

1 2018, Plaintiff APCO Construction, being represented by and through its attorney of record,
2 Cody S. Mounteer, Esq. of the law firm of Marquis Aurbach Coffing, and Defendant Zitting
3 Brothers Construction, Inc., being represented by and through its attorney of record, I-Che Lai,
4 Esq. of the law firm of Wilson, Elser, Moskowitz, Edelman & Dicker LLP; the Court having
5 reviewed the papers and pleadings on file herein, having heard arguments of the parties, and for
6 good cause shown;

7 IT IS HEREBY ORDERED, ADJUDGED AND DECREED that, APCO's Motion for
8 NRCP 54(b) Certification is GRANTED;

9 IT IS FURTHER ORDERED that because no just reason for delay exists, this Court
10 enters an express direction for the entry of judgment as to the Findings of Fact, Conclusions of
11 Law, and Order Granting Zitting Brother Construction, Inc.'s Motion for Partial Summary
12 Judgment, which is hereby certified as final under NRCP 54(b);

13 IT IS FURTHER ORDERED that because no just reason for delay exists, this Court
14 enters an express direction for the entry of judgment as to the Order Denying APCO's Motion
15 for Reconsideration of Court's Order Granting Zitting Brother Construction, Inc.'s Partial
16 Motion for Summary Judgment, which is hereby certified as final under NRCP 54(b);

17 IT IS FURTHER ORDERED that because no just reason for delay exists, this Court
18 enters an express direction for the entry of judgment as to Order Determining Amount of Zitting
19 Brothers Construction, Inc.'s Attorney's Fees, Costs, and Prejudgment Interest, which is hereby
20 certified as final under NRCP 54(b);

21 IT IS FURTHER ORDERED that because no just reason for delay exists, this Court
22 enters an express direction for the entry the Judgment in Favor of Zitting Brothers Construction,
23 Inc., which is hereby is certified as final under NRCP 54(b);

24 IT IS FURTHER ORDERED that APCO's Motion for Stay Pending Appeal is also
25 GRANTED;

1 IT IS FURTHER ORDERED that APCO shall have thirty days from notice of entry of
2 this order to post a bond for the full amount of the Judgment in favor of Zitting Brothers
3 Construction, Inc., \$1,516,723.46, in order to stay these proceedings pending appeal.

4 **ORDER**

5 IT IS SO ORDERED.

6 Dated this 28th day of July, 2018

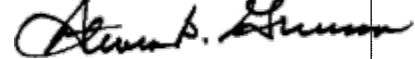
7
8 
9 DISTRICT COURT JUDGE

10 Respectfully submitted by:

11 MARQUIS AURBACH COFFING

12 By 

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16 Nevada Bar No. 11220
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Attorneys for Apco Construction, Inc.

DISTRICT COURT

CLARK COUNTY, NEVADA

APCO CONSTRUCTION, a Nevada
corporation,

Plaintiff,

v.

GEMSTONE DEVELOPMENT WEST, INC., A
Nevada corporation,

Defendant.

Case No.: A571228

Dept. No.: XIII

Consolidated with:

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

AND ALL RELATED MATTERS

NOTICE OF ENTRY OF ORDER

Please take notice that the Order Granting Motion for 54(b) Certification and for Stay
Pending Appeal was entered in the above-captioned matter on the 30th day of July, 2018, a copy

///

///

1 Of which is attached hereto.

2 Dated this 31st day of July, 2018.

3
4 MARQUIS AURBACH COFFING

5
6 By /s/Cody S. Munteer
7 Cody S. Munteer, Esq.
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1 **CERTIFICATE OF SERVICE**

2 I hereby certify that the foregoing **NOTICE OF ENTRY OF ORDER** was submitted
3 electronically for filing and/or service with the Eighth Judicial District Court on the 31st day of
4 July, 2018. Electronic service of the foregoing document shall be made in accordance with the
5 E-Service List as follows:¹

6
7 **Counter Claimant: Camco Pacific Construction Co Inc**

8 Steven L. Morris (steve@gmdlegal.com)

9 **Intervenor Plaintiff: Cactus Rose Construction Inc**

10 Eric B. Zimbelman (ezimbelman@peelbrimley.com)

11 **Intervenor Plaintiff: Interstate Plumbing & Air Conditioning Inc**

12 Jonathan S. Dabbieri (dabbieri@sullivanhill.com)

13 **Intervenor: National Wood Products, Inc.'s**

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19 **Other: Chapter 7 Trustee**

20 Elizabeth Stephens (stephens@sullivanhill.com)

21 Gianna Garcia (ggarcia@sullivanhill.com)

22 Jennifer Saurer (Saurer@sullivanhill.com)

23 Jonathan Dabbieri (dabbieri@sullivanhill.com)

24 **Plaintiff: Apco Construction**

25 Rosie Wesp (rwesp@maclaw.com)

26 **Third Party Plaintiff: E & E Fire Protection LLC**

27 TRACY JAMES TRUMAN (DISTRICT@TRUMANLEGAL.COM)

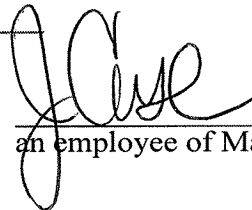
28 ¹ Pursuant to EDCR 8.05(a), each party who submits an E-Filed document through the E-Filing System consents to electronic service in accordance with NRCP 5(b)(2)(D).

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an employee of Marquis Aurbach Coffing



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14 Attorneys for APCO Construction

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15 **DISTRICT COURT**

16 **CLARK COUNTY, NEVADA**

17 APCO CONSTRUCTION, a Nevada
18 corporation,

19 Plaintiff,

20 vs.

21
22 **GEMSTONE DEVELOPMENT WEST, INC., A**
23 Nevada corporation,

24 Defendant.

25
26 **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

ORDER GRANTING MOTION
FOR 54(b) CERTIFICATION AND FOR
STAY PENDING APPEAL

27 Plaintiff APCO Construction's Motion for 54(b) Certification and for Stay Pending
28 Appeal on Order Shortening Time having come on for hearing before this Court on June 21,

MARQUIS AURBACH COFFING

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

RECEIVED

JUL 20 2018

DISTRICT COURT DEPT#13

1 2018, Plaintiff APCO Construction, being represented by and through its attorney of record,
2 Cody S. Mounteer, Esq. of the law firm of Marquis Aurbach Coffing, and Defendant Zitting
3 Brothers Construction, Inc., being represented by and through its attorney of record, I-Che Lai,
4 Esq. of the law firm of Wilson, Elser, Moskowitz, Edelman & Dicker LLP; the Court having
5 reviewed the papers and pleadings on file herein, having heard arguments of the parties, and for
6 good cause shown;

7 IT IS HEREBY ORDERED, ADJUDGED AND DECREED that, APCO's Motion for
8 NRCP 54(b) Certification is GRANTED;

9 IT IS FURTHER ORDERED that because no just reason for delay exists, this Court
10 enters an express direction for the entry of judgment as to the Findings of Fact, Conclusions of
11 Law, and Order Granting Zitting Brother Construction, Inc.'s Motion for Partial Summary
12 Judgment, which is hereby certified as final under NRCP 54(b);

13 IT IS FURTHER ORDERED that because no just reason for delay exists, this Court
14 enters an express direction for the entry of judgment as to the Order Denying APCO's Motion
15 for Reconsideration of Court's Order Granting Zitting Brother Construction, Inc.'s Partial
16 Motion for Summary Judgment, which is hereby certified as final under NRCP 54(b);

17 IT IS FURTHER ORDERED that because no just reason for delay exists, this Court
18 enters an express direction for the entry of judgment as to Order Determining Amount of Zitting
19 Brothers Construction, Inc.'s Attorney's Fees, Costs, and Prejudgment Interest, which is hereby
20 certified as final under NRCP 54(b);

21 IT IS FURTHER ORDERED that because no just reason for delay exists, this Court
22 enters an express direction for the entry the Judgment in Favor of Zitting Brothers Construction,
23 Inc., which is hereby is certified as final under NRCP 54(b);

24 IT IS FURTHER ORDERED that APCO's Motion for Stay Pending Appeal is also
25 GRANTED;

1 IT IS FURTHER ORDERED that APCO shall have thirty days from notice of entry of
2 this order to post a bond for the full amount of the Judgment in favor of Zitting Brothers
3 Construction, Inc., \$1,516,723.46, in order to stay these proceedings pending appeal.

4 **ORDER**

5 IT IS SO ORDERED.

6 Dated this 28th day of July, 2018

7
8 
9 DISTRICT COURT JUDGE

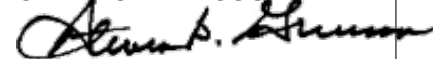
10 Respectfully submitted by:

11 MARQUIS AURBACH COFFING

12 By 
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15 Nevada Bar No. 6367
16 Cody S. Mounteer, Esq.
17 Nevada Bar No. 11220
18 Tom W. Stewart, Esq.
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22 Attorneys for APCO Construction
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Electronically Filed
8/8/2018 4:30 PM
Steven D. Grierson
CLERK OF THE COURT



Electronically Filed
Aug 14 2018 10:21 a.m.
Elizabeth A. Brown
Clerk of Supreme Court

Marquis Aurbach Coffing

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Attorneys for Apco Construction, Inc.

DISTRICT COURT**CLARK COUNTY, NEVADA**

APCO CONSTRUCTION, a Nevada corporation, Case No.: A571228

Dept. No.: XIII

Plaintiff,
v.

GEMSTONE DEVELOPMENT WEST, INC., A Nevada corporation,

Defendant.

Consolidated with:

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

SECOND AMENDED NOTICE OF APPEAL

AND ALL RELATED MATTERS


NOTICE IS HEREBY GIVEN that APCO Construction, Inc. ("APCO") by and through its undersigned counsel of record, the law firms of SPENCER FANE LLP and MARQUIS AURBACH COFFING, appeals to the Supreme Court of Nevada from: (1) the

1 Judgment certified as a Final Judgment pursuant to Rule 54(b) with respect to Zittings claims
2 against APCO on July 30, 2018, attached as **Exhibit A**, and each and every prior order that
3 merged into the Final Judgment, including without limitation, (2) the Findings of Fact,
4 Conclusions of Law, and Order Granting Zitting Brothers Construction, Inc.'s Motion for Partial
5 Summary Judgment Against APCO Construction entered on January 2, 2018,¹ attached as
6 **Exhibit B**, (3) the Order Denying APCO Construction, Inc.'s Motion for Reconsideration of
7 Court's Order Granting Zitting Brothers Construction, Inc.'s Partial Motion for Summary
8 Judgment entered on January 25, 2018,² attached as **Exhibit C**, (4) the Order Determining
9 Amount of Zitting Brothers Construction, Inc.'s Attorney's Fees, Costs and Prejudgment Interest
10 entered on May 8, 2018,³ attached as **Exhibit D**, and (5) Zitting Brothers Construction, Inc.'s
11 Motion In Limine To Limit The Defenses of APCO Construction To The Enforceability of Pay-
12 If-Paid Provision, entered on December 5, 2017⁴, attached as **Exhibit E**.

13 Dated this 8th day of August, 2018.

14 MARQUIS AURBACH COFFING

15 By

16 
17 Jack Chen Min Juan, Esq.
18 Nevada Bar No. 6367
19 Micah S. Echols, Esq.
20 Nevada Bar No. 8437
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25 Attorney(s) for Apco Construction, Inc.

26 ¹ Notice of Entry of Order was on January 2, 2018.

27 ² Notice of Entry of order was on January 31, 2018.

28 ³ Notice of Entry of Order was on May 11, 2018.

⁴ Zitting's Counsel was to prepare an order, but failed to do so.

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of Marquis Aurbach Coffing and that a copy of the foregoing **SECOND AMENDED NOTICE OF APPEAL** was served by electronic transmission through the E-Filing system pursuant to NEFCR 9, NRCP 5(b) and EDCR 7.26 or by mailing a copy to their last known address, first class mail, postage prepaid for non-registered users, on this 8th day of August, 2018, as follows:

Counter Claimant: Camco Pacific Construction Co Inc

Steven L. Morris (steve@gmdlegal.com)

Intervenor Plaintiff: Cactus Rose Construction Inc

Eric B. Zimbelman (ezimbelman@peelbrimley.com)

Intervenor Plaintiff: Interstate Plumbing & Air Conditioning Inc

Jonathan S. Dabbieri (dabbieri@sullivanhill.com)

Intervenor: National Wood Products, Inc.'s

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Richard L Tobler (rltldck@hotmail.com)

Richard Reincke (rreincke@caddenfuller.com)

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Gianna Garcia (ggarcia@sullivanhill.com)

Jennifer Saurer (Saurer@sullivanhill.com)

Jonathan Dabbieri (dabbieri@sullivanhill.com)

Plaintiff: Apco Construction

Rosie Wesp (rwesp@maclaw.com)

Third Party Plaintiff: E & E Fire Protection LLC

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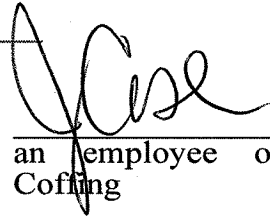
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an employee of Marquis Aurbach
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Exhibit A

Steven D. Grierson

1 **Marquis Aurbach Coffing**
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4 Cody S. Mounteer, Esq.
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6 Tom W. Stewart, Esq.
7 Nevada Bar No. 14280
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12 jjuan@maclaw.com
13 cmounteer@maclaw.com
14 Attorneys for APCO Construction

15 -and-

16 **SPENCER FANE LLP**
17 John H. Mowbray, Esq. (Bar No. 1140)
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19 Mary E. Bacon, Esq. (Bar No. 12686)
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25 RJefferies@spencerfane.com
26 MBacon@spencerfane.com

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

APCO CONSTRUCTION, a Nevada
corporation,

Plaintiff,

vs.

GEMSTONE DEVELOPMENT WEST, INC., A
Nevada corporation,

Defendant.

AND ALL RELATED MATTERS

Case No.: A571228
Dept. No.: XIII

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

ORDER GRANTING MOTION
FOR 54(b) CERTIFICATION AND FOR
STAY PENDING APPEAL

Plaintiff APCO Construction's Motion for 54(b) Certification and for Stay Pending
Appeal on Order Shortening Time having come on for hearing before this Court on June 21,

MARQUIS AURBACH COFFING

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

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JUL 20 2018

DISTRICT COURT DEPT#13

1 2018, Plaintiff APCO Construction, being represented by and through its attorney of record,
2 Cody S. Mounteer, Esq. of the law firm of Marquis Aurbach Coffing, and Defendant Zitting
3 Brothers Construction, Inc., being represented by and through its attorney of record, I-Che Lai,
4 Esq. of the law firm of Wilson, Elser, Moskowitz, Edelman & Dicker LLP; the Court having
5 reviewed the papers and pleadings on file herein, having heard arguments of the parties, and for
6 good cause shown;

7 IT IS HEREBY ORDERED, ADJUDGED AND DECREED that, APCO's Motion for
8 NRCP 54(b) Certification is GRANTED;

9 IT IS FURTHER ORDERED that because no just reason for delay exists, this Court
10 enters an express direction for the entry of judgment as to the Findings of Fact, Conclusions of
11 Law, and Order Granting Zitting Brother Construction, Inc.'s Motion for Partial Summary
12 Judgment, which is hereby certified as final under NRCP 54(b);

13 IT IS FURTHER ORDERED that because no just reason for delay exists, this Court
14 enters an express direction for the entry of judgment as to the Order Denying APCO's Motion
15 for Reconsideration of Court's Order Granting Zitting Brother Construction, Inc.'s Partial
16 Motion for Summary Judgment, which is hereby certified as final under NRCP 54(b);

17 IT IS FURTHER ORDERED that because no just reason for delay exists, this Court
18 enters an express direction for the entry of judgment as to Order Determining Amount of Zitting
19 Brothers Construction, Inc.'s Attorney's Fees, Costs, and Prejudgment Interest, which is hereby
20 certified as final under NRCP 54(b);

21 IT IS FURTHER ORDERED that because no just reason for delay exists, this Court
22 enters an express direction for the entry the Judgment in Favor of Zitting Brothers Construction,
23 Inc., which is hereby is certified as final under NRCP 54(b);

24 IT IS FURTHER ORDERED that APCO's Motion for Stay Pending Appeal is also
25 GRANTED;

1 IT IS FURTHER ORDERED that APCO shall have thirty days from notice of entry of
2 this order to post a bond for the full amount of the Judgment in favor of Zitting Brothers
3 Construction, Inc., \$1,516,723.46, in order to stay these proceedings pending appeal.

4 **ORDER**

5 IT IS SO ORDERED.

6 Dated this 28th day of July, 2018

7
8 
9 DISTRICT COURT JUDGE

10 Respectfully submitted by:

11 MARQUIS AURBACH COFFING

12 By 

13 Jack Chen Min Juan, Esq.
14 Nevada Bar No. 6367
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16 Nevada Bar No. 11220
17 Tom W. Stewart, Esq.
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21 Attorneys for APCO Construction
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Exhibit B

Steven D. Grierson

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13 Attorneys for Lien Clamant,
14 Zitting Brothers Construction, Inc.

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

11 APCO CONSTRUCTION, a Nevada
12 corporation,

13 Plaintiff,

14 vs.

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

17 Defendant.

18 AND ALL RELATED MATTERS

CASE NO. A571228
DEPT. NO. XIII

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

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

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

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

23 Dated this 2nd day of January, 2018.

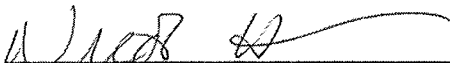
24 **WILSON, ELSE, MOSKOWITZ,**
25 **EDELMAN & DICKER LLP**

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

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of WILSON ELSEER MOSKOWITZ
EDELMAN & DICKER LLP, and that on this 2nd day of January, 2017, I served a true
and correct copy of the foregoing document as follows:

- ☐ by placing same to be deposited for mailing in the United States Mail, in a sealed envelope upon which first class postage was prepaid in Las Vegas, Nevada;
- ☒ via electronic means by operation of the Court's electronic filing system, upon each party in this case who is registered as an electronic case filing user with the Clerk; and pursuant to Rule 9 of the N.E.F.C.R.
- ☐ via hand-delivery to the addressees listed below;
- ☐ via facsimile;
- ☐ by transmitting via email the document listed above to the email address set forth below on this date before 5:00 p.m.



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

Steven D. Grierson

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

11 APCO CONSTRUCTION, a Nevada
12 corporation,

13 Plaintiff,

14 vs.

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

17 Defendant.

18 AND ALL RELATED MATTERS

CASE NO. A571228
DEPT. NO. XIII

Consolidated with:

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

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

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

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

21 **JUDGMENT AGAINST APCO CONSTRUCTION**

22 On November 16, 2017, this Court heard Zitting Brothers Construction, Inc.'s Motion for
23 Partial Summary Judgment Against APCO Construction. Jorge A. Ramirez and I-Che Lai of Wilson
Elser Moskowitz Edelman & Dicker, LLP appeared at the hearing for Zitting Brothers Construction,
Inc. ("ZBCI"). John Randall Jefferies of Spencer Fane LLP and Cody S. 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#13

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1
2 **FINDINGS OF FACT**

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

4 1. Around September 6, 2007, Gemstone Development West, Inc. ("Gemstone") and
5 APCO entered into the ManhattanWest -- General Construction Agreement for GMP ("Prime
6 Contract"). Under the Prime Contract, APCO would serve as the general contractor for the
7 ManhattanWest mixed-use development project located at the following Assessor's Parcel Numbers
8 in Clark County, Nevada: 163-32-101-003, 163-32-101-004, 163-32-101-005, 163-32-101-010, and
9 162-32-101-014 (the "Project").

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 C. Procedural History

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSIONS OF LAW

A. Burden of Proof

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

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

B. APCO's Breach of the Subcontract

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

6 **ORDER**

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

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

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

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

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

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

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

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

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

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

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


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

6 **IT IS SO ORDERED.**

7 Dated this 26th day of December, 2017.

8 
9 _____
10 DISTRICT COURT JUDGE

11 Respectfully submitted by:

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

18 Approved as to form and content by:

19 *declined to sign*
20 John H. Mowbray, Esq.
21 John Randall Jefferies, Esq.
22 Mary E. Bacon, Esq.
23 **SPENCER FANE LLP**
24 300 South Fourth Street, Suite 700
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25 and

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

Exhibit C



1 **ORDR**
2 JORGE A. RAMIREZ, ESQ.
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5 Nevada Bar No. 12247
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13 Attorneys for Lien Clamant,
14 Zitting Brothers Construction, Inc.

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

11 APCO CONSTRUCTION, a Nevada
12 corporation,

13 Plaintiff,

14 vs.

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

17 Defendant.

18 AND ALL RELATED MATTERS

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

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

19 **ORDER DENYING APCO CONSTRUCTION, INC.'S MOTION FOR**
20 **RECONSIDERATION OF COURT'S ORDER GRANTING ZITTING BROTHERS**
21 **CONSTRUCTION, INC.'S PARTIAL MOTION FOR SUMMARY JUDGMENT**

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

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DISTRICT COURT DEPT. XIII

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
Attorneys for Lien Clamant,
Zitting Brothers Construction, Inc.

14 Approved as to form and content by:

15 
16 John H. Mowbray, Esq.
John Randall Jefferies, Esq.

17 Mary E. Bacon, Esq.
18 **SPENCER FANE LLP**
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19 Las Vegas, Nevada 89101

20 and

21 Cody S. Mounteer, Esq.
MARQUIS AURBACH COFFING
10001 Park Run Drive
22 Las Vegas, Nevada 89145
23 Attorneys for APCO Construction, Inc.

Exhibit D



ORDR

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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

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

AND ALL RELATED MATTERS

ORDER DETERMINING AMOUNT OF ZITTING BROTHERS CONSTRUCTION, INC.'S

ATTORNEY'S FEES, COSTS, AND PREJUDGMENT INTEREST

On March 1, 2018, this Court conducted further proceedings on Zitting Brothers Construction, Inc.'s application for payment of attorney's fees, costs, and interest. I-Che Lai of Wilson Elser Moskowitz Edelman & Dicker, LLP appeared at the hearing for Zitting Brothers Construction, Inc. ("ZBCI"). John Randall Jefferies of Spencer Fane LLP appeared for APCO Construction, Inc. ("APCO"). Having heard oral arguments of counsel and examined the records of this case, this Court makes the following findings of fact and conclusions of law:

1. An attorney affidavit in support of ZBCI's request for attorney's fees is not required. Nev. R. Civ. P. 54(d)(2)(C) exempts ZBCI from Nev. R. Civ. P. 54(d)(2)(B)'s requirement for an attorney affidavit to support an attorney's fees request because the substantive law at issue in this

1 case provides for the recovery of attorney fees. Nevertheless, the evidence submitted with ZBCI's
2 memorandum in support of APCO's payment of attorney's fees, costs, and interest is an adequate
3 substitute for the attorney affidavit.

4 2. The four factors set forth in *Brunzell v. Golden Gate Nat. Bank*, 85 Nev. 345, 349,
5 455 P.2d 31, 33 (1969) governs this Court's determination of a reasonable amount of attorney's fees
6 for ZBCI:

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

12 3. These four factors support an award of \$176,968.00 in reasonable attorney's fees.

13 4. APCO concedes that the first factor favors the award of attorney's fees.

14 5. The work of APCO's counsel for APCO in this case likely benefits ZBCI in its
15 pursuit of its claims against Gemstone Development West, Inc. and APCO. Under the second and
16 third *Brunzell* factors, this favors a reduction of ZBCI's \$213,376.00 attorney's fees request by
17 \$36,408.00.

18 6. Given this Court's full award of ZBCI's requested prejudgment interest, as discussed
19 further below, the fourth factor also supports this reduction.

20 7. APCO does not dispute ZBCI's request for \$8,475.95 in costs. Therefore, the
21 requested costs are reasonable.

22 8. Nev. Rev. Stat. 108.237(1) and other statutes governing prejudgment interest does not
23 contain an exception for abatement of prejudgment interest during a stay of the case. Additionally,
24 this Court has not previously issued any orders that would stay the accrual of prejudgment interest.
25 Instead, authorities from other jurisdictions support the accrual of prejudgment interest during a stay.
26 Therefore, prejudgment interest on the amount owed to ZBCI continue to accrue during a stay in this
27 case.

1 **THEREFORE, IT IS HEREBY ORDERED** that ZBCI is awarded \$176,968.00 in
2 attorney's fees.

3 **IT IS FURTHER ORDERED** that ZBCI is awarded \$8,475.95 in costs.

4 **IT IS FURTHER ORDERED** that ZBCI is awarded interest under Nev. Rev. Stat.
5 108.237(2)(b), which began accruing on April 30, 2009.

6 **IT IS SO ORDERED.**

7 Dated this 3rd day of May, 2018.


8
9 
DISTRICT COURT JUDGE

10
11 Respectfully submitted by:

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

15 **WILSON, ELSE, MOSKOWITZ, EDELMAN & DICKER LLP**
16 300 South Fourth Street, 11th Floor
17 Las Vegas, Nevada 89101
18 Attorneys for Lien Clamant,
19 Zitting Brothers Construction, Inc.

20 Approved as to form and content by:

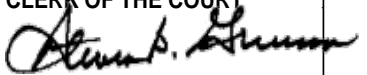
21 
22 John H. Mowbray, Esq.
23 John Randall Jefferies, Esq.
24 Mary E. Bacon, Esq.

25 **SPENCER FANE LLP**
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28 and

29 Cody S. Mounteer, Esq.
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33 Attorneys for APCO Construction, Inc.

Exhibit E



1 **MLIM**
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4 I-CHE LAI, ESQ.
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13 Attorneys for Lien Clamant,
14 Zitting Brothers Construction, Inc.

8 **DISTRICT COURT**

9 **CLARK COUNTY, NEVADA**

10 APCO CONSTRUCTION, a Nevada
11 corporation,

12 Plaintiff,

13 vs.

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

16 Defendant.

CASE NO. A571228
DEPT. NO. XIII

Consolidated with:

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A587168; A580889; A584730; A589195;
A595552; A597089; A592826; A589677;
A596924; A584960; A608717; A608718; and
A590319

17 AND ALL RELATED MATTERS

18
19 **ZITTING BROTHERS CONSTRUCTION, INC.'S MOTION IN LIMINE TO LIMIT**
20 **THE DEFENSES OF APCO CONSTRUCTION TO**
21 **THE ENFORCEABILITY OF PAY-IF-PAID PROVISION**

22 Pursuant to EDCR 2.47, Zitting Brothers Construction, Inc. ("Zitting"), a lien claimant,
23 submits its Motion in Limine to Limit the Defenses of APCO Construction ("APCO") to the
24 Enforceability of Pay-if-Paid Provision. Zitting explains the basis for this motion in the
25 accompanying memorandum of points and authorities, which is supported by the attached exhibits,

26 ...

27 ...

28

1 the records of this Court, and any oral arguments that this Court may entertain at the hearing on this
2 motion.

3 DATED this 6th day of November, 2017

4 WILSON ELSEER MOSKOWITZ EDELMAN &
5 DICKER LLP

6 

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

17
18 **NOTICE OF HEARING ON MOTION**

19 Please take notice that Zitting will bring its Motion in Limine to Limit the Defenses of APCO
20 Construction to the Enforceability of Pay-if-Paid Provision for hearing in Department 13 of the
21 above-captioned court on November 16, 2017, at 9:00 a.m., or as soon thereafter as this matter may
22 be heard.

23 DATED this 6th day of November, 2017

24 WILSON ELSEER MOSKOWITZ EDELMAN &
25 DICKER LLP

26 

27 Jorge Ramirez, Esq.
28 Nevada Bar No. 6787
I-Che Lai, Esq.
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Attorneys for Lien Claimant,
Zitting Brothers Construction, Inc.

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Since the beginning of this case and for more than seven years, APCO remained steadfast to
4 its sole defense against Zitting's claims—the enforceability of the pay-if-paid provision (“Pay-If-
5 Paid Provision”) in APCO's subcontract with Zitting about the Manhattan West Condominiums
6 (“Project”). Notably, APCO repeatedly disclosed this sole defense in its verified responses to
7 Zitting's interrogatories and confirmed this in its Rule 30(b)(6) deposition testimony. Zitting
8 reasonably relied on APCO's disclosures in formulating its litigation plan, which included decisions
9 to avoid or limit written discovery, subpoena, and depositions of certain parties.

10 Seven years later and with discovery closed, APCO now plans to assert additional defenses at
11 trial, which include the alleged lack of APCO's or the Project owner's approval of the unpaid change
12 orders, Zitting's alleged performance of certain work outside of Zitting's contract with APCO, and
13 Zitting's allegedly unripe claim for the retention amount. There is no explanation for the late
14 defenses. Allowing the late defenses unfairly prejudices Zitting's trial preparation. With the
15 substantial passage of time, the new defenses become harder to rebut as memories fade, witnesses
16 become unavailable, and documents become lost. Therefore, this Court must restrict APCO's
17 defense at trial to the enforceability of the Pay-If-Paid Provision.

18 **II. EVIDENCE AND ARGUMENTS SOUGHT TO BE PRECLUDED**

19 Zitting seeks to preclude APCO from offering any evidence or arguments challenging
20 Zitting's recovery from APCO other than evidence and arguments pertaining to the enforceability of
21 the Pay-If-Paid Provision.

22 **III. RELEVANT BACKGROUND**

23 Around December 23, 2008, Zitting mailed APCO its recorded Notice of Lien because of
24 APCO's failure to pay Zitting the amount owed for its work on the Project. (Ex. A.) About five
25 months later, Zitting filed its complaint against APCO, seeking recovery of the amount owed. (Ex.
26 B.)

27 On April 9, 2010, Zitting disclosed to APCO in verified interrogatory responses that it seeks
28 payment of \$750,807.16, comprising of \$347,441.67 in unpaid change orders and \$403,365.49 in

1 unpaid retention amount, exclusive of interest and attorney's fees. (*E.g.*, Ex. G 5:17-22, 25:10-9.)
2 Zitting also served contention interrogatory to APCO requesting all of APCO's grounds for not
3 paying that amount:

4 INTERROGATORY NO. 6:

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

7 (*Ex. C 10:14-16.*) In its April 29, 2010 verified response to this contention interrogatory, APCO
8 identified the Pay-If-Paid Provision as the only ground for refusing payment to Zitting:

9 RESPONSE TO INTERROGATORY NO. 6:

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

19 (*Id.* 10:17-11:5.)

20 To confirm that APCO is not planning to assert additional defenses, Zitting served the same
21 interrogatory about seven years later:

22 INTERROGATORY NO. 6:

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

25 (*Ex. D 9:1-3.*) APCO confirmed by providing the same interrogatory response near the end of
26 discovery:

27 ...

28 ...

