IN THE SUPREME COURT OF THE STATE OF NEVADA

APCO CONSTRUCTION, INC., A NEVADA CORPORATION, Appellant, vs. ZITTING BROTHERS CONSTRUCTION, INC., Respondent.	Case No.: 75197 Appeal from the Eighth Judicial District Court, the Honorable Mark Denton Presiding

APPELLANT'S REPLY BRIEF

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I. INTRODUCTION

Appellant, APCO Construction (APCO), timely supplemented prior interrogatory responses that provided further description of affirmative defenses—concerning the payment schedule and conditions precedent to payment contained in the subcontract between the parties—of which Respondent, Zitting Brothers Construction, Inc. (Zitting), had actual knowledge and regarding which Zitting had both elicited and given deposition testimony. 13 Appellant's Appendix (AA) 2857-66 (eliciting testimony regarding payment schedules and conditions precedent); 12 AA 2671-701 (Zitting giving testimony regarding payment schedules and failure to meet conditions precedent). Because Zitting had knowledge of the information, APCO had no duty to supplement. Since Zitting suffered no prejudice and fairness warranted the defenses' consideration, the defenses should have been tried by consent. The district court, nonetheless, excluded contents of those interrogatories, specifically the payment schedule and conditions precedent defenses, based on its mistaken interpretation of NRCP 26(e)(2).[1] This fundamental misapplication requires reversal.

[1] The version of NRCP 26 in effect at the time provided that a party was under a duty to "seasonably . . . amend" a prior response to an interrogatory, if the party learns that the response is "incomplete or incorrect" and the information "has not otherwise been made known to the other parties during the discovery process or in writing." NRCP 26(e)(2) (2008). NRCP 26 has since been amended, and the analogous rule is now designated as NRCP 26(e)(1), requires the party to "timely supplement" an interrogatory response. *See* NRCP 26(e)(1) (2019).

On the contrary, Zitting asks this Court to affirm a judgment that entitles Zitting to be paid for work that was not complete when APCO left Manhattan West and for change orders that had been rejected. However, Zitting, as the plaintiff, had the burden to provide the district court with admissible evidence that Zitting had performed its scope of work, all change orders had been approved, and that payment was due under the subcontract. Zitting did not—and could not—meet its burden because, as confirmed by the testimony from Zitting's own NRCP 30(b)(6) designee, Zitting had not met the conditions precedent for payment. Thus, summary judgment was inappropriate, and this Court should reverse.

Likewise, the district court erred in its consideration of both the pay-if-paid provisions of the subcontract because it relied upon a misapplication NRS 624.624 and the decisions of this Court interpreting it. This, again, warrants reversal. The district court also applied the incorrect legal standard when concluding that, contrary to the evidence before it, Zitting complied with the conditions precedent for payment. This provides this Court yet another ground for reversal. Finally, the district court erred in granting summary judgment on Zitting's NRS 108 claim because, in doing so, the district court reached a conclusion contrary to NRS 108's overall statutory framework and the long-held legislative purpose underlying it. This, too, demonstrates summary judgment was inappropriate. As a result, this Court should reverse.

II. LEGAL ARGUMENT

A. THE DISTRICT COURT ABUSED ITS DISCRETION IN EXCLUDING THE PAYMENT SCHEDULE AND CONDITIONS PRECEDENT DEFENSES.

The district court's exclusion of the payment schedule and conditions precedent defenses is properly before this Court. As a result, this Court should hold that the district court abused its discretion in excluding those defenses because APCO was under no duty to amend the responses further describing the defenses because APCO timely amended those responses and because, at a minimum, the defenses should have been tried by consent. Thus, this Court should reverse.

1. This Court may review the district court's decision to exclude the conditions precedent defenses because it is contained within a final, appealable order.

To begin, Zitting "objects" to APCO's jurisdictional statement, arguing that the order granting the motion in limine to limit APCO's defenses to the enforceability of pay-if-paid provisions is not an appealable order.[2] *See* Respondent's Answering Brief (RAB) i. Zitting's objection is unfounded.

[2] Zitting's objection may actually result in a more APCO-favorable standard of review. A district court's order in limine is reviewed for an abuse of discretion, *see Whisler v. State*, 121 Nev. 401, 406, 116 P.3d 59, 62 (2005) ("A district court's ruling on a motion in limine is reviewed for an abuse of discretion."), while the district court's conclusions of law contained within an order granting summary judgment are reviewed de novo, *see Daisy Tr. v. Wells Fargo Bank, N.A.*, 135 Nev., Adv. Op. 30, 445 P.3d 846, 848 (2019) (This Court "review[s] a district court's decision to grant summary judgment and its conclusions of law de novo.").

Because the order granting partial summary judgment was certified as final under NRCP 54(b), the prior, interlocutory orders—including the minute order and the final, appealable orders relying upon it—may properly be reviewed by this Court. *Consol. Generator-Nevada, Inc. v. Cummins Engine Co., Inc.*, 114 Nev. 1304, 1312, 971 P.2d 1251, 1256 (1998) ("Although these orders are not independently appealable, since [appellant] is appealing from a final judgment the interlocutory orders entered prior to the final judgment may properly be heard by this court."). Indeed, the order granting partial summary judgment expressly concludes that "APCO cannot introduce any evidence to support any defenses against [Zitting's] claims" other than the purportedly void pay-if-paid-provisions. 14 AA 3247. Thus, even if this decision were not independently appealable, it is appealable because it is contained within a final, appealable order. *See Yu v. Yu*, 133 Nev. 737, 405 P.3d 639 (2017) (concluding that this Court may consider not-otherwise appealable determinations if they are contained within an otherwise independently appealable order). Accordingly, Zitting's first argument fails.

Thus, if this Court concludes the order in limine is not appealable, then the conclusions in the summary judgment on the same issue—the district court excluding the use of the payment schedule and conditions precedent defenses—would be subject to de novo review.

2. APCO had no duty to supplement its interrogatories because the information was made known to Zitting through deposition testimony.

The district court abused its discretion in concluding that APCO did not timely supplement its interrogatory responses because APCO had no duty to do so. Indeed, the district court, 14 AA 3246-47, and Zitting, RAB 23-38, seemed to believe that NRCP 26(e) required APCO to supplement the interrogatory responses despite the conditions precedent defenses being made known to Zitting through APCO's accounting designee's deposition testimony.[3] 13 AA 2857-65 (APCO accounting designee deposition testimony).

