

**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

Electronically Filed  
Oct 16 2019 07:16 p.m.  
Elizabeth A. Brown  
Clerk of Supreme Court

Appeal from the Eighth Judicial District  
Court, the Honorable Mark Denton  
Presiding

**APPELLANT'S REPLY APPENDIX**  
**(Volume 1, Bates Nos. 1–216)**

**Marquis Aurbach Coffing**

Micah S. Echols, Esq.  
Nevada Bar No. 8437  
Cody S. Mounteer, Esq.  
Nevada Bar No. 11220  
Tom W. Stewart, Esq.  
Nevada Bar No. 14280  
10001 Park Run Drive  
Las Vegas, Nevada 89145  
Telephone: (702) 382-0711  
Facsimile: (702) 382-5816  
mechols@maclaw.com  
cmounteer@maclaw.com  
tstewart@maclaw.com

**Fennemore Craig, P.C.**

Christopher H. Byrd, Esq.  
Nevada Bar No. 1633  
John Randall Jefferies, Esq.  
Nevada Bar No. 3512  
300 S. Fourth Street, 14th Floor  
Las Vegas, NV 89101  
Telephone: (702) 692-8000  
Facsimile: (702) 692-8099  
cbyrd@fclaw.com  
rjefferies@fclaw.com

*Attorneys for Appellant, APCO Construction, Inc.*

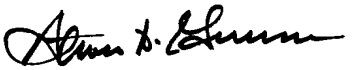
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CLERK OF THE COURT

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Gwen Rutar Mullins, Esq.

Nevada Bar No. 3146

Wade B. Gochmour, Esq.

Nevada Bar No. 6314

**Howard & Howard Attorneys PLLC**

3800 Howard Hughes Parkway

Suite 1400

Las Vegas, NV 89169

Telephone (702) 257-1483

Facsimile (702) 567-1568

E-Mail: grm@h2law.com

wbg@h2law.com

*Attorneys for APCO Construction*

**FILE WITH  
MASTER CALENDAR**

**DISTRICT COURT  
CLARK COUNTY, NEVADA**

APCO CONSTRUCTION, a Nevada  
corporation,

Plaintiff,

vs.

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

Defendants.

AND ALL RELATED CASES AND  
MATTERS


CASE NO.: A571228  
DEPT. NO.: XXV

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

**APCO'S MOTION FOR SUMMARY  
JUDGMENT ON PRIORITY**

Date:

Time:

DEPARTMENT XXV  
NOTICE OF HEARING  
DATE 7/12/10 TIME 10:00 am  
APPROVED BY 

PLEASE PROVIDE A  
COURTESY COPY OF THE  
FILE STAMPED DOCUMENT TO  
DEPARTMENT 25

Page 1 of 13

#1617249

06-18-10 A11:25 IN

ARA 000001

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



1                                   **APCO'S MOTION FOR SUMMARY JUDGMENT ON PRIORITY**

2           APCO CONSTRUCTION ("APCO"), by and through its attorneys of record, Gwen  
3 Rutar Mullins, Esq. and Wade B. Gochmour, Esq., of the law firm of HOWARD & HOWARD  
4 ATTORNEYS PLLC, pursuant to N.R.C.P. Rule 56 hereby moves this Honorable Court for an  
5 order granting summary judgment in favor of APCO and all lien claimants on the issue of  
6 priority of the lien claims over any interest of Scott Financial Corporation ("Scott") and/or  
7 Gemstone Development West, Inc.

8           This Motion is made and based upon the papers and pleadings on file herein, the Points  
9 and Authorities attached, and any other evidence and argument presented at the time of the  
10 hearing hereof.

11           DATED this 17<sup>th</sup> day of June 2010.

12                                   HOWARD & HOWARD ATTORNEYS PLLC

13  
14                                   /s/ Wade B. Gochmour

15                                   Gwen Rutar Mullins, Esq.

16                                   Nevada Bar No. 3146

17                                   Wade B. Gochmour, Esq.

18                                   Nevada Bar No. 6314

19                                   3800 Howard Hughes Pkwy., Ste. 1400

20                                   Las Vegas, Nevada 89169-5914

21                                   Attorneys for APCO Construction

22                                   **ORDER SHORTENING TIME**

23           GOOD CAUSE APPEARING THEREFORE, IT IS HEREBY ORDERED that the time  
24 set for hearing on APCO's Motion for Summary Judgment on Priority will be heard on July 12,  
25 2010 at 10:00 a.m.

26           Dated: June 21, 2010

27                                     
28                                   DISTRICT COURT JUDGE

                                  KATHLEEN E. DELANEY

**DECLARATION OF WADE B. GOCHNOUR, ESQ.**

I, Wade B. Gochmour, declare and state as follows:

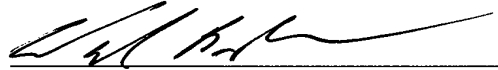
1. I am an attorney licensed to practice law in the state of Nevada and am counsel of record for APCO Construction in this action. I make this declaration in support of APCO's Application for Order Shortening Time.

2. That Scott Financial Services has filed a similar Motion for Summary Judgment on Priority which is scheduled to be heard on July 12, 2010 at 10:00 a.m. Judicial economy would be served by shortening the time for APCO's motion so that both motions may be heard and decided at the same time. Accordingly, APCO requests that the time for hearing on its motion be shortened and that it be scheduled for hearing on July 12, 2010 at 10:00 a.m.

3. This Motion is made in good faith and is not made to delay a trial or hearing of any other matter in this case.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: June 17, 2010

  
Wade B. Gochmour

**MEMORANDUM OF POINTS AND AUTHORITIES**

**I.**

**SUMMARY OF ARGUMENT**

There is no dispute that APCO and its subcontractors started work on the ManhattanWest Project (the "Project") prior to the recording of the Senior Debt Deed Of Trust And Security Agreement With Assignment of Rents And Fixtures Filing (Construction)(\$110,000,000) (hereafter the "Construction Deed of Trust"). APCO began work on the Project no later than May 2007. In turn, the Construction Deed of Trust was not recorded

1 until February 7, 2008. *See* Construction Deed of Trust, attached as Exhibit 1. Therefore,  
2 pursuant to NRS 108.225, the mechanic's lien claimants have priority over the Construction  
3 Deed of Trust.

4 Scott filed other deeds of trust on the property covering the Project beginning on July 5,  
5 2006, with various amendments thereafter<sup>1</sup>. However, these deeds of trust have no effect on the  
6 issue of priority because Scott with full knowledge of the ramifications of doing so executed  
7 and recorded a Mezzanine Deeds of Trust Subordination Agreement (the "Subordination  
8 Agreement") on February 7, 2008. The Subordination Agreement declared that the  
9 Construction Deed of Trust "shall in all respects be deemed prior to and superior to the lien" of  
10 the Mezzanine Deeds of Trust recorded by Scott "as though the Mezzanine Deeds of Trust had  
11 been recorded subsequent to the recordation of the \$110,000,000 Senior Debt Deed of Trust."  
12 *See* Subordination Agreement, attached as Exhibit 2.

13 Scott intentionally, and for all public records purposes, moved any potentially prior  
14 deeds of trust behind the priority of the Construction Deed of Trust, APCO's work clearly  
15 started prior to the recording of the Construction Deed of Trust and prior to the recording of the  
16 Subordination Agreement, giving all of the mechanic's lien's priority over the liens of Scott.

## 17 II.

### 18 FACTS RELEVANT FOR PRIORITY<sup>2</sup>

19 1. Scott recorded a Senior Deed of Trust dated June 26, 2006, on July 5, 2006, at Book  
20 20060705, Instrument No. 0004264 (the "Mezzanine Senior Deed of Trust"). *See* Exhibit 2,  
21 Recitals section.

22 2. Scott recorded a Junior Deed of Trust dated June 26, 2006, on July 5, 2006, at Book  
23 20060705, Instrument No. 0004265. Scott later recorded a First Amendment on May 22, 2007,  
24 at Book 20070522, Instrument No. 0004011 (the "Mezzanine Junior Deed of Trust"). *Id.*

25  
26 <sup>1</sup> APCO is not agreeing or admitting that the work of some of APCO's subcontractors or work of  
other contractors on the Project did not begin prior to July 5, 2006.

27 <sup>2</sup> APCO is aware of disputed facts that may show priority over all of the Scott Deeds of Trust,  
28 but as those facts may be disputed, APCO is not asserting them in this motion.

1           3. Scott recorded a Third Deed of Trust dated June 26, 2006, on July 5, 2006, at Book  
2 20060705, Instrument No. 004266. Scott later recorded a First Amendment to Third Deed of  
3 Trust on October 24, 2007 at Book 20071024, Instrument No. 004182 (the "Mezzanine Third  
4 Deed of Trust"). *Id.*

5           4. The Mezzanine Senior Deed of Trust, Mezzanine Junior Deed of Trust and  
6 Mezzanine Third Deed of Trust are collectively hereafter the "Mezzanine Deeds of Trust."

7           5. Scott recorded a Senior Debt Deed of Trust And Security Agreement With  
8 Assignment of Rents And Fixtures Filing (Construction) dated January 22, 2008, on February 7,  
9 2008, at Book 20080207, Instrument No. 001482 (the "Construction Deed of Trust"). *See*  
10 Exhibit 1.

11           6. Also on February 7, 2008, Scott Recorded the Mezzanine Deeds of Trust  
12 Subordination Agreement (the "Subordination Agreement") at Book 20080207, Instrument No.  
13 001486. *See* Exhibit 2. The Subordination Agreement states:

14                   a) "SFC has agreed and hereby intends to evidence that the Mezzanine Deeds  
15 of Trust and the indebtedness secured thereby shall be subordinate to the \$110,000,000 Senior  
16 Debt Deed of Trust." *Id.*

17                   b) "The lien of the [Construction Deed of Trust] . . . shall in all respects be  
18 deemed prior to and superior to the lien of the Mezzanine Deeds of Trust . . ., as though the  
19 Mezzanine Deeds of Trust had been recorded subsequent to the recordation of the [Construction  
20 Deed of Trust]. *Id.*

21           7. As part of the Construction Deed of Trust, Scott obtained a title policy from  
22 LandAmerica Commonwealth. That policy includes a specific endorsement for mechanic's liens  
23 that have priority over the Construction Deed of Trust. *See* Exhibit 6.

24           8. On January 23, 2008, before the Construction Deed of Trust was recorded, Scott  
25 approved a Scott Draw Summary, which included a Site Inspection Report showing work  
26 APCO performed in November 2007, and pictures of visible work of construction. *See* Exhibit  
27 3.  
28

III.

ARGUMENT

A. Standard of Review.

1. Summary Judgment.

This Court has the authority to grant summary judgment in favor of the lien claimants as there are no genuine issues as to any material facts and the lien claimants are entitled to judgment as a matter of law. N.R.C.P. 56 (c) provides that the Court shall render judgment "forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there are no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Wood v. Safeway, Inc., 121 P.3d 1026, 1031 (Nev.2005) (citing Pegasus v. Reno Newspapers, Inc., 118 Nev. 706, 713, 57 P.3d 82, 87 (2002) (internal citations omitted)).

Summary judgment procedure is properly regarded as an integral part of a judicial process. Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). While it is true that the pleadings and other proof must be construed in a light most favorable to the non-moving party, that party bears the burden to "do more than simply show that there is some metaphysical doubt" as to the operative facts in order to avoid summary judgment being entered in the moving party's favor. Wood, 121 P.3d at 1030 (quoting Matsushita Elec. Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986)). The non-moving party must come forward with specific facts showing that there is a genuine issue for trial. Matsushita, supra. Where the record taken as a whole cannot lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial. Id.

NRCP 56 authorizes summary judgment where it is quite clear what the truth is and that no genuine fact issues remain for trial. Short v. Hotel Riviera, Inc., 79 Nev. 94, 378 P.2d 979 (1963); In re Las Vegas Hilton Hotel Fire Litigation, 101 Nev. 489, 706 P.2d 137. Although the Court must view the evidence in the light most favorable to the non-moving party, the Nevada Supreme Court has made it abundantly clear that "when a motion for summary judgment is

made and supported as required by NRCP 56, the non-moving party may not rest upon general allegations and conclusions, but must, by affidavit or otherwise, set forth specific facts demonstrating the existence of a genuine factual issue." Pegasus v. Reno Newspapers, Inc., 118 Nev. 706, 713, 57 P.3d 82, 87 (2002). The non-moving party may no longer avoid summary judgment by raising the "slightest doubt as to the operative facts." Wood v. Safeway, Inc., 121 P.3d 1026, 1031 (2005). Instead, the non-moving party must raise a genuine issue of material fact, which the Nevada Supreme Court has defined as "evidence such that a rational trier of fact could return a verdict for the nonmoving party." Id. Further, the non-moving party may not defeat a motion for summary judgment by relying "on the gossamer threads of whimsy, speculation and conjecture." Wood, 121 P.2d at 1030 (internal citations omitted).

**B. There Are No Genuine Issues Of Fact That The Lien Claimants Have Priority Over The Liens Of Scott.**

There is no dispute that APCO began work prior to either the execution or recording of the Construction Deed of Trust. As noted before, the Construction Deed of Trust was recorded on February 7, 2008. *See* Exhibit 1. There is no doubt that APCO started work prior to February 7, 2008. Attached as Exhibit 3 is Scott's ManhattanWest Draw Summary ("Draw Summary"), dated January 23, 2008. Included in the Draw Summary is a Construction Progress Report, dated January 7, 2008, for Site Visit No. 2. *Id.* at bates P002416. In the Construction Progress Report, there is the recommendation to approve APCO's payment application for work done in November 2007. *Id.* There are also pictures of the progress of the construction as of January 2, 2008. *Id.* at bates P002419-20. All of this was approved by Scott on January 23, 2008, approximately two weeks before the Construction Deed of Trust and the Subordination Agreement were recorded.

Despite the fact that there were prior deeds of trust recorded by Scott, priority between the lien claimants and Scott is determined on the relative priority between the lien claimants and the Construction Deed of Trust. This results from Scott's decision to subordinate all of its interests in the Mezzanine Deeds of Trust to the Construction Deed of Trust.

Contemporaneously with the recording of the Construction Deed of Trust, Scott also recorded Subordination Agreement on February 7, 2008, at Book No. 20080207, Instrument No. 0001486. See Exhibit 2. The Subordination Agreement provides in pertinent part:

. . . The Mezzanine Notes have been restructured and consolidated into a \$46,000,000 Promissory Note ("Restructured Mezzanine Note") payable by GDW to SFC, and the Mezzanine Deeds of Trust have been amended to secure payment of the Restructured Mezzanine Note, pursuant to the Fourth Amendment to Mezzanine Loan Agreement of even date herewith.  
(Pages 1-2).

C. **SFC has agreed and hereby intends to evidence** that the Mezzanine Deeds of Trust and the indebtedness secured thereby **shall be subordinate to the \$110,000,000 Senior Debt Deed of Trust** and the indebtedness secured thereby.  
(Page 2, emphasis added).

1. **Lien Priority.** The lien of the \$110,000,000 Senior Debt Deed of Trust and the indebtedness secured thereby **shall in all respects be deemed prior to and superior to the lien of the Mezzanine Deeds of Trust** and the indebtedness secured thereby, **as though the Mezzanine Deeds of Trust had been recorded subsequent to the recordation of the \$110,000,000 Senior Debt Deed of Trust.**

1. (sic) **Subordination.** The payment of all of the Restructured Mezzanine Note is hereby expressly subordinated to the extent and in the manner hereinafter set forth to the payment in full of the Senior Debt Notes; and regardless of any priority otherwise available to SFC (as lender of the Restructured Mezzanine Note) by law or by agreement, SFC shall hold a first security interest in all collateral securing payment of the Senior Debt Notes (the "Collateral"), and any security interest claimed therein (including any proceeds thereof) by SFC (as lender of the Restructured Mezzanine Note) shall be and remain fully subordinate for all purposes to the security interest of SFC therein for all purposes whatsoever.

2. **No Payments.** Until all of the Senior Debt Notes has (sic) been paid in full, SFC (as lender of the Restructured Mezzanine Note) shall not demand, receive or accept any payment (whether of principal, interest or otherwise) from the Borrower in respect of the Restructured Mezzanine Note, or exercise any right of or permit any setoff in respect of the Restructured Mezzanine Note, provided that notwithstanding the foregoing, so long as no

1 event of default has occurred with respect to the Senior Debt Notes  
2 or the fees and may pay such interest and fees from advances on  
3 the Mezzanine Note.

(Page 2, *emphasis added*).

4 4. Action on Restructured Mezzanine Note. SFC (as  
5 lender of the Restructured Mezzanine Note) **will not commence**  
6 **any action or proceeding against the Borrower to recover all or**  
7 **any part of the Restructured Mezzanine Note, or join with any**  
8 SFC (as lender of the Restructured Mezzanine Note)(unless SFC  
9 shall so join) **in bringing any proceeding against the Borrower**  
10 under any bankruptcy, reorganization, readjustment of debt,  
11 arrangement of debt receivership, liquidation or insolvency law or  
12 statue of the federal or any state government, or take possession of,  
sell, or dispose of any Collateral, or exercise or enforce any right  
or remedy available to SFC (as lender of the Restructured  
Mezzanine Note) with respect to any such Collateral, **unless and**  
**until the Senior Debt Notes has (sic) been paid in full.**

(Page 3, *emphasis added*).

13 The express terms of the Subordination Agreement are that the Mezzanine Deeds of  
14 Trust are being treated for all purposes as if they were made after the recording of the  
15 Construction Deed of Trust. The terms and language of the Subordination Agreement are clear  
16 and unambiguous. Scott agreed and intended “to evidence” that the Mezzanine Deeds of Trust  
17 were being treated as if they were recorded after the Construction Deed of Trust. *Id.* at page 2.  
18 The Subordination Agreement also explicitly states that the Construction Deed of Trust “shall  
19 **in all respects** be deemed prior to and superior to the [Mezzanine Deeds of Trust], **as though**  
20 **the [Mezzanine Deeds of Trust] had been recorded subsequent to** the recordation of the  
21 [Construction Deed of Trust]. *Id.* (Emphasis added). The Subordination Agreement goes on to  
22 state that Scott could not even take any action to enforce the Mezzanine Deeds of Trust until the  
23 Construction Deed of Trust had been paid in full. *Id.* at 3. Again, these provisions were  
24 recorded on February 7, 2008, and provided notice to the world that the Mezzanine Deeds of  
25 Trust were behind the Construction Deed of Trust.

26 It is clear from the express terms of the Subordination Agreement that Scott fully and  
27 completely subordinated the Mezzanine Deeds of Trust to a position after the Construction  
28



1 Deed of Trust. In the case of *AmSouth Bank v. J & D Financial Corp.*, 679 So.2d 695 (Ala.  
2 1996), the Supreme Court of Alabama held that by subordinating its debt to a later lien holder,  
3 the original lien holder has only put itself behind that lien. *Id.* at 698. The Court noted the  
4 definition of subordination agreement meant that “the subordinating party agrees that its interest  
5 in real property should have a lower priority than the interest to which it is being subordinated.”  
6 *Id.* (citing *Black’s Law Dictionary* (6<sup>th</sup> ed.1990)). The Court went on to note that subordination  
7 “contemplates a reduction in priority. Nothing in the definition contemplates raising a lower  
8 priority lien holder up to the position of the subordinating party.” *Id.* Other cases have reached  
9 similar results. See e.g. *J.C. McConnell v. Mortgage Investment Co. of El Paso*, 292 S.W.2d  
10 636 (Tex.Ct.Civ.App. 1955), and *Ladner v. Hogue Lumber & Supply Co.*, 91 So.2d 545 (Miss.  
11 1956).

12 This holding also complies with the express language of NRS 108.225, which provides:

13 1. The liens provided for in NRS 108.221 to 108.246,  
14 inclusive, are preferred to:

15 (a) Any lien, mortgage or other encumbrance which may have  
16 attached to the property after the commencement of construction of  
17 a work of improvement.

18 (b) Any lien, mortgage or other encumbrance of which the lien  
19 claimant had no notice and which was unrecorded against the  
20 property at the commencement of construction of a work of  
21 improvement.

22 The clear purpose of the lien statute is to ensure that contractors have the right to recover for the  
23 work and materials performed on a construction project before any lien holder whose lien  
24 attaches after construction work has begun. It is clear and cannot be disputed that construction  
25 work began on the Project before the Construction Deed of Trust was recorded. Therefore, the  
26 mechanic’s lien holders have priority.

27 Reinforcing this result is Scott’s own position that the Construction Deed of Trust has  
28 priority over the Mezzanine Deeds of Trust in both its Responses to Lien Claimant’s Standard  
Requests For Admission, and in its Responses To Lien Claimant’s Standard Interrogatories,  
attached as Exhibits 4 and 5, respectively. In response to Requests For Admission Nos. 11, 12

1 and 13, relating to the relative priority between the Mezzanine Deeds of Trust and the  
2 Construction Deed of Trust, Scott stated:

3 Without waiving the objection, it is Scott Financial Corporation's  
4 contention that the Construction Deed of Trust is senior in priority.  
5 See Exhibit 4, pgs. 4-5.

6 In the Interrogatory Responses, Answer To Interrogatory No. 20, Scott stated:

7 **SFC does not contend that any other deed of trust or**  
8 **lien, held by SFC, has priority over the Senior Deed of**  
9 **Trust and Security Agreement with Assignment of Rents**  
10 **and Fixtures Filing (Construction), recorded on February 7,**  
11 **2008, as Book No. 20080207, Instrument No. 1482.**

12 See Exhibit 5, pg. 8. (Emphasis added).

13 Scott's actions during the transaction that lead to the Construction Deed of Trust also  
14 show that Scott understood that it was creating a situation where the mechanic's lien holders  
15 would have priority. As part of the Construction Deed of Trust transaction, Scott obtained a  
16 policy of title insurance. A copy of the Title Insurance Policy is attached as Exhibit 6. As part  
17 of obtaining title insurance, Scott obtained a specific endorsement, which provided:

18 **ENDORSEMENT**  
19 **ATTACHED TO POLICY NO. 05111973**  
20 **ISSUED BY**  
21 **Commonwealth Land Title Insurance Company**

22 The Company hereby insures against loss or damage  
23 sustained by reason of the establishment of priority over the lien of  
24 the Insured Mortgage upon Title of any statutory lien for services,  
25 labor or material arising out of any work of improvement under  
26 construction or completed at Date of Policy.

27 *Id.* at bates P002395. Scott knew about the loss of priority and obtained insurance against any  
28 liens that might result from work on the Project. Scott's actions in obtaining the title insurance  
further show that Scott intended to, and did modify the priority of the Mezzanine Deeds of  
Trust, moving them behind both the mechanic's liens and the Construction Deed of Trust.

///

///

IV.

CONCLUSION

Based upon the above, APCO requests that the Court grant summary judgment on the issue of priority in favor of the mechanic's lien claimants. From Scott's perspective, the Construction Deed of Trust is the earliest filed lien that Scott holds on the Project. It is undisputed that construction work began on the project before the Construction Deed of Trust was recorded. Under the express terms of NRS 108.225, the lien claimants have priority over the Construction Deed of Trust, and therefore, have first priority on the Project.

DATED this 17<sup>th</sup> day of June 2010.

HOWARD & HOWARD ATTORNEYS PLLC

/s/ Wade B. Gochnour

Gwen Rutar Mullins, Esq.

Nevada Bar No. 3146

Wade B. Gochnour, Esq.

Nevada Bar No. 6314

3800 Howard Hughes Pkwy., Ste. 1400

Las Vegas, Nevada 89169-5914

*Attorneys for Hydropressure Cleaning, Inc*

**CERTIFICATE OF SERVICE**

On the 17<sup>th</sup> day of June 2010, the undersigned served a true and correct copy of the foregoing **APCO'S MOTION FOR SUMMARY JUDGMENT ON PRIORITY** 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**

20080207-0001482

Fee: \$35.00

N/C Fee: \$0.00

02/07/2008

10:00:58

T20080021465

Requestor:

COMMONWEALTH TITLE

Debbie Conway

ADF

Clark County Recorder

Pgs: 22

Assessor's Parcel Number: 163-32-101-019

Recording Requested by and  
When Recorded Mail to:

Scott Financial Corporation  
15010 Sundown Drive  
Bismarck, North Dakota 58503

Mail all real property tax notices to:

Gemstone Development West, Inc.  
9121 West Russell Road  
Suite 117  
Las Vegas, NV 89148

**SENIOR DEBT DEED OF TRUST AND SECURITY AGREEMENT WITH  
ASSIGNMENT OF  
RENTS AND FIXTURE FILING  
(CONSTRUCTION) (\$110,000,000)**

NOTE TO COUNTY RECORDER: THIS INSTRUMENT IS TO BE RECORDED AND  
INDEXED AS A FIXTURE FILING AS WELL AS A DEED OF TRUST FOR PURPOSES  
OF THE NEVADA UNIFORM COMMERCIAL CODE.

THIS INSTRUMENT IS A "CONSTRUCTION MORTGAGE" FOR PURPOSES OF THE  
NEVADA UNIFORM COMMERCIAL CODE

This SENIOR DEBT DEED OF TRUST AND SECURITY AGREEMENT WITH  
ASSIGNMENT OF RENTS AND FIXTURE FILING ("**Deed of Trust**") is made and effective as  
of January 22, 2008, between GEMSTONE DEVELOPMENT WEST, INC., a Nevada corporation  
("**Trustor**"), the address of which is set forth above, COMMONWEALTH LAND TITLE  
INSURANCE COMPANY, as Trustee (the "**Trustee**"), and SCOTT FINANCIAL  
CORPORATION, a North Dakota corporation, as Beneficiary ("**Beneficiary**").

**WITNESSETH:**

That Trustor grants the following described real property (the "**Real Property**"), which is  
situated in the County of Clark, State of Nevada, to Trustee in trust, with power of sale for the  
benefit of Beneficiary, to have and to hold upon the trusts, covenants and agreements hereinafter set  
forth:

SCOTT-004700

ARA 000015

See Exhibit "A" attached hereto and incorporated by this reference.

TOGETHER WITH:

Buildings, structures and improvements, and building materials, fixtures and equipment to be incorporated into any buildings, structures or improvements;

Goods, materials, supplies, fixtures, equipment, washers, dryers, appliances, machinery, furniture and furnishings, including without limitation, all such items used for (i) generation, storage or transmission of air, water, heat, steam, electricity, light, fuel, refrigeration or sound; (ii) ventilation, air-conditioning, heating, refrigeration, fire prevention and protection, sanitation, drainage, cleaning, transportation, communications, maintenance or recreation; (iii) removal of dust, refuse, garbage or snow; (iv) transmission, storage, processing or retrieval of information; and (v) floor, wall, ceiling and window coverings and decorations;

Income, receipts, revenues, rents, issues and profits, including without limitation, room rents, minimum rents, additional rents, percentage rents, occupancy and user fees and charges, license fees, parking and maintenance charges and fees, tax and insurance contributions, proceeds of the sale of utilities and services, cancellation premiums, and claims for damages arising from the breach of any leases;

Water and water rights, ditches and ditch rights, reservoirs and reservoir rights, stock or interest in irrigation or ditch companies, minerals, oil and gas rights, royalties, and lease or leasehold interests;

Plans and specifications prepared for the construction of any improvements, including without limitation, all studies, estimates, data, and drawings;

Documents, instruments and agreements relating to, or in any way connected with, the operation, control or development of the Real Property, including without limitation, any declaration of covenants, conditions and restrictions and any articles of incorporation, bylaws and other membership documents of any property owners association or similar group;

Claims and causes of action, legal and equitable, in any form whether arising in contract or in tort, and awards, payments and proceeds due or to become due, including without limitation those arising on account of any loss of, damage to, taking of, or diminution in value of, all or any part of the Real Property or any personal property described herein;

Sales agreements, escrow agreements, deposit receipts, and other documents and agreements for the sale or other disposition of all or any part of the Real Property or any of the personal property described herein, and deposits, proceeds and benefits arising from the sale or other disposition of all or any part of the Real Property or any of the personal property described herein;

Policies or certificates of insurance, contracts, agreements or rights of indemnification, guaranty or surety, and awards, loss payments, proceeds, and premium refunds that may be payable with respect to such policies, certificates, contracts, agreements or rights;

Contracts, agreements, permits, licenses, authorizations and certificates, including without limitation all architectural contracts, construction contracts, management contracts, service contracts, maintenance contracts, franchise agreements, license agreements, building permits and operating licenses;

Trade names, trademarks, and service marks (subject to any franchise or license agreements relating thereto);

Refunds and deposits due or to become due from any utility companies or governmental agencies;

Replacements and substitutions for, modifications of, and supplements, accessions, addenda and additions to, all of the personal property described herein;

Books, records, correspondence, files and electronic media, and all information stored therein;

together with all products and proceeds of all of the foregoing, in any form, including all proceeds received, due or to become due from any sale, exchange or other disposition thereof, whether such proceeds are cash or non-cash in nature, and whether represented by checks, drafts, notes or other instruments for the payment of money.