1 ANSWER TO INTERROGATORY NO. 6:

2 Pursuant to the terms of the Subcontract any payment to Zitting
3 Brothers were specifically conditioned upon APCO's actual receipt of
4 payment from Gemstone for Zitting Brothers' work. Moreover, the
5 Subcontract specifically provides that Zitting Brothers was assuming
6 the same risk that Gemstone may become insolvent and not be paid for
7 its work as APCO assumed in entering into prime contract with
8 Gemstone. Zitting Brothers further agreed that APCO had no
9 obligation to pay Zitting Brothers for any work performed by Zitting
10 Brothers until or unless APCO had actually been paid for such work
by Gemstone. To date, APCO had not been paid for the work
performed, including the work performed by Zitting Brothers. In fact,
due to non-payment, APCO exercised its rights pursuant to NRS
Chapter 624 and terminated the prime contract with Gemstone and
further terminated the Subcontract with Zitting Brothers. Discovery is
ongoing; APCO reserves the right to supplement or amend its response
to this Interrogatory as investigation, discovery, disclosure and
analysis continues.

11 (*Id.* 9:4-16.) On June 5, 2017—less than 30 days from the close of discovery—APCO, through its
12 Rule 30(b)(6) deposition testimony, again confirmed that this was the sole ground for refusing
13 payment to Zitting:

14 Q. Let's talk about the lawsuit between APCO and Zitting
15 Brothers. What is APCO's position that it did not need to pay
16 any of the unpaid balance owed to Zitting Brothers under the
subcontract?

17 A. Throughout our contract it's stated that if the owners were to
18 fail or go defunct, that as a group we would all – for lack of a
better word, suffer, I guess. Probably not a good word.

19 Q. Let me see if I can make it a little easier to say then. Is it fair to
20 say that the only reason that APCO claimed that it did not need
to pay Zitting Brothers was the fact that unless Gemstone pays
APCO, Zitting Brothers would not get paid?

21 A. Yes.

22 (Ex. E at 40:16-41:4.)

23 Despite limiting its defense against Zitting's claims to the enforceability of the Pay-If-Paid
24 Provision for more than seven years and through the entire discovery, APCO now plans to raise new
25 defenses for the first time, such as lack of approval for the unpaid change orders, non-contractual
26 work, and unripe claim for the retention amount. (*See* Ex. F 3:5-6:20, 8:2-21.)

27 ...

28 ...

1 **IV. LEGAL STANDARD FOR MOTION IN LIMINE**

2 The Nevada Supreme Court has approved the use of motions in limine in many cases by
3 recognizing the legitimacy of such pre-trial motion practices and the district court's authority to rule
4 on these motions. *See, e.g., State ex. Rel Dep't of Highways v. Nevada Aggregates & Asphalt Co.*, 92
5 Nev. 370, 551, P.2d 1095 (1996); *Bull v. McCuskey*, 96 Nev. 706, 615 P.2d 957 (1980). The decision
6 to admit or exclude evidence is within the sound discretion of the trial court. *Petrocelli v. State*, 110
7 Nev. 46, 52, 692 P.2d 503, 508 (1985). Additionally, Nev. R. Civ. P. 16(c)(3) grants Nevada courts
8 authority to rule on motions in limine by allowing for advance rulings on admissibility of evidence.

9 **V. ARGUMENT**

10 **A. APCO's discovery conduct restricts APCO's defense to the enforceability of the**
11 **Pay-If-Paid Provision.**

12 Since 2010, APCO has repeatedly sworn that the only reason it refused payment of the
13 amount owed to Zitting was because of the void Pay-If-Paid Provision. Seven years later and after
14 the close of discovery, APCO has raised additional grounds for refusing payment, such as lack of
15 approval for the unpaid change orders, non-contractual work, and unripe claim for the retention
16 amount. (*See* Ex. F 3:5-6:20, 8:2-21.) These new defenses are improper and subject to exclusion.

17 APCO's incomplete discovery responses regarding its defenses preclude APCO from raising
18 any defenses at trial other than the defense arising from the enforceability of the Pay-If-Paid
19 Provision. Nev. R. Civ. P. 33(c) allows a plaintiff to serve contention interrogatories to a defendant,
20 which are interrogatories requiring answers "involv[ing] an opinion or contention that relates to fact
21 or the application of law to fact...." *See also Nat'l Acad. of Recording Arts & Scis., Inc. v. On Point*
22 *Events, LP*, 256 F.R.D. 678, 682 (C.D. Cal. 2009) (addressing the federal counterpart to Nev. R. Civ.
23 P. 33(c)).¹ Contention interrogatories—such as those asking a "defendant to identify its affirmative
24 defenses and state the facts supporting these defenses"—are "consistent with Rule 11 of the Federal
25 Rules of Civil Procedure, which requires parties have some factual basis for their claims and
26 allegations." *Id.* (addressing the federal counterpart to Nev. R. Civ. P. 11) (internal quotation marks

27
28 ¹ "Federal cases interpreting the Federal Rules of Civil Procedure are strong persuasive authority, because the Nevada Rules of Civil Procedure are based in large part upon their federal counterparts." *McClendon v. Collins*, 132 Nev. Adv. Op. 28, 372 P.3d 492, 494 (2016) (internal quotation marks omitted).

1 omitted). “[S]uch interrogatories are helpful in that they may narrow and define the issues for trial
2 and enable the propounding party to determine the proof required to rebut the responding party's
3 claim or defense.” *Moses v. Halstead*, 236 F.R.D. 667, 674 (D. Kan. 2006); *see also Kyoei Fire &*
4 *Marine Ins. Co., Ltd. v. M/V Mar. Antalya*, 248 F.R.D. 126, 157 (S.D.N.Y. 2007). To that end,
5 Zitting has repeatedly served contention interrogatories to APCO so that it can tailor its discovery
6 plan and narrow the issues for trial.

7 Since beginning of this case, Zitting has disclosed that it seeks recovery of \$750,807.16,
8 comprising of \$347,441.67 in unpaid change orders and \$403,365.49 in unpaid retention amount,
9 exclusive of interests and attorney’s fees. (E.g., Ex. B ¶ 11; Ex. G 5:17-22, 25:10-9.) At the outset of
10 discovery in 2010, Zitting served contention interrogatory requesting all of APCO’s grounds for not
11 paying that amount:

12 INTERROGATORY NO. 6:

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

15 (Ex. C 10:14-16.) In its April 29, 2010 verified response to this contention interrogatory, APCO
16 identified the Pay-If-Paid Provision as the only ground for refusing payment to Zitting:

17 RESPONSE TO INTERROGATORY NO. 6:

18 Pursuant to the terms of the Subcontract any payment to Zitting
19 Brothers were specifically conditioned upon APCO’s actual receipt of
20 payment from Gemstone for Zitting Brothers’ work. Moreover, the
21 Subcontract specifically provides that Zitting Brothers was assuming
22 the same risk that Gemstone may become insolvent and not be paid for
23 its work as APCO assumed in entering into prime contract with
24 Gemstone. Zitting Brothers further agreed that APCO had no
25 obligation to pay Zitting Brothers for any work performed by Zitting
26 Brothers until or unless APCO had actually been paid for such work
by Gemstone. To date, APCO had not been paid for the work
performed, including the work performed by Zitting Brothers. In fact,
due to non-payment, APCO exercised its rights pursuant to NRS
Chapter 624 and terminated the prime contract with Gemstone and
further terminated the Subcontract with Zitting Brothers. Discovery is
ongoing; APCO reserves the right to supplement or amend its response
to this Interrogatory as investigation, discovery, disclosure and
analysis continues.

27 (*Id.* 10:17-11:5.)
28

1 To confirm that APCO is not planning to assert additional defenses, Zitting served the same
2 interrogatory about seven years later:

3 INTERROGATORY NO. 6:

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

6 (Ex. D 9:1-3.) APCO confirmed by providing the same interrogatory response near the end of
7 discovery:

8 ANSWER TO INTERROGATORY NO. 6:

9 Pursuant to the terms of the Subcontract any payment to Zitting
10 Brothers were specifically conditioned upon APCO's actual receipt of
11 payment from Gemstone for Zitting Brothers' work. Moreover, the
12 Subcontract specifically provides that Zitting Brothers was assuming
13 the same risk that Gemstone may become insolvent and not be paid for
14 its work as APCO assumed in entering into prime contract with
15 Gemstone. Zitting Brothers further agreed that APCO had no
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17 Brothers until or unless APCO had actually been paid for such work
by Gemstone. To date, APCO had not been paid for the work
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due to non-payment, APCO exercised its rights pursuant to NRS
Chapter 624 and terminated the prime contract with Gemstone and
further terminated the Subcontract with Zitting Brothers. Discovery is
ongoing; APCO reserves the right to supplement or amend its response
to this Interrogatory as investigation, discovery, disclosure and
analysis continues.

18 (*Id.* 9:4-16.) On June 5, 2017—less than 30 days from the close of discovery—APCO, through its
19 Rule 30(b)(6) deposition testimony, again confirmed that this was the sole ground for refusing
20 payment to Zitting:

21 Q. Let's talk about the lawsuit between APCO and Zitting
22 Brothers. What is APCO's position that it did not need to pay
any of the unpaid balance owed to Zitting Brothers under the
23 subcontract?

24 A. Throughout our contract it's stated that if the owners were to
fail or go defunct, that as a group we would all – for lack of a
25 better word, suffer, I guess. Probably not a good word.

26 Q. Let me see if I can make it a little easier to say then. Is it fair to
say that the only reason that APCO claimed that it did not need
27 to pay Zitting Brothers was the fact that unless Gemstone pays
APCO, Zitting Brothers would not get paid?

28 A. Yes.

1 (Ex. E 40:16-41:4.)

2 If APCO wants to assert other defenses for refusing payment to Zitting, Nev. R. Civ. P.
3 26(e)(2) requires APCO to amend its prior discovery responses to include those additional defenses.
4 But APCO has never amended its prior discovery responses nor explained why it did not do so.
5 During seven years of litigation and the entire discovery, APCO has consistently refused payment
6 based solely on the Pay-If-Paid Provision.

7 APCO's failure to disclose additional defenses precludes APCO from asserting those
8 defenses at trial unless there is "substantial justification" for the failure and "such failure is
9 harmless...." Nev. R. Civ. P. 37(c)(1). The party facing preclusion sanctions bears the burden to
10 prove that its failure to disclose was substantially justified and did not prejudice the party seeking
11 sanctions. *E.g., Torres v. City of Los Angeles*, 548 F.3d 1197, 1213 (9th Cir. 2008). Here, APCO, as
12 the party facing preclusion sanctions, cannot meet this burden.

13 First, there is no justification for deviating from defenses discussed in interrogatory
14 responses and deposition. APCO has never taken any steps to explain the late disclosure of
15 additional defenses. There is no suggestion that APCO only recently realized that there were other
16 potential defenses to Zitting's claim for payment of the unpaid change order and the retention
17 amount. Nor can there be. Zitting has made it clear since the beginning of this case that it is seeking
18 such payment. (Ex. B ¶ 11; Ex. G 5:17-22, 25:10-9.) Yet only after the close of discovery does
19 APCO see fit to disclose its plans to pursue those additional defenses. (*See* Ex. F 3:5-6:20, 8:2-21.)

20 Second, it would be highly prejudicial to Zitting for APCO to now argue other grounds for
21 refusing payment to Zitting. Zitting reasonably relied on APCO's discovery responses to form its
22 litigation plan. For example, Zitting did not depose CAMCO and the drywaller for their knowledge
23 on the progress of the drywall construction for Buildings 8 and 9 of the Project. It also streamlined
24 APCO's Rule 30(b)(6) depositions by formulating questions based on APCO's limited defense.
25 Learning of the defense only after Zitting had filed its motion for summary judgment placed Zitting
26 at a distinct disadvantage and constituted unfair surprise.

27 Had APCO timely identified other grounds besides the enforceability of the Pay-If-Paid
28 Provision, Zitting would have prepared for APCO's Rule 30(b)(6) depositions differently, which

1 would have included additional questions on Zitting's unpaid change orders and the retention
2 amount to APCO's Rule 30(b)(6) designee for construction-related topics. Zitting would have also
3 served discovery requests to the drywaller. It would have deposed the owner of the Project, the
4 drywaller, CAMCO, and specific APCO employees. All of this would have occurred years ago when
5 witnesses' memories would have been fresh. "With the passage of time, those facts become harder to
6 prove [for Zitting] as memories fade and witnesses become unavailable." See *N.L.R.B. v. Serv-All*
7 *Co., Inc.*, 491 F.2d 1273, 1275 (10th Cir. 1974). Based on nearly identical facts, a federal court in
8 *Inamed Corp. v. Kuzmak*, 275 F. Supp. 2d 1100 (C.D. Cal. 2002), *aff'd*, 64 Fed. Appx. 241 (Fed. Cir.
9 2003) has precluded defenses not properly disclosed during discovery.

10 In that case, the defendants argued that their agreement with the plaintiff was unenforceable
11 because an individual lacked authority to enter into the agreement on the defendants' behalf. *Id.* at
12 1117. "[The plaintiff] apparently contends that [the] defendants failed seasonably to amend their
13 prior contention interrogatory responses to reflect the fact that they intended to rely on [the
14 individual]'s lack of authority, and thus that [the plaintiff] learned of the defense only during [the
15 individual]'s deposition on the day defendants' opposition to this motion was filed." *Id.* at 1117-18.
16 The court applied the federal counterpart to Nev. R. Civ. P. 37 to bar the defendants' undisclosed
17 defense:

18 Rule 37(c)(1) provides that a preclusion sanction shall be imposed
19 unless the party failing to disclose the information acted with
20 substantial justification or the failure to disclose was harmless. Here,
21 [the] defendants offer no justification for their belated disclosure of the
22 lack of authority defense, and it is difficult to conceive how they
23 could. There is no suggestion that the [defendants] only recently
24 realized that [the individual] acted without authority, nor, given the
25 nature of the defense, could there be. This is the type of a defense that
26 must have been known to the [defendants] from the moment [the
27 plaintiffs] asserted that the ... agreement gave rise to enforceable
28 rights. Yet only in the last several months have they seen fit to assert it
in this proceeding.

24 *Id.* at 1118.

25 Similarly, there can have been no misapprehension that [the]
26 defendants' prior interrogatory answers were incomplete, as they did
27 not apprise [the plaintiffs] that [the defendants] contended [the
28 individual] lacked authority to enter into the ... agreement on [the
defendants'] behalf. [The d]efendants knew that [the plaintiff] was
unaware they intended to rely on this defense in opposing summary
judgment or defending at trial. Yet they took no steps to advise [the

1 plaintiff] of the defense or to supplement their earlier interrogatory
2 answers. Learning of the defense only after it had filed its motion for
3 summary judgment placed [the plaintiff] at a distinct disadvantage and
4 constituted unfair surprise. It was required to digest [the individual's]
deposition hurriedly and to respond to the argument only in reply.
Thus, there is no substantial justification and an affirmative showing
of prejudice. Together, they warrant imposing the preclusion sanction
contemplated by Rule 37(c)(1). [citations omitted]

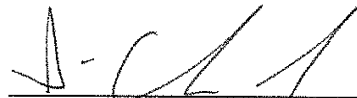
5 *Id.* As *Inamed Corp.* correctly shows, APCO's unjustified and prejudicial tactic warrants a
6 preclusion sanction that bars APCO from raising any defenses at trial other than the defenses
7 pertaining to the enforceability of the Pay-If-Paid Provision.

8 **VI. CONCLUSION**

9 For the foregoing reasons, this Court should preclude APCO from introducing any evidence
10 or argument challenging Zitting Brothers' recovery other than the evidence and arguments pertaining
11 to the enforceability of the pay-if-paid provision of APCO's subcontract with Zitting Brothers for the
12 Project.

13 DATED this 6th day of November, 2017

14 WILSON ELSER MOSKOWITZ EDELMAN &
15 DICKER LLP

16 

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

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 6th day of November, 2017, I served a true and correct copy of the
4 foregoing **ZITTING BROTHERS CONSTRUCTION, INC.'S MOTION IN LIMINE TO**
5 **LIMIT THE DEFENSES OF APCO CONSTRUCTION TO THE ENFORCEABILITY OF**
6 **PAY-IF-PAID PROVISION** document as 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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Williams & Associates

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BY


An Employee of WILSON ELSER MOSKOWITZ
EDELMAN & DICKER LLP

EXHIBIT A

EXHIBIT A

Recorded at the Request of and Return
Recorded Document to:

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

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

NOTICE OF LIEN

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

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

Dated this 23 day of December, 2008.



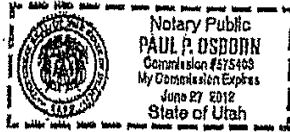
Ryan B. Simpson
Agent for Zitting Brothers Construction

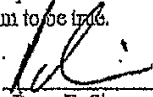
ZBCI001965

AA 006115

STATE OF UTAH)
)ss
COUNTY OF SALT LAKE)

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





Ryan E. Simpson
Agent for Ziffing Brothers Construction

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

EXHIBIT A
LEGAL DESCRIPTION

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

PARCEL 1:

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

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

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

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

PARCEL 2:

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

EXCEPTING THEREFROM the Southerly 396 feet thereof.

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

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

PARCEL 3:

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

PARCEL 4:

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

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

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

PARCEL 5:

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

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

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

102592-02-M-1540

SENDER: COMPLETE THIS SECTION		COMPLETE THIS SECTION ON DELIVERY	
<input type="checkbox"/> Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired. <input type="checkbox"/> Print your name and address on the reverse so that we can return the card to you. <input type="checkbox"/> Attach this card to the back of the mailpiece, or on the front if space permits.		A. Signature <input checked="" type="checkbox"/> Agent <input type="checkbox"/> Addressee	
1. Article Addressed to: APCO 4420 Decatur Blvd LV, NV 89103		B. Received by (Printed Name) C. Date of Delivery	
2. Article Number (transfer from service label) 7008 3340 0003 6596 4275		D. Is delivery address different from item 1? <input type="checkbox"/> Yes If YES, enter delivery address below: <input type="checkbox"/> No	
PS Form 3811, February 2004		3. Service Type <input checked="" type="checkbox"/> Certified Mail <input type="checkbox"/> Express Mail <input type="checkbox"/> Registered <input checked="" type="checkbox"/> Return Receipt for Merchandise <input type="checkbox"/> Insured Mail <input type="checkbox"/> C.O.D.	
Domestic Return Receipt		4. Restricted Delivery? (Extra Fee) <input type="checkbox"/> Yes	

102592-02-M-1540

102592-02-M-1540

SENDER: COMPLETE THIS SECTION		COMPLETE THIS SECTION ON DELIVERY	
<input type="checkbox"/> Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired. <input type="checkbox"/> Print your name and address on the reverse so that we can return the card to you. <input type="checkbox"/> Attach this card to the back of the mailpiece, or on the front if space permits.		A. Signature <input checked="" type="checkbox"/> Agent <input type="checkbox"/> Addressee	
1. Article Addressed to: APCO 3432 N. Firth St LV, NV 89072		B. Received by (Printed Name) C. Date of Delivery	
2. Article Number (transfer from service label) 7008 3340 0003 6596 4268		D. Is delivery address different from item 1? <input type="checkbox"/> Yes If YES, enter delivery address below: <input type="checkbox"/> No	
PS Form 3811, February 2004		3. Service Type <input checked="" type="checkbox"/> Certified Mail <input type="checkbox"/> Express Mail <input type="checkbox"/> Registered <input checked="" type="checkbox"/> Return Receipt for Merchandise <input type="checkbox"/> Insured Mail <input type="checkbox"/> C.O.D.	
Domestic Return Receipt		4. Restricted Delivery? (Extra Fee) <input type="checkbox"/> Yes	

102592-02-M-1540

ZBCI001969

AA 006119

2115 SOUTH DALLIN STREET, SALT LAKE CITY, UTAH 84109

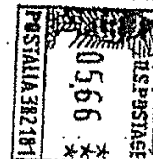
TURNER & SIMPSON
ATTORNEYS AT LAW



7008 1140 0003 8596 4268



0000020043



APCO
3432 North Fifth Street
Las Vegas, Nevada 89032

2115 SOUTH DALLIN STREET, SALT LAKE CITY, UTAH 84109

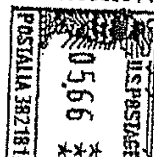
TURNER & SIMPSON
ATTORNEYS AT LAW



7008 1140 0003 8596 4275



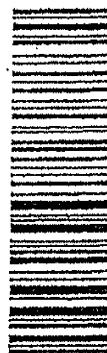
0000020041



APCO
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Las Vegas, Nevada 89103

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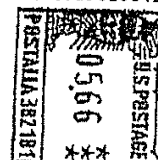
TURNER & SIMPSON
ATTORNEYS AT LAW



7008 1140 0003 8596 4282



0000020042



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

ZBCI001971

AA 006121

UNITED STATES POSTAL SERVICE
FIRST CLASS PERMIT NO. 1000 NEW YORK, NY 10108
POSTAGE WILL BE PAID BY ADDRESSEE

SENDER: COMPLETE THIS SECTION		COMPLETE THIS SECTION ON DELIVERY	
<ul style="list-style-type: none">■ Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.■ Print your name and address on the reverse so that we can return the card to you.■ Attach this card to the back of the mailpiece, or on the front if space permits.		<p>A. Signature X</p> <p>B. Received by (Printed Name) C. Date of Delivery</p> <p>D. Is delivery address different from item 1? <input type="checkbox"/> Yes If YES, enter delivery address below: <input type="checkbox"/> No</p>	
1. Article Addressed to: Gewistone Development west Inc. 9121 W. Russell Road #117 LV, NV 89143		3. Service Type <input checked="" type="checkbox"/> Certified Mail <input type="checkbox"/> Express Mail <input type="checkbox"/> Registered <input checked="" type="checkbox"/> Return Receipt for Merchandise <input type="checkbox"/> Insured Mail <input type="checkbox"/> C.O.D.	
2. Article Number (Transfer from service label) 7008 1140 0003 8596 4282		4. Restricted Delivery? (Extra Fee) <input type="checkbox"/> Yes	
PS Form 3811, February 2004 Domestic Return Receipt			

102395-02-M-1540

EXHIBIT B

EXHIBIT B

ORIGINAL

FILED

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Erin Smith
CLERK OF THE COURT

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DISTRICT COURT
CLARK COUNTY, NEVADA

A-09-589195-C
79348



12 ZITTING BROTHERS CONSTRUCTION, INC.,
13 a Utah corporation,

14 Plaintiff,

15 v.

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

22 Defendants.

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

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

*(Exemption from Arbitration - Concerns
Title to Real Estate)*

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

24 THE PARTIES

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

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

LEWIS
BRISBOIS
BISGAARD
& SMITH LLP
ATTORNEYS AT LAW

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1 this action, the owners, reputed owners, or the persons, individuals and/or entities who claim an
2 ownership interest in that certain real property commonly referred to as Manhattan West mixed use
3 development project and generally located at 9205 W. Russell Road, Clark County, Nevada, and more
4 particularly described as set forth in the Legal Description of the Notice of Lien attached hereto as
5 Exhibit I; and further more particularly described as Clark County Assessor Parcel Number 163-32-
6 101-019, and including all easements, rights-of-way, common areas and appurtenances thereto, and
7 surrounding space which may be required for the convenient use and occupation thereof, upon which
8 Owner caused or allowed to be constructed certain improvements (the "Property").

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

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

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

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

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

25 7. Zitting Brothers entered into an Agreement with APCO Construction and/or Gemstone
26 (the "Agreement") to provide certain construction services and other related work, materials, and
27 equipment for a project located in Clark County, Nevada (the "Work").
28

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

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

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

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

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

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

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

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

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

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

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

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

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

28 . . .

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

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

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

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

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

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

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

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

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

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

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

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

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

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

6 SEVENTH CAUSE OF ACTION
7 (Violation of NRS 624)

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

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

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

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

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

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

21 WHEREFORE, Zitting Brothers prays that this Honorable Court:

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

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

- 1 3. Enters a judgment declaring that Zitting Brothers has a valid and enforceable mechanic's
2 lien against the Property, with priority over all Defendants, in an amount of the
3 Outstanding Balance;
4 4. Adjudge a lien upon the Property for the Outstanding Balance, plus reasonable
5 attorney's fees, costs and interest thereon, and that this Honorable Court enter an Order
6 that the Property, and improvements, such as may be necessary, be sold pursuant to the
7 laws of the State of Nevada, and that the proceeds of said sale be applied to the payment
8 of sums due Zitting Brothers herein; and
9 5. For such other and further relief as this Honorable Court deems just and proper in the
10 premises.

11 Dated this 30th day of April, 2009.

12 LEWIS BRISBOIS BISGAARD & SMITH LLP

13
14 By 

15 Michael M. Edwards, Esq.
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EXHIBIT C

EXHIBIT C

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14 *Attorneys for APCO Construction*

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; NEVADA
23 CONSTRUCTION SERVICES, a Nevada
24 corporation; SCOTT FINANCIAL
25 CORPORATION, a North Dakota corporation;
26 COMMONWEALTH LAND TITLE
27 INSURANCE COMPANY; FIRST
28 AMERICAN TITLE INSURANCE
COMPANY; and DOES I through X,

Defendants.

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
RESPONSES TO ZITTING BROTHERS
CONSTRUCTION, INC.'S
INTERROGATORIES**

AND ALL RELATED CASES AND
MATTERS

APCO CONSTRUCTION'S
RESPONSES TO ZITTING BROTHERS CONSTRUCTION, INC.'S
INTERROGATORIES

APCO Construction ("APCO"), by and through its attorneys of record, Gwen Rutar Mullins, Esq. and Wade B. Gochmour, Esq., of the law firm of HOWARD & HOWARD ATTORNEYS PLLC, pursuant to NRCP Rule 33, hereby responds to the First Set of Interrogatories propounded by Plaintiff Zitting Brothers Construction, Inc. ("Zitting Brothers") upon APCO as follows:

DEFINITIONS

A. "Nondiscoverable/Irrelevant" - The Interrogatory in question concerns a matter which is not relevant to the subject matter of this litigation and is not reasonably calculated to lead to the discovery of admissible evidence.

B. "Unduly burdensome" - The Interrogatory in question seeks discovery which is unduly burdensome or expensive, taking into account the needs of the case, limitations on the parties' resources, and the importance of the issues at stake in the litigation.

C. "Vague" - The Interrogatory in question contains a word or phrase which is not adequately defined, or the overall request is confusing, and APCO is unable to reasonably ascertain what information or documents Zitting Brothers seeks in the request.

D. "Overly broad" - The Interrogatory seeks information or documents beyond the scope of, or beyond the time period relevant to, the subject matter of this litigation and, accordingly, seeks information or documents which are nondiscoverable/irrelevant and unduly burdensome.

GENERAL OBJECTIONS

1. APCO will make reasonable efforts to respond to each Interrogatory, to the extent that it has not been objected to, as APCO understands and interprets the Interrogatory. If Zitting Brothers subsequently asserts an interpretation of any Interrogatory which differs from that of APCO, APCO reserves the right to supplement its responses accordingly.

///

1 APCO objects to each and every Interrogatory to the extent that, and insofar as, Zitting
2 Brothers attempts to purport to impose requirements or obligations beyond those imposed by the
3 Nevada Rules of Civil Procedure.

4 2. APCO objects to each of Zitting Brothers' Interrogatories to the extent that the
5 Interrogatory requests any information that is protected by any absolute or qualified privilege or
6 exception, including, but not limited to, the attorney-client privilege, the attorney work-product
7 exemption, and the consulting-expert exemption.

8 3. APCO objects to any attempt by Zitting Brothers to evade any numerical
9 limitations set on interrogatories by asking multiple independent questions within single
10 individual questions and subparts.

11 4. To the extent applicable to any specific Interrogatory, APCO asserts the
12 following objections: attorney-client privilege and/or work product privilege; proprietary
13 and/or confidential business or personal information; irrelevant and not reasonably calculated to
14 lead to admissible evidence; vague and ambiguous; overbroad and burdensome and/or the
15 burden outweighs the benefit of the requested production; and cumulative and duplicative.
16 Each of these objections is hereby incorporated by this reference as to each and every one of the
17 following Responses to Zitting Brothers' Interrogatories. It is unfair and inappropriate to require
18 a complete, comprehensive factual exposition on the matters covered by the interrogatories at
19 the very outset of the discovery phase of the case. Accordingly, APCO reserves the right to
20 supplement their interrogatory answers later in these proceedings as required by Rule 26(e) of
21 the Nevada Rules of Civil Procedure.

22 5. All answers and responses will be made solely for the purpose of this action.

23 6. Each response will be subject to all objections as to competence, relevance,
24 materiality, propriety and admissibility, and to any and all other objections on any ground which
25 would require the exclusion from evidence of any statement herein if any such statements were
26 made by a witness present and testifying at trial, all of which objections and grounds are
27 expressly reserved and may be interposed at such hearings or trial.

1 7. APCO adopts by reference the above objections and incorporates each objection
2 as if it were fully set forth below in each of APCO's responses below.

3 8. The following Objections, Answers and Responses are based upon the
4 information and documents presently available to and known by APCO and disclose only those
5 contentions which are presently asserted based upon facts now known. It is anticipated that
6 further discovery, independent investigation, legal research and analysis will supply additional
7 facts, add meaning to known facts, as well as establish entirely new factual conclusions and
8 legal contentions, all of which may lead to substantial addition to, change in, and variations
9 from these contentions and responses. APCO herein reserves the right to change any of these
10 Objections, Answers and Responses as additional facts are recalled or ascertained, analyses are
11 made, legal research is completed and contentions are made. These Answers and Responses are
12 made in good faith to supply as much information and specification as is presently known.

13 9. Additionally, APCO reserves the right to amend, revise, correct, supplement or
14 clarify any of the responses contained herein pursuant to any facts or information gathered at
15 any time subsequent to the date of this response. By responding to these requests, APCO does
16 not adopt or agree with any of Zitting Brothers' allegations or definitions in the discovery
17 requests, but rather, is a good faith attempt to respond to the discovery requests. APCO's
18 responses are not admissions on any matter in this case.

19 10. APCO further objects to the instructions and definitions contained in Zitting
20 Brothers' Interrogatories because, as applied to specific discovery requests, they cause the
21 requests to be overly broad and global, vague and ambiguous, unduly burdensome, and to seek
22 information, in part, protected from disclosure by the attorney-client, work product, party
23 communications, investigative, and consulting expert privileges.