The district court abused its discretion in this conclusion—indeed, under NRCP 26(e), further disclosures "are only necessary when the omitted or after–acquired information has not otherwise been made known to the other parties during the discovery process or in writing," and, thus, there is no need to supplement "to include information already revealed by a witness in a deposition

[3] In addition to APCO's accounting designee's deposition testimony explicitly detailing these defenses, Zitting had actual knowledge of the conditions precedent defenses throughout the life of the case because the additional defenses were asserted as affirmative defenses when APCO answered Zitting's complaint eight years earlier, 5 AA 1106-17; because Zitting's scope of work—notably, the drywall—was not complete, as acknowledged by Zitting's designee during his deposition, 12 AA 2797-802; and because Zitting's designee testified that Zitting did not submit its required close-out documents and releases required under the subcontract, 12 AA 2679.

or otherwise through formal discovery." 8A Wright & Miller, *Fed. Prac. & Proc. Civ.* § 2049.11993 (3d ed.) (analyzing federal analog).

On this point, Zitting seems to argue that—although APCO had no duty to supplement its interrogatory responses to include affirmative defenses of which Zitting was made aware—the district court did not err in excluding the conditions precedent defenses because APCO's defenses "did not apprise Zitting of its grounds for refusing payment," and that a "reasonable mind may read the [affirmative] defenses to reflect only the 'pay-if-paid condition precedent." RAB 26. Yet, Zitting elicited conflicting testimony regarding the affirmative defenses from APCO's two NRCP 30(b)(6) designees after waiting seven years to notice, and subsequently depose, those designees. RAB 27. Thus, Zitting's NRCP 30(b)(6) testimony, that "Zitting always believed it complied with the requirements for payment," RAB 28, is incorrect.

First, APCO's accounting designee provided the explicit grounds for refusing Zitting payment, which relieved APCO of a duty to supplement the interrogatory responses and presented competing evidence regarding affirmative defenses at issue here. NRCP 26(e)(1); 8A Wright & Miller, *Fed. Prac. & Proc. Civ.* § 2049.11993 (3d ed.). Additionally, summary judgment is not appropriate if a conclusion can only be supported by the assumptions of "a reasonable mind"—rather, summary judgment requires the total absence of genuine issues of material

fact, and, if, as here, competing evidence is presented on a topic, then summary judgment is inappropriate. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-55 (1986) ("If reasonable minds could differ as to the import of the evidence," summary judgment is inappropriate; "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whe[n] he is ruling on a motion for summary judgment."); *Hidden Wells Ranch, Inc. v. Strip Realty, Inc.*, 83 Nev. 143, 145, 425 P.2d 599, 601 (1967) ("[T]he trial judge may not in granting summary judgment pass upon the credibility or weight of the opposing affidavits or evidence."). Thus, Zitting's counterargument is without merit and, indeed, demonstrates that the district court abused its discretion in excluding the defenses and relying upon those excluded defenses in granting summary judgment.

Second, Zitting presents a confusing argument regarding how Zitting was somehow "prejudice[d]" by the competing testimony of APCO's two NRCP 30(b)(6) designees.[4] RAB 4-6, 27, 31-38. However, in analyzing whether

[4] Zitting also argues that it "limited its discovery" and "would have approached discovery much differently" in 2010 "or shortly after"—a period during which it conducted no discovery on any party on any issue germane to this appeal—had APCO's interrogatory response been amended sooner. RAB 4-6; RAB 34-38. In doing so, however, Zitting merely cites to the arguments of its counsel made before the district court, which "are not evidence," "do not establish the facts of the case," and, thus, can be disregarded. *See Nev. Ass'n Servs., Inc. v. Eighth Judicial Dist. Court*, 130 Nev. 949, 957, 338 P.3d 1250, 1255 (2014).

the district court properly excluded evidence, "[t]he interrogating party's reliance on an answer, alone, is not sufficient to show prejudice." 23 Am. Jur. 2d *Depositions and Discovery* § 132 (2019). Additionally, Zitting's argument that this prejudice was "strengthened" because the APCO NRCP 30(b)(6) designees did not elect to "make [changes] to APCO's interrogatory responses" is illogical. The moment APCO's designees testified regarding the payment schedule and conditions precedent affirmative defenses, the topic of the testimony "became known" to Zitting "during the discovery process," and, thus, APCO was no longer required to supplement the interrogatory responses.[5] NRCP 26(e)(2) (2008). This Court should again disregard Zitting's argument to the contrary.

Third, Zitting now asserts that Zitting "always believed it complied with the requirements for payment." RAB 28. This is belied by the record and, indeed, by Zitting's own binding NRCP 30(b)(6) deposition testimony, in which Zitting's designee testified that Zitting's scope of work—notably, the drywall—was not

[5] Additionally, Zitting admits that both parties had knowledge of the payment schedule and conditions precedent affirmative defenses—Zitting argues that "APCO, as the general contractor overseeing the Project, independently knew what Zitting, the subcontractor, knew." RAB 33. This is dispositive—NRCP 26(e) only requires supplemental responses if the "information has not otherwise been made known to the other parties." So, if Zitting and APCO both knew of the defenses, then NRCP 26(e) does not require a supplemental interrogatory response—this confirms the district court abused its discretion in excluding the defenses.

complete, 12 AA 2797-802, and that Zitting did not submit its required close-out documents and releases required under the subcontract. 12 AA 2679.

Thus, the district court abused its discretion in relying on a mistaken understanding of NRCP 26(e)(2) in entering the order in limine precluding APCO's condition precedent defenses and in failing to consider those defenses in granting Zitting's motion for partial summary judgment.[6] *See State v. Eighth Judicial Dist. Court (Armstrong)*, 127 Nev. 927, 931-32, 267 P.3d 777, 780 (2011) (providing that a manifest abuse of discretion occurs when a district court clearly misinterprets or misapplies a law or rule). This Court should reverse.

3. APCO timely supplemented its interrogatory responses.

Even if APCO were under a duty to supplement, however, APCO timely supplemented its interrogatory responses to include the payment schedule and

[6] Zitting argues "other courts have excluded untimely evidence under similar circumstances," RAB 38-42, but provides no cases demonstrating similar circumstances. Instead, Zitting cites cases involving late-disclosed expert reports, a more narrow area of discovery governed by inapplicable portions of Rule 26, *see Transclean Corp. v. Bridgewood Services, Inc.*, 77 F. Supp. 2d 1045, 1063 (D. Minn. 1999) (striking expert's supplemental report); or *Heidelberg Harris, Inc. v. Mitsubishi Heavy Indus., Ltd.*, 1996 WL 680243 (N.D. Ill. Nov. 21, 1996) (party learned of information from expert report), or involve defenses that were not asserted until after a party moved for summary judgment, *see Inamed Corp. v. Kuzmak*, 275 F. Supp. 2d 1100, 1117 (C.D. Cal. 2002) (defense asserted after summary judgment). Neither situation applies here. Moreover, in each of these cases, the information excluded was information that only the party proffering the evidence would know or a defense that was raised after discovery closed. Given both parties knowledge of the conditions precedent, and Zitting's failure to meet them, these cases offer analysis wholly inapplicable here.

conditions precedent affirmative defenses.[7] To conclude the opposite would be to adopt an interpretation of NRCP 26 that directly contradicts both the plain text of the rule and of the settled interpretations of that text, including the interpretation of professors Wright and Miller.