The real property together with the rights and interests of Trustor described hereinabove shall hereinafter collectively be referred to as the **"Property"**.

**FOR THE PURPOSE OF SECURING:**

A. Payment of the principal sum of One Hundred Ten Million and 00/100 Dollars (\$110,000,000.00), or so much thereof as shall be advanced to Trustor, together with interest thereon, according to the terms of a Senior Debt Construction Note and a Senior Debt Contingency Note, each of even date herewith, made by Trustor payable to the order of the Beneficiary, according to the tenor and effect of said notes and all renewals, extensions, modifications, amendments and substitutions of, or for, said promissory notes (hereinafter collectively referred to as the **"Note"**).

B. The expenses and costs incurred or paid by Beneficiary in the preservation and enforcement of the rights and remedies of Beneficiary and the duties and liabilities of Trustor hereunder, including, but not by way of limitation, attorneys' fees, court costs, witness fees, expert



witness fees, collection costs, and costs and expenses paid by Beneficiary in performing for Trustor's account any obligation of said Trustor under this instrument or under any obligation secured hereby.

C. Payment of additional sums and interest thereon which may hereafter be loaned to Trustor when evidenced by a promissory note or notes which recite that the same is secured by this Deed of Trust.

D. Notwithstanding anything herein to the contrary, this Deed of Trust will not secure any obligations under that certain Environmental Indemnity of even date herewith executed by Trustor in favor of Beneficiary, and Trustor=s obligations thereunder will survive any foreclosure, trustee=s sale or any other similar proceeding hereunder.

E. Performance of each and every term, provision, covenant and condition contained in any loan agreement, credit agreement or any other document or instrument executed by Trustor in favor of Beneficiary relating to the loan evidenced by the Note hereby secured (the Note together with any such agreement, document or instrument shall hereinafter collectively be referred to as the "Loan Documents").

F. All "future advances," as that term is defined in Nevada Revised Statutes § 106.320. This Deed of Trust will be governed by Nevada Revised Statutes §§ 106.300 through 106.400, inclusive. For purposes of those statutes, the Note will be deemed fully advanced as of the date thereof. The maximum amount of principal to be advanced under the Note is one hundred fifty percent (150%) of the face principal amount of the Note, with the understanding that advances made by Beneficiary in excess of the face principal amount of the Note may be made to protect the Property or to otherwise protect Beneficiary=s interest hereunder.

**AND IT IS FURTHER PROVIDED THAT:**

1. **Compliance with Laws.** Trustor shall not commit, suffer or permit any act to be done, or condition to exist, on the Property which violates or is prohibited by any law, statute, code, act, ordinance, order, judgment, decree, injunction, rule, regulation, permit, license, authorization, direction or requirement of any government or subdivision thereof, whether it be federal, state, county or municipal, which is applicable to the Property, or any part thereof, now or at any time hereafter, (including, without limitation, the Americans with Disabilities Act (42 U.S.C. §§ 12101-12213 and 47 U.S.C. §§ 225 and 611). The requirements set forth by this section 1 are hereinafter collectively referred to as the "Legal Requirements".

2. **Repair and Maintenance.** Trustor agrees to properly care for and keep the Property in first class condition, order and repair; to care for, protect and repair all buildings and improvements situate thereon; not to remove, materially alter or demolish any buildings or other improvements situate thereon; not to remove, materially alter or demolish any buildings or

improvements damaged or destroyed thereon; to complete in a good workmanlike manner any building or other improvement which may be constructed thereon; and to pay, when due, all claims for labor performed and for materials furnished therefor; and otherwise to protect and preserve the same; to comply with all Legal Requirements having application to any alterations or improvements made thereon; not to commit or permit any waste or deterioration of said buildings and improvements or of said Property, to comply with the Clean Air Act, the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended, the Resource Conservation Act of 1976, as amended, the Hazardous Materials Transportation Act, as amended, the Resource Conservation and Recovery Act, as amended, or any other Legal Requirement related to hazardous substances; and to do any other act or acts all in a timely and proper manner, which, from the character or use of the Property may be reasonably necessary to maintain the Property in a first-class condition, the specific enumerations herein not excluding the general (including, without limitation, the establishment of an equipment replacement reserve, acceptable to Bank, for all equipment that is part of the Property).

3. **Environmental Compliance.** (a) As used herein, the term "**Hazardous Substances**" shall mean any or all of the following: (i) any and all hazardous substances, hazardous materials, toxic substances or solid waste as defined in the Clean Air Act, the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended, the Resource Conservation Act of 1976, as amended, and the Hazardous Materials Transportation Act, as amended, the Resource Conservation and Recovery Act, as amended, or any other Legal Requirement related to hazardous substances and the regulations promulgated thereunder, (ii) any substance or materials listed as hazardous or toxic in the United States Department of Transportation Table, by the Environmental Protection Agency or any successor agency or under any Federal, state or local laws or regulations, (iii) any asbestos, poly-chlorinated biphenyls, urea formaldehyde foam, explosives or radioactive waste, or (iv) any other chemical, material or substance which is not classified as hazardous or toxic but exposure to which is prohibited, limited or regulated by any Federal, state, local or other governmental authority having jurisdiction over the Property.

(b) Trustor shall comply with any and all Legal Requirements regarding the presence or removal of Hazardous Substances on the Property, shall pay immediately, when due, the costs of removal from the Property of any such Hazardous Substances which are required to be removed pursuant to any Legal Requirement and shall keep the Property free of any lien which may arise pursuant to such Legal Requirements. The Trustor shall not, and shall not permit any person or entity to release, discharge, or dispose of any Hazardous Substances on the Property except in compliance with all Legal Requirements and, if the same shall exist, Trustor shall immediately remove or cause to be removed from the Property such Hazardous Substances to the extent required to be removed pursuant to any Legal Requirement.

4. **Taxes.** (a) Trustor agrees to pay, at least ten (10) days before default and/or delinquency (i) all taxes and assessments, of any kind or nature, which are assessed against or affect

the Property or any part thereof ("**Impositions**") and (ii) all obligations which are represented, evidenced or secured by liens, encumbrances, charges and/or claims on said Property, or any part thereof, which appear to have priority over the lien of this Deed of Trust ("**Senior Encumbrances**").

(b) In the event that Trustor fails to make any payment required by section 4(a) above, within the time periods required therein, Beneficiary may pay the same without demand or notice (in which case Beneficiary shall be the sole judge of the legality, validity and/or priority of the obligation so paid and of the amount required to be paid).

5. **Appraisals.** Upon the occurrence of an Event of Default, but not more frequently than annually, the Trustor hereby agrees to provide Beneficiary, at Beneficiary=s sole option, and at Trustor's expense, and within sixty (60) days of Beneficiary's request therefor, an appraisal of the Property which: (i) is in a form and substance acceptable to Beneficiary in the sole and absolute exercise of its discretion; and (ii) is completed by an appraiser acceptable to Beneficiary in the sole and absolute exercise of its discretion. The Trustor hereby agrees that Beneficiary may enter onto the Property at reasonable times and in a manner to limit the disruption to Trustor's operations, within ten (10) days' prior written notice to Trustor to perform its own appraisal of the Property and that Beneficiary will have access to all buildings and/or improvements on the Property so that it can complete that appraisal.

6. **Insurance.** Trustor agrees to keep all buildings and/or improvements, which are ever located on the Property, and all of the Property, including any personal property that is part of the Property, insured by policies of general liability insurance and insurance providing coverage against loss by fire and/or hazard, and/or flood, which policy(ies) shall have extended coverage endorsements, shall include business interruption provisions, and shall be issued by company(ies) authorized to issue such policy(ies) in the State of Nevada. The terms and amounts of all such policies, and the insurance companies that issue such policies, must be acceptable to Beneficiary in its reasonable discretion, and shall be not less than amounts customarily obtained on similar projects. Said insurance shall provide for at least thirty (30) days advance written notice to Beneficiary prior to cancellation. Said insurance shall, at Beneficiary=s sole option, be payable to Beneficiary to the amount of the unsatisfied obligations to Beneficiary hereby secured or include such riders or mortgagee=s endorsements as Beneficiary may require. The policy or policies of said insurance shall be delivered to Beneficiary, as further security, and in default hereof, Beneficiary may procure such insurance, and expend such sum or sums therefor as Beneficiary shall deem necessary. Subject to the terms of the other Loan Documents, so long as no Event of Default (as defined in section 14 below) has occurred and is continuing, Trustor may settle, compromise or adjust or apply any insurance or other claim without the Beneficiary=s prior written consent, or any need to comply with the requirements specified in the following sentence, so long as the amount of the claim (but not the settlement or compromise thereof) is less than \$50,000.00. So long as no Event of Default has occurred or is continuing (it being understood that a claim for or the receipt of insurance proceeds or a condemnation or receipt condemnation proceeds shall not be

an Event of Default), Beneficiary shall apply all insurance proceeds to the repair and or restoration of the Property upon the satisfaction of the following conditions: i) Trustor shall have delivered written notice to Beneficiary of its intention to commence repairs and restoration within ten (10) business days following the settlement of any claim or claims under any insurance policies relating to the Property; ii) all insurance proceeds are deposited with Beneficiary; iii) within ten (10) business days following the deposit of such insurance proceeds with Beneficiary, Trustor shall have deposited with Beneficiary the amount necessary, if any, to pay the difference between the cost of restoration or repair of the Property and the amount of such insurance proceeds; iv) Trustor shall have delivered to Beneficiary a budget of all costs of reconstruction, repair and or restoration for the Property, acceptable to Beneficiary in the reasonable exercise of its discretion; and v) Beneficiary and all applicable governmental agencies shall have approved the final plans and specifications for the reconstruction, repair or restoration of the Property. Subject to conditions set forth in the foregoing sentence, Beneficiary shall disburse such insurance proceeds as necessary to pay for the reconstruction, repair or restoration of the Property. Upon the occurrence of an Event of Default: Beneficiary shall have the sole right to settle, compromise or adjust any insurance or other claim in such manner as Beneficiary may determine, and for this purpose, Beneficiary may, in its own name or in the name of Trustor, take such action as Beneficiary deems appropriate; any amount collected by Trustor with respect to an insurance or other claim shall be delivered immediately to Beneficiary; the amount collected by Trustor or Beneficiary under any fire or other insurance policy may be applied by Beneficiary upon the indebtedness secured hereby and in such order as Beneficiary may determine, or at the option of Beneficiary, the entire amount so collected, or any part thereof, may be released to Trustor upon such conditions as Beneficiary may impose (such application or release shall not cure or waive any default or notice of default hereunder or invalidate any act done pursuant to the terms of this Deed of Trust).

7. **Impound Accounts.** In Beneficiary's sole and absolute discretion, Trustor shall pay to Beneficiary, on the day of each calendar month when installment payments are due under the Note secured hereby, an amount, to be estimated by Beneficiary, which will be sufficient to provide for payment, at least thirty (30) days prior to the applicable due date(s), of one or more (as required by Beneficiary) of the following: (i) the Impositions which are required to be paid under section 4 above, (ii) the obligations which are represented, evidenced or secured by Senior Encumbrances and which are required to be paid under section 4 above; and/or (iii) the premiums necessary to maintain the insurance coverage required by section 6 above. Beneficiary shall be responsible to pay, as and when due, all installments of taxes, insurance and other payments for which sufficient impounds have been received. Amounts held by Beneficiary hereunder shall not be, nor be deemed to be, trust funds, but may be commingled with the general funds of Beneficiary, and no interest shall be payable in respect thereof. Upon demand of the Beneficiary, Trustor agrees to deliver to Beneficiary such additional monies as are necessary to make up any deficiencies in the amounts necessary to enable Beneficiary to pay such Impositions, obligations which are represented, evidenced or secured by Senior Encumbrances and/or insurance premiums. Subject to the terms of NRS §§ 100.091 and 106.105, upon the occurrence of an Event of Default as set forth in section 14

below, the Beneficiary may apply to reduction of the sums secured hereby, in such manner as Beneficiary shall determine, any amount remaining to the Beneficiary's credit hereunder.

8. **Assignment of Rents and Condemnation Proceeds.** (a) Trustor hereby irrevocably and absolutely assigns and transfers to Beneficiary, all rents, issues, income, revenues, royalties and profits derived from the Property, or any business activity conducted thereon, and each and every part thereof, including all present and future leases and rental agreements (the "Rents") reserving unto Trustor a license to collect the Rents prior to written notice to Trustor of any Event of Default, as defined by section 14 below. Subsequent to such an Event of Default, and written notice to Trustor thereof, and the passage of applicable notice and cure periods, the Rents, including those past due, unpaid or undetermined, shall be collected by Beneficiary or its agent, and shall be applied, less costs and expenses of operation and collection, including reasonable attorneys' fees, to any indebtedness and/or obligation secured hereby, and in such order as Beneficiary shall determine. Rights assigned to Beneficiary under this section 8 may be enforced by Beneficiary without regard to the adequacy of the security hereof or the solvency of Trustor by any one or more of the following methods: (i) appointment of a receiver, (ii) Beneficiary's taking possession of the Property; (iii) Beneficiary's collecting any monies payable under leases or rental agreements directly from the parties obligated for payment; (iv) injunctions; and (v) any other method permitted by law. The collection of the Rents, and the application thereof as aforesaid, shall not cure or constitute a waiver of any default or notice of default hereunder or invalidate any act done pursuant to such notice. Trustor and Beneficiary intend that this assignment shall be a present, absolute and unconditional assignment, not an assignment for additional security only, and shall, immediately upon the execution hereof, subject to the license granted above, give Beneficiary, and its agent, the right to collect the Rents and to apply them as aforesaid. Nothing contained herein, nor any collection of rents, issues, profits and income by Beneficiary, or its agent, or a receiver, shall be construed to make Beneficiary a "mortgagee-in-possession" of the Property so long as Beneficiary has not itself entered into actual possession of the Property or shall be construed to be an assumption of liability by Beneficiary under, or a subordination of, the lien of this Deed of Trust, to any tenancy, lease or option. Trustor agrees to provide Beneficiary with updated leases within thirty (30) days of any request by Beneficiary.

(b) Any award of damages in connection with any condemnation for public use of, or injury to the Property, or any part thereof, is hereby assigned and shall be paid to Beneficiary, who may apply such monies to the balance of the Note or, in its sole discretion, release such monies received by Beneficiary in the same manner and with the same effect as herein provided for disposition of proceeds of insurance.

9. **Performance by Trustee or Beneficiary.** (a) Should the Trustor fail to make any payment or perform any act which Trustor is obligated to make or perform hereby (within any applicable cure period), then the Trustee, or Beneficiary, at the election of either of them, but without any obligation to do so, without demand or notice to the Trustor, or any successor in interest of the Trustor and without releasing Trustor from any obligation hereunder, may make such

payment or perform such act and incur any liability, or expend whatever amounts, in its absolute discretion, it may deem necessary therefor. All reasonable sums incurred or expended by the Trustee or Beneficiary, under the terms hereof, shall become immediately due and payable by the Trustor to the Trustee or Beneficiary when so incurred or expended, and shall bear interest until paid at an annual percentage rate equal to the Default Rate that is set forth by section 14 below. In no event shall payment by Trustee or Beneficiary be construed as a waiver of the default occasioned by Trustor's failure to make such payment or payments.

(b) If, during the existence of the trust created hereby, there is commenced or pending any suit or action affecting the Property, or any part thereof, or the title thereto, or if any adverse claim for or against the Property, or any part thereof, is made or asserted, the Trustee or Beneficiary may appear or intervene in the suit or action and retain counsel therein and defend same, or otherwise take such action therein as they may be advised, and may settle or compromise same or the adverse claim, provided that so long as no event of default (including applicable notice and cure periods) has occurred and is continuing, such settlement or compromise shall be only with the agreement of the Trustor; and in the behalf and for any of the purposes may pay and expend such sums of money as the Trustee or Beneficiary may deem to be necessary. All such sums incurred or expended by Trustee or Beneficiary under the provisions of this section shall become immediately due and payable by the Trustor to the Trustee or Beneficiary when so incurred or expended and shall bear interest until paid an annual percentage rate equal to the Default Rate which is set forth by section 14 below.

(c) Trustor agrees to pay and discharge all reasonable costs, fees and expenses if incurred in connection with any default by Trustor or the preservation of the trust created hereby, including without limitation (i) reconveyance and foreclosure fees of Trustee, (ii) costs and expenses of Beneficiary or Trustee or any receiver appointed under this Deed of Trust in connection with the operation, maintenance, management, protection, preservation, collection, sale or other liquidation of the trust created hereby or foreclosure of this Deed of Trust, (iii) advances made by Beneficiary to complete or partially construct all or any part of any construction which may have commenced on the Property or otherwise to protect the security of this Deed of Trust, (iv) costs of evidence of title, and (v) the reasonable fees and disbursements of Trustee's and Beneficiary's legal counsel and other out-of-pocket expenses; together with interest on all such amounts until paid at the Default Rate.

10. **Modifications.** At any time, and from time to time, without liability therefor and without notice to Trustor, upon written request of Beneficiary and presentation of this Deed of Trust and the Note secured hereby for endorsement, and without affecting the personal liability of any person for payment of the indebtedness secured hereby or the effect of this Deed of Trust upon the remainder of the Property, Trustee may (a) reconvey any part of the Property; (b) consent in writing to the making of any map or plat thereof; (c) join in granting any easement thereon, or (d) join in any extension agreement or subordination agreement in connection herewith. The Beneficiary may without notice to or consent of Trustor extend the time of payment of any

indebtedness secured hereby to any successor in interest of the Trustor without discharging the Trustor from liability thereon.

11. **Reconveyance.** Upon receipt of written request from Beneficiary reciting that all sums secured hereby have been paid and upon surrender of this Deed of Trust and the Note secured hereby to Trustee for cancellation and retention, or such other disposition as Trustee, in its sole discretion, may choose, and upon payment of its fees, the Trustee shall reconvey, without warranty all portions of the Property which are then encumbered hereby. The recitals in such reconveyance of any matters of fact shall be conclusive proof of the truth thereof. The grantee in such reconveyance may be described in general terms as "the person or persons legally entitled thereto".

12. **Substitution of Trustee.** The Beneficiary or its assigns may, from time to time, appoint another trustee, or trustees, to execute the trust created by this Deed of Trust or other conveyance in trust. Upon the recording in the appropriate county of such certified copy or executed and acknowledged instrument, the new trustee or trustees shall be vested with all the title, interest, powers, duties and trusts in the Property which are vested in or conferred upon the original trustee. If there be more than one trustee, either may act alone and execute the trusts upon the request of the Beneficiary, and all his acts thereunder shall be deemed to be the acts of all trustees, and the recital in any conveyance executed by such sole trustee of such request shall be conclusive evidence thereof, and of the authority of such sole trustee to act in accordance therewith.

13. **Due on Sale, etc.** (a) There shall be no "Transfer of Interest" (as defined by section 13(b) below) with respect to the Property, without the prior written consent of Beneficiary having first been obtained, and in the event of such a "Transfer of Interest," then, at the option of Beneficiary, any indebtedness or obligation which is secured hereby shall immediately become due and payable, without demand or notice, irrespective of the maturity dates which may be expressed in any Loan Documents evidencing such indebtedness or obligation. (b) A "Transfer of Interest" shall be deemed to have occurred with respect to the Property (i) if Trustor, without Beneficiary's prior written consent, shall (or shall enter into an agreement to), sell, transfer, encumber, create a junior lien, convey or in any manner alienate any interest in the Property or shall be divested of title to the Property in any manner or way, whether voluntarily or involuntarily (except for bona fide sales of completed condominium units made in the ordinary course of business), and/or (ii) if any ownership interests of Trustor are sold or otherwise transferred, and/or if the present chief executive officer of the Trustor is changed without the Beneficiary's prior written consent (which shall not be unreasonably withheld). Notwithstanding the foregoing, a Transfer of Interest shall not include transfers of ownership interests in Trustor by shareholders of Trustor to affiliates of such shareholders. If the Project, which is defined in the Loan Documents, is not complete as of a change in management of Trustor, the new management of Trustor shall employ a development company to complete the Project of a fee basis, the identity of which development company shall be reasonably satisfactory to Beneficiary.

14. **Default.** (a) The occurrence of any “**Event of Default**” defined in the Loan Documents (including, without limitation, that certain Loan Agreement, of even date herewith, by and between Trustor and Beneficiary) shall be an Event of Default hereunder including, without limitation: (i) subject to applicable cure periods set forth in the Note and in the Loan Documents, failure by Trustor to pay when due any amount which Trustor is required to pay under the Note, or any other Loan Document secured by this Deed of Trust, (ii) subject to applicable cure periods, failure by Trustor to satisfy or perform any obligation secured by this Deed of Trust, other than the payment of money, or failure by Trustor to comply with, satisfy or perform any term, provision, covenant or condition, other than the payment of money as contained in the Loan Documents which default is not cured as allowed in the relevant Loan Document, (iii) the commencement by Trustor of a voluntary case or other proceeding seeking liquidation, reorganization or other relief with respect to it or its respective debts under the United States Bankruptcy Code or any bankruptcy, insolvency or other similar law now or hereafter in effect or seeking the appointment of a trustee, receiver, liquidator, custodian or other similar official, for any substantial part of its property or the consent by Trustor to any such relief or to the appointment or taking possession by any such official in any involuntary case or other proceeding commenced against Trustor that is not dismissed within sixty (60) days after it is initialed, or the admission by Trustor, in writing, of its inability to pay its debts as they come due, (iv) any notice by Trustor that the Deed of Trust no longer secures future advances, or the repudiation and/or cancellation of any guaranty of the Note, and/or (v) any Transfer of Interest shall occur. Notwithstanding anything to the contrary set forth in this Deed of Trust, where no cure period is provided hereunder, Trustor shall not be deemed to be in default of this Deed of Trust until the expiration of ten (10) days written notice from Beneficiary, in the case of monetary defaults, and the expiration of thirty (30) days written notice from Beneficiary, in the case of non-monetary defaults; provided, however, in the case of non-monetary defaults, Trustor shall not be deemed to be in default of the terms of this Deed of Trust if Trustor diligently undertakes efforts to effectuate a cure within such 30-day period and is unable to do so because the nature of the cure in question requires more than 30 days to complete, except that in no event shall such period be extended for more than ninety (90) days. (b) The term “**Default Rate**” shall have the meaning therefor set forth in the Note.

15. **Power of Sale.** Upon the occurrence of an Event of Default, as defined by section 14 above, then the Trustee, its successors or assigns, on demand by Beneficiary, and recording of the notice of default and election to sell, as required by Chapter 106 of the Nevada Revised Statutes, shall sell the Property, in whole or in part, in order to accomplish the objectives of these trusts, in the manner following, namely: (a) The Trustee shall first give notice of the time and place of such sale pursuant to Nevada Revised Statutes Chapter 106, may from time to time postpone such sale by such advertisement as it may deem reasonable, or sale, in the manner provided by the laws of the State for the sale of real property under execution, and without further advertisement, by proclamation made to the persons assembled at the time and place previously appointed and advertised for such sale, and on the day of sale so advertised, or to which such sale may have been postponed, the Trustee may sell the property as so advertised, at public auction, at the time and place specified in the notice, in the county in which the Property, or any part thereof, to be sold, is



situated, to the highest bidder. The beneficiary, obligee, creditor, or the holder or holders of the Loan Documents secured hereby may bid and purchase at such sale. The Beneficiary may, after recording the notice of breach and election, waive or withdraw the same or any proceedings thereunder, and shall thereupon be restored to its former position and have and enjoy the same rights as though such notice had not been recorded.

(b) Subject to the provisions of Nevada Revised Statutes chapter 106, the Trustee, upon such sale, shall make (without warranty), execute and, after due payment made, deliver to purchaser or purchasers, his or their heirs or assigns, a deed or deeds of the Property so sold which shall convey to the purchaser all the title of the Trustor in the Property and shall apply the proceeds of the sale thereof in payment, firstly, to the expenses of such sale, together with the reasonable expenses of this trust, including counsel fees, in a reasonable amount, which shall become due upon any default made by Trustor in any of the payments aforesaid; and also such sums, if any, as Trustee or Beneficiary shall have paid, for procuring a search of the title to the Property, of any part thereof, subsequent to the execution of the Deed of Trust; and in payment, secondly, to the obligations or debts secured hereby, and interest thereon then remaining unpaid, and the amount of all other moneys with interest thereon herein agreed or provided to be paid by Trustor in such order as Beneficiary may elect in its sole discretion; and the balance or surplus of such proceeds of sale it shall pay to Trustor, its successor or assigns.

(c) In the event of a sale of the Property conveyed or transferred in trust, or any part thereof, and the execution of a deed or deeds therefor under such trust, the recital therein of default, and of recording the notice of breach and election to sell, and of the elapsing of the 3-month period, and of the giving of notice of sale, and of a demand by Beneficiary that such sale should be made, shall be conclusive proof of such default, recording, election, elapsing of time, and of the due giving of such notice, and that the sale was regularly and validly made on due and proper demand by Beneficiary; and any such deed or deeds with such recitals therein shall be effectual and conclusive against Trustor, its successors and assigns, and all other persons; and the receipt for the purchase money recited or contained in any deed executed to the purchaser as aforesaid shall be sufficient discharge to such purchaser from all obligation to see to the proper application of the purchase money, according to the trusts aforesaid. With respect to any of the Property which is personal property, Beneficiary shall have, in the jurisdiction in which enforcement of this Deed of Trust is sought, or in any other applicable jurisdiction, all remedies of a secured party under the Nevada Uniform Commercial Code and may require Trustor, on demand, to assemble all such personal property and make the same available to Beneficiary at such places as Beneficiary may select that are reasonably convenient for both parties, whether at the premises of Trustor or elsewhere.

16. **Deficiency.** Subject to applicable Nevada law, including without limitation Nevada Revised Statutes chapter 40, Trustor agrees to pay any deficiency arising from any cause after applications of the proceeds of the sale held in accordance with the provisions section 15 above.

17. **Remedies Cumulative and Limitation of Waiver.** The rights and remedies of Beneficiary upon the occurrence of one or more defaults by Trustor (whether such rights and remedies are conferred by statute, by rule of law, by this Deed of Trust, or otherwise) may be exercised by Beneficiary, in the sole discretion of Beneficiary, either alternatively, concurrently, or consecutively in any order. The exercise by Beneficiary, or Trustee at the express direction of Beneficiary, of any one or more of such rights and remedies shall not be construed to be an election of remedies nor a waiver of any other rights and remedies Beneficiary might have unless, and limited to the extent that, Beneficiary shall so elect or so waive by an instrument in writing delivered to Trustee. By accepting payment of any sum secured hereby after its due date, Beneficiary does not waive its right either to require prompt payment, when due, of all other sums so secured or to declare default, as herein provided, for failure to so pay.

