are.

1 MS. BACON: Okay. I'll -- I'll give you a couple of highlights
2 then then --

3 THE COURT: Okay.

4 MS. BACON: -- and I'll let -- let me know if you have any
5 questions.

6 One of the key things that APCO would like to point out is
7 there were at least eight disputed material facts in APCO's original
8 opposition that were not addressed in -- or at least, not adequately
9 addressed, in the reply. And so to the extent that those were not decided
10 and those were important things including, but not limited to, whether or
11 not the drywall was complete, whether or not Zitting actually invoiced
12 APCO for these change orders that it allegedly submitted on the job.
13 APCO wasn't on site so who we gave these change orders to, whether or
14 not they went to Camco, whether or not they were approved. It also
15 represented that it didn't do any work for Camco in that reply and later at
16 the deposition, we found out that that was not accurate.

17 So not only did we point out these eight disputed material
18 facts that they didn't address in their original reply, we think that is very
19 important. And then, additionally, once the -- as this Court knows, once
20 everything was briefed, the parties let you know that they had entered
21 into an agreement to attempt to save money and funds for settlement and
22 had delayed some discovery. And this Court ordered discovery
23 reopened as to depositions for certain parties that had previously agreed
24 to that. And in delaying discovery so much, the parties understood they
25 were taking a risk. They were taking a risk that they were leaving facts

1 on the table that nobody knew and they were delaying them to the end to
2 save money.

3 So APCO understood this. Zitting understood this. And the
4 parties still agreed, with their attorneys, to delay this discovery. When we
5 realized, or when this Court realized and the parties realized, that
6 settlement may not be possible and we were at calendar call, the Court
7 reopened discovery. At that deposition, the party -- Zitting was asked
8 about several of the facts and material statements that it submitted to this
9 Court in its motion for summary judgment as, I believe it was, Exhibit A to
10 the motion. It was an affidavit by Mr. Sam Zitting. Mr. Zitting in that
11 affidavit confirmed to this Court all of the preconditions to precedent --
12 sorry, preconditions to payment were met including the drywall was
13 complete. He had submitted closeout documents.

14 Other preconditions, at his deposition and you have the
15 testimony in your briefing so I'm not going to go through it in detail, he
16 basically confirmed he's not aware of whether or not they were closeout
17 documents. He's not aware of whether -- he said, oh, it does look like
18 certain change orders were rejected. He said that oh he did now do work
19 for Camco. So unfortunately, I believe Zitting waived their argument to
20 say oh this is all coming out at the last second. Because it specifically
21 agree let's delay these depositions, let's save money for settlement. So
22 in agreeing to do that, it understood that new depositions or new
23 evidence, it was clear that new evidence was going to come out in
24 discovery.

25 This wasn't just an exercise to allow lawyers to bill for

1 depositions and go through documents. We prepared. We were ready.
2 We got the information we needed. If you were going to make an
3 argument that you're biased, because everything was waiting until -- it
4 was postponed until the end, then you shouldn't have entered into that
5 agreement in the first place. If you were uncomfortable as an attorney or
6 as a client, then you should have said no. We need to comply with this
7 and instead they agreed.

8 Instead they said, yes, not once, but twice. We noticed their
9 deposition. Twice that deposition was postponed for settlement
10 discussions. If they were interested in having that information and relying
11 on whichever defense that was in interrogatory, one, there were more
12 formal ways to go ahead and try and strike that such as motion for
13 summary judgment and/or motion to strike. And instead, sorry, they're
14 relying on that answer to an interrogatory when Zitting actually asked our
15 PMK -- there were two PMKs from APCO for this project.

16 The P -- one of the PMK's testified they didn't meet the
17 conditions precedent to payment. They didn't meet 3.8. We were not
18 paid. So at that point, if Zitting was relying on APCO's response when
19 interrogatory, they should have said, whoa, what's going on here? Now,
20 you're testifying that there are other reasons. You're testifying that there
21 are other affirmative defenses. You were testifying that there's 16 more
22 reasons that we are not paid.

23 And at that point, they should have been on notice to say one,
24 we need to either speak with our client more clearly about these things
25 and confirm that we have met the conditions precedent to payment. Or

1 two, we need to go ahead and confirm these because there's -- they
2 shouldn't be allowed to notice APCO's PMK, let them talk about other
3 defenses that we're asserting, and then say they have no notice of these
4 defenses. As is copied and pasted for, I think, six pages in my motion,
5 we testified about those defenses at length.

6 THE COURT: Okay.

7 MS. BACON: Oh, and to the extent that this Court wants to --
8 to not grant this motion for reconsideration, we believe that it would be
9 appropriate to, and would be necessary to, have an evidentiary hearing
10 on the *Young* factors because, essentially, what Zitting has argued are --
11 is and what was granted is case terminating sanctions for failing to
12 update an interrogatory. And so we believe that more would be
13 necessary because we believe from the Court's order that -- and Zitting
14 will likely argue this, that our supplemental brief was not taken into
15 account because it was quote/unquote too little, too late.

16 However, any argument, I believe, they're going to make
17 regarding that it was delayed, they waived when they agreed to it. They
18 waived when they agreed with APCO's counsel to postpone that
19 deposition. They waived it when they came into this courtroom and said,
20 yes, we did agree to that. We're going to go ahead and get deposed.
21 They waived it when this Court ordered that they had to be deposed. We
22 were not just supposed to sit on that information and do nothing. And to
23 the extent that it's relevant, Zitting's counsel requested that the
24 deposition be continued.

25 THE COURT: All right.

1 MS. BACON: Thank you, Your Honor.

2 THE COURT: Thank you.

3 MR. LAI: Your Honor, as Mr. Zimbelman mentioned earlier,
4 the motion before this Court is a reconsideration motion. The only way
5 for this Court to reconsider the motion if -- if APCO's counsel
6 demonstrates a clear error with this Court's decision and as Ms. Bacon
7 has argued, these issues have arisen at the prior hearing so these -- this
8 Court has already considered the prior arguments. Nothing new has
9 come out and it had not shown that this Court made a clear mistake in
10 precluding all evidence other than the pay-if-paid defense.

11 And I'll kind of briefly highlight some of the responses in Ms.
12 Bacon's argument. On the -- the preclusion of all the other evidence,
13 there needs to be either an absence of substantial justification for them
14 not to disclose the -- the factual grounds in response to our 2010
15 interrogatories.

16 Now, the fact that they mention all these continuances, these
17 waivers, those occurred in 2017, seven years after the fact, after APCO
18 has already admitted three separate occasions that they're only relying
19 on the pay-if-paid provisions. Seven years later, witnesses are gone,
20 memories have faded, we have proceeded for seven years on this barely
21 narrow defense opting not to conduct extensive discovery seven years
22 prior, and all of a sudden, being blindsided 2017 for the first time that
23 there's the other factual basis for their -- for their affirmative defenses.

24 We even asked them in our 2010 interrogatories, what is the
25 basis for this failure to comply with condition precedent? That was

1 interrogatory number ten in our 2010 interrogatory. They said in their at
2 response that they only relied on the pay-if-paid provision. So since 2010
3 and consistently, we've been asking them just to confirm we were only
4 dealing with the pay-if-paid provision and their very first 30(b)(6) dep --
5 PMK and 2017 confirmed that.

6 Once we heard all of that, we again just followed through,
7 prepared a very simple MSJ, rebutting solely the pay-if-paid provision,
8 not being enforceable and that's all we did. They've never shown that
9 this was not prejudicial to the Zitting Brothers, they can't, and under
10 similar facts, a federal court in the *Inamed* decision that we cited to this
11 Court, had precluded that defense. So there's no clear error. This
12 Court's decision -- and it's certainly not case-ending.

13 In the *Bahena* case, the Supreme Court defined case-ending
14 as where the sanctions precluded all other litigation or any other issues.
15 This Court let them proceed on the sole issue of the pay-if-paid provision
16 because that's what APCO wanted to proceed with. That is not case-
17 ending. The fact that they lost on the issue does not make the preclusion
18 itself case-ending. And on that basis, we submit our briefs.

19 THE COURT: All right. Thank you.

20 MS. BACON: Just a couple of key points. I'd just like to
21 incorporate our pay-if-paid arguments as part of the last motion in this
22 one which will be relevant. And as the Court's order read, it's at least my
23 understanding that, that new evidence was not considered so our new
24 evidence would be that deposition testimony, that discovery, that we
25 were allowed to conduct that the parties agreed to that Court ordered that

1 as the Court's order reads now, my understanding, was not considered in
2 the last decision.

3 And so what I'm -- what our position is now is that is the new
4 evidence. It was error. When you compare the deposition testimony as
5 presented in our motion to the affidavit that his client submitted to this
6 Court, you can see that there are just clear inconsistencies. And to the
7 extent that Zitting claims more prejudice, they had the information within
8 their knowledge the entire time.

9 They could've asked their client, was the drywall completed?
10 He would've said no 'cause we asked him and he honestly answered, in
11 our deposition, was the drywall completed, and he said no. They
12 could've asked him, did you submit closeout documents? And he
13 would've said no. Or he would've at least -- in his deposition, I don't
14 believe he exactly said no, but he said something to the effect of, I'm not
15 aware of them being submitted and also I'm not aware of any documents
16 in my file.

17 So to the extent that they filed an affidavit with this Court to
18 grant that motion for summary judgment saying it complied with those
19 five conditions precedent, they knew when they signed -- they should've
20 at least known then when they just sent this draft affidavit to their client
21 saying please sign this. Or please check it for factual accuracy. Is it
22 correct?

23 Well, assuming that Mr. Zitting would've given the same
24 responses that he gave to APCO in his deposition, he would not have
25 been able to sign that. His affidavit he submitted for -- to this Court was

1 directly contradictory to his deposition testimony and I think that
2 deposition testimony needs to be taken into account, at least for
3 purposes of this motion, because the Court ordered the discovery, Zitting
4 agreed to delay the discovery. Any prejudice that they're suffering is
5 because they asked us to delay the deposition, and we did.

6 THE COURT: All right. Thank you. All things considered, the
7 respective motions and joinder are denied. So I'll ask counsel for, what,
8 Peel Brimley lien claimants and Zitting to submit proposed orders.

9 MR. LAI: Yes, Your Honor.

10 THE COURT: All right. Thank you.

11 MR. LAI: Thank you, Your Honor.

12 MS. BACON: Thank you.

13 MR. TAYLOR: Your Honor, I have one other -- one other
14 matter.

15 THE COURT: I'll be seeing you -- I'll be seeing you on
16 Tuesday because I've signed an order shortening time on a motion that's
17 seeking a stay, okay, so. I just signed that this morning, so it's going to
18 have to be served and everything.

19 MR. TAYLOR: Well, one other quick housekeeping matter.
20 I'm here pro hac vice. Mr. Tobler has been ably assisting me. I had
21 another trial in Las Vegas a few years back and Judge Johnson agreed
22 that that for purposes of trial, I would be at the trial and Mr. Tobler would
23 merely be available should either I need him or should she think that
24 somehow I was needing that assistance. I've talked to some of the
25 counsel and no one has indicated any problem with that. I'd just like to

1 see how this Court whether it would allow me to appear with Mr. Tobler
2 merely being available and not in the courtroom.

3 THE COURT: Any objection?

4 MR. MOUNTEER: No objection, Your Honor.

5 MS. BACON: No objections, Your Honor.

6 THE COURT: I'll allow it.

7 MR. TAYLOR: Thank you, Your Honor.

8 THE COURT: Okay. Thank you.

9 MS. BACON: Your Honor, one -- one other procedural matter,
10 I believe that [indiscernible] set this motion for attorney's fees hearing
11 next week on a Thursday. Or it was signed into the Zitting order. Can
12 you --

13 MR. LAI: It was, Your Honor. And the parties asked for
14 briefing 30 days from the date of the order was signed which was in late
15 December of which would be in conflict with the scheduled hearing. And
16 I think the parties are in agreement that whether the Court can continue
17 the hearing to allow adequate briefing, especially with counsel here
18 preparing for trial, we think it would be fair for them to have additional
19 time to respond.

20 THE COURT: Okay.

21 MS. BACON: And we would appreciate that immensely.

22 THE COURT: When would you like to have it continued to?

23 MR. LAI: I'll defer to counsel like I said 'cause she's, again, is
24 prepping for trial, so.

25 MS. BACON: Could you submit the motion in the -- in the next

1 two weeks --

2 MR. LAI: Yeah.

3 MS. BACON: -- and then we'll go on a normal briefing
4 schedule and Your Honor can assign a date?

5 THE COURT: Okay. Well, it's already on calendar for the
6 18th, right?

7 MS. BACON: Yes.

8 MR. LAI: Yes, Your Honor.

9 THE COURT: So --

10 MS. BACON: Oh could -- could we move it out a month?

11 THE COURT: Sure.

12 MS. BACON: Or six weeks?

13 THE COURT: Any problem?

14 MR. LAI: That works for us. Whatever counsel wants.

15 THE COURT: Let's put it in February sometime. Hold on a
16 second.

17 MR ZIMBELMAN: Your Honor, Eric Zimbelman on the phone.
18 May I ask a question, please?

19 THE COURT: Yes.

20 MR. ZIMBELMAN: I heard something about a motion for a
21 stay, could I just ask whichever party is submitting that to send out
22 courtesy copies given that apparently a hearing is set for Tuesday?

23 MR. MOUNTEER: Yeah. It'll be sent out this morning, Your
24 Honor. We just found out it was signed.

25 THE COURT: Did you hear that? It'll be sent this morning.

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MR. ZIMBELMAN: Thank you very much.

THE COURT: Now the date for the hearing on the motion for attorney's fees?

THE CLERK: March 1st.

THE COURT: What's that?

THE CLERK: March 1st.

THE COURT: March 1st okay for that hearing on that motion for attorney's fees?

MR. LAI: That works for us.

MS. BACON: That works for us.

THE COURT: Do I need to set a briefing schedule or can you just --

MR. LAI: The briefing schedule is actually set in the order, but if the Court will like, we'll defer to this Court's schedule.

MS. BACON: We'll work it out.

THE COURT: Okay. Thank you. Appreciate that.

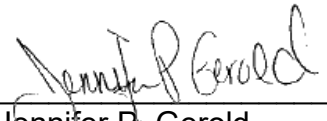
MS. BACON: Thank you, Your Honor.

THE COURT: Thank you.

[Proceeding concluded at 10:27 a.m.]

* * * * *

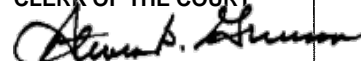
ATTEST: I do hereby certify that I have truly and correctly transcribed the audio/video proceedings in the above-entitled case to the best of my ability.



Jennifer P. Gerold
Court Recorder/Transcriber

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Attorneys for Various Lien Claimants

DISTRICT COURT

CLARK COUNTY, NEVADA

APCO CONSTRUCTION, a Nevada
corporation,

Plaintiff,

vs

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

Defendants.

AND ALL RELATED MATTERS.

LEAD CASE NO.: A571228
DEPT. NO.: XIII

Consolidated with:

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

**ORDER DENYING APCO
CONSTRUCTION'S MOTION FOR
RECONSIDERATION OF ORDER
GRANTING PARTIAL SUMMARY
JUDGMENT PRECLUDING
DEFENSES BASED ON PAY-IF-PAID
AGREEMENTS**

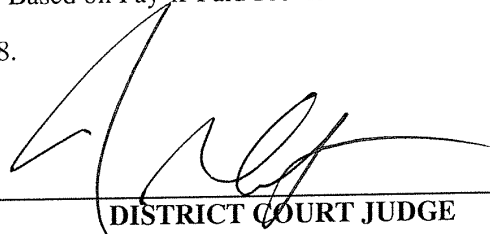
This matter came on for hearing January 11, 2018 before the Honorable Mark Denton in Dept. 13 on APCO Construction, Inc.'s Motion for Reconsideration of Court's Order Granting Peel Brimley Lien Claimants' Partial Motion for Summary Judgment to Preclude Defenses Based on Pay-if-Paid Provisions on an Order Shortening Time. Mary Bacon, Esq. of SPENCER FANE LLP appeared on behalf of Plaintiff APCO Construction, Inc. ("APCO"); Eric B. Zimbelman, Esq. of PEEL BRIMLEY LLP appeared on behalf of Peel Brimley Lien Claimants ('PB Lien Claimants'); and John Taylor, Esq. of CADDEN FULLER LLP appeared on behalf of National Wood Products, Inc. ("NWP").

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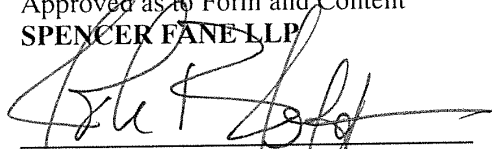
1 The Court having considered all of the pleadings and papers on file, and for good cause
2 appearing,

3 **IT IS HEREBY ORDERED, ADJUDGED AND DECREED** that APCO's Motion
4 for Reconsideration of Court's Order Granting Peel Brimley Lien Claimants' Partial Motion
5 for Summary Judgment to Preclude Defenses Based on Pay-if-Paid Provisions is denied.


6 Dated this 18th day of January, 2018.

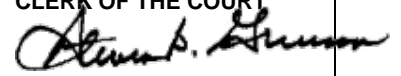
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9 
DISTRICT COURT JUDGE

10
11 Approved as to Form and Content
12 **SPENCER FANE LLP**

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21 *APCO Construction, Inc.*

22 Submitted by:
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Attorneys for Various Lien Claimants

DISTRICT COURT

CLARK COUNTY, NEVADA

APCO CONSTRUCTION, a Nevada
corporation,

Plaintiff,

vs

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

Defendants.

AND ALL RELATED MATTERS.

CASE NO.: A571228

DEPT. NO.: XIII

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

NOTICE OF ENTRY OF ORDER

PLEASE TAKE NOTICE that an Order Denying APCO Construction's Motion for
Reconsideration of Order Granting Partial Summary Judgment Precluding Defenses Based on
Pay-if-Paid Agreements was filed on January 19, 2018, a copy of which is attached as Exhibit A.

PEEL BRIMLEY, LLP

/s/ Eric Zimbelman
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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of PEEL BRIMLEY LLP and that on this 19th day of January 19, 2018, I caused the above and foregoing document entitled **NOTICE OF ENTRY OF ORDER** to be served as follows:

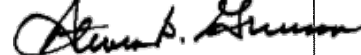
- ☐ by placing same to be deposited for mailing in the United States Mail, in a sealed envelope upon which first class postage was prepaid in Las Vegas, Nevada to the party(ies) and/or attorney(s) listed below; and/or
- ☒ to registered parties via Wiznet, the Court's electronic filing system;
- ☐ pursuant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

/s/ Amanda Armstrong
An Employee of Peel Brimley LLP

Exhibit A

PEEL BRIMLEY LLP
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CLERK OF THE COURT



ORDR

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Attorneys for Various Lien Claimants

DISTRICT COURT

CLARK COUNTY, NEVADA

APCO CONSTRUCTION, a Nevada
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Plaintiff,

vs

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

Defendants.

AND ALL RELATED MATTERS.

LEAD CASE NO.: A571228
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A571792, A574391, A577623, A580889,
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**ORDER DENYING APCO
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GRANTING PARTIAL SUMMARY
JUDGMENT PRECLUDING
DEFENSES BASED ON PAY-IF-PAID
AGREEMENTS**

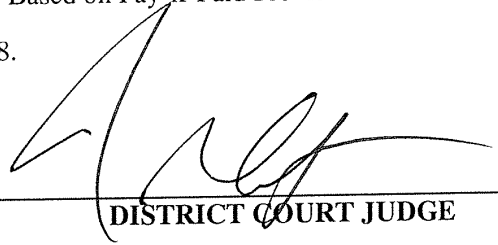
This matter came on for hearing January 11, 2018 before the Honorable Mark Denton in Dept. 13 on APCO Construction, Inc.'s Motion for Reconsideration of Court's Order Granting Peel Brimley Lien Claimants' Partial Motion for Summary Judgment to Preclude Defenses Based on Pay-if-Paid Provisions on an Order Shortening Time. Mary Bacon, Esq. of SPENCER FANE LLP appeared on behalf of Plaintiff APCO Construction, Inc. ("APCO"); Eric B. Zimbelman, Esq. of PEEL BRIMLEY LLP appeared on behalf of Peel Brimley Lien Claimants ('PB Lien Claimants'); and John Taylor, Esq. of CADDEN FULLER LLP appeared on behalf of National Wood Products, Inc. ("NWP").

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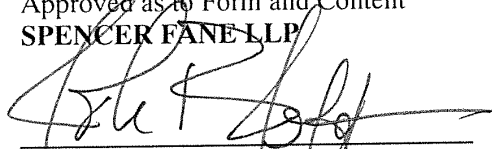
1 The Court having considered all of the pleadings and papers on file, and for good cause
2 appearing,

3 **IT IS HEREBY ORDERED, ADJUDGED AND DECREED** that APCO's Motion
4 for Reconsideration of Court's Order Granting Peel Brimley Lien Claimants' Partial Motion
5 for Summary Judgment to Preclude Defenses Based on Pay-if-Paid Provisions is denied.


6 Dated this 18th day of January, 2018.

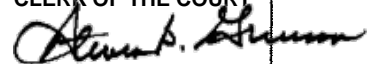
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DISTRICT COURT JUDGE

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21 *APCO Construction, Inc.*

22 Submitted by:
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1 **ORDR**

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4 I-CHE LAI, ESQ.

5 Nevada Bar No. 12247

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11 Jorge.Ramirez@wilsonelser.com

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13 Attorneys for Lien Clamant,

14 Zitting Brothers Construction, Inc.

15 **DISTRICT COURT**

16 **CLARK COUNTY, NEVADA**

17 APCO CONSTRUCTION, a Nevada
18 corporation,

19 Plaintiff,

20 vs.

21 GEMSTONE DEVELOPMENT WEST, INC., a
22 Nevada corporation,

23 Defendant.

CASE NO. 08A571228
DEPT. NO. XIII

Consolidated with:

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

24 AND ALL RELATED MATTERS

Date of Hearing: January 11, 2018
Time of Hearing: 9:00 a.m.