24 ///

25 ///

26 ///

27 ///

28 ///

1 Subject to the general objections made above, and without waiving them, APCO
2 responds to Zitting Brothers' Interrogatories propounded against APCO as follows:

3 **INTERROGATORIES**

4 **INTERROGATORY NO. 1:**

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

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

8 Objection. APCO objects to this Interrogatory on the grounds that this Interrogatory is
9 vague, ambiguous, overly broad, unduly burdensome and oppressive because it seeks to force
10 APCO to "Identify and state with specificity the facts that you intend to rely upon to refute each
11 cause of action in Zitting Brothers' Complaint." Broad ranging interrogatories are improper
12 when they essentially subsume every fact in the case or every person having knowledge. See
13 Hiskett v. Wal-Mart Stores, Inc., 180 F.R.D. 403, 404 (D. Kan. 1998). ("Interrogatories should
14 not require the answering party to provide a narrative account of its case."). Parties can hardly
15 know when they have identified "all" facts, persons, and documents with respect to anything –
16 particularly before the close of discovery. "How can the court make enforceable orders with
17 reference to 'all' of anything?" Often, the relevance of a particular fact to a particular issue is
18 not known until clarified and put into context by testimony at deposition or trial. Such a
19 question places the responding party in an impossible position. See Id.; Safeco of Am. V.
20 Rawstron, 181 F.R.D. 441, 447048 (C.D. Cal. 1998)(finding unreasonable an interrogatory
21 calling for all facts supporting denial of a request for admission); Lawrence v. First Kan. Bank
22 & Trust Co., 169 F.R.D. 657, 660-63 (D. Kan. 1996)(same); Hilt v. SFC, Inc., 170 F.R.D. 182,
23 186-87 (D. Kan. 1997)(finding unduly burdensome an interrogatory seeking to require plaintiff
24 to state 'each and every fact' supporting allegations of a complaint). APCO further objects on
25 the grounds that to answer this Interrogatory would result in annoyance, embarrassment, or
26 oppression to APCO in that the question is overly broad, vague, ambiguous, indefinite as to
27 time and without reasonable limitation in its scope. APCO further objects on the basis that the
28 question is oppressive, harassing and burdensome; the information sought seeks APCO's

1 counsel's legal analysis and theories regarding laws, ordinances, safety orders, etc., which are
2 equally available to Zitting Brothers; the question also invades the attorney's work product
3 privilege. APCO further objects on the basis that the question calls for information which is
4 available to all parties equally, and is therefore oppressive and burdensome to APCO. APCO
5 further objects on the basis that the question seeks information which is protected from
6 disclosure by the attorney's work product privilege. APCO further objects on the basis that the
7 question seeks to invade APCO's counsel's work product privilege in that it calls for him to
8 provide an analysis of written data. APCO further objects on the basis that the question seeks to
9 ascertain all facts and other data which APCO intends to offer at trial and, as such, is violative
10 of the attorney work product privilege. APCO objects on the basis that the attorney-client
11 privilege protects disclosure of the information sought. APCO further objects to this
12 Interrogatory on the grounds that it calls for legal conclusions, and that the contract documents
13 at issue speak for themselves.

14 Subject to and without waiving any objections, APCO responds as follows: Gemstone
15 Development West, Inc. ("Gemstone") has asserted various complaints about the quality of the
16 work performed by APCO and its subcontractors. As of this time, Gemstone has not identified
17 specific issues that Gemstone has with APCO's or its subcontractor's work, including that of
18 Zitting Brothers. However, as a result of Gemstone's assertions that there are issues with the
19 quality of the work performed on the Project, Gemstone has failed to pay APCO for the work
20 that APCO performed including the work that was performed by Zitting Brothers. Pursuant to
21 the terms of the Subcontract Agreement, any payments to Zitting Brothers were specifically
22 conditioned upon APCO's actual receipt of payment from Gemstone for Zitting Brothers' work.
23 Moreover, the Subcontract specifically provided that Zitting Brothers was assuming the same
24 risk that Gemstone may become insolvent and not be paid for its work as APCO assumed in
25 entering into prime contract with Gemstone. Zitting Brothers further agreed that APCO had no
26 obligation to pay Zitting Brothers for any work performed by Zitting Brothers until or unless
27 APCO had actually been paid for such work by Gemstone. To date, APCO has not been paid
28 for the work performed, including the work performed by Zitting Brothers. In fact, due to non-

1 payment, APCO exercised its rights pursuant to NRS Chapter 624 and terminated the prime
2 contract with Gemstone and further terminated the Subcontract with Zitting Brothers. After
3 APCO ceased work on the Project, Zitting Brothers may have negotiated with Camco Pacific
4 Construction Company ("Camco"), the replacement general contractor, and/or Gemstone and
5 may have entered into a ratification agreement, wherein APCO was replaced as the general
6 contractor under the Subcontract and Camco and/or Gemstone became liable for any monies
7 due Zitting Brothers on the Project. Discovery is ongoing; APCO reserves the right to
8 supplement or amend its response to this Interrogatory as investigation, discovery, disclosure
9 and analysis continues.

10 **INTERROGATORY NO. 2:**

11 State the procedure by which you and/or Gemstone paid Zitting Brothers for its work,
12 material, and/or equipment furnished at the Project.

13 **RESPONSE TO INTERROGATORY NO. 2:**

14 APCO paid Zitting Brothers pursuant to the terms of the Subcontract. More specifically,
15 see Section 3 of the Subcontract. Basically the procedure for payment was as follows: Pursuant
16 to the terms of the Subcontract, Zitting Brothers submitted to APCO its monthly billing, no later
17 than the 25th of each month, showing quantities of subcontract work that has been satisfactorily
18 completed in the preceding month, as well as backup material. In the event that Zitting Brothers
19 failed to timely submit its monthly billing with the necessary backup material that resulted in
20 that monthly payment application being rolled over to the following month. In turn, APCO
21 submitted its Application for Payment, which included the subcontractor's monthly billing and
22 backup documentation to Gemstone for payment. Upon actual receipt of payment by APCO
23 from Gemstone, APCO then paid the amount that APCO received for Zitting Brothers work to
24 Zitting Brothers as required under the Subcontract. Discovery is ongoing. APCO reserves the
25 right to supplement or amend its response to this Interrogatory as investigation, discovery,
26 disclosure and analysis continues.

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1 **INTERROGATORY NO. 3:**

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

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

6 To date, APCO has paid Zitting Brothers the sum of \$3,282,848.55. More specifically,
7 APCO paid Zitting Brothers as follows: See Exhibit 1 attached hereto for the breakdown. See
8 also documents identified by Bate Stamp No. APCO00044563 through APCO00044784 which
9 APCO deposited into a depository established by APCO for this litigation matter with Litigation
10 Services located at 1640 W. Alta Drive, Suite 4, Las Vegas, NV 89106 and/or are hereby made
11 available for review and copying (at requestor's expense) at a mutually agreeable time and
12 place. APCO does not have any information as to what payments may have been made by
13 Gemstone directly to Zitting Brother after APCO terminated its prime contract with Gemstone.
14 However, from the information obtained through Zitting Brothers discovery requests
15 propounded upon APCO, it appears that Gemstone may have paid Zitting Brothers at least
16 \$364,760.00. Discovery is ongoing. APCO reserves the right to supplement or amend its
17 response to this Interrogatory as investigation, discovery, disclosure and analysis continues.

18 **INTERROGATORY NO. 4:**

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

22 **RESPONSE TO INTERROGATORY NO. 4:**

23 Objection. APCO objects to this Interrogatory on the grounds that this Interrogatory is
24 vague, ambiguous, overly broad, unduly burdensome and/or oppressive. Subject to, and
25 without waiving any objections, APCO responds as follows: See documents identified by Bate
26 1640 W. Alta Drive, Suite 4, Las Vegas, NV 89106 and/or are hereby made available for
27 review and copying (at requestor's expense) at a mutually agreeable time and place. More
28 specifically, see documents identified by Bate Stamp No. APCO00033494 through

Page 8 of 47

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1 APCO00035651. Discovery is ongoing. APCO reserves the right to supplement or amend its
2 response to this Interrogatory as investigation, discovery, disclosure and analysis continues.

3 **INTERROGATORY NO. 5:**

4 Do you contend that the value of the unpaid work, material, and/or equipment furnished
5 or supplied by Zitting Brothers is less than the amount set forth in Zitting Brothers' mechanic's
6 lien? If so, please state:

7 a) the basis for your contention including all facts, witnesses, or documents you
8 rely on in support of your contention;

9 b) how much you contend the work and equipment provided by Zitting Brothers is
10 actually valued at;

11 c) the manner in which you calculated the value of the work, materials, and/or
12 equipment provided by Zitting Brothers;

13 **RESPONSE TO INTERROGATORY NO. 5:**

14 Objection. APCO objects to this Interrogatory on the grounds that this Interrogatory is
15 vague, ambiguous, overly broad, unduly burdensome and oppressive. More specifically APCO
16 objects on the grounds that it is vague and ambiguous in that "value of the unpaid work,
17 material and/or equipment furnished or supplied by Zitting Brothers" and "the amount set forth
18 in Zitting Brothers' mechanic's lien" are not defined. APCO further reiterates its General
19 Objections and adds that as this action is in the initial stages of discovery and APCO has not yet
20 determined which witnesses will testify or what evidence will be used in support of APCO's
21 assertions or denials; therefore, this Interrogatory is premature. APCO further objects as the
22 Interrogatory seeks information which is protected from disclosure by the attorney's work
23 product privilege. APCO further objects on the basis that the Interrogatory seeks disclosure of
24 trial witnesses (other than experts) and is therefore violative of the attorney work product
25 privilege. APCO further objects on the basis that the Interrogatory seeks to ascertain the
26 anticipated testimony of witnesses who are not "experts" and as such violate the attorney work
27 product privilege. APCO further objects on the basis that the question seeks to ascertain all
28 facts and other data which APCO intends to offer at trial and, as such, is violative of the

1 attorney work product privilege. Furthermore, APCO objects to this Interrogatory insofar as it
2 purports to require APCO to describe the substance of each person's knowledge for the reason
3 that such a requirement seeks to impose burdens on APCO beyond those permitted by the
4 Nevada Rules of Civil Procedure, calls for APCO to speculate, is overly broad and unduly
5 burdensome and seeks information protected from disclosure by the attorney-client, work
6 product, party communications, investigative, and consulting expert privileges.

7 Subject to and without waiving any objections, APCO responds as follows: See
8 documents identified by Bate Stamp No. APCO00000001¹ through APCO00078992 which
9 APCO has deposited into a depository established by APCO for this litigation matter with
10 Litigation Services located at 1640 W. Alta Drive, Suite 4, Las Vegas, NV 89106 and/or are
11 hereby made available for review and copying (at requestor's expense) at a mutually agreeable
12 time and place. Discovery is ongoing; APCO reserves the right to supplement or amend its
13 response to this Interrogatory as investigation, discovery, disclosure and analysis continues.

14 **INTERROGATORY NO. 6:**

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

17 **RESPONSE TO INTERROGATORY NO. 6:**

18 Pursuant to the terms of the Subcontract any payments to Zitting Brothers were
19 specifically conditioned upon APCO's actual receipt of payment from Gemstone for Zitting
20 Brothers' work. Moreover, the Subcontract specifically provides that Zitting Brothers was
21 assuming the same risk that Gemstone may become insolvent and not be paid for its work as
22 APCO assumed in entering into prime contract with Gemstone. Zitting Brothers further agreed
23 that APCO had no obligation to pay Zitting Brothers for any work performed by Zitting
24 Brothers until or unless APCO had actually been paid for such work by Gemstone. To date,

25
26 ¹ Please note that documents bate stamped APCO00000001 through APCO00001557 are not being produced by
27 APCO as those documents were delivered by APCO to Gemstone Development West ("Gemstone") on September
28 3 2008, around the time of termination of APCO's prime contract so that Gemstone could continue with the
construction of the Project. APCO does not have a copy of these documents as they remain in Gemstone's
possession. Furthermore, due to clerical error, the following Bate Stamp Nos. were not used, APCO00005841,
APCO00024165 and APCO00033296 and are thus not being produced..

1 APCO has not been paid for the work performed, including the work performed by Zitting
2 Brothers. In fact, due to non-payment, APCO exercised its rights pursuant to NRS Chapter 624
3 and terminated the prime contract with Gemstone and further terminated the Subcontract with
4 Zitting Brothers. Discovery is ongoing; APCO reserves the right to supplement or amend its
5 response to this Interrogatory as investigation, discovery, disclosure and analysis continues.

6 **INTERROGATORY NO. 7:**

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

9 **RESPONSE TO INTERROGATORY NO. 7:**

10 Objection. APCO objects to this Interrogatory on the grounds that this Interrogatory is
11 overly broad, unduly burdensome and oppressive because it seeks to force APCO to identify
12 "each and every fact" that APCO relied upon to support its position that any claim for "unjust
13 enrichment against you is invalid." Broad ranging written discovery is improper when it
14 essentially subsumes every fact in the case. See Hiskett v. Wal-Mart Stores, Inc., 180 F.R.D.
15 403, 404 (D. Kan. 1998); Safeco of Am. V. Rawstron, 181 F.R.D. 441, 447048 (C.D. Cal.
16 1998); Lawrence v. First Kan. Bank & Trust Co., 169 F.R.D. 657, 660-63 (D. Kan.
17 1996)(same); Hilt v. SFC, Inc., 170 F.R.D. 182, 186-87 (D. Kan. 1997). APCO further objects
18 to this Interrogatory on the grounds of attorney client privilege and/or attorney work product.
19 APCO further objects that this Interrogatory is premature, as discovery has just commenced on
20 this matter and APCO has not yet identified what documents it may decide to utilize or offer as
21 exhibits against Zitting Brothers at the time of trial.

22 Subject to and without waiving any objections, See Response to Interrogatory No. 1 and
23 6 above, which are incorporated herein by this reference. Also, see documents identified by
24 Bate Stamp No. APCO00000001² through APCO00078992 which APCO has deposited into a
25 depository established by APCO for this litigation matter with Litigation Services located at
26 1640 W. Alta Drive, Suite 4, Las Vegas, NV 89106 and/or are hereby made available for
27

28 ² See Footnote No. 1.

1 review and copying (at requestor's expense) at a mutually agreeable time and place. Discovery
2 is ongoing; APCO reserves the right to supplement or amend its Response to this Interrogatory
3 as investigation, discovery, disclosure and analysis continues.

4 **INTERROGATORY NO. 8:**

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

8 **RESPONSE TO INTERROGATORY NO. 8:**

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

21 Subject to and without waiving any objections, See Response to Interrogatory No. 1, 6,
22 and 7 above, which are incorporated herein by this reference. Moreover, it is APCO's
23 understanding that after APCO terminated its prime contract with Gemstone for nonpayment,
24 Gemstone requested all subcontractors, including Zitting Brothers, to continue their work on the
25 Project. Further, it is APCO's understanding that Zitting Brothers elected not to complete its
26 work and insure that their work was accepted by the inspectors and Gemstone. As such, Zitting
27 Brothers failed to put themselves in the position to receive payment for the work that allegedly
28 remains unpaid at this time. Also, see documents identified by Bate Stamp No.

1 APCO00000001³ through APCO00078992 which APCO has deposited into a depository
2 established by APCO for this litigation matter with Litigation Services located at 1640 W. Alta
3 Drive, Suite 4, Las Vegas, NV 89106 and/or are hereby made available for review and copying
4 (at requestor's expense) at a mutually agreeable time and place. Discovery is ongoing; APCO
5 reserves the right to supplement or amend its Response to this Interrogatory as investigation,
6 discovery, disclosure and analysis continues.

7 **INTERROGATORY NO. 9:**

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

11 **RESPONSE TO INTERROGATORY NO. 9:**

12 Objection. APCO objects to this Interrogatory on the grounds that this Interrogatory is
13 overly broad, unduly burdensome and oppressive because it seeks to force APCO to identify
14 "each and every fact" that APCO relied upon to support its position that "Zitting Brothers had
15 full knowledge and assumed the risk of any circumstance, condition, or result pertaining to or
16 arising from the Project as asserted in your Fifth and Eighth Affirmative Defenses." Broad
17 ranging written discovery is improper when it essentially subsumes every fact in the case. See
18 Hiskett v. Wal-Mart Stores, Inc., 180 F.R.D. 403, 404 (D. Kan. 1998); Safeco of Am. V.
19 Rawstron, 181 F.R.D. 441, 447048 (C.D. Cal. 1998); Lawrence v. First Kan. Bank & Trust Co.,
20 169 F.R.D. 657, 660-63 (D. Kan. 1996)(same); Hilt v. SFC, Inc., 170 F.R.D. 182, 186-87 (D.
21 Kan. 1997). APCO further objects to this Interrogatory on the grounds of attorney client
22 privilege and/or attorney work product. APCO further objects that this Interrogatory is
23 premature, as discovery has just commenced on this matter and APCO has not yet identified all
24 facts that it intends to use relative the Zitting Brothers' action.

25 Subject to and without waiving any objections, See Response to Interrogatory No. 1, 6, 7
26 and 8 above, which are incorporated herein by this reference. Also, see documents identified by
27

28 ³ See Footnote No. 1.

1 Bate Stamp No. APCO00000001⁴ through APCO00078992 which APCO has deposited into a
2 depository established by APCO for this litigation matter with Litigation Services located at
3 1640 W. Alta Drive, Suite 4, Las Vegas, NV 89106 and/or are hereby made available for
4 review and copying (at requestor's expense) at a mutually agreeable time and place. Discovery
5 is ongoing. APCO reserves the right to supplement or amend its Response to this Interrogatory
6 as investigation, discovery, disclosure and analysis continues.

7 **INTERROGATORY NO. 10:**

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

12 **RESPONSE TO INTERROGATORY NO. 10:**

13 Objection. APCO objects to this Interrogatory on the grounds that this Interrogatory is
14 overly broad, unduly burdensome and oppressive because it seeks to force APCO to identify
15 "each and every fact" that APCO relied upon to support its position that "Zitting Brothers'
16 claims to be owed by APCO Construction has been fully performed, satisfied, excused, and/or
17 discharged as asserted in your Tenth Affirmative Defense." Broad ranging written discovery is
18 improper when it essentially subsumes every fact in the case. See Hiskett v. Wal-Mart Stores,
19 Inc., 180 F.R.D. 403, 404 (D. Kan. 1998); Safeco of Am. V. Rawstron, 181 F.R.D. 441, 447048
20 (C.D. Cal. 1998); Lawrence v. First Kan. Bank & Trust Co., 169 F.R.D. 657, 660-63 (D. Kan.
21 1996)(same); Hilt v. SFC, Inc., 170 F.R.D. 182, 186-87 (D. Kan. 1997). APCO further objects
22 to this Interrogatory on the grounds of attorney client privilege and/or attorney work product.
23 APCO further objects that this Interrogatory is premature, as discovery has just commenced on
24 this matter and APCO has not yet identified all facts that it intends to use relative the Zitting
25 Brothers' action.

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28 ⁴ See Footnote No. 1.

1 Subject to and without waiving any objections, See Response to Interrogatory No. 1, 6
2 and 7 above, which are incorporated herein by this reference. Discovery is ongoing. APCO
3 reserves the right to supplement or amend its Response to this Interrogatory as investigation,
4 discovery, disclosure and analysis continues.

5 **INTERROGATORY NO. 11:**

6 State each and every fact that you intend to rely upon to support your position that any
7 obligation or duty, contractual or otherwise that Zitting Brothers' claims to be owed by APCO
8 has been replaced, terminated, voided, cancelled or otherwise released as asserted in your
9 Sixteenth Affirmative Defense.

10 **RESPONSE TO INTERROGATORY NO. 11:**

11 Objection. APCO objects to this Interrogatory on the grounds that this Interrogatory is
12 overly broad, unduly burdensome and oppressive because it seeks to force APCO to identify
13 "each and every fact" that APCO relied upon to support its position that "Zitting Brothers'
14 claims to be owed by APCO has been replaced, terminated, voided, cancelled or otherwise
15 released as asserted in your Sixteenth Affirmative Defense." Broad ranging written discovery is
16 improper when it essentially subsumes every fact in the case. See Hiskett v. Wal-Mart Stores,
17 Inc., 180 F.R.D. 403, 404 (D. Kan. 1998); Safeco of Am. V. Rawstron, 181 F.R.D. 441, 447048
18 (C.D. Cal. 1998); Lawrence v. First Kan. Bank & Trust Co., 169 F.R.D. 657, 660-63 (D. Kan.
19 1996)(same); Hilt v. SFC, Inc., 170 F.R.D. 182, 186-87 (D. Kan. 1997). APCO further objects
20 to this Interrogatory on the grounds of attorney client privilege and/or attorney work product.
21 APCO further objects that this Interrogatory is premature, as discovery has just commenced on
22 this matter and APCO has not yet identified all facts that it intends to use relative the Zitting
23 Brothers' action.

24 Subject to and without waiving any objections, See Response to Interrogatory No. 1, 6
25 and 7 above, which are incorporated herein by this reference. Also, see documents identified by
26 Bate Stamp No. APCO00000001⁵ through APCO00078992 which APCO has deposited into a
27

28 ⁵ See Footnote No. 1.

1 depository established by APCO for this litigation matter with Litigation Services located at
2 1640 W. Alta Drive, Suite 4, Las Vegas, NV 89106 and/or are hereby made available for
3 review and copying (at requestor's expense) at a mutually agreeable time and place. Discovery
4 is ongoing. APCO reserves the right to supplement or amend its Response to this Interrogatory
5 as investigation, discovery, disclosure and analysis continues.

6 **INTERROGATORY NO. 12:**

7 If you contend that Zitting Brothers entered into any independent agreement or
8 ratification with Camco Pacific or Gemstone, state each and every fact that you rely on to
9 support your position and on what basis any such agreement relieves APCO of its contractual
10 duties to Zitting Brothers.

11 **RESPONSE TO INTERROGATORY NO. 12:**

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

22 **INTERROGATORY NO. 13:**

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

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RESPONSE TO INTERROGATORY NO. 13:

Objection. APCO objects to this Interrogatory on the grounds that this Interrogatory is overly broad, unduly burdensome and oppressive because it seeks to force APCO to identify "each and every fact" that APCO relied upon to support its position "that the damages sustained by Zitting Brothers are the result of the acts, omission to act, or negligence of Zitting Brothers or third party(ies) over whom APCO has no control as asserted in your Fourth Affirmative Defense". Broad ranging written discovery is improper when it essentially subsumes every fact in the case. See Hiskett v. Wal-Mart Stores, Inc., 180 F.R.D. 403, 404 (D. Kan. 1998); Safeco of Am. V. Rawstron, 181 F.R.D. 441, 447048 (C.D. Cal. 1998); Lawrence v. First Kan. Bank & Trust Co., 169 F.R.D. 657, 660-63 (D. Kan. 1996)(same); Hilt v. SFC, Inc., 170 F.R.D. 182, 186-87 (D. Kan. 1997). APCO further objects to this Interrogatory on the grounds of attorney client privilege and/or attorney work product. APCO further objects that this Interrogatory is premature, as discovery has just commenced on this matter and APCO has not yet identified all facts that it intends to use relative the Zitting Brothers' action.

Subject to and without waiving any objections, See Response to Interrogatory No. 1, 6, and 7 above, which are incorporated herein by this reference. Also, see documents identified by Bate Stamp No. APCO00000001⁶ through APCO00078992 which APCO has deposited into a depository established by APCO for this litigation matter with Litigation Services located at 1640 W. Alta Drive, Suite 4, Las Vegas, NV 89106 and/or are hereby made available for review and copying (at requestor's expense) at a mutually agreeable time and place. Discovery is ongoing. APCO reserves the right to supplement or amend its Response to this Interrogatory as investigation, discovery, disclosure and analysis continues.

INTERROGATORY NO. 14:

State each and every fact that you rely on to support your position that damages sustained by Zitting Brothers were caused solely by a breach of contract, breach of warranty,

⁶ See Footnote No. 1.

1 expressed and implied, and acts or omissions of Zitting Brothers or some third party(ies) over
2 whom APCO had no control as asserted in your Fourth Affirmative Defense.

3 **RESPONSE TO INTERROGATORY NO. 14:**

4 Objection. APCO objects to this Interrogatory on the grounds that Interrogatory is
5 overly broad, unduly burdensome and oppressive because it seeks to force APCO to identify
6 "each and every fact" that APCO relied upon to support its position "that damages sustained by
7 Zitting Brothers were caused solely by a breach of contract, breach of warranty, expressed and
8 implied, and acts or omissions of Zitting Brothers or some third party(ies) over whom APCO
9 had no control as asserted in your Fourth Affirmative Defense". Broad ranging written
10 discovery is improper when it essentially subsumes every fact in the case. See Hiskett v. Wal-
11 Mart Stores, Inc., 180 F.R.D. 403, 404 (D. Kan. 1998); Safeco of Am. V. Rawstron, 181 F.R.D.
12 441, 447048 (C.D. Cal. 1998); Lawrence v. First Kan. Bank & Trust Co., 169 F.R.D. 657, 660-
13 63 (D. Kan. 1996)(same); Hilt v. SFC, Inc., 170 F.R.D. 182, 186-87 (D. Kan. 1997). APCO
14 further objects to this Interrogatory on the grounds of attorney client privilege and/or attorney
15 work product. APCO further objects that this Interrogatory is premature, as discovery has just
16 commenced on this matter and APCO has not yet identified all facts that it intends to use
17 relative the Zitting Brothers' action.

18 Subject to and without waiving any objections, See Response to Interrogatory No. 1, 6
19 and 7 above, which are incorporated herein by this reference. Also, see documents identified by
20 Bate Stamp No. APCO00000001⁷ through APCO00078992 which APCO has deposited into a
21 depository established by APCO for this litigation matter with Litigation Services located at
22 1640 W. Alta Drive, Suite 4, Las Vegas, NV 89106 and/or are hereby made available for
23 review and copying (at requestor's expense) at a mutually agreeable time and place. Discovery
24 is ongoing. APCO reserves the right to supplement or amend its Response to this Interrogatory
25 as investigation, discovery, disclosure and analysis continues.

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28 ⁷ See Footnote No. 1.

1 **INTERROGATORY NO. 15:**

2 State each and every fact that you rely on to support your position that Zitting Brothers
3 claims have been waived as a result of Zitting Brothers' respective acts and conduct as asserted
4 in your Second Affirmative Defense.

5 **RESPONSE TO INTERROGATORY NO. 15:**

6 Objection. APCO objects to this Interrogatory on the grounds that this Interrogatory is
7 overly broad, unduly burdensome and oppressive because it seeks to force APCO to identify
8 "each and every fact" that APCO relied upon to support its position "that Zitting Brothers
9 claims have been waived as a result of Zitting Brothers' respective acts and conduct as asserted
10 in your Second Affirmative Defense." Broad ranging written discovery is improper when it
11 essentially subsumes every fact in the case. See Hiskett v. Wal-Mart Stores, Inc., 180 F.R.D.
12 403, 404 (D. Kan. 1998); Safeco of Am. V. Rawstron, 181 F.R.D. 441, 447048 (C.D. Cal.
13 1998); Lawrence v. First Kan. Bank & Trust Co., 169 F.R.D. 657, 660-63 (D. Kan.
14 1996)(same); Hilt v. SFC, Inc., 170 F.R.D. 182, 186-87 (D. Kan. 1997). APCO further objects
15 to this Interrogatory on the grounds of attorney client privilege and/or attorney work product.
16 APCO further objects that this Interrogatory is premature, as discovery has just commenced on
17 this matter and APCO has not yet identified all facts that it intends to use relative the Zitting
18 Brothers' action.

19 Subject to and without waiving any objections, See Response to Interrogatory No. 1, 6
20 and 7 above, which are incorporated herein by this reference. Also, see documents identified by
21 Bate Stamp No. APCO00000001⁸ through APCO00078992 which APCO has deposited into a
22 depository established by APCO for this litigation matter with Litigation Services located at
23 1640 W. Alta Drive, Suite 4, Las Vegas, NV 89106 and/or are hereby made available for
24 review and copying (at requestor's expense) at a mutually agreeable time and place. Discovery
25 is ongoing. APCO reserves the right to supplement or amend its Response to this Interrogatory
26 as investigation, discovery, disclosure and analysis continues.

27
28 ⁸ See Footnote No. 1.

1 **INTERROGATORY NO. 16:**

2 State each and every fact that you rely on to support your position that Zitting Brothers'
3 claims are premature as asserted in your Thirteenth Affirmative Defense.

4 **RESPONSE TO INTERROGATORY NO. 16:**

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

17 Subject to and without waiving any objections, See Response to Interrogatory No. 1, 6,
18 and 7 above, which are incorporated herein by this reference. Also, see documents identified by
19 Bate Stamp No. APCO00000001⁹ through APCO00078992 which APCO has deposited into a
20 depository established by APCO for this litigation matter with Litigation Services located at
21 1640 W. Alta Drive, Suite 4, Las Vegas, NV 89106 and/or are hereby made available for review
22 and copying (at requestor's expense) at a mutually agreeable time and place. Discovery is
23 ongoing. APCO reserves the right to supplement or amend its Response to this Interrogatory as
24 investigation, discovery, disclosure and analysis continues.

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28 ⁹ See Footnote No. 1.

1 **INTERROGATORY NO. 17:**

2 State each and every fact that you rely on to support your position that Zitting Brothers'
3 claims for relief against Gemstone are barred by Zitting Brothers' prior breach of contract
4 including the failure to perform any conditions precedent or conditions subsequent as asserted
5 in your Twelfth Affirmative Defense.

6 **RESPONSE TO INTERROGATORY NO. 17:**

7 Objection. APCO objects to this Interrogatory on the grounds that this Interrogatory is
8 overly broad, unduly burdensome and oppressive because it seeks to force APCO to identify
9 "each and every fact" that APCO relied upon to support its position "that Zitting Brothers'
10 claims for relief against Gemstone are barred by Zitting Brothers' prior breach of contract
11 including the failure to perform any conditions precedent or conditions subsequent as asserted
12 in your Twelfth Affirmative Defense." Broad ranging written discovery is improper when it
13 essentially subsumes every fact in the case. See Hiskett v. Wal-Mart Stores, Inc., 180 F.R.D.
14 403, 404 (D. Kan. 1998); Safeco of Am. V. Rawstron, 181 F.R.D. 441, 447048 (C.D. Cal.
15 1998); Lawrence v. First Kan. Bank & Trust Co., 169 F.R.D. 657, 660-63 (D. Kan.
16 1996)(same); Hilt v. SFC, Inc., 170 F.R.D. 182, 186-87 (D. Kan. 1997). APCO further objects
17 to this Interrogatory on the grounds of attorney client privilege and/or attorney work product.
18 APCO further objects that this Interrogatory is premature, as discovery has just commenced on
19 this matter and APCO has not yet identified all facts that it intends to use relative the Zitting
20 Brothers' action.

21 Subject to and without waiving any objections, See Response to Interrogatory No. 1, 6
22 and 7 above, which are incorporated herein by this reference. Also, see documents identified by
23 Bate Stamp No. APCO00000001¹⁰ through APCO00078992 which APCO has deposited into a
24 depository established by APCO for this litigation matter with Litigation Services located at
25 1640 W. Alta Drive, Suite 4, Las Vegas, NV 89106 and/or are hereby made available for
26 review and copying (at requestor's expense) at a mutually agreeable time and place. Discovery
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28 ¹⁰ See Footnote No. 1.