18. **Stamps.** If at any time the United States of America, any state thereof or any governmental subdivision of such state shall require revenue stamps to be affixed to the Note or any of the other Loan Documents, or the payment of any other tax paid on or in connection therewith, Trustor shall pay the same with any interest or penalties imposed in connection therewith if Trustor is permitted by law to pay such amount and, if not so permitted then the Note shall immediately be due and payable.

19. **Law.** Trustor acknowledges and agrees that this Deed of Trust and the other Loan Documents, including provisions with respect to the making of any disbursements, the creation of any monetary obligations and the rights accruing and compensation payable to Beneficiary in connection therewith, shall be governed by and construed in accordance with the substantive and procedural laws of the State of Nevada; provided, however, in all instances, Federal Law shall apply to the extent that it displaces Nevada law by application of conflicts of laws principals.

20. **Miscellaneous.**

(a) This Deed of Trust applies to, inures to the benefit of, and binds all parties hereto, their heirs, legatees, devisees, administrators, executors, successors, and assigns. It is expressly agreed that the trust created hereby is irrevocable by Trustor.

(b) In the event that Trustor consists of more than one person or entity, the obligations of Trustor hereunder shall be joint and several.

(c) In this Deed of Trust, whenever the context so requires, the masculine gender includes the feminine and/or neuter, and the singular number includes the plural. The term "**Beneficiary**" includes any future holder of the note secured hereby. The term "**Trustor**" includes the term "**Grantor**."

(d) Trustor hereby appoints Beneficiary the attorney-in-fact of Trustor to prepare, sign, file and record one or more financing statements; any documents of title or registration, or like

papers, and to take any other action deemed necessary, useful or desirable by Beneficiary to perfect and preserve Beneficiary's security interest as granted pursuant to the Loan Documents against the rights or interests of third persons. The power vested in said attorney-in-fact is and shall be deemed to be coupled with an interest and irrevocable.

(e) If any provision of this Deed of Trust or its application to any person or circumstances is held invalid, the other provisions hereof or the application of the provision to other persons or circumstances shall not be affected.

(f) The captions or headings at the beginning of each section hereof are for convenience of the parties and are not a part of this Deed of Trust.

(g) Time is of the essence of each provision of this Deed of Trust.

(h) Covenants numbered 1, 3, 4, 5, 6, 7, 8 and 9 of Nevada Revised Statutes § 107.030 are incorporated herein by reference. The rate of interest for Covenant Number 4 shall be the Default Rate (defined in the Note). The percent of counsel fees under Covenant No. 7 shall be reasonable. Except for Covenants Numbers 6, 7 and 8, to the extent that any terms of this Deed of Trust are inconsistent with such statutory covenants, the terms of this Deed of Trust will control. Covenants Numbers 6, 7 and 8 shall control over the express terms of any inconsistent terms of this Deed of Trust.

21. **Notice.** Except as otherwise provided by law, any notice, request, demand, consent, approval or other communication ("**Notice**") provided or permitted under this Deed of Trust, or any other instrument contemplated hereby, shall be in writing, signed by the part giving such Notice and shall be given by personal delivery to the other party or by United States certified or registered mail, postage prepaid, return receipt requested, addressed to the party for whom it is intended at its address as set forth below. Unless otherwise specified, Notice shall be deemed given when received, but if delivery is not accepted, on the earlier of the date delivery is refused or the third day after same is deposited in any official United States Postal Depository. Any party from time to time, by Notice to the other parties given as above set forth, may change its address for purpose of receipt of any such communication.

Beneficiary:	Scott Financial Corporation 15010 Sundown Drive Bismarck, North Dakota 58503
Trustor:	Gemstone Development West, Inc. 9121 West Russell Road, Suite 117 Las Vegas, Nevada 89148
Trustee:	Commonwealth Land Title Insurance Company

5550 Painted Mirage, #440  
Las Vegas, NV 89102

22. **No Third Party Beneficiaries.** This Deed of Trust is made and entered into for the sole protection and benefit of the parties hereto, and no other person or entity shall be a direct or indirect beneficiary of, or shall have any direct or indirect cause of action or claim in connection with this Deed of Trust or any of the other Loan Documents.

23. **No Offset.** Under no circumstances shall Trustor fail or delay to perform (or resist the enforcement of) any of its obligations in connection with any of the Loan Documents because of any alleged offsetting claim or cause of action against Beneficiary (or any indebtedness or obligation of Beneficiary) which has not been confirmed in a final judgment of a court of competent jurisdiction (sustained on appeal, if any) against Beneficiary, and Trustor hereby waives any such rights of setoff (or offset) which it might otherwise have with respect to any such claims or causes of action against Beneficiary (or any such obligations or indebtedness of Beneficiary), unless and until such right of setoff is confirmed and liquidated by such a final judgment. Trustor further waives any right that it might otherwise have to require a marshaling of any security of Beneficiary or to direct the order in which Beneficiary pursues its rights or remedies with respect to any of its security.

24. **Continuation of Payments.** Notwithstanding any taking by eminent domain or other governmental action causing injury to, or decrease in value of, the Property and creating a right to compensation therefor, Trustor shall continue to make the required payments of principal and interest on the Note. If, prior to the receipt by Beneficiary of such award or compensation, the Property shall have been sold in any action or proceeding to foreclose this Deed of Trust, Beneficiary shall have the right to receive said award or compensation to the extent of any deficiency found to be due upon such sale, with interest hereon, whether or not a deficiency judgment of this Deed of Trust shall have been sought or recovered, together with reasonable counsel fees and the costs and disbursements incurred by Beneficiary in connection with the collection of such award or compensation.

25. **Security Agreement.**

(a) With respect to all of the personal property that is included in the description of the Property (the "**Collateral**"), this Deed of Trust shall constitute a security agreement under Article 9 of the Nevada Uniform Commercial Code, and Trustor hereby grants Beneficiary a security interest in the Collateral for the purpose of securing all of Trustor's obligations under the Note, and grants Beneficiary all rights of a secured party under the provisions of Article 9 of the Nevada Uniform Commercial Code in connection therewith.

(b) Without limiting the generality of any other provision of this Deed of Trust, Trustor further covenants that the Collateral will be kept on or at the Property, that Trustor will not

sell or otherwise dispose of the Collateral, that Trustor will keep the Collateral in good condition and repair, that Beneficiary may inspect and examine the Collateral at any reasonable time, that the Collateral is free and clear of any other liens or encumbrances, and that the security interest granted hereby extends to all proceeds and replacements for any or all of the Collateral.

(c) If there is an Event of Default, beneficiary may take possession of any part of all of the Collateral, and thereafter take all actions in connection therewith that it deems necessary or appropriate to protect or preserve the Collateral, require Trustor to assemble the Collateral at a place designated by Beneficiary, sell the Collateral at a public or private sale in such order as Beneficiary may determine (independent of any Trustee's sale hereunder), and exercise any and all other rights extended to secured parties under the terms of Article 9 of the Nevada Uniform Commercial Code.

26. **Fixture Filing.** This Deed of Trust covers goods that are or are to become fixtures related to the Property, and constitutes a "**fixture filing**" with respect thereto, executed by Trustor as "**debtor**" and Beneficiary as "**secured party**," for purposes of the Nevada Uniform Commercial Code.

27. **Warranty of Title.** Trustor warrants that it is the sole owner of good and marketable unencumbered title to the Property, and Trustor will forever defend the same against all claims and persons whomsoever, unto Beneficiary, its successors and assigns, subject only to the matters approved by beneficiary as acceptable exceptions to title pursuant to the provisions of the closing instruction letter delivered herewith to the title insurance company insuring the lien of this Deed of Trust. All of Trustor's present and future right, title and interest in the Property shall be subject to the lien and other terms and provisions of this Deed of Trust regardless of the time that any such right, title and interest is created, obtained by or conveyed, transferred or assigned to Trustor.

28. **Intentionally Deleted.**

29. **Appointment of a Receiver.** Following the occurrence of an Event of Default and provided that all applicable notice and cure provisions have passed without Trustor effectuating a cure, a receiver may be appointed, with or without notice, where upon the receiver shall immediately be entitled to possession of all of the Property. Beneficiary's right to a receiver shall be absolute and unconditional. The receiver may be appointed without regard to the adequacy of any security for the Note and Trustor shall immediately surrender possession of the Property to the receiver upon his appointment. The receiver shall have the right to take possession of the Property, to collect the Rents therefrom, to complete the construction of any structures or improvements in progress thereon, to lease the Property or any part thereof, to operate any business thereon, and to exercise such other rights as may be granted by the court pending such proceedings, and up to the time of redemption or issuance of a Trustee's deed. Rents shall be applied to the costs and expenses of the receiver and the receivership, including any costs of construction, and the balance

shall be applied in the manner provided for herein. The receiver shall have the power to borrow money from any person, including Beneficiary, for expenses of operating, preserving, maintaining and caring for the Property, and completing the construction in progress of any improvements or structures upon the Property, and all such borrowed sums, together with interest thereon, whether expended or not, shall be added to the obligations secured hereby. In addition, any costs incurred, or advances made, by beneficiary in connection with the implementation or operation of the receivership, shall be added to the obligations secured hereby, bear interest at the Default Rate, be guaranteed by any guarantee(s) now or thereafter relating to the obligations secured hereby and be secured by this Deed of Trust. Trustor hereby waives any right it may have under Nevada Revised Statutes § 107.100 to require Beneficiary to make any showing or meet any obligation as a condition to the appointment of a receiver.

30. **Construction Mortgage.** This Deed of Trust is a “**construction mortgage**” as that term is defined in Article 9 of the Nevada Uniform Commercial Code (Nevada Revised Statutes Chapter 104).

31. **Waiver of Jury Trial.** Trustor and Beneficiary each (a) covenants and agrees not to elect a trial by jury with respect to any issue arising out of this instrument or the relationship between the parties as borrower and lender that is triable of right by a jury and (b) waives any right to trial by jury with respect to such issue to the extent that any such right exists now or in the future. This waive of right to trial by jury is separately given by each party, knowingly and voluntarily with the benefit of competent legal counsel.

32. **Waiver of Marshaling.** To the extent permitted by law Trustor waives (i) the benefit of all present or future laws providing for any appraisalment before sale or any portion of the Property, (ii) all rights of redemption, valuation, appraisalment, stay of execution, notice of election to mature or declare due the whole of the debts and/or obligations secured by this Deed of Trust and marshaling in the event of foreclosure of the lien created by this Deed of Trust, (iii) all rights and remedies which Trustor may have or be able to assert by reason of the laws of the State of Nevada pertaining to the rights and remedies of sureties, (iv) the right to assert any statute of limitations as a bar to the enforcement of the lien of this Deed of Trust or to any action brought to enforce the Note or any other obligation secured by this Deed of Trust, (v) any rights, legal or equitable, to require marshaling of assets or to require upon foreclosure sales in a particular order, including any rights under Nevada Revised Statutes Beneficiary shall have the right to determine the order in which any or all of the Property shall be subjected to the remedies provided by this Deed of Trust. Beneficiary shall have the right to determine the order in which any or all portions of the indebtedness and obligations secured by this Deed of Trust are satisfied from the proceeds realized upon the exercise of the remedies provided by this Deed of Trust.

33. **Certification of Loan Documents.** Within ten (10) business days after a written request from Beneficiary, Trustor shall deliver to Beneficiary a written statement, signed and acknowledged by Trustor, certifying to Beneficiary or any person designated by the Beneficiary, as

of the date of such statement (i) that the Loan Documents are unmodified and in full force and effect (or if there have been modifications, that the Loan Documents are in full force and effect as modified and setting forth such modifications), (ii) the unpaid principal balance of the Note, (iii) the date to which interest under the Note has been paid, (iv) that Trustor is not in default in paying the indebtedness or in performing or observing any of the covenants and agreements contained in this Deed of Trust or any other Loan Document (or, if the Trustor is in default, describing such default in reasonable detail), (v) whether or not there are then existing any offsets or defenses known to Trustor against the enforcement of any right or remedy of Beneficiary under the Loan Documents, and (vi) any additional facts requested by the Beneficiary. Failure to timely issue the requested certificate shall, at the election of the Trustor, be an Event of Default by the Trustor.

**34. Release.** Provided that there is no Event of Default, Trustor shall be entitled to the release of the lien of this Deed of Trust with respect to certain parcels of the Property upon payment of required proceeds from each such parcel as set forth in the Loan Agreement, subject to the following conditions:

(a) The satisfaction of all state, county, municipal or other requirements regarding the subdivision of the Property and the sale of the parcel thereof to be released, and evidence thereof satisfactory to Beneficiary;

(b) The release in question shall be in connection with the sale of a parcel of the Property to a bona fide purchaser for value, and shall be approved by Lender;

(c) Beneficiary shall have been paid the release price for such parcel;

(d) Beneficiary shall have received such title insurance endorsements to its policy of title insurance insuring the lien of this Deed of Trust as Beneficiary may require, in the sole and absolute exercise of its discretion;

(e) Beneficiary shall have received a written request for such release in a form and substance satisfactory to Beneficiary in the sole and absolute exercise of its discretion;

(f) All costs and expenses of Beneficiary relating to such release shall be paid by Trustor including, without limitation, reconveyance fees, title fees, recording fees and legal expenses;

(g) No partial release shall impair or adversely affect Beneficiary's security in the remainder of the Property subject to this Deed of Trust, and Trustor shall provide such access and/or use easements (burdening the Property to be released for the benefit of the remaining portion of the Property) as Beneficiary may deem necessary in the reasonable exercise of its discretion;

(h) The release price may be applied to the Note by Beneficiary in any order that Beneficiary so desires.

**35. CC&R's.** By accepting this Deed of Trust, Beneficiary agrees that the priority of this Deed of Trust shall be at all times as if any Covenants, Conditions and Restrictions (CC&R's) relating to the ManhattanWest Project to be constructed on the Property had been recorded prior to the recording hereof.

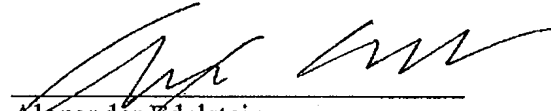


IN WITNESS WHEREOF, Trustor has executed this instrument on the day and year first above written.

TRUSTOR:

GEMSTONE DEVELOPMENT WEST, INC.

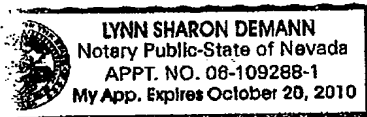
By:

  
Alexander Edelstein  
Its Chief Executive Officer

STATE OF NEVADA        }  
                                  } ss  
COUNTY OF CLARK        }

This instrument was acknowledged before me on January 30, 2008, by Alexander Edelstein, the Chief Executive Officer of Gemstone Development West, Inc., a Nevada corporation, on behalf of the corporation.

  
NOTARY PUBLIC



## **EXHIBIT A**

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 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.

**ASSESSOR'S PARCEL NO.: 163-32-101-003**

### **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.

**ASSESSOR'S PARCEL NO.: 163-32-101-004**

### **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.

**ASSESSOR'S PARCEL NO.: 163-32-101-005**

**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 Final Order of Condemnation recorded November 20, 1998 in Book 981120 as Document No. 00763 of Official Records.

**ASSESSOR'S PARCEL NO.: 163-32-101-014**

**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.

**ASSESSOR'S PARCEL NO.: 163-32-101-010**

**NOTE: THE NEW PARCEL NO. FOR THE ALL OF THE ABOVE IS 163-32-101-019**

# **EXHIBIT 2**

20080207-0001486

Assessor's Parcel Number: 163-32-101-019

Recording Requested by and  
When Recorded Mail to:

Scott Financial Corporation  
15010 Sundown Drive  
Bismarck, ND 58503

Fee: \$21.00

N/C Fee: \$0.00

02/07/2008

10:00:58

T20080021465

Requestor:

COMMONWEALTH TITLE

Debbie Conway

ADF

Clark County Recorder Pgs: 8

**MEZZANINE DEEDS OF TRUST SUBORDINATION AGREEMENT**

THIS AGREEMENT is made effective January 22, 2008, by **SCOTT FINANCIAL CORPORATION**, a North Dakota corporation ("SFC").

**RECITALS**

A. Gemstone Apache, LLC ("Apache") is the "Trustor" and SFC is the "Beneficiary" under the following described deeds of trust (separately and collectively, together with amendments now existing or hereafter arising, the "Mezzanine Deeds of Trust") covering the real property described on Exhibit A hereto (the "Trust Property"), each of which was recorded in the Official Records of Clark County, Nevada ("Office"):

(i) Senior Deed of Trust dated June 26, 2006, and recorded July 5, 2006, at Book 20060705, Instrument No. 0004264, securing \$15,000,000 evidenced by a promissory note of equal amount payable by Apache to SFC, affecting a portion of the Trust Property (the "Mezzanine Senior Deed of Trust");

(ii) Junior Deed of Trust dated June 26, 2006, and recorded July 5, 2006, at Book 20060705, Instrument No. 0004265, securing \$10,000,000 evidenced by a promissory note of equal amount payable by Apache to SFC, as amended by a First Amendment recorded May 22, 2007, at Book 20070522, Instrument No. 0004011, securing an additional \$8,000,000 evidenced by a promissory note of equal amount payable by Apache to SFC (the "Mezzanine Junior Deed of Trust"); and

(iii) Third Deed of Trust dated June 26, 2006, and recorded July 5, 2006, at Book 20060705, Instrument No. 004266, securing \$13,000,000 evidenced by a promissory note of equal amount payable by Alexander Edelstein to SFC ("Edelstein Note"), as amended by a First Amendment to Third Deed of Trust recorded October 24, 2007 at Book 20071024, Instrument No. 004182, securing an additional \$10,000,000 evidenced by a promissory note of equal amount payable by Apache to SFC (the "Mezzanine Third Deed of Trust"). (The foregoing promissory notes payable by Apache to SFC are herein referred to separately and collectively as the "Mezzanine Notes.")

B. Gemstone Development West, Inc. ("GDW") has purchased the Trust Property from Apache and has assumed the obligations under the Mezzanine Deeds of Trust and the Mezzanine Notes and the Edelstein Note pursuant to an Assumption Agreement to be recorded contemporaneously herewith. The Mezzanine Notes have been restructured and consolidated into a \$46,000,000 Promissory Note ("Restructured Mezzanine Note") payable by GDW to SFC, and the Mezzanine Deeds of Trust have

been amended to secure payment of the Restructured Mezzanine Note, pursuant to the Fourth Amendment to Mezzanine Loan Agreement of even date herewith.

C. SFC has agreed to loan \$110,000,000 to GDW pursuant to a Senior Debt Loan Agreement ("Senior Debt Loan Agreement") of even date herewith between GDW, as Borrower, and SFC, as SFC, as further evidenced by a \$100,000,000 Senior Debt Construction Note and a \$10,000,000 Senior Debt Contingency Notes (the "Senior Debt Notes") payable by GDW to SFC, payment of which is secured by a Senior Debt Deed of Trust of even date recorded in the Office at Book ~~✱~~, Instrument No. ~~✱✱~~ wherein GDW is the Trustor and SFC is the Beneficiary of a Senior Deed of Trust (the "\$110,000,000 Senior Debt Deed of Trust"). *\* Book 2008207 \* Instrument No. 01482*

C. SFC has agreed and hereby intends to evidence that the Mezzanine Deeds of Trust and the indebtedness secured thereby shall be subordinate to the \$110,000,000 Senior Debt Deed of Trust and the indebtedness secured thereby.

#### AGREEMENT

NOW, THEREFORE, in consideration of the premises and of the terms and conditions hereafter set forth, and as inducement for any participant to acquire any interest in the Senior Debt Loan Agreement, the Senior Debt Notes and all related loan documents, SFC hereby agrees as follows:

1. Lien Priority. The lien of the \$110,000,000 Senior Debt Deed of Trust and the indebtedness secured thereby shall in all respects be deemed prior to and superior to the lien of the Mezzanine Deeds of Trust and the indebtedness secured thereby, as though the Mezzanine Deeds of Trust had been recorded subsequent to the recordation of the \$110,000,000 Senior Debt Deed of Trust.

1. Subordination. The payment of all of the Restructured Mezzanine Note is hereby expressly subordinated to the extent and in the manner hereinafter set forth to the payment in full of the Senior Debt Notes; and regardless of any priority otherwise available to SFC (as lender of the Restructured Mezzanine Note) by law or by agreement, SFC shall hold a first security interest in all collateral securing payment of the Senior Debt Notes (the "Collateral"), and any security interest claimed therein (including any proceeds thereof) by SFC (as lender of the Restructured Mezzanine Note) shall be and remain fully subordinate for all purposes to the security interest of SFC therein for all purposes whatsoever.

2. No Payments. Until all of the Senior Debt Notes has been paid in full, SFC (as lender of the Restructured Mezzanine Note) shall not demand, receive or accept any payment (whether of principal, interest or otherwise) from the Borrower in respect of the Restructured Mezzanine Note, or exercise any right of or permit any setoff in respect of the Restructured Mezzanine Note, provided that notwithstanding the foregoing, so long as no event of default has occurred with respect to the Senior Debt Notes or the \$110,000,000 Senior Debt Deed of Trust, SFC may receive and Borrower may pay scheduled interest and fees and may pay such interest and fees from advances on the Mezzanine Note.

3. Receipt of Prohibited Payments. If SFC (as lender of the Restructured Mezzanine Note) receives any payment on the Restructured Mezzanine Note that SFC (as lender of the Restructured Mezzanine Note) is not entitled to receive under the provisions of this Agreement, SFC (as lender of the Restructured Mezzanine Note) will hold the amount so received in trust for SFC and will forthwith turn over such payment to SFC in the form received (except for the endorsement of SFC (as lender of the Restructured Mezzanine Note) where necessary) for application to then-existing Senior Debt Notes

(whether or not due), in such manner of application as SFC may deem appropriate. In the event that SFC (as lender of the Restructured Mezzanine Note) shall exercise any right of setoff that SFC (as lender of the Restructured Mezzanine Note) is not permitted to exercise under the provisions of this Agreement, SFC (as lender of the Restructured Mezzanine Note) will promptly pay over to SFC, in immediately available funds, an amount equal to the amount of the claims or obligations offset. If SFC (as lender of the Restructured Mezzanine Note) fails to make any endorsement required under this Agreement, SFC, or any of its officers or employees or agents on behalf of SFC, is hereby irrevocably appointed as the attorney-in-fact (which appointment is coupled with an interest) for SFC (as lender of the Restructured Mezzanine Note) to make such endorsement in SFC (as lender of the Restructured Mezzanine Note)'s name.

4. Action on Restructured Mezzanine Note. SFC (as lender of the Restructured Mezzanine Note) will not commence any action or proceeding against the Borrower to recover all or any part of the Restructured Mezzanine Note, or join with any SFC (as lender of the Restructured Mezzanine Note) (unless SFC shall so join) in bringing any proceeding against the Borrower under any bankruptcy, reorganization, readjustment of debt, arrangement of debt receivership, liquidation or insolvency law or statute of the federal or any state government, or take possession of, sell, or dispose of any Collateral, or exercise or enforce any right or remedy available to SFC (as lender of the Restructured Mezzanine Note) with respect to any such Collateral, unless and until the Senior Debt Notes has been paid in full.

5. Foreclosure of Collateral. Notwithstanding any security interest now held or hereafter acquired by SFC (as lender of the Restructured Mezzanine Note), SFC may take possession of, sell, dispose of, and otherwise deal with all or any part of the Collateral, and may enforce any right or remedy available to it with respect to the Collateral, all without notice to or consent of SFC (as lender of the Restructured Mezzanine Note) except as specifically required by applicable law. All proceeds received by SFC with respect to any Collateral may be applied, first, to pay or reimburse SFC for all costs and expenses (including reasonable attorneys' fees) incurred by SFC in connection with the collection of such proceeds, and, second, to any indebtedness secured by the Bank's security interest in that Collateral in any order that it may choose.

6. Bankruptcy and Insolvency. In the event of any receivership, insolvency, bankruptcy, assignment for the benefit of SFC (as lender of the Restructured Mezzanine Note)s, reorganization or arrangement with SFC (as lender of the Restructured Mezzanine Note)s, whether or not pursuant to bankruptcy law, the sale of all or substantially all of the assets of the Borrower, dissolution, liquidation or any other marshaling of the assets or liabilities of the Borrower, SFC (as lender of the Restructured Mezzanine Note) will file all claims, proofs of claim or other instruments of similar character necessary to enforce the obligations of the Borrower in respect of the Restructured Mezzanine Note and will hold in trust for SFC and promptly pay over to SFC in the form received (except for the endorsement of SFC (as lender of the Restructured Mezzanine Note) where necessary) for application to the then-existing Senior Debt Notes, any and all moneys, dividends or other assets received in any such proceedings on account of the Restructured Mezzanine Note unless and until the Senior Debt Notes has been paid in full. If SFC (as lender of the Restructured Mezzanine Note) shall fail to take any such action, SFC, as attorney-in-fact for SFC (as lender of the Restructured Mezzanine Note), may take such action on SFC (as lender of the Restructured Mezzanine Note)'s behalf. SFC (as lender of the Restructured Mezzanine Note) hereby irrevocably appoints SFC, or any of its officers or employees on behalf of SFC, as the attorney-in-fact for SFC (as lender of the Restructured Mezzanine Note) (which appointment is coupled with an interest) with the power but not the duty to demand, sue for, collect and receive any and all such moneys, dividends or other assets and give acquittance therefor and to file any claim, proof of claim or other instrument of similar character, to vote claims on the Restructured Mezzanine Note to accept or reject any plan of partial or complete liquidation, reorganization, arrangement, composition or extension and to take such other action in SFC's own name or in the name of SFC (as lender of the Restructured Mezzanine Note) as SFC may deem necessary or advisable for the enforcement of the agreements contained herein; and SFC (as lender of the Restructured Mezzanine Note) will execute and deliver to SFC such other and further powers-of-attorney or instruments as SFC may request in order to accomplish the foregoing.

7. Restrictive Legend; Transfer of Restructured Mezzanine Note. SFC (as lender of the Restructured Mezzanine Note) will cause all notes, bonds, debentures or other instruments evidencing the Restructured Mezzanine Note or any part thereof to contain a specific statement thereon to the effect that the indebtedness thereby evidenced is subject to the provisions of this Agreement, and SFC (as lender of the Restructured Mezzanine Note) will mark its books conspicuously to evidence the subordination effected hereby. SFC (as lender of the Restructured Mezzanine Note) will not assign, transfer or pledge to any other person any of the Restructured Mezzanine Note unless the subordination provisions hereof are accepted and agreed by such other person.

8. Continuing Effect. This Agreement shall constitute a continuing agreement of subordination, and SFC may modify any term of the Senior Debt Notes in reliance upon this Agreement. Without limiting the generality of the foregoing, SFC may, at any time and from time to time:

- (a) change the interest rate or change the amount of payment or extend the time for payment or renew or otherwise alter the terms of any Senior Debt Notes or any instrument evidencing the same in any manner;



(b) sell, exchange, release or otherwise deal with any property at any time securing payment of the Senior Debt Notes or any part thereof;

(c) release anyone liable in any manner for the payment or collection of the Senior Debt Notes or any part thereof;

(d) exercise or refrain from exercising any right against the Borrower or any other person (including SFC (as lender of the Restructured Mezzanine Note)); and

(e) apply any sums received by SFC, by whomsoever paid and however realized, to the Senior Debt Notes in such manner as SFC shall deem appropriate.

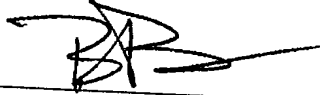
10. This Agreement shall not be construed as affecting the priority of any other liens or **encumbrances** in favor of SFC on the Trust Property.

11. This Agreement shall be construed according to the laws of the State of Nevada and shall **be binding** upon and inure to the benefit of SFC, its participants, and their successors and assigns.