25 **ORDER DENYING APCO CONSTRUCTION, INC.'S MOTION FOR**
26 **RECONSIDERATION OF COURT'S ORDER GRANTING ZITTING BROTHERS**
27 **CONSTRUCTION, INC.'S PARTIAL MOTION FOR SUMMARY JUDGMENT**

28 On January 11, 2018, this Court heard APCO Construction, Inc.'s Motion for
29 Reconsideration of Court's Order Granting Zitting Brothers Construction, Inc.'s Partial Motion for
30 Summary Judgment. I-Che Lai of Wilson Elser Moskowitz Edelman & Dicker, LLP appeared at the
31 hearing for Zitting Brothers Construction, Inc. ("ZBCI"). Mary E. Bacon of Spencer Fane LLP and
32 Cody S. Munteer of Marquis Aurbach Coffing appeared for APCO Construction, Inc. ("APCO").
33 Having considered APCO's motion, the pleadings and papers filed in this case, and oral arguments
34 of counsel and finding good cause,

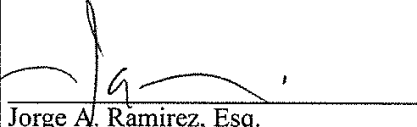
1251240v.1

1 **IT IS HEREBY ORDERED** that APCO's Motion for Reconsideration of Court's Order
2 Granting Zitting Brothers Construction, Inc.'s Partial Motion for Summary Judgment is denied.

3 Dated this 24th day of January, 2018.

4
5
6 
DISTRICT COURT JUDGE RA

7 Respectfully submitted by:

8
9 
Jorge A. Ramirez, Esq.

10 I-Che Lai, Esq.

11 **WILSON, ELSE, MOSKOWITZ, EDELMAN & DICKER LLP**

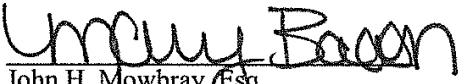
12 300 South Fourth Street, 11th Floor

13 Las Vegas, Nevada 89101

14 Attorneys for Lien Clamant,

15 Zitting Brothers Construction, Inc.

16 Approved as to form and content by:

17 

18 John H. Mowbray, Esq.

19 John Randall Jefferies, Esq.

20 Mary E. Bacon, Esq.

21 **SPENCER FANE LLP**

22 300 South Fourth Street, Suite 700

23 Las Vegas, Nevada 89101

24 and

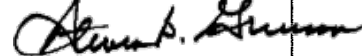
25 Cody S. Mounteer, Esq.

26 **MARQUIS AURBACH COFFING**

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28 Las Vegas, Nevada 89145

Attorneys for APCO Construction, Inc.



1 **MEMO**

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3 Nevada Bar No. 6787
4 I-CHE LAI, ESQ.
5 Nevada Bar No. 12247
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14 *Zitting Brothers Construction, Inc.*

15 **DISTRICT COURT**

16 **CLARK COUNTY, NEVADA**

17 APCO CONSTRUCTION, a Nevada
18 corporation,

19 Plaintiff,

20 vs.

21 GEMSTONE DEVELOPMENT WEST, INC.,
22 a Nevada corporation,

23 Defendant.

24 AND ALL RELATED MATTERS

CASE NO. A571228
DEPT. NO. XIII

Consolidated with:

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

Date of Hearing: March 1, 2018

Time of Hearing: 9:00 a.m.

25 **MEMORANDUM IN SUPPORT OF APCO CONSTRUCTION, INC.'S PAYMENT OF**
26 **ATTORNEYS' FEES, COSTS, AND INTEREST TO ZITTING BROTHERS**
27 **CONSTRUCTION, INC.**

28 Pursuant to this Court's December 29, 2017 order, Zitting Brothers Construction, Inc. ("Zitting"), a lien claimant, submits this memorandum in support of an award for \$213,376.00 in attorney's fees, \$8,475.95 in costs, and interest at the rate of 8.25% that has accrued on the \$750,807.16 award since April 30, 2009 to the present.¹ Both Zitting's contract with APCO Construction, Inc. ("APCO") and Chapter 108 of the Nevada Revised Statutes authorizes such amounts. Zitting explains this further in the accompanying memorandum of points and authorities,

¹ Under Nev. Rev. Stat. 108.237(2)(b), this interest rate re-adjusts on each subsequent January 1 and July 1 until the amount is fully paid.

1 which is supported by the attached exhibits, the record of this Court, and any oral argument that this
2 Court may entertain at the March 1, 2018 hearing on this issue.

3 Dated: January 29, 2018

4 WILSON ELSE MOSKOWITZ EDELMAN &
5 DICKER LLP

6 

7 Jorge Ramirez, Esq.
8 Nevada Bar No. 6787
9 I-Che Lai, Esq.
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14 Facsimile: (702) 727-1401
15 *Attorneys for Lien Claimant,*
16 *Zitting Brothers Construction, Inc.*

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 As this Court is well aware, this is a breach of contract and mechanics' lien case involving
4 the construction of the Manhattan West Condominiums (the "Project") in Las Vegas, Nevada. Since
5 2009, APCO has refused to pay Zitting the amount owed for Zitting's work on the Project, alleging
6 that it had no obligation under Nevada law and Zitting's contract with APCO to pay. Zitting
7 litigated this case for about 8.5 years before obtaining summary judgment for the entire amount
8 owed for the unpaid work, including attorney's fees, interest and costs—leaving only the issue of the
9 amount of the attorney's fees, cost, and interest rate.

10 Zitting now seeks \$213,376.00 in attorney's fees, \$8,475.95 in costs, and interest rate of
11 8.25% that later readjusts pursuant to Nev. Rev. Stat. 108.237. As set forth, the amount of attorney's
12 fees requested is reasonable under the *Brunzell* analysis. The amount of costs, including the costs to
13 perfect its mechanics' lien, is also necessary in Zitting's effort to prevail in this case. The interest
14 rate cannot be disputed, as it is clearly allowed under Nev. Rev. Stat. 108.237. Therefore, this Court
15 should award the requested amount of attorney's fees, cost, and interest.

16 **II. ARGUMENT**

17 **A. Zitting has incurred \$213,376.00 in attorney's fees in connection with this case,**
18 **which is reasonable under the *Brunzell* factors.**

19 This Court has already determined that Zitting can recover attorney's fees incurred in
20 obtaining recovery of the amount owed to Zitting. (Zitting MSJ Order² 10:15-16.) The sole issue is
21 the reasonable amount of such fees. (*Id.* 10:19-28.) In determining this amount, courts look to
22 applicable rule, statute, or contractual provision. *See Rhoden v. First Nat. Bank of Nevada*, 96 Nev.
23 654, 656, 615 P.2d 244, 245 (1980).

24 Both Nev. Rev. Stat. 108.237(1) and section 18.5 of Zitting's contract with APCO provides
25 the frame work for the recovery of attorney's fees. The statutory and contractual provisions allow
26 Zitting, as the prevailing party, to recover all attorney's fees incurred in connection with litigation of

27 ² Zitting cites the Findings of Fact, Conclusions of Law, and Order Granting Zitting Brothers Construction, Inc.'s Motion
28 for Partial Summary Judgment Against APCO Construction, entered by this Court on December 29, 2017, as "Zitting
MSJ Order."

1 the claims arising out of the contract. (*See* Ex. F at APCO00044606); *see also* Nev. Rev. Stat.
2 108.237(1). This provides for an award of \$213,376.00 in attorney's fees, which was the amount
3 incurred by Zitting in litigating this case. (Ex. A ¶ 5; Ex. B.)

4 This amount is reasonable. The *Brunzell* factors govern the evaluation of whether the
5 attorney's fees are reasonable:

6 (1) the qualities of the advocate: his ability, his training, education,
7 experience, professional standing and skill; (2) the character of the
8 work to be done: its difficulty, its intricacy, its importance, time and
9 skill required, the responsibility imposed and the prominence and
10 character of the parties where they affect the importance of the
11 litigation; (3) the work actually performed by the lawyer: the skill,
12 time and attention given to the work; (4) the result: whether the
13 attorney was successful and what benefits were derived.

14 *Brunzell v. Golden Gate Nat. Bank*, 85 Nev. 345, 349, 455 P.2d 31, 33 (1969). Although courts
15 consider each factor, no one factor predominates the consideration or "be given undue weight." *Id.*
16 An award of \$213,376.00 in attorney's fees satisfies these factors.

17 **1. The first *Brunzell* factor favors the amount of the requested attorney's**
18 **fees.**

19 As to the first factor, the qualities of the advocate, experienced attorneys from Wilson, Elser,
20 Moskowitz, Edelman & Dicker, LLP ("Wilson Elser") represented Zitting throughout this litigation.
21 Michael Edwards, Jorge Ramirez, Reuben Cawley, and I-Che Lai performed the bulk of the work to
22 obtain the favorable results for Zitting. (*See* Ex. B.) Michael Edwards is a twenty-second-year
23 attorney who was the Managing Partner of Wilson Elser's Las Vegas office and the original
24 supervising partner on this case. He has extensive experience litigating construction and breach of
25 contract cases. Jorge Ramirez is a nineteenth-year attorney who is the Deputy Managing Partner of
26 Wilson Elser's Las Vegas office and the partner replacing Mr. Edwards in this case. Mr. Ramirez
27 also has extensive experience litigating construction and breach of contract cases, including
28 successfully arguing the granting of summary judgment in a mechanic lien case, similar to this case,
before the Nevada Supreme Court. Reuben Cawley is twelfth-year attorney who was a former
partner of Wilson Elser's Las Vegas office and the former attorney who performed the day-to-day
responsibilities on this case. Mr. Cawley has years of experience litigating construction and breach
of contract cases, including assisting Jorge Ramirez with the Supreme Court appeal. I-Che Lai is a

1 ninth-year associate attorney who spent almost his entire legal career litigating case involving a
2 breach of contract. Mr. Lai has replaced Mr. Cawley's role in this case. Counsel for Zitting
3 unequivocally have the professional standing and skill justifying the reasonable rate and amount of
4 attorneys' fees sought by Zitting in this case.

5 **2. The second *Brunzell* factor favors the amount of the requested attorney's**
6 **fees.**

7 As to the second factor, the character of the work, they both more than supported the
8 requested amount of attorney's fees. Early on in this case, this Court deemed this case complex,
9 (NRCP 16.1(f) Order³), as it involved "complex issues, multiple parties, difficult legal questions, or
10 unusual proof problems...." Nev. R. Civ. P. 16.1(f). The parties ultimately disclosed tens of
11 thousands of pages of documents and prepared briefing on numerous motions. The case also
12 involved a writ petition before the Nevada Supreme Court, resulting in a published decision. *See*
13 *generally In re Manhattan W. Mech.'s Lien Litig.*, 131 Nev. Adv. Op. 70, 359 P.3d 125 (2015). The
14 fact that APCO incurred about \$900,000.00 in attorney's fees further shows the complex character of
15 this case. (Mot. for Recon.⁴ 25:6-7.) Therefore, the character of the work supports the reasonableness
16 of the rate charged and the attorney's fees sought to be recovered by Zitting.

17 **3. The third *Brunzell* factor favors the amount of the requested attorney's**
18 **fees.**

19 As to the third factor, the work actually done, they more than support the requested amount.
20 Zitting's attorneys have spent 990.50 hours over 8.5 years to pursue recovery of the amount owed.
21 (Ex. B.) The hourly rate for the attorneys is a blended \$225.00 per hour, and the hourly rate for the
22 paralegals is \$125.00. (*Id.*) These hourly rates are well within the range of customary and reasonable
23 hourly rates in the community for 7-9 year associate attorneys handling this type let alone partners
24 with over 18 years of experience each. This is especially true when this Court compares the
25 requested amount of \$213,376.00 against APCO's claimed \$900,000.00 in legal fees.

26 ³ Zitting cites this Court's Order Setting Rule 16 Conference, Designating the Case as Complex Pursuant to NRCP
27 16.1(f), and Continuing the Hearing on Defendant Scott Financial Corporation's Motion to Dismiss Co-Defendants Vista
Financial Services, L.L.C. and Tharaldson Motels II, Inc.'s Counterclaim, entered on November 10, 2009, as "NRCP
16.1(f) Order."

28 ⁴ Zitting cites APCO's Motion for Reconsideration of Court's Order Granting Zitting Brothers Construction, Inc.'s
Partial Motion for Summary Judgment, filed on January 8, 2018, as "Mot. for Recon."

1 **4. The fourth *Brunzell* factor favors the amount of the requested attorney's**
2 **fees.**

3 The fourth factor clearly favors Zitting. Zitting has been successful in obtaining all of its
4 requested relief through summary judgment, thereby obviating the expense associated with trial.

5 As set forth above, the rate and amount of the attorney's fees sought by Zitting is reasonable
6 and justified based upon application of the *Brunzell* factors. Therefore, this Court should award the
7 requested amount of \$213,376.00 of attorney's fees.

8 **B. The requested \$8,475.95 in cost is recoverable under Nevada law and Zitting's**
9 **contract with APCO.**

10 This Court has also determined that Zitting can recover costs relates to its efforts to collect
11 the amount owed. (Zitting MSJ Order 10:15-16.) Again, the sole issue is the amount of such fees.
12 (*Id.* 10:19-28.)

13 Both Nevada law and section 18.5 of Zitting's contract provide for the recoverable costs.
14 (*See* Ex. F at APCO00044606); Nev. Rev. Stat. 108.237(1); see also Nev. Rev. Stat. 18.020(3)
15 (allowing award of costs when plaintiff recovers more than \$2,500.00). This includes all costs
16 related to the cost of preparing and recording the notice of lien, the costs of the proceedings, and the
17 costs for representation of the lien claimant in the proceedings. Nev. Rev. Stat. 108.237(1).

18 Here, Zitting has documented its recoverable costs incurred in the attached memorandum of
19 costs (Ex. C.) These costs relate to court costs, filing fees, photocopying, postage, research, court
20 reporter fees, messenger services, and process servers. Zitting's costs were reasonable and necessary
21 to its efforts to recover the amount owed. Additionally, the costs are not estimates, but the costs that
22 were actually incurred by Zitting. Therefore, Zitting requests an award of costs in the amount of
23 \$8,475.95.

24 **C. Interest accrues on the amount of \$750,807.16 pursuant to Nev. Rev. Stat.**
25 **108.237(2)(b) from April 30, 2009 until the amount is paid.**

26 This Court has concluded that interest accrues on the \$750,807.16 award from the date
27 Zitting's complaint was filed—April 30, 2009—to the date the entire amount is paid. (Zitting MSJ
28 Order 10:7-18.) Nev. Rev. Stat. 108.237(2)(b) provides the calculation of the accrued interest. (*Id.*
9:25-10:2.) Under that statute,

1 [i]f a rate of interest is not provided in the lien claimant's contract,
2 interest at a rate equal to the prime rate at the largest bank in Nevada,
3 as ascertained by the Commissioner of Financial Institutions, on
4 January 1 or July 1, as the case may be, immediately preceding the
date of judgment, plus 4 percent, on the amount of the lien found
payable. The rate of interest must be adjusted accordingly on each
January 1 and July 1 thereafter until the amount of the lien is paid.

5 Nev. Rev. Stat. 108.237(2)(b).

6 Here, this Court has entered summary judgment awarding Zitting \$750,807.16 on December
7 29, 2017. (Zitting MSJ Order.) Therefore, the prime rate on July 1, 2017 is applicable. *See* Nev. Rev.
8 Stat. 108.237(2)(b). That interest rate is 4.25%. (Ex. G.) This results in a total interest of 8.25%. *See*
9 Nev. Rev. Stat. 108.237(2)(b). The \$750,807.16 award therefore initially accrues at an annual
10 interest at 8.25% and re-adjust "accordingly on each January 1 and July 1 thereafter until the
11 amount" is paid. *See id.* The total amount of simple interest accrued to date—from April 30, 2009 to
12 January 29, 2018—is \$542,361.20, which is the result of a simple interest calculation $(0.0825/365) * 750,807.16 * 3,196$.
13

14 Interest after the final judgment is entered should also be awarded the initial rate of 8.25%.
15 Such interest increases the final judgment amount on a daily basis by the amount of \$169.70⁵ from
16 January 29, 2018 until the judgment is paid in full.⁶

17 **III. CONCLUSION**

18 Based on the foregoing reasons, this Court should award the following to Zitting:

- 19 1. \$213,376.00 in attorney's fees,
- 20 2. \$8,475.95 in costs,
- 21 3. pre-judgment interest at a rate of 8.25% that accrues on the Award amount from April 30,
22 2009 until January 29, 2018, for a total amount of \$542,361.20, and
- 23 4. post-judgment interest at an initial annual rate of 8.25%, which increases the final
24 judgment by \$169.70 per day from January 29, 2018 until the judgment amount owed to
25 Zitting is completely paid.

26
27 ⁵ This is the result of a calculation of the daily simple interest: $(0.0825/365) * 750,807.16$.

28 ⁶ Again, this interest is subject to change on each subsequent January and July. *See* Nev. Rev. Stat. 108.237(2)(b).

1 Zitting therefore requests that the total for the judgment amount be amended to include the attorney
2 fees, costs and interest requested. The judgment amount should therefore be amended to reflect a
3 sum of \$1,515,020.31, with simple interest accruing daily at \$169.70 per day from January 29, 2018
4 until the judgment amount owed to Zitting is completely paid.

5 Dated: January 29, 2018

6 WILSON ELSEER MOSKOWITZ EDELMAN &
7 DICKER LLP

8 
9 _____
10 Jorge Ramirez, Esq.
11 Nevada Bar No. 6787
12 I-Che Lai, Esq.
13 Nevada Bar No. 12247
14 300 South 4th Street, 11th Floor
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18 *Attorneys for Lien Claimant,*
19 *Zitting Brothers Construction, Inc.*

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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of Wilson Elser Moskowitz Edelman & Dicker LLP, and that on this 29th day of January, 2018, I served a true and correct copy of the foregoing **MEMORANDUM IN SUPPORT OF APCO CONSTRUCTION, INC.'S PAYMENT OF ATTORNEYS' FEES, COSTS, AND INTEREST TO ZITTING BROTHERS CONSTRUCTION, INC.** as follows:

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

BY



An Employee of WILSON ELSEER MOSKOWITZ
EDELMAN & DICKER LLP

EXHIBIT A

1 **DECL**
2 JORGE RAMIREZ, ESQ.
3 Nevada Bar No. 6787
4 I-CHE LAI, ESQ.
5 Nevada Bar No. 12247
6 WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP
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11 Jorge.Ramirez@wilsonelser.com
12 I-Che.Lai@wilsonelser.com
13 *Attorneys for Lien Clamant,*
14 *Zitting Brothers Construction, Inc.*

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

17 APCO CONSTRUCTION, a Nevada
18 corporation,

19 Plaintiff,

20 vs.

21 GEMSTONE DEVELOPMENT WEST, INC.,
22 a Nevada corporation,

23 Defendant.

CASE NO. A571228
DEPT. NO. XIII

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

Date of Hearing: March 1, 2018
Time of Hearing: 9:00 a.m.

24 AND ALL RELATED MATTERS

25 **DECLARATION OF SAM ZITTING IN SUPPORT OF ZITTING BROTHERS**
26 **CONSTRUCTION, INC.'S MEMORANDUM IN SUPPORT OF APCO CONSTRUCTION,**
27 **INC.'S PAYMENT OF ATTORNEYS' FEES, COSTS, AND INTEREST TO ZITTING**
28 **BROTHERS CONSTRUCTION, INC.**

I, Sam Zitting, declare as follows:

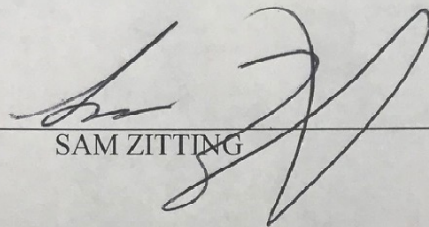
1. I am over eighteen years of age and competent to testify in a court of law.
2. I am the President of Zitting Brothers Construction, Inc. ("Zitting").
3. I have personal knowledge of the facts set forth below, unless otherwise stated. If called upon to testify, I will do so truthfully.
4. I make this declaration in support of Zitting's Memorandum in Support of APCO Construction, Inc.'s Payment of Attorney's Fees, Costs, and Interest to Zitting Brothers Construction, Inc (the "Memorandum").

1 5. I have reviewed the Billed Time Report, attached as Exhibit "B" to the Memorandum.
2 The \$213,376.00 in attorney's fees was the amount billed to me by Wilson, Elser, Moskowitz,
3 Edelman & Dicker LLP in connection with this case.

4 6. I have also reviewed the Cost Report, attached as Exhibit "D" to the Memorandum.
5 The \$8,475.95 in costs was the amount billed to me by Wilson, Elser, Moskowitz, Edelman &
6 Dicker LLP in connection with this case.

7 I declare under penalty of perjury under the law of the State of Nevada that the foregoing is
8 true and correct.

9 Executed on January 29, 2018.

10
11 
12 _____
13 SAM ZITTING
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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 03:01 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 19, Bates Nos. 4254–4487)

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MAC:05161-019 3698575_1

INDEX TO APPELLANT'S APPENDIX

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11/19/2008	Platte River Insurance Company's Answer and Crossclaim	1	AA 31–45
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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
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EXHIBIT 25

Case Nos. 67397 & 68683

IN THE SUPREME COURT OF THE STATE OF NEVADA

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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 REPLY BRIEF

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Rule 26.1 Disclosure

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

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ARGUMENT

I. NO SUBSTANTIAL EVIDENCE PADILLA OMISSION OR COMMISSION CAUSED THE SEPARATIONS

In its Answering Brief (“AB”), Respondent, Big-D Construction Corp. (“Big-D”), states the District Court made two distinct categories of factual conclusions: (1), that Padilla’s Work was defective and (2), Padilla failed to present reliable evidence to the contrary.¹ The district court’s factual findings will be upheld, if not clearly erroneous, and if supported, by substantial evidence. *Ogawa v. Ogawa*, 125 Nev. 660, 668, 231 P.3d 699 (2009).

The trial issue, as recognized by the District Court, was causation.² Not whether Padilla’s work deviated from the projects plans and specifications, but instead, whether the alleged deviations were material³, *Calloway v. City of Reno*, 116 Nev. 250, 256, 993 P.2d 1259 (2000); caused the claimed damages. The District Court: “is that [trial related to causation] correct” directed to Padilla Counsel; “That is

¹ RAB pg. 21, section A., first sentence.

² RAB pg. 2, last paragraph, first sentence.