1 is ongoing. APCO reserves the right to supplement or amend its Response to this Interrogatory
2 as investigation, discovery, disclosure and analysis continues.

3 **INTERROGATORY NO. 19:**

4 State each and every fact that you rely on to support your claim that Zitting Brothers
5 failed to comply with the requirements contained in NRS Chapter 108 and thus does not have a
6 valid and enforceable lien against the property at issue as asserted in your Nineteenth
7 Affirmative Defense.

8 **RESPONSE TO INTERROGATORY NO. 19:**

9 Objection. APCO objects to this Interrogatory on the grounds that this Interrogatory is
10 overly broad, unduly burdensome and oppressive because it seeks to force APCO to identify
11 "each and every fact" that APCO relied upon to support its position "that Zitting Brothers failed
12 to comply with the requirements contained in NRS Chapter 108 and thus does not have a valid
13 and enforceable lien against the property at issue as asserted in your Nineteenth Affirmative
14 Defense." Broad ranging written discovery is improper when it essentially subsumes every fact
15 in the case. See Hiskett v. Wal-Mart Stores, Inc., 180 F.R.D. 403, 404 (D. Kan. 1998); Safeco
16 of Am. V. Rawstron, 181 F.R.D. 441, 447048 (C.D. Cal. 1998); Lawrence v. First Kan. Bank &
17 Trust Co., 169 F.R.D. 657, 660-63 (D. Kan. 1996)(same); Hilt v. SFC, Inc., 170 F.R.D. 182,
18 186-87 (D. Kan. 1997). APCO further objects to this Interrogatory on the grounds of attorney
19 client privilege and/or attorney work product. APCO further objects that this Interrogatory is
20 premature, as discovery has just commenced on this matter.

21 Subject to and without waiving any objections, APCO responds as follows: Discovery is
22 ongoing. APCO reserves the right to supplement or amend its Response to this Interrogatory as
23 investigation, discovery, disclosure and analysis continues.

24 **INTERROGATORY NO. 20:**

25 Identify and describe any and all complaints you have regarding the quality of work,
26 materials, and/or equipment furnished by Zitting Brothers at the Project.

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RESPONSE TO INTERROGATORY NO. 20:

Objection. APCO objects to this Interrogatory on the grounds that this Interrogatory is vague, ambiguous, overly broad, unduly burdensome and oppressive because it seeks to force APCO to identify "all complaints you have regarding the quality of work materials, and/or equipment furnished by Zitting Brothers at the Project." Broad ranging interrogatories are improper when they essentially subsume every fact in the case or every person having knowledge. See Hiskett v. Wal-Mart Stores, Inc., 180 F.R.D. 403, 404 (D. Kan. 1998). ("Interrogatories should not require the answering party to provide a narrative account of its case."). Parties can hardly know when they have identified "all" facts, persons, and documents with respect to anything – particularly before the close of discovery. "How can the court make enforceable orders with reference to 'all' of anything?" Often, the relevance of a particular fact to a particular issue is not known until clarified and put into context by testimony at deposition or trial. Such a question places the responding party in an impossible position. See Id.; Safeco of Am. V. Rawstron, 181 F.R.D. 441, 447-48 (C.D. Cal. 1998)(finding unreasonable an interrogatory calling for all facts supporting denial of a request for admission); Lawrence v. First Kan. Bank & Trust Co., 169 F.R.D. 657, 660-63 (D. Kan. 1996)(same); Hilt v. SFC, Inc., 170 F.R.D. 182, 186-87 (D. Kan. 1997)(finding unduly burdensome an interrogatory seeking to require plaintiff to state 'each and every fact' supporting allegations of a complaint).

Subject to, and without waiving the foregoing objections, Gemstone has asserted various complaints about the quality of the work performed by APCO and its subcontractors. As of this time, Gemstone has not identified specific issues that Gemstone has with APCO's or its subcontractor's work, including that of Zitting Brothers. However, as a result of Gemstone's assertions that there are issues with the quality of the work performed on the Project, Gemstone has failed to pay APCO for the work that APCO performed including the work that was performed by Zitting Brothers. Discovery is ongoing. APCO reserves the right to supplement or amend its response to this Interrogatory as investigation, discovery, disclosure and analysis continues.

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1 **INTERROGATORY NO. 21:**

2 State each and every fact that you rely on to support your claim that Zitting Brothers has
3 failed to comply with the requirements of NRS 624 as asserted in your Eighteenth Affirmative
4 Defense.

5 **RESPONSE TO INTERROGATORY NO. 21:**

6 Objection. APCO objects to this Interrogatory on the grounds that this Interrogatory is
7 overly broad, unduly burdensome and oppressive because it seeks to force APCO to identify
8 "each and every fact" that APCO relied upon to support its position "that Zitting Brothers has
9 failed to comply with the requirements of NRS 624 as asserted in your Eighteenth Affirmative
10 Defense." Broad ranging written discovery is improper when it essentially subsumes every fact
11 in the case. See Hiskett v. Wal-Mart Stores, Inc., 180 F.R.D. 403, 404 (D. Kan. 1998); Safeco
12 of Am. V. Rawstron, 181 F.R.D. 441, 447048 (C.D. Cal. 1998); Lawrence v. First Kan. Bank &
13 Trust Co., 169 F.R.D. 657, 660-63 (D. Kan. 1996)(same); Hilt v. SFC, Inc., 170 F.R.D. 182,
14 186-87 (D. Kan. 1997). APCO further objects to this Interrogatory on the grounds of attorney
15 client privilege and/or attorney work product. APCO further objects that this Interrogatory is
16 premature, as discovery has just commenced on this matter and APCO has not yet identified all
17 facts that it intends to use relative the Zitting Brothers' action.

18 Subject to and without waiving any objections, See Response to Interrogatory No. 1, 6
19 and 7 above, which are incorporated herein by this reference. Also, see documents identified by
20 Bate Stamp No. APCO00000001¹¹ through APCO00078992 which APCO has deposited into a
21 depository established by APCO for this litigation matter with Litigation Services located at
22 1640 W. Alta Drive, Suite 4, Las Vegas, NV 89106 and/or are hereby made available for
23 review and copying (at requestor's expense) at a mutually agreeable time and place. Discovery
24 is ongoing. APCO reserves the right to supplement or amend its Response to this Interrogatory
25 as investigation, discovery, disclosure and analysis continues.

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27 ///

28 ¹¹ See Footnote No. 1.

1 **INTERROGATORY NO. 22:**

2 Identify, sufficiently to permit service of subpoena, each witness to this action known to
3 you, your attorney, agent or any investigator or detective employed by you or your attorney or
4 anyone acting on your behalf, which you intend to have testify at the time of trial relative the
5 work, material, and/or equipment supplied by Zitting Brothers and provide a brief statement of
6 their anticipated testimony.

7 **RESPONSE TO INTERROGATORY NO. 22:**

8 Objection. APCO reiterates its General Objections and adds that as this action is in the
9 initial stages of discovery, and APCO has not yet determined which witnesses APCO intends
10 "to have testify at the time of trial relative the work, material, and/or equipment supplied by
11 Zitting Brothers". APCO further objects that this Interrogatory is premature. APCO further
12 objects as the Interrogatory seeks information which is protected from disclosure by the
13 attorney's work product privilege. APCO further objects on the basis that the Interrogatory seeks
14 disclosure of trial witnesses (other than experts) and is therefore violative of the attorney work
15 product privilege. APCO further objects on the basis that the Interrogatory seeks to ascertain
16 the anticipated testimony of witnesses who are not "experts" and as such violate the attorney
17 work product privilege. APCO further objects on the basis that the question seeks to ascertain
18 all facts and other data which APCO intends to offer at trial and, as such, is violative of the
19 attorney work product privilege. APCO further objects on the grounds that this Interrogatory is
20 vague, ambiguous, overly broad, unduly burdensome and oppressive because it seeks to force
21 APCO to identify "each witness to this action known to you, your attorney, agent, or any
22 investigator or detective employed by you or your attorney or anyone acting on your behalf, and
23 provide a brief statement of their anticipated testimony." See also, Response to Interrogatory
24 No. 1 above, which is incorporated herein by this reference.

25 Furthermore, APCO objects to this Interrogatory insofar as it purports to require APCO
26 to describe the substance of each person's knowledge for the reason that such a requirement
27 seeks to impose burdens on APCO beyond those permitted by the Nevada Rules of Civil
28 Procedure, calls for APCO to speculate, is overly broad and unduly burdensome and seeks

1 information protected from disclosure by the attorney-client, work product, party
2 communications, investigative, and consulting expert privileges. Subject to and without
3 waiving any objections, APCO anticipates that the following individuals may be witnesses
4 and/or have relevant information relative the claims asserted in this action:

- 5 1. Randy Nickerl
6 APCO Construction
7 c/o Gwen Rutar Mullins, Esq.
8 Howard & Howard Attorneys PLLC
3800 Howard Hughes Pkwy, Ste. 1400
Las Vegas, Nevada 89169

9 Mr. Nickerl will testify regarding the facts and circumstances surrounding this action
10 and provide other testimony to support the allegations of APCO's Complaint against Gemstone
11 and all other claims that APCO has asserted against various subcontractors, including Zitting
12 Brothers. Mr. Nickerl will further provide testimony to refute the allegations of Gemstone's
13 Counterclaim and various Complaints in Intervention filed by various subcontractors, including
14 Zitting Brothers.

- 15 2. Joe Pelan
16 APCO Construction
17 c/o Gwen Rutar Mullins, Esq.
18 Howard & Howard Attorneys PLLC
3800 Howard Hughes Pkwy, Ste. 1400
Las Vegas, Nevada 89169

19 Mr. Pelan will testify regarding the facts and circumstances surrounding this action and
20 provide other testimony to support the allegations of APCO's Complaint against Gemstone and
21 all other claims that APCO has asserted against various subcontractors, including Zitting
22 Brothers. Mr. Pelan will further provide testimony to refute the allegations of Gemstone's
23 Counterclaim and various Complaints in Intervention filed by various subcontractors, including
24 Zitting Brothers.

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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.

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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.

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

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

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

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

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

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

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

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

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16. Person Most Knowledgeable
Zitting Brothers Construction
c/o Michael M. Edwards, Esq.
WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP
415 South Sixth Street, Ste. 300
Las Vegas, Nevada 89101

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

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

INTERROGATORY NO. 23:

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

RESPONSE TO INTERROGATORY NO. 23:

Objection. APCO objects to this Interrogatory as being overly broad, unduly burdensome and oppressive because it seeks to force APCO to identify "all documents, records, writings, etc., that support your Answers to these Interrogatories and your responses to Requests for Admission." Broad ranging written discovery is improper when it essentially subsumes every fact in the case. See Hiskett v. Wal-Mart Stores, Inc., 180 F.R.D. 403, 404 (D. Kan. 1998); Safeco of Am. V. Rawstron, 181 F.R.D. 441, 447048 (C.D. Cal. 1998); Lawrence v. First Kan. Bank & Trust Co., 169 F.R.D. 657, 660-63 (D. Kan. 1996)(same); Hilt v. SFC, Inc., 170 F.R.D. 182, 186-87 (D. Kan. 1997). APCO further objects to this Interrogatory on the grounds of attorney client privilege and/or attorney work product. APCO further objects that this Interrogatory is premature, as discovery has just commenced on this matter and APCO has not yet identified all facts that it intends to use relative the Zitting Brothers' action.

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1 Subject to and without waiving any objections, see documents identified by Bate Stamp
2 No. APCO00000001¹² through APCO00078992 which APCO has deposited into a depository
3 established by APCO for this litigation matter with Litigation Services located at 1640 W. Alta
4 Drive, Suite 4, Las Vegas, NV 89106 and/or are hereby made available for review and copying
5 (at requestor's expense) at a mutually agreeable time and place. Discovery is ongoing. APCO
6 reserves the right to supplement or amend its Response to this Interrogatory as investigation,
7 discovery, disclosure and analysis continues.

8 **INTERROGATORY NO. 24:**

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

12 **RESPONSE TO INTERROGATORY NO. 24:**

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

25 Subject to and without waiving any objections, see Response to Interrogatory No. 22
26 above. Also, see APCO's disclosure of witnesses previously served on this matter. Discovery
27

28 ¹² See Footnote No. 1.

1 is ongoing. APCO reserves the right to supplement or amend its Response to this Interrogatory
2 as investigation, discovery, disclosure and analysis continues.

3 **INTERROGATORY NO. 25:**

4 State the reasons why you failed to Zitting Brothers for the work, material, and/or
5 equipment it furnished on the Project.

6 **RESPONSE TO INTERROGATORY NO. 25:**

7 Objection. This Interrogatory is overly broad, vague and incomplete and APCO is
8 unable to determine what inquiry is being made by Zitting Brothers.

9 **INTERROGATORY NO. 26:**

10 State each and every fact that supports your position that you are not legally liable for
11 payment to Zitting Brothers for the work, material, and/or equipment that it furnished on the
12 Project.

13 **RESPONSE TO INTERROGATORY NO. 26:**

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

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

1 Bate Stamp No. APCO00000001¹³ through APCO00078992 which APCO has deposited into a
2 depository established by APCO for this litigation matter with Litigation Services located at
3 1640 W. Alta Drive, Suite 4, Las Vegas, NV 89106 and/or are hereby made available for
4 review and copying (at requestor's expense) at a mutually agreeable time and place. Discovery
5 is ongoing. APCO reserves the right to supplement or amend its Response to this Interrogatory
6 as investigation, discovery, disclosure and analysis continues.

7 **INTERROGATORY NO. 27:**

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

- 10 1) the subject matter on which the expert is expected to testify, the substance of the
11 facts and opinions to which each expert is expected to testify;
12 2) a summary of the grounds for each opinion;
13 3) whether written document was prepared by such expert;
14 4) the professional title, educational background, qualifications and work
15 experience of each such expert.

16 **RESPONSE TO INTERROGATORY NO. 27:**

17 Objection. APCO objects to this Interrogatory on the grounds that it is premature.
18 APCO has not yet decided on which, if any, expert witnesses might be called at trial. In fact,
19 APCO has not yet retained any expert witness on this matter. Discovery is ongoing. APCO
20 reserves the right to supplement this Response when APCO has retained an expert witness on
21 this matter.

22 **INTERROGATORY NO. 28:**

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

26 ///

27 _____
28 ¹³ See Footnote No. 1.

RESPONSE TO INTERROGATORY NO. 28:

Objection. APCO objects to this Interrogatory on the grounds that it is premature. APCO has yet to determine the exhibits to be produced at trial. See also Response to Interrogatory No. 1 above, which is incorporated herein by this reference.

Subject to and without waiving any objections, see documents identified by Bates Stamp No. APCO00000001¹⁴ through APCO00078992 which APCO has deposited into a depository established by APCO for this litigation matter with Litigation Services located at 1640 W. Alta Drive, Suite 4, Las Vegas, NV 89106 and/or are hereby made available for review and copying (at requestor's expense) at a mutually agreeable time and place. See also documents produced by other parties to this action, including any documents produced by Zitting Brothers in this action. Discovery is ongoing. APCO reserves the right to supplement or amend its Response to this Interrogatory as investigation, discovery, disclosure and analysis continues.

INTERROGATORY NO. 29:

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

RESPONSE TO INTERROGATORY NO. 29:

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

¹⁴ See Footnote No. 1.

1 product privilege. APCO objects on the basis that the attorney-client privilege protects
2 disclosure of the information sought.

3 Subject to and without waiving any objections, APCO, in view of the claims that have
4 been asserted by Gemstone, APCO is evaluating all of its options, including asserting claims
5 against Zitting Brothers, including, but not limited to, breach of contract, unjust enrichment,
6 indemnity, set off, and contribution. Discovery is ongoing. APCO reserves the right to
7 supplement or amend its response to this Interrogatory as investigation, discovery, disclosure
8 and analysis continues.

9 **INTERROGATORY NO. 30:**

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

12 **RESPONSE TO INTERROGATORY NO. 30:**

13 Objection. APCO objects on the basis that the Interrogatory is oppressive, harassing and
14 burdensome as the information sought information that is equally available to Zitting Brothers.
15 Subject to and without waiving any objections, APCO responds as follows: Zitting Brothers
16 commenced with its work on the Project sometime in November 2007. APCO does not know
17 the last date that Zitting Brothers performed work on the Project. APCO understands that
18 Zitting Brothers continued to perform work on the Project after APCO ceased its work and
19 terminated the prime contract with Gemstone. Discovery is ongoing. APCO reserves the right
20 to supplement or amend its response to this Interrogatory as investigation, discovery, disclosure
21 and analysis continues.

22 **INTERROGATORY NO. 31:**

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

26 **RESPONSE TO INTERROGATORY NO. 31:**

27 Objection. This Interrogatory calls for multiple responses as there were denials made by
28 APCO to Zitting Brothers' Requests for Admissions. APCO objects to any attempt by Zitting

1 Brothers to evade any numerical limitations set on interrogatories by asking multiple
2 independent questions within single individual questions and subparts. APCO further objects
3 on the grounds of relevance and that this Interrogatory is vague, ambiguous, overly broad,
4 unduly burdensome and oppressive because it seeks to force APCO to identify "each and every
5 denial." See also Response to Interrogatory No. 1 above, which is incorporated herein by this
6 reference.

7 Subject to and without waiving any objections, see APCO's Responses to Zitting
8 Brothers' Requests for Admissions. See also, Responses to Interrogatory No. 1, 6 and 7 above,
9 which are incorporated herein by this reference. Also, see documents identified by Bate Stamp
10 No. APCO00000001¹⁵ through APCO00078992 which APCO has deposited into a depository
11 established by APCO for this litigation matter with Litigation Services located at 1640 W. Alta
12 Drive, Suite 4, Las Vegas, NV 89106 and/or are hereby made available for review and copying
13 (at requestor's expense) at a mutually agreeable time and place. Discovery is ongoing. APCO
14 reserves the right to supplement or amend its Response to this Interrogatory as investigation,
15 discovery, disclosure and analysis continues.

16 **INTERROGATORY NO. 32:**

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

20 **RESPONSE TO INTERROGATORY NO. 32:**

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

28 ¹⁵ See Footnote No. 1.

1 169 F.R.D. 657, 660-63 (D. Kan. 1996)(same); Hilt v. SFC, Inc., 170 F.R.D. 182, 186-87 (D.
2 Kan. 1997). APCO further objects to this Interrogatory on the grounds of attorney client
3 privilege and/or attorney work product. APCO further objects that this Interrogatory is
4 premature, as discovery has just commenced on this matter and APCO has not yet identified all
5 facts that it intends to use relative the Zitting Brothers' action.

6 Subject to and without waiving any objections, APCO responds as follows: After
7 APCO was not paid by Gemstone for work that was being performed by APCO and its
8 subcontractors, APCO, pursuant to Nevada law, gave notice to Gemstone of its intent to stop
9 work and terminate the prime contract unless payment was made. APCO provided a copy of
10 such notice to its subcontractors, including Zitting Brothers, so that the subcontractors,
11 including Zitting Brother, could take whatever action they deemed necessary to protect their
12 respective rights under Nevada law. After payment from Gemstone was not made, APCO, as
13 allowed under Nevada law, terminated its prime contract with Gemstone and further notified its
14 subcontractors, including Zitting Brothers of such termination. See also, Responses to
15 Interrogatory No. 1, 6 and 7 above, which are incorporated herein by this reference. Also, see
16 documents identified by Bate Stamp No. APCO00000001¹⁶ through APCO00078992 which
17 APCO has deposited into a depository established by APCO for this litigation matter with
18 Litigation Services located at 1640 W. Alta Drive, Suite 4, Las Vegas, NV 89106 and/or are
19 hereby made available for review and copying (at requestor's expense) at a mutually agreeable
20 time and place. Discovery is ongoing. APCO reserves the right to supplement or amend its
21 Response to this Interrogatory as investigation, discovery, disclosure and analysis continues.

22 **INTERROGATORY NO. 33:**

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

27 ///

28 ¹⁶ See Footnote No. 1.

1 **RESPONSE TO INTERROGATORY NO. 33:**

2 Objection. APCO objects on the grounds of relevance and further objects that this
3 Interrogatory is vague, ambiguous, overly broad, unduly burdensome and oppressive because it
4 seeks to force APCO to identify any conversations that APCO may have had with Zitting
5 Brothers including the dates of each conversation, persons involved and the contents of the
6 conversations. APCO further objects to this Interrogatory on the grounds that the burden of
7 deriving or ascertaining the answer to this Interrogatory is substantially the same for Zitting
8 Brothers as for APCO. See also Response to Interrogatory No. 2 above, which is incorporated
9 herein by this reference.

10 Subject to and without waiving any objections, APCO, during the course of
11 construction, had numerous conversations with Zitting Brothers relative Zitting Brothers' work
12 and the Project in general. APCO is unable to recall each and every conversation and their
13 contents. Discovery is ongoing. APCO reserves the right to supplement or amend its response
14 to this Interrogatory as investigation, discovery, disclosure and analysis continues.

15 **INTERROGATORY NO. 34:**

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

20 **RESPONSE TO INTERROGATORY NO. 34:**

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

27 Subject to and without waiving any objections, APCO, does not recall having any
28 conversations with Camco regarding Zitting Brothers' work or otherwise. Discovery is

1 ongoing. APCO reserves the right to supplement or amend its response to this Interrogatory as
2 investigation, discovery, disclosure and analysis continues.

3 **INTERROGATORY NO. 35:**

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

8 **RESPONSE TO INTERROGATORY NO. 35:**

9 Objection. APCO objects on the grounds of relevance and further objects that this
10 Interrogatory is vague, ambiguous, overly broad, unduly burdensome and oppressive because it
11 seeks to force APCO to identify any conversations that APCO may have had with Gemstone
12 including the dates of each conversation, persons involved and the contents of the
13 conversations. See also Response to Interrogatory No. 2 above, which is incorporated herein by
14 this reference.

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

20 **INTERROGATORY NO. 36:**

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

25 **RESPONSE TO INTERROGATORY NO. 36:**

26 Objection. APCO objects on the grounds of relevance and further objects that this
27 Interrogatory is vague, ambiguous, overly broad, unduly burdensome and oppressive because it
28 seeks to force APCO to identify any conversations that APCO may have had with a Third Party

1 including the dates of each conversation, persons involved and the contents of the
2 conversations. See also Response to Interrogatory No. 2 above, which is incorporated herein by
3 this reference.

4 Subject to and without waiving any objections, APCO does not recall having any
5 conversations with a "Third-Party" regarding Zitting Brothers' work or otherwise. Discovery is
6 ongoing. APCO reserves the right to supplement or amend its response to this Interrogatory as
7 investigation, discovery, disclosure and analysis continues

8 **INTERROGATORY NO. 37:**

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

11 **RESPONSE TO INTERROGATORY NO. 37:**

12 Objection. APCO objects on the grounds of relevance and further objects that this
13 Interrogatory is vague, ambiguous, overly broad, unduly burdensome and oppressive because it
14 seeks to force APCO to identify "each and every fact supporting" "that your lien has priority
15 over any other party in this matter." See also Response to Interrogatory No. 2 above, which is
16 incorporated herein by this reference.

17 Subject to and without waiving any objections, APCO responds as follows: APCO has
18 asserted priority over the deeds of trust that are of record against the Manhattan West Project
19 pursuant to NRS 108.225. Priority over the deeds of trusts is based on the fact that APCO first
20 performed work under the Grading Agreement on or about May 2007. APCO first performed
21 work under the ManhattanWest General Construction Agreement for GMP or about September
22 5, 2007. The deeds of trust on the property attached after construction work commenced.
23 APCO has further asked the Court to declare the rank of mechanic's liens pursuant to NRS
24 108.236. See also documents identified by Bate Stamp No. APCO00000001¹⁷ through
25 APCO00078992 which APCO has deposited into a depository established by APCO for this
26 litigation matter with Litigation Services located at 1640 W. Alta Drive, Suite 4, Las Vegas,

27
28 ¹⁷ See Footnote No. 1.

NV 89106 and/or are hereby made available for review and copying (at requestor's expense) at a mutually agreeable time and place. Discovery is ongoing; APCO reserves the right to supplement or amend its Response to this Interrogatory as investigation, discovery, disclosure and analysis continues.

INTERROGATORY NO. 37:

Identify the amount of your lien and state whether any of the amounts owed to the subcontractors in this matter, including Zitting Brothers, are included in said amount. If so, provide a break down of all amounts making up your lien on the Project.

RESPONSE TO INTERROGATORY NO. 37:

The current principal amount of APCO's lien, as set forth in the Amended and Restated Notice of Lien that APCO recorded on February 11, 2009 in Book 20090211 as Instrument No. 48031, is \$20,782,659.95. APCO's lien includes an amounts owed to the subcontractors and/or suppliers through the date of APCO's termination of prime contract with Gemstone. APCO's lien does not include any sums for any work that any subcontractor and/or supplier may have performed and/or furnished after termination directly to Gemstone or through Camco. The breakdown of APCO's lien is as follows:

Original Contract Amount	\$ 153,472,300.00
Change Orders	\$ <u>14,597,570.26</u>
Revised Contract Amount	\$ 168,069,870.26
Contract Work Performed & Billed Thru August 2008	\$ 60,325,901.89
Change Order Work Performed Thru Aug 2008	\$ <u>9,168,116.32</u>
Total Work Performed Thru August 2008	\$ 69,494,018.21
Less Previous Payments	\$ (48,711,358.26)
Final Lien Amount	\$ 20,782,659.95

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

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1 **INTERROGATORY NO. 38:**

2 Identify the date you started construction and describe the work that was performed
3 during the first three months of the Project.

4 **RESPONSE TO INTERROGATORY NO. 38:**

5 Objection. APCO objects on the grounds of relevance and further objects that this
6 Interrogatory is vague, ambiguous, overly broad, unduly burdensome and oppressive because it
7 seeks to force APCO to describe "the work that was performed during the first three months of
8 the Project." APCO further objects on the grounds that it is vague and ambiguous in that
9 "construction", "work" and "first three months of the Project" are not defined. See also
10 Response to Interrogatory No. 2 above, which is incorporated herein by this reference.

11 Subject to and without waiving any objections, APCO responds as follows: APCO first
12 performed work under the Grading Agreement on or about May 2007. APCO first performed
13 work under the ManhattanWest General Construction Agreement for GMP or about September
14 5, 2007. See also documents identified by Bate Stamp No. APCO00000001¹⁸ through
15 APCO00078992 which APCO has deposited into a depository established by APCO for this
16 litigation matter with Litigation Services located at 1640 W. Alta Drive, Suite 4, Las Vegas,
17 NV 89106 and/or are hereby made available for review and copying (at requestor's expense) at
18 a mutually agreeable time and place. Discovery is ongoing; APCO reserves the right to
19 supplement or amend its Response to this Interrogatory as investigation, discovery, disclosure
20 and analysis continues.

21 **INTERROGATORY NO. 39:**

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

24 ///

25 ///

26
27
28 ¹⁸ See Footnote No. 1.

RESPONSE TO INTERROGATORY NO. 39:

None. APCO has not received any payments for work, materials and/or equipment furnished by Zitting Brothers at the Project for which Zitting Brother has not been paid by APCO.

INTERROGATORY NO. 40:

Identify all facts, opinions, or law not set forth in other responses, which you contend would excuse you from paying Zitting Brothers the owed and outstanding amounts for the work, material, and/or equipment furnished by Zitting Brothers at the Project.

RESPONSE TO INTERROGATORY NO. 40:

Objection. APCO objects on the grounds of relevance and further objects that this Interrogatory is vague, ambiguous, overly broad, unduly burdensome and oppressive because it seeks to force APCO to identify "all facts, opinions, or law not set forth in other responses, which you contend would excuse you from paying Zitting Brothers the owed and outstanding amounts for the work, material, and/or equipment furnished by Zitting Brothers at the Project." APCO further objects to this Request on the grounds of attorney client privilege and/or attorney work product. APCO further objects that this Interrogatory is premature, as discovery has just commenced on this matter and APCO has not yet identified all facts that it intends to use relative the Zitting Brothers' action. APCO further objects on the basis that to answer this Interrogatory would result in annoyance, embarrassment, or oppression to APCO in that the question is overly broad, vague, ambiguous, indefinite as to time and without reasonable limitation in its scope. APCO further objects on the basis that the question is oppressive, harassing and burdensome; the information sought seeks APCO's counsel's legal analysis and theories regarding laws, ordinances, safety orders, etc., which are equally available to Zitting Brother; the question also invades the attorney's work product privilege. APCO further objects on the basis that the question calls for information which is available to all parties equally, and is therefore oppressive and burdensome to APCO. APCO further objects on the basis that the question seeks information which is protected from disclosure by the attorney's work product privilege. APCO further objects on the basis that the question seeks to invade APCO's counsel's

1 work product privilege in that it calls for him to provide an analysis of written data and/or law.
2 APCO further objects to this Interrogatory on the ground that it calls for legal conclusions. See
3 also Response to Interrogatory No. 2 above, which is incorporated herein by this reference.

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

25 ///

26 ///

27 ///

28 ///

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

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

3 DATED this 29th day of April 2010.

4 HOWARD & HOWARD ATTORNEYS PLLC

5
6 /s/ Gwen Rutar Mullins

Gwen Rutar Mullins, Esq.

7 Nevada Bar No. 3146

8 Wade B. Gochnour, Esq.

Nevada Bar No. 6314

9 3800 Howard Hughes Pkwy., Ste. 1400

10 Las Vegas, Nevada 89169-5914

11 Attorneys for APCO CONSTRUCTION

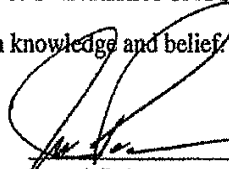
HOWARD & HOWARD ATTORNEYS PLLC
3800 Howard Hughes Pkwy., Suite 1400
Las Vegas, NV 89169
(702) 257-1483

VERIFICATION

STATE OF NEVADA)
) ss.
COUNTY OF CLARK)

Joseph Pelan, being first duly sworn according to law, deposes and says:

That he is the Senior Project Manager of APCO CONSTRUCTION, and that he executed the foregoing instrument on behalf of APCO CONSTRUCTION in the capacity set forth above; that he has read the foregoing APCO CONSTRUCTION'S RESPONSES TO ZITTING BROTHERS CONSTRUCTION, INC.'S INTERROGATORIES and knows the contents thereof; that the same are true of his own knowledge and belief.

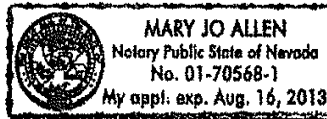


Joseph Pelan

SUBSCRIBED AND SWORN to before me
this 27th day of April, 2010.



NOTARY PUBLIC in and for said
County and State.