*The rest of this page is intentionally left blank.*

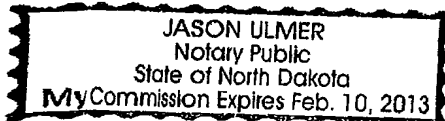
SCOTT FINANCIAL CORPORATION

By:

  
\_\_\_\_\_  
Brad J. Scott  
President

STATE OF NORTH DAKOTA }  
COUNTY OF BURLEIGH } ss

This instrument was acknowledged before me on January 29, 2008, by Brad J. Scott, President of Scott Financial Corporation, a North Dakota corporation, on behalf of the corporation.



  
\_\_\_\_\_  
NOTARY PUBLIC

THIS INSTRUMENT WAS DRAFTED BY:  
Maslon Edelman Borman & Brand, LLP (PRH)  
3300 Wells Fargo Center  
90 South Seventh Street  
Minneapolis, Minnesota 55402  
(612) 672-8200

## **EXHIBIT A**

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 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.

**ASSESSOR'S PARCEL NO.: 163-32-101-003**

### **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.

**ASSESSOR'S PARCEL NO.: 163-32-101-004**

### **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.

**ASSESSOR'S PARCEL NO.: 163-32-101-005**

### **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.

SCOTT-004782

ARA 000044

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 Final Order of Condemnation recorded November 20, 1998 in Book 981120 as Document No. 00763 of Official Records.

**ASSESSOR'S PARCEL NO.: 163-32-101-014**

**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.

**ASSESSOR'S PARCEL NO.: 163-32-101-010**

**NOTE: THE NEW PARCEL NO. FOR THE ALL OF THE ABOVE IS 163-32-101-019**

SCOTT-004783

ARA 000045

# **EXHIBIT 3**



1

January 23, 2008

To: ManhattanWest Phase 1 Vertical Financing Participants

## ManhattanWest Draw Summary

Draw #: Sr. Loan Initial Draw  
Invoice Period: Project start thru November  
Draw Amount: \$24,549,923.02  
Funding Date: February 6, 2008

Enclosed you will find the following supporting documentation for this draw request:

1. SFC Draw Cover Letter 1-23-08
2. NCS Voucher Control Summary Letter 1-23-08
3. SFC Document E: Everything (Contractor Cost, Developer Cost, Loan Balances)
4. SFC Document C: Contractor Costs Detail
5. SFC Document D: Developer Costs Detail
6. Application and Certificate for Payment 11-30-07
7. NCS Loan Budget Item Status/Activity 11-30-07
8. NCS Construction Progress Inspection Report 11-30-07
9. Participant Funding Breakdown & Wiring Instructions

By signing below, Scott Financial Corporation (Lender) and Bank of Oklahoma, N.A. (Co-lead) have reviewed and approved the enclosed Draw Request.

LENDER:  
SCOTT FINANCIAL CORPORATION

Brad J. Scott  
Its President

1/30/08  
Date

CO-LEAD:  
BANK OF OKLAHOMA, N.A.

Tim James  
Its Sr. Vice President

Date

\* See next page for signature →

P002405

ARA 000047



1

January 23, 2008

To: ManhattanWest Phase 1 Vertical Financing Participants

## ManhattanWest Draw Summary

Draw #: Sr. Loan Initial Draw  
Invoice Period: Project start thru November  
Draw Amount: \$24,549,923.02  
Funding Date: February 6, 2008

Enclosed you will find the following supporting documentation for this draw request:

1. SFC Draw Cover Letter 1-23-08
2. NCS Voucher Control Summary Letter 1-23-08
3. SFC Document E Everything (Contractor Cost, Developer Cost, Loan Balances)
4. SFC Document C Contractor Costs Detail
5. SFC Document D Developer Costs Detail
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8. NCS Construction Progress Inspection Report 11-30-07
9. Participant Funding Breakdown & Wiring Instructions

By signing below, Scott Financial Corporation (Lender) and Bank of Oklahoma, N.A. (Co-lead) have reviewed and approved the enclosed Draw Request.

LENDER:  
SCOTT FINANCIAL CORPORATION

Brad J. Scott  
Its President

Date

CO-LEAD:  
BANK OF OKLAHOMA, N.A.

Tim James  
Its Sr. Vice President

Date

1/30/08

P002406

ARA 000048

in an effort to efficiently execute the monthly draws; SFC has provided the following footnotes to assist in navigating through the draw documents:

**(These footnotes are handwritten on the enclosed draw documents)**

A: Contractor Phase 1 Project Budget	\$ 78,938,160.00
B: Contractor GROSS Draw from start thru Nov.	\$ 14,180,886.20
C: Contractor GROSS Total Draws	\$ 14,180,886.20
D: Contractor GROSS Remaining Budget	\$ 64,757,273.80
E: Contractor Retention from start thru Nov.	\$ 1,280,354.00
F: Contractor Total Retentions	\$ 1,280,354.00
G: Contractor Retention Remaining	\$ 1,280,354.00
H: Contractor NET Draws from start thru Nov.	\$ 12,900,532.20
I: Contractor NET Total Draws	\$ 12,900,532.20
J: Contractor NET Remaining Budget	\$ 66,037,627.80
K: Developer Phase 1 Budget	\$ 54,545,383.64
L: Developer NET Draw from start thru Nov.	\$ 11,649,390.82
M: Developer NET Total Draws	\$ 11,649,390.82
N: Developer NET Remaining Budget	\$ 42,895,992.82
O: Total Budget	\$133,483,543.64
<b>P: Total NET Draw from start thru Nov.</b>	<b>\$ 24,549,923.02</b>
Q: Total NET Draws	\$ 24,549,923.02
R: Total NET Remaining Budget	\$108,933,620.62
S: Senior Debt Note Balance	\$ 24,549,923.02
T: Mezzanine Debt Note Balance	\$ 44,508,099.40
U: Developer Equity	\$ 2,000,000.00
V: Total Project Funding start thru Nov.	\$ 71,058,022.42
W: Contractor GROSS Draw Nov.	\$ 6,228,055.20
X: Contractor Retention Nov.	\$ 622,806.20
Y: Contractor NET Draw Nov.	\$ 5,605,249.00





NEVADA  
CONSTRUCTION  
SERVICES

SFC  
Approved 1/23/08 (2)  
JAZ

January 23, 2008

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

RE: DRAW REQUEST ON THE FOLLOWING PROJECT:

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

Gross	\$6,228,055.20
Retention	\$622,806.20
Net	\$5,605,249.00

Footnotes  
W  
X  
Y

=====Please fund \$5,605,249.00 ✓

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

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

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

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

Sincerely,

*J. Olivares/px*

Jennifer Olivares  
Disbursement Agent

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

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

P002408

ARA 000050

# Document E: Everything

3

## Actual Draw Request Summary PHASE 1

REVENUE SUMMARY	Updated Date	Senior Budget Amount	SR ACTUAL INITIAL DRAW	Budget Balance
Building 2	commercial	\$ 24,307,712.00		\$ 24,307,712.00
Building 3	commercial	\$ 28,865,408.00		\$ 28,865,408.00
Building 7	76	\$ 36,920,822.89		\$ 36,920,822.89
Building 8	76	\$ 30,071,196.79		\$ 30,071,196.79
Building 9	76	\$ 30,071,196.79		\$ 30,071,196.79
PROJECT COST SUMMARY				
Contractor Fee		\$ 4,996,086.08	\$ 732,861.50	\$ 4,263,224.58
Site Improvement		\$ 4,241,136.71	\$ 2,790,127.50	\$ 1,451,009.21
Clubhouse/Pool/Guardhouse		\$ 430,886.08		\$ 430,886.08
Framing Contract		\$ 3,381,518.99	\$ 1,296,650.00	\$ 2,084,868.99
Condo Construction		\$ 65,888,532.15	\$ 9,359,242.20	\$ 56,529,289.95
General Contractor Subtotal		\$ 78,938,160.00	\$ 14,180,886.20	\$ 64,757,273.80
Approved Change Orders - Approved AIA 702				
General Contractor Subtotal with Change Orders		\$ 78,938,160.00	\$ 14,180,886.20	\$ 64,757,273.80
RETENTION				
OTHER Adjustments			\$ (1,280,354.00)	\$ 1,280,354.00
Pending Unit Upgrade Expenses				
Pending Change Orders (Not Approved AIA 702)				
TOTAL General Contractor Cash Advances		\$ 78,938,160.00	\$ 12,900,532.20	\$ 66,037,627.80
Upgrade Costs		\$ 2,299,925.53		\$ 2,299,925.53
Tenant Improvement Allowances		\$ 4,463,040.00		\$ 4,463,040.00
Allowance for Amenities Buildout		\$ 1,000,000.00		\$ 1,000,000.00
Total Construction Allowances		\$ 7,762,965.53		\$ 7,762,965.53
Allowance Retainage				
Developer Allowance Advances		\$ 7,762,965.53		\$ 7,762,965.53
Developer Costs				
Interest Expense		\$ 10,331,475.66		\$ 10,331,475.66
Loan Fees		\$ 275,000.00	\$ 275,000.00	
Management Overhead		\$ 4,280,347.83	\$ 813,845.31	\$ 3,466,502.52
Construction Costs outside GMP		\$ 2,039,000.00		\$ 2,039,000.00
Soft Costs		\$ 14,818,385.29	\$ 7,463,944.43	\$ 7,354,440.86
Sales & Marketing Expense		\$ 10,850,209.54	\$ 3,096,601.08	\$ 7,753,608.46
Developer Contingency		\$ 4,390,000.00		\$ 4,390,000.00
Developer Subtotal		\$ 46,782,418.11	\$ 11,649,390.82	\$ 35,133,027.29
Approved Change Orders - Approved AIA 702				
Developer Subtotal with Change Orders and Allowances		\$ 54,548,383.64	\$ 11,649,390.82	\$ 42,898,992.82
OTHER Adjustments				
Pending Change Orders (Not Approved AIA 702)				
Developer Monthly Advance		\$ 54,548,383.64	\$ 11,649,390.82	\$ 42,898,992.82
Deferred Developer Costs		\$ 6,758,238.74		\$ 6,758,238.74
NET PROFIT		\$ 9,994,564.08		\$ 9,994,564.08
NET PROFIT		\$ 7,595,000.00		\$ 7,595,000.00
PROJECT EQUITY VALUE		\$ 17,590,184.08		\$ 17,590,184.08
PROJECT FINANCING SUMMARY				
\$100MM Senior Debt Construction Note				
Senior Loan Advances		\$ 133,483,543.84	\$ 24,648,823.02	\$ 108,834,720.82
\$10MM Senior Debt Contingency Note				
Senior Loan Advances				
\$40MM Mezz Loan				
\$2MM Edelman Equity				
Upgrade Deposit Allocation:				

WIRE SUMMARY	
Wire to Gemstone Development West, Inc.	\$ 2,524,361.06
Wire to NCS	\$ 2,573,960.36
Wire to SFC	\$ 275,000.00
Wire to Club Vista Financial Services	
Previous Budgeted Contractor Costs	\$ 10,326,571.84
Previous Budgeted Developer Costs	\$ 8,850,029.76
Interest \$46MM Mezz Note	
TOTAL WIRES	\$ 24,549,923.02

sr. Debt First Advance

SFC  
Approved  
1-23-08  
TJB

(4)

# Document C: Contractor Costs Detail

## General Contractor Cost Detail-APCO

	BUDGET	Draw			
<b>General Conditions</b>					
<b>1000 GENERAL CONDITIONS</b>					
1000 APCO Contractor Fee	\$ 4,996,086.00	\$ 699,452.00	\$ 699,452.00	86.00%	\$ 4,296,634.00
1310 General Conditions	\$ 7,095.00	\$ 709.50	\$ 709.50	90.00%	\$ 6,385.50
1330 Submittals	\$ 4,500.00	\$ 2,700.00	\$ 2,700.00	40.00%	\$ 1,800.00
1500 Mobilization	\$ 50,000.00	\$ 30,000.00	\$ 30,000.00	40.00%	\$ 20,000.00
1780 Closeout Documents	\$ 4,000.00	\$ -	\$ -	100.00%	\$ 4,000.00
<b>TOTAL BUDGET AMOUNT</b>	<b>\$ 5,061,681.00</b>	<b>\$ 732,861.50</b>	<b>\$ 732,861.50</b>	<b>14.48%</b>	<b>\$ 4,328,819.50</b>
<b>Site Improvements</b>					
<b>2000 SITEWORK</b>					
2200 Site Prep & Mass Excavation	\$ 2,754,700.00	\$ 2,754,700.00	\$ 2,754,700.00	0.00%	\$ -
2300 Mass Excavation	\$ -	\$ -	\$ -	#DIV/0!	\$ -
2510 Site Water	\$ 647,000.00	\$ -	\$ -	100.00%	\$ 647,000.00
2530 Site Sanitary Sewer	\$ 615,000.00	\$ -	\$ -	100.00%	\$ 615,000.00
2580 Site electric	\$ -	\$ -	\$ -	#DIV/0!	\$ -
2600 Storm Sewer	\$ 511,000.00	\$ -	\$ -	100.00%	\$ 511,000.00
2740 Asphaltic concrete Paving	\$ 512,350.00	\$ 35,427.50	\$ 35,427.50	93.09%	\$ 476,922.50
2750 Concrete Paving and Approaches	\$ -	\$ -	\$ -	#DIV/0!	\$ -
2770 Curbs and Gutters	\$ 205,020.00	\$ -	\$ -	100.00%	\$ 205,020.00
2775 Sidewalks	\$ 430,000.00	\$ -	\$ -	100.00%	\$ 430,000.00
2780 Unit Pavers	\$ 255,000.00	\$ -	\$ -	100.00%	\$ 255,000.00
2800 Irrigation System	\$ -	\$ -	\$ -	#DIV/0!	\$ -
2820 Fencing	\$ -	\$ -	\$ -	#DIV/0!	\$ -
2870 Site furnishings	\$ 100,000.00	\$ -	\$ -	100.00%	\$ 100,000.00
2900 Landscaping	\$ 345,000.00	\$ -	\$ -	100.00%	\$ 345,000.00
<b>TOTAL BUDGET AMOUNT</b>	<b>\$ 6,376,070.00</b>	<b>\$ 2,790,127.50</b>	<b>\$ 2,790,127.50</b>	<b>43.77%</b>	<b>\$ 3,584,942.50</b>
<b>Clubhouse/Pool/Pool House/ Guard House</b>					
<b>18000 ALLOWANCES</b>					
18000 Pools	\$ 460,000.00	\$ -	\$ -	0.00%	\$ 460,000.00
<b>TOTAL BUDGET AMOUNT</b>	<b>\$ 460,000.00</b>	<b>\$ -</b>	<b>\$ -</b>	<b>0.00%</b>	<b>\$ 460,000.00</b>
<b>Framing Contract</b>					
6100 Rough Framing	\$ 3,610,000.00	\$ 1,298,650.00	\$ 1,298,650.00	64.03%	\$ 2,311,350.00
<b>TOTAL BUDGET AMOUNT</b>	<b>\$ 3,610,000.00</b>	<b>\$ 1,298,650.00</b>	<b>\$ 1,298,650.00</b>	<b>64.03%</b>	<b>\$ 2,311,350.00</b>
<b>Condo Construction</b>					
<b>3000 CONCRETE</b>					
3300 Cast in Place Concrete	\$ 8,875,000.00	\$ 5,494,000.00	\$ 5,494,000.00	38.10%	\$ 3,381,000.00
3450 Precast Concrete	\$ 1,000,000.00	\$ -	\$ -	100.00%	\$ 1,000,000.00
<b>4000 MASONRY</b>					
4100 CMU	\$ 1,531,800.00	\$ 38,233.00	\$ 38,233.00	97.50%	\$ 1,493,567.00
<b>5000 METALS</b>					
5100 Structural Steel	\$ 10,884,461.00	\$ 1,890,185.00	\$ 1,890,185.00	82.63%	\$ 8,994,276.00
5500 Miscellaneous Metals (incl)	\$ -	\$ -	\$ -	#DIV/0!	\$ -
<b>6000 CARPENTRY</b>					

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	BUDGET	Draw			
6200 Millwork	\$ 1,900,000.00	\$ -	\$ -	100.00%	\$ 1,900,000.00
6400 Architectural Woodwork	\$ -	\$ -	\$ -	#DIV/0!	\$ -
<b>7000 THERMAL / MOISTURE PROTECTION</b>					
7100 Waterproofing	\$ 774,400.00	\$ 74,045.40	\$ 74,045.40	90.44%	\$ 700,354.60
7220 Insulation	\$ 359,840.00	\$ -	\$ -	100.00%	\$ 359,840.00
7240 EIFS/Stucco	\$ 1,455,600.00	\$ -	\$ -	100.00%	\$ 1,455,600.00
7530 EPDM Roofing 60 mil	\$ -	\$ -	\$ -	#DIV/0!	\$ -
7650 Flashing	\$ -	\$ -	\$ -	#DIV/0!	\$ -
7720 Roof Hatches w/ladder	\$ 843,440.00	\$ -	\$ -	100.00%	\$ 843,440.00
7810 Sprayed on Fireproofing	\$ 260,000.00	\$ -	\$ -	100.00%	\$ 260,000.00
7900 Caulking and Sealants	\$ -	\$ -	\$ -	#DIV/0!	\$ -
<b>8000 DOORS &amp; WINDOWS</b>					
8100 HM doors and Frames	\$ -	\$ -	\$ -	#DIV/0!	\$ -
8200 Wood Doors and Frames	\$ -	\$ -	\$ -	#DIV/0!	\$ -
8310 Access Panels	\$ -	\$ -	\$ -	#DIV/0!	\$ -
8360 Overhead Doors	\$ -	\$ -	\$ -	#DIV/0!	\$ -
8400 Storefront	\$ 68,200.00	\$ -	\$ -	100.00%	\$ 68,200.00
8560 Vinyl Windows	\$ 746,800.00	\$ -	\$ -	100.00%	\$ 746,800.00
8700 Door Hardware	\$ -	\$ -	\$ -	#DIV/0!	\$ -
8800 Glass and glazing	\$ 5,100,000.00	\$ -	\$ -	100.00%	\$ 5,100,000.00
<b>9000 FINISHES</b>					
6415 Granite	\$ 332,000.00	\$ -	\$ -	100.00%	\$ 332,000.00
9200 LGMF and Drywall	\$ 9,076,092.00	\$ -	\$ -	100.00%	\$ 9,076,092.00
9250 GWB w/light guage metal framing	\$ -	\$ -	\$ -	#DIV/0!	\$ -
9300 Ceramic Tile	\$ -	\$ -	\$ -	#DIV/0!	\$ -
9520 ACT	\$ -	\$ -	\$ -	#DIV/0!	\$ -
9600 Flooring	\$ 1,650,000.00	\$ -	\$ -	100.00%	\$ 1,650,000.00
9680 Carpet	\$ -	\$ -	\$ -	#DIV/0!	\$ -
9720 Wallcovering @22.00 sy.	\$ -	\$ -	\$ -	#DIV/0!	\$ -
9900 Painting	\$ 2,220,000.00	\$ -	\$ -	100.00%	\$ 2,220,000.00
<b>10000 SPECIALTIES</b>					
10180 Toilet Partitions	\$ -	\$ -	\$ -	#DIV/0!	\$ -
10440 Interior Signage	\$ -	\$ -	\$ -	#DIV/0!	\$ -
10520 Fire extinguishers and Cabinets	\$ -	\$ -	\$ -	#DIV/0!	\$ -
10550 Mail Boxes	\$ -	\$ -	\$ -	#DIV/0!	\$ -
10800 Bathroom Accessories	\$ -	\$ -	\$ -	#DIV/0!	\$ -
<b>11000 EQUIPMENT</b>					
11000 APPLIANCES	\$ 336,000.00	\$ -	\$ -	100.00%	\$ 336,000.00
<b>14000 CONVEYING SYSTEMS</b>					
14200 HYDRAULIC ELEVATORS	\$ 1,442,976.00	\$ -	\$ -	100.00%	\$ 1,442,976.00
<b>15000 MECHANICAL</b>					
15000 FIRE PROTECTION	\$ -	\$ -	\$ -	#DIV/0!	\$ -
15010 PLUMBING	\$ 5,957,200.00	\$ 791,333.80	\$ 791,333.80	86.72%	\$ 5,165,866.20
15020 H.V.A.C.	\$ 2,395,100.00	\$ -	\$ -	100.00%	\$ 2,395,100.00
<b>16000 ELECTRICAL</b>					
16000 ELECTRICAL	\$ 6,222,500.00	\$ 1,071,450.00	\$ 1,071,450.00	82.78%	\$ 5,151,050.00
<b>TOTAL BUDGET AMOUNT</b>	<b>\$ 63,431,408.00</b>	<b>\$ 9,359,247.20</b>	<b>\$ 9,359,247.20</b>	<b>14.75%</b>	<b>\$ 54,072,161.80</b>
<b>GRAND TOTAL OF GENERAL CONTRACTOR</b>	<b>\$ A 78,838,160.00</b>	<b>\$ B 14,180,886.20</b>	<b>\$ C 14,180,886.20</b>	<b>17.98%</b>	<b>\$ D 64,757,273.80</b>
<b>TOTAL RETENTION</b>		<b>\$ E (1,280,354.00)</b>	<b>\$ F (1,280,354.00)</b>	<b>#DIV/0!</b>	<b>\$ G 1,280,354.00</b>
<b>NET CASH ADVANCES</b>	<b>\$ 78,838,160.00</b>	<b>\$ 12,900,532.20</b>	<b>\$ 12,900,532.20</b>		<b>\$ 66,037,627.80</b>

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## Document D: Developer Costs Detail

Developer Cost Detail					
	SENIOR BUDGET	Initial Draw	Developer EXPENSES PROJECT TO DATE		
<b>Interest Expense</b>					
INTEREST EXPENSE (14%)					
9000 Interest Expense	\$ 10,331,476	-	\$ -	0.00%	\$ 10,331,475.66
<b>TOTAL BUDGET AMOUNT</b>	<b>\$ 10,331,476</b>	<b>\$ -</b>	<b>\$ -</b>	<b>0.00%</b>	<b>\$ 10,331,476</b>
<b>Loan Fees</b>					
LOAN FEES					
9011 Loan Fees	\$ 275,000	275,000.00	\$ 275,000.00	100.00%	\$ -
<b>TOTAL BUDGET AMOUNT</b>	<b>\$ 275,000</b>	<b>\$ 275,000.00</b>	<b>\$ 275,000.00</b>	<b>0.00%</b>	<b>\$ -</b>
<b>Management Overhead</b>					
MANAGEMENT Overhead					
11000 Management Overhead	\$ 4,280,348	813,845.31	\$ 813,845.31	19.01%	\$ 3,466,502.32
<b>TOTAL BUDGET AMOUNT</b>	<b>\$ 4,280,348</b>	<b>\$ 813,845.31</b>	<b>\$ 813,845.31</b>	<b>0.00%</b>	<b>\$ 3,466,502</b>
<b>Items not included in GMP</b>					
Construction Items not included in GMP					
Guard House	\$ 120,000	-	\$ -	0.00%	\$ 120,000.00
Site Sculptures	\$ 100,000	-	\$ -	0.00%	\$ 100,000.00
Project Signage	\$ 120,000	-	\$ -	0.00%	\$ 120,000.00
Common Area Freeze (HVAC)	\$ 48,000	-	\$ -	0.00%	\$ 48,000.00
Cora Equipment Type II (HVAC)	\$ 36,000	-	\$ -	0.00%	\$ 36,000.00
HVAC Type II (condenser, line, and air handler)	\$ 1,350,000	-	\$ -	0.00%	\$ 1,350,000.00
Wind Power	\$ 50,000	-	\$ -	0.00%	\$ 50,000.00
Solar Power	\$ 50,000	-	\$ -	0.00%	\$ 50,000.00
Lobby Glass Sculpture	\$ 100,000	-	\$ -	0.00%	\$ 100,000.00
Koi Pond	\$ 20,000	-	\$ -	0.00%	\$ 20,000.00
SkyLounge Planters	\$ 20,000	-	\$ -	0.00%	\$ 20,000.00
Lobby Planters	\$ 25,000	-	\$ -	0.00%	\$ 25,000.00
<b>TOTAL BUDGET AMOUNT</b>	<b>\$ 2,039,000</b>	<b>\$ -</b>	<b>\$ -</b>	<b>0.00%</b>	<b>\$ 2,039,000.00</b>
<b>Soft Costs</b>					
24000 SOFT COSTS					
20001 Land Acquisition & Closing Cost	\$ 850,000	847,665.00	\$ 847,665.00	99.73%	\$ 2,335.00
20002 Miscellaneous Consultants & Studies	\$ 246,873	83,634.53	\$ 83,634.53	33.88%	\$ 163,238.49
20003 Property Taxes	\$ 384,053	41,777.96	\$ 41,777.96	10.88%	\$ 342,275.46
20004 Civil Engineering	\$ 550,000	97,514.91	\$ 97,514.91	17.73%	\$ 452,485.09
20005 Protective Fencing	\$ 15,000	7,413.00	\$ 7,413.00	49.42%	\$ 7,587.00
20006 Decorative Fencing	\$ 20,000	12,276.00	\$ 12,276.00	61.38%	\$ 7,724.00
20007 County Impact Fee	\$ 700,000	-	\$ -	0.00%	\$ 700,000.00
21000 Architecture	\$ 1,113,406	1,110,908.01	\$ 1,110,908.01	99.78%	\$ 2,497.99
21001 Architecture Construction Administration	\$ 234,000	151,274.32	\$ 151,274.32	64.65%	\$ 82,725.68
21002 Structural Engineering	\$ 533,352	494,677.43	\$ 494,677.43	92.76%	\$ 38,674.57
21003 Reproduction & Courier	\$ 46,136	26,912.05	\$ 26,912.05	58.33%	\$ 19,223.80
21004 Landscape & Lighting Architect	\$ 87,821	9,488.86	\$ 9,488.86	10.80%	\$ 78,332.24
21006 Legal Fees	\$ 270,169	230,282.43	\$ 230,282.43	85.24%	\$ 39,886.30
21007 Accounting Services	\$ 21,652	4,425.00	\$ 4,425.00	20.44%	\$ 17,227.00
21008 Voucher Disbursement Services	\$ 200,000	79,866.00	\$ 79,866.00	39.93%	\$ 120,134.00
21009 HOA Services	\$ 32,500	-	\$ -	0.00%	\$ 32,500.00
21010 Miscellaneous Professional Fees	\$ 43,456	33,659.08	\$ 33,659.08	77.46%	\$ 9,796.84
21011 Project Coordination & Site Management	\$ 541,687	-	\$ -	0.00%	\$ 541,666.67
21012 Unit Closing Costs	\$ 303,333	145,960.00	\$ 145,960.00	48.12%	\$ 157,373.33
21013 HOA Dues	\$ 16,667	-	\$ -	0.00%	\$ 16,666.67
21014 Inspections & Quality Control	\$ 297,917	-	\$ -	0.00%	\$ 297,916.67
21015 Upfront Insurance Premiums	\$ 900,000	881,129.66	\$ 881,129.66	97.90%	\$ 18,870.34
21016 Insurance Premiums	\$ 1,137,500	176,203.00	\$ 176,203.00	15.49%	\$ 961,297.00
21017 Brokerage Commissions & Fundraising Expense	\$ 75,000	-	\$ -	0.00%	\$ 75,000.00
21018 Corporate - Operations (Postage, Utilities, etc...)	\$ 59,332	34,200.59	\$ 34,200.59	57.64%	\$ 25,131.44
21019 Corporate - Administrative Support	\$ 27,385	657.41	\$ 657.41	2.40%	\$ 26,727.24
21020 Technology (Software, Services, Hardware)	\$ 52,538	1,510.98	\$ 1,510.98	2.88%	\$ 51,026.70
22001 Application, Map, Filing Fees	\$ 400,000	218,848.15	\$ 218,848.15	54.71%	\$ 181,151.85
22002 Water Connection Fees (and Sewer Connection)	\$ 3,202,877	2,171,786.11	\$ 2,171,786.11	67.81%	\$ 1,031,090.69
22004 Power Security Deposit	\$ 25,000	-	\$ -	0.00%	\$ 25,000.00
22005 Telephone Security Deposit	\$ 35,100	-	\$ -	0.00%	\$ 35,100.00
22006 Building Permit Fees	\$ 1,344,927	494,263.58	\$ 494,263.58	36.75%	\$ 850,663.09
21025 Auto Rental	\$ 2,800	-	\$ -	0.00%	\$ 2,600.00
21026 Entertainment	\$ 2,800	-	\$ -	0.00%	\$ 2,600.00
21027 Meals	\$ 2,600	-	\$ -	0.00%	\$ 2,600.00
21028 Travel	\$ 10,400	-	\$ -	0.00%	\$ 10,400.00