³ A failure to perform is material if it defeats the purpose of the contract. Nevada Jury Instruction, 13CN.42.

correct”; the District Court “All right. The record will so reflect.” TSRCP 1, JA Vol. V., pg. 445, lines 6-11. Causation is an essential element of a claim for breach of contract. *Clark Cty. Sch. Dist. V Richardson Constr.*, 123 Nev. 383, 396, 168 P.3d 87 (2007). Causation is defined as the act by which an effect is produced. *Black’s Law Dictionary* 221 (6th ed. 1990). And further, “That is if the damage of which the promisee [Big-D] complains [separations of stucco coats] would not have been avoided by the promisor’s [Padilla] not breaking [its] promise [to complete all work in accordance with the project plans and specification], the breach cannot give rise to damages.” *Clark Cty. Sch. Dist. at 396*.

II. DEFECTIVE IS NOT UNEQUIVOCALLY CAUSATION

According to Big-D, the District Court’s factual determination that the Padilla Work was defective is supported by the overwhelming weight of the evidence.⁴ “A product is ‘defective’ if it is not fit for the ordinary purpose for which such articles are sold and used.” *Black’s Law Dictionary* 418 (6th ed. 1990). At no point has

⁴ RAB pg. 21, section A.i., first sentence.

Padilla denied its Work (product), in some instances, failed to support the stone facade, the purpose for which it was intended. Instead, as agreed by all parties, the disputed issue before the court was not if the product failed, but instead, **what caused the product failure**: Big-D claimed it was because of deviations from the plans and specifications for the project;⁵ and Padilla claimed it was because its product was not allowed to cure long enough before installing the stone facade.⁶

Evidence of causation by Padilla's alleged deviations from the plans and specifications doesn't exist as argued in Padilla's Opening Brief⁷, which is supplemented here, and because Chin's testing was flawed. Contrary to Big-D's assertion, there is no evidence as to compaction, hydration, nor petrographic analysis.⁸ The only exhibit alleging a petrographic study and containing the words hydration or compaction is trial exhibit 406⁹, which Padilla objected to as hearsay¹⁰

⁵ Joint Appendix ("JA") Vol. 1, pg. 000017, paragraphs 12 & 13.

⁶ JA Vol. V, pg. 000411, lines 10-25.

⁷ AOB pg. 9, last paragraph – pg. 10, last full paragraph.

⁸ RAB pg. 22, first partial paragraph, third line of text; last partial paragraph, first sentence.

⁹ JA Vol. IV, pgs. 380-381.

¹⁰ JA Vol. VI, pg. 000704, lines 15-16.

and the District Court allowed “limited admission, not for the truth of the matter asserted, but for what happened in his [Chin’s] mind as to why he acted the way he did.”¹¹ A statement merely offered to show that a statement was made and the listener was affected by the statement, and which is not offered to show the truth of the matter asserted is admissible as non-hearsay. *Grosjean v. Imperial Palace*, 125 Nev. 349, 362, 212 P.3d 1068 (2009). Consequently, the alleged truth of the matters asserted as to petrographic studies, compaction or hydration in trial exhibit 406 were not admitted into evidence.

There wasn’t any testing of the failed product; stucco that had been allowed to cure the requisite time, and was found to have separations between the first coat (scratch) and the second coat (brown). Despite the controversy regarding the correct cure time, there isn’t any evidence of testing of stucco when the scratch coat cured two days and the brown coat cured seven days as specified by Big-D¹² and the bond between the two coats failed. There is nothing in the record relating to any of the

¹¹ JA Vol. VI, pg. 000709, lines 19-23.

¹² JA Vol. VI, pg. 631, line 24 – pg. 632, line 2.

observations/testing Chin¹³ performed, September 17th and 22nd,¹⁴ showing the installation dates of either the scratch or the brown coat, and, Chin testified he didn't know when Padilla installed the examined/tested stucco.¹⁵ The cure time is critical to the strength of the bond between the scratch and the brown coats. According to Chin, in answer to the question of what the Architect's plan instruction to determine the most effective procedures for curing and lapse time between coats based on climatic and job conditions, meant:

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

So this is very important because you want to make sure that the strength of the materials are up to the point where you can apply materials to it without causing any damage to the [stucco] system. TSRCP 2, JA Vol. VI., pg. 682, line 22 – pg. 683, line 6.¹⁶ Emphasis added.

While Big-D's Project Manager, Brinkerhoff, described a project procedure that the date Padilla finished a scratch coat or brown coat was marked on the wall so they knew when the cure time started, Big-D never produced evidence showing dates

¹³ AOB pg. 2, pg. 3, Ian Chin was IGT's consultant during the IGT project and subsequently, Big-D's consultant.

¹⁴ JA Vol. VII pg. 000751; Vol. V, TEXH 449, pg. 000395.

¹⁵ JA Vol. VII, pg. 000749, line 24 – pg. 000750, line 2; pg. 000751, lines 15-19.

¹⁶ AOB pgs. 6-7.

marked on the walls that were the subject of Chin's examinations/tests. Instead, the only evidence of any date markings were on stucco samples provided to Padilla's expert in March of 2012 that were marked "Brown coat Finished 9/14", "Sample date 9/18¹⁷." Obviously, rendering any examination/testing of those samples invalid in the absence of the 7 days cure time specified by Big-D for the brown coat. Given Chin's assertion that proper curing is important to the strength of the stucco and the absence of any evidence that the examined/tested stucco had been properly cured, it shouldn't be a surprise that Chin could report he peeled stucco coats apart with his hands¹⁸ and Big-D's Brinkerhoff reported "you could just twist" the stucco coats apart.¹⁹

The absence of documentation for the stucco installation corrupted the veracity of any conclusions drawn from Chin's examination/testing as to the cause of the separations of the two coats of stucco. For instance, if a sample of stucco exhibited a separation of the two coats of stucco and exhibited a deviation from the plans and

¹⁷ JA Vol. VII, pgs. 000793-000796.

¹⁸ JA Vol. VI, pg. 000707, lines 18-20.

¹⁹ JA Vol. VI, pg. 000589, lines 7-9.

specifications, e.g. the scratch coat wasn't grooved the specified one-eighth inch, and the brown coat was only cured four days instead of the specified seven days; what valid conclusion could be made as to the cause of the separations; the lack of proper grooving or the lack of proper curing?

III. NO DUTY FOR PADILLA TO PRESENT CONTRARY EVIDENCE

Big-D's assignment of the burden of proof to Padilla to present reliable evidence contrary to Big-D's alleged proof²⁰ that Padilla's work was defective ignores the lawful assignment of the burden of proof. Instead, it was Big-D's exclusive burden to present evidence and argument to prove the allegations of its Counterclaim. *Nassiri and Johnson v. Chiropractic Physicians' Board*, 130 Nev. Adv. Op., No. 27, pg. 3 (2014). That, pursuant to *Clark Cty. Sch. Dist.*, at 396, but for Padilla's alleged deviations from the project plans and specifications, the complained of separations of the stucco would not have occurred.

Additionally, how was Padilla going to obtain the reliable evidence? Padilla

²⁰ RAB pg. 21, section A. first sentence.

never received any samples of the ‘failed’ work, nor had the opportunity to obtain them.²¹

IV. DUTY TO PAY PADILLA ACCORDING TO TERMS OF THE SUBCONTRACT

Big-D asserts it had no obligation under the terms of the Subcontract to pay Padilla in light of Padilla’s material breaches and IGT’s rejection of the stucco.²² In addition to its AOB argument²³, Padilla asserts that at the time that Padilla was owed a written notice of a material breach/default of the Subcontract or payment²⁴, Big-D did not possess knowledge of a Padilla material breach. As late as November 18, 2009²⁵, when Big-D stopped payment on its check and two months after Padilla left the project, Big-D’s Project Principal-In-Charge McNabb,²⁶ admitted Big-D didn’t know the cause of the failures: “We still don’t know who’s at fault.”²⁷

Big-D’s argument that IGT’s rejection of the stucco justifies not paying Padilla;

²¹ AOB pg. 24, last paragraph, last full sentence – pg. 25, second paragraph.

²² RAB pg. 27, section i.

²³ AOB pg. 15, section V. – pg.18.

²⁴ AOB pg. 17 section 5.1 of Subcontract, pg. 18 Exhibit “Z” to the Subcontract.

²⁵ JA Vol III, pgs. 000281-000282.

²⁶ JA Vol. VI, pg. 000513, line 16.

²⁷ AOB pg. 9, section III. B. last sentence.

ignores the differing justifications for rejection and withholding payment. IGT had a right to reject Padilla's work merely on the premise that it wasn't fit for the purpose IGT was purchasing it for, it was defective, *Black's Law Dictionary* 418 (6th ed. 1990), which under the circumstances of instances when the stucco would not hold the stone facade, it was. According to Chin, his recommendation to IGT was the stucco was not suitable and should be rejected.²⁸ IGT didn't consider the cause of the separations, only that it wasn't fit for IGT's intended use.

On the other hand, withholding payment requires a material breach of the Subcontract and proof of several elements, including causation, *Clark County School Dist. at 396*, which as argued above, there isn't any evidence that a Padilla omission or commission was the cause of the separations.

V. DUTY TO PROVIDE PADILLA AN OPPORTUNITY TO CURE ACCORDING TO THE TERMS OF THE SUBCONTRACT

Big-D argues it "gave Padilla written notice and request to cure the defective Padilla work when the failures were first identified. SOF 7-8."²⁹ A review of the

²⁸ JA Vol. VI, pg. 000714, lines 13-15.

²⁹ AOB pg. 27. Section ii, second sentence.

cites to the record in the Answering Brief's Statement of Facts ("SOF") on pages 7-8 does not find any record that Big-D gave Padilla written notice and request to cure. Not surprising, in that the record as a whole does not contain a written notice to Padilla to cure; an issue raised in its Opening Brief.³⁰

Big-D asserts it "was obligated to follow the directions of IGT who directed the Padilla work be removed and replaced with a cement board system (making any further cure request impractical). SOF 6-7, 10."³¹ Again, the cites to the record in the SOF 6-7, 10, do not support an obligation to IGT to remove and replace Padilla's work to the detriment of Padilla's right to cure. There is nothing in the record indicating that IGT prevented Big-D from providing the requisite written notice of default as specified in Section 5.1 of the Subcontract,³² or mandated Big-D to breach its Subcontract with Padilla.

Big-D's assertion that a safety risk excused any required notice to cure³³ is

³⁰ AOB pg. 15, section V., first sentence; pg. 18, last paragraph, first sentence.

³¹ AOB pg. 27, last sentence beginning with the word "Second" – pg. 28, remainder of sentence.

³² AOB pg. 17, single spaced indented paragraph, Section 5.1 of the Subcontract.

³³ AOB pg. 28, first partial paragraph, sentence beginning with the word "Third."

unsupported by the cites to the record at SOF 10. Lastly, Big-D states “Padilla was unwilling to take any actions to investigate or cooperate-making any additional request to cure futile. SOF 8-9.”³⁴ None of the cites to the record in SOF pgs. 8 and 9 support the statement that Padilla was unwilling to take any actions to investigate or cooperative; except, JA Vol. 1, pg. 49, lines 18-19 that states Padilla made a telephone call to the stucco mix manufacturer to discuss the separations in response to Big-D’s email notice of the separations.

VI. PAYMENT WAS DUE TO PADILLA IN THE ABSENCE
OF WRITTEN NOTICE CONFORMING WITH NRS 624.624(3)

According to Big-D, Padilla wasn’t due payment in conformance with the provisions of NRS 624.624 because payment wasn’t due on October 25, 2009 or because Big-D’s notice of withholding wasn’t given until November 3, 2009.³⁵ In addition to the argument put forth on the issue of NRS 624.624 payment in its opening brief,³⁶ Padilla adds the following.

According to Big-D, payment to Padilla wasn’t due on October 25, 2009 because

³⁴ AOB pg. 28, first partial paragraph, sentence beginning with the work “Fourth.”

³⁵ RAB pg. 28, section iii, first paragraph.

³⁶ AOB pgs. 19-22.

the Subcontract provided Padilla was to be paid within 10 days after Big-D received payment from IGT and after IGT accepted the Padilla work.³⁷ This assertion ignores the plain language of NRS 624.624(1)(a) or (b)³⁸, which clearly limits the condition of when, if ever, the higher-tiered contractor (Big-D) receives payment for the Subcontractor's (Padilla) work from the project owner (IGT) to influencing the date payment is made to the Subcontractor, "whichever is earlier." In the instance of a subcontract with a schedule of payments, the NRS 624.624(1)(a) date payment was due would be prescribed in the schedule of payments, and if earlier than when the Contractor received payment from the project owner, if ever, the date payment was due to the Subcontractor. In the instance of a Subcontract without a NRS 624.624(1)(b) schedule of payments, the due date for payments is dictated by the relevant provisions of the Subcontract, and again, if earlier than when the Contractor received payment from the project owner, if ever, the date payment was due to the Subcontractor. To the extent that Big-D's argument relies on the single factor of

³⁷ RAB pg. 28, section a.

³⁸ JA Vol. V, pg. 425.

when, if ever, it received payment from IGT³⁹, as the excuse not to pay Padilla, it is void as a matter of law. Contract provisions that contravene the law do not create a right of action and must be severed if it does not destroy the symmetry of the contract. *Vincent v. Santa Cruz*, 98 Nev. 338, 341 (1982) The ‘pay if paid’ provision of Section 4.2, including its waiver if Big-D exclusively caused the Owner’s failure to make the payment, was specifically and expressly subordinated to Nevada law by the parties: “Nevada Law will take precedence.”⁴⁰ According to *Lehrer McGovern Bovis v. Bullock Insulation*, 124 Nev. 1102, 1117-1118, 197 P.3d 1032 (2008), “pay-if-paid provisions are unenforceable because they violate public policy.”

Big-D’s reliance on the NRS 624.624(1)(a) provision for agreements “that includes a schedule for payments”⁴¹ is inconsistent with the plain language of the Big-D – Padilla Subcontract⁴², which does not contain a schedule of payments.

Instead of a Schedule of Payments, the Subcontract provides for monthly

³⁹ RAB pg. 29, first partial paragraph, first full sentence.

⁴⁰ JA Vol. I, pg. 101, handwritten text at end of section 4.2, initialed by Big-D’s Brinkerhoff; JA Vol. V. pg. 461, lines 18-19: “We’ll stipulate that every edit in this contract Mr. Brinkerhoff has initialed.”

⁴¹ RAB pg. 29, second full paragraph, last sentence before indented quoted text.

⁴² JA Vol. I, pgs. 91-107.

payments:

4.2 Billings/Payments⁴³

We agree to make monthly payments to You for that portion of the work satisfactorily performed in the preceding month in accordance with monthly billings prepared by you and approved by us, Architect and Owner . . . on approved forms, with a schedule of values and conditional waivers submitted to us on or before the date outlined in your Subcontract.

D: Payments⁴⁴

[P]ayment Request form, with Schedule of Values and Big-D's Conditional Lien Waiver submitted to Contractor before the **25th** day of each month.

Padilla submitted its payment request on the specified Big-D Construction Payment Request form, 9/25/09.⁴⁵ As Brinkerhoff testified⁴⁶, Padilla's work had been satisfactorily performed. The language which conditions payment approval, in addition to Big-D, also on the Architect and Owner, is ambiguous in practice given the content of the specified payment request and its sole approval by Big-D's Brinkerhoff without anything in the record indicating, although Brinkerhoff had approved the payment request, a final approval was contingent on the approval of

⁴³ JA Vol. I, pg. 101, section 4.2, first two sentences.

⁴⁴ JA Vol. I, pg. 92, paragraph D, first sentence.

⁴⁵ JA Vol. II, pg. 215.

⁴⁶ JA Vol. V, pg. 491, lines 11-12.

both the Architect's and IGT's. Instead, Brinkerhoff testified:

I approved this [Payment Request] at 82 percent complete, absolutely did. I felt like Padilla has installed 82 percent of the product. Was I convinced that the product was going to continue to fail or was failing? No.⁴⁷

Consistent with the conditions of section 4.21 and paragraph D of the Subcontract, above, Padilla was entitled to payment October 25, 2009; as Brinkerhoff testified:

Q It says approved it [Payment Request] and, above, it says payment date 10/25

A Payment date is reflective of the 9/25 date on your pay application. That's just - -

Q Right

A - - standard procedure.⁴⁸

VII. PADILLA NEVER RECEIVED REQUISITE
NOTICE WITHHOLDING PAYMENT⁴⁹

Big-D argues it "provided repeated written notices of the failures in the Padilla

⁴⁷ JA Vol. V, pg. 491, lines 8-12.

⁴⁸ JA Vol. V., pg. 475, lines 1-6.

⁴⁹ RAB pg. 31, a., Padilla's response.

Work.”⁵⁰ According to section 5.1 Notice to Cure provision of the Subcontract, if you (subcontractor):

are guilty of a material breach of a provision of this Subcontract, You may be deemed in default of this Subcontract. If You fail, within three (3) days **after written notification**, to commence and continue satisfactory correction of such default, then at your expense, we will: (a) . . . (b) . . . (c) Withhold payment of moneys due You until the work is fully completed and accepted by the Owner. Emphasis added.

Pursuant to NRS 624.624(3): if a Contractor intends to withhold any amount from a payment to be made to a Subcontractor, **the Contractor must give, on or before the date the payment is due, a written notice** to the Subcontractor.

The written notice of withholding must:

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

None of the documents cited by Big-D meet the criteria for notices as described in either the Subcontract or NRS 624.624 as condition precedent to withholding the

⁵⁰ RAB pg. 31, last partial paragraph, first sentence.

October 25th payment due Padilla.

Big-D's document list:⁵¹

1. "Real time notice by Padilla's own crews that the work was separating itself. SOF 9-10." In the face of Padilla's complaints that its product wasn't allowed to cure long enough, this wasn't notice of a material breach as required by the Subcontract or specific reference required by NRS 624.624, but rather a confirmation by Padilla's stucco crew of the peril of the premature installation of the stone façade.
2. "Written notice from Big-D to Padilla requesting that Padilla immediately investigate its work on several occasions, SOF 7-8." A review of the record cites found in the designated pages of the Answering Brief's Statement of Facts did not disclose any written notice to Padilla in conformity to either the requirements of the Subcontract or NRS 624.624.
3. "Telephone notice from Big-D to Padilla" On its face, this is not a written

⁵¹ RAB pg. 31.

notice.

4. "Meetings on-site with the product manufacturer and IGT consultants discussing the failures in the Padilla work, SOF 11-13." A review of the record cites found in the designated pages of the Answering Brief's Statement of Facts did not disclose any written notice to Padilla in conformity to either the requirements of the Subcontract or NRS 624.624.
5. "Real-time information that IGT had rejected the Padilla Work and direct Big-D to remove and replace it, SOF 11-13." A review of the record cites found in the designated pages of the Answering Brief's Statement of Facts did not disclose any written notice to Padilla in conformity to either the requirements of the Subcontract or NRS 624.624.
6. "Finally, formal written notice from Big-D on November 3, 2009 informing Padilla that no payment would be processed unless and until Padilla could assist Big-D demonstrate that the failures in Padilla work were caused by factors other than Padilla (which Padilla took no efforts to do), SOF 8-9." A review of the

record cites found in the designated pages of the Answering Brief's Statement of Facts did not disclose any written notice to Padilla in conformity to either the requirements of the Subcontract or NRS 624.624. Additionally, see this Reply Brief pg. 8, and reference, footnote 21.

Big-D's withholding Padilla's payment it approved September 29th in the absence of the requisite written notice before withholding was both a breach of the Subcontract and NRS 624.624.

VIII. BIG-D NOT ENTITLED TO CLAIMED DEDUCTIONS

According to Big-D, even if Padilla is entitled to payment for its work, it overstated the payment due in its September 25th Payment request.⁵² Big-D admits a \$25,000.00 payment before Padilla started work on the project was precontract⁵³, then at trial first made a claim for a \$25,000.00 credit against the contract amount. There's nothing in the record that the payment was part of the contract amount shown on the Payment Request, which Brinkerhoff approved September 25th.⁵⁴

⁵² RAB pg. 33, section v., first sentence.

⁵³ JA Vol. VI., pg. 494, lines 24-25.

⁵⁴ JA Vol. II, pg. 216

As to the alleged payment of one of Padilla's material suppliers, there is nothing in the record that Big-D ever contacted Padilla to verify, if in fact, it received the materials, and if so, whether Padilla had paid the bill. Instead, in the absence of any cite to the record, Big-D claims "it is undisputed that Big-D was required to pay one of Padilla's material suppliers."⁵⁵

IX. PADILLA WAS ENTITLED TO A SPOILIATION INSTRUCTION

According to Big-D, Padilla contends that Big-D failed to retain portions of the stucco over which stone was installed and that is a red herring because it is premised upon Padilla's incorrect argument that only the stucco over which stone installation had commenced failed.⁵⁶ Fundamental forensics starts with an examination of the failure. According to Chin in response to the question whether he would start his investigation looking at the failed pieces: "Yes. We would do an inspection of the failed site, not just the failed piece, but also the location on the building where the failure occurred to see what was supporting the piece."⁵⁷ Q. [Y]ou're starting with

⁵⁵ RAB pg. 33, section v., third sentence.

⁵⁶ RAB pg. 34, section C., second paragraph, third and fourth sentence.

⁵⁷ JA Vol. VI, pg.734, lines 11-17.

the failure and working out from there? A. “In the case of failure, that’s –we start from – the failure initiates the investigation.”⁵⁸

As argued, above, the alleged deviations from the plans and specifications were not material; did not cause the separations from which this case arises.⁵⁹ Testing of samples that had not failed would thwart any possibility to identify a nexus between the failure and the cause: deviation from the plans and specifications, premature installation of the stone, etc. Even Big-D admitted there was the possibility of causes unrelated to the plans and specifications. According to Brinkerhoff in answer to the question why Big-D never terminated the Subcontract with Padilla: “[W]e made a decision based on the rejection of Padilla's work by IGT. We didn't know the cause. We didn't know whether it was labor related. We didn't know whether it was material related. We didn't know whether it was weather condition related. We didn't know the cause.”⁶⁰ While IGT never determined causation, Big-D acquiesced and never put them to their proof: that the alleged deviations from the plans and

⁵⁸ JA Vol. VI, pg. 734, lines 18-21.

⁵⁹ Reply Brief, pgs. 2-4.

⁶⁰ JA Vol. V, pg. 469, lines 10-24.

specifications were material; caused the separations, the defect. This unilaterally prejudiced Padilla's defense in that by the time Padilla received written notice⁶¹ that Big-D believed the cause of the separations was the alleged deviations from the plans and specifications, no samples of the failed stucco were available, having been destroyed, according to Brinkerhoff's calendar, September 14 – 16th.⁶² In fact, the only samples provided to Padilla were marked "Brown coat Finished 9/14", "Sample date 9/18⁶³." The brown coat had been cured far less than the seven days specified by Big-D.