Indeed, although no brightline rule exists to determine the timeliness of supplemental responses, "[s]upplementation need not be made as each new item of information is learned but should be made at appropriate intervals during the discovery period, and with special promptness as the trial date approaches." 8A Wright & Miller, *Fed. Prac. & Proc. Civ.* § 2049.1 (3d ed.) (citing 2010 Advisory Committee Notes to FRCP 26(e)). Supplementation is only necessary "if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing." NRCP 26(e)(2) (2008). Importantly, this means that a responding party is not "irrevocably bound" to its answers but, rather, that responding parties "must simply do their best, move on, and supplement as required." *In re MGM Mirage Sec. Litig.*, 2:09-CV-1558-GMN, 2014 WL 6675732, at *6 (D. Nev. Nov. 25, 2014) (citing 8 Wright &

[7] To provide additional clarity on this point, APCO provides this Court a visual timeline of relevant litigation events. *See* Timeline, p. 34. The timeline—and the sparsity of any litigation-related events during the years-long stay, as shown in the middle of the timeline—further demonstrates that APCO's interrogatories were supplemented at an "appropriate interval" and "with special promptness as the trial date approache[d]." 8A Wright & Miller, *Fed. Prac. & Proc. Civ.* § 2049.1 (3d ed.) (citing 2010 Advisory Committee Notes to FRCP 26(e)).

Miller, *Fed. Prac. & Proc. Civ.* § 2181 (3d ed.)). Additionally, "[a]nswers to interrogatories are unlike admissions and pleadings in that they can be contradicted through examination." 23 Am. Jur. 2d *Depositions and Discovery* § 132 (2019).

Zitting's answering brief goes to great lengths in arguing that APCO's interrogatory responses were not timely supplemented. RAB 28-38. In doing so, Zitting omits crucial facts—namely, that the underlying case was stayed for more than six years on all issues germane to this appeal. *See* Timeline, p. 34. Although this Court does not re-weigh facts and evidence, *Bombardier Transp. (Holdings) USA, Inc. v. Nevada Labor Comm'r*, 135 Nev., Adv. Op. 3, 433 P.3d 248, 256 (2019), closer examination of the timeline of the underlying litigation here reveals that the interrogatories were supplemented at an "appropriate interval" and "with special promptness as the trial date approache[d]" and, thus, were timely in accordance with NRCP 26(e)(2). *See* Timeline, p. 34. Because the interrogatories were timely supplemented, the district court abused its discretion in excluding the payment schedule and condition precedent defenses.

a. The litigation was stayed for six years on all issues germane to this appeal.

On April 30, 2009, Zitting filed its complaint. 4 AA 793. APCO timely answered Zitting's complaint, 5 AA 1106-17, and, in doing so, APCO asserted affirmative defenses for, among other things, Zitting's failure to meet conditions

precedent to payment, 5 AA 1113, and Gemstone's failure to pay APCO for Zitting's work, 5 AA 1112.

In March 2010, Zitting propounded interrogatories to APCO seeking, among many other things, the basis of APCO's conditions precedent defense. 9 AA 2138. APCO's initial interrogatory responses indicated that APCO would rely on the enforceability of the pay-if-paid provision in the subcontract to excuse payment to Zitting. *See* 9 AA 2122-39. Zitting did not notice or take any depositions of any APCO witness during that time frame, nor did Zitting move to compel supplemental interrogatory responses.

Within four months, however, the focus of the litigation drastically shifted—for the next six years, the litigation centered entirely on the issue of the priority of payment stemming from the foreclosure of Manhattan West by 'its lender, Scott Financial Corporation, and not on the claims of APCO and the various subcontractors, including Zitting. *See* Appellant's Reply Appendix (ARA) 118-21. Importantly, no discovery occurred regarding any issues germane to this appeal during that six-year period.

Indeed, in July of 2010, APCO filed for summary judgment on the priority issue, arguing that APCO and its various subcontractors, including Zitting, had priority over Scott Financial Corporation. ARA 1-13. Zitting joined APCO's motion. ARA 115-17. A flurry of motion work followed, and, eventually, Scott

Financial moved to stay all further activity in the underlying litigation until the issue of priority had been resolved. ARA 118-21. In late 2010, the district court stayed the litigation as to all issues, including the issues within this appeal, except for priority. ARA 118-21. As a result, no discovery occurred regarding the issues in this appeal during this time.

In 2012, the priority issue became the subject of an original proceeding before this Court that would not be resolved for another four years. *Compare In re Manhattan W. Mech.'s Lien Litig.*, Docket No. 61131 (Joint Petition for Writ of Mandamus or, in the Alternative, Prohibition, June 25, 2012), *with id.* (Notice in Lieu of Remittitur, Mar. 12, 2016). This Court eventually determined that Scott Financial had priority over the various lien claimants, including APCO and Zitting. *See In re Manhattan W. Mech.'s Lien Litig.*, 131 Nev., Adv. Op. 70, 359 P.3d 125 (2015). As a result, in April of 2016, the district court ordered the proceeds of the sale of Manhattan West to be released to Scott Financial. 8 AA 1816-18. And, again, during this four-year writ proceeding, neither Zitting nor APCO were litigating or conducting discovery on the issues relevant to this appeal, including the payment schedule and condition precedent defenses.

After the sale proceeds were distributed, the district court litigation began again, but the focus again shifted—for most of the next year in which the district court sought to determine which parties and claims remained following the stay.

To this end, a special master was appointed in 2016 to determine "the remaining claims, guide the parties in their dealings with each other and resolve any forthcoming disputes" over "documents, witnesses and so forth" following the years-long stay. ARA 122-32, 152-60. On October 7, 2016, the district court dismissed all but twenty parties from the litigation based on the special master's report and recommendation. 8 AA 1819-22. During this time, the motion work focused on identifying the remaining parties and claims but did not concern the validity or merits of the payment schedule and condition precedent defenses.

b. After the years-long stay, Zitting elicits deposition testimony regarding the defenses and APCO supplements the prior responses.

After years of litigation over collateral issues, it was not until early 2017 that litigation over the central issues relevant to this appeal—payment for work performed on Manhattan West pursuant to the prime contract and the subcontract—began in earnest in the district court.