	SENIOR BUDGET	Initial Draw	Developer EXPENSES PROJECT TO DATE		
21029 Lodging	\$ 2,600	-	\$ -	0.00%	\$ 2,600.00
21030 Telecom/Cell Phone	\$ 59,499	18,711.89	\$ 18,711.89	28.09%	\$ 42,786.95
21031 Office Rent	\$ 227,552	90,898.48	\$ 90,898.48	39.95%	\$ 136,653.77
2020 Wireless Devices	\$ 50,000	-	\$ -	0.00%	\$ 50,000.00
3001 Appliance & FF&E	\$ 200,000	-	\$ -	0.00%	\$ 200,000.00
3017 Exercise Equipment	\$ 165,000	-	\$ -	0.00%	\$ 165,000.00
3018 Pool Furniture	\$ 125,875	-	\$ -	0.00%	\$ 125,875.00
<b>TOTAL BUDGET AMOUNT</b>	<b>\$ 14,616,388</b>	<b>\$ 7,483,944.43</b>	<b>\$ 7,483,944.43</b>	<b>0.80%</b>	<b>\$ 7,182,441</b>
<b>Sales &amp; Marketing Expense</b>					
23001 Sales Administration	\$ 150,000	-	\$ -	0.00%	\$ 150,000.00
23004 Sales Manager	\$ 304,320	161,500.00	\$ 161,500.00	53.07%	\$ 142,820.00
23005 Sales Agent pay and commissions	\$ 1,539,714	131,868.00	\$ 131,868.00	8.56%	\$ 1,407,845.79
23006 Sales Director Fee & Bonuses	\$ 130,000	-	\$ -	0.00%	\$ 130,000.00
23007 Co-Brokerage Allowance	\$ 1,854,547	-	\$ -	0.00%	\$ 1,854,546.74
23009 Sales Office Operation	\$ 126,708	55,955.13	\$ 55,955.13	44.16%	\$ 70,752.94
23010 Sales Office Rental	\$ 158,087	39,182.06	\$ 39,182.06	25.10%	\$ 116,905.33
23012 Sales Office Setup	\$ 712,500	693,380.96	\$ 693,380.96	97.32%	\$ 19,119.04
23013 Misc. Sales Tools Development	\$ 23,659	5,956.51	\$ 5,956.51	25.18%	\$ 17,702.61
23014 Sales Expense - Meals	\$ 5,200	-	\$ -	0.00%	\$ 5,200.00
23015 Retail /Commercial Sales Expense	\$ 3,190,387	-	\$ -	0.00%	\$ 3,190,387.20
24001 Marketing VP	\$ 200,000	-	\$ -	0.00%	\$ 200,000.00
24002 Media Buying (newspaper, radio, billboard, etc.)	\$ 534,300	206,209.11	\$ 206,209.11	38.59%	\$ 328,090.89
24003 Media (Launch)	\$ 900,000	851,908.23	\$ 851,908.23	94.66%	\$ 48,091.77
24004 Onsite Signage	\$ 126,000	125,844.39	\$ 125,844.39	99.88%	\$ 155.61
24005 Printed Material	\$ 380,000	376,556.87	\$ 376,556.87	99.09%	\$ 3,443.13
24006 Rendering	\$ 105,200	83,241.24	\$ 83,241.24	79.13%	\$ 21,958.76
24008 Scale Model	\$ 142,000	141,425.99	\$ 141,425.99	99.60%	\$ 574.01
24009 Public Relations (PR) and Events	\$ 289,687	223,572.59	\$ 223,572.59	82.93%	\$ 46,014.62
<b>TOTAL BUDGET AMOUNT</b>	<b>\$ 10,860,210</b>	<b>\$ 3,096,601.08</b>	<b>\$ 3,096,601.08</b>	<b>0.00%</b>	<b>\$ 7,763,808.46</b>
<b>Developer Contingency</b>					
<b>DEVELOPER CONTINGENCY</b>					
8003 Developer Contingency	\$ 3,600,000	-	\$ -	0.00%	\$ 3,600,000.00
Contingency for Adjustments to Construction Drawings	\$ 790,000	-	\$ -	0.00%	\$ 790,000.00
<b>TOTAL BUDGET AMOUNT</b>	<b>\$ 4,390,000</b>	<b>\$ -</b>	<b>\$ -</b>	<b>0.00%</b>	<b>\$ 4,390,000.00</b>
<b>Developer Allowances</b>					
Upgrade Costs	\$ 2,299,925.53	-	\$ -	0.00%	\$ 2,299,925.53
Tenant Improvement Allowances	\$ 4,463,040.00	-	\$ -	0.00%	\$ 4,463,040.00
Allowance for Amenities Buildout	\$ 1,000,000.00	-	\$ -	0.00%	\$ 1,000,000.00
<b>TOTAL BUDGET AMOUNT</b>	<b>\$ 7,762,965.53</b>	<b>\$ -</b>	<b>\$ -</b>	<b>0.00%</b>	<b>\$ 7,762,965.53</b>
Less Retainage		-	\$ -		
<b>Net Payment</b>	<b>\$ 7,762,965.53</b>	<b>\$ -</b>	<b>\$ -</b>		
<b>SUBTOTAL OF GENERAL DEVELOPER COSTS</b>	<b>\$ 54,646,383.64</b>	<b>\$ 11,649,390.82</b>	<b>\$ 11,649,390.82</b>	<b>0.00%</b>	<b>\$ 42,896,992.82</b>
<b>Approved Change Orders (Approved AIA 702)</b>					
			\$ -	0.00%	\$ -
			\$ -	0.00%	\$ -
<b>TOTAL BUDGET AMOUNT</b>	<b>\$ -</b>	<b>\$ -</b>	<b>\$ -</b>	<b>#DIV/0!</b>	<b>\$ -</b>
<b>Pending Change Orders (Not Approved AIA 702)</b>					
			\$ -	0.00%	\$ -
			\$ -	0.00%	\$ -
<b>TOTAL BUDGET AMOUNT</b>	<b>\$ -</b>	<b>\$ -</b>	<b>\$ -</b>	<b>#DIV/0!</b>	<b>\$ -</b>
<b>TOTAL OF DEVELOPER COSTS with Change Orders</b>	<b>\$ 54,646,384</b>	<b>\$ 11,649,390.82</b>	<b>\$ 11,649,390.82</b>	<b>0.00%</b>	<b>\$ 42,896,992.82</b>
<b>OTHER ADJUSTMENTS</b>					
			\$ -		
<b>NET DEVELOPER COSTS</b>	<b>\$ 54,646,384</b>	<b>\$ 11,649,390.82</b>	<b>\$ 11,649,390.82</b>		<b>\$ 42,896,992.82</b>

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APPLICATION AND CERTIFICATE FOR PAYMENT

TO OWNER: Manhattan West  
9121 W. Russell Rd.  
Las Vegas, NV 89148

PROJECT: Manhattan West  
Phase 1

PAGE 1 OF 2

APPLICATION NO: 2

PERIOD: 11/30/2007

PROJECT NOS: 168

CONTRACT DATE: 09/08/07

FROM CONTRACTOR: APCO Construction  
3432 North 8th Street  
N. Las Vegas, NV 89032

VIA ARCHITECT: OZ Architects

CONTRACT FOR: Manhattan West

CONTRACTOR'S APPLICATION FOR PAYMENT

Application is made for payment, as shown below, in connection with the Contract.  
Continuation sheet is attached.

1. ORIGINAL CONTRACT SUM \$ 78,838,180.00

2. Net change by Change Orders \$

3. CONTRACT SUM TO DATE (Line 1 + 2) \$ 78,838,180

4. TOTAL COMPLETED & STORED TO DATE (Column G on G703) \$ 14,180,888

5. RETAINAGE \$ 1,280,354

a. % of completed work (Columns D + E on G703) \$

b. % of Stored Material (Columns F on G703) \$

Total Retainage (line 5a 5b or total in column I on G703) \$

6. TOTAL EARNED LESS RETAINAGE (Line 4 less Line 5 Total) \$ 1,280,354

7. LESS PREVIOUS CERTIFICATES FOR PAYMENT (Line 6 form prior Certificate) \$ 12,900,532

8. CURRENT PAYMENT DUE \$ 7,295,283

9. BALANCE TO FINISH, INCLUDING RETAINAGE (Line 3 less Line 6) \$ 5,565,248

86,037,627.80

CHANGE ORDER SUMMARY	ADDITIONS	DEDUCTIONS
TOTAL CHARGES APPROVED IN PREVIOUS MONTHS BY OWNER	\$	
Total approved this Month		\$
TOTALS	\$	\$
NET CHARGES by change order		

The undersigned contractor certifies that to the best of the Contractor's knowledge, information and belief the Work covered by the Application for Payment has been completed in accordance with the Contract Documents, and all amounts have been paid by the Contractor for Work for which previous Certificates for Payment were issued and payments received from the Owner, and that current payment shown herein is now due.

CONTRACTOR

By: [Signature]

Date: 12/20/07

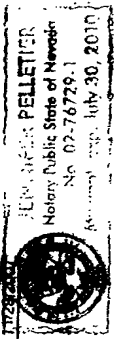
State of Nevada

County of Clark

Subscribed and sworn to before me this 12th day of December, 2007

Notary Public

My Commission expires August 16, 2008



ARCHITECT REPRESENTATIVE OF OF

By: [Signature] Date: 12/20/07

OWNER

By: [Signature] Date: 12/21/07

SFC APPROVED

X [Signature]

1/23/08

-WCS. prev.

-W9 2008

APCO

POSTED

6

# NCS Loan Budget Item Status/Activity

Loan Budget Item	Original Loan Budget Amount	Revised Budget Amount	Borrower's Requested Gross This Draw	Retention Withheld This Draw	Borrower's Requested Net This Draw	Borrower's Requested Gross To Date	Retention Withheld To Date	Line Item Balance Remaining Including Retention	Total Percentage Requested	Inspection Percentage Observed
GRADING										
SUBTOTAL GRADING	\$ 4,527,700	\$ 4,527,700	\$ -	\$ -	\$ -	\$ 2,754,700	\$ 137,735	\$ 1,910,735.00	60.84%	59.06%
ONOFFSITE IMPROVEMENTS										
SUBTOTAL ONOFFSITES	\$ 2,375,853	\$ 2,375,853	\$ 37,383.21	\$ 3,738.32	\$ 33,844.89	\$ 37,383	\$ 3,738.32	\$ 2,342,208.11	1.57%	1.95%
BUILDING 2										
SUBTOTAL BUILDING 2	\$ 11,113,021	\$ 11,113,021	\$ 650,863.66	\$ 65,086.37	\$ 585,777.29	\$ 1,685,590	\$ 166,559.03	\$ 9,613,989.49	14.99%	20.84%
BUILDING 3										
SUBTOTAL BUILDING 3	\$ 11,113,021	\$ 11,113,021	\$ 650,863.66	\$ 65,086.37	\$ 585,777.29	\$ 1,685,873	\$ 168,587.35	\$ 9,595,734.57	15.17%	15.07%
BUILDING 7										
SUBTOTAL BUILDING 7	\$ 23,522,746	\$ 23,522,746	\$ 1,403,999.86	\$ 140,399.99	\$ 1,263,599.87	\$ 2,178,349	\$ 217,834.87	\$ 21,562,232.51	9.26%	10.67%
BUILDING 8										
SUBTOTAL BUILDING 8	\$ 13,142,810	\$ 13,142,810	\$ 1,828,639.08	\$ 182,863.91	\$ 1,645,775.17	\$ 3,004,725	\$ 300,472.50	\$ 10,438,657.17	22.88%	27.53%
BUILDING 9										
SUBTOTAL BUILDING 9	\$ 13,142,910	\$ 13,142,910	\$ 1,656,305.75	\$ 165,630.58	\$ 1,490,675.18	\$ 2,854,266	\$ 285,428.57	\$ 10,574,070.57	21.72%	26.88%
GRAND TOTAL OF COSTS	\$ 78,938,160	\$ 78,938,160	\$ 6,228,065.22	\$ 622,806.52	\$ 5,605,249.70	\$ 14,180,886.22	\$ 1,280,354	\$ 66,037,627.42	17.96%	20.85%

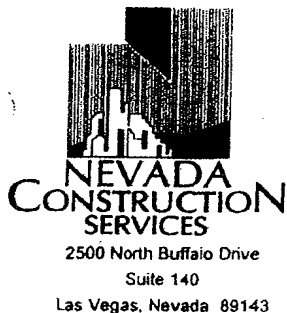
Items highlighted in this shade are soft costs shown for reference only and are not used in calculating overall percentage complete (only hard costs used for calculating overall percentage complete). Percentages observed for these line items will match draw request percentages.

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X  
Y  
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J

x BBS

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## CONSTRUCTION PROGRESS REPORT

Project Name: Manhattan West Condominiums  
Project Address: Las Vegas, NV

Date: 1/7/2008

Site Visit No.: 2

Date: 1/2/2008

Contractor Pay Application No.: 2

Date: 11/30/2007

For The Period: 11/1/2007 to 11/30/2007 ✓

## FUNDING STATEMENT

This analysis is based on a review of the documentation provided, conditions of the project observed on the date of the field inspection and/or verbal communications. See attached schedule of values, percentages of completion, loan budget line item comments and photographs.

The workmanship and progress appear to be adequate and sufficient and Nevada Construction Services recommends funding Pay Application #2, dated, November 30, 2007, for the amount requested of \$5,605,249.00.

## EXECUTIVE SUMMARY

Buildings 2/3 have the column and wall footings poured, the perimeter first level concrete walls and columns to the second level poured, the slab on grade in progress, the second floor deck forms, reinforcing bar, suspended second level concrete slab and columns from the second level to the third level all in progress at varying stages of completion and the perimeter waterproofing and backfilling in progress and near completion. Buildings 8/9 have the first level perimeter concrete and CMU walls complete, the first to second level columns poured, the second level suspended concrete slab poured, the second level wall framing complete, the third floor joists and decking in progress, the third floor wall layout and framing started and the perimeter wall waterproofing and backfilling substantially complete. Building 7 has the footings, perimeter walls, first level to second level columns and slab on grade poured, the second level deck and beams formed and the reinforcing bar placed and tied.

Conformance to Original Specifications Statement:  
plans, specifications and addenda.

All work completed as of date of inspection conforms to current

SFC  
Reviewed  
Approved  
1-23-08  
[Signature]

[Signature]  
Keith Schleichardt  
Inspector

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## A. Budget

- The project appears to be within the contract budget.

- The project should be completed within the contract budget.

- Pay Applications (Draw Request)

- The amounts requested are consistent with the value and types of completed construction work in place.
- Materials stored on site are stored in protected and secure environment to prevent any damage or loss.
  - Not applicable at this time.
- Materials stored off site are/are not stored in accordance with contract documents requirements.
  - Not applicable at this time.

- Project Changes

- The proposed change orders should not adversely impact the budget.
  - The costs of the proposed change orders appear to be fair and reasonable.
  - The budget set aside (contingency) for changes appears adequate.
- 

## B. Schedule

- The project is currently on schedule.

- The project should be completed on schedule.

- Project Changes

- The proposed changes should not adversely impact the schedule.
- The time requests for proposed changes are reasonable.

- Recent Milestones and Activities

- Started Buildings 2/3 first floor forming, sleeving and rebar

- Upcoming Milestones and Activities

- First floor concrete for Buildings 2/3
- Slab on grade for Building 7 basement garage slab on grade

- Project Documentation

- The contractor is updating (revising) the project schedule accurately and on a regular basis.
- 

## C. Quality

- In-place construction work

- The quality of the work in place construction work appears to be in compliance with the project plans and specifications.

- Contractor-Subcontractor Coordination

- The project is sufficiently manned.
- The Contractor/Subcontractor job site coordination meetings are being held.
- Sufficient pre-work instructions are being given to the job site subcontractors, by the A/E and/or CM.

- Project Inspections

- All required code, quality assurance, manufacturers' A/E and CM inspections are being performed. These inspections have been within codes and guidelines required.
- The project milestones/critical interfaces/systems integration events and activities have been identified. The required/necessary inspections have been coordinated with same.

- Project Changes

- The proposed changes appear to be consistent with the scope and nature of the project.
- The proposed changes should not adversely impact the quality of the project.

- Project Documentation

- The project's record drawings are being regularly updated.
- All addenda, change documentation, RFIs, ASIs, etc. are being regularly posted into the project's working and record set of plans and specifications.
- The project's closeout documentation and instructions are adequate to ensure an efficient closeout.

## D. Issues

Issues which could adversely impact either the baseline budget, schedule or quality, if they are not resolved properly, are described discussed and evaluated below. Where helpful or useful, photos accompany the text.

- There were no adverse effect issues noted during this inspection.

### ■ Issue 1

● Identification:

● Impact:

● Resolution:

### ■ Issue 2

● Identification:

● Impact:

● Resolution:

### ■ Issue 3

● Identification:

● Impact:

● Resolution:

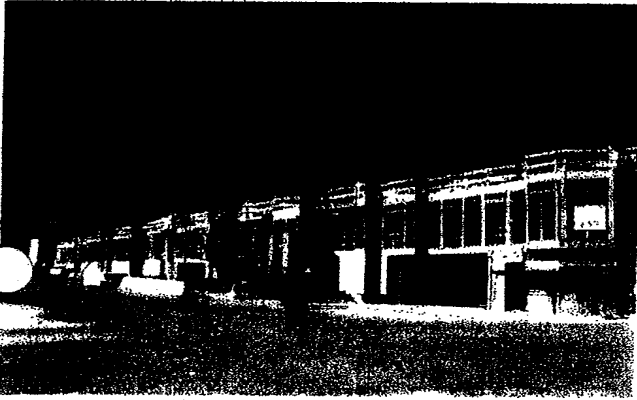
## Project Photos



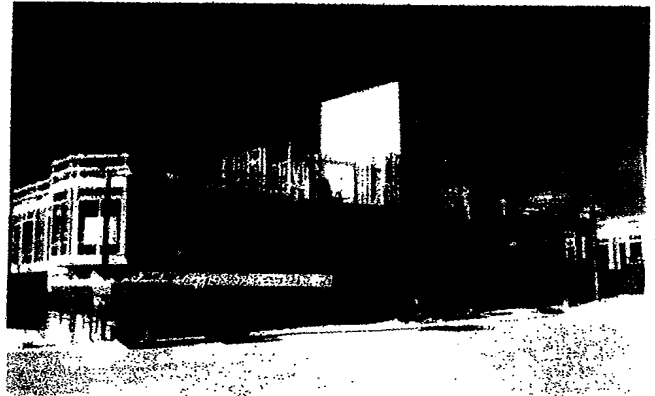
Buildings 2/3 south half from east end



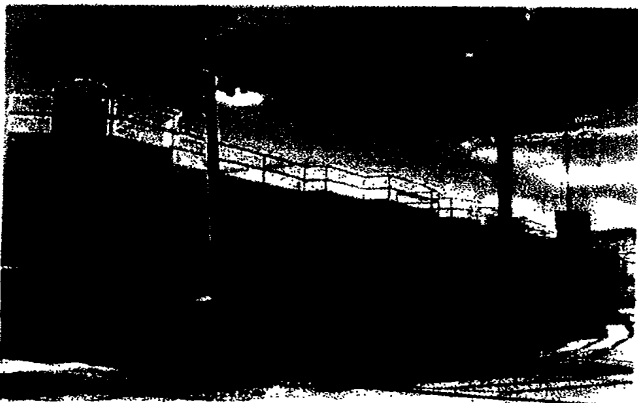
Buildings 2/3 north half from east end



Building #9 south elevation



Building #9 east elevation

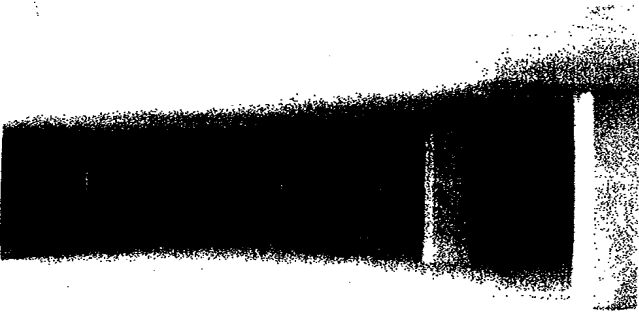


Building #8 north elevation

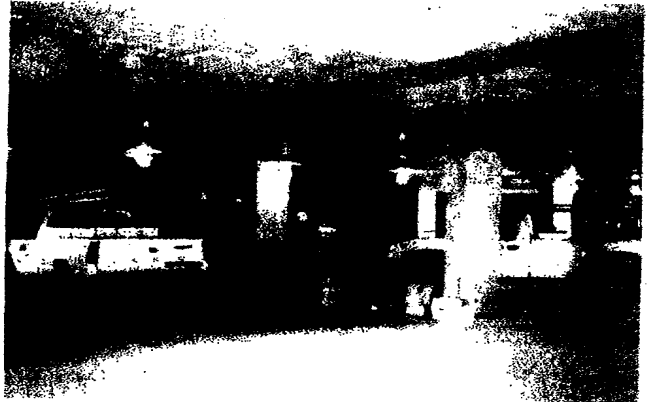


Building #8 east elevation

## Project Photos



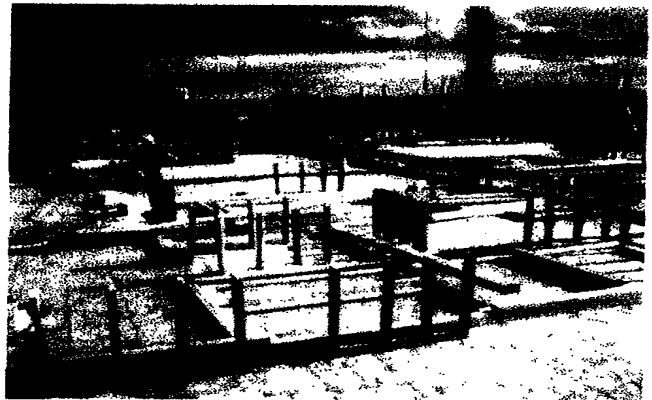
Building #9 garage (first) level



Building #8 garage (first) level - underslab sewer piping in progress at the time of inspection



Second level common area between Buildings #9 and #8



Building #9 third level wall framing in progress



Building #7 from northeast corner - second level reinforcing bar substantially complete



Building #7 from northwest corner - second level reinforcing bar substantially complete



Gemstone Development West, Inc.

ManhattanWest-Senior Vertical Construction Phase 1  
9121 West Russell Road, Suite 117, Las Vegas, NV 89148

Date of Advance: 2/6/2008

**Please execute the wire before 11:00am  
Central Standard Time.**

SFC 001170 Part	Bank Name	Total Approved Loan	Loan %	Column G	
				ADVANCE 2008	Loan Balance YTD
Bank 01	Bank of Oklahoma-Tulsa OK	\$24,000,000	24.00%	\$5,891,981.62	\$5,891,981.62
Bank 02	Bank of North Dakota-Bismarck ND	\$15,000,000	15.00%	\$3,682,488.46	\$3,682,488.46
Bank 03	Arvest Bank-Tulsa	\$5,000,000	5.00%	\$1,227,496.15	\$1,227,496.15
Bank 04	First Western Bank & Trust-Minot ND	\$5,000,000	5.00%	\$1,227,496.15	\$1,227,496.15
Bank 05	Landmark Nat'l Bk (SNB)-Manhattan KS	\$5,000,000	5.00%	\$1,227,496.15	\$1,227,496.15
Bank 06	Sunflower Bank-Salina KS	\$5,000,000	5.00%	\$1,227,496.15	\$1,227,496.15
Bank 07	Choice Financial-Grand Forks ND	\$4,500,000	4.50%	\$1,104,746.64	\$1,104,746.64
Bank 08	Club Vista Financial Services-Las Vegas NV	\$3,400,000	3.40%	\$834,697.38	\$834,697.38
Bank 09	Citizens State Bank-Clara City MN	\$2,500,000	2.50%	\$613,748.08	\$613,748.08
Bank 10	Equitable Bank-Grand Island NE	\$2,500,000	2.50%	\$613,748.08	\$613,748.08
Bank 11	Alerus Financial-Grand Forks ND	\$2,000,000	2.00%	\$490,998.46	\$490,998.46
Bank 12	BANK VI-Salina KS	\$2,000,000	2.00%	\$490,998.46	\$490,998.46
Bank 13	BankWest-Pierre SD	\$2,000,000	2.00%	\$490,998.46	\$490,998.46
Bank 14	First State Bank of ND-Casselton ND	\$2,000,000	2.00%	\$490,998.46	\$490,998.46
Bank 15	First Western Bank & Trust-Eden Prairie MN	\$2,000,000	2.00%	\$490,998.46	\$490,998.46
Bank 16	McKenzie County Bank-Watford City ND	\$2,000,000	2.00%	\$490,998.46	\$490,998.46
Bank 17	Ramsey National Bank-Devils Lake ND	\$2,000,000	2.00%	\$490,998.46	\$490,998.46
Bank 18	United Community Bank of ND-Minot ND	\$2,000,000	2.00%	\$490,998.46	\$490,998.46
Bank 19	First National Bank-Wellington KS	\$1,900,000	1.90%	\$466,448.64	\$466,448.64
Bank 20	American State Bank & Trust-Williston ND	\$1,500,000	1.50%	\$368,248.85	\$368,248.85
Bank 21	Citizens Bank of Kansas-Kingman KS	\$1,500,000	1.50%	\$368,248.85	\$368,248.85
Bank 22	State Bank of Wheaton-Wheaton MN	\$1,200,000	1.20%	\$294,599.08	\$294,599.08
Bank 23	Border State Bank	\$1,000,000	1.00%	\$245,499.23	\$245,499.23
Bank 24	The Goose River Bank-Mayville ND	\$1,000,000	1.00%	\$245,499.23	\$245,499.23
Bank 25	The Security National Bank of Enid-Enid OK	\$1,000,000	1.00%	\$245,499.23	\$245,499.23
Bank 26	Starion Financial-Mandan ND	\$1,000,000	1.00%	\$245,499.23	\$245,499.23
Bank 27	United Valley Bank-Cavalier	\$1,000,000	1.00%	\$245,499.23	\$245,499.23
Bank 28	The National Bank of Harvey-Harvey ND	\$500,000	0.50%	\$122,749.61	\$122,749.61
Bank 29	Union State Bank-Hazen ND	\$500,000	0.50%	\$122,749.61	\$122,749.61
Total		\$100,000,000	100.00%	\$24,549,923.02	\$24,549,923.02

## WIRE INSTRUCTIONS

### Receiving Bank General Information

Bank Name: Nevada State Bank  
Address 1: 750 E. Warm Springs Rd, 4th Floor  
City, State Zip: Las Vegas, NV 89119-0990  
Phone: (702) 855-4503

### Specific Wire Information Below

ABA Routing Number: 122400779

Account Number: 612023275

Account Name: Scott Financial Corporation

Account Address: 15010 Sundown Drive, Bismarck, ND 58503

Wiring Date: Wednesday, February 06, 2008

YOUR Bank Amount: [amount from COLUMN G for your bank]

P002421

ARA 000063

# **EXHIBIT 4**

MEIER & FINE, LLC  
2300 West Sahara Avenue, Suite 430  
Las Vegas, Nevada 89102  
Tel: (702) 673-1000  
Fax: (702) 673-1001

RSPN  
GLENN F. MEIER, ESQ.  
Nevada Bar No. 006059  
J. TAYLOR OBLAD, ESQ.  
Nevada Bar No. 011430  
MEIER & FINE, LLC  
2300 West Sahara Avenue, Suite 430  
Las Vegas, Nevada 89102  
(702) 673-1000  
Attorneys for SCOTT FINANCIAL  
CORPORATION

ELECTRONICALLY SERVED  
04/07/2010 05:21:24 PM

**DISTRICT COURT**  
**CLARK COUNTY, NEVADA**

APCO CONSTRUCTION, INC., a Nevada  
corporation,

Case No. A571228  
Dept. No. XIII

Plaintiff,

vs.