Big-D argues that the requested adverse inference is not necessary for a sophisticated judge⁶⁴ and Padilla's request was not timely.⁶⁵ Both of these arguments were made in Opposition to Padilla's Motion in Limine II. February 5, 2014, resulting in the District Court deferring its ruling "until all evidence is heard."⁶⁶

⁶¹ JA Vol. I, pg. 10; pg. 16, lines 27-28; pg. 17, lines 13.

⁶² JA Vol. III, pg. 294.

⁶³ JA Vol. VII, pgs. 000793-000796.

⁶⁴ RAB pg. 36, first partial paragraph, first sentence.

⁶⁵ RAB pg. 36, first full paragraph, first sentence.

⁶⁶ Appellant's Supplemental Brief, pg. 000912.

Finally, Big-D argues that sanction in the way of an adverse inference are only appropriately issued to a party ‘controlling the evidence.’” There isn’t anything in the record that Big-D didn’t control the failed stucco. While it is true they were directed to demolish the stucco⁶⁷ to make way for installation of the replacement cement board to mount the stone façade on, there isn’t anything in the record that IGT prohibited them from preserving samples of the failed stucco for future defense, either theirs or Padilla’s. Therefore, their lack of control argument fails.

X. CLAIMED ATTORNEYS’ FEES, COSTS, AND INTEREST
ARE NOT POST CONFIRMATION DEBT

Padilla supplements its Opening Brief argument relevant to Attorney’s Fees, Costs, and Interest⁶⁸ to address the issue of post confirmation debt. According to Big-D, the District Court had jurisdiction to award Big-D attorneys’ fees and costs because post confirmation “debts are liabilities of reorganized Chapter 11 debtor and are not affected by the bankruptcy proceeding.”⁶⁹

⁶⁷ JA Vol. III, pg. 294.

⁶⁸ AOB pg. 27.

⁶⁹ RAB pg. 37, section D., first partial paragraph, first sentence.

According to *In re Vickie Lynn Marshall*, 273 B.R. 822, 830 (Bankr.C.D.Cal., 2002), the court found that attorneys' fees and costs arising out of prepetition litigation rooted in prepetition conduct must be treated as prepetition debt, not postpetition debt citing Ninth Circuit cases: *In re Kadjevich*, 220 F. 3d 1016 (9th Cir. 2000) and *In re Abercrombie*, 139 F.3d 755 (9th Cir. 1998). In the instant matter, the prepetition conduct occurred in September 2009, the prepetition litigation was filed March 9, 2010 and Padilla's bankruptcy petition was filed October 14, 2011. As a result, and according to *In re Marshall*, Big-D's fees and costs are prepetition debt and subject to the discharge, *In re Marshall*, at 830-831, Padilla received in its bankruptcy case.

XI. CONCLUSION

The District Court's finding of fact that Padilla's omission or commission caused the complained of damages; the separations of the first coat from the second coat of stucco, is not supported by substantial evidence and must be reversed, including those determinations arising from the erroneous findings, Judgment for Big-D and

the associated award of attorney's fees and costs. Instead, there is substantial evidence that Big-D breached the Subcontract, and therefore, Padilla is entitled to Judgment in the amount of the stopped payment check, \$185,991.95.⁷⁰ In the alternative, should this Court determine that Big-D is entitled to money damages, then the District Court's misunderstanding of the Stipulated Judgment and its jurisdiction to award judgment in excess of the claim authorized by the United States Bankruptcy Court must be addressed.

Note: On page 3 of the Respondent's Answering Brief, Respondent points out Appellant's Joint Appendix ("JA") omits a number of admitted trial exhibits. It was agreed between counsels that the JA would include all admitted Trial Exhibits. Our investigation indicates the error arose from the scanning process to create the Joint Appendix PDF Volumes that was not noticed when the Table of Contents was subsequently created. While undersigned counsel takes full responsibility for the administrative error, there was no intention to hide any evidence, and after review

⁷⁰ JA Vol. 2, pg. 221, Trial Exhibit 11.

of the Respondents Appendix and the missing Exhibits, our error did not prejudice the Respondent's Argument.

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

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

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

2. I further certify that this brief complies with the volume limitations of NRAP 32(a)(7)(A)(ii) because it does not contain more than 7,000 words.

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a

reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 25th day of April 2016.

/s/ Bruce R. Mundy

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EXHIBIT 26

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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

NOTICE OF TAKING NRCP RULE 30(B)(6) DEPOSITION OF PERSON MOST
KNOWLEDGEABLE FOR ZITTING BROTHERS CONSTRUCTION, INC.

21 PLEASE TAKE NOTICE that pursuant to Rule 30(b)(6) of the Nevada Rules of Civil
22 Procedure, Plaintiff, APCO Construction, by and through its attorneys, Marquis Aurbach
23 Coffing, will take the deposition of Zitting Brothers Construction, Inc. upon oral examination on
24 **June 28, 2017 at 2:00p.m.** before a Notary Public, or before some other officer authorized by
25 law to administer oaths. The deposition will take place at Marquis Aurbach Coffing located at
26 10001 Park Run Drive, Las Vegas, Nevada 89145.

27 //

28 //

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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 22nd day of May, 2017.

7
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9
10 By

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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 22nd day of May, 2017. Electronic service of the foregoing document shall be made in accordance with the E-Service List as follows:¹

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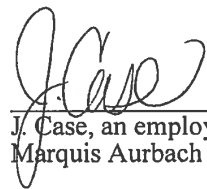
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J. Case, an employee of
Marquis Aurbach Coffing

EXHIBIT 27

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Location : District Court Civil/Criminal [Help](#)

REGISTER OF ACTIONS

CASE No. 08A571228

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

Case Type: **Business Court**
 Date Filed: **09/09/2008**
 Location: **Department 13**
 Cross-Reference Case Number: **A571228**

RELATED CASE INFORMATION

Related Cases

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

PARTY INFORMATION

Lead Attorneys

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

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

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

Defendant

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

~~Monica Caffaratti~~
~~Retained~~

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

Donald H Williams
Retained
7023207755(W)

Intervenor Pressure Grout Co

T. James Truman

Intervenor Professional Doors & Millworks LLC

T. James Truman

Intervenor Steel Structures Inc

Martin A. Little

Intervenor Tri-City Drywall Inc

Jennifer R. Lloyd-

Intervenor Camco Pacific Construction Co Inc

Steven L. Morris

Intervenor Camco Pacific Construction Co Inc

Steven L. Morris

Intervenor Club Vista Financial Services LLC

Martin A. Muckleroy

Intervenor Club Vista Financial Services LLC

Martin A. Muckleroy

Intervenor Commonwealth Land Title Ins Co

Intervenor Commonwealth Land Title Ins Co

Intervenor Concrete Visions Inc

Intervenor E & E Fire Protection LLC

Stephen M. Dixon

Intervenor **Fidelity & Deposit Company Of**
Defendant **Maryland**

Steven L. Morris
Retained

Intervenor **Fidelity And Deposit Co Of Maryland**

Steven L. Morris

Intervenor **First American Title Insurance Co**

Intervenor **First American Title Insurance Co**

Intervenor **Gemstone Development West Inc**

Monica Caffaratti

Intervenor **Gemstone Development West Inc**

Monica Caffaratti

Intervenor **Gemstone Development West Inc**

Intervenor **Gemstone Development West Inc**

Intervenor **Gemstone Development West Inc**

Monica Caffaratti

Intervenor **Jeff Heit Plumbing Co LLC**

Keith E. Gregory

Intervenor **Marshall, Kelly**

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

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

EVENTS & ORDERS OF THE COURT

09/05/2017 **Calendar Call (2:00 PM)** (Judicial Officer Denton, Mark R.)**Minutes**

09/05/2017 2:00 PM

- APPEARANCES: Jack Chen Min Juan and Cody Munteer, Attorney for Pltf Elizabeth Stephens, Attorney for IPAC, Chapter 7 Trustee John Taylor and Rich Tobler, Attorneys for National Wood Products I-Che Lai, Attorney for Zitting Brothers Eric Zimbelman, Attorney for Helix Electric of Nevada LLC, Heinaman Contract Glazing, Buchele Inc, Cactus Rose Construction Inc, Fast Glass Inc Benjamin Johnson, Attorney for United Subcontractors Inc d/b/a Skyline William Urga and Michael R. Ernst, Attorneys for Gerdau Reinforcing Steel, Steel Structures Inc, Nevada Prefab Engineers Inc, and Unitah Tracy Truman, Attorney for E & E Fire Steve Morris, Camco Pacific Construction Company Inc Court noted the settlement conference scheduled September 21, 2017. Mr. Juan requested that the calendar call and trial be continued so the parties can proceed with settlement. Further, Mr. Juan stated that the only parties that should remain are those that have complied with the Special Master's questionnaire and have filed their pre-trial disclosures. Mr. Johnson noted confusion with the number of parties in the case, knowing what's going on procedurally, and the Motion for Summary Judgment and Joinders being moved to October. Further, Mr Johnson noted his objection to the striking of his client's claims. Colloquy regarding parties left in the case with claims and proceeding with negotiations. COURT ORDERED deadline for parties who have not complied with the Special Master's questionnaire and have not filed their pretrial disclosures SET Friday, September 8, 2017 by 5:00 pm and FURTHER ORDERED hearing SET Monday, September 11, 2017 on Pltf's Oral Motion to Dismiss Pursuant to Rule 7(b). COURT FURTHER ORDERED the current trial setting VACATED and status check SET October 5, 2017 at 9:00 am to discuss resetting the trial. HEARING ON PLTF'S ORAL MOTION TO DISMISS PURSUANT TO RULE 7 (b): 09/11/2017 9:00 AM STATUS CHECK RE:RESETTING TRIAL: 10/05/2017 9:00 AM CLERK'S NOTE: The above minute order has been distributed via the E-Service Master List.

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EXHIBIT 28



1 RTRAN

2
3
4
5 DISTRICT COURT
6 CLARK COUNTY, NEVADA

7
8 APCO CONSTRUCTION,
9 Plaintiffs,

10 vs.

11 GEMSTONE DEVELOPMENT
12 WEST, INC.,

13 Defendants.

CASE NO. 08A571228

DEPT. XIII

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

16
17 **RECORDER'S TRANSCRIPT OF HEARING**
18 **RE: ALL PENDING MOTIONS**

19
20
21 (Appearances on Page 2)

22
23
24
25 RECORDED BY: JENNIFER GEROLD, COURT RECORDER

1	APPEARANCES:	
2	For the Plaintiffs:	CHEN MIN JACK JUAN, ESQ.
3		CODY S. MOUNTEER, ESQ.
4		MARY E. BACON, ESQ.
		JOHN H. MOWBRAY, ESQ.
5	For Camco Pacific Construction Co., Inc.:	STEVEN L. MORRIS, ESQ.
6	For various Lien Claimants:	ERIC B. ZIMBELMAN, ESQ.
7	For Zitting Brothers Construction, Inc.:	I-CHE LAI, ESQ.
8	For various Counter Defendants:	MICHAEL R. ERNST, ESQ.
9	For E&E Fire Protection, LLC:	JAMES T. TRUMAN, ESQ.
10		
11	For United Subcontractors, Inc.:	BENJAMIN JOHNSON, ESQ.
12	For the Intervenor:	JOHN B. TAYLOR, ESQ.
13		RICHARD L. TOBLER, ESQ.
14	For Chapter 7 Trustee:	ELIZABETH E. STEPHENS, ESQ.
15		
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1 Las Vegas, Nevada; Thursday, October 5, 2017

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

5 [Bench conference - not transcribed]

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

12 MR. JUAN: Correct.

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

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

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

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

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

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

7 MR. JUAN: If possible.

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

9 MR. JUAN: Thank you, Judge.

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

12 THE COURT: Okay.

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

19 MR. JUAN: Your Honor, --

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

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

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

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

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

14 MR. JUAN: Thank you, Judge.

15 [Matter trailed]

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

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

22 THE COURT: No, not -- really?

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

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

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

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

6 THE COURT: November 28th.

7 MR. ZIMBELMAN: November 28.

8 THE COURT: That's pretty quick.

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

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

24 THE COURT: Okay.

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

1 THE COURT: Okay.

2 MR. MOWBRAY: Your Honor, may I ask, I'm new to the case, but is

3 the November 28th, would we be set for a time certain or would we just be on a

4 stack?

5 THE COURT: At this point, well, I'm not sure what the stack looks

6 like. Do we have any firm settings on that?

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

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

9 MR ZIMBELMAN: It, you know honestly, we've had conversations

10 about how trial would --

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

12 MR. MOWBRAY: It is a firm setting.

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

14 MR. MOWBRAY: Ah.

15 THE COURT: And what I do is I have a calendar call before that and

16 I hear from everybody as to when on the stack you could go --

17 MR. ZIMBELMAN: Right.

18 THE COURT: -- but when I give a firm setting, it's not necessarily on

19 the 28th itself, but its firm during that stack. And then I hear from everybody at the

20 calendar call and identify the date and time for the trial. This is a bench case;

21 right?

22 MR. JUAN: Yes, Your Honor.

23 THE COURT: So how much time is expected?

24 MR. ZIMBELMAN: Well, I think that -- that's what I was going to

25 raise, I mean, to the extent that the case is, you know primarily, and I think it is

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

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

16 THE COURT: Okay.

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

19 THE COURT: Okay.

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

1 That's how we were thinking about that.

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

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

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

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

16 MR. JUAN: If possible.

17 THE COURT: Right.

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

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

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

24 THE COURT: Okay.

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

1 THE COURT: That seems --

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

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

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

10 THE COURT: No, I understand.

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

13 THE COURT: Okay.

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

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

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

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

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

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

5 MR. JOHNSON: Sure.

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

11 MR. JUAN: Thank you, Judge.

12 THE COURT: Will that work?

13 MR. JUAN: Yes. Thanks, Judge.

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

19 THE COURT: Any objection to that?

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

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

23 MR. LAI: No objections from Zitting Brothers.

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

1 you're opening.

2 THE COURT: Okay. Any problem with that?

3 MR. JUAN: No, because I know they're referring to Joe Palin

4 [phonetic]. I have no problem with that.

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

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

7 THE COURT: Should I have an order that reflects what it is that

8 we've done here?

9 MR. JUAN: Please, Your Honor.

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

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

12 THE COURT: Would you run it by everybody?

13 MR. JUAN: Yes, Your Honor.

14 THE COURT: Okay.

15 MR. JUAN: Thank you, Judge.

16 THE COURT: I think that's fair. Now we got -- when we get the case

17 tried, you know, depending upon what rulings are made on the motions, et

18 cetera, we'll see what happens.

19 MR. ZIMBELMAN: Thank you, Your Honor.

20 MR. JUAN: Thank you, Your Honor.

21 ALL COUNSEL: Thank you, Your Honor.

22 THE COURT: Hold on a sec.

23 THE JEA: Excuse me. I have a question. What's the dispositive

24 motion deadline going to be?

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

1 THE JEA: The dispositive motion.

2 THE COURT: The what?

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

4 THE COURT: Oh you mean the deadline for filing that? Yes, she's

5 asking me, my JEA is asking me about the deadline for filing the motions in

6 limine and the what, Rule 56, additional Rule 56 motions.

7 MR. MOUNTEER: I think we could request about ten days after the

8 depositions close. It would give us time to get those depositions.

9 THE COURT: And when will the depositions close?

10 MR. JUAN: Do you want to do November 9th? Have everything held

11 November 9th? Because we already have --

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

13 motions.

14 [Counsel confer]

15 THE COURT: I could move that that -- the 9th day to the 16th to give it

16 a little bit more time for everybody.

17 MS. BACON: That would be helpful.

18 THE COURT: Would that work?

19 MR. MOUNTEER: Yeah the 16th would be fine with us.

20 THE COURT: Okay. So we'll do that. The hearing on the 16th at

21 9:00 a.m. on these motions that are before the Court today and then any other

22 motions that are going to be filed should be scheduled for that same time; right?

23 MR. JUAN: Yes, Judge.

24 THE COURT: Right?

25 MR. MOUNTEER: Yes, Your Honor.

1 ALL COUNSEL: Yes, Your Honor.

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

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

4 then?

5 THE COURT: Well, I think there was some discussion about

6 somebody wanted to file a 56 motion as I recall. Was that --

7 MR. MOUNTEER: On the new -- on any of these new depositions

8 that we're taking if something comes up. I also think motion in limine issues

9 could really and part of motion in limine issues, I mean, we already have the pay-

10 if-paid issue, maybe NRS 108 issue, but if we can limit the issues at trial through

11 motion in limines it could substantially --

12 THE COURT: Okay. Let's not have any more motions for summary

13 judgment then. Let's just have motions in limine because I think that will perhaps

14 --

15 MR. MOUNTEER: Okay.

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

17 MR. JUAN: Thank you, Judge.

18 MR. ZIMBELMAN: And I -- what was the date that was for the

19 motions in limine to be filed?

20 MR. JUAN: November 16.

21 MR. ZIMBELMAN: Oh, filed by the 16th.

22 ALL COUNSEL: No. Heard.

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

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

25 that?

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

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

3 MR. JUAN: October 31st?

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

5 MR. ZIMBELMAN: No. October 30th.

6 MR. JUAN: October 30th?

7 THE COURT: What's that?

8 MR. JUAN: October 30th?

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

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

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

21 THE COURT: Right.

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

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

1 motions; right? So.

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

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

4 MR. MORRIS: It is.

5 THE COURT: -- addressed though.

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

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

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

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

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

23 THE COURT: Okay.

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

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

7 THE COURT: All right.

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

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

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

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

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

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

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

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

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MR. JUAN: Thank you, Judge.

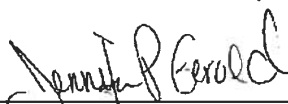
ALL COUNSEL: Thank you, Your Honor.

THE COURT: Okay.

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

* * * * *

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



Jennifer P. Gerold
Court Recorder/Transcriber

EXHIBIT 29

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

11 APCO CONSTRUCTION, a Nevada
12 corporation,

12 Plaintiff,

13 vs.

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

15 Defendant.

16 AND ALL RELATED MATTERS

CASE NO. A571228
DEPT. NO. XIII

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

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

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

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

20 **JUDGMENT AGAINST APCO CONSTRUCTION**

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

//

1236578v.2

Case Number: 08A571228

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DISTRICT COURT DEPT XIII

AA 004331

1 **FINDINGS OF FACT**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

26 16. ZBCI demanded APCO pay the \$750,807.16 still owed on the contract. However,
27 APCO refused to do so, causing ZBCI to initiate proceedings to recover the requested amount.
28

1 **C. Procedural History**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSIONS OF LAW

A. Burden of Proof

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

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

B. APCO's Breach of the Subcontract

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

6 **ORDER**

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

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

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

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

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

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

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

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

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

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

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


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

6 **IT IS SO ORDERED.**

7 Dated this 26th day of December, 2017.

8 
9
10 DISTRICT COURT JUDGE

11 Respectfully submitted by:

12 
13
14 Jorge A. Ramirez, Esq.
I-Che Lai, Esq.

15 **WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP**
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Attorneys for Lien Clamant,
17 Zitting Brothers Construction, Inc.

18 Approved as to form and content by:

19 declined to sign

20 John H. Mowbray, Esq.
John Randall Jefferies, Esq.
21 Mary E. Bacon, Esq.

22 **SPENCER FANE LLP**
300 South Fourth Street, Suite 700
23 Las Vegas, Nevada 89101

24 and

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

EXHIBIT 30

Original

Electronically Filed
10/26/2017 9:29 AM
Steven D. Grierson
CLERK OF THE COURT

Steven D. Grierson

1 **Marquis Aurbach Coffing**
2 Jack Chen Min Juan, Esq.
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12 *Attorneys for APCO Construction*

13 **DISTRICT COURT**
14 **CLARK COUNTY, NEVADA**

15 APCO CONSTRUCTION, a Nevada
16 corporation,

Plaintiff,

Case No.: A571228

vs.

Dept. No.: XIII

17 GEMSTONE DEVELOPMENT WEST, INC., A
18 Nevada corporation,

Defendant.

Consolidated with:

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

19 AND ALL RELATED MATTERS

20 **ORDER**

21 This matter has come on for hearing before this court on the Peel Brimley Lien
22 Claimants' Motion for Partial Summary Judgment Precluding Defenses Based on Pay-If-Paid
23 Agreements; Joinders thereto by Zitting Brothers, Steel Structures, Nevada Prefab Engineering,
24 Interstate, E&E Fire Protection and Uintah Investments dba Sierra Reinforcing and Gerdau
25 Reinforcing; Oppositions thereto by APCO and CAMCO; and for a status check. Based on the
26 papers on file herein and oral arguments of counsel, the Court hereby finds, adjudicates and
27 orders as follows:

28 1. During today's hearing, there was discussion among counsel outside the presence
of the Court regarding trial dates, depositions and motions. The parties then informed the Court
of counsels' respective positions. And, the parties informed the Court of what they disagreed
and agreed regarding the trial dates, depositions and motions.

2. Having heard the positions of the parties, the Court hereby orders as follows:

MARQUIS AURBACH COFFING

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

RECEIVED

OCT 12 2017

DISTRICT COURT DEPT#13

1 A. That discovery is re-opened, limited only to the depositions of the person
2 the subcontractor/lien-claimant intends call at trial to prove up its case and defenses; and/or the
3 NRCP 30(b)(6) PMK of its respective claims and defenses thereto for Zitting; Interstate;
4 National Wood, Plaintiff in Intervention of Cabinetec; Uintah Investments LLC dba Sierra
5 Reinforcing and Gerdau Reinforcing; United Subcontractors dba Skyline Insulation, Steel
6 Structures and Nevada Prefab);

7 B. These depositions shall take place and be concluded on or by October 30,
8 2017;

9 C. Motion in Limines can be filed on or by November 5, 2017;

10 D. Motion in Limines shall be heard by the Court on November 16, 2017 at
11 9:00am;

12 E. The pending Peel Brimley Lien Claimants' Motion for Partial Summary
13 Judgment Precluding Defenses Based on Pay-If-Paid Agreements and Zitting Brothers
14 Construction Inc.'s Motion for Partial Summary Judgment shall be continued to November 16,
15 2017 at 9:00 am; and

16 F. The Bench trial of this case shall start on November 28, 2017.

17 **ORDER**

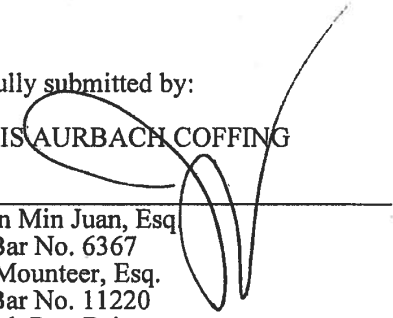
18 IT IS SO ORDERED.