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

CERTIFICATE OF SERVICE

On the 29th day of April 2010, the undersigned served a true and correct copy of the foregoing APCO CONSTRUCTION'S RESPONSES TO ZITTING BROTHERS CONSTRUCTION INC.'s INTERROGATORIES 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'

RESPONSE TO INTERROGATORY NO. 3

Date of Payment	Check No.	Amt. Paid	% Paid on Completion on Phase 1 Only
1/24/2008	12787	\$ 800,000.00	22.2%
2/6/2008	12878	\$ 388,785.00	32.4%
2/19/2008	12944	\$ 567,148.60	48.1%
3/13/2008	13184	\$ 408,225.70	59.4%
4/15/2008	13458	\$ 495,804.80	73.2%
5/19/2008	13647	\$ 424,688.70	84.8%
6/13/2008	13956	\$ 156,574.80	89.3%
7/28/2008	14392	\$ 27,973.60	90.0%
8/28/2008	NCS628388	\$ 33,847.55	89.5%
		\$ 3,282,848.55	

Zitting Bros. was paid 90% of their contract through payment #8 (07/28/08). Payment #9 (08/28/08) was a joint check issued by Nevada Construction Services for work performed on Owner approved change orders paid at 90%. The owner is holding 10% retention for all owner approved work performed by Zitting through August 2008.

IN THE SUPREME COURT OF THE STATE OF NEVADA

APCO CONSTRUCTION, INC., A
NEVADA CORPORATION,

Appellant,

vs.

ZITTING BROTHERS CONSTRUCTION,
INC.,

Respondent.

Electronically Filed
Apr 15 2019 03:10 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

Case No.: 75197
Appeal from the Eighth Judicial
District Court, the Honorable Mark
Denton Presiding

APPELLANT'S APPENDIX
(Volume 26, Bates Nos. 5974–6180)

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Attorneys for Appellant, APCO Construction, Inc.

MAC:05161-019 3698575_1

INDEX TO APPELLANT'S APPENDIX

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10/30/2008	Ahern Rentals, Inc.'s Complaint	1	AA 17–30
11/19/2008	Platte River Insurance Company's Answer and Crossclaim	1	AA 31–45
12/08/2008	APCO Construction's First Amended Complaint	1	AA 46–63
02/06/2009	Cabinetec's Statement and Complaint	1	AA 64–73
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03/12/2009	Cell-Crete Fireproofing of Nevada, Inc.'s Statement and Complaint	1	AA 217–233
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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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01/02/2018	Notice of Entry of Order Granting Zitting Brothers Construction, Inc.'s MSJ	14	AA 3256–3268
01/03/2018	Notice of Entry of Order Granting Peel Brimley MSJ	14	AA 3269–3280
01/04/2018	Motion for Reconsideration of Court's Order Granting Peel Brimley Lien Claimants' Partial Motion for Summary Judgment to Preclude Defenses Based on Pay If Paid Provisions on an Order Shortening Time	15	AA 3281–3517
		16	AA 3518–3633


<u>Date</u>	<u>DOCUMENT DESCRIPTION</u>	<u>Vol.</u>	<u>Bates Nos.</u>
01/08/2018	Motion for Reconsideration of Court's Order Granting Zitting Brothers Construction, Inc.'s Partial Motion for Summary Judgment and Ex Parte Application for Order Shortening Time and to Exceed Page Limit	16 17 18 19	AA 3634–3763 AA 3764–4013 AA 4014–4253 AA 4254–4344
01/09/2018	Plaintiff in Intervention, National Wood Products, Inc.'s Opposition to APCO Construction's Motion for Reconsideration of the Court's Order Granting Peel Brimley Lien Claimants' Motion for Partial Summary Judgment to Preclude Defenses of Pay if Paid Provisions	19	AA 4345–4350
01/09/2018	Peel Brimley Lien Claimants' Opposition to APCO Construction's Motion for Reconsideration of Order Granting Partial Summary Judgment Precluding Defenses Based on Pay-If-Paid Agreements	19	AA 4351–4359
01/10/2018	APCO's Reply in Support of Motion for Reconsideration of Court's Order Granting Peel Brimley Lien Claimants' Partial Motion for Summary Judgment to Preclude Defenses Based on Pay-If-Paid Provisions on an Order Shortening Time	19	AA 4360–4372
01/10/2018	Zitting Brothers Construction, Inc. Opposition to APCO Construction, Inc.'s Motion for Reconsideration of Court's Order Granting Zitting Brothers Construction's Partial Motion for Summary Judgment	19	AA 4373–4445
01/11/2018	Recorder's Transcript of Hearing RE: All Pending Motions	19	AA 4446–4466

<u>Date</u>	<u>DOCUMENT DESCRIPTION</u>	<u>Vol.</u>	<u>Bates Nos.</u>
01/19/2018	Order Denying APCO Construction's Motion for Reconsideration of Court's Order Granting Partial Summary Judgment Precluding Defenses Based on Pay-If-Paid Agreements	19	AA 4467-4468
01/19/2018	Notice of Entry of Order Denying APCO's motion for reconsideration of Peel Brimley Order	19	AA 4469-4473
01/25/2018	Order Denying APCO Construction's Motion for Reconsideration of Order Granting Zitting Brothers Construction, Inc.'s Partial Motion for Summary Judgment	19	AA 4474-4475
01/29/2018	Memorandum in Support of APCO Construction, Inc.'s Payment of Attorney's Fees, Costs, and Interest to Zitting Brothers Construction, Inc.	19 20	AA 4476-4487 AA 4488-4689
01/31/2018	Notice of Entry of Order Denying APCO Construction, Inc.'s Motion for Reconsideration of Court's Order Granting Zitting Brothers Construction, Inc.'s Partial Summary Judgment	20	AA 4690-4693
02/05/2018	2018 Stipulation and Order to Dismiss Third Party Complaint of Interstate Plumbing & Air Conditioning, LLC Against APCO Construction, Inc. with Prejudice	20	AA 4694-4695
02/16/2018	Notice of Appeal	20	AA 4696-4714

<u>Date</u>	<u>DOCUMENT DESCRIPTION</u>	<u>Vol.</u>	<u>Bates Nos.</u>
02/16/2018	APCO Construction, Inc.'s Opposition to Zitting Brothers, Inc.'s Memorandum in Support of APCO Construction Inc.'s Payment of Attorneys' Fees, Costs and Interest to Zitting Construction Brothers, Inc.	20 21	AA 4715–4726 4740
02/26/2018	Zitting Brothers Construction Inc.'s Reply in Support of its Memorandum in Support of APCO Construction, Inc.'s Payment of Attorneys' Fees, Costs, and Interest	21	AA 4741–4751
02/27/2018	Notice of Appeal	21 22 23	AA 4752–4976 AA 4977–5226 AA 5227–5288
05/04/2018	Order Regarding Plaintiff's Motion to Stay Pending Entry of Final Judgment Pursuant to NRCP 62(B) and 62(H) on Order Shortening Time	23	AA 5289–5290
05/08/2018	Order Determining Amount of Zitting Brothers Construction, Inc.'s Attorney's Fees, Costs, and Prejudgment Interests	23	AA 5291–5293
05/11/2018	Notice of Entry of Order Determining Amount of Zitting Brothers Construction, Inc.'s Attorney's Fees, Costs, and Prejudgment Interest	23	AA 5294–5298
05/23/2018	Judgment in Favor of Zitting Brothers Construction, Inc.	23	AA 5299–5300
05/24/2018	Notice of Entry of Judgment in Favor of Zitting Brothers Construction, Inc.	23	AA 5301–5304
06/08/2018	Amended Notice of Appeal	23 24 25	AA 5305–5476 AA 5477–5724 AA 5725–5871

<u>Date</u>	<u>DOCUMENT DESCRIPTION</u>	<u>Vol.</u>	<u>Bates Nos.</u>
06/08/2018	Plaintiff's Motion for 54(b) Certification and for Stay Pending Appeal on Order Shortening Time	25 26	AA 5872–5973 AA 5974–6038
06/19/2018	Zitting Brothers' Construction, Inc.'s Limited Opposition to APCO Construction, Inc.'s Motion for 54(b) Certification and for Stay Pending Appeal on Order Shortening Time	26	AA 6039–6046
06/26/2018	Recorder's Transcript of Hearing RE: Plaintiff's Motion for 54(b) Certification and for Stay Pending Appeal on Order Shortening Time	26	AA 6047–6051
07/30/2018	Order Granting Motion for 54(b) Certification and for Stay Pending Appeal	26	AA 6052–6054
07/31/2018	Notice of Entry of Order	26	AA 6055–6063
08/08/2018	Second Amended Notice of Appeal	26 27 28 29	AA 6064–6180 AA 6181–6430 AA 6431–6679 AA 6680–6854
	Docket of District Court Case No. 08A571228	30	AA 6855–6941

EXHIBIT D



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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

Hearing Date: September 5, 2017
 Hearing Time: 9:00 a.m.


21 **APCO CONSTRUCTION'S OPPOSITION TO ZITTING BROTHERS**
 22 **CONSTRUCTION INC.'S PARTIAL MOTION FOR SUMMARY JUDGMENT**

23 Plaintiff APCO Construction ("APCO"), by and through its counsel of record, Marquis
 24 Aurbach Coffing, hereby submits its Opposition to Zitting Brothers Construction Inc.'s
 25 ("Zitting") Motion for Partial Summary Judgment against APCO Construction.
 26
 27
 28

1 This Opposition is made and based on the papers and pleadings on file herein, the
2 attached Memorandum of Points and Authorities, and any oral argument the Court may choose
3 to entertain at the time of hearing.

4 Dated this 21st day of August, 2017.

5 MARQUIS AURBACH COFFING

6
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19 **MEMORANDUM OF POINTS AND AUTHORITIES**

20 **I. INTRODUCTION**

21 Zitting asserts it is entitled to summary judgment on (1) its breach of contract cause of
22 action, and (2) its NRS 108 claim. It has been a long standing policy of Nevada courts to hear
23 cases on the merits, and not to grant summary judgment where there are clear issues of
24 materially disputed facts. Here, Zitting's purported statement of undisputed material facts is not
25 only riddled with disputed facts, but is also full of nothing more than misdirection and smoke
26 and mirror tactics in an effort to try to get the Court to grant its Motion prior to trial. As detailed
27 herein, when the smoke clears the Court will see that denying Zitting's Motion in its entirety and
28 hearing the case on the merits — weighing the creditability of Zitting's witnesses and document
— is really the only option.

Furthermore, the Court recently conducted a lengthy hearing on August 10, 2017
regarding the Lien Claimants' — including Zitting — NRS 108 claims as it relates to the Project,
whereat the Court determined that "there are some genuine issues that need to be further

developed . . .” and denied APCO’s motion to dismiss or for summary judgment without prejudice.¹ Consequently, for this reason alone, the Court should deny Zitting’s Motion with regard to its request for summary judgment on Zitting’s NRS 108 claims.²

II. APCO’S CONTROVERTED FACTS

Zitting’s assertion that “there is no triable issue of APCO’s breach of contract . . .” cannot be farther from the truth and is quite disingenuous, as there are numerous material issues of fact that must be presented at trial.³ The following facts are in direct contravention to those presented by Zitting and, which, require denial of Zitting’s Motion:⁴

Zitting’s Purported Undisputed Material Fact	Controverted Material Fact
“APCO would pay Zitting the retention amount for work on a building once the building is “complete.” Motion at 3:24–25; (Ex. D to Motion at APC000044595). “The subcontract deemed Zitting’s work on a building to be “complete” as soon as “drywall [for the building] is completed.” Motion at 3:25–27; (<i>Id.</i>)	By Zitting’s own admission a “building” is considered to be “complete” pursuant to the subcontract as soon as “drywall [for the building] is completed.” Thus, Zitting’s admission in and of itself defeats its own Motion, as the drywall in the buildings were, in fact, not complete . Exhibit 1 at ¶ 3 & Exhibit 2 (photographs of the Project taken on 8/20/2008 & 11/20/08). Moreover, Camco’s Application for Payment dated 9/30/2008, at line 478 for building #8, only evidences a 77% completion of the drywall in building #8, and at line 632 only an 84% completion of the drywall for building #9. <u>See Exhibit 6</u> at 00250 and 00253. The photos and Application for Payment clearly

¹ See Court’s Minute Order from hearing conducted on 08/10/2017 regarding APCO’s Motion to Dismiss or for Summary Judgment on Lien Claimants’ NRS 108 Claims for Foreclosure of Mechanic’s Lien on file with the Court.

² Due to the Court having recently denied APCO’s motion for summary judgment regarding NRS 108 issues related to the Parties in the instant action without prejudice, and the same having been asserted by Zitting through its instant Motion that was filed prior to the 08/10/2017 hearing, APCO, out of an abundance of caution, only provides a brief summation of the argument and reserves the right to fully brief and present the issue to the Court during trial pursuant to this Court’s holding at the 08/10/2017 hearing regarding NRS 108 issues.

³ Motion at 3:14.

⁴ For judicial efficiency, the following list addresses the primary purported undisputed facts to evidence that there are a vast number of triable issues of material fact and, likewise, the absence of any mention of asserted purported facts or contravening evidence is not to be considered as waiver of any provided statement from Zitting, and APCO specifically reserves the right to address such facts at hearing or trial on the issues.

Zitting's Purported Undisputed Material Fact	Controverted Material Fact
	<p>* Continued *</p> <p>evidences that the drywall was not complete at the subject buildings on any of the aforementioned dates, or at a minimum, there is an issue of material fact as to the percent of the completion and Zitting's scope of work when APCO stopped work for nonpayment and Camco assumed responsibility for the Project.</p> <p>Thus, if the "drywall" was not "complete" — which the pictures and pay application evidence it was not — Zitting is not owed its retention pursuant to the language of the subcontract that Zitting specifically cited to in its Motion. This is yet another reason that stands alone to substantiate denying Zitting's Motion in its entirety.</p>
<p>"Nevertheless, in the event that APCO's contract with Gemstone is terminated, APCO would pay Zitting the entire amount owed for the work completed." Motion at 3:27–28; (<u>Id.</u> at APC000044601).</p>	<p>Zitting did not invoice APCO after 6/30/2008. Exhibit 1 at ¶ 4. Zitting's invoices and payment applications contradict each other and were prepared and executed long after APCO was no longer in control of the Project and Zitting was conducting work under Camco. Specifically, Zitting's invoice dated "6-30-08" evidences the balance due Zitting on 6-30-08 was \$180,231.35, not the \$423,654.85 Zitting claims APCO owes it. Exhibit 1 at ¶ 6, and Exhibit 3.</p> <p>Further, all approved change orders for Zitting were paid through August 2008 prior to APCO stopping work at the Project. Exhibit 1 at ¶ 5. Zitting's purported pay application (from Zitting's own production in the instant case) for the period to "6/30/2008" also claims the current payment due is \$347,441.67 – contradicting the prior invoice provided to APCO. Exhibit 4. APCO also never received the 6/30/2008 pay application as Zitting alleges. Exhibit 1 at ¶ 7. This is evidenced by the pay application being executed on "01/30/09" — a significant time subsequent to APCO stopping work and turning the Project over to Camco. If that were not enough, Zitting is similarly trying to pass off the "11/30/2008" pay application in the same disingenuous fashion as the prior June pay app, which was also not executed until "01/30/09."</p>

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Zitting's Purported Undisputed Material Fact	Controverted Material Fact
	<p>* Continued *</p> <p>Given the above contradicting dates and values of Zitting's invoices and pay applications, the authenticity and credibility of the amount Zitting claims to be owed is called into question, and clearly creates an issue of disputed material fact defeating Zitting's Motion.</p>
<p>"Zitting began its work under the subcontract around November 19, 2007, and continued its work until approximately December 15, 2008, when Zitting received notice that the Project was shutting down." Motion at 4:3-5; (Ex. A (Zitting Decl.) at ¶ 6).</p>	<p>Zitting admits it conducted work at the Project "until approximately December 15, 2008." Zitting also admits that APCO was off the Project "in August 2008." Motion at 4:15. It is undisputed that Camco took over the Project from APCO in August 2008. Consequently, it is further undisputed that Zitting conducted work under Camco's control of the Project and, likewise, if Zitting was owed anything – which it is not – it would be owed from its time and work conducted under Camco's supervision, not APCO's tenure. Hence, should Zitting deny it is owed any amount from the time Camco controlled the Project, and that everything is owed from APCO, then Zitting's own denial to the assertion raises an issue of material fact between the Parties defeating its Motion.</p> <p>Of particular note, while Zitting clearly conducted work under Camco, it fails to make any mention of the value of its work or claim for retention under the work it conducted under Camco's control of the Project. Thus, due to Zitting's own admission of the scope of time it conducted work at the Project, the issue of the value of work conducted under Camco's tenure is a whole separate set of issues of material fact, that by themselves, defeat Zitting's Motion.</p>
<p>"By the time the Project shut down, Zitting completed its contracted work that cost \$4,033,654.85, including \$423,654.85 in owner-requested change orders that was approved by operation of law." Motion at 4:5-7; (<u>Id.</u> at 11 10.)</p>	<p>The value of Zitting's work is clearly in dispute as address above. Moreover, the application of law toward the approval of purported change orders is a disputed fact, as there is a dispute as to who Zitting provided the change orders to, <u>e.g.</u>, APCO, Camco or the Owner, and whether they were ever approved by the Owner.</p>
<p>"The completed work included Zitting's entire scope of work for Buildings 8 and 9 of the Project." Motion at 4:7-8; (<u>Id.</u> at 117.)</p>	<p>This assertion by Zitting is clearly disputed, as when APCO left the Project in August 2008 Zitting had remaining issues with its work to be completed, otherwise Zitting would not have continued to work for Camco.</p>

Zitting's Purported Undisputed Material Fact	Controverted Material Fact
	<p>* Continued *</p> <p>Moreover, any purported payment Zitting claims to be owed is clearly in dispute as addressed above. It is also in dispute whether Zitting is owed anything according to its own admissions, as the buildings were not "complete" pursuant to the contract language Zitting itself added to the subcontract.</p>
<p>"The drywall was completed in those two buildings, and Zitting had submitted close-out documents for its work, including as-built drawings." Motion at 4:8-10; (<i>Id.</i> at ¶¶ 7-8.)</p>	<p>As clearly evidenced by the photographs attached as Exhibit 2 and Camco's Application for Payment dated 9/30/2008 attached as Exhibit 6, this assertion by Zitting is completely fabricated, utterly false, and calls into the question the credibility of Zitting and its other sworn statements. Further, if the drywall were complete, where are the inspection certificates stating the buildings passed their respective inspections evidencing their stage of completion?</p>
<p>"APCO refused to pay Zitting \$750,807.16 of the amount remaining owed for Zitting's work completed prior to APCO's departure from the Project, including \$347,441.67 in unpaid change orders and \$403,365.49 in unpaid retention amount." Motion at 4:11-14; (<i>Id.</i> ¶¶ 12-13, 15; Ex. F at ZBC1002037; Ex. G at ZBC1002032).</p>	<p>As detailed above, due to the inconsistent dates and values in Zitting's invoices and pay applications, it makes the entirety of any value claimed by Zitting questionable and an issue of disputable material fact between the Parties.</p>
<p>"Zitting never received a written notice of termination for cause from APCO." Motion at 4:16-17; (Ex. A at ¶ 16.)</p>	<p>Zitting was served with APCO's notice of stop work and associated correspondence dated August 21, 2008. Exhibit 1 at ¶ 9 and Exhibit 5. Further, Zitting admitted it knew APCO was off the Project and had turned control of the Project over to Camco. Motion at 4:15.</p>

III. LEGAL STANDARDS.

"Summary judgment ... is properly regarded not as a disfavored procedural shortcut, but rather an integral part of the [procedural] rules as a whole, which are designed to 'secure the just, speedy and inexpensive determination of every action.'" Wood v. Safeway, Inc., 121 Nev. 724 121 P.3d 1026 (2005). Summary judgment is appropriate when the pleadings, depositions, answer to interrogatories, admissions, and affidavits that are before the court demonstrates that

1 no genuine issue of material fact exists, **and** the moving party is entitled to judgment as a matter
2 of law. Wood, 121 Nev. 724, 121 P.3d 1026.

3 NRCP 56 outlines Nevada's procedural mechanism of summary judgment. NRCP 56. A
4 genuine issue of material fact exists when "a reasonable jury could return a verdict for the non-
5 moving party." Posadas v. City of Reno, 109 Nev. 448, 452, 851 P.2d 438, 441-43 (1993). A
6 fact is material only if "might affect the outcome of the suit under the governing law." Anderson
7 v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 2510 (1986).⁵ Once the moving party
8 has met its burden, by demonstrating to the court that there is an absence of evidence to support
9 the non-moving party's case, the burden shifts to the respondent to set forth specific facts
10 demonstrating that there is a genuine issue of material fact for trial. Celotex Corp. v. Catrett, 477
11 U.S. 317, 330, 106 S. Ct. 2548, 2556 (1986).

12 While the pleadings and other proof must be construed in a light most favorable to the
13 non-moving party, the non-moving party bears the burden to "do more than simply show that
14 there is some metaphysical doubt" as to the operative facts in order to avoid summary judgment
15 being entered in the moving party's favor. Wood, 121 Nev. at 732, 121 P.3d at 1031 (quoting
16 Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986)). The non-
17 moving party must, by affidavit or otherwise, set forth specific facts demonstrating the existence
18 of a genuine issue for trial or have summary judgment entered against him. Collins v. Union Fed.
19 Savings & Loan, 99 Nev. 284, 294, 662 P.2d 610, 618-19 (1983). Accordingly, the non-moving
20 party's documentation must be admissible evidence; the non-moving party "is not entitled to
21 build a case on the gossamer threads of whimsy, speculation and conjecture." Id. at 302 (quoting
22 Hahn v. Sargent, 523 F.2d 461, 467 (1st Cir.1975), cert. denied, 425 U.S. 904, 96 S.Ct. 1495
23 (1976)).

24 ...

25 ...

26 ⁵ See Vanguard Piping v. Eighth Jud. Dist. Ct., 129 Nev. Adv. Op. 63, 309 P.3d 1017 (2013) ("Federal
27 cases interpreting a rule of civil procedure that contains similar language to an analogous Nevada rule are
28 strong persuasive authority in the interpretation of the Nevada rule.").

1 **IV. LEGAL ARGUMENT**

2 **A. APCO DID NOT BREACH ITS CONTRACT WITH ZITTING.**

3 In order to maintain a breach of contract action in Nevada, a plaintiff must prove (1) the
4 existence of a valid contract,⁶ (2) an unexcused breach by the defendant, and (3) damage as a
5 result of the breach.” See Brown v. Kinross Gold U.S.A., Inc., 531 F. Supp. 2d 1234, 1240 (D.
6 Nev. 2008). When interpreting the provision of a contract, courts are required to give effect to
7 the intent of the parties, determined in the light of the surrounding circumstances when the intent
8 of the parties is not clear from the contract itself. NGA #2 Liab. Co. v. Rains, 113 Nev. 1151,
9 1158, 946 P.2d 163, 167 (1997).

10 Here, the evidence clearly demonstrates triable, genuine issues of material fact exist that
11 must be weighed by this Court at trial with respect to Zitting’s breach of contract claim. While
12 Zitting cogently outlines the principles of Nevada contract theory relevant to this matter, Zitting
13 not only predictably characterizes the facts in a manner most favorable to Zitting, but also
14 completely, and in an uncreditable manner, makes sworn statements to the Court that are
15 contradicted by the provided evidence attached to APCO’s Opposition. Consequently, Zitting’s
16 characterization of said facts is questionable at best, misguided, and incomplete in many
17 instances.

18 Specifically, and as more fully addressed above, (1) Zitting’s invoicing is inconsistent
19 and questionable at best, (2) the Project was not “complete” pursuant to the Subcontract as
20 Zitting represents, and (3) significant and material questions of fact remain with regard to the
21 timeline of events and who Zitting conducted work under, e.g. APCO or Camco.

22 **B. NEVADA LAW DOES ALLOW FOR PAY-IF-PAID PROVISIONS**
23 **UNDER SOME CIRCUMSTANCES.**

24 Under NRS 624.626, subcontractors may stop work if a higher-tiered contractor fails to
25 make timely payments, “even if the higher-tiered contractor has not been paid and the agreement

26 ⁶ A valid contract requires offer, acceptance, meeting of the minds, and consideration. Certified Fire
27 Protection, Inc. v. Precision Constr., Inc., 128 Nev. Adv. Op. 35, 283 P.3d 250, 255 (2012).

1 contains a provision which requires the higher-tiered contractor to pay the lower-tiered
2 subcontractor only if or when the higher-tiered contractor is paid.” The next statutory
3 subsection, NRS 624.628, provides additional guidance regarding pay-if-paid provisions. In
4 particular, it provides that:

5 3. A condition, stipulation or provision in an agreement which:

6 ...

7 c) Requires a lower-tiered subcontractor to waive, release or extinguish a claim
8 or right for damages or an extension of time that the lower-tiered subcontractor
9 may otherwise possess or acquire as a result of delay, acceleration, disruption or
10 an impact event that is unreasonable under the circumstances, that was not
within the contemplation of the parties at the time the agreement was entered
into, or for which the lower-tiered subcontractor is not responsible, is against
public policy and is void and unenforceable. (Emphasis added).

11 Thus, while both of these provisions provide certain limitations regarding payment of
12 subcontractors, Nevada’s statutory law does not outright prohibit pay-if-paid clauses.

13 Unfortunately, the Supreme Court of Nevada’s decisions in Lehrer McGovern Bovis, Inc.
14 v. Bullock Insulation, Inc., 124 Nev. ___, 185 P.3d 1055 (June 2008) (“Lehrer I”), and Lehrer
15 McGovern Bovis, Inc. v. Bullock Insulation, Inc., 124 Nev. 1102, 197 P.3d 1032 (Oct. 2008)
16 (“Lehrer II”), caused significant confusion over this otherwise straight-forward statute.

17 Both Lehrer cases centered on a subcontract between subcontractor Bullock Insulation
18 (“Bullock”) and general contractor Lehrer McGovern Bovis (“Bovis”) in which Bullock agreed
19 to provide firestopping work needed for the construction of the Venetian hotel and casino. See
20 Lehrer I, 185 P.3d at 1058; Lehrer II, 124 Nev. at 1107, 197 P.3d at 1035. The subcontract
21 incorporated several terms from the Construction Management Agreement, including a lien
22 waiver clause and pay-if-paid provision. Lehrer I, 185 P.3d at 1058; Lehrer II, 124 Nev. at 1107-
23 08, 197 P.3d at 1036. After much of the work on the project had been completed, an inspection
24 revealed that Bullock had not properly installed putty pads in accordance with the subcontract.
25 Lehrer I, 185 P.3d at 1059; Lehrer II, 124 Nev. at 1107, 197 P.3d at 1036. In order to correct the
26 mistake, Bullock had to complete significant retrofit work. Lehrer I, 185 P.3d at 1059; Lehrer II,
27 124 Nev. at 1108, 197 P.3d at 1036. When the retrofitting was complete Bullock recorded a

1 mechanic's lien for the total value of the retrofit and initiated litigation. Lehrer I, 185 P.3d at
2 1059; Lehrer II, 124 Nev. at 1108, 197 P.3d at 1036.

3 The case proceeded to trial and a jury found in favor of Bullock. Lehrer I, 185 P.3d at
4 1057; Lehrer II, 124 Nev. at 1109, 197 P.3d at 1036-37. But, because the jury gave
5 contradictory responses to special interrogatories regarding the subcontract, Bovis moved for a
6 new trial. Lehrer I, 185 P.3d at 1060; Lehrer II, 124 Nev. at 1110, 197 P.3d at 1037. In both
7 cases, "the primary issue [was] whether a new trial [wa]s required when the district court creates
8 special interrogatories upon issues of fact and the jury's answers to those interrogatories are
9 inconsistent." Lehrer I, 185 P.3d at 1057; Lehrer II, 124 Nev. at 1105-06, 197 P.3d at 1034. As
10 secondary issues, Bovis questioned whether the district court erred by holding that the lien
11 waiver and pay-if-paid provisions which were incorporated into the subcontract were
12 unenforceable under Nevada law. Lehrer I, 185 P.3d at 1058; Lehrer II, 124 Nev. at 1106, 197
13 P.3d at 1035.

14 In both decisions, the Supreme Court held that remand was necessary because the general
15 verdict was irreconcilable with the interrogatory answers. Lehrer I, 185 P.3d at 1062; Lehrer II,
16 124 Nev. at 1113, 197 P.3d at 1039. *The Court's position with regard to pay-if-paid clauses*
17 *shifted, however, from the first decision to the second.*

18 In the first Lehrer decision, the Supreme Court noted that the parties entered into the
19 subcontract before the Legislature "proclaimed pay-if-paid provision unenforceable." Lehrer I,
20 185 P.3d at 1063. In a footnote, the Court further clarified that the Legislature amended NRS
21 Chapter 624 in 2001 to include "prompt payment provisions . . . which make pay-if-paid
22 provisions entered into subsequent to the Legislature's amendments unenforceable." Id. at 1063
23 n.33. Nevertheless, while new statutory language did not apply to parties' subcontract, the
24 Supreme Court determined that the pay-if-paid provision in the parties' subcontract was
25 unenforceable because "a pay-if-paid provision limits a subcontractor's ability to be paid for
26 work already performed," and effectively "impair[ed] the [Bullock's] statutory right to place a
27 mechanic's lien on the construction project." Id. at 1064.

1 The Supreme Court issued a second, amended opinion a few months later in order to
2 clarify a portion of its decision that “could be misconstrued as being contrary to this court’s
3 precedent.” Lehrer II, 124 Nev. at 1105, 197 P.3d at 1034. In the revised opinion, the Supreme
4 Court again noted that the parties entered into the subcontract before the Legislature “proclaimed
5 pay-if-paid provisions unenforceable.” Id. at 1117, 197 P.3d at 1042. But, in the related
6 footnote, the Court altered its explanation of the statutory amendment by stating, “[p]ay-if-paid
7 provisions entered into subsequent to the Legislature’s amendments are enforceable only in
8 limited circumstances and are subject to the restrictions laid out in [the statute].” Id. at 1117
9 n.50, 197 P.3d at 1042 n.50. Then, as in the previous decision, the Court held that the
10 subcontract between Bullock and Bovis was unenforceable because it effectively impaired
11 Bullock’s right to place a mechanic’s lien on the project. Id. at 1117, 197 P.3d at 1042.

12 In the aftermath of the Lehrer decisions, scholars and attorneys understandably expressed
13 confusion.⁷ In particular, confusion remains regarding the actual impact of the Supreme Court’s
14 remarks regarding pay-if-paid clauses because the Court’s decision turned on the issue of
15 inconsistent verdicts and all other matters were purely dictum.⁸ In addition, it remains unclear
16 how the Court reached its decision, given that NRS 624 does not contain any direct references to
17 pay-of-paid clauses. And, by the same token, it is unclear why the Supreme Court revised its
18 dicta regarding pay-if-paid clauses when the supposed purpose of the amended opinion was to
19 clarify confusion regarding inconsistent verdicts.