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

**SCOTT FINANCIAL CORPORATION'S  
RESPONSES TO LIEN CLAIMANT'S  
STANDARD REQUEST FOR  
ADMISSIONS**

Defendants.

AND ALL RELATED CASES.

COMES NOW Defendant, SCOTT FINANCIAL CORPORATION ("SFC"), by and  
through his attorneys, MEIER AND FINE, LLC, and hereby responds to Lien Claimant's Standard  
Request for Admissions as follows:

**REQUEST NO. 1:**

Admit that SFC was the beneficiary of a Deed of Trust recorded on July 5, 2006, at Book  
No. 20060705 as Instrument No. 4265 (the "First Junior Deed of Trust")

**RESPONSE:**

Admit



**REQUEST NO. 2:**

Admit that SFC was the beneficiary of a Deed of Trust recorded on July 5, 2006, at Book No. 20060705 as Instrument No. 4264 ( the "First Senior Deed of Trust")

**RESPONSE:**

Admit.

**REQUEST NO. 3:**

Admit that SFC was the beneficiary of a Deed of Trust recorded on July 5, 2006, at Book No. 20060705 as Instrument No. 4266 (the "Third Deed of Trust")

**RESPONSE:**

Admit.

**REQUEST NO. 4:**

Admit that the First Junior Deed of trust was amended by the First Amendment Junior Deed of Trust and Security Agreement with Assignment of Rents and Fixture Filing (Line of Credit), recorded on May 22, 2007 at Book No. 20070522 as Instrument No. 4011 (the "Amended Junior Deed of Trust")

**RESPONSE:**

Objection. Request calls for a legal conclusion that the First Junior Deed of Trust was *amended* by the First Amendment Junior Deed of Trust and Security Agreement of Rents and Fixture Filing (Line of credit). However, without waiving said objection, SFC admits, to the extent as to the recording date, that the First Amendment Junior Deed of Trust and Security Agreement with Assignment of Rents and Fixture Filing (Line of Credit) was recorded on May 22, 2007 at Book No. 20070522 as Instrument No. 4011.

**REQUEST NO. 5:**

Admit that the Third Deed of Trust was amended by the First Amendment to the Third Deed of Trust and Security Agreement with Assignment of Rents and Fixture Filing (Line of Credit), recorded on October 24, 2007 at Book No. 20071024 as Instrument No. 4182 (the "Amended Third Deed of Trust")

1 RESPONSE:

2 Objection. Request calls for a legal conclusion that the Third Deed of Trust was *amended* by  
3 the First Amendment to Third Deed of Trust and Security Agreement with Assignment of  
4 Rents and Fixture Filing (Line of Credit). However, without waiving said objection, SFC  
5 admits, to the extent as to the recording date, that the First Amendment to Third Deed of Trust  
6 and Security Agreement with Assignment of Rents and Fixture Filing (Line of Credit) was  
7 recorded on October 24, 2007 at Book No. 20071024 as Instrument No. 4182.

8 REQUEST NO. 6:

9 Admit the First Senior Deed of Trust was amended by the First Amendment to the Senior  
10 Deed of Trust an Security Agreement with Assignment of Rents and Fixture Filing (Line of  
11 Credit) (Mezzanine), recorded on February 7, 2008 at Book No. 2000207 as Instrument No.  
12 1484 (the "Amended Senior Deed of Trust")

13 RESPONSE:

14 Objection. Request calls for a legal conclusion that the First Senior Deed of Trust was  
15 *amended* by the First Amendment to Senior Deed of Trust and Security Agreement with  
16 Assignment of Rents and Fixture Filing (Line of credit)(Mezzanine) . However, without  
17 waiving said objection, SFC admits, to the extent as to the recording date, that the First  
18 Amendment to Senior Deed of Trust and Security Agreement with Assignment of Rents and  
19 Fixture Filing (Line of credit)(Mezzanine) was recorded on February 7, 2008 a Book No.  
20 20080207 as Instrument No. 1484.

21 REQUEST NO. 7:

22 Admit that the Amended Junior Deed of Trust was amended by the Second Amendment  
23 to Junior Deed of Trust and Security Agreement with Assignment of Rents and Fixture Filing  
24 (Line of Credit) (Mezzanine), recorded on February 7, 2008 at Book No. 20080207 as  
25 Instrument No. 1485 (the "Second Amended Junior Deed of Trust")

26 RESPONSE:

27 Objection. Request calls for a legal conclusion that the Amended Junior Deed of Trust  
28 was *amended* by the Second Amendment to Junior Deed of Trust and Security Agreement with

1 Assignment of Rents and Fixture Filing (Line of Credit) (Mezzanine). However, without  
2 waiving said objection, SFC admits, to the extent as to the recording date, that the Second  
3 Amendment to Junior Deed of Trust and Security Agreement with Assignment of Rents and  
4 Fixture Filing (Line of Credit) (Mezzanine) was recorded on February 7, 2008 a Book No.  
5 20080207 as Instrument No. 1485.

6 **REQUEST NO. 8:**

7 Admit that SFC was the beneficiary of the Senior Debt Deed of Trust and Security  
8 Agreement with Assignment of Rents and Fixture Filing (Construction) dated January 22,  
9 2008, and recorded on February 7, 2008 at Book No. 20080207 as Instrument No. 1482 (the  
10 "Construction Deed of Trust")

11 **RESPONSE:**

12 Admit

13 **REQUEST NO. 9:**

14 Admit that you executed a Mezzanine Deeds of Trust Subordination Agreement dated  
15 January 22, 2008 (the "Subordination Agreement")

16 **RESPONSE:**

17 Admit

18 **REQUEST NO. 10:**

19 Admit that the Subordination Agreement was recorded on February 7, 2008 at Book No.  
20 20080207 as Instrument No. 1486.

21 **RESPONSE:**

22 Admit.

23 **REQUEST NO. 11:**

24 Admit that part of the purpose of the Subordination agreement was to give the  
25 Construction Deed of Trust priority over the Amended senior Deed of Trust.

26 **RESPONSE:**

27 Objection. This request is vague and ambiguous in that "part of the purpose" is too  
28 vague and broad of a term. Without waving the objection, it is Scott Financial Corporation's

1 contention that the Construction Deed of Trust is senior in priority. SFC believes that the  
2 pending litigation of Club Vista et al. v. Scott Financial et al., Case No. A579963 in Department  
3 13 of Clark County will resolve this issue.

4 **REQUEST NO. 12:**

5 Admit that part of the purpose of the Subordination agreement was to give the  
6 Construction Deed of Trust priority over the Second Amended Junior Deed of Trust.

7 **RESPONSE:**

8 Objection. This request is vague and ambiguous in that "part of the purpose" is too  
9 vague and broad of a term. Without waving the objection, it is Scott Financial Corporation's  
10 contention that the Construction Deed of Trust is senior in priority. SFC believes that the  
11 pending litigation of Club Vista et al. v. Scott Financial et al., Case No. A579963 in Department  
12 13 of Clark County will resolve this issue.

13 **REQUEST NO. 13:**

14 Admit that part of the purpose of the Subordination Agreement was to give the  
15 Construction Deed of trust priority over the Amended Third Deed of Trust

16 **RESPONSE:**

17 Objection. This request is vague and ambiguous in that "part of the purpose" is too  
18 vague and broad of a term. Without waving the objection, it is Scott Financial Corporation's  
19 contention that the Construction Deed of Trust is senior in priority. SFC believes that the  
20 pending litigation of Club Vista et al. v. Scott Financial et al., Case No. A579963 in Department  
21 13 of Clark County will resolve this issue.

22 **REQUEST NO. 14:**

23 Admit that APCO Construction ("APCO") and Gemstone Development West, Inc.  
24 ("Gemstone West") entered into the ManhattanWest [*sp?*] General Construction Agreement for  
25 GMP, dated September 6, 2007 (the "Construction Agreement")

26 **RESPONSE:**

27 SFC was not a party to the General Construction Agreement dated September 6, 2007  
28 between APCO and Gemstone West. As such, SFC lacks sufficient information at this time

1 and SFC can neither admit nor deny the contention in this Request.

2 **REQUEST NO. 15:**

3 Admit that you were aware that APCO and/or its subcontractors had commenced visible  
4 construction work under the Construction Agreement prior to February 7, 2008

5 **RESPONSE:**

6 Objection. This request is vague and ambiguous in that "aware" is too ambiguous.  
7 Further "commencement" and "visible construction" are not defined and are also too broad of  
8 terms to make a valid response. Further, this request does not specify a date, in the past, when  
9 SFC might or might not have been "aware" of the "commencement" of "visible construction"  
10 prior to February 7, 2008; i.e., this request does not specify whether it seeks to know if SFC  
11 knew prior to February 7, 2008 of any "visible construction" or whether SFC knew of any  
12 "visible construction" that had transpired prior to February 7, 2008. Finally, SFC lacks  
13 sufficient information and evidence at this time. As such SFC can neither admit nor deny the  
14 contention in this response.

15 **REQUEST NO. 16:**

16 Admit that SFC had knowledge that Gemstone West had made payments to APCO for  
17 construction work performed prior to February 7, 2008.

18 **RESPONSE:**

19 Objection. This request is vague and ambiguous in that "knowledge" is too ambiguous.  
20 Further, this request does not specify a date, in the past, when SFC might or might not have  
21 had "knowledge" of payment to APCO from Gemstone West; i.e., this request does not specify  
22 whether it seeks to know if SFC knew prior to February 7, 2008 of any payments to APCO  
23 from Gemstone West or whether SFC knew of any payments that transpired prior to February  
24 7, 2008 from Gemstone West to APCO. Finally, SFC lacks sufficient information and  
25 evidence at this time. As such SFC can neither admit nor deny the contention in this response.

26 **REQUEST NO. 17:**

27 Admit that the Construction Deed of Trust, the Amended Senior Deed of Trust, the  
28 Second Amended Junior Deed of Trust and the Amended Third Deed of Trust were the only

MEIER & FINE, LLC  
2300 West Sahara Avenue, Suite 430  
Las Vegas, Nevada 89102  
Tel: (702) 673-1000  
Fax: (702) 673-1001

1 deeds of trust on the Property as of February 7, 2008.

2 RESPONSE:

3 Objection. This request asks for information that is public record and the Requesting  
4 Party has equal access to this information. Without waiving this objection, SFC is not aware of  
5 other interests recorded against the subject property as of 2/7/2008.

6 DATED this 7<sup>th</sup> day of April, 2010.

7 MEIER & FINE, LLC

8  
9 By 

10 GLENN F. MEIER, ESQ.

11 Nevada Bar No. 006059

12 J. TAYLOR OBLAD, ESQ.

13 Nevada Bar No. 011430

14 MEIER & FINE, LLC

15 2300 West Sahara Avenue, Suite 430

16 Las Vegas, Nevada 89102

17 (702) 673-1000

18 Attorneys for SCOTT FINANCIAL  
19 CORPORATION

MEIER & FINE, LLC  
2300 West Sahara Avenue, Suite 430  
Las Vegas, Nevada 89102  
Tel: (702) 673-1000  
Fax: (702) 673-1001

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that I am an Employee of the law firm of MEIER & FINE, LLC,  
and that on this 7 day of April, 2010, I served the above and foregoing **SCOTT  
FINANCIAL CORPORATION'S RESPONSES TO LIEN CLAIMANT'S STANDARD  
REQUEST FOR ADMISSIONS** 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.

  
An Employee of MEIER & FINE, LLC

# **EXHIBIT 5**



MEIER & FINE, LLC  
2300 West Sahara Avenue, Suite 430  
Las Vegas, Nevada 89102  
Tel: (702) 673-1000  
Fax: (702) 673-1001

1 **RSPN**  
2 GLENN F. MEIER, ESQ.  
3 Nevada Bar No. 006059  
4 J. TAYLOR OBLAD, ESQ.  
5 Nevada Bar No. 011430  
6 MEIER & FINE, LLC  
7 2300 West Sahara Avenue, Suite 430  
8 Las Vegas, Nevada 89102  
9 (702) 673-1000  
10 Attorneys for SCOTT FINANCIAL  
11 CORPORATION

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**DISTRICT COURT**  
**CLARK COUNTY, NEVADA**

12 APCO CONSTRUCTION, INC., a Nevada  
13 corporation,

Case No. A571228  
Dept. No. XIII

14 Plaintiff,  
15 vs.

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

**SCOTT FINANCIAL  
CORPORATION'S RESPONSES TO  
LIEN CLAIMANT'S STANDARD  
INTERROGATORIES**

25 Defendants.

26 AND ALL RELATED CASES.

27 COMES NOW Defendant, SCOTT FINANCIAL CORPORATION ("SFC"), by and  
28 through his attorneys, MEIER AND FINE, LLC, and hereby responds to Lien Claimant's  
Standard Interrogatories as follows:

**INTERROGATORY NO. 1:**

Identify all persons who assisted in preparing the responses to these interrogatories.

**ANSWER TO INTERROGATORY NO. 1:**

Counsel for Scott Financial Corporation in this litigation and in the Club Vista litigation.

**INTERROGATORY NO. 2:**

1 For any response to the Lien Claimants' Standard Request For Admissions To Scott  
2 Financial Corporation that is not an unqualified admission, please provide the factual basis for  
3 your qualification or denial.

4 **ANSWER TO INTERROGATORY NO. 2:**

5 The basis the for qualifications or denials are explained in each Response. Please see our  
6 Responses to the Lien Claimants Requests for Admission.

7 **INTERROGATORY NO. 3:**

8 Please identify all persons you intend to use as an expert witness or otherwise expect to  
9 provide opinion testimony in this matter.

10 **ANSWER TO INTERROGATORY NO. 3:**

11 We have yet to retain any expert witnesses in this matter. SFC reserves the right to  
12 supplement their Answer in the event circumstances change, and any designation of an expert  
13 witness will be within the limitations set forth in the Case management Order filed on January  
14 28, 2010 (hereinafter the "CMO").

15 **INTERROGATORY NO. 4:**

16 Please provide the factual basis for your contention that any of the lien claimants' has  
17 failed to properly perfect its mechanic's lien.

18 **ANSWER TO INTERROGATORY NO. 4:**

19 Discovery is ongoing and as such SFC does not have sufficient information to answer this  
20 interrogatory at this time. SFC reserves the right to supplement their Answer when sufficient  
21 information via discovery becomes available.

22 **INTERROGATORY NO. 5:**

23 Please provide the factual basis for your contention that any of the lien claimants'  
24 mechanic's liens are invalid.

25 **ANSWER TO INTERROGATORY NO. 5**

26 Discovery is ongoing and as such SFC does not have sufficient information to answer  
27 this interrogatory at this time. SFC reserves the right to supplement their Answer when  
28 sufficient information via discovery becomes available.

1 **INTERROGATORY NO. 6:**

2 Please provide the factual basis for your contention that ant of the lien claimants'  
3 mechanic's liens are excessive.

4 **ANSWER TO INTERROGATORY NO. 6:**

5 Discovery is ongoing and as such SFC does not have sufficient information to answer this  
6 interrogatory at this time. SFC reserves the right to supplement their Answer when sufficient  
7 information via discovery becomes available.

8 **INTERROGATORY NO. 7:**

9 Please provide the factual basis for your contention that any of the lien claimants' claims  
10 are barred by laches.

11 **ANSWER TO INTERROGATORY NO. 7:**

12 Discovery is ongoing and as such SFC does not have sufficient information to answer this  
13 interrogatory at this time. SFC reserves the right to supplement their Answer when sufficient  
14 information via discovery becomes available.

15 **INTERROGATORY NO. 8:**

16 Please provide the factual basis for your contention that any of the lien claimants' claims  
17 are barred by unclean hands

18 **ANSWER TO INTERROGATORY NO. 8:**

19 Discovery is ongoing and as such SFC does not have sufficient information to answer this  
20 interrogatory at this time. SFC reserves the right to supplement their Answer when sufficient  
21 information via discovery becomes available.

22 **INTERROGATORY NO. 9:**

23 Please provide the factual basis for your contention that any of the lien claimants'  
24 claims are subject to offset.

25 **ANSWER TO INTERROGATORY NO. 9:**

26 Discovery is ongoing and as such SFC does not have sufficient information to answer this  
27 interrogatory at this time. SFC reserves the right to supplement their Answer when sufficient  
28 information via discovery becomes available.

**INTERROGATORY NO. 10:**

Please provide the factual basis for your contention that your interest in the property has priority over the lien claimants' mechanic's liens.

**ANSWER TO INTERROGATORY NO. 10:**

Discovery is ongoing and as such SFC does not have sufficient information to answer this interrogatory at this time. SFC reserves the right to supplement their Answer when sufficient information via discovery becomes available.

**INTERROGATORY NO.11:**

Please provide the factual basis for your contention that any of the lien claimants have failed to mitigate damages.

**ANSWER TO INTERROGATORY NO. 11:**

Discovery is ongoing and as such SFC does not have sufficient information to answer this interrogatory at this time. SFC reserves the right to supplement their Answer when sufficient information via discovery becomes available.

**INTERROGATORY NO. 12:**

Please provide the factual basis for your contention that any of the lien claimants' claims are barred by waiver.

**ANSWER TO INTERROGATORY NO. 12:**

Discovery is ongoing and as such SFC does not have sufficient information to answer this interrogatory at this time. SFC reserves the right to supplement their Answer when sufficient information via discovery becomes available.

**INTERROGATORY NO. 13:**

Please provide the factual basis for your contention that any of the lien claimants' claims are barred by the appropriate statute of limitations.

**ANSWER TO INTERROGATORY NO. 13:**

Discovery is ongoing and as such SFC does not have sufficient information to answer this interrogatory at this time. SFC reserves the right to supplement their Answer when sufficient information via discovery becomes available.

1 **INTERROGATORY NO. 14:**

2 Please provide the factual basis for your contention that any of the lien claimants failed to  
3 satisfy conditions precedent to bringing any action against you.

4 **ANSWER TO INTERROGATORY NO. 14:**

5 Discovery is ongoing and as such SFC does not have sufficient information to answer this  
6 interrogatory at this time. SFC reserves the right to supplement their Answer when sufficient  
7 information via discovery becomes available.

8 **INTERROGATORY NO. 15:**

9 To the extent you assert additional affirmative defenses after the service of these  
10 interrogatories, please provide the factual basis for any such affirmative defense(s) against any  
11 such lien claimant.

12 **ANSWER TO INTERROGATORY NO. 15:**

13 Discovery is ongoing and as such SFC does not have sufficient information to answer this  
14 interrogatory at this time. SFC reserves the right to supplement their Answer when sufficient  
15 information via discovery becomes available.

16 **INTERROGATORY NO. 16:**

17 Please identify any title company that performed title work or provided title insurance  
18 with regard to any lien you have held upon the Property from January 1, 2007 to the present.

19 **ANSWER TO INTERROGATORY NO. 16:**

20 Commonwealth Land Title Insurance Company and First American Tile Company.

21 **INTERROGATORY NO. 17:**

22 Identify all parties who participated in or provided funding for the loan secured by the  
23 Senior Debt Deed of Trust and Security Agreement with Assignment of Rents and Fixture  
24 Filing (Construction), recorded on February 7, 2008, as Book No. 20080207, Instrument No.  
25 1482.

26 **ANSWER TO INTERROGATORY NO. 17:**

27 Objection. This Interrogatory is vague, ambiguous, irrelevant, and overbroad in scope.  
28 SFC reserves the right to amend this response as discovery is continuing. The term

1 "Participated" and "funding" are vague and ambiguous. Without waiving said objection those  
2 parties who provided funding secured by the Senior Debt Deed of Trust and Security  
3 Agreement with Assignment of Rents and Fixture Filing (Construction), recorded on February  
4 7, 2008, as Book No. 20080207, Instrument No. 1482 are:

- 5 • Alerus Financial
- 6 • American State Bank & Trust Williston
- 7 • Arvest Bank
- 8 • Bank of ND
- 9 • Bank of OK
- 10 • Bank VI
- 11 • BankWest
- 12 • Border State Bank
- 13 • Choice Financial
- 14 • Citizens Bank of KS
- 15 • Citizens State Bank Clara City
- 16 • Club Vista Contingency
- 17 • Equitable Bank
- 18 • First National Bank of Wellington
- 19 • First State Bank of ND
- 20 • First West Bank & Trust Eden Prairie
- 21 • First West Bank & Trust Minot
- 22 • Goose River Bank
- 23 • Landmark National Bank
- 24 • McKenzie County Bank Original \$2MM 1 21 08
- 25 • National Bank of Harvey
- 26 • Ramsey National Bank & Trust Devils Lake
- 27 • Security National Bank of Enid
- 28 • Starion Financial

- State Bank of Wheaton
- Sunflower Bank
- Union State Bank
- United Community Bank of ND
- United Valley Bank

**INTERROGATORY NO. 18:**

Identify in sufficient detail all documents and materials presented by you to each of the parties identified in Interrogatory 17, above, as part of the process of soliciting their investment.

**ANSWER TO INTERROGATORY NO. 18:**

The documents and materials presented to the parties in Interrogatory 17 are on file pursuant to the CMO as the Credit Display documents. The Bates numbers are unknown as of this date. However, SFC reserves the right to supplement their Answer when sufficient information via discovery becomes available.

**INTERROGATORY NO. 19:**

Identify all deeds of trust or liens you hold on the property.

**ANSWER TO INTERROGATORY NO. 19:**

Objection, interrogatory is vague in that "hold" is ambiguous. Also the interrogatory asks for a legal conclusion. Without waiving this objection, SFC has secured the following deeds of trust: Second Amendment to Junior Deed of Trust and Security Agreement with Assignment of Rents and Fixture Filing (Line of Credit) (Mezzanine), recorded on February 7, 2008 at Book No. 20080207 as Instrument No. 1485 (the "Second Amended Junior Deed of Trust"), First Amendment to the Third Deed of Trust and security Agreement with Assignment of Rents and Fixture Filing (Line of Credit), recorded on October 24, 2007 at Book No. 20071024 as Instrument No. 4182 (the "Amended Third Deed of Trust"), First Amendment to the Senior Deed of Trust an Security Agreement with Assignment of Rents and Fixture Filing (Line of Credit) (Mezzanine), recorded on February 7, 2008 at Book No. 2000207 as Instrument No. 1484 (the "Amended Senior Deed of Trust"), and Senior Debt Deed of Trust and Security

1 Agreement with Assignment of Rents and Fixture Filing (Construction) dated January 22,  
2 2008, and recorded on February 7, 2008 at Book No. 20080207 as Instrument No. 1482 (the  
3 "Construction Deed of Trust")

4 **INTERROGATORY NO. 20:**

5 If you contend that the Senior Debt Deed of Trust and Security Agreement with  
6 Assignment of Rents and Fixture Filing (Construction), recorded on February 7, 2008, as Book  
7 No. 20080207, Instrument No. 1482 does not have priority over any other deed of trust or lien  
8 held by you, please provide the factual basis for that contention.

9 **ANSWER TO INTERROGATORY NO. 20:**

10 SFC does not contend that any other deed of trust or lien, held by SFC, has priority over the  
11 Senior Debt Deed of Trust and Security Agreement with Assignment of Rents and Fixture  
12 Filing (Construction), recorded on February 7, 2008, as Book No. 20080207, Instrument No.  
13 1482. However, discovery is ongoing and SFC reserves the right to supplement their Answer  
14 if further information via discovery becomes available.

15 **INTERROGATORY NO. 21:**

16 If you contend that any lien or deed of trust held by you has priority over any mechanic's  
17 lien recorded against the Property, please provide the factual basis for that contention.

18 **ANSWER TO INTERROGATORY NO. 21:**

19 SFC was the beneficiary of a subordination agreement. SFC believes that the subordinating  
20 interest was recorded prior to the commencement of construction. SFC reserves the right to  
21 supplement their Answer if further information via discovery becomes available.

22 **INTERROGATORY NO. 22:**

23 Please identify all SFC employees who conducted any due diligence review or  
24 investigation prior to the recording of the Senior Debt Deed of Trust and Security Agreement  
25 with Assignment of Rents and Fixture Filing (Construction), recorded on February 7, 2008, as  
26 Book No. 20080207, Instrument No. 1482

27 **ANSWER TO INTERROGATORY NO. 22:**

28 Objection. This Interrogatory is vague, ambiguous, irrelevant, overbroad in scope, and



1 not likely to lead to discovery of admissible evidence. SFC reserves the right to amend this  
2 response as discovery is continuing. Without waiving said objection Brad Scott and Jason  
3 Ulmer conducted the due diligence review.

4 **INTERROGATORY NO. 23:**

5 Please identify all SFC employees who were involved in developing or creating the  
6 documentation relating to the loan secured by the Senior Debt Deed of Trust and Security  
7 Agreement with Assignment of Rents and Fixture Filing (Construction), recorded on February  
8 7, 2008, as Book No. 20080207, Instrument No. 1482.

9 **ANSWER TO INTERROGATORY NO. 23:**

10 Objection. This Interrogatory is vague, ambiguous, irrelevant, overbroad in scope, and  
11 not likely to lead to discovery of admissible evidence. SFC reserves the right to amend this  
12 response as discovery is continuing. Without waiving said objection Brad Scott and Jason  
13 Ulmer were involved in the developing or creation of the documents relating to the loan  
14 secured by the Senior Debt Deed of Trust and Security Agreement with Assignment of Rents  
15 and Fixture Filing (Construction), recorded on February 7, 2008, as Book No. 20080207,  
16 Instrument No. 1482.

17 **INTERROGATORY NO. 24:**

18 Identify all funding distributions made to or on behalf of the owner/developer of the  
19 Project.

20 **ANSWER TO INTERROGATORY NO. 24:**

21 Upon SFC's understanding and belief, all funding distributions were made through Nevada  
22 Construction Services.

23 ...

24 ...

25 ...

26 ...


27 ...

28 ...

MEIER & FINE, LLC  
2300 West Sahara Avenue, Suite 430  
Las Vegas, Nevada 89102  
Tel: (702) 673-1000  
Fax: (702) 673-1001

1 DATED this 7<sup>th</sup> day of April, 2010.

2 MEIER & FINE, LLC

3  
4 By   
5 GLENN F. MEIER, ESQ.  
6 Nevada Bar No. 006059  
7 J. TAYLOR OBLAD, ESQ.  
8 Nevada Bar No. 011430  
9 MEIER & FINE, LLC  
10 2300 West Sahara Avenue, Suite 430  
11 Las Vegas, Nevada 89102  
12 (702) 673-1000  
13 Attorneys for SCOTT FINANCIAL  
14 CORPORATION  
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MEIER & FINE, LLC  
2300 West Sahara Avenue, Suite 430  
Las Vegas, Nevada 89102  
Tel: (702) 673-1000  
Fax: (702) 673-1001

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that I am an Employee of the law firm of MEIER & FINE, LLC,  
and that on this 7 day of April, 2010, I served the above and foregoing **SCOTT  
FINANCIAL CORPORATION'S RESPONSES TO LIEN CLAMANT'S STANDARD  
INTERROGATORIES** 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.