19 Dated: October 24, 2017

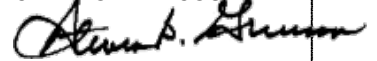
20 
21 DISTRICT COURT JUDGE

22 Respectfully submitted by:

23 MARQUIS AURBACH COFFING

24 By 
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NATIONAL WOOD PRODUCTS, INC., a Utah corporation

DISTRICT COURT
CLARK COUNTY, NEVADA

APCO CONSTRUCTION, a Nevada corporation,
Plaintiff,

vs.

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

Defendants.

AND ALL RELATED MATTERS.

CASE NO. A571228
DEPT. NO.: XIII

Consolidated with:

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

**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**

Hearing Date: January 11, 2018
Hearing Time: 9:00 a.m.

1 Plaintiff in Intervention, National Wood Products, Inc. ("National Wood"), by and through
2 its counsel of record, the law offices of Richard L. Tobler, Ltd. and Cadden & Fuller LLP, hereby
3 submit its opposition to APCO Construction's ("APCO") Motion for Reconsideration of Court's
4 Order Granting Peel Brimley Lien Claimants' Motion for Partial Summary Judgment ("MSJ").

5
6 **MEMORANDUM OF POINTS AND AUTHORITIES**

7
8 **1. INTRODUCTION**

9 APCO'S motion for reconsideration relies on a misreading of the unpublished decision of
10 Padilla Construction Co. of Nevada v. Big-D Construction Corp., 286 P.3d 982 (2016). That
11 decision was not persuasive when APCO raised it at oral argument on the MSJ. It is still not
12 persuasive now.

13 The MSJ was correctly decided. It should not be reconsidered. If it is reconsidered, the
14 result should be the same.

15
16 **2. PADILLA IS NOT ON POINT**

17 APCO suggests that Padilla stands for the proposition that, where there is no waiver of
18 mechanic's lien rights, a pay-if-paid provision is enforceable. A plain reading of Padilla shows this
19 is simply not the case.

20 In Padilla, the subcontractor had two hurdles in its case against the general contractor. First,
21 the subcontractor had to show that it actually properly performed its work under the subcontract.
22 Second, if it passed the first hurdle, the subcontractor had to show that the pay-if-paid provision
23 was invalid.

24 The subcontractor did not pass the first hurdle. The subcontractor could not show that it
25 properly performed under the contract. Instead, the district court judge found that the problems
26 with the project were caused by "improper installation of the stucco" by the subcontractor. This
27 decision was affirmed on appeal.

28 ///

1 In fact, the subcontractors' work was so deficient, that the general contractor's counterclaim
2 against the subcontractor resulted in a \$600,000 award against the subcontractor. This award was
3 also affirmed on appeal.

4 Because the subcontractor did not cross the first hurdle, there was no need for the Supreme
5 Court to resolve the pay-if-paid issue. That is, if the pay-if-paid provision was invalid, the
6 subcontractor would lose because it had not properly performed. Similarly, if the pay-if-paid
7 provision was valid, the subcontractor would still lose because it had not properly performed. Any
8 mention of the "pay-if-paid" provision in the Padilla decision is mere dicta.

9 In fact, the Supreme Court only mentioned the "pay-if-paid" language in a single sentence:
10 "Because the parties' subcontract contained a payment schedule that required that [the
11 subcontractor] be paid within ten days after [the owner] accepted [the subcontractor's] work and
12 paid [the general contractor] for that work and it is undisputed that [the owner] never accepted [the
13 subcontractor's] work and never paid [the general contractor] for [the subcontractor's] work." The
14 Supreme Court did not analyze the "pay-if-paid" language. This language is surplusage to the
15 reference to the work being acceptable to the owner, an issue the district court resolved against the
16 subcontractor.

17 APCO seeks to get around the fact that Supreme Court resolved the appeal without any
18 discussion of "pay-if-paid" by noting that the parties argued it in their briefs. Of course, the parties
19 had to argue this issue in the chance that the Supreme Court found that the subcontractor had passed
20 the first hurdle. Because the Supreme Court resolved the appeal due to the failure of the
21 subcontractor to pass the first hurdle, the Supreme Court had no reason to analyze the "pay-if-paid"
22 arguments raised by the litigants and did not do so. The arguments of the litigants are hardly
23 persuasive authority – especially since the Supreme Court did not opine on this subject of those
24 arguments.

25 The single sentence in the Padilla decision is not sufficient to warrant reconsideration of the
26 ruling on the MSJ or to warrant a modification of that ruling.

27 ///

28 ///

1 **3. THE LEHRER CASE IS DISPOSITIVE**

2 APCO also seeks to distinguish Lehrer McGovern Bovis, Inc. v. Bullock Insulation, Inc.
3 124 Nev. 1102 (2008) as a mechanic's lien waiver case. According to APCO, because there was no
4 lien waiver clause in the Manhattan West contracts, Lehrer is not applicable. A plain reading of
5 Lehrer shows that this is not the case.

6 In Lehrer, the Supreme Court addressed both the lien waiver issue and the pay-if-paid issue
7 separately. In one section of the opinion, the Supreme Court determined that "the lien waiver
8 provision was unenforceable." 124 Nev. at 1117. The Supreme Court opined that "such a
9 provision violates public policy." Id. at 1116.

10 In an entirely different section, the Supreme Court analyzed the pay-if-paid provision. This
11 section was not based on the lien waiver ruling. In this section, the Supreme Court ruled: "we
12 conclude that pay-if-paid provisions are unenforceable because they violated public policy.
13 Accordingly, we affirm the portion of the district court's judgment concluding that the pay-if-paid
14 provision of the subcontract was unenforceable." Id. at 1117-1118.

15
16 **4. APCO'S EFFORTS TO ENFORCE LIENS DO NOT DISTINGUISH LEHRER**

17 APCO argues that, because the Manhattan West contracts did not contain lien waiver
18 provisions, they did not impair lien rights. APCO argues that, therefore, the pay-if-paid provisions
19 may remain. This argument suffers from a logical fallacy.

20 In particular, while the Lehrer contracts contained lien waiver *language*, that language was
21 stricken as against public policy. Because that language was stricken from the contracts, it could
22 not have any lingering impact on any other contractual provision. That is, once that language was
23 stricken, the Lehrer contracts were similar to the Manhattan West contracts. In their effect, neither
24 set of contracts had valid, effective lien waivers.

25 The pay-if-paid provisions in the Lehrer contracts, which had no effective lien waivers, were
26 void as against public policy. Similarly, the pay-if-paid provisions in the Manhattan West
27 contracts, which have no lien waivers, are also void.

28 ///

1 **5. CAMCO'S JOINDER IS OF NO MOMENT**

2 CAMCO has joined in APCO's motion for reconsideration. In support of its joinder, with
3 the slight exception of a single sentence regarding the rule of court authorizing reconsideration
4 (CAMCO brief, 3:25-27), CAMCO's argument is quoted verbatim from its opposition to the
5 original MSJ. These arguments fail here for the same reasons they failed originally.

6
7 **6. CONCLUSION**

8 For the foregoing reasons, APCO's motion for reconsideration should be denied. The ruling
9 on the MSJ should not be reconsidered. Even if it were reconsidered, the ruling should not be
10 modified.

11
12 Dated this 9th day of January, 2018.

13 RICHARD L. TOBLER, LTD.

14
15 By: 

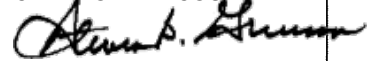
16 Richard L. Tobler, Esq.
17 Nevada Bar No. 004070
18 3654 North Rancho Drive, Suite 102
19 Las Vegas, Nevada 89130
20 (702) 256-6000
21 Attorneys for Plaintiff in Intervention,
22 *NATIONAL WOOD PRODUCTS, INC.*,
23 a Utah corporation
24
25
26
27
28

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 9th day of January, 2018, pursuant to N.R.C.P., 5(b), I served a true and correct copy of the foregoing **PLAINTIFF IN INTERVENTION, NATIONAL WOOD PRODUCTS, INC.'S OPPOSITION TO APCO CONSTRUCTION'S MOTION FOR RECONSIDERATION OF THE COURT'S ORDER GRANTING PEEL PRIMLEY LIEN CLAIMANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT TO PRECLUDE DEFENSES OF PAY IF PAID PROVISIONS**, via the Court's Efile and Serve program upon all parties/counsel set up to receive notice via electronic service in this matter.



An employee of Richard L. Tobler, Ltd.



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ERIC B. ZIMBELMAN,
Nevada Bar No. 9407
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Attorneys for Various Lien Claimants

DISTRICT COURT

CLARK COUNTY, NEVADA

APCO CONSTRUCTION, a Nevada
corporation,

Plaintiff,

vs

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

Defendants.

AND ALL RELATED MATTERS.

LEAD CASE NO.: A571228
DEPT. NO.: XIII

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

**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**

COME NOW the Lien Claimants represented by the undersigned counsel of the law firm of PEEL BRIMLEY LLP ("the Peel Brimley Lien Claimants")¹ and do hereby submit the following Opposition to Plaintiff/Cross-Claim Defendant APCO Construction's ("APCO") Motion for Reconsideration of the Court's Order Granting Partial Summary Judgment Precluding Defenses Based on Pay-if-Paid Agreements ("the Reconsideration Motion").

///


///

¹ The Peel Brimley Lien Claimants are: Cactus Rose Construction; Fast Glass Inc.; Heinaman Contract Glazing; Helix Electric of Nevada, LLC; and SWPPP Compliance Solutions, LLC.

1 This Opposition is based on the following Memorandum of Points and Authorities, the
2 pleadings and papers on file, and such matters as may be considered by the Court.

3 DATED this 9th day of January 2018.

4 PEEL BRIMLEY LLP

5
6 
7 RICHARD L. PEEL, ESQ.
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10 Nevada Bar No. 9407
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15 ezimbelman@peelbrimley.com
16 rpeel@peelbrimley.com
17 Attorneys for Various Lien Claimants

18 **MEMORANDUM OF POINTS AND AUTHORITIES**

19 APCO's Reconsideration Motion asserts no claims or arguments not previously asserted,
20 offers no new evidence and in no way justifies a hearing on its Motion, much less reconsideration
21 and reversal of this Court's well-considered Order. "Pay-if-Paid" agreements are void and
22 unenforceable under controlling Nevada case authority. Further, NRS 624 plainly requires prompt
23 payment and provides no excuse for non-payment based on Pay-if-Paid. The Court should
24 summarily deny the Reconsideration Motion.

25 "A district court may reconsider a previously decided issue if substantially different
26 evidence is subsequently introduced or the decision is clearly erroneous." *Masonry & Tile*
27 *Contractors Ass'n of S. Nevada v. Jolley, Urga & Wirth, Ltd.*, 113 Nev. 737, 741, 941 P.2d 486,
28 489 (1997) (emphasis added). Citing *Little Earth of United Tribes v. Department of Housing*, 807
F.2d 1433, 1441 (8th Cir.1986); and *Moore v. City of Las Vegas*, 92 Nev. 402, 405, 551 P.2d 244,
246 (1976) ("Only in very rare instances in which new issues of fact or law are raised supporting
a ruling contrary to the ruling already reached should a motion for rehearing be granted.")
(Emphasis added).² Here, APCO offers no new evidence and there have been no intervening case

² In *Masonry & Tile Contractors*, a new District Court judge properly reconsidered a decision by a since-deceased predecessor judge because of "new clarifying case law." 113 Nev. at 741.

1 decisions that might alter the Court’s analysis. Even if it were entitled to do so (it is not) APCO
2 offers no legal argument or analysis that is did not present in briefing and/or at oral argument.³
3 The Court’s well-reasoned Order was not clearly erroneous.⁴

4 It is beyond dispute that the Nevada Supreme Court declared “pay if paid” provisions in
5 construction contracts void and unenforceable as against Nevada’s public policy because
6 “Nevada’s public policy favors securing payment for labor and material contractors,” *see Lehrer*
7 *McGovern Bovis, Inc. v. Bullock Insulation, Inc.*, 124 Nev. 1102, 1117-18, 197 P.3d 1032, 1042
8 (Nev. 2008). This Court’s Order correctly follows controlling case authority and should not be
9 reconsidered or altered in any way.

10 While the *Bullock* decision involved mechanic’s liens, this Court also properly rejected
11 APCO’s contention that the public policy rationale of *Bullock* is limited to the concept of security
12 or does not apply when there is no security, such as in the present case where the property and
13 proceeds were released to a senior lienor. If indeed Nevada public policy favors securing payment
14 for labor and material contractors (as it clearly does – see *Bullock*, 124 Nev. at 1117-18), such
15 policy is not advanced by precluding pay-if-paid agreements only when security for a lien exists
16 while permitting such anti-contractor provisions when the security has been lost. No valid
17 justification exists for making such a distinction. Further, as the Nevada Supreme Court has
18 repeatedly held, “whether work is entitled to a lien pursuant to NRS 108.22184 and whether it is
19 entitled to priority over other encumbrances pursuant to NRS 108.225 are two entirely separate
20 issues.” *J.E. Dunn Northwest, Inc. v. Corus Const. Venture, LLC*, 127 Nev. 72, 81, 249 P.3d 501,
21 507 (2011). Simply stated, the loss of security does not mean the loss of lien or of the rights
22 afforded a lien claimant pursuant to NRS Chapter 108. It certainly does not mean that an
23

24
25 ³ As more fully discussed below, APCO first presented argument at the hearing regarding the
26 unpublished decision in *Padilla Construction Company of Nevada v. Big-D Construction Corp.*,
386 P.3d 982 (Nev. 2016 (unpublished)). To the extent APCO suggests this case constitutes
27 relevant intervening case law, it is badly mistaken (*see discussion infra*) and, in any event, was
28 argued, considered and rejected by this Court at oral argument.

⁴ APCO’s reliance on NRCP 59(e) is inapposite. That rule only prescribes the time limit within
which a motion for reconsideration must be filed. Any such motion must still be supported by one
of the grounds set forth in NRCP 59(a) (including “newly discovered evidence”) for which APCO
offers not support. APCO’s reliance on NRCP 60(b) fails for the same reason.

1 otherwise odious, void and unenforceable contract provision such as pay-if-paid ceases to be
2 contrary to the public policy of Nevada.

3 Finally, and as this Court properly concluded, NRS 624.624(1) provides for the obligation
4 of prompt payment by a higher-tiered contractor (such as APCO and Camco) to a lower-tiered
5 subcontractor (such as the Peel Brimley Lien Claimants) and provides no exception or allowance for
6 pay-if-paid agreements.⁵ As repeatedly argued, and as adopted by this Court as its Order, NRS
7 624.624(1) plainly states that if there is a “schedule of payments” in an otherwise enforceable written
8 agreement, the higher-tiered contractor must pay the lower-tiered subcontractor – at the latest – on the
9 date payment is due; If there is no enforceable written agreement containing a schedule of payments,
10 the payment is due to the lower-tiered subcontractor – at the latest - within 30 days of its request for
11 payment. Under either circumstance it has been approximately nine years since payments on the
12 Project ceased to be made.

13 Finally, and despite having presented this Court with oral argument relating to the
14 unpublished decision of *Padilla Construction Company of Nevada v. Big-D Construction Corp.*,
15 386 P.3d 982 (Nev. 2016 (unpublished)), APCO now (for the first time) presents written argument
16 relating to that inapposite case. First, it is plainly apparent from the face of this unpublished

17 ⁵ NRS 624.624(1) provides:

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

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

- 21 (1) On or before the date payment is due; or
22 (2) Within 10 days after the date the higher-tiered contractor receives payment
23 for all or a portion of the work, materials or equipment described in a request
24 for payment submitted by the lower-tiered subcontractor,
25 ➔ whichever is earlier.

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

- (1) Within 30 days after the date the lower-tiered subcontractor submits a
request for payment; or
(2) Within 10 days after the date the higher-tiered contractor receives payment
for all or a portion of the work, labor, materials, equipment or services
described in a request for payment submitted by the lower-tiered subcontractor,
➔ whichever is earlier.

1 decision that the Supreme Court did not consider the applicability of *Bullock* and its prohibition
2 on pay-if-paid, presumably because neither party raised the issue. *See Nye Cty. v. Washoe Med.*
3 *Ctr.*, 108 Nev. 490, 493, 835 P.2d 780, 782 (1992) (Generally, an issue which is not raised in the
4 district court is waived on appeal). There is also no indication from the Supreme Court decision in
5 *Padilla* that pay-if-paid was brought to the attention of the District Court.

6 In addition, the District Court's decision in *Padilla* – reviewed and affirmed on a
7 “substantial evidence” standard - hinged on the fact that the subcontractor (Padilla) materially
8 breached the subcontract before any payment was owed because of its improper installation of
9 stucco materials. Here not only is there no evidence of such a breach, this Court has granted
10 motions *in limine* prohibiting the introduction of evidence or argument if such breaches. Simply
11 stated, there is no evidence of any defective or non-confirming work by any of the Peel Brimley
12 Lien Claimants.

13 To the extent the Court wishes to consider intervening case decisions, the court should
14 consider *Cashman Equipment Company v. West Edna Associates, Ltd.*, 380 P.3d 844 (2016), 132
15 Nev. Adv. Op. 69 (2016). *Cashman* is a 2016 **published** decision that relied on and reaffirmed
16 *Bullock*. *Cashman* rejected the argument that a lower-tiered subcontractor's unconditional lien
17 release waived its right to lien when in fact it never received payment, holding: “the waiver is
18 void. Just as we refused to enforce the pay-if-paid provision in [*Bullock*] we likewise refuse to
19 enforce *Cashman's* release.” 380 P.3d at 849. In other words, *Bullock* remains good law and this
20 Court's Order was proper and should not be reconsidered.

21 ///

22 ///

23 ///

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CONCLUSION

Based on the foregoing, the Peel Brimley Lien Claimants respectfully request that the Court deny APCO's Motion for Reconsideration.

DATED this 9th day of January 2018.

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CERTIFICATE OF SERVICE

Pursuant to Nev. R. Civ. P. 5(b), I certify that I am an employee of PEEL BRIMLEY LLP and that on this 9th day of January 2018, I caused the above and foregoing document entitled **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** to be served as follows:

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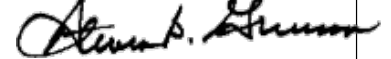
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22 **DISTRICT COURT**

23 **CLARK COUNTY, NEVADA**

24 APCO CONSTRUCTION, a Nevada
25 corporation,

26 Plaintiff,

27 v.

28 GEMSTONE DEVELOPMENT WEST, INC., A
Nevada corporation,

Defendant.

Case No.: A571228

Dept. No.: XIII

Consolidated with:

A574391; A574792; A577623; A583289;

A587168; A580889; A584730; A589195;

A595552; A597089; A592826; A589677;

A596924; A584960; A608717; A608718; and

A590319

**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**

AND ALL RELATED MATTERS

APCO Construction, Inc. ("APCO"), by and through its undersigned counsel of record, the
law firms of SPENCER FANE LLP and MARQUIS AURBACH COFFING, submits the

1 following Reply in Support of its Motion for Reconsideration of the Court's Order Granting the
2 Peel Brimley Lien Claimants Partial Motion for Summary Judgment to Preclude Defenses based
3 on Pay-if-Paid Provisions. This Reply addresses National Wood's and Peel Brimley's
4 Oppositions.

5 APCO's Motion should be granted because National Wood's Opposition exclusively relies
6 on its misplaced argument that this Court and the Nevada Supreme Court did not decide *Padilla*
7 *Construction Co. of Nevada v. Big-D Construction Corp.*¹ ("*Padilla v. Big-D*") based upon the
8 payment schedule (and corresponding lack of payment from the owner to the general contractor
9 for the subcontractor's work). Instead, National Wood claims that this Court and the Nevada
10 Supreme Court decided the case solely on a different condition precedent: whether Padilla's work
11 was accepted by the owner. This reading is contrary to the plain language of both this Court's
12 order in *Padilla v. Big-D* and the Nevada Supreme Court's decision. The Nevada Supreme Court
13 decided *Padilla v. Big-D* for two separate and independent reasons: (1) Padilla's work was not
14 accepted by the owner; *and* (2) because Big-D was never paid for Padilla's work by the owner.

15 APCO's Motion should be granted because the Nevada Supreme Court has found that pay-
16 if-paid provisions are valid conditions precedent to a general contractor's obligation to pay a
17 subcontractor without a mechanic's lien waiver. There have been no waiver of lien rights in this
18 instance, and all parties agreed to valid preconditions to payment.

19 DATED: January 10, 2018.

SPENCER FANE LLP

20
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¹ 286 P.3d 982 (2016)

1 **I. National Wood’s Opposition**²

2 **A. *Padilla v. Big-D* is exactly on point.**

3 The Court’s analysis in *Padilla v. Big-D* applies to the facts of this case. While National
4 Wood’s Opposition presents a two-step analysis that it believes the Nevada Supreme Court
5 followed in its decision in *Padilla v. Big-D*, its position is wholly unsupported. See Opposition at
6 2 (“First, the subcontractor had to show that it actually properly performed its work under the
7 subcontract. Second, if it passed the first hurdle, the subcontractor had to show that the pay-if-paid
8 provision was invalid.”). National Wood’s reading of this Court’s and the Nevada Supreme
9 Court’s alleged two-step analysis contains no citations to the decisions and ignores both this
10 Court’s and the Nevada Supreme Court’s specific findings regarding when Big-D, the general
11 contractor, had to pay Padilla, the subcontractor. Accordingly, this Court should consider *Padilla*
12 *v. Big-D* as persuasive authority pursuant to Nev. R. App. P. 36(3) and apply its reasoning to this
13 case.³

14 **B. This Court found Big-D’s payment to Padilla was never triggered because two**
15 **conditions precedent to payment were not met.**

16 After trial in the *Padilla v. Big-D* matter, this Court found that: (1) NRS 624.624 was
17 designed to ensure that general contractors pay subcontractors *after* the owner pays the general;⁴
18 (2) NRS 624.624 yields to a schedule of payments;⁵ (3) the subcontract confirmed that Padilla
19
20

21 ² While APCO is separating its Reply by headings addressing National Wood’s and Peel
22 Brimley’s Oppositions, all of its arguments in both sections are meant to address both
23 Oppositions.