20 Thus, to summarize, there remain many questions regarding Nevada’s law on pay-if-paid
21 provisions. But, under existing law there is no reason to believe that such provisions are *per se*
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23 ⁷ See, e.g., Leon F. Mead II, Nevada Supreme Court Rules Pay-If-Paid Clause Unenforceable, June 2008,
24 available at: [http://www.swlaw.com/assets/pdf/publications/2008/06/16/NevadaSupremeCourtRules_6.08](http://www.swlaw.com/assets/pdf/publications/2008/06/16/NevadaSupremeCourtRules_6.08indd.pdf)
25 [indd.pdf](https://www.hollandhart.com/16931); Gregory S. Gilbert, Pay-if-Paid Clauses: Still Alive in Nevada, Mar. 2009, available at:
<https://www.hollandhart.com/16931>; Greg Gledhill, Nevada Supreme Court Declares Pay-If-Paid Clauses
Unenforceable – Or Did It?, available at: http://www.gcila.org/publications/files/pub_en_97.pdf.

26 ⁸ Argentina Consol. Min. Co. v. Jolley Urga Wirth Woodbury & Standish, 125 Nev. 527, 536, 216 P.3d
27 779, 785 (2009) (“A statement in a case is dictum when it is “unnecessary to a determination of the
28 questions involved.” (Quoting Stanley v. Levy & Zentner Co., 60 Nev. 432, 448, 112 P.2d 1047, 1054
(1941)).

unenforceable because Supreme Court of Nevada simply would not have revised its opinion in Lehrer if its intent was disallow pay-if-paid clauses under all circumstances.⁹ Further, the Supreme Court would not have noted the value of case-by-case assessments if pay-if-paid provisions were never permissible.¹⁰ So, for purposes of this litigation, this Court should consider whether the pay-if-paid provisions are appropriate under the unique circumstances of this case and reject any empty attempt by Helix, or the Joining Subcontractors, to impose a *per se* limitation that simply does not exist — especially when no facts or authenticated contracts have been presented to the Court for consideration.

1. **With there being clear issues of material fact, there is no way the Court could conduct the proper analysis required to determine the application of the pay-if-paid provisions in the contract.**

First, dicta is not controlling law, Kaldi v. Farmers Ins. Exch., 117 Nev. 273, 282, 21 P.3d 16, 22 (2001) and, as such, there is a fair argument that the Lehrer decisions actually have no bearing on the instant matter. Nevertheless, even if this Court is inclined to treat the Supreme Court's reasoning as persuasive,¹¹ it is best to consider the pay-if-paid clause under the unique facts and circumstances in this case. Indeed, while the Supreme Court has yet to address how to assess the enforceability of a pay-if-paid clause, it has stated that a case-by-case assessment is appropriate where a contract includes a lien waiver provision. Lehrer II, 124 Nev. at 1116, 197 P.3d at 1041 ("The enforceability of each lien waiver clause must be resolved on a case-by-case basis"). And, while the applicable law regarding liens differs from the prompt payment provisions in Chapter 624, the Supreme Court has indicated that its concerns regarding pay-if-

⁹ See NRAP 40(c)(2) (providing that rehearing is only warranted "[w]hen it appears that [the Supreme Court] has overlooked or misapprehended a material matter in the record or otherwise, or . . . in such other circumstances as will promote substantial justice."); Moore v. City of Las Vegas, 92 Nev. 402, 405, 551 P.2d 244, 246 (1976) (a rehearing is proper "[o]nly in very rare instances in which new issues of fact or law are raised supporting a ruling contrary to the ruling already reached").

¹⁰ Vegas Franchises, Ltd. v. Culinary Workers Union, Local No. 226, 83 Nev. 422, 424, 433 P.2d 263, 265 (1967) (stating the Supreme Court will not perpetuate error); Nevada-California Transp. Co. v. Pub. Serv. Comm'n, 60 Nev. 310, 108 P.2d 850, 852 (1941) (holding that it is the Supreme Court's duty "to correct rather than perpetuate [] errors.").

¹¹ Humphrey's Ex'r v. United States, 295 U.S. 602, 627, 55 S. Ct. 869, 874 (1935) (holding that "dicta [] may be followed if sufficiently persuasive" even though it is "not controlling").

1 paid provisions stem from the same public policy concerns regarding secure payment for
2 contractors. Id. at 1116-18, 197 P.3d at 1041-42.

3 Here, Zitting, while providing its recitation of the purported current state of pay-if-paid
4 law in Nevada, has failed — in the same way it's joinder to Helix's motion for summary
5 judgment on the pay-if-paid issues — to provide the Court with any language or analysis toward
6 granting its Motion. Thus, while Zitting has attached a contract to its Motion, it has failed to
7 provid the Court with any specific language or analysis as to what language is purported to be
8 pay-if-paid and how said language is applicable to the cited law and factual relationship between
9 Zitting and APCO. Further, Zitting's failure to cite to contract language and provide the Court
10 with any analysis in its Motion cannot be rectified in its Reply, as it would be procedurally
11 improper to allow facts and analysis to be considered outside the scope of the original motion on
12 a dispositive motion such as this.

13 Consequently, it is impossible for the Court to conduct ANY analysis on a case-by-case
14 basis and offer anything more than an advisory opinion, which the Court should refrain from.¹²
15 Moreover, to further evidence this point, NRS 624.628 provides guidance regarding pay-if-paid
16 provisions, wherein subsection (c) directs the analysis to determine whether the clause is: (1)
17 unreasonable under the circumstances, (2) was not within the contemplation of the parties at the
18 time the agreement was entered into, or (3) for which the lower-tiered subcontractor is not
19 responsible. Zitting has failed to provide the Court with any analysis of facts for the Court to
20 consider the above factors in this case.

21 Further, public policy concerns weigh in favor of APCO rather than Zitting. As the
22 Supreme Court stated in Lehrer, public policy favors secure payment for contractors. The

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24 ¹² It has long been held that decisions may be rendered only where actual controversies exist. Applebee v.
25 Applebee, 97 Nev. 11, 12, 621 P.2d 1110, 1110 (1981). Likewise, "a controversy must be present through
26 all stages of the proceeding, and even though a case may present a live controversy at its beginning,
27 subsequent events may render the case moot." Solid v. Eighth Judicial Dist. Court of State in & for Cty.
28 of Clark, 393 P.3d 666, 670 (Nev. 2017). Moreover, the Nevada Supreme Court has always been reluctant
to establish laws or give advisory opinions, especially when unnecessary and broad in scope. Nat'l Union
Fire Ins. Co. of Pittsburgh, Pa. v. Pratt & Whitney Canada, Inc., 107 Nev. 535, 546, 815 P.2d 601, 608
(1991).

1 rationale for this public policy is easy to understand, as “contractors are generally in a vulnerable
2 position because they extend large blocks of credit; invest significant time, labor, and materials
3 into a project; and have any number of workers vitally depend upon them for eventual payment.”
4 Lehrer II, 124 Nev. at 1116, 197 P.3d at 1041. Here, following Zitting’s rationale would do
5 nothing more than turn APCO into a *de facto* lender to the Owner in the event the project goes
6 under and there becomes a situation of non-payment or insolvency — which is exactly what
7 occurred in this case, but while the Project was under the control of Camco, not APCO.

8 Nonetheless, Zitting has failed to provide any evidence for the Court to conduct its
9 analysis and, therefore, must deny the Motion in its entirety.¹³

10 **C. ZITTING IS NOT ENTITLED TO SUMMARY JUDGMENT UNDER**
11 **CHAPTER 108 OF THE NRS.¹⁴**

12 Zitting is not entitled to summary judgment against APCO pursuant to Chapter 108 of the
13 Nevada Revised Statutes. First, the Court already ruled at the hearing conducted on August 10,
14 2017 regarding APCO’s Motion to Dismiss or for Summary Judgment on Lien Claimants’ NRS

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19 ¹³ In the alternative, and when properly before the court, should the Court rule that the subject contract
20 language is in fact pay-if-paid language against public policy, the Court should still allow evidence of the
21 contract language to support the intent and interactions between the Parties. Zitting has asserted a borage
22 of claims sounding in NRS 108, contract law, breach of the covenant of good faith and fair dealing, and
23 unjust enrichment, to name a few. If the Court, when the pay-if-paid issue is properly before it, were to
24 consider the contractual language to be a pay-if-paid provision against public policy — which we believe
25 it will not when the Court conducts the case-by-case analysis — then alternatively the Court must still
26 allow testimony and evidence at trial with regard to the contract language as it relates to the intentions
27 and interactions between the Parties. Here, the instant case is set for a bench trial. Likewise, there is no
28 threat of confusing or contaminating a jury with regard to the ultimate determination by the Court on the
application of pay-if-paid language, as the Court can rightfully discern the application of the language and
how it affected the interactions of the Parties.

¹⁴ As further detailed above, due to the Court’s finding on 08/10/2017 regarding APCO’s Motion to
Dismiss or for Summary Judgment on Lien Claimants’ NRS 108 Claims for Foreclosure of Mechanic’s
Lien, the following is merely a brief summation of APCO’s NRS 108 argument, APCO specifically
incorporates all facts and arguments heard by the Court at the aforementioned hearing, and specially
reserves its rights to argue and present the issue at trial or when otherwise properly before the Court.

1 108 Claims for Foreclosure of Mechanic's Lien that "there are some genuine issues that need to
2 be further developed . . ." and denied APCO's NRS 108 motion without prejudice.¹⁵

3 With that said, it is important to note that the purpose of Nevada's mechanics lien statute
4 is to provide contractors, laborers, and materialmen rights against an improved property (and, by
5 extension, the property owner) when the owner fails to ensure that the contractors, laborers, and
6 materialmen have been paid for their work on the improved property. Chapter 108 is not, and
7 never was, intended to give a subcontractor rights against a general contractor. Consequently,
8 any rights Zitting may have had against the Property (and/or the Property owner) pursuant to
9 Chapter 108 were extinguished at time of the foreclosure sale and when the Nevada Supreme
10 Court determined that lenders for Project had first priority over any of the parties who provided
11 work at the Project, including, but not limited to APCO and Zitting.

12 1. **The provisions of Chapter 108's are intended to provide rights and**
13 **claims against the owner of an improved property – not the general**
14 **contractor.**

15 The purpose of a mechanics' lien is to ensure that a contractor who performs work to
16 improve a parcel of real property has a legal avenue to seek compensation *even if the landowner*
17 *refuses to pay*. Southern Cross Const., In. v. Enclave Court, LLC, 2011 WL 13067632. As "a
18 mechanic's lien is directed at a specific property,"¹⁶ and represents a claim against said property
19 and not a general contractor. See Brewer Corp. v. Point Ctr. Fin., Inc., 223 Cal. App. 4th 831,
20 839, 167 Cal. Rptr. 3d 555, 560 (2014), as modified on denial of reh'g (Feb. 27, 2014). Again,
21 the purpose of a mechanics' lien is to prevent unjust enrichment of a property owner at the
22 expense of laborers or material suppliers. Basic Modular Facilities, Inc. v. Ehsanipour, 70 Cal.
23 App. 4th 1480, 1483, 83 Cal. Rptr. 2d 462, 464 (1999) (citing Abbett Electric Corp. v. California
24 Fed. Savings & Loan Assn., 230 Cal.App.3d 355, 360, 281 Cal.Rptr. 362 (1991)). The Nevada

25 ¹⁵ See Court's Minute Order from hearing conducted on 08/10/2017 regarding APCO's Motion to
26 Dismiss or for Summary Judgment on Lien Claimants' NRS 108 Claims for Foreclosure of Mechanic's
27 Lien on file with the Court.

28 ¹⁶ Simmons Self-Storage v. Rib Roof, Inc., 130 Nev. Adv. Op. 57, 331 P.3d 850, 853 (2014), as modified
on denial of reh'g (Nov. 24, 2014).

1 Supreme Court has even gone as far as characterizing a mechanic's lien as a "taking" in that the
2 property owner is deprived of a significant property interest. J.D. Constr. v. IBEX Int'l Grp., 126
3 Nev. 366, 376, 240 P.3d 1033, 1040 (2010).

4 While Chapter 108 alludes to a lien claimant's right to maintain a civil action to recover
5 that debt against the person liable (see NRS 108.238), this provision does not afford a lien-
6 claimant with the same remedies against a general contractor as they would have again the
7 property owner. This is the only reasoning that makes sense considering the general contractor
8 has no legal title to the property that could be subjected to foreclosure pursuant to the mechanics
9 lien. Similarly, while NRS 108.227(12) affords a party whose claim is not completely satisfied
10 at a foreclosure sale the right to a "personal judgment for the residue against the party legally
11 liable for the residue amount," NRS 108.227(12) does not provide the subcontractor with the
12 rights to attorneys fees, costs, and interests against a general contract.

13 2. **Any perceived claims Zitting believes it has pursuant to Chapter 108**
14 **were extinguished at the foreclosure sale.**

15 In Nevada, "any mechanics' liens that may arise out of the construction of the intended
16 improvements are junior and subordinate to the earlier recorded mortgage or deed of trust."
17 Erickson Const. Co. v. Nevada Nat. Bank, 89 Nev. 350, 353, 513 P.2d 1236, 1238 (1973).
18 Therefore, when a mechanic's lien is subject to a prior recorded deed of trust and said deed of
19 trust is foreclosed, the subordinate mechanic's lien is extinguished. Id. Here, while Zitting's filed
20 a complaint to foreclose on its mechanics' lien under NRS Chapter 108, any and all of Zitting's
21 claims, rights, and privileges under Chapter 108 were extinguished at the time that the subject
22 Property was foreclosed upon and when the Nevada Supreme Court determined that the lenders
23 for the Project had superior liens to the Property.

24 Thus, any protections, rights, or privileges afforded to Zitting by Chapter 108 no longer
25 apply.

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V. CONCLUSION

Accordingly, based on the foregoing, APCO respectfully request that this Court Deny Zitting's Motion for Summary Judgment in its entirety.

Dated this 21st day of August, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing **APCO CONSTRUCTION'S OPPOSITION TO ZITTING BROTHERS CONSTRUCTION INC.'S MOTION FOR PARTIAL SUMMARY JUDGMENT** was submitted electronically for filing and/or service with the Eighth Judicial District Court on the 21 day of August, 2017. Electronic service of the foregoing document shall be made in accordance with the E-Service List as follows:¹⁷

Party: Apco Construction - Plaintiff

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Party: Camco Pacific Construction Co Inc - Counter Claimant

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Party: Fidelity & Deposit Company Of Maryland - Intervenor Defendant

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Party: Interstate Plumbing & Air Conditioning Inc - Intervenor Plaintiff

Jonathan S. Dabbieri dabbieri@sullivanhill.com

Party: Cactus Rose Construction Inc - Intervenor Plaintiff

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Party: National Wood Products, Inc.'s - Intervenor

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¹⁷ Pursuant to EDCR 8.05(a), each party who submits an E-Filed document through the E-Filing System consents to electronic service in accordance with NRCP 5(b)(2)(D).

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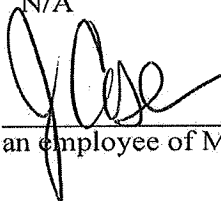
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EXHIBIT E

Steven D. Grierson

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DEPARTMENT XIII
NOTICE OF HEARING
DATE 1/11/18 TIME 9:00 AM
APPROVED BY *SG*

DISTRICT COURT
CLARK COUNTY, NEVADA

APCO CONSTRUCTION, a Nevada
corporation,

Plaintiff,

v.

GEMSTONE DEVELOPMENT WEST, INC., A
Nevada corporation,

Defendant.

Case No.: A571228

Dept. No.: XIII

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

MOTION FOR RECONSIDERATION OF
COURT'S ORDER GRANTING ZITTING
BROTHERS CONSTRUCTION, INC.'S
PARTIAL MOTION FOR SUMMARY
JUDGMENT
AND EX PARTE APPLICATION FOR
ORDER SHORTENING TIME AND TO
EXCEED PAGE LIMIT

AND ALL RELATED MATTERS

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

RECEIVED


JAN 05 2018

DISTRICT COURT DEPT#13

1 following Motion for Reconsideration of the Court's Order Granting Zittings Brothers
2 Construction, Inc.'s ("Zitting") Partial Motion for Summary Judgment. The Motion for
3 Reconsideration should be granted because: (1) APCO's original opposition confirmed no less
4 than eight material facts that remain in dispute, (2) Zitting's Reply did not meaningfully address
5 any of those eight material facts and did not accurately represent APCO's affirmative defenses, (3)
6 this Court authorized and Zitting agreed to additional discovery, which, as reflected in APCO's
7 supplemental briefing, resulted in new evidence confirming Zitting misrepresented several key
8 facts, (4) Zitting's Surreply contained many inaccuracies, none of which account for the material
9 facts that are in dispute, (5) because inaccurate statements regarding the critical *Padilla v. Big-D*
10 *Construction* case were made at the hearing on this matter, and (6) when the Nevada Supreme
11 Court has analyzed pay-if-paid provisions without a mechanic's lien waiver, it has found such
12 provisions to be valid conditions precedent to a general contractor's obligation to pay a
13 subcontractor. These new facts and considerations require reconsideration and a denial of Zitting's
14 Motion. APCO is entitled to a trial on the merits.

15 DATED: January 5th, 2018.

16 SPENCER FANE LLP

17 By: 
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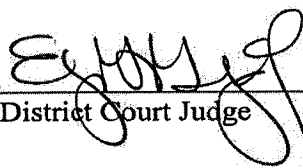

ORDER SHORTENING TIME AND TO EXCEED PAGE LIMIT

The Court having reviewed APCO Construction, Inc.'s Motion for Reconsideration on Order Shortening Time and good cause appearing:

It is HEREBY ORDERED that the time may be shortened and the Motion shall be set for hearing on the 11th day of January, 2018, at 9:00 a.m., in Department XIII.

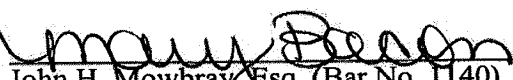
It is also HEREBY ORDERED that APCO can exceed the 30 page limit set forth in EDCR 2.20. APCO's Motion may be 39 pages (including its table of contents and table of authorities).

Dated this 8th day of January, 2018.


for District Court Judge 
MARK R. DENTON

Submitted by:

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- NRCP 30(b)
- NRS 624
- NRS 624.624
- NRS 624.626

I. PROCEDURAL HISTORY

This case's procedural history is fraught with complexity. Zitting filed its complaint against APCO asserting lien claims, breach of contract, and other causes of action more than eight

1 years ago on April 30, 2009.¹ On June 10, 2009, APCO filed its answer to Zitting's complaint.²
2 APCO asserted 20 affirmative defenses in its answer, including Zitting's failure to meet conditions
3 precedent to payment.³ All related actions were consolidated and APCO took the lead in pursuing
4 its claims against Gemstone.⁴ This enured to Zitting's benefit because it was simply able to join a
5 significant amount of APCO's briefing.⁵ The bank who financed the Project filed a motion for
6 summary judgment as to lien priority, and the court granted the bank's motion.⁶ This had the
7 practical effect of granting all residual funds from the Project to the bank. APCO spearheaded *and*
8 financed the related appeal, which Zitting joined. The appeal was denied in September 2015, and a
9 special master was appointed in June 2016 to oversee discovery.⁷ Just last year, in August 2016,
10 the special master scheduled discovery and requested that parties submit answers to a
11 questionnaire about their respective claims.⁸ Just last year, Zitting filed its *initial* list of witnesses
12 and production of documents on September 1, 2016, and responded to the special master
13 questionnaire on September 23, 2016.⁹ On September 29, 2016, the special master held a hearing
14 to confirm which parties were asserting claims in the instant matter since it was not clear.¹⁰ So
15 discovery with respect to Zitting's claims against APCO and APCO's defenses really only started
16 in September 2016.

17
18 ¹ Exhibit 1, Zitting Complaint against APCO.

19 ² Exhibit 2, APCO's Answer to Zitting's Complaint.

20 ³ Exhibit 2, APCO's Answer to Zitting's Complaint.

21 ⁴ See Docket Entries at: 2010-03-08 (APCO files Objections to Lenders' Standard Interrogatories to the Lien
22 Claimants); 2010-03-09 (Zitting's Joins APCO's Objections to Lenders' Standard Interrogatories to the Lien
23 Claimants); 2010-05-28 (Zitting files a Motion for Summary Judgment Against Gemstone and for Certification of
24 Final Judgment Pursuant to NRCP 54(B)); 2010-07-01 (APCO files an Opposition to Bank's Motion for Partial
25 Summary Judgment as to Priority of Liens); 2010-07-21 (Zitting files a Joinder to APCO's Opposition to Bank's
26 Motion for Partial Summary Judgment as to Priority of Liens); 2010-07-22 (Zitting files a Joinder to APCO's Motion
for Partial Summary Judgment as to Priority of Liens); 2011-11-04 (APCO files a Motion for Issuance of Order on
Priority on Order Shortening Time); 2011-11-08 (Zitting files a Joinder to APCO's Motion for Issuance of Order on
Priority on Order Shortening Time); 2011-12-12 (APCO files Opposition to Motion for Reconsideration or Re-
Hearing); 2012-01-04 (Zitting files a Joinder to APCO's Opposition to Motion for Reconsideration or Re-Hearing);
2012-03-15 (APCO files an Opposition to SFC's Supplement to Summary Judgment as to Priority of Liens); 2012-03-
20 (Zitting files a Joinder to APCO's Opposition to SFC's Supplement to Summary Judgment as to Priority of Liens);
2012-06-25 (APCO files Appeal); (Zitting joined the appeal and APCO carries the cost of the Appeal); 2015-09-24
(Unfortunately, the Appeal is Denied).

27 ⁵ *Id.*

28 ⁶ Exhibit 3, Notice of Entry of Order Granting the Bank's Motion for Summary Judgment.

⁷ See Exhibit 4, Order Appointing Special Master.

⁸ Exhibit 5, Special Master Order.

⁹ See Docket.

¹⁰ See Special Master Hearing Order.

1 And while APCO noticed Zitting's deposition on March 29, 2017,¹¹ APCO and Zitting
2 agreed to continue the deposition to permit the parties to spend less on attorneys fees, and more
3 time engaging in settlement discussions.¹² Three months later, APCO noticed Zitting's deposition
4 for June 28, 2017.¹³ Once again, APCO and Zitting agreed to continue the deposition.¹⁴ Then on
5 July 31, 2017, Zitting filed its partial motion for summary judgment against APCO. APCO
6 opposed the motion, and Zitting replied in September 2017.

7 The Court had a calendar call on September 5, 2017.¹⁵ Tellingly, the parties noted
8 confusion regarding which parties were still in the case at the calendar call.¹⁶ And parties that did
9 not timely comply with their mandatory pre-trial disclosure requirements were given more time to
10 comply.¹⁷ The remaining parties participated in a settlement conference on September 29, 2017,
11 which was not fruitful. The Court was scheduled to hear Zitting's Partial Motion for Summary
12 Judgment on October 5, 2017. At that hearing, APCO's counsel requested that discovery be
13 extended 45 days to allow the parties to complete depositions that had been intentionally delayed
14 per the mutual agreement of the parties.¹⁸ This Court authorized and the parties agreed to reopen
15 deposition discovery until the end of the month.¹⁹ Tellingly, while the parties came prepared to
16 argue the dispositive motions before the Court, the Court delayed hearing the pending dispositive
17 motions until after the depositions would be completed.²⁰

18 On October 27, 2017, *less than 2 months ago*, Zitting's NRCP 30(b)(6) witness was
19 deposed for the first time.²¹ That Court authorized deposition occurred after all initial briefing in
20

21 ¹¹ See Exhibit 17, March 29, 2017 Notice of Deposition to Zitting.

22 ¹² See Exhibit 6, Declaration of Cody Munteer, Esq.

23 ¹³ See Exhibit 26, June 28, 2017 Notice of Deposition to Zitting.

24 ¹⁴ Exhibit 6, Declaration of Cody Munteer, Esq.

25 ¹⁵ See docket.

26 ¹⁶ See Exhibit 27, Minutes from September 5, 2017 Hearing ("Mr. Johnson noted confusion with the number of parties
in the case, knowing what's going on procedurally, and the Motion for Summary Judgment and Joinders being moved
to October.").

27 ¹⁷ See Minutes from September 5, 2017 Hearing ("COURT ORDERED deadline for parties who have not complied
with the Special Master's questionnaire and have not filed their pretrial disclosures SET Friday, September 8, 2017 by
5:00 pm and FURTHER ORDERED hearing SET Monday, September 11, 2017 on Pltf's Oral Motion to Dismiss
Pursuant to Rule 7(b).").

28 ¹⁸ See Minutes from October 5, 2017 Hearing.

¹⁹ See Exhibit 30, Order from October 5, 2017 Hearing.

²⁰ See Exhibit 28, Transcript from October 5, 2017 hearing at 10-12.

²¹ See Exhibit 7, Deposition of S. Zitting.

1 Zitting's original Motion.

2 Zitting's deposition revealed a significant amount of new information that contradicted
3 Zitting evidence submitted with its motion. As such, APCO filed a supplemental brief on
4 November 6, 2017 to make the Court aware of this new critical evidence.²² Critically, Zitting did
5 not timely object to the supplement because of the order allowing new discovery. The next day,
6 APCO supplemented its interrogatory responses to Zitting to account for the defenses APCO was
7 able to clarify through Zitting's deposition.²³ Then on November 15, 2017, Zitting filed
8 supplemental briefing to respond to APCO's supplemental brief.²⁴ The Court held an abbreviated
9 hearing on the matter on November 16, 2017, and then the Court issued a minute order granting
10 Zitting's Partial Motion for Summary Judgment on November 27, 2017 despite the documented
11 factual disputes.²⁵

12 Following issuance of the Court's minute order, APCO followed up with counsel for
13 Zitting to acquire a draft order on Zitting's motion for Partial Summary Judgment. Zitting finally
14 provided the order on Wednesday, December 20, 2017. Subsequent to receiving the draft order, it
15 became apparent that the Parties fundamentally disagreed with regard to the interpretation of the
16 language in the Decision. Specifically, the minute order states that "the Court still has before it
17 the question of whether there are genuine issues going to breach of the contract related to Zitting's
18 performance of the same."²⁶ Yet, then provides that "the subject Motion is GRANTED in its
19 entirety."²⁷ As the Court's Decision reads, it is APCO's position that the Court specifically found
20 "genuine issues" of material fact remain as to Zitting's "performance" and breach of the contract
21 that must be presented at trial. Conversely, Zitting asserts that regardless of the above finding, the
22 Court granted the Motion in its entirety and, as such, Zitting is effectively removed from the case
23 and there are no issues of fact to present at trial. As evidenced by the instant Motion, it is clear
24 that the Court, in fact, "still has before it the question of whether there are genuine issues going to

25
26 ²² See Docket at November 6, 2017.

27 ²³ See Exhibit 8, APCO's Supplemental Responses to Zitting's First Set of Interrogatories.

28 ²⁴ See Docket at November 15, 2017.

²⁵ See Exhibit 9, Court's November 27, 2017 Minute Order.

²⁶ *Id.*

²⁷ *Id.*

1 breach of the contract related to Zitting's performance of the same."²⁸ Lastly, Zitting's order is
2 materially flawed, as it contains language from Helix's motion for partial summary judgment that
3 was not presented by Zitting in any form or fashion.

4 **II. LEGAL STANDARD.**

5 The Nevada Supreme Court has held that "[u]nless and until an order is appealed,
6 the district court retains jurisdiction to reconsider the matter."²⁹ In Clark County, a motion for
7 rehearing must be filed within 10 days after service of written notice of entry of the order
8 following the original hearing.³⁰ Rehearings are appropriate only when "substantially different
9 evidence is subsequently introduced or the decision is clearly erroneous."³¹ This Court has
10 discretion on the question of rehearing. See *Harvey's Wagon Wheel, Inc. v. MacSween*,³²
11 (reconsideration of previously denied motion for summary judgment approved as the "judge
12 was more familiar with the case by the time the second motion was heard, and he was persuaded
13 by the rationale of the newly cited authority").

14 In addition, a motion for reconsideration of summary judgment may be brought under
15 both *NRCP 59(e)* and *NRCP 60(b)*. Rehearings are justified when a party seeks to reargue a point
16 of law and provides a convincing legal basis for doing so. See *Gibbs v. Giles*,³³ (holding trial court
17 did not err in granting motion for rehearing in order to permit a party to reargue the law).

18 APCO submits that the unique procedural history of this case requires this Court to
19 entertain this Motion for Reconsideration because new facts became available with the late
20 discovery ordered by the Court and after briefing on Zitting's Motion was completed. In light of
21 those new facts, the application of law mandates reconsideration and the denial of Zitting's
22 Motion. There are triable issues of fact that entitle APCO to a trial on the merits. Reconsideration
23 now will save the parties significant time and money associated with an appeal.

24
25 ²⁸ *Id.*

26 ²⁹ *Gibbs v. Giles*, 96 Nev. 243, 245, 607 P.2d 118, 119 (1980); accord *Barry v. Lindner*, 119 Nev. 661, 670, 81 P.3d 537, 543 (2003).

27 ³⁰ See EDCR 2.24(b).

28 ³¹ *Masonry & Tile Contractors Ass'n of S. Nev. v. Jolley, Urga & Wirth, Ltd.*, 113 Nev. 737, 741, 941 P.2d 486, 489 (1997)

³² 96 Nev. 215, 217-18, 606 P.2d 1095, 1097 (1980)

³³ 96 Nev. 243, 244-45, 607 P.2d 118, 119 (1980)

1 **III. APCO's original Opposition raised Material Issues of Fact.**

2 **1. APCO disputed eight material facts necessary for summary judgment, and**
3 **Zitting did not adequately address these material facts.**

4 Zitting's Motion for Summary Judgment asked for summary judgment on its breach of
5 contract and NRS 108 claims.³⁴ APCO cited admissible evidence directly disputing no less than
6 eight material facts in its opposition to Zitting's Motion. Those facts included: whether the drywall
7 was complete as required per the subcontract for a release of retention, whether Zitting invoiced
8 APCO after 06/30/08 (and whether Zitting's purported pay applications were inconsistent or ever
9 received by APCO), whether Zitting segregated the amount of work it allegedly completed under
10 APCO or Camco, the value of Zitting's completed work (and whether or not it was ever
11 submitted, approved, or rejected by APCO or Camco), whether Zitting ever submitted close-out
12 documents, and whether Zitting received a notice of stop work.³⁵ APCO's rebuttal of these points
13 was based on the affidavits of Mary Jo Allen, APCO's PMK. Resolving these critical facts was
14 necessary for the Court to decide in Zitting's favor. As explained below, Zitting's Reply did not
15 adequately address these material facts. As such, this Court was necessarily weighing the
16 credibility of the evidence and witnesses. "[A] district court cannot make findings concerning the
17 credibility of witnesses or weight of evidence in order to resolve a motion for summary
18 judgment."³⁶ "[T]he trial judge may not in granting summary judgment pass upon the credibility
19 or weight of the opposing affidavits or evidence. That function is reserved for the trial. On a
20 summary judgment motion the court is obligated to accept as true all evidence favorable to the
21 party against whom the motion is made."³⁷

22 Thus, any award of a breach of contract action would be error since Zitting's Reply did not
23 sufficiently address the eight genuine issues of material fact that APCO presented and the Court
24 was mandated to accept as true.