To this end, Zitting did not re-serve its interrogatories on APCO until April 12, 2017, 11 AA 2520-70, and did not properly notice the deposition for APCO's two NRCP 30(b)(6) designees until May 11, 2017. ARA 171-80, 181-88. Those depositions did not take place until June 5, 2017, 8 AA 1853-72 (APCO construction designee) and July 18, 2017. 17 AA 3900-4013 (APCO accounting designee). Zitting did not object to deposing APCO's accounting designee after

the initial close of discovery. During these depositions, Zitting elicited testimony from APCO's designees regarding the basis of APCO's payment schedule and condition precedent affirmative defenses.[8] *See* 13 AA 2857-65.

Meanwhile, on March 29, 2017, APCO noticed Zitting's NRCP 30(b)(6) deposition. 18 AA 4018-25. Upon Zitting's request, APCO and Zitting agreed to continue the deposition to permit the parties to spend less on attorney fees and more time engaging in settlement discussions. 16 AA 3731. Three months later, APCO re-noticed Zitting's NRCP 30(b)(6) deposition, this time for June 28, 2017. 16 AA 3731. Once again, upon Zitting's request, APCO and Zitting agreed to postpone the deposition to engage in further settlement discussions. 19 AA 4290-97. Once again, upon Zitting's request, APCO and Zitting agreed to postpone the deposition to engage in further settlement discussions. 16 AA 3731.

On July 31, 2017, despite agreeing to postpone their own NRCP 30(b)(6) deposition to engage in further settlement discussions, Zitting filed a motion for partial summary judgment against APCO. 8 AA 1831-10, 2198. On October 5, 2017, at the initial hearing set for Zitting's motion for partial summary judgment, the district court reopened discovery to allow the parties forty-five days to

[8] To distract from the adverse testimony provided by APCO's accounting designee, Zitting claims that both APCO NRCP 30(b)(6) designees declined to amend APCO's answers to interrogatories when asked at the deposition. RAB 27. However, neither PMK notice included that as a topic for preparation. *See* 12 AA 2843-45; 19 AA 4406-09. Thus, this argument is without merit.

complete depositions that had been intentionally delayed per the parties' mutual agreement, including the deposition of Zitting's NRCP 30(b)(6) designee.[9] 11 AA 2414-33; 17 AA 3880.

Following the district court reopening discovery, Zitting's NRCP 30(b)(6) designee was deposed. 12 AA 2671-701. Contrary to his earlier sworn affidavit to the district court, 8 AA 1850, Zitting's designee's testimony confirmed that Zitting did not meet the five conditions precedent to be entitled to any retention payment. 12 AA 2671-701.

On November 7, 2017—a little more than six months after Zitting re-served its interrogatories, three months after Zitting deposed APCO's accounting designee's deposition about the payment schedule and condition precedent defenses, and within the forty-five days of additional discovery allowed by the district court—APCO supplemented its prior interrogatory responses to Zitting to confirm and underscore the payment schedule and condition precedent defenses of which Zitting already had knowledge. 17 AA 3765-817. Likewise, APCO supplemented its interrogatory responses within two weeks of taking Zitting's designee's deposition—which had been moved repeatedly at Zitting's request,

[9] Zitting did not object to its PMK being deposed after the initial close of discovery, 11 AA 2414-33, nor could it, because Zitting had requested the postponement. Had Zitting's PMK deposition been taken as originally noticed, the evidence regarding Zitting's failure to comply with the conditions for payment would have been put on the record before the initial discovery deadline.

compare 12 AA 2671, *with* 17 AA 3765—in which Zitting's designee directly contradicted his earlier sworn testimony regarding the payment schedule and conditions precedent defenses. *Compare* 8 AA 1850 (affidavit stating conditions precedent were met), *with* 12 AA 2792-97 (deposition testimony that conditions precedent were not met).

In short, APCO supplemented an interrogatory response—to which APCO was not judicially bound nor under a duty to supplement—well within the additional time for discovery ordered by the district court, to provide further description of an affirmative defense of which Zitting had actual knowledge and regarding which Zitting had both elicited and given testimony. Yet, the district court, nonetheless, excluded contents of that interrogatory because of its mistaken interpretation of the timeliness requirements of the inapplicable NRCP 26(e)(2) supplementation requirement.

Before the district court and in its answering brief, Zitting tries to obscure this timeline, and, instead, tries to focus upon simply the filing date of the complaint and the service date of the amended interrogatory responses to demonstrate prejudice. In doing so, Zitting omits the six-year-long stay, *compare* ARA 118-21 (order staying case in 2010), *with In re Manhattan W. Mech.'s Lien Litig.*, Docket No. 61131 (Notice in Lieu of Remittitur, Mar. 12, 2016), its knowledge of the payment schedule and conditions precedent defenses—including

the deposition testimony that Zitting elicited on the topic from APCO's accounting designee, 13 AA 2857-65—and the timely amendment of the interrogatory answer that APCO supplemented within the additional discovery period ordered by the district court. Thus, even if APCO were under a duty to supplement the interrogatory responses, APCO timely amended the interrogatory response, and the district court abused its discretion in concluding otherwise. Reversal is warranted.

4. The district court abused its discretion in not allowing the payment schedule and condition precedent defenses to be tried by consent.

Even if APCO had a duty to supplement its interrogatories, and even if that amendment had not been timely, the district court, nonetheless, abused its discretion in excluding the payment schedule and condition precedent defenses because those defenses should have been tried by consent.

On this point, Zitting argues, at some length, that APCO either waived the argument by not "properly" raising the issue below, RAB 42-44, or that APCO "has not shown" that trial by consent is proper. RAB 45-47. Zitting is incorrect in both instances.

As to the first point, the trial by consent issue was properly raised below and, thus, is properly before this Court. The issue was raised in APCO's motion for reconsideration, *see* 16 AA 3654-57, and was entertained on the merits by the district court, *see* 19 AA 4446-66. Because the district court "elected to entertain

the motion [for reconsideration] on its merits," and, by extension, the trial-by-consent issue contained within it, then this Court "may consider the arguments asserted in the reconsideration motion in deciding" this appeal. *Arnold v. Kip*, 123 Nev. 410, 417, 168 P.3d 1050, 1054 (2007) ("[I]f the reconsideration order and motion are properly part of the record on appeal from the final judgment, and if the district court elected to entertain the motion on its merits, then we may consider the arguments asserted in the reconsideration motion in deciding an appeal from the final judgment."). Thus, the issue is properly before this Court, and Zitting's argument fails.