  
An Employee of MEIER & FINE, LLC

# **EXHIBIT 6**



Commonwealth Land Title Insurance Company  
Title Operations  
5550 Painted Mirage, #440  
Las Vegas, NV 89102  
Phone: (702) 836-0940

January 31, 2008

Scott Financial Corporation  
15010 Sundown Drive  
Bismarck, ND 58503

CERTIFIED TO BE A TRUE COPY OF  
THE ORIGINAL  
COMMONWEALTH LAND TITLE  
INSURANCE COMPANY  
BY *Josh Shadd*

Attention: Post Closing Department

Property Address: 9205 W. Russell Road, Las Vegas, NV 89148  
Your Reference: 2006-1029  
Borrower: Gemstone Development West, Inc.  
Our Number: 05111973

Dear Lender:

On behalf of LandAmerica, Commonwealth Land Title Insurance Company please find your ALTA 2006 Loan Policy of title insurance.

If you have not already received your original documents, they should be arriving in the next few weeks.

Thank you, for selecting LandAmerica, Commonwealth Land Title Insurance Company for your transactional management needs.

Sincerely,

A handwritten signature in black ink, appearing to read 'B. Pidgeon', with a long horizontal stroke extending to the right.

Brien Steven Pidgeon  
LandAmerica Financial Group, Inc

Encl.

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# LOAN POLICY OF TITLE INSURANCE

Issued by **Commonwealth Land Title Insurance Company**



*Commonwealth Land Title Insurance Company is a member of the LandAmerica family of title insurance underwriters.*

Any notice of claim and any other notice or statement in writing required to be given to the Company under this Policy must be given to the Company at the address shown in Section 17 of the Conditions.

## COVERED RISKS

SUBJECT TO THE EXCLUSIONS FROM COVERAGE, THE EXCEPTIONS FROM COVERAGE CONTAINED IN SCHEDULE B, AND THE CONDITIONS, COMMONWEALTH LAND TITLE INSURANCE COMPANY, a Nebraska corporation (the "Company") insures as of Date of Policy and, to the extent stated in Covered Risks 11, 13, and 14, after Date of Policy, against loss or damage, not exceeding the Amount of Insurance, sustained or incurred by the Insured by reason of:

1. Title being vested other than as stated in Schedule A.
2. Any defect in or lien or encumbrance on the Title. This Covered Risk includes but is not limited to insurance against loss from
  - (a) A defect in the Title caused by
    - (i) forgery, fraud, undue influence, duress, incompetency, incapacity, or impersonation;
    - (ii) failure of any person or Entity to have authorized a transfer or conveyance;
    - (iii) a document affecting Title not properly created, executed, witnessed, sealed, acknowledged, notarized, or delivered;
    - (iv) failure to perform those acts necessary to create a document by electronic means authorized by law;
    - (v) a document executed under a falsified, expired, or otherwise invalid power of attorney;
    - (vi) a document not properly filed, recorded, or indexed in the Public Records including failure to perform those acts by electronic means authorized by law; or
    - (vii) a defective judicial or administrative proceeding.
  - (b) The lien of real estate taxes or assessments imposed on the Title by a governmental authority due or payable, but unpaid.
  - (c) Any encroachment, encumbrance, violation, variation, or adverse circumstance affecting the Title that would be disclosed by an accurate and complete land survey of the Land. The term "encroachment" includes encroachments of existing improvements located on the Land onto adjoining land, and encroachments onto the Land of existing improvements located on adjoining land.
3. Unmarketable Title.
4. No right of access to and from the Land.
5. The violation or enforcement of any law, ordinance, permit, or governmental regulation (including those relating to building and zoning) restricting, regulating, prohibiting, or relating to
  - (a) the occupancy, use, or enjoyment of the Land;
  - (b) the character, dimensions, or location of any improvement erected on the Land;
  - (c) the subdivision of land; or
  - (d) environmental protectionif a notice, describing any part of the Land, is recorded in the Public Records setting forth the violation or intention to enforce, but only to the extent of the violation or enforcement referred to in that notice.
6. An enforcement action based on the exercise of a governmental police power not covered by Covered Risk 5 if a notice of the enforcement action, describing any part of the Land, is recorded in the Public Records, but only to the extent of the enforcement referred to in that notice.
7. The exercise of the rights of eminent domain if a notice of the exercise, describing any part of the Land, is recorded in the Public Records.
8. Any taking by a governmental body that has occurred and is binding on the rights of a purchaser for value without knowledge.
9. The invalidity or unenforceability of the lien of the Insured Mortgage upon the Title. This Covered Risk includes but is not limited to insurance against loss from any of the following impairing the lien of the Insured Mortgage
  - (a) forgery, fraud, undue influence, duress, incompetency, incapacity, or impersonation;
  - (b) failure of any person or Entity to have authorized a transfer or conveyance;
  - (c) the Insured Mortgage not being properly created, executed, witnessed, sealed, acknowledged, notarized, or delivered;
  - (d) failure to perform those acts necessary to create a document by electronic means authorized by law;
  - (e) a document executed under a falsified, expired, or otherwise invalid power of attorney;
  - (f) a document not properly filed, recorded, or indexed in the Public Records including failure to perform those acts by electronic means authorized by law; or
  - (g) a defective judicial or administrative proceeding.
10. The lack of priority of the lien of the Insured Mortgage upon the Title over any other lien or encumbrance.
11. The lack of priority of the lien of the Insured Mortgage upon the Title
  - (a) as security for each and every advance of proceeds of the loan secured by the Insured Mortgage over any statutory lien for services, labor, or material arising from construction of an improvement or work related to the Land when the improvement or work is either
    - (i) contracted for or commenced on or before Date of Policy; or
    - (ii) contracted for, commenced, or continued after Date of Policy if the construction is financed, in whole or in part, by proceeds of the loan secured by the Insured Mortgage that the Insured has advanced or is obligated on Date of Policy to advance; and
  - (b) over the lien of any assessments for street improvements under construction or completed at Date of Policy.

Dbf Cover-ALTA Loan Policy (6/17/06)  
Form 1191-172

Valid Only If Schedules A and B are attached

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12. The invalidity or unenforceability of any assignment of the Insured Mortgage, provided the assignment is shown in Schedule A, or the failure of the assignment shown in Schedule A to vest title to the Insured Mortgage in the named Insured assignee free and clear of all liens.
13. The invalidity, unenforceability, lack of priority, or avoidance of the lien of the Insured Mortgage upon the Title
  - (a) resulting from the avoidance in whole or in part, or from a court order providing an alternative remedy, of any transfer of all or any part of the title to or any interest in the Land occurring prior to the transaction creating the lien of the Insured Mortgage because that prior transfer constituted a fraudulent or preferential transfer under federal bankruptcy, state insolvency, or similar creditors' rights laws; or
  - (b) because the Insured Mortgage constitutes a preferential transfer under federal bankruptcy, state insolvency, or similar creditors' rights laws by reason of the failure of its recording in the Public Records
    - (i) to be timely, or
    - (ii) to impart notice of its existence to a purchaser for value or to a judgment or lien creditor.
14. Any defect in or lien or encumbrance on the Title or other matter included in Covered Risks 1 through 13 that has been created or attached or has been filed or recorded in the Public Records subsequent to Date of Policy and prior to the recording of the Insured Mortgage in the Public Records..

The Company will also pay the costs, attorneys' fees and expenses incurred in defense of any matter insured against by this Policy, but only to the extent provided in the Conditions.

IN WITNESS WHEREOF, the Company has caused this Policy to be signed with the facsimile signatures of its President and Secretary and sealed as required by its By-Laws.

#### COMMONWEALTH LAND TITLE INSURANCE COMPANY

Attest:



Secretary



By:



President

#### EXCLUSIONS FROM COVERAGE

The following matters are expressly excluded from the coverage of this policy, and the Company will not pay loss or damage, costs, attorneys' fees, or expenses that arise by reason of:

1. (a) Any law, ordinance, permit, or governmental regulation (including those relating to building and zoning) restricting, regulating, prohibiting, or relating to
  - (i) the occupancy, use, or enjoyment of the Land;
  - (ii) the character, dimensions, or location of any improvement erected on the Land;
  - (iii) the subdivision of land; or
  - (iv) environmental protection;
 or the effect of any violation of these laws, ordinances, or governmental regulations. This Exclusion 1(a) does not modify or limit the coverage provided under Covered Risk 5.  
 (b) Any governmental police power. This Exclusion 1(b) does not modify or limit the coverage provided under Covered Risk 6.
2. Rights of eminent domain. This Exclusion does not modify or limit the coverage provided under Covered Risk 7 or 8.
3. Defects, liens, encumbrances, adverse claims, or other matters
  - (a) created, suffered, assumed, or agreed to by the Insured Claimant;
  - (b) not Known to the Company, not recorded in the Public Records at Date of Policy, but Known to the Insured Claimant and not disclosed in writing to the Company by the Insured Claimant prior to the date the Insured Claimant became an Insured under this policy;
  - (c) resulting in no loss or damage to the Insured Claimant;
  - (d) attaching or created subsequent to Date of Policy (however, this does not modify or limit the coverage provided under Covered Risk 11, 13, or 14); or
  - (e) resulting in loss or damage that would not have been sustained if the Insured Claimant had paid value for the Insured Mortgage.
4. Unenforceability of the lien of the Insured Mortgage because of the inability or failure of an Insured to comply with applicable doing-business laws of the state where the Land is situated.
5. Invalidity or unenforceability in whole or in part of the lien of the Insured Mortgage that arises out of the transaction evidenced by the Insured Mortgage and is based upon usury or any consumer credit protection or truth-in-lending law.
6. Any claim, by reason of the operation of federal bankruptcy, state insolvency, or similar creditors' rights laws, that the transaction creating the lien of the Insured Mortgage, is
  - (a) a fraudulent conveyance or fraudulent transfer, or
  - (b) a preferential transfer for any reason not stated in Covered Risk 13(b) of this policy.
7. Any lien on the Title for real estate taxes or assessments imposed by governmental authority and created or attaching between Date of Policy and the date of recording of the Insured Mortgage in the Public Records. This Exclusion does not modify or limit the coverage provided under Covered Risk 11(b).

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## CONDITIONS

### 1. DEFINITION OF TERMS

The following terms when used in this policy mean:

(a) "Amount of Insurance": The amount stated in Schedule A, as may be increased or decreased by endorsement to this policy, increased by Section 8(b) or decreased by Section 10 of these Conditions.

(b) "Date of Policy": The date designated as "Date of Policy" in Schedule A.

(c) "Entity": A corporation, partnership, trust, limited liability company, or other similar legal entity.

(d) "Indebtedness": The obligation secured by the Insured Mortgage including one evidenced by electronic means authorized by law, and if that obligation is the payment of a debt, the Indebtedness is the sum of

(i) the amount of the principal disbursed as of Date of Policy;

(ii) the amount of the principal disbursed subsequent to Date of Policy;

(iii) the construction loan advances made subsequent to Date of Policy for the purpose of financing in whole or in part the construction of an improvement to the Land or related to the Land that the Insured was and continued to be obligated to advance at Date of Policy and at the date of the advance;

(iv) interest on the loan;

(v) the prepayment premiums, exit fees, and other similar fees or penalties allowed by law;

(vi) the expenses of foreclosure and any other costs of enforcement;

(vii) the amounts advanced to assure compliance with laws or to protect the lien or the priority of the lien of the Insured Mortgage before the acquisition of the estate or interest in the Title;

(viii) the amounts to pay taxes and insurance; and

(ix) the reasonable amounts expended to prevent deterioration of improvements; but the Indebtedness is reduced by the total of all payments and by any amount forgiven by an Insured.

(e) "Insured": The Insured named in Schedule A.

(i) The term "Insured" also includes

(A) the owner of the Indebtedness and each successor in ownership of the Indebtedness, whether the owner or successor owns the Indebtedness for its own account or as a trustee or other fiduciary, except a successor who is an obligor under the provisions of Section 12(c) of these Conditions;

(B) the person or Entity who has "control" of the "transferable record," if the Indebtedness is evidenced by a "transferable record," as these terms are defined by applicable electronic transactions law;

(C) successors to an Insured by dissolution, merger, consolidation, distribution, or reorganization;

(D) successors to an Insured by its conversion to another kind of Entity;

(E) a grantee of an Insured under a deed delivered without payment of actual valuable consideration conveying the Title

(1) If the stock, shares, memberships, or other equity interests of the grantee are wholly-owned by the named Insured,

(2) If the grantee wholly owns the named Insured, or

(3) If the grantee is wholly-owned by an affiliated Entity of the named Insured, provided the affiliated Entity and the named Insured are both wholly-owned by the same person or Entity;

(F) any government agency or instrumentality that is an insurer or guarantor under an insurance contract or guaranty insuring or guaranteeing the Indebtedness secured by the Insured Mortgage, or any part of it, whether named as an Insured or not;

(ii) With regard to (A), (B), (C), (D), and (E) reserving, however, all rights and defenses as to any successor that the Company would have had against any predecessor Insured, unless the successor acquired the Indebtedness as a purchaser for value without Knowledge of the asserted defect, lien, encumbrance, or other matter insured against by this policy.

(f) "Insured Claimant": An Insured claiming loss or damage.

(g) "Insured Mortgage": The Mortgage described in paragraph 4 of Schedule A.

(h) "Knowledge" or "Known": Actual knowledge, not constructive knowledge or notice that may be imputed to an Insured by reason of the Public Records or any other records that impart constructive notice of matters affecting the Title.

(i) "Land": The land described in Schedule A, and affixed improvements that by law constitute real property. The term "Land" does not include any property beyond the lines of the area described in Schedule A, nor any right, title, interest, estate, or easement in abutting streets, roads, avenues, alleys, lanes, ways, or waterways, but this does not modify or limit the extent that a right of access to and from the Land is insured by this policy.

(j) "Mortgage": Mortgage, deed of trust, trust deed, or other security instrument, including one evidenced by electronic means authorized by law.

(k) "Public Records": Records established under state statutes at Date of Policy for the purpose of imparting constructive notice of matters relating to real property to purchasers for value and without Knowledge. With respect to Covered Risk 5(d), "Public Records" shall also include environmental protection liens filed in the records of the clerk of the United States District Court for the district where the Land is located.

(l) "Title": The estate or interest described in Schedule A.

(m) "Unmarketable Title": Title affected by an alleged or apparent matter that would permit a prospective purchaser or lessee of the Title or lender on the Title or a prospective purchaser of the Insured Mortgage to be released from the obligation to purchase, lease, or lend if there is a contractual condition requiring the delivery of marketable title.

### 2. CONTINUATION OF INSURANCE

The coverage of this policy shall continue in force as of Date of Policy in favor of an Insured after acquisition of the Title by an Insured or after conveyance by an Insured, but only so long as the Insured retains an estate or interest in the Land, or holds an obligation secured by a purchase money Mortgage given by a purchaser from the Insured, or only so long as the Insured shall have liability by reason of warranties in any transfer or conveyance of the Title. This policy shall not continue in force in favor of any purchaser from the Insured of either (i) an estate or interest in the Land, or (ii) an obligation secured by a purchase money Mortgage given to the Insured.

### 3. NOTICE OF CLAIM TO BE GIVEN BY INSURED CLAIMANT

The Insured shall notify the Company promptly in writing (i) in case of any litigation as set forth in Section 5(a) of these Conditions, (ii) in case Knowledge shall come to an Insured of any claim of title or interest that is adverse to the Title or the lien of the Insured Mortgage, as Insured, and that might cause loss or damage for which the Company may be liable by virtue of this policy, or (iii) if the Title or the lien of the Insured Mortgage, as Insured, is rejected as Unmarketable Title. If the Company is prejudiced by the failure of the Insured Claimant to provide prompt notice, the Company's liability to the Insured Claimant under the policy shall be reduced to the extent of the prejudice.

### 4. PROOF OF LOSS

In the event the Company is unable to determine the amount of loss or damage, the Company may, at its option, require as a condition of payment that the Insured Claimant furnish a signed proof of loss. The proof of loss must describe the defect, lien, encumbrance, or other matter insured against by this policy that constitutes the basis of loss or damage and shall state, to the extent possible, the basis of calculating the amount of the loss or damage.

### 5. DEFENSE AND PROSECUTION OF ACTIONS

(a) Upon written request by the Insured, and subject to the options contained in Section 7 of these Conditions, the Company, at its own cost and without unreasonable delay, shall provide for the defense of an Insured in litigation in which any third party asserts a claim covered by this policy adverse to the Insured. This obligation



#### Conditions Continued

is limited to only those stated causes of action alleging matters insured against by this policy. The Company shall have the right to select counsel of its choice (subject to the right of the Insured to object for reasonable cause) to represent the Insured as to those stated causes of action. It shall not be liable for and will not pay the fees of any other counsel. The Company will not pay any fees, costs, or expenses incurred by the Insured in the defense of those causes of action that allege matters not insured against by this policy.

(b) The Company shall have the right, in addition to the options contained in Section 7 of these Conditions, at its own cost, to institute and prosecute any action or proceeding or to do any other act that in its opinion may be necessary or desirable to establish the Title or the lien of the Insured Mortgage, as insured, or to prevent or reduce loss or damage to the Insured. The Company may take any appropriate action under the terms of this policy, whether or not it shall be liable to the Insured. The exercise of these rights shall not be an admission of liability or waiver of any provision of this policy. If the Company exercises its rights under this subsection, it must do so diligently.

(c) Whenever the Company brings an action or asserts a defense as required or permitted by this policy, the Company may pursue the litigation to a final determination by a court of competent jurisdiction, and it expressly reserves the right, in its sole discretion, to appeal any adverse judgment or order.

#### 6. DUTY OF INSURED CLAIMANT TO COOPERATE

(a) In all cases where this policy permits or requires the Company to prosecute or provide for the defense of any action or proceeding and any appeals, the Insured shall secure to the Company the right to so prosecute or provide defense in the action or proceeding, including the right to use, at its option, the name of the Insured for this purpose. Whenever requested by the Company, the Insured, at the Company's expense, shall give the Company all reasonable aid (i) in securing evidence, obtaining witnesses, prosecuting or defending the action or proceeding, or effecting settlement, and (ii) in any other lawful act that in the opinion of the Company may be necessary or desirable to establish the Title, the lien of the Insured Mortgage, or any other matter as insured. If the Company is prejudiced by the failure of the Insured to furnish the required cooperation, the Company's obligations to the Insured under the policy shall terminate, including any liability or obligation to defend, prosecute, or continue any litigation, with regard to the matter or matters requiring such cooperation.

(b) The Company may reasonably require the Insured Claimant to submit to examination under oath by any authorized representative of the Company and to produce for examination, inspection, and copying, at such reasonable times and places as may be designated by the authorized representative of the Company, all records, in whatever medium maintained, including books, ledgers, checks, memoranda, correspondence, reports, e-mails, disks, tapes, and videos whether bearing a date before or after Date of Policy, that reasonably pertain to the loss or damage. Further, if requested by any authorized representative of the Company, the Insured Claimant shall grant its permission, in writing, for any authorized representative of the Company to examine, inspect, and copy all of these records in the custody or control of a third party that reasonably pertain to the loss or damage. All information designated as confidential by the Insured Claimant provided to the Company pursuant to this Section shall not be disclosed to others unless, in the reasonable judgment of the Company, it is necessary in the administration of the claim. Failure of the Insured Claimant to submit for examination under oath, produce any reasonably requested information, or grant permission to secure reasonably necessary information from third parties as required in this subsection, unless prohibited by law or governmental regulation, shall terminate any liability of the Company under this policy as to that claim.

#### 7. OPTIONS TO PAY OR OTHERWISE SETTLE CLAIMS; TERMINATION OF LIABILITY

In case of a claim under this policy, the Company shall have the following additional options:

(a) To Pay or Tender Payment of the Amount of Insurance or to Purchase the Indebtedness.

(i) To pay or tender payment of the Amount of Insurance under this policy together with any costs, attorneys' fees, and expenses incurred by the Insured Claimant that were authorized

by the Company up to the time of payment or tender of payment and that the Company is obligated to pay; or

(ii) To purchase the Indebtedness for the amount of the Indebtedness on the date of purchase, together with any costs, attorneys' fees, and expenses incurred by the Insured Claimant that were authorized by the Company up to the time of purchase and that the Company is obligated to pay.

When the Company purchases the Indebtedness, the Insured shall transfer, assign, and convey to the Company the Indebtedness and the Insured Mortgage, together with any collateral security.

Upon the exercise by the Company of either of the options provided for in subsections (a)(i) or (ii), all liability and obligations of the Company to the Insured under this policy, other than to make the payment required in those subsections, shall terminate, including any liability or obligation to defend, prosecute, or continue any litigation.

(b) To Pay or Otherwise Settle With Parties Other Than the Insured or With the Insured Claimant.

(i) to pay or otherwise settle with other parties for or in the name of an Insured Claimant any claim insured against under this policy. In addition, the Company will pay any costs, attorneys' fees, and expenses incurred by the Insured Claimant that were authorized by the Company up to the time of payment and that the Company is obligated to pay; or

(ii) to pay or otherwise settle with the Insured Claimant the loss or damage provided for under this policy, together with any costs, attorneys' fees, and expenses incurred by the Insured Claimant that were authorized by the Company up to the time of payment and that the Company is obligated to pay.

Upon the exercise by the Company of either of the options provided for in subsections (b)(i) or (ii), the Company's obligations to the Insured under this policy for the claimed loss or damage, other than the payments required to be made, shall terminate, including any liability or obligation to defend, prosecute, or continue any litigation.

#### 8. DETERMINATION AND EXTENT OF LIABILITY

This policy is a contract of indemnity against actual monetary loss or damage sustained or incurred by the Insured Claimant who has suffered loss or damage by reason of matters insured against by this policy.

(a) The extent of liability of the Company for loss or damage under this policy shall not exceed the least of

(i) the Amount of Insurance,

(ii) the Indebtedness,

(iii) the difference between the value of the Title as insured and the value of the Title subject to the risk insured against by this policy, or

(iv) If a government agency or instrumentality is the Insured Claimant, the amount it paid in the acquisition of the Title or the Insured Mortgage in satisfaction of its insurance contract or guaranty.

(b) If the Company pursues its rights under Section 5 of these Conditions and is unsuccessful in establishing the Title or the lien of the Insured Mortgage, as insured,

(i) the Amount of Insurance shall be increased by 10%, and

(ii) the Insured Claimant shall have the right to have the loss or damage determined either as of the date the claim was made by the Insured Claimant or as of the date it is settled and paid.

(c) In the event the Insured has acquired the Title in the manner described in Section 2 of these Conditions or has conveyed the Title, then the extent of liability of the Company shall continue as set forth in Section 8(a) of these Conditions.

(d) In addition to the extent of liability under (a), (b), and (c), the Company will also pay those costs, attorneys' fees, and expenses incurred in accordance with Sections 5 and 7 of these Conditions.

#### 9. LIMITATION OF LIABILITY

(a) If the Company establishes the Title, or removes the alleged defect, lien, or encumbrance, or cures the lack of a right of access to or from the Land, or cures the claim of Unmarketable Title, or establishes the lien of the Insured Mortgage, all as insured, in a reasonably diligent manner by any method, including litigation and the completion of any appeals, it shall have fully performed its obligations with respect to that matter and shall not be liable for any loss or damage caused to the Insured.

(b) In the event of any litigation, including litigation by the Company or with the Company's consent, the Company shall have no

Conditions Continued

liability for loss or damage until there has been a final determination by a court of competent jurisdiction, and disposition of all appeals, adverse to the Title or to the lien of the Insured Mortgage, as insured.

(c) The Company shall not be liable for loss or damage to the Insured for liability voluntarily assumed by the Insured in settling any claim or suit without the prior written consent of the Company.

**10. REDUCTION OF INSURANCE; REDUCTION OR TERMINATION OF LIABILITY**

(a) All payments under this policy, except payments made for costs, attorneys' fees, and expenses, shall reduce the Amount of Insurance by the amount of the payment. However, any payments made prior to the acquisition of Title as provided in Section 2 of these Conditions shall not reduce the Amount of Insurance afforded under this policy except to the extent that the payments reduce the indebtedness.

(b) The voluntary satisfaction or release of the Insured Mortgage shall terminate all liability of the Company except as provided in Section 2 of these Conditions.

**11. PAYMENT OF LOSS**

When liability and the extent of loss or damage have been definitely fixed in accordance with these Conditions, the payment shall be made within 30 days.

**12. RIGHTS OF RECOVERY UPON PAYMENT OR SETTLEMENT**

**(a) The Company's Right to Recover**

Whenever the Company shall have settled and paid a claim under this policy, it shall be subrogated and entitled to the rights of the Insured Claimant in the Title or Insured Mortgage and all other rights and remedies in respect to the claim that the Insured Claimant has against any person or property, to the extent of the amount of any loss, costs, attorneys' fees, and expenses paid by the Company. If requested by the Company, the Insured Claimant shall execute documents to evidence the transfer to the Company of these rights and remedies. The Insured Claimant shall permit the Company to sue, compromise, or settle in the name of the Insured Claimant and to use the name of the Insured Claimant in any transaction or litigation involving these rights and remedies.

If a payment on account of a claim does not fully cover the loss of the Insured Claimant, the Company shall defer the exercise of its right to recover until after the Insured Claimant shall have recovered its loss.

**(b) The Insured's Rights and Limitations**

(i) The owner of the indebtedness may release or substitute the personal liability of any debtor or guarantor, extend or otherwise modify the terms of payment, release a portion of the Title from the lien of the Insured Mortgage, or release any collateral security for the indebtedness, if it does not affect the enforceability or priority of the lien of the Insured Mortgage.

(ii) If the Insured exercises a right provided in (b)(i), but has knowledge of any claim adverse to the Title or the lien of the Insured Mortgage insured against by this policy, the Company shall be required to pay only that part of any losses insured against by this policy that shall exceed the amount, if any, lost to the Company by reason of the impairment by the Insured Claimant of the Company's right of subrogation.

**(c) The Company's Rights Against Noninsured Obligor**

The Company's right of subrogation includes the Insured's rights against non-insured obligors including the rights of the Insured to indemnities, guaranties, other policies of insurance, or bonds, notwithstanding any terms or conditions contained in those instruments that address subrogation rights.

The Company's right of subrogation shall not be avoided by acquisition of the Insured Mortgage by an obligor (except an obligor described in Section 1(e)(f)(F) of these Conditions) who acquires the Insured Mortgage as a result of an indemnity, guarantee, other policy of insurance, or bond, and the obligor will not be an Insured under

this policy.

**13. ARBITRATION**

Either the Company or the Insured may demand that the claim or controversy shall be submitted to arbitration pursuant to the Title Insurance Arbitration Rules of the American Land Title Association ("Rules"). Except as provided in the Rules, there shall be no joinder or consolidation with claims or controversies of other persons. Arbitrable matters may include, but are not limited to, any controversy or claim between the Company and the Insured arising out of or relating to this policy, any service in connection with its issuance or the breach of a policy provision, or to any other controversy or claim arising out of the transaction giving rise to this policy. All arbitrable matters when the Amount of Insurance is \$2,000,000 or less shall be arbitrated at the option of either the Company or the Insured. All arbitrable matters when the Amount of Insurance is in excess of \$2,000,000 shall be arbitrated only when agreed to by both the Company and the Insured. Arbitration pursuant to this policy and under the Rules shall be binding upon the parties. Judgment upon the award rendered by the Arbitrator(s) may be entered in any court of competent jurisdiction.

**14. LIABILITY LIMITED TO THIS POLICY; POLICY ENTIRE CONTRACT**

(a) This policy together with all endorsements, if any, attached to it by the Company is the entire policy and contract between the Insured and the Company. In interpreting any provision of this policy, this policy shall be construed as a whole.

(b) Any claim of loss or damage that arises out of the status of the Title or lien of the Insured Mortgage or by any action asserting such claim shall be restricted to this policy.