24 ³ See Nev. R. App. P. 36(3) (“A party may cite for its persuasive value, if any, an unpublished
25 disposition issued by this court on or after January 1, 2016.”).

26 ⁴ Exhibit 11 to Motion for Reconsideration, Findings of Fact and Conclusions of Law and
27 Judgment at 21:14-16 (emphasis added) (“NRS 624.624 is designed to ensure that general
28 subcontractors promptly pay subcontractor after the general contractor receives payment from the
Owner associated with work performed by the subcontract.”).

⁵ *Id.* at 21: 17-19 (“By its own terms, NRS 624.624 yields to (a) payment schedules contained in
subcontract agreements and (b) contractual rights to withhold payments from a subcontractor after
arising from deficient work.”); *id.* at 22:6-9 (“Here, it is undisputed that the Subcontract
Agreement is a written agreement between Big-D and Padilla. Accordingly, pursuant to NRS
624.624(1)(a) payment is due to Padilla on the date specified in the Subcontract Agreement.”).

1 would get paid after the owner accepted and paid the prime contractor for the work;⁶ and (4) the
2 owner never accepted the work so Big-D's payment to Padilla never became due.⁷ *This Court did*
3 *not proclaim any two-step analysis or refuse to decide when payment would be due under the*
4 *schedule of payments, as National Wood would have this Court believe.* Instead, it decided the
5 issue of when Big-D's payment to Padilla would come due head on: it ruled on NRS 624.624
6 regarding when payments to subcontractors are due, it acknowledged the subcontract contained a
7 schedule of payments, confirmed when payment was due under that schedule of payments, and
8 determined that payment never became due because the owner never paid Big-D for Padilla's
9 work.⁸ If this Court wanted to punt the issue, those findings of fact and conclusions of law would
10 have been unnecessary.

11 **C. The Nevada Supreme Court held that Big-D's payment to Padilla was never**
12 **triggered because two conditions precedent to payment were not met.**

13 Next, unlike National Wood's representation that the Nevada Supreme Court did not
14 address the second "hurdle,"⁹ the pay-if-paid provision, it is clear that the Nevada Supreme
15 Court's decision accounted for the same two separate conditions precedent which were not met
16 (the owner never accepted the subcontractor's work, and the owner never paid the general for the
17 subcontractor's work) in determining that Big-D's payment obligation never became due:

18 Because the parties' subcontract contained a payment
19 schedule that required that Padilla be paid within ten days after
20 IGT accepted Padilla's work and paid Big-D for that work and it
21 is undisputed that **IGT never accepted Padilla's work and never
paid Big-D for Padilla's work**, the district court correctly found
that payment never became due to Padilla under the subcontract
or *NRS 624.624(1)(a)*.¹⁰

22 National Wood's position is even more tenuous given the Nevada Supreme Court's
23 proclivity to explicitly state when it is resting its decision on one dispositive issue, and not
24 _____

25 ⁶ *Id.* at 22:9-11 ("The Subcontract provided that Padilla was to be paid within ten (10) days after
26 IGT paid Big-D and after IGT accepted the Padilla work.").

27 ⁷ See Findings of Fact and Conclusions of Law and Judgment. at 23:2-3 ("Here, it is undisputed
that IGT never accepted the Padilla work. Accordingly, payment to Padilla never became due.").

28 ⁸ See *id.*

⁹ National Wood's Opposition at 3:17-24.

¹⁰ 386 P.3d 982, 2016 Nev. Unpub. LEXIS 958 (emphasis added).

1 deciding other issues.

2 **D. *Lehrer* is not dispositive.**

3 National Wood also misunderstands APCO's position of *Lehrer McGovern Bovis, Inc. v.*
4 *Bullock Insulation, Inc.*¹¹ As APCO explained in its Motion, when considering the pay-if-paid
5 provision *in conjunction with the preemptive waiver of mechanic's lien rights*, the *Lehrer* court
6 stated in dicta that pay-if-paid provisions are against public policy when they impair a
7 subcontractor's right to place a mechanic's lien on the property and have the same practical effect
8 of waiving a right to a mechanic's lien.¹² The rationale in *Lehrer* is inapplicable in this case
9 because the subcontracts at issue did not contain a waiver or impairment of the Subcontractors'
10 mechanic's lien rights. The Subcontractors maintained such rights and lienied the property to get
11 paid for their labor and materials.¹³ So even if pay-if-paid language was stricken in *Lehrer*, the
12 rationale (of impairing mechanic's lien rights) remains. That logic and rationale should not be
13 applicable in this instance since the pay-if-paid language does not impair mechanic's lien rights.
14

15 Further, National Wood tries to distinguish *Lehrer* from the instant case by pointing out the
16 *Lehrer* court struck down the mechanic's lien waiver, and arguing there was no "effective waiver
17 of a mechanic's lien." National Wood's argument is unpersuasive. First, this argument fails to
18 account for APCO's position that the rationale of *Lehrer* should not control this case (as explained
19 above). Second, it ignores the fact that when the Court analyzes a waiver of a mechanic's lien in
20 conjunction with pay-if-paid language, the subcontractor has no remedy. It cannot lien the
21 property, and it cannot pursue the general contractor. However, when the subcontract only
22 contains pay-if-paid language, the subcontractor has a remedy: it can lien the property. And as the
23 Nevada Supreme Court pointed out in *Padilla v. Big-D*, when the subcontract only contains pay-
24 if-paid language within a schedule of payments, the pay-if-paid language is a valid condition
25

26
27 ¹¹ 124 Nev. 1102 (2008).

28 ¹² *Lehrer McGovern Bovis v. Bullock Insulation*, 197 P.3d 1032, 124 Nev. 1102 (Nev. 2008)
(internal citations omitted).

¹³ See **Exhibits 4-6**.

1 precedent to payment.

2 **II. Peel Brimley's Opposition**

3 Peel Brimley is correct in that NRS 624 requires prompt payment to subcontractors.
4 However, as this Court has previously ruled, NRS 624.624 was designed to ensure that general
5 contractors pay subcontractors *after* the owner pays the general contractor for the subcontractor's
6 work.¹⁴ Since it is undisputed that the owner never paid APCO for the Subcontractors' work,
7 APCO's payment obligation under the respective Subcontracts or NRS 624 was not triggered.¹⁵

8 Helix conflates the *Lehrer* decision beyond its holding in an attempt to merge contract and
9 lien rights into one body of law. Specifically, Helix argues that the policy discussed in *Bullock* is
10 not advanced by precluding pay-if-paid agreements only when there is security of lien. Converse
11 to Helix's assertion, there is a valid justification for making the distinction, because if the
12 distinction is not made, and by following Helix's rational, every general contractor in the State of
13 Nevada has now become a personal guarantor of payment under NRS 108 when a project fails, the
14 property is sold, priority to the proceeds are determined, and there are remaining
15 contractors/subcontractors who have purported outstanding balances owed to them. Of the utmost
16 importance, nowhere does NRS 108 state the security afford there under obligates a general
17 contractor in any form or fashion to be liable or guarantee such NRS 108 securities.

18
19 Helix cites to *J.E. Dunn Northwest, Inc. v. Corus Const. Venture, LLC*,¹⁶ for the
20 proposition that the Supreme Court of Nevada has already found that the "loss of security does not
21 mean the loss of lien rights afforded a lien claimant pursuant to NRS 108."¹⁷ Helix's reliance on
22 *J.E. Dunn* is misplaced, as *J.E. Dunn* specifically addresses lien priorities between various lien
23 claimants, which has already been done by the Supreme Court in the instant case. What is not
24

25
26 ¹⁴ **Exhibit 11** to Motion for Reconsideration, Findings of Fact and Conclusions of Law and
27 Judgment at 21:14-16 (emphasis added). ("NRS 624.624 is designed to ensure that general
28 subcontractors promptly pay subcontractor after the general contractor receives payment from the
Owner associated with work performed by the subcontract.").

¹⁵ See *Padilla*, 386 P.3d 982, 2016 Nev. Unpub. LEXIS 958.

¹⁶ 127 Nev. 72, 81, 249 P.3d 501, 507 (2011)

1 found anywhere in *J.E. Dunn*, or any other case cited by Helix, is how a general contractor is still
2 liable to a subcontractor pursuant to NRS 108 once the priority and lien rights have been
3 determined. Thus, these two bodies of law must be kept distinctly separate, and is why a case-by-
4 case analysis of the factors enunciated in NRS 624.628 must be analyzed by the Court.

5 And while *Lehrer* concluded that the pay-if-paid provision in that subcontract was
6 unenforceable, it did so for reasons that are not applicable here because in this case, the
7 Subcontractors did not waive their lien rights. In *Lehrer*, the combination of a waiver of a
8 subcontractor's mechanic's lien rights and the pay-if-paid language left the subcontractor without
9 a remedy against either the owner's property and the general. As such, *Padilla v. Big-D* is far more
10 similar in that it contained pay-if-paid language, and no waiver of lien rights. So the
11 Subcontractors had a remedy in both *Padilla v. Big-D* and the instant case: they could lien the
12 property.
13

14 Peel Brimley argues that "the Supreme Court did not consider the applicability of *Bullock*
15 [*Lehrer*] and its prohibition on pay-if-paid, presumably because neither party raised the issue."¹⁸
16 Peel Brimley is incorrect. APCO's Motion chronicled the parties' detailed briefing on pay-if-paid
17 provisions, and even *Lehrer* specifically.¹⁹

18 Next, Peel Brimley contends that the *Padilla v. Big-D* decision "hinged on the fact that
19 Padilla materially breached the subcontract."²⁰ This Court does not need to consider Peel
20 Brimley's speculation on the basis of the Court's decision because the Court explained the basis
21 for its decision:

22 Because the parties' subcontract contained a payment
23 schedule that required that Padilla be paid within ten days after
24 IGT accepted Padilla's work and paid Big-D for that work and it
is undisputed that **IGT never accepted Padilla's work and never
paid Big-D for Padilla's work**, the district court correctly found

27 ¹⁷ Opposition at 3:21–22

28 ¹⁸ See Opposition at 5:1–2.

¹⁹ See Motion for Reconsideration at 12:10–13:22.

²⁰ See Opposition at 5:7–8.

that payment never became due to Padilla under the subcontract or *NRS 624.624(1)(a)*.²¹

Lastly, Peel Brimely contends that the Court should consider *Cashman Equipment Company v. West Edna Associates, Ltd.*²² *Cashman* is inapposite and consideration of *Cashman* would not change the Court's analysis. As APCO presented in its Motion, there are essentially three categories of provisions that are important to keep in mind: (1) a waiver of a mechanic's lien rights; (2) a waiver of a mechanic's lien rights in conjunction with a pay-if-paid provision; and (3) a pay-if-paid provision which does not impair a subcontractor's mechanic's lien rights. The Nevada Supreme Court addressed the first two categories in the *Lehrer* case.²³ The Nevada Supreme Court did not address pay-if-paid provisions in subcontracts that did not waive, impair, or have the practical effect of waiving or impairing a subcontractor's right to place a mechanic's lien on the property in *Lehrer*. Instead, it addressed them in *Padilla v. Big-D*, and found the pay-if-paid language to be a valid condition precedent to payment.²⁴

The instant case is a category 3 case: a pay-if-paid provision which does not impair a subcontractor's mechanic's lien rights. *Cashman* is inapposite since it is a category 1 case which only involved a mechanic's lien waiver. Further, its mere mention of pay-if-paid provisions being unenforceable as against public policy is unpersuasive because as set forth above, that case and its rationale did not account for the situation in the instant case: pay-if-paid language without a waiver of a mechanic's lien. Only the *Padilla v. Big-D* Court has decided a category 3 case.

²¹ 386 P.3d 982, 2016 Nev. Unpub. LEXIS 958 (emphasis added). Further, this Court will hear arguments at trial regarding how the Subcontractors did not meet its other conditions precedent to payment pursuant to sections 3 and 4 of their respective Subcontracts. Thus, to Helix's argument, this Court's ultimate decision could be that the Subcontractors did not meet two (or more) of the conditions precedent to payment, like the Court ruled in *Padilla*.

²² 380 P.3d 844 (2016), 132 Nev. Adv. Op. 26 (2016).

²³ *Lehrer*, 197 P.3d at 1040-44.

²⁴ 386 P.3d 982, 2016 Nev. Unpub. LEXIS 958

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DATED: January 10, 2018.

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1 **CERTIFICATE OF SERVICE**

2 I hereby certify that I am an employee of SPENCER FANE LLP and that a copy of the
3 foregoing **REPLY IN SUPPORT OF MOTION FOR RECONSIDERATION OF COURT'S**
4 **ORDER GRANTING PEEL BRIMLEY LIEN CLAIMANTS' PARTIAL MOTION FOR**
5 **SUMMARY JUDGMENT TO PRECLUDE DEFENSES BASED ON PAY IF PAID**
6 **PROVISIONS ON AN ORDER SHORTENING TIME** was served by electronic transmission
7 through the E-Filing system pursuant to NEFCR 9, NRCP 5(b) and EDCR 7.26 or by mailing a
8 copy to their last known address, first class mail, postage prepaid for non-registered users, on this
9 10th day of January, 2018, as follows:
10

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15 **Intervenor Plaintiff: Interstate Plumbing & Air Conditioning Inc**

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28 **Plaintiff: Apco Construction**

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DISTRICT COURT

CLARK COUNTY, NEVADA

APCO CONSTRUCTION, a Nevada
corporation,

Plaintiff,

vs.

GEMSTONE DEVELOPMENT WEST, INC., a
Nevada corporation,

Defendant.

CASE NO. A571228
DEPT. NO. XIII

Consolidated with:

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

AND ALL RELATED MATTERS

Date of Hearing: January 11, 2018
Time of Hearing: 9:00 a.m.

**ZITTING BROTHERS CONSTRUCTION, INC.'S OPPOSITION TO APCO
CONSTRUCTION, INC.'S MOTION FOR RECONSIDERATION OF COURT'S ORDER
GRANTING ZITTING BROTHERS CONSTRUCTION'S PARTIAL MOTION FOR
SUMMARY JUDGMENT**

Zitting Brothers Construction, Inc. ("Zitting"), a lien claimant, respectfully opposes APCO Construction, Inc.'s motion to reconsider this Court's order granting Zitting's motion for summary judgment in its entirety. APCO Construction, Inc. ("APCO") fails to introduce any law or evidence that was new or could not have been introduced and argued in the prior briefing on Zitting's motion. APCO also fails to show that this Court's decision was clearly erroneous. Zitting explains this further in the accompanying Memorandum of Points and Authorities, which is supported by the

1 record of this Court and any oral argument that this Court may entertain at the hearing on APCO's
2 motion.

3 Dated: January 10, 2018

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5 DICKER LLP

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16 *Zitting Brothers Construction, Inc.*

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Wanting yet another “bite at the apple,” APCO seeks reconsideration of this Court’s order
4 granting Zitting’s motion for summary judgment. This reconsideration manifests in a 39-page
5 motion, filed 5:17 p.m. on January 8, 2018—giving Zitting little time to oppose and leaving this
6 Court almost no time to review the opposition. Critically, APCO devotes its entire motion re-arguing
7 issues that it raised or could have raised in the prior briefing on Zitting’s motion. There is no new
8 evidence for this Court to consider APCO has failed to show that this Court clearly erred in granting
9 Zitting’s motion.

10 Zitting has concerns that this motion is nothing more than an attempt to wear this Court down
11 by attrition and to force a reversal out of the court’s frustration. This is not the purpose of a motion
12 for reconsideration. It is why motions for reconsideration are disfavored and routinely denied. While
13 APCO claims that it is seeking reconsideration to later avoid appealing this decision, it is apparent
14 from APCO’s demeanor throughout this case that it intends to file an appeal of any monetary
15 decision awarded to either Zitting or any other lien claimant. Thus, APCO’s motion for
16 reconsideration should be denied as the end result is going to be litigation before Nevada’s appellate
17 court. Denying APCO’s motion will avoid this Court and Zitting from having to expend any more
18 time and resources.

19 **II. ARGUMENT**

20 **A. This Court should not reconsider its order granting Zitting’s Motion for Summary**
21 **Judgment because it re-argues various issues in a futile attempt to vacate a proper**
22 **order.**

23 APCO fails to raise any grounds to support its motion for reconsideration of the order
24 granting Zitting’s motion for summary judgment—opting instead to reargue points raised in the
25 parties’ briefing on Zitting’s motion. Although courts have discretion to reconsider and “mend,
26 correct, resettle, modify, or vacate” their prior orders, *Trail v. Faretto*, 91 Nev. 401, 403, 536 P.2d
27 1026, 1027 (1975),
28

1 [m]otions for reconsideration are disfavored ... and are not the place
2 for parties to make new arguments not raised in their original briefs.
3 ... Nor is reconsideration to be used to ask the Court to rethink what it
has already thought.

4 *Motorola, Inc. v. J.B. Rodgers Mech. Contractors*, 215 F.R.D. 581, 582 (D. Ariz. 2003) (citations
5 omitted). A party may not present evidence for the first time in a motion for reconsideration when
6 the evidence was previously available. *Trentacosta v. Frontier Pac. Aircraft Indus., Inc.*, 813 F.2d
7 1553, 1557 (9th Cir. 1987). A party's failure to make arguments in prior proceedings constitutes a
8 waiver of such arguments. *Chowdry v. NLVH, Inc.*, 111 Nev. 560, 563, 893 P.2d 385, 387 (1995).

9 As APCO admits, reconsideration of a motion is "appropriate only when 'substantially
10 different evidence is subsequently introduced or the decision is clearly erroneous.'" (Mot. for
11 Reconsideration¹ 10:8-9 (citing *Masonry & Tile Contractors Ass'n of S. Nev. v. Jolley, Urga &*
12 *Wirth, Ltd.*, 113 Nev. 737, 741, 941 P.2d 486, 489 (1997)).) "A finding is clearly erroneous when
13 although there is evidence to support it, the reviewing court on the entire evidence is left with the
14 definite and firm conviction that a mistake has been committed.'" *Unionamerica Mortgage & Equity*
15 *Trust v. McDonald*, 97 Nev. 210, 211-212, 626 P.2d 1272, 1273 (1981) (citation omitted). Here,
16 APCO has failed to introduce any new evidence that would warrant reconsideration, as shown by its
17 reliance on the same evidence it submitted to support its original and supplemental oppositions to
18 Zitting's motion for summary judgment.

19 For example, APCO cites to Zitting's Rule 30(b)(6) deposition testimony as new evidence.
20 (Mot. for Reconsideration 11:25-14:8.) But APCO admits that it had addressed this testimony in its
21 supplemental opposition to Zitting's motion briefing, which this Court considered. (*Id.* 9:3-4
22 (admitting that it addressed Zitting's deposition testimony in supplemental briefing).) APCO
23 therefore cannot dispute that it previously asserted—or could have asserted—each of the arguments
24 in its motion for reconsideration. (*See id.* 11:1-16:23 (re-arguing points from APCO's original and
25 supplemental opposition to Zitting's motion for summary judgment).) As discussed below, APCO's
26 arguments in its motion for reconsideration are wholly without merit and fail to leave a definite and
27

28 ¹ Zitting cites APCO's motion for reconsideration as "Mot. for Reconsideration."

1 firm conviction that this Court had made a mistake.² Accordingly, this Court should deny APCO's
2 motion for reconsideration.

3 **1. This Court's November 27, 2017 decision regarding Zitting's Motion for**
4 **Summary Judgment was clear that it granted the motion in its entirety and**
5 **was therefore mistake-free.**

6 As an initial matter, APCO suggests that this Court mistakenly entered its December 29,
7 2017 Order granting Zitting's motion for summary judgment because that order contradicted this
8 Court's November 27, 2017 Decision ("Decision") on Zitting's motion. (*Id.* 9:12-10:1.) Specifically,
9 APCO claims that this Court found genuine issues of material fact as to the breach of contract and
10 Nev. Rev. Stat. 108 claims, which would preclude summary judgment. (*See id.*) However, the plain
11 language of the November 27, 2017 Decision shows that there is no such contradiction.

12 The Decision found that the resolution of the "pay-if-paid" aspect of Zitting's [m]otion [for
13 summary judgment]" does not resolve Zitting's breach of contract claim. (Decision 2:2-7 (Nov. 27,
14 2017).) This made sense. The resolution of the "pay-if-paid" aspect did not establish a breach of
15 contract. *See Richardson v. Jones*, 1 Nev. 405, 408 (1865) (requiring the existence of a valid
16 contract, a breach by the defendant, and damage as a result of the breach for a breach of contract).
17 This was why this Court also found that it "still ha[d] before it the question of whether there are
18 genuine issues going to breach of contract related to Zitting's performance of the same." (Decision
19 2:2-7 (Nov. 27, 2017).)

20 To resolve that question, this Court found that "what APCO has provided is 'too little too
21 late'" and that it was "simply unfair to require Zitting to address supposed issues that have been
22 drawn out at the last minute." (*Id.* 2:7-13.) This adopted Zitting's argument that Nev. R. Civ. P. 37
23 precludes APCO from using any evidence other than the evidence regarding the enforceability of the
24 "pay-if-paid" provision to oppose Zitting's motion. (*See id.* 2:14-17.) Moreover, it was evident from
25 the Decision and the pleadings filed with the Court that APCO did not present admissible evidence

26 ² In light of APCO's re-litigation of previously decided issues, Zitting incorporates all of its argument discussed in its
27 Motion for Partial Summary Judgment Against APCO Construction, Reply in Support of Motion for Partial Summary
28 Judgment Against APCO Construction, Response to APCO Construction's Supplemental Opposition to Zitting Brothers
Construction, Inc.'s Motion for Partial Summary Judgment, and Joinder to Peel Brimley Lien Claimants' Motion for
Partial Summary Judgment Precluding Defenses Based on Pay-if-Paid Agreements.

1 to create a genuine issue of material fact to challenge all of the evidence presented by Zitting in
2 summary judgment. The only “evidence” and arguments APCO presented were those conjured up at
3 the eleventh hour after it had mislead Zitting. By concluding that the “pay-if-paid” provision was
4 void and unenforceable, and that APCO had no evidence to oppose the other aspect of Zitting’s
5 motion, summary judgment completely in Zitting’s favor was warranted. (*See id.* 2:12-13.) This
6 Court should therefore not reconsider its December 29, 2017 Order on this basis.