As to the second point, Zitting argues, contrary to the record, that it "did not have fair notice of those defenses" and would be prejudiced by their inclusion. RAB 46. Much like the district court, Zitting fails to provide the applicable analysis on this issue—whether the inclusion of affirmative defenses of which Zitting had actual knowledge, and which Zitting has to prove as part of its case-in-chief,[10] would somehow deprive Zitting of its "ability to respond and its conduct of the case," as opposed to whether the consideration of the affirmative defenses "[could lead] to an unfavorable verdict," *W. Coast Paving, Inc. v. Engineered Structures, Inc.*, Docket No. 67877, 2016 WL 4082447, at *1 (Order of

[10] Zitting, as the plaintiff, "has the burden to plead and prove that it fulfilled conditions precedent in order to recover on a breach of contract claim." *Clark County Sch. Dist. v. Richardson Constr., Inc.*, 123 Nev. 382, 395, 168 P.3d 87, 95 (2007).

Affirmance, July 28, 2016) (citing *Jeong v. Minn. Mut. Life Ins. Co.*, 46 Fed. App'x 448, 450 (9th Cir. 2002))—which demonstrates that Zitting was not prejudiced by the inclusion of the payment schedule and conditions precedent defenses and, thus, that fairness warranted consideration of those defenses. *Douglas Disposal, Inc. v. Wee Haul, LLC*, 123 Nev. 552, 558, 170 P.3d 508, 517 (2007) ("[A]n affirmative defense may be tried by consent or when fairness warrants consideration of the affirmative defense and the plaintiff will not be prejudiced by the district court's consideration of it."). Thus, the payment schedule and conditions precedent defenses should have been tried by consent, and the district court abused its discretion in reaching the opposite conclusion. As a result, reversal is warranted.

Further, Zitting claims that it never expressly or impliedly consented to the trial of additional defenses. RAB 45-46. To support its argument, Zitting incorrectly maintains that its motion for summary judgment addressed only APCO's pay-if-paid defense. RAB 46. However, Zitting's argument misunderstands the nature of its claims—Zitting's claim for payment and the requirements for payment under the subcontract necessitated that Zitting prove each condition precedent in order to recover. *Clark County Sch. Dist. v. Richardson Constr., Inc.*, 123 Nev. 382, 395, 168 P.3d 87, 95 (2007). These conditions precedent were part of Zitting's case in chief, which Zitting had the

burden to prove. *Id.* Although Zitting sought relief from one purported condition precedent—that receipt of payment from the owner was an unenforceable condition under NRS Chapter 624—the district court still had to determine if there were material facts that showed Zitting had not satisfied *all* of the conditions for payment. *See* Restatement (Second) of Contracts § 237 (1981). Thus, by opening the door to this theory of recovery, the issue of conditions precedent was tried by the consent of the parties. *See United States v. Whitworth*, 856 F.2d 1268, 1285 (9th Cir. 1988) (under the rule of curative admissibility, or the "opening the door" doctrine, the introduction of inadmissible evidence by one party allows an opponent, in the court's discretion, to introduce evidence on the same issue to rebut any false impression that might have resulted from the earlier admission); *see also* I J. Wigmore, Evidence § 15 (Tillers rev. 1983). Otherwise, Zitting could not recover on its breach of contract claim. Thus, the district court erred in failing to allow the defenses to be tried by consent, and reversal is appropriate.

B. THE DISTRICT COURT ERRED IN ITS INTERPRETATION OF THE PAY-IF-PAID DEFENSES.

The district court also erred in its consideration of the affirmative defense it did consider—the pay-if-paid defenses, which, contrary to this Court's decision in *Padilla Constr. Co. of Nevada v. Big-D Constr. Corp.*, Docket No. 67937, 2016 WL 6837851 (Order of Affirmance, Nov. 18 2016) (unpublished), the district court concluded were "void and unenforceable" or "against public policy." 14 AA 3244.

In its answering brief, Zitting echoes the district court's faulty position and ignores the payment schedule contained within the subcontract.[11] In doing so, Zitting advances a definition of "payment schedule" that this Court expressly rejected in *Padilla*: rather than Zitting's unsupported definition of "payment schedule" requiring only a schedule that "turns on the passage of time," RAB 51, this Court has recognized that a valid, enforceable payment schedule may exist pursuant to NRS 624.624(1)(a) when the schedule is triggered after owner payment. *See Padilla Constr. Co. of Nevada v. Big-D Constr. Corp.*, Docket No. 67397, 2016 WL 6837851, at *2 (Order of Affirmance, Nov. 18 2016) (unpublished) ("Because the parties' subcontract contained a payment schedule that required that [subcontractor] be paid within ten days after [owner] accepted [subcontractor]'s work and paid [prime contractor] for that work and it is undisputed that [owner] never accepted [subcontractor]'s work and never paid [prime contractor] for [subcontractor]'s work, the district court correctly found that payment never became due to [subcontractor] under the subcontract or

[11] Additionally, contrary to Zitting's assertion, RAB 49-52, the subcontract includes a valid payment schedule. 9 AA 1920-21. Thus, this Court can safely disregard Zitting's analysis to the contrary, which asks this Court to examine the inapplicable NRS 624.624(1)(b). Even still, the case's current procedural posture makes an accurate analysis of the provisions under NRS 624.624(1)(b) impossible—given the litany of disputed material facts, this Court cannot accurately ascertain whether Zitting complied with the conditions precedent to the contract and, thus, ever submitted any valid requests for payment, further demonstrating the impropriety of summary judgment.

NRS 624.624(1)(a).”). As support for its payment schedule argument, Zitting only points to different state courts interpreting their distinct statutes and, in doing so, asks this Court to ignore its own analysis of a Nevada statute. This Court should not be persuaded. Rather, this Court should apply the *Padilla* analysis here and, having done so, reverse the district court’s grant of summary judgment.