25 **IV. Zitting's subsequent deposition testimony undermined the basis of Zitting's**
26 **Motion.**

27 ³⁴ Exhibit 10, Zitting's Motion for Summary Judgment.

28 ³⁵ See APCO's Opposition at 3-6, on file herein.

³⁶ *Borgerson v. Scanlon*, 117 Nev. 216, 220, 19 P.3d 236, 238 (2001)

³⁷ *Hidden Wells Ranch v. Strip Realty*, 83 Nev. 143, 145, 425 P.2d 599, 601 (1967)

1 Notably, Zitting's original Reply did not even address four of APCO's disputed facts.³⁸
2 And of the four disputed material facts that Zitting did address, all were later directly contradicted
3 by its own deposition testimony. More specifically, Zitting addressed: (1) Camco's responsibility
4 for the amount owed to Zitting, (2) Zitting's failure to submit the pay applications at issue, (3) the
5 fact that the change orders at issue were never approved, and (4) completion of the drywall for
6 Buildings 8 and 9, which was the milestone per the retention payment schedule.³⁹

7 Addressing amounts allegedly owed by Camco, Zitting's Reply claimed it "never had any
8 relationship" with Camco on the Project.⁴⁰ Zitting's deposition confirmed differently. Zitting
9 admitted that it performed change order work under Camco's direction:

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

12 A. It appears that way, yes.

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

14 A. It appears to be an accounting of hours spent by Zitting
employees doing change order work that was signed off by
somebody with CAMCO, it looks like.⁴¹

15 ...
Would you agree, sir, that what you're showing is Change Order
Request 22, 23, 24, and 25 in Exhibit 3 were actually performed
for CAMCO?

16 A. Performed under their direction.⁴²

17 Zitting's Reply also alleges that APCO does not have any admissible proof that Zitting
18 worked on the Project after APCO's departure.⁴³ As represented above, Zitting's own accounting
19 records and its deposition testimony confirm this statement is not accurate.⁴⁴ Further, Zitting's
20 Reply also represented that the amount it sought from this Court was only for approved and
21 completed work on Buildings 8 and 9, completed *before* APCO left the Project.⁴⁵ As quoted
22 above, Zitting admitted its employees were on the Project doing change order work for Camco in
23

24 ³⁸ Zitting's Reply failed to address four disputed facts listed in APCO's opposition: whether Zitting's pay applications
25 were inconsistent, the value of Zitting's completed work, whether its work was ever approved by APCO or Camco,
and whether Zitting submitted close out documents.

26 ³⁹ See Zitting's Reply at 11-13, on file herein.

27 ⁴⁰ Reply at 11:19-23, on file herein.

28 ⁴¹ Zitting Deposition at 42.

⁴² Zitting Deposition at 54.

⁴³ Reply at 11:23-24.

⁴⁴ See Zitting deposition at 42, 54.

⁴⁵ Reply at 11:25-27.

1 September 2009, which was *after* APCO left the Project in August 2008. Those amounts are
2 incorrectly included in the amount Zitting was just awarded by the Court's granting of Zitting's
3 Motion.⁴⁶

4 Among other things, Zitting was not entitled to retention until the drywall was completed
5 in Buildings 8 and 9. APCO's original opposition included photos of the Project in August and
6 November of 2008 confirming the drywall was not complete.⁴⁷ And then, in Zitting's Court
7 authorized deposition, Zitting not only acknowledged the drywall requirement but confirmed it
8 had no evidence to satisfy that precondition of the retention payment schedule:

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

11 A. I can testify that the first layer, if you will, of drywall was
12 complete and the only thing that was, to my knowledge, not
13 complete was some soffits in the kitchens, that there was an issue
14 with the assembly -- the fire assembly or something. So they
15 were not done, but they had done flooring under them and they had
even done some cabinets in some areas. And so there was some
open soffits that they were still waiting for clarification or design
on. And to my knowledge, that's the only thing that was not
complete, in terms of drywall.⁴⁸

16 ...
17 Q. Okay. Go to page 27 [of Exhibit 15]. And, again, I've got a head
start on you. Mine's highlighted, but if you look under Buildings 8
and 9, you'll see references to drywall.

18 A. Okay.

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

20 A. Okay.

21 Q. Continuing on to the next page, 28, under Building 9, it says,
22 **Corridors, drywall has not started.** First floor corridor lid framing
is 70 percent complete and then the drywall itself is shown as
23 **being 55 to 70 percent complete depending upon the building.**
My question to you is: Sitting here as the corporate designee for
Zitting, do you have any facts documents, or information to rebut
24 these purported percentages of completion for the drywall on
Buildings 8 and 9?

25 A. I don't.⁴⁹

26
27 ⁴⁶ See Zitting Deposition at 42 and 54.

28 ⁴⁷ See Exhibit 11, Photos of Buildings 8 and 9 confirming the drywall was not completed.

⁴⁸ Zitting Brother's NRCF 30(b)(6) deposition at 27:21-29:2.

⁴⁹ Zitting Deposition at 93:6-94:15.

1 Lastly, Zitting's Reply argues APCO never denied certain change orders in its Reply.
2 Zitting's deposition confirmed the opposite:

3 Q. Okay. Isn't it true, sir, that as the corporate representative for
4 Zitting today, that APCO – whether you agreed or not, APCO did
5 reject some change order requests. Correct?
6 A. It appears that they had.⁵⁰

7 APCO's original Opposition and newly authorized evidence raised genuine issues of
8 material fact. As such, the only way the Court could have decided in Zitting's favor was to weigh
9 the credibility of the evidence at this summary judgment stage.

10 **A. All of APCO's Opposition exhibits were admissible.**

11 Zitting Reply takes issue with Ms. Allen's affidavit arguing that most of it is
12 inadmissible.⁵¹ Zitting's objections are unfounded. As Zitting admitted, Ms. Allen acted as
13 APCO's NRCP 30(b)(6) designee. Accordingly, Ms. Allen had not only the opportunity but the
14 mandate to inform herself to speak for APCO.⁵²

15 Zitting insisted Ms. Allen needed to have personal knowledge for her affidavit.⁵³ Zitting is
16 wrong. "The testimony of a Rule 30(b)(6) designee represents the knowledge of the corporation,
17 not of the individual deponents." *Great Am. Ins. Co. of New York v. Vegas Const. Co.*,⁵⁴
18 (providing an exhaustive overview of the principles behind a Rule 30(b)(6) deposition). As such, a
19 Rule 30(b)(6) designee need not have any personal knowledge of the designated subject matter.⁵⁵
20 This is true even of affidavits submitted by 30(b)(6) designees.⁵⁶

21 ⁵⁰ Zitting Deposition at 51:22-52:1.

22 ⁵¹ See Zitting's Reply at 3-5.

23 ⁵² See NRCP 30(b)(6) (Under NRCP 30(b)(6), an organization must designate individuals to "testify as to matters
24 known or reasonably available to the organization.")

25 ⁵³ Zitting's Reply at 3-5.

26 ⁵⁴ 251 F.R.D. 534, 538 (D. Nev. 2008) (internal quotation marks omitted).

27 ⁵⁵ *Id.*

28 ⁵⁶ *Sunbelt Worksite Mktg. v. Metro. Life Ins. Co.*, No. 8:09-cv-02188-EAK-MAP, 2011 U.S. Dist. LEXIS 87387, at
*5-6 (M.D. Fla. Aug. 8, 2011) (collecting cases) and citing *Atlantic Marine Florida, LLC v. Evanston Ins. Co.*, 2010
U.S. Dist. LEXIS 56067, 2010 WL 1930977 (M.D. Fla. May 13, 2010) (where the Court refused to strike an
authorized corporate representative's filed affidavit in support of the corporation's motion for summary judgment on
the grounds of insufficient *personal* knowledge, because the court found that it is not necessary for a corporate
representative designated as a Rule 30(b)(6) witness to have direct, personal knowledge of each and every fact
discussed in an affidavit or deposition because a Rule 30(b)(6) representative or designee can be inferred to have
knowledge on the behalf of the corporation as the corporation is meant to appear vicariously through them); *ABN
Amro Mortgage Group, Inc. v. Maximum Mortgage, Inc., et al*, No. 1:04cv492, 2006 U.S. Dist. LEXIS 64455, 2006
WL 2598034, *7 (N.D.Ind. Sept.8, 2006) (finding a corporate representative's knowledge is inferred regarding the

To prepare, a 30(b)(6) designee must, if necessary, “use documents, past employees, and other resources.”⁵⁷ Here, Ms. Allen, as APCO’s NRCP 30(b)(6) designee, educated herself in the topics of her affidavit, spoke with APCO employees, utilized documents at APCO’s disposal, and reviewed APCO’s NRS 51.135 business records in making her affidavit.⁵⁸ *Cf. Theriault v. State*,⁵⁹ (NRS 51.135 provides that business records are admissible in any form). The chart below summarizes why each of Zitting’s alleged objections to Ms. Allen’s NRCP 30(b)(6) affidavit is without merit.

<u>Exhibit in APCO’s Opposition</u>	<u>Zitting’s Objection to Exhibit</u>	<u>Why it is admissible.</u>
Exhibit 1, paragraph 3 of Ms. Allen declaration (“Attached as Exhibit 2 to the Opposition are photographs of buildings 8 and 9 at the Project, and that were taken by APCO during its ordinary course of business.”)	Ms. Allen cannot authenticate the photos.	As APCO’s NRCP 30(b)(6) designee, Ms. Allen familiarized herself with APCO’s business records to make her affidavit. She was able to confirm that the photos in question were taken by Brian Benson in the regular course of business. ⁶⁰
Exhibit 1, paragraph 5. “All of Zitting’s approved change orders that APCO was responsible for were paid through August 2008.”	Ms. Allen’s statement calls for a legal conclusion, and a lack of foundation.	Ms. Allen’s statement was never intended to make a legal conclusion. Her factual statement was simply that APCO paid for the approved change orders it received through August 2008. Further, there is foundation for Ms. Allen’s statement. Ms. Allen is APCO’s accounts payable clerk. She is responsible for processing and paying approved change orders. ⁶¹
Exhibit 1 at paragraph 7. “APCO was never	Foundation and alleged contrary	Ms. Allen’s statement is admissible. As stated above, Ms. Allen confirmed that APCO was

matters she attests to and does not have to a demonstrated “personal knowledge”); *Hijec v. Menlo Logistics, Inc.*, No. 3:07-cv-0530-G, 2008 U.S. Dist. LEXIS 12886, 2008 WL 465274, *4 (N.D.Tex. Feb.21, 2008) (acknowledging a corporate representative does not have to have direct personal knowledge of each and every fact discussed in affidavit or deposition but can be subjective beliefs and opinions of the corporation).

⁵⁷ *Bridell v. Saint Gobain Abrasives Inc.*, 233 F.R.D. 57, 60 (D. Mass. 2005).

⁵⁸ Exhibit 13, Declaration of Mary Jo Allen.

⁵⁹ 92 Nev. 185, 547 P.2d 668, 1976 Nev. LEXIS 561 (Nev. 1976), overruled, *Alford v. State*, 111 Nev. 1409, 906 P.2d 714, 111 Nev. Adv. Rep. 163, 1995 Nev. LEXIS 161 (Nev. 1995), overruled as stated in *Hill v. State*, 114 Nev. 169, 953 P.2d 1077, 114 Nev. Adv. Rep. 21, 1998 Nev. LEXIS 24 (Nev. 1998), overruled in part, *Bigpond v. State*, 128 Nev. 108, 270 P.3d 1244, 128 Nev. Adv. Rep. 10, 2012 Nev. LEXIS 27 (Nev. 2012).

⁶⁰ Exhibit 13, Declaration of Mary Jo Allen.

⁶¹ See Declaration of Mary Jo Allen.

1 provided or received 2 Zitting's alleged pay 3 applications dated 4 06/30/2008 and 5 11/30/2008 that are 6 collectively attached to 7 the Opposition as 8 Exhibit 4."	deposition statement.	never provided or received the referenced pay applications by reviewing Project documents, and speaking with APCO employees.
9 Exhibit 1 at paragraph 7. 10 "Zitting still had a 11 remaining part of its 12 scope of work to 13 complete at the Project 14 when APCO stopped 15 work and turned the 16 Project over to Camco in 17 August 2008."	No personal knowledge of the Project's construction	Ms. Allen made herself aware of these facts as the NRCP 30(b)(6) representative through speaking with Joe Pelan and Brian Benson and reviewing the Project's records, including the drywaller's billings. ⁶² And as cited above, 30(b)(6) designees do not need to have personal knowledge for their declarations on behalf of the company.
18 Exhibit 2 (photographs 19 of buildings 8 and 9).	Authentication and admissibility, APCO didn't have personal knowledge of the construction since it left the project before November 2008 when the photos were taken	As APCO's NRCP 30(b)(6) designee, Ms. Allen familiarized herself with APCO's business records to make her affidavit. She was able to confirm that the photos in question were taken by Brian Benson in the regular course of business. ⁶³
22 Exhibit 6 (Camco's 23 Payment Application)	Authentication and admissibility, no evidence documents are what they claim to be, no declaration to authenticate, no personal knowledge.	These were documents produced by Camco, a party to this litigation. "[D]ocuments provided to a party during discovery by an opposing party are presumed to be authentic, shifting the burden to the producing party to demonstrate that the evidence that they produced was not authentic." <i>Lorraine v. Markel Am. Ins. Co.</i> , ⁶⁴ citing <i>Indianapolis Minority Contractors Ass'n.</i> , ⁶⁵ ("The act of production is an implicit authentication of documents produced...").

Notably, the Court's minute entry granting Zitting's Motion did not address these
evidentiary issues, and the Court's order found Zitting's evidentiary objections to be "moot."⁶⁶

**B. Zitting was on notice of APCO's defenses eight years ago when APCO filed its
answer.**

⁶² Exhibit 13, Declaration of Mary Jo Allen.

⁶³ Exhibit 13, Declaration of Mary Jo Allen.

⁶⁴ 241 F.R.D. 534, 552 (D. Md. 2007)

⁶⁵ 1998 U.S. Dist. LEXIS 23349, 1998 WL 1988826, at *6

⁶⁶ Exhibit 29, Findings of Fact and Conclusions of Law and Order Granting Zitting's Motion.

1 Zitting's Reply claims that APCO is precluded from opposing Zitting's Motion on any
2 other basis than a pay-if-paid defense because APCO only listed a pay-if-paid defense in its
3 interrogatories.⁶⁷ Zitting argued that "[d]uring the seven years of litigation, APCO has consistently
4 refused payment based solely on the void pay-if-paid provision."⁶⁸ This is completely inaccurate,
5 and quite frankly, lacks candor to this Court. APCO filed its answer to Zitting's complaint on June
6 1, 2009 and specifically asserted 20 affirmative defenses, including the following:⁶⁹

7 **SECOND AFFIRMATIVE DEFENSE**

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

10 **THIRD AFFIRMATIVE DEFENSE**

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

14 **FIFTH AFFIRMATIVE DEFENSE**

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

20 **EIGHTH AFFIRMATIVE DEFENSE**

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

23 **TENTH AFFIRMATIVE DEFENSE**

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

25 **TWELFTH AFFIRMATIVE DEFENSE**

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

28 **SIXTEENTH AFFIRMATIVE DEFENSE**

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

EIGHTEENTH AFFIRMATIVE DEFENSE

ZBCI has failed to comply with the requirements of NRS 624.⁷⁰

So Zitting has been on notice of APCO's defenses since June 1, 2009.

⁶⁷ Reply at 5.

⁶⁸ Reply at 7:16-17.

⁶⁹ Exhibit 2, APCO's Answer to Zitting's Complaint.

1 APCO also testified about its multiple affirmative defenses at its NRCP 30(b)(6)
2 deposition. Zitting's July 17, 2017 NRCP 30(b)(6) deposition notice specifically requested that
3 APCO's designee be prepared to testify to "[a]ll facts related to your defenses against ZBCI's
4 claims as alleged in ZBCI's complaint in this case."⁷¹ On July 19, 2017, APCO's NRCP 30(b)(6)
5 designee, Mary Jo Allen, testified about several of APCO's defenses, including that Zitting did not
6 meet the conditions of the subcontract's retention payment schedule:

7 Q. What is your understanding of a retention?

8 A. Retention is not due on the project until the project has totally
9 been completed in its entirety. Not only that, the owner has to accept
10 all the work that was completed, the as-builts must be in, the closeouts
11 must be in, and retention is then paid from the owner and will then be
12 paid to the subcontractors. **It is not due until all those five things [in
13 paragraph 3.8 of the subcontract] have been completed.**

14 Q. Understood. And during the course of Zitting's work on the
15 project, Zitting received progress payments; correct?

16 A. Yes, sir.

17 Q. In the course of making those progress payments, there were
18 retention that were withheld, is that correct?

19 A. Yes, sir.

20 Q. **You testified that Zitting would not get those retentions
21 until certain conditions were met, correct?**

22 A. Yes, sir.

23 Q. **Until those conditions were met, was there an actual
24 retention check being issued to anyone and held by anyone?**

25 A. No.

26 Q. The retention would only be withheld if the
27 work had already been approved and completed by Zitting, correct?

28 A. When completed by all subcontractors.

Q. Let me clarify. When you say completed by all
subcontractors, that's only when the retention is being paid to
Zitting, correct?

A. The project had to be completed in its entirety. This contract
was bound to the prime contract. They signed this – in they are
bound to the same terms of the prime contract. The prime contract
states that no retention will be released until the entire project is
completed in its entirety.

Q. Understood. And I'm not talking about when the actual
retention is released to Zitting, I'm talking about the process before
that, basically when the progress payments are authorized to be
issued, where someone retains ten percent of that progress .

⁷⁰ Exhibit 2, APCO's Answer to Zitting's Complaint.

⁷¹ See Exhibit 12, Zitting Notice of Deposition to APCO at 4:10-12.

1 A. The bank.

2 Q. Right, the bank retains ten percent of that amount. Before the
3 bank can even retain that amount and once the payment was
4 authorized, that work for which the proper assignment was assigned
5 to, that had to be approved and completed by Zitting, correct?

6 A. The work that was paid for, the 90 percent that was paid, yes.
7 The percentage of work that was completed was approved by the
8 owner. The owner approved the percentage. They were the one that
9 told us what to pay the subcontractors.

10 Q. **Right, so the only reason why the retention was not paid
11 right away was that there were other conditions that may depend
12 on other subcontractors, correct?**

13 A. **The job in its entirety.**

14 Q. Earlier you testified that the retention would be released once
15 the entire project is complete; is that correct?

16 A. Yes.⁷²

17 More specifically to the retention payment schedule, APCO's NRCP 30(b)(6) designee
18 also discussed Subcontract Section 3.8 and the preconditions to APCO's obligation to pay
19 Zitting's retention:

20 Q. Right, can I direct you to section 3.8?

21 A. Um-hum. The building was not completed. Neither building.
22 Neither 8 nor 9 was completed.

23 Q. Understood. But I haven't asked any questions with respect
24 to buildings 8 or 9, so there was no questions pending.

25 A. Sorry.

26 Q. I'm not trying to be rude, I'm trying to make the record
27 clear. I know you're very excited to answer questions.

28 Q. **Can I have you read the first sentence up until Part A,
where it starts with "the ten percent withheld" into the record,
please.**

A. **"The ten percent withheld retention shall be payable to
subcontractor upon and only upon the occurrence of the
following events, each of which is a condition precedent to the
subcontractor's right to receive final payment hereunder and
payment of such retainer."**

Q. Earlier you talked about how the release of retention is
conditioned precedent to the completion. Can I have you read
the handwritten part at the end of section 3.8 into the record.

A. F, down here, sir?

Q. Yes.

A. **"Building is considered complete as soon as the drywall is
complete."⁷³**

...

⁷² Exhibit 16, Allen Deposition, Volume II at 117:1-119:17.

⁷³ Allen Deposition, Volume II at 119:18-120:19.

1 Q. Right. After the payment application number 11 shown on
2 APCO 106218, did APCO receive any payment applications from
the subs?

3 A. No.

4 Q. Not that you're aware of?

5 A. No, sir.

6 Q. As far as you know, the owner has withheld a retention
amount from all the subs, not just Zitting, for their work on the
project?

7 A. Yes, sir.

8 Q. Has APCO ever received any payment of the retention
amount?

9 A. No, sir.

10 Q. And just for clarity of the record then, that means APCO has
not paid any retention amount to anyone; is that correct?

11 A. That is correct.⁷⁴

12 So it is clear that Zitting knew of APCO's position that the retention preconditions were not met.
13 Zitting's Reply and Court's ruling did not account for these references to defenses unrelated to the
14 pay-if-paid issue.

15 APCO's 30(b)(6) designee also testified that not all of Zitting's change order work was
16 approved by the owner, a condition precedent to Zitting being paid under the change order
17 payment schedule:

18 Q. Do you know whether Zitting has completed work for the
project for the total amount of \$4,033,654.85. Does that number
ring a bell to you?

19 A. Not without papers in front of me.

20 Q. And the numbers shown on Exhibit Allen 75, this reflects both
the contract work and the change order work, correct?

21 A. The change order work that was submitted to the owner.

22 Q. And approved, correct?

23 A. Not all of it was approved, sir.

24 Q. Is there a reason for APCO to submit a bill containing change
orders that was not approved by the owner?

25 A. The owner was the one that would determine what was
approved. If Zitting gave us a change order billing, we would give it
to the owner. The owner would say yes or no.

26 Q. Understood. So during the application review process that's
when, as far as you know, the owner would approve or disapprove of the
change order work being billed, correct?

27 A. Correct.⁷⁵

28 In addition to its answer and 30(b)(6) deposition testimony, APCO also supplemented its
responses to Zitting's interrogatories within two weeks of taking Zitting's NRCP 30(b)(6)

⁷⁴ Allen Deposition, Volume II at 140, lines 8-24.

⁷⁵ Allen Volume II at 146:1-23.

1 deposition.⁷⁶ The Court's failure to consider these various sources and articulations of APCO's
2 affirmative defenses is the equivalent of case terminating sanctions. Such a sanction would only be
3 appropriate after the Court conducted a full sanctions analysis under *Young v. Johnny Ribeiro*
4 *Bldg.*⁷⁷ including evaluating: the degree of wilfulness of the offending party; the extent to which
5 the non-offending party would be prejudiced by a lesser sanction; the severity of the sanction of
6 ssal relative to the severity of the alleged discovery abuse; whether any evidence has been
7 irreparably lost; the feasibility and fairness of alternatives; the policy favoring adjudication on the
8 merits; whether sanctions unfairly operate to penalize a party for the misconduct of its attorney, and
9 the need to deter parties and future litigants from similar abuses.⁷⁸ No such analysis was
10 performed in this case.

11 Further, "Nevada is a notice-pleading jurisdiction and pleading should be liberally
12 construed to allow issues that are fairly noticed to the adverse party."⁷⁹ "However, even if not
13 properly pleaded, an affirmative defense may be tried by consent or when fairness warrants
14 consideration of the affirmative defense and the plaintiff will not be prejudiced by the district
15 court's consideration of it."⁸⁰ And, NRCP 15(b) permits liberal amendment of pleadings during
16 trial "when the presentation of the merits of the action will be subserved thereby and the objecting
17 party fails to satisfy the court that the admission of such evidence would prejudice him in
18 maintaining his action or defense upon the merits."⁸¹ "And omission of an affirmative defense is
19 not fatal as long as it is included in the pretrial order."⁸²

20
21 ⁷⁶ Exhibit 8, APCO's Supplement to Zitting's First Set of Interrogatories.

22 ⁷⁷ 106 Nev. 88, 93, 787 P.2d 777, 780 (1990).⁷⁷

23 ⁷⁸ *Id.*

24 ⁷⁹ *Great Am. Ins. Co. v. Gen. Builders, Inc.*, 113 Nev. 346, 353-54 (1997) (quoting *Nevada State Bank v. Jamison*
25 *Partnership*, 106 Nev. 792, 801 (1990)).

26 ⁸⁰ *Douglas Disposal, Inc. v. Wee Haul, LLC*, 123 Nev. 552, 558 (2007) (affirming the district court's decision to
27 consider affirmative defenses that were not included in defendants' answers because plaintiff had notice of them). *See*
28 *also Schettler v. RalRon Capital Corp.*, 128 Nev. 209, 221 n.7 (2012) (finding that fair notice of an affirmative
defense was given on reconsideration and thus allowing the affirmative defense to be considered); *Williams v.*
Cottonwood Cove Dev. Co., 96 Nev. 857, 619 P.2d 1219, (1980) (affirming the decision of the district court because
the buyers were given reasonable notice and opportunity to respond to the newly asserted affirmative defense in
limited partnership's motion for summary judgment).

⁸¹ NRCP 15(b).

⁸² *Pulliam v. Tallapoosa Cty. Jail*, 185 F.3d 1182, 1185 (11th Cir. 1999) *citing Hargett v. Valley Fed. Sav. Bank*, 60
F.3d 754, 763 (11th Cir.1995) (failure to assert affirmative defense in answer curable by insertion of defense in
pretrial order); *Id. citing Fed.R.Civ.P. 16(e)* (pretrial order "shall control the subsequent course of action").

1 In *Colony Ins. Co. v. Kuehn*,⁸³ the defendants were completely uncooperative in that they
2 did not file initial disclosures and failed to respond to plaintiff's discovery. Plaintiffs filed a
3 motion to compel to force defendants to respond and file its initial disclosures. Shockingly, the
4 defendants did not even bother to oppose the motion. The motion was granted and the defendants
5 were given several weeks to comply. Plaintiffs filed another motion to compel months later
6 because the defendants did a poor job of answering the discovery. Plaintiffs requested that
7 defendants be ordered to completely answer its discovery and asked for sanctions including
8 striking the defendant's affirmative defenses, and disallowing certain witnesses from testifying on
9 a particular issue. The court ordered that certain witnesses would be prohibited from testifying
10 since defendants still had not made its initial disclosures. The court did not strike the defendants'
11 affirmative defenses.

12 Plaintiffs were forced to file a third motion to compel because defendants would still not
13 completely answer their discovery. The court reviewed defendant's interrogatories and found that
14 one interrogatory went to the veracity of one of the defendant's defenses regarding mental state.
15 The court found that interrogatory answer to be vague and lacked factual detail. *Instead of*
16 *granting the request to preclude this critical defense, the court granted the defendants an*
17 *opportunity to supplement this interrogatory.* Shockingly, defendants resubmitted the exact same
18 response to the critical interrogatory they were given an opportunity to supplement. Only then did
19 the court preclude the defendants from providing any testimony on this defense. The court
20 recognized that, "Precluding all evidence on this issue is tantamount to striking defendant's
21 affirmative defense of Mr. Kuehn's mental state."⁸⁴ *Colony Ins.* exemplifies the rare circumstances
22 in which a court may or should consider striking affirmative defenses.

23 Through the granting of Zitting's Motion on the current record, the Court is issuing a case
24 terminating sanction by not considering APCO's affirmative defenses because of its interrogatory
25 responses. The Nevada Supreme Court had the opportunity to consider the severity of case
26

27 ⁸³ No. 2:10-cv-01943-KJD-GWF, 2011 U.S. Dist. LEXIS 155198, at *6 (D. Nev. Dec. 22, 2011)

28 ⁸⁴ *Id.* at 7.

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

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

27 _____
28 ⁸⁵ No. 54852, 2011 Nev. Unpub. LEXIS 1628, at *1 (Sep. 29, 2011)

⁸⁶ *Young v. Johnny Ribeiro Bldg.*, 106 Nev. 88, 787 P.2d 777 (1990)

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

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

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

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

23 The architect and engineer argued that the bank was unjustly enriched because the work
24 they performed increased the value of the property. The Court found that
25

26 ⁸⁷ No. 1:07-CV-1191 (LEK/DRH), 2010 U.S. Dist. LEXIS 45938, at *39 (N.D.N.Y. May 11, 2010)

27 ⁸⁸ See APCO's Opposition at 14-16, on file herein.

28 ⁸⁹ 108 Nev. 151, 157, 826 P.2d 560, 563 (1992)

⁹⁰ *Id.* at 157.

⁹¹ *Id.* at 157.

⁹² *Id.* at 157.

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

2 The same logic applies here. While APCO received some minor benefit by being able to
3 perform its work in conjunction with Zitting, APCO certainly was not unjustly enriched and
4 APCO is not personally liable for the Owner’s debt. APCO was not paid for June, July or August
5 2008.⁹⁴ APCO lost approximately \$8,000,000 on this job and APCO did not acquire the
6 property.⁹⁵ Instead, it endured a \$900,000 legal battle on behalf of itself and its subcontractors to
7 endeavor to get priority and paid from the owner.⁹⁶ Unfortunately, after the project shut down,
8 everyone lost, most of all APCO.

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

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

15 The hearing on Zitting’s Motion was scheduled for October 5, 2017.⁹⁷ At that hearing,
16 APCO informed the Court that depositions were not finished, and requested 45 days to complete
17 the depositions.⁹⁸ The Court granted the parties until October 30, 2017 to take these depositions.⁹⁹

18 “The timing of discovery as established in the Rules may be modified through the parties’
19 stipulation or by court or discovery commissioner order in most instances.”¹⁰⁰ In this case, Zitting
20 and APCO (and other parties) agreed to postpone depositions.¹⁰¹ The subsequent depositions are
21
22

23
24 ⁹³ *Id.* at 157.

25 ⁹⁴ Exhibit 13, Declaration of Mary Jo Allen.

26 ⁹⁵ See Exhibit 13, Declaration of Mary Jo Allen.

27 ⁹⁶ See Exhibit 13, Declaration of Mary Jo Allen.

28 ⁹⁷ See Docket at October 5, 2017 entry.

⁹⁸ Exhibit 14, October 5, 2017 Minutes. (“Further, [APCO’s counsel] requested discovery be extended another 45 days to finish up depositions, which resulted in colloquy as to deferring the hearing on the motions pending depositions... COURT FURTHER ORDERED that the deadline for taking depositions is October 30, 2017.”)

⁹⁹ *Id.*

¹⁰⁰ 1-13 Nevada Civil Practice Manual § 13.03 (2017).

¹⁰¹ See Affidavit of Cody Munteer, Esq.