7 **2. Preclusion of all of APCO’s evidence other than evidence regarding the**
8 **enforceability of the “pay-if-paid” provision was warranted and did not**
9 **constitute a case-ending sanction.**

10 APCO fails to definitively prove that the primary basis for this Court’s granting of Zitting’s
11 motion—Nev. R. Civ. P. 37’s preclusion of evidence other than enforceability of pay if paid
12 provision—was a mistake. Nev. R. Civ. P. 37(c)(1) prohibits a “party that without substantial
13 justification fails to ... amend a prior response to discovery as required by Rule 26(e)(2) ... [from]
14 us[ing] as evidence at a trial, at a hearing, or on a motion any ... information not so disclosed”
15 unless “such failure is harmless.” For example, “failure to supplement interrogatory responses under
16 Rule 26(e)(2) may ... result in the exclusion of all evidence related to the non-supplemented
17 subject.” *Heidelberg Harris, Inc. v. Mitsubishi Heavy Indus., Ltd.*, No. 95 C 0673, 1996 WL 680243,
18 at *8 (N.D. Ill. Nov. 21, 1996) (citing *Holiday Inn, Inc. v. Robertshaw Controls Co.*, 560 F.2d 856,
19 858 (7th Cir. 1977)). “Rule 37(c)(1)’s preclusionary sanction is ‘automatic....’” *Am. Stock Exch.,*
20 *LLC v. Mopex, Inc.*, 215 F.R.D. 87, 93 (S.D.N.Y. 2002). The party facing preclusion bears the
21 burden to prove that its failure to disclose was substantially justified and did not prejudice the party
22 seeking sanctions. *E.g., Torres v. City of Los Angeles*, 548 F.3d 1197, 1213 (9th Cir. 2008). Here,
23 APCO—again—fails to meet this burden.

24 **a. APCO does not dispute that it had no justification for not timely**
25 **disclosing all grounds for refusing payment to Zitting in its**
26 **interrogatory responses.**

27 In its motion for reconsideration, APCO does not dispute—and therefore concedes—that it
28 had no justification for failing to disclose in its 2010 and 2017 original interrogatory responses

1 grounds for refusing payment to Zitting other than one based on the enforceability of the “pay-if-
2 paid” provision. (*See* Mot. for Reconsideration 6:25-35:9.) There was also no justification for APCO
3 to not seasonably amending its interrogatory responses to include additional grounds for refusing
4 payment. (*See id.*) Nor can APCO show this.

5 APCO has never denied that it could disclose all grounds for its defenses in 2010. (*See id.*)
6 APCO admits that it had independent knowledge to assert those defenses since the outset of this
7 case, including defenses based on

- 8 ▪ whether Zitting submitted any application for payment of the amount owed;
- 9 ▪ whether APCO received close-out documents from Zitting—a purported condition
10 precedent to payment under the contract; and
- 11 ▪ whether APCO provided executed change orders to Zitting—another purported condition
12 precedent to payment under the contract.

13 (*See id.* 15:1-16:21, 18:1-20:24.) Nonetheless, Zitting has expressly given both of APCO’s Rule
14 30(b)(6) witnesses an opportunity during their deposition to amend APCO’s interrogatory responses.
15 (Ex. A 14:8-24; Ex. B 109:11-111:50.) They did not amend the responses. (*See id.*) This is
16 unsurprising given the testimony from APCO’s Rule 30(b)(6) witness on APCO’s affirmative
17 defenses that APCO was still relying solely on the “pay-if-paid” provision to excuse payment.
18 (MSJ,³ Ex. B 40:16-41:4.)

19 **b. APCO fails to show that this Court’s finding of prejudice was clearly**
20 **erroneous.**

21 APCO also fails to show that this Court’s finding of prejudice to Zitting was wrong. In a
22 misguided attempt to show a lack of prejudice to Zitting, APCO argues that discovery “really only
23 started in September 2016.” (Mot. for Reconsideration 7:11-15.) This argument ignores the parties’
24 prior disclosure of thousands of pages of documents and prior discovery. (*See, e.g.*, Ex. C; MSJ, Ex.
25 T.) Discovery has only “seemed” like it started for APCO because Zitting had relied on APCO’s sole
26 defense under the “pay-if-paid” provision and refrained from conducting other discovery.

27
28 _____
³ Zitting cites its motion for summary judgment as “MSJ”) and its reply in support of that motion as “MSJ Reply.”

1 Had APCO disclosed all grounds for refusing payment in its 2010 interrogatory responses,
2 Zitting would have approached discovery much differently in 2010—when witnesses are all
3 available and their recollection of the relevant facts is fresh. For example, it would have

- 4 ▪ served written discovery requests to the drywaller;
- 5 ▪ deposed specific APCO employees on Zitting’s work;
- 6 ▪ deposed the owner on its approval of Zitting’s work;
- 7 ▪ deposed CAMCO and the drywaller on the status of Buildings 8 and 9’s drywall; and
- 8 ▪ retained an expert to assess the value of Zitting’s completed work.

9 “With the passage of time, those facts become harder to prove [for Zitting] as memories fade and
10 witnesses become unavailable.” *See N.L.R.B. v. Serv-All Co., Inc.*, 491 F.2d 1273, 1275 (10th Cir.
11 1974).

12 Also, as APCO’s motion for reconsideration accurately points out, discovery resumed in
13 2016 after the appellate issues were resolved.⁴ It is abundantly clear that APCO had over a year
14 before the close of discovery to supplement its discovery responses to add the affirmative defenses
15 that it has now tried to do on the eve of trial, and only after Zitting and the other lien claimants had
16 already filed their respective summary judgment motions. Instead, APCO chose to rely on its one
17 affirmative defense throughout the remainder of discovery all to the detriment of Zitting.

18 Again, Zitting had relied on APCO’s original interrogatory responses to pursue a litigation
19 plan to pursue limited discovery and file a motion for summary judgment that focused on the
20 enforceability of the “pay-if-paid” provision. To that end, Zitting

- 21 ▪ limited its review of the voluminous documents disclosed in this case;
- 22 ▪ limited depositions and written discovery;
- 23 ▪ truncated APCO’s Rule 30(b)(6) depositions by not pursuing all questions beyond
24 APCO’s limited defense;
- 25 ▪ prepared its Rule 30(b)(6) witness for his deposition based on limited information.

26 _____
27 ⁴ APCO attempts to curry sympathy from this Court by stating in its pending motion that it took on the lions share of the
28 appellate work to try and get its lien to take priority over the bank. As this Court is aware, however, APCO did not do
this out of any benevolence for its subcontractors who are the lien claimants in this litigation. It undertook the primary
role in the appeal because of its interest in trying to offset the amounts due to its subcontracts, which are owed under
Nevada law (NRS 624, et seq.) by APCO irrespective of whether any money is garnered from the sale of the property.

1 Based on nearly identical facts, a federal court in *Inamed Corp. v. Kuzmak*, 275 F. Supp. 2d 1100
2 (C.D. Cal. 2002), *aff'd*, 64 Fed. Appx. 241 (Fed. Cir. 2003) has precluded defenses not properly
3 disclosed during discovery. Although Zitting discusses this federal case in its briefing on its motion
4 for summary judgment, (MSJ Reply 7:22-8:24), APCO completely overlooks the case. (*See* Mot. for
5 Reconsideration 6:25-35:9.) This case further confirms the soundness of this Court's finding of
6 prejudice.

7 **c. APCO's vague affirmative defenses did not apprise Zitting of APCO's**
8 **grounds for refusing payment.**

9 APCO—again—cites the affirmative defenses alleged in its answer to show the absence of
10 prejudice to Zitting. (Mot. for Reconsideration 16:24-17:26.) However, this does not show that
11 preclusion of evidence related to these defenses was clearly erroneous.

12 APCO has alleged 20 affirmative defenses in its June 10, 2009 answer, including:

- 13 ▪ Tenth Affirmative Defense: APCO's obligation to Zitting have been satisfied or excused.
- 14 ▪ Twelfth Affirmative Defense: The claim for breach of contract is barred as a result of
15 Zitting's failure to satisfy conditions precedent.

16 (*Id.* 7:1-3, Ex. 2 7:1-9:13.) The affirmative defense cited by APCO can be read to reflect only the
17 "pay-if-paid" condition precedent. (*See id.* 17:7-25.) However, these affirmative defenses are vague
18 and do not identify any factual basis. (*See id.*)

19 As discussed in Zitting's prior briefing, uncertain of APCO's factual basis for the affirmative
20 defenses, Zitting first served interrogatories in 2010 to obtain more details about those defenses and
21 to see if the parties can narrow the issues for trial. For example, the interrogatories asked APCO to
22 explain its refusal to pay Zitting (interrogatory nos. 1, 6, and 40) and APCO's bases for affirmative
23 defenses nos. 10 and 12 (interrogatory nos. 10 and 17). (MSJ, Ex. T 5:4-7:9, 10:14-11:5, 14:7-15:4,
24 21:1-22:2, 43:5-45:2.) APCO only disclosed its reliance on the "pay-if-paid" condition precedent.
25 (*Id.*) On June 5, 2017, APCO's Rule 30(b)(6) designee for APCO's affirmative defenses
26 subsequently confirmed through deposition testimony that this was the sole ground for refusing
27 payment to Zitting. (MSJ, Ex. B at 10:24-12:20, 40:16-41:4, Ex. 1.) Assuming *arguendo* that the
28

1 vague affirmative defenses asserted in 2009 provided notice of APCO's affirmative defenses,
2 APCO's subsequent discovery responses had eliminated that notice.

3 Moreover, assuming this Court was to entertain APCO's condition precedent argument,
4 APCO still loses. The condition precedent that APCO asserts are two fold. First, APCO claims that
5 the drywall needs to be up for Zitting to get paid its retention under its contract. It is undisputed that
6 the units are complete so this condition precedent has been met. The contract does not say that the
7 drywall has to be up during the time that APCO is on the project. The contract provision just says
8 that the drywall has to be completed. Second, APCO claims that the change order has to be
9 approved by the contractor and owner. However, as this Court ruled, by operation of law the change
10 order was accepted and approved when APCO failed to challenge the change order within 30 days of
11 its submission. APCO's failure to acknowledge that its contract cannot contravene Nevada law is
12 what has lead it to continue this protracted litigation. However, as established herein, this Court
13 was well aware when it issued its Decision and Order that the conditions precedent APCO is
14 clamoring about in its motion for reconsideration were met. Therefore, Zitting was owed its
15 retention amount plus its change orders, which is why this Court granted Zitting summary judgment.

16 **d. Deposition testimony from APCO's Rule 30(b)(6) witness on**
17 **accounting cannot undo the prejudice to Zitting.**

18 APCO again argues that its July 19, 2017 Rule 30(b)(6) deposition testimony on accounting
19 provided Zitting notice of grounds for APCO's defenses. (Mot. for Reconsideration 18:1-20:24.)
20 However, this is wholly without merit.

21 Notably, APCO completely disregards the prejudicial effect of its June 5, 2017 Rule 30(b)(6)
22 deposition testimony on APCO's affirmative defenses and construction-related topics. (Ex. A 10:24-
23 12:20, Ex. 1.) The witness at that deposition has testified that APCO was solely relying on the "pay-
24 if-paid" provision to avoid paying Zitting the amount owed. (MSJ, Ex. B 40:16-41:4.) APCO's
25 subsequent Rule 30(b)(6) deposition on other topics cannot contradict this. When Zitting's counsel
26 asked both witnesses about any changes they want to make to APCO's interrogatory responses, both
27 witness did not make any changes. (Ex. A 14:21-24, Ex. B 109:16-111:15.)
28

1 Nevertheless, those depositions occurred 7 years after APCO’s initial interrogatory response,
2 near the end of discovery, and only a few months before trial. By the time of the depositions,
3 Zitting—in reliance on APCO’s conduct over the course of 7 years—had already lost opportunities
4 to conduct the discovery needed to respond to APCO 11th-hour defenses. As this Court noted, this is
5 “too little[,] too late.” (Decision 2:8-10 (Nov. 27, 2017).)

6 **e. APCO’s late supplemental interrogatory responses cannot undo the**
7 **prejudice to Zitting.**

8 Likewise, APCO’s 11th-hour supplement to its interrogatory responses cannot undo the
9 prejudice to Zitting. APCO served this supplement to its interrogatory responses on November 7,
10 2017—after the close of discovery, after Zitting’s motion for summary judgment was filed, and
11 about two months before trial. (Mot. for Reconsideration, Ex. 8.) This cannot undo prejudice from
12 years of Zitting’s prior reliance and lost opportunity to conduct discovery. Again, this is “too little[,]
13 too late.” (Decision 2:8-10 (Nov. 27, 2017).)

14 **f. APCO has failed to show that preclusion of evidence due to its**
15 **tardiness alone is case terminating, so consideration of the *Young***
16 **factors and holding of an evidentiary hearing are unnecessary.**

17 APCO argues that this Court’s preclusion of evidence “is the equivalent of case terminating
18 sanctions” that warranted consideration of *Young* factors and an evidentiary hearing. (Mot. for
19 Reconsideration 21:1-24:2.) Critically, APCO fails to raise this in its prior briefing on Zitting’s
20 motion for summary judgment, including APCO’s supplemental opposition. This constitutes a
21 waiver of the argument. *See Chowdry*, 111 Nev. at 563, 893 P.2d at 387. Nonetheless, this argument
22 has no merit.

23 The Nevada Supreme Court defines “case terminating sanctions” as one where the court
24 sanctions a party by dismissing the complaint or striking the entire answer. *Bahena v. Goodyear Tire*
25 *& Rubber Co.*, 126 Nev. 606, 615 n. 6, 245 P.3d 1182, 1188 n. 6 (2010). The court has only required
26 the consideration of *Young* factors and the completion of an evidentiary hearing in cases where the
27 trial court considers case terminating sanctions, such as “dismissal with prejudice.” *See id.* at 613,
28 245 P.3d at 1186–87; *Young v. Johnny Ribeiro Bldg., Inc.*, 106 Nev. 88, 92, 787 P.2d 777, 779

1 (1990). This is because the trial court has “broad authority to impose severe sanctions,” including
2 broad discretion to decide what factors it would consider. *Id.* at 614, 245 P.3d at 1187. “Nevada
3 jurisprudence does not follow the federal model of requiring progressive sanctions....” *Id.* at 610,
4 245 P.3d at 1184. Here, the preclusion in this case is not case terminating.

5 Notably, this Court provided similar preclusion to another lien claimant, National Wood
6 Products, Inc. (“National Wood”). The court would preclude “evidence, testimony, documents[,] and
7 things not properly produced by ... APCO ... in discovery.” (Order Granting Pl. in Intervention,
8 Nat’l Wood Prods., Inc.’s Mot. in Limine 2:1-5 (Jan. 9, 2018).) Yet, trial is still proceeding in
9 National Wood’s case, which shows that the preclusion of evidence did not serve as case terminating
10 sanctions.

11 Likewise, the preclusion of evidence conjured up at the last minute in Zitting’s case does not
12 resolve the issue of whether the “pay-if-paid” provision is enforceable. (Decision 2:2-7 (Nov. 27,
13 2017).) The parties must still address that issue, and the preclusion does not affect the parties’ ability
14 to litigate the merits of that issue. There is nothing to suggest that this Court’s simultaneous
15 resolution of the issues of preclusion and the enforceability of the “pay-if-paid” provision renders the
16 preclusion case-terminating. Rather, it is indisputable that preclusion would not be case terminating
17 had APCO prevailed on the “pay-if-paid” defense—as APCO would be the prevailing party instead.

18 APCO’s reliance on two unpublished cases—*Colony Ins. Co. v. Kuehn*, 2:10-CV-01943-
19 KJD, 2011 WL 7946295 (D. Nev. Dec. 22, 2011) and *McDonald v. Shamrock Investments, LLC*, No.
20 54852, 2011 WL 4527787 (Nev. Sept. 29, 2011) (unpublished)—do not lead to a different
21 conclusion. (*See* Mot. for Reconsideration 22:1-24:2.) As an initial matter, court rules preclude
22 APCO from citing a 2011 unpublished decision from Nevada Supreme Court as authoritative is
23 improper. *See* Nev. R. App. P. 36(a)(3) (allowing citation to unpublished Nevada Supreme Court
24 decision issued on or after January 1, 2016). Nonetheless, both of those cases involve case
25 terminating sanctions that precluded the sanctioned party from litigating any issues on the merits, *i.e.*
26 striking of a party’s answer. *See, e.g., McDonald*, 2011 WL 4527787, at *2. This is not the case here
27 since this Court still permitted APCO to litigate via its summary judgment oppositions critical issues
28

1 of whether Nevada Revised Statute 624, et seq. required payment of the primary contractors
2 subcontractors and the enforceability of pay-if-paid. (*See* Decision 2:2-7 (Nov. 27, 2017).)

3 In fact, the Nevada Supreme Court in *Pizarro-Ortega v. Cervantes-Lopez*, 133 Nev. ___,
4 P.3d 783 (2017) has recently affirmed this Court’s discretion in evaluating the grounds for
5 preclusion based solely on Nev. R. Civ. P. 37(c):

6 We clarify that when a party has failed to abide by NRCP 16.1’s
7 disclosure requirements, NRCP 37(c)(1) provides the appropriate
8 analytical framework for district courts to employ in determining the
9 consequence of that failure. Under NRCP 37(c)(1), a party is
10 prohibited from “us[ing] as evidence at trial ... any witness or
11 information not so disclosed” unless the party can show there was
“substantial justification” for the failure to disclose or “unless such
failure is harmless.” *See also* NRCP 16.1(e)(3)(B) (providing for
discretionary exclusion of evidence under similar circumstances if an
attorney “fails to *788 reasonably comply with any provision of
[NRCP 16.1]”).

12 *Id.*, 396 P.3d at 787–88. In other words, APCO has no right to an analysis under the *Young* factors in
13 conjunction with an evidentiary hearing prior to this Court’s issuance of preclusion. *See id.*

14 Both in its oppositions to summary judgment and in this reconsideration motion, APCO
15 ignores the fact that Zitting presented arguments based on APCO’s obligations as a primary
16 contractor pursuant to Chapter 624 of the Nevada Revised Statutes. Instead, APCO argues that
17 Zitting must strictly perform all conditions precedent in its contract. (Mot. for Reconsideration 33:1-
18 34:4.) But APCO’s own cited authority shows that this argument fails as a matter of law.

19 *DeValk Lincoln Mercury, Inc. v. Ford Motor Co.*, 811 F.2d 326, 336 (7th Cir. 1987)—cited
20 by APCO in its motion—expressly states that a party is entitled to payment under a construction
21 contract when it substantially performs its contractual obligations:

22 As an initial matter, we hesitate to apply the substantial performance
23 rule outside the realm of cases in which that rule is applied in
24 Michigan. ***The substantial performance rule in Michigan allows***
contractors, engineers, builders, and other construction
professionals to recover a proportionate share of a contractual sum
when they have substantially performed their construction
obligations. *See, e.g., Antonoff v. Basso*, 347 Mich. 18, 78 N.W.2d 604
25 (1956); *McCall v. Freedman*, 35 Mich.App. 243, 192 N.W.2d 275
26 (1971). Outside of those construction-type cases, however, we are
27 unable to find any evidence that Michigan’s courts are willing to more
broadly apply the substantial performance rule. *Cf. Gordon v. Great*
Lakes Bowling Corp., 18 Mich.App. 358, 171 N.W.2d 225, 228–29
28 (1969) (applying substantial performance rule to lease dispute, but in

1 addition to rent, parties argued over construction costs and
construction delay).

2 *DeValk Lincoln Mercury, Inc. v. Ford Motor Co.*, 811 F.2d 326, 336 (7th Cir. 1987) (emphasis
3 added). APCO admits that the Nevada Supreme Court has adopted this reasoning in *MB Am., Inc. v.*
4 *Alaska Pac. Leasing*, 132 Nev. Adv. Op. 8, 367 P.3d 1286, 1288 (2016). (Mot. for Reconsideration
5 33:8-19.) Strict compliance as argued by APCO applies outside of the context of construction-
6 context, such as prelitigation mediation provision in a commercial contract as indicated by the
7 Nevada Supreme Court in *MB Am.*, 367 P.3d at 1288. Here, there is no dispute that Zitting's contract
8 is a construction contract between contractors. Therefore, the substantial compliance standard
9 applies.

10 Assuming *arguendo* that both APCO's contracts with the owner and Zitting are terminated,
11 both Zitting's contract and Nevada law requires APCO to pay the amount owed for the work
12 completed by Zitting. Contrary to APCO's assertion, (Mot. for Reconsideration 32:7-25), nothing
13 about section 9.4 of Zitting's subcontract requires a termination for convenience. The provision only
14 requires a termination. (*See id.*) Further, Nev. Rev. Stat. 624.626(6) requires payment upon
15 termination. (MSJ Reply 12:12-20.) This Court has already considered this when it granted Zitting's
16 motion for summary judgment. (*See* Decision (Nov. 27, 2017).) APCO has not shown why this
17 Court should reconsider its prior decision.

18 In any event, APCO's conduct excuses Zitting's performance of the conditions precedent.
19 Again, APCO's departure from the project prevented Zitting from fully performing its contract with
20 APCO. "The prevention doctrine provides that a party may not escape contractual liability by
21 reliance upon the failure of a condition precedent where the party wrongfully prevented performance
22 of that condition precedent." *A.I.C., Ltd. v. Mapco Petroleum, Inc.*, 711 F.Supp. 1230, 1238
23 (D.De.1989).

24 APCO's failure to acknowledge all of the legal arguments raised in Zitting's summary
25 judgment motion skews its view of the facts and legal arguments considered by this Court in
26 reaching its Decision. The reason the Court's exclusion of the late arguments and evidence lead to
27 summary judgment is because APCO was legally wrong on all issues making judgment in favor of
28

1 Zitting warranted. The exclusion of evidence served only to bolster the necessity to grant summary
2 judgment pursuant to APCO's obligations as the primary contractor.

3 This Court has already considered APCO's arguments and has found them wanting.
4 Therefore, there was no clear error made by this Court in granting summary judgment to Zitting.