Zitting further argues that this Court should not adopt the analysis of NRS 624.624 announced in *Padilla* because “[t]here is no evidence that any of Zitting’s work was rejected,” as was the case with the subcontractor in *Padilla*. *See* RAB 54. Zitting’s argument is without merit—APCO’s accounting designee testified that several of the change orders at issue were not approved by Gemstone, 12 AA 2858; 12 AA 1265. A short while later, and in stark contrast to his earlier sworn declaration, Zitting’s designee testified he had “no knowledge” of whether APCO ever received “approval and final acceptance” of Zitting’s work on the project. 12 AA 2693. The district court improperly weighed this competing testimony and failed to apply the proper payment-schedule definition in granting summary judgment. Thus, this Court should apply *Padilla*’s payment-schedule definition here and, in doing so, reverse the district court’s improper grant of summary judgment.[12]

[12] Strangely, Zitting argues that “[w]ithout any explanation, APCO . . . ignores altogether the applicability of NRS 624.628(3)(a) . . . and thereby waives any argument based on the statute.” RAB 50. Zitting’s assertion is entirely

Zitting also takes issue with the "case-by-case" approach to analyzing pay-if-paid provisions, arguing that the statutory language of NRS 624.624 invalidates the requirements for courts to engage in a "case-by-case analysis" of whether the provision violates public policy by waiving the subcontractor's lien rights. RAB 56. Zitting's argument is again without merit—this Court requires courts to conduct such an analysis, and has not put statutory limitations on the propriety of that analysis. *See Lehrer McGovern Bovis, Inc. v. Bullock Insulation, Inc.*, 124 Nev. 1102, 1116, 197 P.3d 1032, 1041 (2008) ("The enforceability of each lien waiver clause must be resolved on a case-by-case basis by considering whether the form of the lien waiver clause violates Nevada's public policy to secure payment for contractors"); *see also Cashman Equip. Co. v. W. Edna Associates, Ltd.*, 132 Nev. 689, 694, 380 P.3d 844, 848 (2016) ("[T]he district court must engage in a public policy analysis particular to each lien waiver provision that the court is asked to enforce."). Thus, although the district court was required to conduct a case-by-case analysis of the purported waiver of Zitting's lien rights, it failed to do so.[13] Reversal is appropriate.

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unfounded—APCO argued, extensively, that NRS 624.628(3)(a)'s rights-waiver requirement was not met by the subcontract and, thus, was inapplicable. *See* Appellant's Opening Brief 37-39.

[13] Zitting also presents an argument that the legislative intent of NRS 624 supports the district court's grant of summary judgment, RAB 56-57, but fails to cite to any legislative history or relevant authority regarding that purported intent. Thus, this

C. THE DISTRICT COURT ERRED IN ITS INTERPRETATION OF THE SUBCONTRACT.

The district court's failure to properly analyze whether Zitting met the conditions precedent to payment under the subcontract warrants reversal. Zitting's counterarguments both misunderstand the terms of the subcontract and misstate the applicable standard for the conditions precedent. Nonetheless, Zitting's binding testimony creates an issue of fact demonstrating the impropriety of summary judgment and, as a result, warrants reversal.

1. The timing of APCO's departure does not excuse Zitting's failure to meet the conditions precedent to payment.

Zitting's first argument on this point misunderstands the effect of the conditions precedent for payment on any obligation arising from the subcontract. RAB 59-60. Although APCO turned over Manhattan West to a subsequent prime contractor, Zitting is not entitled to payment because Zitting failed to perform the conditions precedent for payment within the subcontract and, thus, was never entitled to payment.[14] 17A Am. Jur. 2d *Contracts* § 447 (2019) (A condition

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Court need not consider it. *Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (providing that this Court need not consider arguments not adequately briefed, supported by relevant authority, or cogently argued).

[14] Zitting's argument regarding NRS 624.626 is also without merit. RAB 61-62. The provisions in Zitting's answering brief only apply to agreements terminated because a subcontractor stops work pursuant to certain inapplicable scenarios. NRS 624.626(2), (4), and (5). Thus, this Court need not consider them. *See Davis*

precedent "is an act or event . . . that must occur before . . . a duty to perform a promise in an agreement arises."); 9 AA 1920-21 (subcontract's payment schedule and conditions precedent). On this point, Zitting seemingly argues that, despite not performing the conditions precedent to payment, the timing of APCO's departure should provide Zitting with a $900,000 windfall, RAB 59-60. However, the numerous factual issues regarding Zitting's non-performance, as well as APCO's eventual departure, are questions of fact that demonstrate that the district court erred in granting summary judgment. 17A Am. Jur. 2d *Contracts* § 598 (2019) (whether a party breached a contract by the manner of performance is a factual question). Thus, this Court should reverse.

2. <u>Zitting did not comply with the conditions precedent.</u>

What is clear from the record before this Court, however, is that Zitting failed to meet the conditions precedent to payment, under either a strict compliance or a substantial compliance standard, and that this issue could only be resolved after a trial on the merits, not summary judgment.

Courts require strict compliance with contractual conditions precedent. *MB Am., Inc. v. Alaska Pac. Leasing*, 132 Nev., Adv. Op. 8, 367 P.3d 1286, 1288 (2016); 17A Am. Jur. 2d *Contracts* § 598 (2019) ("An express condition of a contract must be literally performed in order for the relevant obligation to arise.").

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v. Gomez, 92 Nev. 629, 629, 555 P.2d 1228, 1228 (1976) (arguments "are without merit" and this Court "need not consider them.").

The district court applied a less-stringent legal standard—substantial compliance—in assessing whether Zitting complied with the conditions precedent for payment, and, as a result, summary judgment was improper. *Staccato v. Valley Hosp.*, 123 Nev. 526, 528, 170 P.3d 503, 504 (2007) ("Because the district court's decision was based on an incorrect legal standard, we reverse its judgment and remand this matter."). Under either standard, however, summary judgment was inappropriate because genuine issues of material fact remain regarding the performance of the conditions precedent for payment, and, as a result, reversal is appropriate.

Both Zitting and the district court mistakenly believe that substantial compliance governs the conditions precedent at issue here.[15] *See* 14 AA 3545; RAB 64-67. Even if this were the correct standard, however, genuine issues of fact regarding substantial compliance would still preclude summary judgment on this issue. 17A Am. Jur. 2d *Contracts* § 607 (2019) ("[T]he question whether a party has substantially performed is one of fact."). Substantial performance requires "the performance of all important parts" of a contract. *Id.* § 606. Here, the subcontract

[15] Despite making broad, unfounded assertions about strict compliance rule only "apply[ing] outside of construction contracts," RAB 65, Zitting actually concedes that the subcontract requires strict compliance in order to fulfill Zitting's scope of work. RAB 66-67. "The substantial performance rule does not apply when," as here, "the parties, by the terms of their agreement, make it clear that only complete performance will be satisfactory." 15 *Williston on Contracts* § 44:53 (4th ed.). Thus, strict compliance is the relevant legal standard.

outlined five conditions precedent for payment: (1) completion of drywall within the buildings; (2) the approval and final acceptance of the work by Gemstone; (3) receipt of final payment by APCO from Gemstone; (4) Zitting's delivery of all as-built drawings and other close-out documents to APCO; and (5) Zitting's delivery of releases and waiver of claims. 9 AA 1921. The subcontract further states that "[c]ompletion of the entire building" is a condition precedent to the release of retention payments, and specifies that a "[b]uilding is considered complete as soon as drywall is completed." 9 AA 1921. Zitting's own testimony indicates that buildings 8 and 9 were not complete, 12 AA 2695, while APCO's accounting designee testified that the buildings were not complete and that not all of Zitting's change order work was approved by Gemstone, a condition precedent to Zitting being paid. 13 AA 2858, 2864-66. Thus, genuine issues of material fact remain regarding whether Zitting "perform[ed] of all important parts" of the subcontract, and, thus, summary judgment was inappropriate.