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

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

11 When discovery is re-opened, courts typically acknowledge that corresponding deadlines
12 need to be adjusted to account for the change in discovery.¹⁰⁴ Cf. *Visa Int'l Serv. Ass'n v. JSL*
13 *Corp.*,¹⁰⁵ (discovery was re-opened and the District Court for the District of Nevada concluded
14 there was good cause to extend the deadline for filing dispositive motions). Under these
15 circumstances the new deposition testimony should be considered by the Court. See *Morgan v.*
16 *D&S Mobile Home Ctr., Inc.*,¹⁰⁶ (where the trial court considered the decision to reopen discovery
17 as "implicitly negating" its previously issued order denying appellant the opportunity to proffer
18 evidence on damages. The court cautioned litigants that reopening discovery "may change
19 everything," that parties may have to "resubmit motions for Summary Judgment" and that by
20 doing so, it may allow the opposing party to "create factual issues"). As in *Morgan*, once
21
22

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

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

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

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

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

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

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

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

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

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

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

20 The second precondition is that the Owner must give final acceptance of APCO's or
21 Zitting's work. Zitting's affidavit also represented that the Owner accepted and approved Zitting
22 Brother's work: "I am not aware of any complaints with the timing or quality of Zitting's work on
23 the Project. As far as I am aware, Gemstone Development West, Inc., the owner of the Project, has
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27 ¹⁰⁷ See Section 3.8 of Subcontract.

28 ¹⁰⁸ Exhibit 15, Subcontract at Section 3.8.

¹⁰⁹ See Zitting Brother's Motion for Partial Summary Judgment Against APCO Construction, Inc. at Exhibit A, ¶ 7, on
file herein.

1 approved the timing and quality of Zitting's work."¹¹⁰ Three months later, Zitting Brother's NRCP
2 30(b)(6) designee testified he had no knowledge of the Owner's acceptance:

3 "Q. While you -- let's look back at paragraph 3.8 of the subcontract,
4 Exhibit 1. We've talked about subparagraph A, the completion as
5 you further defined it in subparagraph F. Subparagraph B was the
6 approval and final acceptance of the building work by owner. While
7 you were working for APCO, did that occur, to your knowledge?
8 A. I have no knowledge of that."¹¹¹

9 ...
10 "Q. Do you know if there was ever a certificate of occupancy for
11 Building 8?

12 A. I didn't -- I do not know.

13 Q. Do you know if there was ever a certificate of occupancy for
14 Building 9?

15 A. I do not know."

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

18 Q. Okay. Next item is, receipt of final payment by contractor from
19 owner. Do you have any personal knowledge or information to
20 suggest whether that occurred?

21 A. I do not.¹¹²

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

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

28 Q. Item D [within Section 3.8 of Subcontract] is delivery to
contractor from subcontractor, all as-built drawings for its scope of
work, and other closeout documents. Did Zitting ever satisfy that
requirement?

A. I don't recall.

¹¹⁰ See Zitting Brother's Motion for Partial Summary Judgment Against APCO Construction, Inc. at Exhibit A, ¶ 7, on file herein.

¹¹¹ Zitting Deposition.

¹¹² Exhibit 7, Zitting's NRCP 30(b)(6) Deposition at 31: 17-20.

¹¹³ Exhibit 18, Accounting Records Confirming Owner Never Paid APCO Zitting Brothers' Retention.

¹¹⁴ See Zitting Brother's Motion for Partial Summary Judgment Against APCO Construction, Inc. at Exhibit A, ¶ 7, on file herein.

1 **Q. Do you know?**

2 **A. I don't recall.**

3 Q. Prior to today, have you seen any records in your file that would
4 reflect the transmittal of that type of closeout documentation and as-
5 built?

6 A. Not that I recall.¹¹⁵

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

9 Q. Sitting here today as the corporate designee, are you aware
10 of any documents, facts, information to suggest that Zitting met the
11 conditions of subparagraphs B, C, and D of paragraph 3.8?

12 A. I'm not aware of any.¹¹⁶

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

16 Subcontractor agrees that Contractor shall have no obligation to pay
17 Subcontractor for any changed or extra work performed by
18 Subcontractor until or unless Contractor has actually been paid for
19 such work by the Owner **unless Contractor has executed and**
20 **approved change order directing subcontractor to perform**
21 **certain changes in writing, and certain changes have been**
22 **completed by subcontractor.**¹¹⁷

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

27 Q. So your -- if I understand your testimony, your
28 entitlement to a change order could be determined separate, apart
29 from whether the owner paid APCO, if you had executed approved
30 change orders?

31 A. That was my intention here.

32 Q. My statement is correct, yes?

33 ¹¹⁵ Zitting Deposition pp. 31-32.

34 ¹¹⁶ Zitting Depo. pp. 34-35.

35 ¹¹⁷ Exhibit 15, Section 3.9 of Subcontract.

36 ¹¹⁸ Exhibit 7, Zitting Deposition at p. 37:1-5 ("Q. Sitting here today as the corporate designee, would you agree that
37 Zitting accepted that payment schedule for change orders? A. With some changes and modifications, it appears that I
38 did.").

¹¹⁹ Exhibit 7, Zitting Deposition at 37:6-16.

1 A. Yes.¹²⁰

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

5 Q. -- okay -- do you have executed and approved change order
6 forms from APCO on those?

7 A. Not on all of them.

8 Q. On some of them do you?

9 A. I believe so.

10
11 Q. (By Mr. Jefferies) Sir, do you have -- as the corporate
12 designee, do you have any information, documentation, evidence to
13 suggest that APCO was paid your retention that you're seeking in
14 this action?

15 A. Not that I know of.

16 Q. As you sit here today as the corporate designee, do you have
17 any documents, facts, information to suggest that APCO received
18 payment for the change orders you're seeking payment for in this
19 action?

20 A. Not that I know of.¹²¹

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

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

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

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

32 ¹²⁰ Exhibit 7, Zitting Deposition at 38:9-13.

33 ¹²¹ Exhibit 7, Zitting Deposition at 39:16-40:8.

34 ¹²² Exhibit 15, Zitting Subcontract at Section 3.4 (emphasis added).

35 ¹²³ Exhibit 19, Zitting's Progress Releases.

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

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

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

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

16 Zitting was deposed in this case for the first time on Friday, October 27, 2017.¹²⁵ After the
17 deposition, APCO supplemented its interrogatory responses to reiterate its defenses given Zitting's
18 critical admissions less than two weeks later, on Wednesday, November 8, 2017.¹²⁶ Zitting has
19 acknowledged that APCO specifically reserved the right to supplement or amend its interrogatory
20 answers as investigation, discovery, disclosure and analysis of the case continued.¹²⁷ Further,
21 APCO did not need to amend its Answer since these defenses were already listed in its answer.
22

23 **VI. Zitting's surreply contained many inaccuracies.**

24 Zitting's surreply filed the day before the November 15, 2017 oral argument contained
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27 ¹²⁴ 2015 Nev.. LEXIS 4, *31-33, 357 P.3d 966, 977, 131 Nev. Adv. Rep. 34 App. (internal citations and quotations
omitted).

28 ¹²⁵ Exhibit 7, Zitting Deposition.

¹²⁶ APCO CONSTRUCTION'S SUPPLEMENTAL ANSWERS TO ZITTING BROTHERS CONSTRUCTION
INC.'S FIRST REQUEST FOR INTERROGATORIES at 6-7.

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

7 **A. APCO’s departure from the project does not trigger payment under Section 9.4**
8 **of the Subcontract.**

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

17 9.4 Effect of Owner’s Termination of Contractor. If there has been a
18 termination of the Contractor’s contract with the Owner, the
19 Subcontractor shall be paid the amount due from the Owner to the
20 Contractor for the Subcontractor’s completed work, as provided in
21 the Contract Documents, after payment by the Owner to the
22 Contractor.¹²⁹

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

28 ¹²⁷ See Zitting’s MIL at 8:25-27 and 9:16-18, on file herein.

¹²⁸ See Zitting’s Reply to APCO’s Supplemental Brief, on file herein.

¹²⁹ Exhibit 15, Zitting Subcontract at 9.4.

¹³⁰ See Zitting Subcontract.

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

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

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

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

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¹³¹ 98 Nev. 285, 287, 646 P.2d 555, 556 (1982).

27 ¹³² *Id.* at 287.

28 ¹³³ 367 P.3d 1286, 1288 (Nev. 2016)

¹³⁴ 811 F.2d 326, 336 (7th Cir. 1987)

¹³⁵ 108 Nev. 617, 620, 836 P.2d 627, 629 (1992)

¹³⁶ 386 P.3d 982, 2016 Nev. Unpub. LEXIS 958.

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

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

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

15 **D. The condition precedent of an executed and approved change order was not only**
16 **for Zitting’s benefit.**

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

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

24 Q. So as the corporate designee, would you agree that APCO
25 rejected certain change order requests because it objected to your
26 labor rate?

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

Q. So that's a yes?

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

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

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

9 A. It appeared that they had.

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

12 A. Correct.¹³⁷

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

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

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

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

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

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

¹³⁷ Exhibit 17, S. Zitting Deposition at 51-52.

¹³⁸ See Zitting's Deposition at 53-56.

¹³⁹ Exhibit 20, Transcript of November 16, 2017 hearing at 12.

¹⁴⁰ 124 Nev. 1102, 1117-1118, 197 P.3d 1032 (2008).

¹⁴¹ 386 P.3d 982 (Nev. 2016).

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

8 **B. The Nevada Supreme Court**

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

13 Big-D addressed pay-if-paid provisions in its responding brief and argued that NRS
14 624.624 does not change when payment is due, and that payment was not due until: (1) the owner
15 accepted Padilla's work, and (2) the owner paid Big-D for Padilla's work under the subcontract:

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

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

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

24 ¹⁴⁴ *Id.* at 21: 17-19. ("By its own terms, NRS 624.624 yields to (a) payment schedules contained in subcontract
agreements and (b) contractual rights to withhold payments from a subcontractor after arising from deficient work.");
25 *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.").

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

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

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

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

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

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

8 First, NRS 624 was not in effect or being interpreted in *Lehrer*
9 *McGovern Bovis, Inc. v. Bullock Insulation, Inc.* 124 Nev. 1102,
10 1117 (2008). Second, the issue here is not whether the payment
11 schedule in the Big-D subcontract is a pay-if-paid clause that
12 would excuse Big-D's obligation to pay Padilla if the owner
13 failed to pay Big-D for Padilla's work. Rather, the issue is, for
the purposes of NRS 624.624 notice of withholding, when was
the payment from Big-D to Padilla due. The Subcontract
Agreement contained a schedule for payments-payment to
Padilla was due after IGT approved Padilla's work *and* after
Big-D received payment attributable to Padilla's work.¹⁵⁰
14 Padilla's reply brief reargued that *Lehrer McGovern Bovis* prohibits pay if paid provisions, and
15 that there was not a schedule of payments in the subcontract.¹⁵¹ This Court and the Nevada
16 Supreme Court disagreed and applied the subcontract provision as written. That is exactly the
17 case here with APCO's subcontract. So it is clear the Nevada Supreme Court had the
18 opportunity to consider pay-if-paid clauses and *Lehrer McGovern Bovis* in its decision and still
19 enforced agreed upon payment schedules.

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

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

26 ¹⁴⁹ Exhibit 24, Big D's responding brief at 28-29.

¹⁵⁰ See Exhibit 24, Big-D's responding brief at 32 (citations to the record omitted).

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

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

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

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

12
13 **VIII. Pay-if-Paid Defenses**

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

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

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

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¹⁵² 386 P.3d 982, 2016 Nev. Unpub. LEXIS 958.

28 ¹⁵³ Exhibit 15, Subcontract at 3.4.

¹⁵⁴ Exhibit 15, Subcontract at Section 3.8.

¹⁵⁵ *Kahn v. Orme*, 108 Nev. 510, 516, 835 P.2d 790, 794 (1992)


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

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

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

11 DATED: January ~~5th~~ 2018.

12 **SPENCER FANE LLP**

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28 ¹⁵⁶ *Havas v. Bank of Nev.*, 96 Nev. 567, 613 P.2d 706 (1980).

¹⁵⁷ *Hotel Last Frontier Corp. v. Frontier Props.*, 79 Nev. 150, 155, 380 P.2d 293, 295 (1963).

¹⁵⁸ No. 63868, 2014 Nev. Unpub. LEXIS 790, at *4 n.1 (May 14, 2014)

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

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12 **Intervenor Plaintiff: Cactus Rose Construction Inc**

13 Eric B. Zimbelman (ezimbelman@peelbrimley.com)

14 **Intervenor Plaintiff: Interstate Plumbing & Air Conditioning Inc**

15 Jonathan S. Dabbieri (dabbieri@sullivanhill.com)

16 **Intervenor: National Wood Products, Inc.'s**

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22 **Other: Chapter 7 Trustee**

23 Elizabeth Stephens (stephens@sullivanhill.com)

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26 Jonathan Dabbieri (dabbieri@sullivanhill.com)

27 **Plaintiff: Apco Construction**

28 Rosie Wesp (rwesp@maclaw.com)

Third Party Plaintiff: E & E Fire Protection LLC

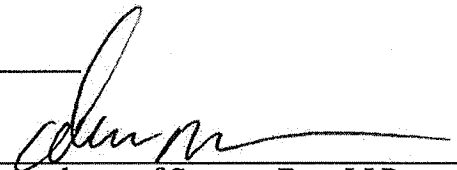
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Zitting Brothers Construction, Inc.

DISTRICT COURT

CLARK COUNTY, NEVADA

APCO CONSTRUCTION, a Nevada
corporation,

Plaintiff,

vs.

GEMSTONE DEVELOPMENT WEST, INC., a
Nevada corporation,

Defendant.

CASE NO. 08A571228

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: June 21, 2018

Time of Hearing: 9:00 a.m.

AND ALL RELATED MATTERS

ZITTING BROTHERS' CONSTRUCTION, INC.'S LIMITED OPPOSITION TO APCO

CONSTRUCTION, INC.'S MOTION FOR 54(b) CERTIFICATION AND FOR STAY

PENDING APPEAL ON ORDER SHORTENING TIME

Zitting Brothers Construction, Inc. ("Zitting"), a lien claimant and now judgment creditor, submits this limited opposition to APCO Construction, Inc.'s Motion for 54(b) Certification and for Stay Pending Appeal on Order Shortening Time ("Motion"). Zitting does not oppose the request for Nev. R. Civ. P. 54(b) certification. However, Zitting opposes the request for a stay pending appeal. APCO Construction, Inc. ("APCO") fails to state any valid legal grounds for a Nev. R. App. P. 8(c) stay pending appeal without a supersedeas bond for the full judgment amount. 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: June 19, 2018

4 WILSON ELSEER MOSKOWITZ
5 EDELMAN & DICKER LLP

6 /s/I-Che Lai

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Zitting does not oppose APCO’s request for a Nev. R. Civ. P. 54(b) certification or even
4 APCO’s request for a stay pending appeal—so long as APCO posts a supersedeas bond for the full
5 judgment amount owed to Zitting. A stay without such bond—no matter how short—prejudices
6 Zitting’s collection efforts. Thus, the Nevada Supreme Court has generally required a bond for the
7 full judgment amount before imposing a stay pending appeal. APCO has not even attempted explain
8 why it should be exempt from posting adequate security for the stay. This Court should therefore
9 require a bond for the full judgment amount.

10 If APCO seeks a stay without such bond, APCO has failed to articulate a valid reason to
11 support such a stay. None of the factors governing a stay pending appeal support a stay. A denial of
12 the stay does not affect the object of the appeal—the judgment amount—because this Court can
13 order Zitting to return any money collected if the Nevada Supreme Court reverses the judgment. To
14 that end, APCO cannot suffer any serious harm from the absence of a stay. On the other hand,
15 APCO’s threatened plan to thwart Zitting’s collection efforts will prevent Zitting from collecting the
16 large amount owed to it and will therefore inflict serious harm on Zitting. The harm to Zitting is that
17 during a bondless stay period APCO can dilute company assets. Lastly, by relying on its failed
18 argument in opposing the money judgment to Zitting, APCO has failed to show that it is likely to
19 prevail on the merits of the appeal. This Court should therefore deny any stay without a bond for the
20 full judgment amount.

21 **II. ARGUMENT**

22 **A. Although Zitting does not oppose APCO’s request for Nev. R. Civ. P. 54(b)**
23 **certification, the certification is unnecessary.**

24 Zitting questions the need for a Nev. R. Civ. P. 54(b) certification. Certification under that
25 rule contemplates the need for a final judgment. *See* Nev. R. Civ. P. 54(b). But on December 29,
26 2017, this Court has entered an order directing “final judgment on [Zitting]’s claim upon a decision
27 on the fees and costs.” (Order 11:1-3 (Dec. 29, 2017).) This Court has subsequently entered an order
28 on the fees and costs and a judgment in favor of Zitting. (Order (May 8, 2018); J. in Favor of Zitting

(May 23, 2018).) APCO's certification request is therefore moot. Nonetheless, Zitting does not oppose APCO's request.

B. The requested stay pending appeal requires APCO to post a supersedeas bond for the full judgment amount owed to Zitting.

Nev. R. Civ. P. "62(d) governs stays pending appeal." *Nelson v. Heer*, 121 Nev. 832, 834, 122 P.3d 1252, 1253 (2005). Under that rule, courts require security from the judgment debtor as a condition precedent for any stay pending appeal. *See id.* at 835-36, 122 P.3d at 1254. Notably, courts usually require the judgment debtor to post a supersedeas bond for the full judgment amount. *Id.* at 834, 122 P.3d at 1253. This "protect[s] the judgment creditor's ability to collect the judgment if it is affirmed by preserving the status quo and prevent[s] prejudice to the creditor arising from the stay." *Id.* at 835-36, 122 P.3d at 1254. APCO does not provide any reason why this Court should not impose measures to protect Zitting's ability to collect the judgment amount as a condition precedent to a stay pending appeal. (*See Mot.*¹ 5:17-9:6.) Nor can it.

In its motion, APCO has overlooked the presumption in favor of the bond for the full judgment amount. (*See Mot.* 5:17-9:6.) As discussed below, Zitting has concerns with APCO's plan to deprive Zitting of the judgment amount. This alone warrants a supersedeas bond to protect Zitting's interests. *See Nelson*, 121 Nev. at 835-36, 122 P.3d at 1254. To allay this concern, this Court should condition the stay pending appeal on APCO posting a bond for the full judgment amount.

C. Any stay pending appeal without a bond for the full judgment amount fails to comply with the rule governing such stay.

Absent a supersedeas bond for the full judgment amount, APCO is not entitled to a Nev. R. App. P. 8(c) stay pending resolution of the appeal. A stay under Nev. R. App. P. 8(c) is subject to the court's discretion. *See Nelson*, 121 Nev. at 834, 122 P.3d at 1253. As APCO states in its motion, in deciding whether to issue a stay, courts generally considers the following four factors:

(1) whether the object of the appeal will be defeated if the stay is denied; (2) whether appellant will suffer irreparable or serious injury if the stay is denied; (3) whether respondent will suffer irreparable or

¹ Zitting cites the Motion as "Mot."

1 serious injury if the stay is granted; and (4) whether appellant is likely
2 to prevail on the merits in the appeal.

3 (Mot. 6:24-7:6.) As with Nev. R. Civ. P. 62(d), Nev. R. App. P. 8(c) serves to preserve the benefit of
4 the judgment for the judgment creditor. *See Nelson*, 121 Nev. at 835-36, 122 P.3d at 1254. A stay,
5 especially “[t]he power to stay execution, should be exercised with caution and never unless the case
6 is plain and the equity of the party seeking it free from doubt or difficulty.” *See Virtual Tech.*, 169
7 F.R.D. at 88 (quoting *In re Baldwin–United Corporation*, 52 B.R. 142, 145 (Bankr. S.D. Ohio
8 1985)). Here, as discussed below, APCO fails to satisfy the factors to support a stay pending appeal
9 without a bond for the full judgment amount.

10 **1. The denial of the requested stay does not defeat the object of the appeal.**

11 A denial of the stay will not defeat the object of the appeal—the judgment amount owed to
12 Zitting. APCO argues that any collection on Zitting’s judgment for damages will defeat APCO’s
13 plan for appeal. (*See* Mot. 7:4-14.) Again, APCO cites to no authority for this argument. (*See id.*)
14 Nor can it. If this Court accepts APCO’s argument that potential enforcement on a money judgment
15 warrants a stay, there will be an automatic stay in every case where a party receives a judgment for
16 damages. This eviscerates the discretion granted to the district court to allow for a stay under Nev. R.
17 Civ. P. 62(d) and Nev. R. App. P. 8(c).

18 Nonetheless, APCO’s concern is a non-issue. If Zitting collects on its judgment and APCO
19 later prevails on appeal to reverse this Court’s decision, this Court can simply order Zitting to return
20 the money to APCO. Zitting will certainly comply with this Court’s order. Zitting should be allowed
21 to at least get its collection efforts started by depositing the principals of APCO to determine what
22 assets, if any, it has or has recently divested itself of to avoid any prejudice that may arise from a
23 transfer of assets or further depletion of bank accounts. It is apparent that Zitting has waited long
24 enough for payment of its material and work.

25 **2. The denial of the requested stay will not present irreparable or serious harm
26 to APCO.**

27 APCO will not suffer serious harm if the requested stay is denied. APCO only concludes
28 without any explanation that it would suffer “serious injury if Zitting is allowed to execute on the

1 judgment before APCO has the opportunity to fully litigate its rights on appeal.” (See Mot. 7:17-19.)
2 There is no merit to this conclusion. Again, if Zitting collects on its judgment and APCO later
3 prevails on appeal, Zitting will comply with any order regarding the return of the amount collected.
4 APCO has not, and cannot, show how a denial of the stay under these circumstances will harm it in
5 any way.

6 **3. A stay without a supersedeas bond for the full judgment amount will**
7 **seriously harm Zitting.**

8 In contrast, a stay without a bond for the full judgment amount seriously harms Zitting by
9 allowing APCO additional time to prepare a plan to avoid collection. APCO has repeatedly
10 threatened Zitting with a bankruptcy filing, claiming that there are no assets to pay any judgments.
11 Yet, APCO has somehow retained and paid three law firms during this litigation—including two law
12 firms to represent it in the pending appeal—and it has paid them over \$900,000.00 (an amount that is
13 more than what Zitting was originally owed). Zitting therefore has obvious concerns with APCO’s
14 potential relocation of assets or efforts to thwart Zitting’s collection efforts. APCO’s silence on this
15 speaks volumes. There is no reason for a stay without a bond for the full judgment amount.

16 APCO’s cited authority—*Waddell v. L.V.R.V. Inc.*, 122 Nev. 15, 125 P.3d 1160 (2006)—
17 does not lead to a different outcome. (See Mot. 7:20-8:2.) APCO has cited that authority for the
18 proposition that post-judgment interest resolves any concerns Zitting may have regarding the delay
19 in collection. (See *id.*) However, *Waddell* does not stand for that proposition. The only issue in
20 *Waddell* was whether post-judgment interest accrues on an award of attorney’s fees. See *Waddell*,
21 122 Nev. at 26, 125 P.3d at 1167. Accrual of post-judgment interest does not mitigate any harm to
22 Zitting if APCO later thwarts collection of the judgment amount by disposing of assets during the
23 stay period and the extra post-judgment interest. Allowing a stay without the supersedeas bond
24 allows APCO only serves to harm Zitting’s chances at collecting on its judgment.

25 **4. APCO is not likely to prevail on the merits of the appeal.**

26 APCO fails to show that it will likely prevail on the merits of its appeal. APCO admits that it
27 must “present a substantial case on the merits” to establish the likelihood of success for a stay. (See
28 Mot. 8:4-6.) However, APCO’s arguments do not present such a case.

APCO's arguments chiefly relies on the arguments set forth in APCO's opposition to Zitting's motion for summary judgment and APCO's motion for reconsideration. (*See id.* 8:6-11.) This Court has already found those arguments meritless. The fact that APCO prevailed against the other lien claimants means nothing since the circumstances of those claims are significantly different from Zitting's claims.² Otherwise, this Court would not have granted summary judgment in favor of Zitting's claims and found for APCO on the other lien claimants' claims. For comparison, Zitting's claim against APCO is similar to the other lien claimants lawsuit against CAMCO, who this Court found at trial owed the lien claimants. APCO's Motion seems to acknowledge the significant differences because it fails to even attempt to articulate any factual similarities between Zitting's case and the other lien claimants' case. Therefore, this factor favors Zitting.

III. CONCLUSION

For the foregoing reasons, this Court should deny APCO's Motion for 54(b) Certification and for Stay Pending Appeal on Order Shortening Time. In the alternative, it should require APCO to post a supersedeas bond for the full judgment amount. This is the only way to insure that APCO does not deplete the assets available for payment of the judgment amount owed to Zitting.

Dated: June 19, 2018

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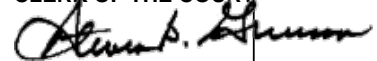
² One of the biggest differences is that Zitting never signed an agreement with CAMCO, the subsequent general contractor, like the other lien claimants.

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1 RTRAN

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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, JUNE 21, 2018

15 **RECORDER'S TRANSCRIPT OF HEARING RE:**
16 **PLAINTIFF'S MOTION FOR 54(b) CERTIFICATION AND FOR STAY**
17 **PENDING APPEAL ON ORDER SHORTENING TIME**

18 APPEARANCES:

19 For the Plaintiff:

CODY S. MOUNTEER, ESQ.

20 For Counter Defendant:

I-CHE LAI, ESQ.

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25 RECORDED BY: JENNIFER GEROLD, COURT RECORDER

1 **Las Vegas, Nevada; Thursday, June 21, 2018**

2 [Proceeding commenced at 9:01 a.m.]

3
4 THE COURT: Good morning. Please be seated. Resolved
5 matters. Unopposed matters. Status checks. Stipulated continuances.

6 MR. MOUNTEER: Yes. Good morning, Your Honor, Cody
7 Munteer on page 12, the APCO Construction/Gemstone matter. There
8 was a --

9 THE COURT: Anybody else appearing?

10 MR. MOUNTEER: Sorry.

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

12 THE COURT: Okay.

13 MR. MOUNTEER: There was a motion on order shortening
14 time for a 54(b) certification and a NRAP 8(c) stay. After seeing the
15 opposition from opposing counsel, I think we've stipulated and agreed to
16 the orders. We will -- we've asked the Court for a 54(b) certification on
17 the order granting summary judgment in favor of Zitting, the subsequent
18 denial APCO's motion for reconsideration, and the order granting fees
19 and the judgment granting fees, and we would just ask for 30 days to get
20 the bond in place because that's what it takes for what my contractors
21 typically, once the order's signed, to get the bond for the appeals
22 [indiscernible].

23 THE COURT: So there's an agreement that it be certified
24 54(b)?

25 MR. LAI: Zitting does not oppose the request for certification.

1 THE COURT: I saw the limited opposition.

2 MR. LAI: Right. And our only opposition was to the fact that
3 to the extent they're seeking a stay without the bond. That would -- that's
4 why we would oppose it, but since APCO's counsel's stating that they're
5 agreeing to the bond for a full judgment amount, we have no opposition
6 to that amount.

7 THE COURT: All right. I had some questions about it, but --
8 so this 54(b) certification will make it an enforceable judgment, right?

9 MR. MOUNTEER: It will. And that's why we're asking for the
10 stay.

11 THE COURT: Right.

12 MR. MOUNTEER: And giving us --

13 THE COURT: That was one of my questions, if it weren't
14 certified, then arguably it's not enforceable, right?

15 MR. MOUNTEER: Correct, Your Honor.

16 THE COURT: As a judgment. All right. But, you know, by
17 writ of execution.

18 MR. MOUNTEER: Yes.

19 THE COURT: So that's what you want to go ahead and -- is
20 there any motion practice that's related to the orders that I made in other
21 cases involving -- in other cases involving the pay-if-paid?

22 MR. MOUNTEER: There is not, Your Honor. This is the case
23 that had gone to trial. I think the only thing that's pending before right
24 now with any of the other parties that went through trial is the fees and
25 costs motion. There's nothing with regard to the pay-if-paid.

1 THE COURT: Okay, so. Because I think there was one --
2 that was one of the contentions that was being made, as I understand it,
3 is that the ruling I made in -- on this case was a bit different from the one
4 I made in others, right? That's one of the --

5 MR. MOUNTEER: Yeah, originally, yes. That was the *Big-D*
6 *Construction* case and one of the reasons we're asking --

7 THE COURT: No, I'm talking about rulings I've made with
8 regard to other parties in this case relative to pay-if-paid, right. I've made
9 some rulings that are arguably inconsistent.

10 MR. MOUNTEER: I think what the argument is on that, Your
11 Honor, is Zitting was taken out of this case on summary judgment long
12 before trial.

13 THE COURT: Right.

14 MR. MOUNTEER: When the trial went through, Your Honor
15 came back and hailed on the pay-if-paid and on the specific contract
16 language in those orders. That is the same contract language that Zitting
17 has that my client, APCO Construction, is not responsible and it was
18 Camco who was responsible for that.

19 THE COURT: Right.

20 MR. MOUNTEER: That's why we feel that there will be
21 success on appeal, but until we can get up on appeal and get that
22 worked out.

23 THE COURT: Okay. Well, I mean, if you want it certified
24 54(b) at this time, in accordance with your stipulation, so ordered. So
25 what was it going to be stayed for 30 days pending posting of the bond; is

1 that right?

2 MR. MOUNTEER: Yeah. If I could just have 30 days from the
3 time of the entry of the judgment to, I mean, entry of this order to post the
4 bond.

5 THE COURT: Okay. Very well.

6 MR. MOUNTEER: Okay. Thank you, Your Honor.

7 THE COURT: Submit a proposed order.

8 MR. MOUNTEER: We'll present a --

9 THE COURT: And run it by counsel so you're all on the same
10 page.

11 MR. MOUNTEER: Yeah, will do.

12 THE COURT: Thanks.

13 MR. MOUNTEER: Perfect. Thank you.

14 MR. LAI: Thank you, Your Honor.

15 [Proceeding concluded at 9:04 a.m.]

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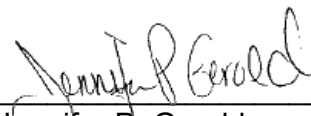
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21 ATTEST: I do hereby certify that I have truly and correctly transcribed the
22 audio/video proceedings in the above-entitled case to the best of my ability.

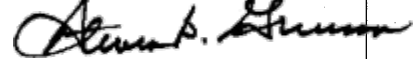
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16 **DISTRICT COURT**

17 **CLARK COUNTY, NEVADA**

18 APCO CONSTRUCTION, a Nevada
19 corporation,

20 Plaintiff,

21 vs.

22 GEMSTONE DEVELOPMENT WEST, INC., A
23 Nevada corporation,

24 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

**ORDER GRANTING MOTION
FOR 54(b) CERTIFICATION AND FOR
STAY PENDING APPEAL**

25 AND ALL RELATED MATTERS

26
27 Plaintiff APCO Construction's Motion for 54(b) Certification and for Stay Pending
28 Appeal on Order Shortening Time having come on for hearing before this Court on June 21,

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