5 Because APCO cannot show that preclusion was clearly erroneous, there is no need for this
6 Court to consider APCO's arguments regarding defenses other than the enforceability of the "pay-if-
7 paid" provision.⁵

8 **g. APCO has failed to show that this Court erred in voiding the "pay-if-
9 paid" provision.**

10 APCO argues extensively that an unpublished decision—*Padilla Constr. Co. of Nevada v.*
11 *Big-D Constr. Corp.*, Nos. 67397, No. 68683, 2016 WL 6837851 (Nev. Nov. 18, 2016)—proves that
12 this Court is wrong about not enforcing the "pay-if-paid" provision. (Mot. for Reconsideration
13 35:11-38:11.) APCO's reliance on this case does not lead to a different outcome. As an initial
14 matter, this case is not controlling because it is an unpublished decision. Nev. R. App. P. 36(a)(2).
15 Nevertheless, *Padilla Constr. Co. of Nevada*, 2016 WL 6837851, at *1 involves a materially
16 different issue—a subcontractor's right to payment for work that was expressly rejected as defective.

17 In contrast, the owner has approved all of Zitting's work, as discussed in the prior briefing on
18 Zitting's motion for summary judgment and as further supported by the preclusion of any effort by
19 APCO to challenge this. For example, a third-party lien claimant's ratification agreement shows the
20 completion of Zitting's scope of work by the time APCO departed the Project. (Supp. Response,⁶
21 Ex. A, Ex. 15 at CAMCO-MW 01346.) APCO's Rule 30(b)(6) witness has also testified as to no
22 quality concerns with Zitting's work. (MSJ, Ex. B 28:15-29:5.) As Zitting's Rule 30(b)(6) witness
23

24 ⁵ In any event, APCO fails to show that Zitting's declaration is inconsistent with Zitting's deposition testimony, as
25 discussed in the briefing on Zitting's motion for summary judgment. APCO relies on out of context—and quite
26 misleading—excerpts of Zitting's Rule 30(b)(6) deposition testimony. For example, to argue that Zitting admitted
27 APCO's rejection of the change orders at issue, APCO omits the relevant portion from Zitting's deposition testimony
where Zitting's Rule 30(b)(6) witness testified that he based his response on the limited information presented by
APCO's counsel. (Mot. for Reconsideration, Ex. 7 50:5-52:1.) APCO therefore cannot show a genuine issue of material
fact.

28 ⁶ Zitting cites its response to APCO Construction's supplemental opposition to its motion for summary judgment as
"Supp. Response."

1 explained at the deposition, covering up Zitting's work with drywall shows acceptance. (Mot. for
2 Reconsideration, Ex. 7 27:3-13.) This makes sense. One would not cover up defective framing work
3 with drywall because the drywall would then have to be ripped down to make any repairs to the
4 framing. (*See id.*) Also, it is undisputed that the project is now complete. This is proof of the
5 owner's final acceptance of Zitting's work.

6 In any event, the rules of statutory construction obviate the need to consider *Padilla Constr.*
7 *Co. of Nevada*. It is well-settled that when a statute is clear and unambiguous, this court gives effect
8 to the plain and ordinary meaning of the words and does not resort to the rules of construction. *Orion*
9 *Portfolio Servs. 2 LLC v. Cnty. of Clark*, 126 Nev. ___, ___, 245 P.3d 527, 531 (2010) (citations
10 omitted). In other words, public policy is irrelevant when the statute is clear and unambiguous. *See*
11 *id.* APCO does not dispute that Nev. Rev. Stat. 624.626(1)(b) is clear and unambiguous on the
12 limitations for a pay-if-paid provision. Nev. Rev. Stat. 624.628(3)(a) is also clear and unambiguous
13 on the invalidity of any pay-if-paid provision that goes beyond the limitations of Nev. Rev. Stat.
14 624.626(1)(b). Therefore, this Court only needs to apply the statutes as plainly written and void the
15 "pay-if-paid" provision in APCO's subcontract with Zitting.

16 Zitting and the other parties have already discussed extensively in their prior and other
17 briefings on this issue why the "pay-if-paid" provision does not pass statutory muster. Zitting
18 incorporates those briefings, such as Zitting's Motion for Partial Summary Judgment Against APCO
19 Construction, Reply in Support of Motion for Partial Summary Judgment Against APCO
20 Construction, Response to APCO Construction's Supplemental Opposition to Zitting Brothers
21 Construction, Inc.'s Motion for Partial Summary Judgment, and Joinder to Peel Brimley Lien
22 Claimants' Motion for Partial Summary Judgment Precluding Defenses Based on Pay-if-Paid
23 Agreements. Zitting also incorporates the arguments set forth by National Wood Products, Inc. and
24 Peel Brimley Lien Claimants in their opposition to APCO's motion for reconsideration of the order
25 granting Peel Brimley Lien Claimants' Motion for Partial Summary Judgment to Preclude Defenses
26 of Pay If Paid Provision.

27 //

28 //

1 **3. APCO has contravened public policy of deciding cases on their merits and**
2 **therefore does not deserve any reconsideration of this Court's order.**

3 APCO cannot invoke the public policy in favor of deciding cases on its merits. As discussed
4 above and in the parties' briefing on Zitting's motion for summary judgment, APCO's conduct over
5 the course of 7 years have made it impossible for Zitting to now prepare for trial on APCO's late-
6 asserted defenses. APCO has severely undermined Zitting's ability to obtain evidence to respond to
7 those defenses. The purpose of the discovery rules is to avoid "surprise" or "trial by ambush."
8 *Mopex*, 215 F.R.D. at 93. And Nev. R. Civ. P. 37 serves this purpose by punishing those who
9 prevent other parties from adjudicating their cases on the merits. To allow trial to go forward in this
10 case will eviscerate the purpose of Nev. R. Civ. P. 37. APCO can only blame itself for its
11 predicament.

12 **III. CONCLUSION**

13 Because APCO fails to introduce any new evidence that warrants a reversal of this Court's
14 order or show how the order was clearly erroneous, this Court should deny APCO's motion for
15 reconsideration.

16 Dated: January 10, 2018

17 WILSON ELSEER MOSKOWITZ EDELMAN &
18 DICKER LLP

19 /s/I-Che Lai

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27 Facsimile: (702) 727-1401
28 Attorneys for Lien Claimant,
 Zitting Brothers Construction, Inc.

1 **CERTIFICATE OF SERVICE**

2 Pursuant to NRCP 5(b), I certify that I am an employee of Wilson Elser Moskowitz Edelman
3 & Dicker LLP, and that on this 10th day of January, 2018, I served a true and correct copy of the
4 foregoing **ZITTING BROTHERS CONSTRUCTION, INC.'S OPPOSITION TO APCO**
5 **CONSTRUCTION, INC.'S MOTION FOR RECONSIDERATION OF COURT'S ORDER**
6 **GRANTING ZITTING BROTHERS CONSTRUCTION'S PARTIAL MOTION FOR**
7 **SUMMARY JUDGMENT** document as follows:

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

16
17 BY: /s/Nicole Hrustyk
18 An Employee of WILSON ELSEER MOSKOWITZ
19 EDELMAN & DICKER LLP
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Exhibit A

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DISTRICT COURT
CLARK COUNTY, NEVADA

APCO CONSTRUCTION, a Nevada
corporation,

Plaintiff,

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

Defendants.

AND ALL RELATED MATTERS.

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

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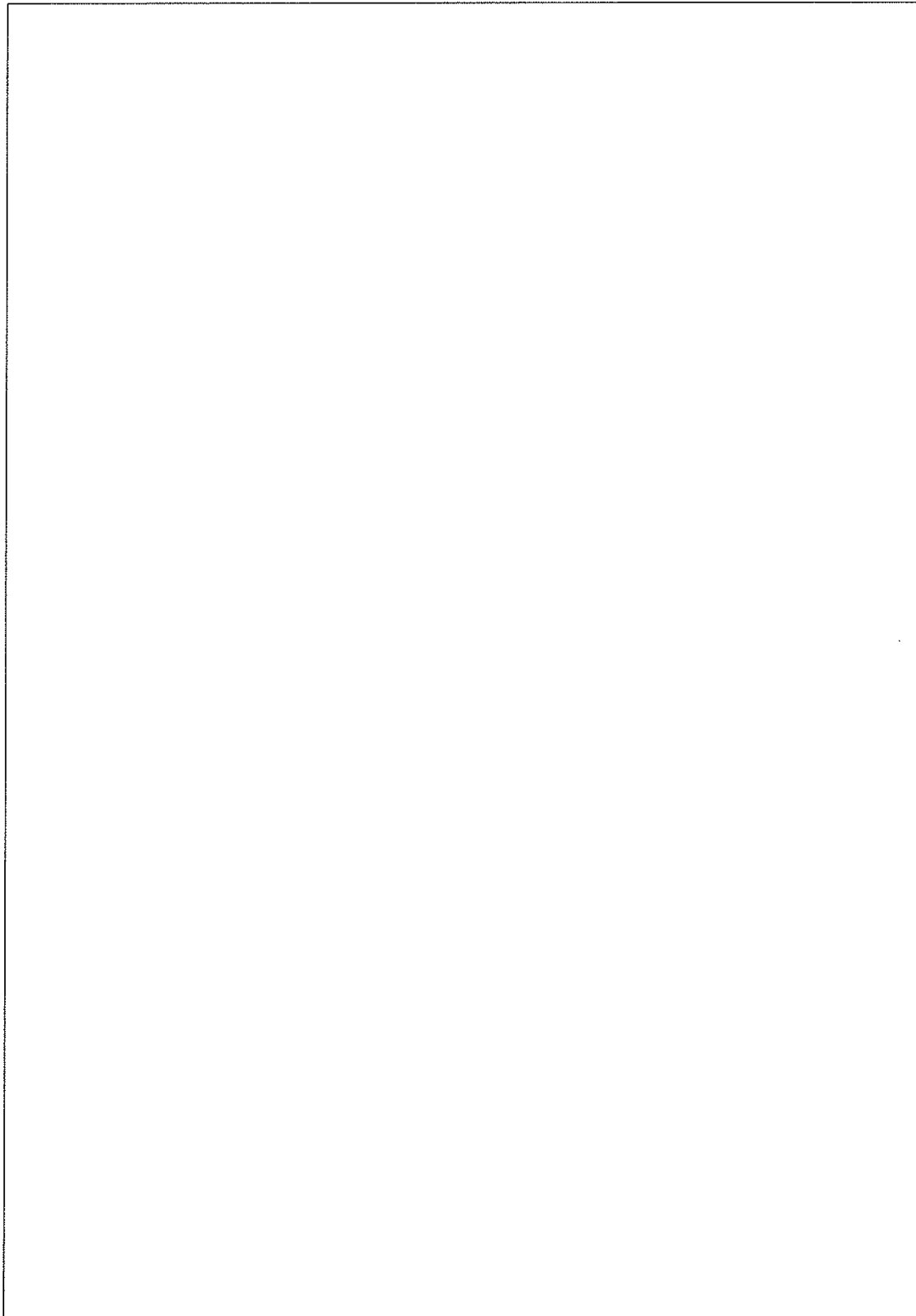
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* * * * *

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5	By Mr. Taylor		40
6	By Mr. Zimbelman		54
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9	By Mr. Taylor		92
10	E X H I B I T S		
11	Exhibit No.	Description	Page
12	Benson		
13	1	Zitting Brothers Construction, Inc.'s	9
14		amended notice of deposition of APCO	
		Construction pursuant to NRCP 30(b)(6)	
15	2	APCO Construction's responses to	12
16		Zitting Brothers Construction, Inc.'s	
		interrogatories	
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18		Brothers Construction, Inc's first	
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21	5	Subcontract agreement between Asphalt	18
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23		APCO Construction and Zitting Brothers	
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24	E X H I B I T S (Continued)		
25	Exhibit No.	Description	Page

1	Benson	
2		
3	6	Document on Scott Financial Corporation letterhead to Nevada State Contractor's Board, April 28, 2009, CAMCO-MV 00029 through 37 25
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5	7	Correspondence from APCO Construction, James Barker to Alexander Edelstein, Gemstone, July 18, 2008, ZBCI001151 through 1154 29
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12	11	Subcontract Agreement, Asphalt Products Corporation and CabineTec, April 17, 2007, APCO-NCS 0024749 through 24765 41
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15	12	Correspondence to APCO Construction from Rob Trickett, Cabinetec, Inc., 08?06?2008, apco00044958 45
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Deposition of BRIAN DAVID BENSON

June 5, 2017

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

Thereupon--

BRIAN DAVID BENSON,
was called as a witness, and having been first duly sworn, was examined and testified as follows:

EXAMINATION

BY MR. LAI:

Q. Good morning. Is it Mr. Benson?

A. Yes, sir.

Q. My name is I-Che Lai, and I'm one the attorneys for Zitting Brothers Construction. For shorthand I'll refer to them as Zitting; is that okay?

A. Sure.

Q. Can you state your name for the record.

A. Brian Daniel Benson.

Q. Is that B-e-n-s-o-n?

A. Yes.

Q. Have you ever had your deposition taken before?

1 it done.

2 Q. Did you go to high school?

3 A. Yes.

4 Q. Where did you go to high school?

5 A. West Scranton High School.

6 Q. Where is that?

7 A. Scranton, Pennsylvania.

8 Q. Did you graduate?

9 A. Yes.

10 Q. When?

11 A. 1989.

12 Q. Did you go to college?

13 A. No.

14 Q. Do you have any professional licenses or
15 certifications?

16 A. No.

17 Q. The next two questions are questions I ask
18 all deponents, so please don't take offense. Have you
19 ever been convicted of a felony?

20 A. No.

21 Q. Have you ever been convicted of crime
22 involving dishonesty or fraud?

23 A. No.

24 MR. LAI: Mark this as Exhibit 1.

25 (Exhibit 1 marked



1 for identification.)

2 BY MR. LAI:

3 Q. Mr. Benson, the court reporter has handed you
4 a document marked as Benson 1. Have you seen this
5 document before?

6 A. Yes.

7 Q. Did you read this document before coming here
8 today?

9 A. Yes.

10 Q. So what is this document?

11 A. I guess the best way to say it is Zitting
12 Brothers' case against APCO.

13 Q. I'll represent to you that Benson 1 is the
14 deposition notice we served on APCO Construction for
15 your deposition here today. Do you agree to testify on
16 APCO's behalf today?

17 A. Yes.

18 Q. I want to flip to page, starting at page 3.
19 Do you see the bolded words saying "Area of
20 examination"?

21 A. Yes.

22 Q. Beneath that, do you see a list of numbers
23 going up to 13?

24 A. Yes.

25 Q. Just for the sake of clarity, do you

1 understand which topics under these areas of
2 examination that you agree to testify on APCO's behalf
3 today?

4 A. Yes.

5 Q. Which topics?

6 MR CHEN: If I can help out, he's going to be
7 talking on the money issues, which is number 4 -- I'm
8 sorry. The money issues that he's not going to be
9 talking about are numbers 4, 5, 7, 8. And as for 9,
10 10, 11 and 12, if they relate to payments, that's all
11 going to be Mary Jo. So payments will be Mary Jo. He
12 will talk about things out in the field and everything
13 else.

14 BY MR. LAI:

15 Q. Mr. Benson, does your counsel's statements
16 make sense to you?

17 A. Yes.

18 Q. Are you prepared to go through these topics
19 today?

20 A. Yes.

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

23 A. Just reviewed the documents presented for the
24 deposition.

25 Q. Can you please explain what type of documents



1 Q. Mr. Benson, the court reporter has handed you
2 documents marked as Benson 2 and 3. Have you ever seen
3 those documents before?

4 A. I believe so, yes.

5 Q. Were these the documents that you reviewed as
6 part of your preparation for today's deposition?

7 A. Yes, briefly.

8 Q. Let's talk about Benson 2. Let's turn to
9 page 46 of 47. Do you see the name Joseph Pelan?

10 A. Joseph Pelan, yes.

11 Q. Who is Joseph Pelan?

12 A. The man sitting two chairs to the right of
13 me.

14 Q. Do you believe that this is a true and
15 correct copy of APCO'S responses to interrogatories?

16 A. Yes.

17 Q. Let me direct your attention to Benson 3.
18 Did you assist in preparing the responses to the
19 interrogatories in Exhibit Benson 3?

20 A. No.

21 Q. After your review of both Benson 2 and 3, is
22 there anything that you notice that you want to change
23 in those responses?

24 A. I didn't go over them in that much detail.

25 Q. Let's talk about the ManhattanWest mixed use



1 A. I believe so.

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

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

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

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

12 A. Not that I was personally aware.

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

15 A. Yes, sir.

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

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

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

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

4 A. Yes.

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

8 A. I can't speak to that.

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

10 (Whereupon, a recess was taken.)

11 EXAMINATION

12 BY MR. TAYLOR:

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

18 A. No.

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

21 A. No.

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

25 A. I do not.



[illegible]

That prior to being deposed, the witness was duly sworn by me to testify to the truth. That I thereafter transcribed my said stenographic notes via computer-aided transcription into written form, and that the typewritten transcript is a complete, true and accurate transcription of my said stenographic notes. That review of the transcript was requested.

IN WITNESS WHEREOF, I have set my hand in my
office in the County of Clark, State of Nevada, this
15th day of June, 2017.

June W. Lord



ESQUIRE
DEPOSITION SOLUTIONS

AA 004405

1 ANTD
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4 I-CHE LAI, ESQ.
5 Nevada Bar No. 12247
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11 Jorge.Ramirez@wilsonelser.com
12 I-Che.Lai@wilsonelser.com
13 Attorneys for Lien Clamant,
14 Zitting Brothers Construction, Inc.

DISTRICT COURT
CLARK COUNTY, NEVADA

10 APCO CONSTRUCTION, a Nevada
11 corporation,

12 Plaintiff,

13 vs.

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

16 Defendant.

CASE NO. A571228
DEPT. NO. XIII

Consolidated with:

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

17 AND ALL RELATED MATTERS

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

DATE: June 5, 2017
TIME: 9:00 a.m.

23 ///

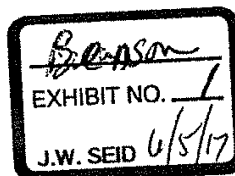
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28 ///



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

3 TO: APCO CONSTRUCTION

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

5 TO: ALL PARTIES AND THEIR RESPECTIVE ATTORNEYS OF RECORD

6 PLEASE TAKE NOTICE that pursuant to NRCP 30(b)(6), ZITTING BROTHERS
7 CONSTRUCTION, INC., ("ZBCI"), by and through its counsel of record, Jorge A. Ramirez, Esq.,
8 and I-Che Lai, Esq., of the law firm of WILSON ELSEER MOSKOWITZ EDELMAN & DICKER,
9 LLP, will take the oral deposition of one or more designated representatives for
10 APCO CONSTRUCTION ("APCO") on the 5th day of June, 2017, at the hour of 9:00 a.m. at
11 Esquire Deposition Solutions, located at 2300 W. Sahara Ave., Suite 770, Las Vegas, NV 89102.
12 ZBCI plans to depose APCO's designated representative(s) on each of the numbered categories
13 identified below. The deposition will take place before an officer duly authorized by law to
14 administer oaths and record testimony. This deposition will be recorded by stenographic means and
15 will be taken pursuant to all applicable provisions of the Nevada Rules of Civil Procedure pertaining
16 to the taking of and use of depositions. You are invited to attend and cross-examine.
17
18

19 DEFINITIONS

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

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

23 2. The term "Gemstone" refers to Gemstone Development West, Inc., its employees,
24 agents, representatives, attorneys, experts, and all other persons acting or purporting to act on its
25 behalf
26

27 3. The term "ZBCI" refers to Zitting Brothers Construction, Inc., its employees, agents,
28 representatives, attorneys, experts, and all other persons acting or purporting to act on its behalf.

1 4. The term "Manhattan West Project" refers to the real property commonly referred to
2 as Manhattan West mixed used development project at issue in this case and generally located at
3 9205 West Russell Road, Clark County, Nevada.

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

7 6. The term "Sub-Contract" refers to the agreement you entered into with ZBCI
8 regarding the Manhattan West Project, including but not limited to the original contact(s), change
9 orders, and any ratification agreements.
10

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

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

- 15 1. All facts fact related to the Contract;
- 16 2. All facts fact related to the Sub-Contract;
- 17 3. All facts related to ZBCI's work under the Sub-Contract, including but not limited to
18 the scope and quality of ZBCI's work;
- 19 4. All facts related to your process for obtaining payment under the Contract;
- 20 5. All facts related to your process for paying sub-contractors under the Sub-Contract
21 and sub-contracts with other sub-contractors;
- 22 6. All facts related to all payments you received in connection with the Manhattan West
23 Project;
- 24 7. All facts related to all payments you made to ZBCI in connection with the Manhattan
25 West Project;
- 26 8. All facts related to all payments you made to sub-contractors other than ZBCI in
27
28

1 connection with the Manhattan West Project;

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

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

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

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

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

12 DATED this 11th day of May, 2017.

13
14
15 WILSON ELSEER MOSKOWITZ EDELMAN &
DICKER LLP

16
17 By: 

Jorge Ramirez, Esq.
Nevada Bar No. 6787
I-Che Lai, Esq.
Nevada Bar No. 12247
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Facsimile: (702) 727-1401
*Attorneys for Lien Claimant,
Zitting Brothers Construction, Inc.*

1 **CERTIFICATE OF SERVICE**

2 Pursuant to NRCP 5(b), I certify that I am an employee of Wilson Elser Moskowitz Edelman
3 & Dicker LLP, and that on this 11th day of May, 2017, I served a true and correct copy of the
4 foregoing **ZITTING BROTHERS CONSTRUCTION, INC.'S AMENDED NOTICE OF**
5 **DEPOSITION OF APCO CONSTRUCTION PURSUANT TO NRCP 30(b)(6)** document as
6 follows:

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

15 **Bennett Tueller Johnson & Deere**

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BY


An Employee of WILSON ELSER MOSKOWITZ
EDELMAN & DICKER LLP

Exhibit B

DISTRICT COURT

CLARK COUNTY, NEVADA

APCO CONSTRUCTION, a Nevada
corporation,

Plaintiff,

vs.

CASE NO. A571228
DEPT. NO. XIII

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

Defendants.

AND ALL RELATED MATTERS.

THE DEPOSITION OF

MARY JO ALLEN

PMK on behalf of APCO

VOLUME II

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

2300 West Sahara Avenue, Suite 770
Las Vegas, Nevada

June W. Seid, CCR No. 485

APPEARANCES OF COUNSEL

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For Helix Electrical of Nevada, LLC:

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