The analysis under a strict compliance standard is the same. The subcontract requires that only "[i]n consideration of the strict and complete and timely performance of all [s]ubcontract [w]ork" did APCO and Zitting agree to the work and payment as described in the subcontract. 9 AA 1919. Zitting argues that it "has strictly and completely complied with its scope of work" under the subcontract. RAB 67. Zitting's assertion is not supported by the record. Indeed,

Zitting only presents the testimony of one APCO 30(b)(6) designee, RAB 66, while ignoring the testimony of APCO's other NRCP 30(b)(6) designee, as well as Zitting's own NRCP 30(b)(6) designee—both of which confirm that Zitting never completed its scope of work under the subcontract. 12 AA 2679-95 (Zitting's designee testifying scope of work was not completed); 13 AA 2857 (APCO's accounting designee confirming Zitting did not complete scope of work). Thus, the arguments of Zitting's counsel in its answering brief can be ignored, *see Nev. Ass'n Servs.*, 130 Nev. at 957, 338 P.3d at 1255, while the binding deposition testimony of both APCO and Zitting demonstrate that Zitting did not strictly comply with the conditions precedent to payment. and, as a result, the district court erred in granting summary judgment.

D. THE DISTRICT COURT ERRED IN ITS INTERPRETATION OF ZITTING'S NRS 108 CLAIM.

Finally, the district court erred in granting summary judgment on Zitting's claims made under NRS 108.239(12) because APCO has no ownership interest in Manhattan West and, thus, cannot be held liable for a deficiency judgment in the property.[16] Additionally, the district court erred in making APCO a de facto guarantor of Gemstone's deficiency judgment despite the plain language of

[16] This Court has already determined priority of payment under NRS 108, *see In re Manhattan W. Mech.'s Lien Litig.*, 131 Nev., Adv. Op. 70, 359 P.3d 125 (2015), and payment has already been disbursed. 8 AA 1816-1818 (releasing net proceeds from the sale to Scott Financial Corporation).

NRS 108.235(2) which mandates that only in "cases where a prime contractor has been paid for the work, materials or equipment which are the subject of a [mechanic's lien]" is a prime contractor obligated to indemnify the owner.

Zitting's answering brief seeks to parse these statutes out without considering them in harmony and without giving effect to each word within them. In doing so, Zitting asks this Court to adopt a statutory interpretation scheme inconsistent with the Court's long-held canons of interpretation, in which the Court "will interpret . . . a statute in harmony with other . . . statutes," *Bank of Am., N.A. v. SFR Investments Pool 1, LLC*, 134 Nev., Adv. Op. 72, 427 P.3d 113, 119 (2018), and "[i]f possible, [give] every word and every provision in a statute . . . effect. None should be ignored [or] given an interpretation that causes it to . . . have no consequence." *State Eng'r v. Happy Creek, Inc.*, 135 Nev., Adv. Op. 41 (2019) (citing Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 174 (2012)).

Reading the two statutes in harmony produces a simple result: under NRS 108.239(12), a "party whose claim is not satisfied" by a mechanics' lien foreclosure "is entitled to personal judgment for the residue against" either the prime contractor, if the owner has paid the prime contractor for the work, or if, as here, the owner has not paid the prime contractor for the work, then the party is entitled to a personal judgment against the owner, consistent with NRS 109.235(2).

This result, however, runs contrary to the district court's decision, 14 AA 3245, and, that, demonstrates that summary judgment on Zitting's NRS 108 claim was improper.[17]

Additionally, this result is consistent with the presumption that the Legislature "[does] not to intend to overturn long-established principles of law" when enacting a statute. *Shadow Wood Homeowners Ass'n v. N.Y. Cmty. Bancorp. Inc.*, 132 Nev. 49, 59, 366 P.3d 1105, 1112 (2016) (quoting *Hardy Cos., Inc. v. SNMARK, LLC*, 126 Nev. 528, 537, 245 P.3d 1149, 1155-56 (2010)). Indeed, the long-established "purpose of a mechanics' lien is to prevent unjust enrichment of a property owner"—not the prime contractor—"at the expense of laborers or material suppliers," *Basic Modular Facilities, Inc. v. Ehsanipour*, 83 Cal. Rptr. 2d 462 (Cal. Ct. App. 4th 1999), and, as a result, the object of Nevada's "mechanics' lien statutes is to secure payment to those who perform labor or furnish material to improve the property of the owner." *Lehrer McGovern Bovis, Inc. v. Bullock Insulation, Inc.*, 124 Nev. 1102, 1115, 197 P.3d 1032, 1041 (2008); *see also In re Fontainebleau Las Vegas Holdings*, 128 Nev. 556, 573-575, 289 P.3d 1199, 1210-11 (2012) (providing history of mechanics' lien statutes). Thus, this Court should

[17] This error resulted in the district court awarding Zitting prejudgment interest in the amount of $542,361.20, and post judgment interest. 19 AA 4481-82. Pre- and post-judgment interest was awarded solely based upon Zitting's NRS Chapter 108 claim. *See* 19 AA 4481-82. Thus, given the impropriety of the district court's decision, this Court should, at a minimum, vacate this cost award.

presume that the Legislature did not intend to overturn that long-standing principal in enacting NRS 108.239(12) and NRS 108.235(2) to allow a prime contractor to become the guarantor of a property's owner in the event of non-payment. This presumption further demonstrates the impropriety of summary judgment and, as a result, further warrants reversal.

III. CONCLUSION

APCO timely supplemented a prior interrogatory response to include defenses of which Zitting had actual knowledge, and the district court abused its discretion in excluding them. Even still, the issues should have been tried by consent, and the district court erred in not allowing the issues to proceed be trial. Further, the district court erred in its consideration of the pay-if-paid provisions of the subcontract because it relied upon a misapplication NRS 624.624 and the decisions of this Court interpreting it. Additionally, the district court applied the incorrect legal standard when concluding, contrary to the evidence before it, that Zitting complied with conditions precedent. Finally, the district court erred in granting summary judgment on Zitting's NRS 108 claim because, in doing so, the district court reached a conclusion contrary to NRS 108's overall statutory framework and the long-held legislative purpose underlying it. This, too, demonstrates that summary judgment was inappropriate. As a result, APCO respectfully requests this Court reverse the district court's findings of fact,

conclusions of law, and order granting Zitting's motion for partial summary judgment, entered on January 2, 2018, 14 AA 3239-3249, and certified as final under NRCP 54(b) on July 30, 2018, 26 AA 6052-6054; the district court's order denying APCO's motion for reconsideration of the order granting Zitting's motion for partial summary judgment, entered on January 25, 2018, 19 AA 4474-4475; the district court's order determining the amount of Zitting's attorney fees, costs and prejudgment interest, entered on May 8, 2018, 23 AA 5291-5293; and the district court's order granting the motion in limine to limit the defenses of APCO to the enforceability of pay-if-paid provisions, entered on December 15, 2017. 14 AA 3250-3255.

Dated this 16th day of October, 2019.

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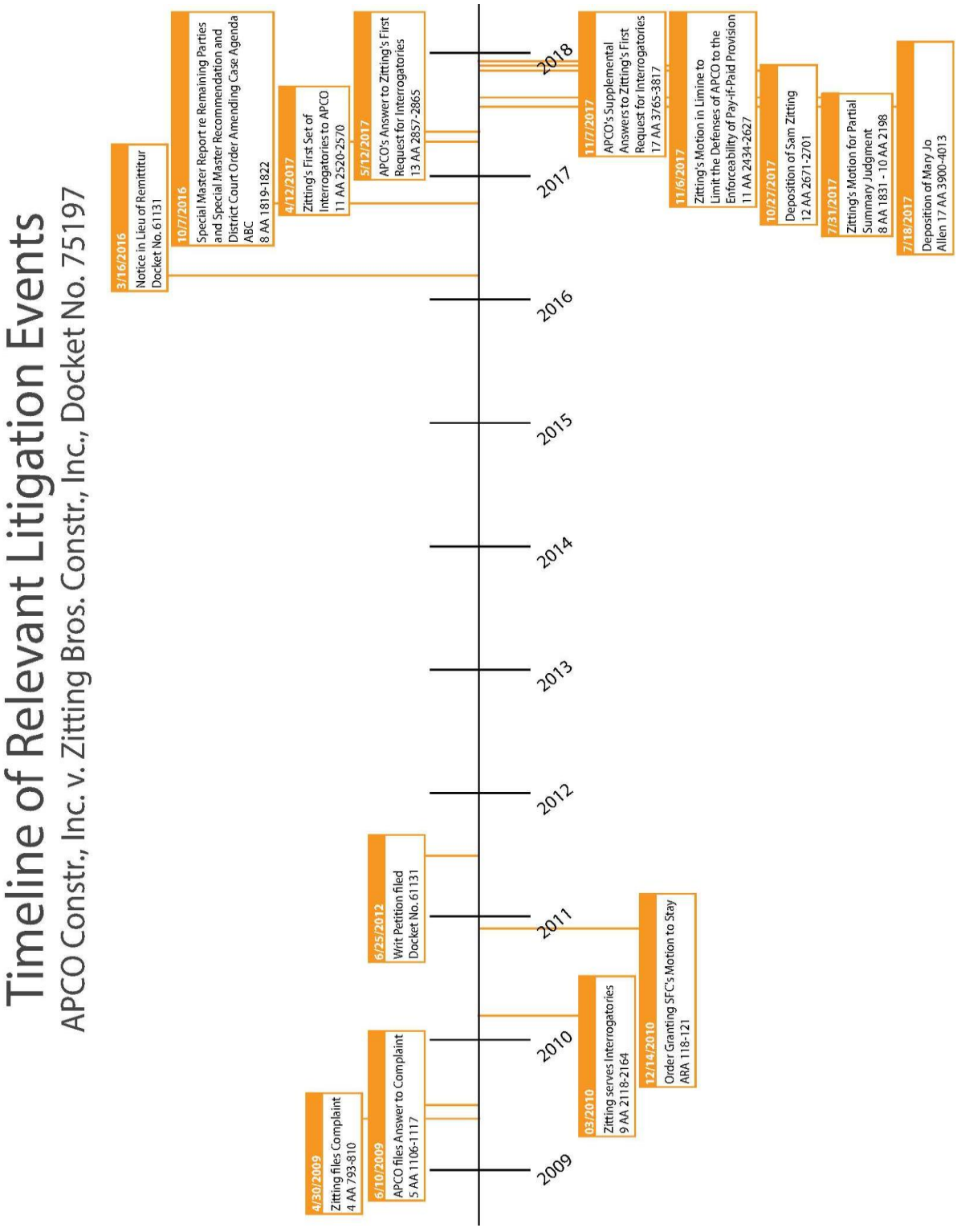
TIMELINE


Timeline of Relevant Litigation Events
APCO Constr., Inc. v. Zitting Bros. Constr., Inc., Docket No. 75197
2009
2010
2011
2012
2013
2014
2015
2016
2017
2018
4/30/2009
Zitting files Complaint
4 AA 793-810
6/10/2009
APCO files Answer to Complaint
5 AA 1106-1117
6/25/2012
Writ Petition filed
Docket No. 61131
03/2010
Zitting serves Interrogatories
9 AA 2118-2164
12/14/2010
Order Granting SFC's Motion to Stay
ARA 118-121
3/16/2016
Notice in Lieu of Remittitur
Docket No. 61131
10/7/2016
Special Master Report re Remaining Parties and Special Master Recommendation and District Court Order Amending Case Agenda
ABC
8 AA 1819-1822
4/12/2017
Zitting's First Set of Interrogatories to APCO
11 AA 2520-2570
5/12/2017
APCO's Answer to Zitting's First Request for Interrogatories
13 AA 2857-2865
11/7/2017
APCO's Supplemental Answers to Zitting's First Request for Interrogatories
17 AA 3765-3817
11/6/2017
Zitting's Motion in Limine to Limit the Defenses of APCO to the Enforceability of Pay-if-Paid Provision
11 AA 2434-2627
10/27/2017
Deposition of Sam Zitting
12 AA 2671-2701
7/31/2017
Zitting's Motion for Partial Summary Judgment
8 AA 1831 - 10 AA 2198
7/18/2017
Deposition of Mary Jo Allen 17 AA 3900-4013

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 14-point Times New Roman font.

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

☒ proportionally spaced, has a typeface of 14 points or more and contains 8,213 words; or

☐ does not exceed _____ pages.

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

sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 16th day of October, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing **APPELLANT'S REPLY BRIEF AND APPELLANT'S REPLY APPENDIX, VOLUME 1** were filed electronically with the Nevada Supreme Court on the 16th day of October, 2019. Electronic Service of the foregoing documents shall be made in accordance with the Master Service List as follows:

I-Che Lai
Jorge Ramirez

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

N/A

/s/ Leah Dell
An employee of Marquis Aurbach Coffing