(c) Any amendment of or endorsement to this policy must be in writing and authenticated by an authorized person, or expressly incorporated by Schedule A of this policy.

(d) Each endorsement to this policy issued at any time is made a part of this policy and is subject to all of its terms and provisions. Except as the endorsement expressly states, it does not (i) modify any of the terms and provisions of the policy, (ii) modify any prior endorsement, (iii) extend the Date of Policy, or (iv) increase the Amount of Insurance.

**15. SEVERABILITY**

In the event any provision of this policy, in whole or in part, is held invalid or unenforceable under applicable law, the policy shall be deemed not to include that provision or such part held to be invalid, but all other provisions shall remain in full force and effect.

**16. CHOICE OF LAW; FORUM**

(a) Choice of Law: The Insured acknowledges the Company has underwritten the risks covered by this policy and determined the premium charged therefor in reliance upon the law affecting interests in real property and applicable to the interpretation, rights, remedies, or enforcement of policies of title insurance of the jurisdiction where the Land is located. Therefore, the court or an arbitrator shall apply the law of the jurisdiction where the Land is located to determine the validity of claims against the Title or the lien of the Insured Mortgage that are adverse to the Insured and to interpret and enforce the terms of this policy. In neither case shall the court or arbitrator apply its conflicts of law principles to determine the applicable law.

(b) Choice of Forum: Any litigation or other proceeding brought by the Insured against the Company must be filed only in a state or federal court within the United States of America or its territories having appropriate jurisdiction.

**17. NOTICES, WHERE SENT**

Any notice of claim and any other notice or statement in writing required to be given the Company under this Policy must be given to the Company at: Consumer Affairs Department PO Box 27567 Richmond, Virginia 23261-7567

## LOAN POLICY OF TITLE INSURANCE

American Land Title Association (9/17/06)

Issued by  
**Commonwealth Land Title  
Insurance Company**

Commonwealth Land Title Insurance Company  
is a member of the LandAmerica family of title insurance  
underwriters.



LandAmerica Financial Group, Inc.  
5600 Cox Road  
Glen Allen, Virginia 23060-9298  
[www.landam.com](http://www.landam.com)

Form B 1191-172

## THANK YOU.

Title insurance provides for the protection of your  
real estate investment. We suggest you keep this  
policy in a safe place where it can be readily  
available for future reference.

If you have questions about title insurance or the  
coverage provided by this policy, contact the  
office that issued this policy, or you may call or  
write:

Commonwealth Land Title Insurance Company  
Consumer Affairs  
P.O. Box 27567  
Richmond, Virginia 23261-7567  
telephone, toll free: 800 446-7086  
web: [www.landam.com](http://www.landam.com)

We thank you for choosing to do business with  
Commonwealth Land Title Insurance Company,  
and look forward to meeting your future title  
insurance needs.

Commonwealth Land Title Insurance Company  
is a member of the LandAmerica family of title insurance  
underwriters.





CERTIFIED TO BE A TRUE COPY OF  
THE ORIGINAL  
COMMONWEALTH LAND TITLE  
INSURANCE COMPANY

*High Blade*

**PRO FORMA**

**ALTA Loan Policy 2006  
POLICY OF TITLE INSURANCE  
ISSUED BY  
Commonwealth Land Title Insurance Company  
SCHEDULE A**

Amount of Insurance: **\$110,000,000.00**

Policy/File No.: **05111973**

Loan Number: **2006-1029**

Address Reference: **9205 W. Russell Road, Las Vegas, NV 89148**

Premium: **\$52,800.00**

Endorsement Fees: **\$19,230.00**

Date of Policy: **January 25, 2008 at 8:00 A.M.**

1. Name of Insured:  
**Scott Financial Corporation, its successors and/or assigns**
2. The estate or interest in the Land that is encumbered by the Insured Mortgage is:  
**A Fee**
3. Title is vested in:  
**Gemstone Development West, Inc., a Nevada corporation**
4. The Insured Mortgage and its assignments, if any, are described in Exhibit "A" attached hereto and made a part hereof.
5. The Land referred to in this policy is described as set forth in the insured mortgage, is situated in the County of Clark, State of Nevada, and is identified as more particularly described in Exhibit "B" attached hereto and made a part hereof.
6. This policy incorporates by reference those ALTA endorsements selected below:  
**110.1, 101.3, 100.29, 103.5, 102.5, 100.2, 123.1, 116.4, 116.1**

By: *Rhodene L. Chandler*  
Authorized Signatory

**EXHIBIT "A"**

A deed of trust to secure an indebtedness in the amount shown below, and any other obligations secured thereby.

Amount:	\$110,000,000.00
Dated:	January 22, 2008
Trustor:	Gemstone Development West, Inc., a Nevada corporation
Trustee:	Commonwealth Land Title Insurance Company
Beneficiary:	Scott Financial Corporation, a North Dakota corporation
Loan No.:	2006-1029
Recorded:	as Instrument No. , Official Records

**EXHIBIT "B"**

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 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.

**ASSESSOR'S PARCEL NO.: 163-32-101-003**

**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.

**ASSESSOR'S PARCEL NO.: 163-32-101-004**

**PARCEL 3:**

The Sputherly 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.

**ASSESSOR'S PARCEL NO.: 163-32-101-005**

**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.

**EXHIBIT "B" Continued**

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 Final Order of Condemnation recorded November 20, 1998 in Book 981120 as Document No. 00763 of Official Records.

**ASSESSOR'S PARCEL NO.: 163-32-101-014**

**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.

**ASSESSOR'S PARCEL NO.: 163-32-101-010**

**NOTE: THE NEW PARCEL NO. FOR THE ALL OF THE ABOVE IS  
163-32-101-019**

Assessor's Parcel Number      **163-32-101-019**

**SCHEDULE B  
PART I**

This policy does not insure against loss or damage and the Company will not pay costs, attorneys' fees or expenses that arise by reason of:

1. Taxes for the fiscal year 2007-2008 in the total amount of \$16,997.18 of which \$12,747.88 is paid. Next installment in the amount of \$4,249.30 is due the first Monday in March.  
Assessor's Parcel Number: 163-32-101-003  
  
AFFECTS PARCEL 1
2. Taxes for the fiscal year 2007-2008 in the total amount of \$7,152.05 of which \$5,364.04 is paid. Next installment in the amount of \$1,788.01 is due the first Monday in March.  
Assessor's Parcel Number: 163-32-101-004  
  
AFFECTS PARCEL 2
3. Taxes for the fiscal year 2007-2008 in the total amount of \$8,829.73 of which \$6,622.30 is paid. Next installment in the amount of \$2,207.43 is due the first Monday in March.  
Assessor's Parcel Number: 163-21-101-005  
  
AFFECTS PARCEL 3
4. Taxes for the fiscal year 2007-2008 in the total amount of \$18,183.86 of which \$13,637.90 is paid. Next installment in the amount of \$4,545.96 is due the first Monday in March.  
Assessor's Parcel Number: 163-32-101-014  
  
AFFECTS PARCEL 4
5. Taxes for the fiscal year 2007-2008 in the total amount of \$9,674.20 of which \$7,255.64 is paid. Next installment in the amount of \$2,418.56 is due the first Monday in March.  
Assessor's Parcel Number: 163-32-101-010  
  
AFFECTS PARCEL 5
6. A lien of supplemental taxes, if any, assessed pursuant to the provisions of the Nevada Revised Statute 361.260
7. The property described herein is located within the boundaries of the Clark County Sanitation District and is subject to any fees that may be charged against said property by the hereinbefore mentioned district.
8. Water rights, claims or title to water.
9. Reservations and easements in the Patent from the United States of America.  
Recorded: December 19, 1979  
Book 1163 Doc/Inst. No. 1122179 of Official Records  
  
Right of Way not exceeding 33 feet in width for roadway and public utilities purposes to be located along the boundaries of said land.  
  
Partial Release of Patent Easement Rights  
Recorded: March 1, 2007  
Book 20070301 Doc/Inst. No. 0002730 of Official Records



**SCHEDULE B - PART I**  
**Continued**

**Vacation of Patent Easements**

Recorded: August 23, 2007  
Book 20070823 Doc/Inst. No. 0004781 of Official Records

And re-recorded: August 28, 2007  
Book 20070828 Doc/Inst. No. 0004280 of Official Records

**AFFECTS PARCEL 1**

10. Reservations and easements in the Patent from the United States of America.

Recorded: June 7, 1962  
Book 365 Doc/Inst. No. 295090 of Official Records

Right of Way not exceeding 33 feet in width for roadway and public utilities purposes to be located along the boundaries of said land.

**Partial Release of Patent Easement Rights**

Recorded: March 1, 2007  
Book 20070301 Doc/Inst. No. 0002730 of Official Records

**Vacation of Patent Easements**

Recorded: August 23, 2007  
Book 20070823 Doc/Inst. No. 0004781 of Official Records

And re-recorded: August 28, 2007  
Book 20070828 Doc/Inst. No. 0004280 of Official Records

**AFFECTS PARCELS 2 AND 3**

11. Reservations and easements in the Patent from the United States of America.

Recorded: October 16, 1979  
Book 1133 Doc/Inst. No. 1092838 of Official Records

Right of Way not exceeding 33 feet in width for roadway and public utilities purposes to be located along the boundaries of said land.

**Partial Release of Patent Easement Rights**

Recorded: March 1, 2007  
Book 20070301 Doc/Inst. No. 0002730 of Official Records

**Vacation of Patent Easements**

Recorded: August 23, 2007  
Book 20070823 Doc/Inst. No. 0004781 of Official Records

And re-recorded: August 28, 2007  
Book 20070828 Doc/Inst. No. 0004280 of Official Records

**AFFECTS PARCEL 4**

12. Reservations and easements in the Patent from the United States of America.

Recorded: September 9, 1957  
Book 139 Doc/Inst. No. 114353 of Official Records

Right of Way not exceeding 33 feet in width for roadway and public utilities purposes to be located along the boundaries of said land.

**Partial Release of Patent Easement Rights**

**SCHEDULE B - PART I**  
**Continued**

Recorded: March 1, 2007  
Book 20070301 Doc/Inst. No. 0002730 of Official Records

**Vacation of Patent Easements**

Recorded: August 23, 2007  
Book 20070823 Doc/Inst. No. 0004781 of Official Records

And re-recorded: August 28, 2007  
Book 20070828 Doc/Inst. No. 0004280 of Official Records

**AFFECTS PARCEL 5**

13. Reservations and easements in the Patent from the United States of America.  
Recorded: January 28, 2000  
Book 20000128 Doc/Inst. No. 00913 of Official Records

**AFFECTS ALL**

14. The terms, covenants, restrictions and provisions shown in that certain "Grant, Bargain and Sale Deed" recorded October 5, 2004 in Book 20041005 Doc/Inst. No. 0005012 of Official Records, and the effect of any failure to comply with same.

**AFFECTS PARCELS 1, 2 AND 3**

15. An easement for the purpose shown below and rights incidental thereto as set forth in a document  
Granted to: Russell 215, LLC, Pantea, LLC, and Las Vegas Land Dev Co, LLC  
Purpose: Private Drainage Easement  
Recorded: December 30, 2004  
Book: 20041230 Doc/Inst. No. 0001346 of Official Records

**AFFECTS PARCEL 4**

16. An easement for the purpose shown below and rights incidental thereto as set forth in a document  
Granted to: Russell 215, LLC, and Pantea, LLC  
Purpose: Private Drainage Easement  
Recorded: December 30, 2004  
Book: 20041230 Doc/Inst. No. 0001347 of Official Records

**AFFECTS PARCEL 4**

17. Intentionally deleted

**AFFECTS PARCEL 5**

18. The terms, covenants and provisions of that certain "Resolution of Intent to Reclassify Real Property" recorded November 27, 2006 in Book 20061127 Doc/Inst. No. 0000293 of Official Records, and the effect of any failure to comply with same.

**AFFECTS ALL**

19. The terms, covenants and provisions of that certain "Improvement Phasing Agreement" recorded February 7, 2007 in Book 20070207 Doc/Inst. No. 0004555 of Official Records, and the effect of any failure to comply with same.

**SCHEDULE B - PART I**  
**Continued**

**AFFECTS ALL**

20. An easement for the purpose shown below and rights incidental thereto as set forth in a document
- |             |  |
|-------------|--|
| Granted to: | County of Clark                                    |
| Purpose:    | Pedestrian access and utility                      |
| Recorded:   | August 23, 2007                                    |
| Book:       | 20070823 Doc/Inst. No. 0004784 of Official Records |

**AFFECTS PARCELS 1 AND 2**

21. Any easements not vacated by reason of that certain "Order of Vacation" recorded August 23, 2007 in Book 20070823 as Document No. 0004781.
- |                  |  |
|------------------|--|
| And re-recorded: | August 28, 2007                                    |
| Book             | 20070828 Doc/Inst. No. 0004280 of Official Records |

**AFFECTS ALL**

22. The terms, covenants and provisions of that certain "Development Agreement" recorded November 28, 2007 in Book 20071128 Doc/Inst. No. 0004645 of Official Records, and the effect of any failure to comply with same.
- |                                    |  |
|------------------------------------|--|
| Ordinance to Adopt the Development |  |
| Recorded:                          | November 28, 2007                                  |
| Book                               | 20071128 Doc/Inst. No. 0004646 of Official Records |

**AFFECTS ALL**

23. The terms, covenants and provisions of that certain "Off-Site Improvements Agreement" recorded December 3, 2007 in Book 20071203 Doc/Inst. No. 0000472 of Official Records, and the effect of any failure to comply with same.

**AFFECTS ALL**

24. An easement for the purpose shown below and rights incidental thereto as set forth in a document
- |             |   |
|-------------|---|
| Granted to: | Las Vegas Valley water District                     |
| Purpose:    | water lines   |
| Recorded:   | January 3, 2008                                     |
| Book:       | 20080103 Doc/Inst. No. 00003130 of Official Records |

**AFFECTS ALL**

25. Discrepancies, conflicts in boundary lines, shortage in area, encroachments or any other facts which a correct survey would disclose, and which are not shown by the public records.
26. Any facts, rights, interests, or claims which are not shown by the public records but which could be ascertained by an inspection of the land or which may be asserted by persons in possession thereof.

**End of Schedule B - Part I**

File No.: 05111973

**SCHEDULE B - PART I**  
**Continued**

## SCHEDULE B PART II

In addition to the matters set forth in Part I of this Schedule, the Title is subject to the following matters, and the Company insures against loss or damage sustained in the event that they are not subordinate to the lien of the Insured Mortgage:

The following affects all parcels:

1. A senior deed of trust to secure an indebtedness in the amount shown below, and any other obligations secured thereby.

Amount: \$15,000,000.00  
 Dated: June 26, 2006  
 Trustor: Gemstone Apache, LLC, a Nevada limited liability company  
 Trustee: First American Title Insurance Company  
 Beneficiary: Scott Financial Corporation, a North Dakota corporation  
 Recorded: July 5, 2006  
 Book 20060705 Doc/Inst. No. 0004264 of Official Records

An Assumption Agreement pertaining to said Deed of Trust  
 Executed by: Scott Financial Corporation and Gemstone apache, LLC, a Nevada limited liability company and Gemstone Development West, Inc.

Recorded:  
 Book Doc/Inst. No. of Official Records

First Amendment to the above Senior Deed of Trust for an additional \$28,000,000.00

Recorded:  
 Book Doc/Inst. No. of Official Records

By the provisions of an agreement

Dated: January 22, 2008  
 Executed by: Scott Financial Corporation  
 Recorded:  
 Book Doc/Inst. No. of Official Records

Said instrument was made subordinate to the lien of the document or interest shown: as Exhibit A

2. A junior deed of trust to secure an indebtedness in the amount shown below, and any other obligations secured thereby.

Amount: \$10,000,000.00  
 Dated: June 26, 2006  
 Trustor: Gemstone Apache, LLC, a Nevada limited liability company  
 Trustee: First American Title Insurance Company  
 Beneficiary: Scott Financial Corporation, a North Dakota corporation  
 Recorded: July 5, 2006  
 Book 20060705 Doc/Inst. No. 0004265 of Official Records

First Amendment to the above Junior Deed of Trust for an additional \$8,000,000.00

Recorded: May 22, 2007  
 Book 20070522 Doc/Inst. No. 0004011 of Official Records

An Assumption Agreement pertaining to said Deed of Trust  
 Executed by: Scott Financial Corporation and Gemstone apache, LLC, a Nevada limited liability company and Gemstone Development West, Inc.

Recorded:  
 Book Doc/Inst. No. of Official Records

**SCHEDULE B - PART II  
Continued**

Second Amendment to the above Junior Deed of Trust for an additional \$8,000,000.00

Recorded:

Book                                      Doc/Inst. No.                      of Official Records

By the provisions of an agreement

Dated:                                      January 22, 2008

Executed by:                              Scott Financial Corporation

Recorded:

Book                                      Doc/Inst. No.                      of Official Records

Said instrument was made subordinate to the lien of the document or interest shown: as Exhibit  
A

3. A third deed of trust to secure an indebtedness in the amount shown below, and any other obligations secured thereby.

Amount:                                      \$13,000,000.00

Dated:                                      June 26, 2006

Trustor:                                      Gemstone Apache, LLC, a Nevada limited liability company

Trustee:                                      First American Title Insurance Company

Beneficiary:                                      Scott Financial Corporation, a North Dakota corporation

Recorded:                                      July 5, 2006

Book                                      20060705 Doc/Inst. No. 0004266 of Official Records

First Amendment to the above Third Deed of Trust for an additional \$10,000,000.00

Recorded:                                      October 24, 2007

Book                                      20071024 Doc/Inst. No. 0004182 of Official Records

An Assumption Agreement pertaining to said Deed of Trust

Executed by:                                      Scott Financial Corporation and Gemstone apache, LLC, a Nevada  
limited liability company and Gemstone Development West, Inc.

Recorded:

Book                                      Doc/Inst. No.                      of Official Records

By the provisions of an agreement

Dated:                                      January 22, 2008

Executed by:                                      Scott Financial Corporation

Recorded:

Book                                      Doc/Inst. No.                      of Official Records

Said instrument was made subordinate to the lien of the document or interest shown: as Exhibit  
A

**End of Schedule B - Part II**

to1

**ENDORSEMENT**

**ATTACHED TO POLICY NO. 05111973**

**ISSUED BY**

**Commonwealth Land Title Insurance Company**

The Policy is hereby amended by deleting paragraph 13 of Covered Risks.

This endorsement is issued as part of the policy. Except as it expressly states, it does not (i) modify any of the terms and provisions of the policy, (ii) modify any prior endorsements, (iii) extend the Date of Policy, or (iv) increase the Amount of Insurance. To the extent a provision of the policy or a previous endorsement is inconsistent with an express provision of this endorsement, this endorsement controls. Otherwise, this endorsement is subject to all of the terms and provisions of the policy and of any prior endorsements.

Dated: 01/25/2008

By: Therese L. Chandler  
Authorized Signatory

**ENDORSEMENT**

**ATTACHED TO POLICY NO. 05111973**

**ISSUED BY**

**Commonwealth Land Title Insurance Company**

The Company hereby insures against loss or damage sustained by reason of the establishment of priority over the lien of the Insured Mortgage upon Title of any statutory lien for services, labor or material arising out of any work of improvement under construction or completed at Date of Policy.

This endorsement is issued as part of the policy. Except as it expressly states, it does not (i) modify any of the terms and provisions of the policy, (ii) modify any prior endorsements, (iii) extend the Date of Policy, or (iv) increase the Amount of Insurance. To the extent a provision of the policy or a previous endorsement is inconsistent with an express provision of this endorsement, this endorsement controls. Otherwise, this endorsement is subject to all of the terms and provisions of the policy and of any prior endorsements.

Dated: 01/25/2008

By: Theodore L. Chandler Jr.

Authorized Signatory



**ENDORSEMENT**

**ATTACHED TO POLICY NO. 05111973**

**ISSUED BY**

**Commonwealth Land Title Insurance Company**

The Company insures the insured against loss which the insured shall sustain by reason of damage to existing improvements, including lawns, shrubbery or trees resulting from the exercise of any right to use the surface of the land for the extraction or development of the minerals excepted from the description of the land or shown as a reservation in Schedule B.

This endorsement is issued as part of the policy. Except as it expressly states, it does not (i) modify any of the terms and provisions of the policy, (ii) modify any prior endorsements, (iii) extend the Date of Policy, or (iv) increase the Amount of Insurance. To the extent a provision of the policy or a previous endorsement is inconsistent with an express provision of this endorsement, this endorsement controls. Otherwise, this endorsement is subject to all of the terms and provisions of the policy and of any prior endorsements.

Dated: January 25, 2008

By: Therese L. Chandler, Jr.

Authorized Signatory

**ENDORSEMENT**  
**ATTACHED TO POLICY NO. 05111973**  
**ISSUED BY**  
**Commonwealth Land Title Insurance Company**

The Company hereby insures the insured against loss which the insured shall sustain by reason of damage to existing improvements, including lawns, shrubbery or trees, resulting from the exercise of any right to use the surface of the land for the extraction or development of water excepted from the description of the land or shown as a reservation in Schedule B.

This endorsement is issued as part of the policy. Except as it expressly states, it does not (i) modify any of the terms and provisions of the policy, (ii) modify any prior endorsements, (iii) extend the Date of Policy, or (iv) increase the Amount of Insurance. To the extent a provision of the policy or a previous endorsement is inconsistent with an express provision of this endorsement, this endorsement controls. Otherwise, this endorsement is subject to all of the terms and provisions of the policy and of any prior endorsements.

Dated: January 25, 2008

By: Therese L. Chandler  
Authorized Signatory

**ENDORSEMENT**

**ATTACHED TO POLICY NO. 05111973**

**ISSUED BY**

**Commonwealth Land Title Insurance Company**

The Company hereby insures the owner of the indebtedness secured by the insured mortgage against loss or damage which the insured shall sustain by reason of:

- (1) The failure of the foundation of the structure under construction on the land to be within the boundary lines of the land as of the date hereof;
- (2) The location of the foundation as of the date hereof, being in violation of the covenants, conditions or restrictions referred to in Schedule B as of the date hereof;
- (3) The foundation encroaching as of the date hereof, onto any of the easements referred to in Schedule B.

This endorsement is issued as part of the policy. Except as it expressly states, it does not (i) modify any of the terms and provisions of the policy, (ii) modify any prior endorsements, (iii) extend the Date of Policy, or (iv) increase the Amount of Insurance. To the extent a provision of the policy or a previous endorsement is inconsistent with an express provision of this endorsement, this endorsement controls. Otherwise, this endorsement is subject to all of the terms and provisions of the policy and of any prior endorsements.

Dated: 01/25/2008

By: *Thedene L Chandler*

Authorized Signatory

## **ENDORSEMENT**

**ATTACHED TO POLICY NO. 05111973**

**ISSUED BY**

**Commonwealth Land Title Insurance Company**

The Company insures the owner of the indebtedness secured by the insured mortgage against loss or damage sustained by reason of:

1. The existence, at Date of Policy, of any of the following:
  - a. Covenants, conditions, or restrictions under which the lien of the insured mortgage can be divested, subordinated, or extinguished, or its validity, priority or enforceability impaired.
  - b. Unless expressly excepted in Schedule B
    - i. Present violations on the land of any enforceable covenants, conditions, or restrictions, and any existing improvements on the land which violate any building setback lines shown on a plat of subdivision recorded or filed in the public records.
    - ii. Any instrument referred to in Schedule B as containing covenants, conditions, or restrictions on the land that, in addition, (A) establishes an easement on the land; (B) provides a lien for liquidated damages; (C) provides for a private charge or assessment; (D) provides for an option to purchase, a right of first refusal, or the prior approval of a future purchaser or occupant.
    - iii. Any encroachment of existing improvements located on the land onto adjoining land, or any encroachment onto the land of existing improvements located on adjoining land.
    - iv. Any encroachment of existing improvements located on the land onto that portion of the land subject to any easement excepted in Schedule B.
    - v. Any notices of violation of covenants, conditions, or restrictions relating to environmental protection recorded or filed in the public records.
2. Any future violation on the land of any existing covenants, conditions, or restrictions occurring prior to the acquisition of title to the estate or interest in the land by the insured, provided the violation results in
  - a. Invalidity, loss of priority, or unenforceability of the lien of the insured mortgage; or
  - b. loss of title if the insured shall acquire title in satisfaction of the indebtedness secured by the insured mortgage.
3. Damage to existing improvements, including lawns, shrubbery, or trees:
  - a. which are located on or encroach upon that portion of the land subject to any easement excepted in Schedule B, which damage results from the exercise of the right to maintain the easement for the purpose for which it was granted or reserved;
  - b. resulting from the future exercise of any right to use the surface of the land for the extraction or development of minerals excepted from the description of the land or excepted in Schedule B.
4. Any final court order or judgment requiring the removal from any land adjoining the land of any encroachment excepted in Schedule B.
5. Any final court order or judgment denying the right to maintain any existing improvements on the land because of any violation of covenants, conditions or restrictions, or building setback lines shown on a plat of subdivision recorded or filed in the public records.

CLTA Form 100.2 (6-17-06)  
ALTA Form 9 (6-17-06)  
Restrictions, Encroachments, Minerals  
Lender

P002399

ARA 000109

Wherever in this endorsement the words "covenants, conditions, or restrictions" appear, they shall not be deemed to refer to or include the terms, covenants, conditions, or limitations contained in an instrument creating a lease.

As used in paragraphs 1.b(i) and 5, the words "covenants, conditions, or restrictions" do not include any covenants, conditions, or restrictions (a) relating to obligations of any type to perform maintenance, repair, or remediation on the land, or (b) pertaining to environmental protection of any kind or nature, including hazardous or toxic matters, conditions, or substances, except to the extent that a notice of a violation or alleged violation affecting the land has been recorded or filed in the public records at Date of Policy and is not excepted in Schedule B.

This endorsement is issued as part of the policy. Except as it expressly states, it does not (i) modify any of the terms and provisions of the policy, (ii) modify any prior endorsements, (iii) extend the Date of Policy, or (iv) increase the Amount of Insurance. To the extent a provision of the policy or a previous endorsement is inconsistent with an express provision of this endorsement, this endorsement controls. Otherwise, this endorsement is subject to all of the terms and provisions of the policy and of any prior endorsements.

Dated: January 25, 2008

By: Theodore L. Chandler Jr.  
Authorized Signatory

**ENDORSEMENT**

**ATTACHED TO POLICY NO. 05111973**

**ISSUED BY**

**Commonwealth Land Title Insurance Company**

The Company insures the Insured against loss or damage sustained in the event that, at Date of Policy:

1. According to applicable zoning ordinances and amendments thereof, the land is not classified Zone R-E.
2. The following use or uses are not allowed under that classification:  
Rural Estates Residential

There shall be no liability under this endorsement based on:

- (a) Lack of compliance with any conditions, restrictions, or requirements contained in the zoning ordinances and amendments thereto mentioned above, including but not limited to the failure to secure necessary consents or authorizations as a prerequisite to the use or uses. This paragraph 2.a does not modify or limit the coverage provided in Covered Risk 5.
- (b) The invalidity of the zoning ordinances and amendments until after a final decree of a court of competent jurisdiction adjudicating the invalidity, the effect of which is to prohibit the use or uses.
- (c) The refusal of any person to purchase, lease or lend money on the estate or interest covered by this policy.

This endorsement is issued as part of the policy. Except as it expressly states, it does not (i) modify any of the terms and provisions of the policy, (ii) modify any prior endorsements, (iii) extend the Date of Policy, or (iv) increase the Amount of Insurance. To the extent a provision of the policy or a previous endorsement is inconsistent with an express provision of this endorsement, this endorsement controls. Otherwise, this endorsement is subject to all of the terms and provisions of the policy and of any prior endorsements.

Dated: January 25, 2008

By: Therese L. Chandler, Jr.  
Authorized Signatory

**ENDORSEMENT**

**ATTACHED TO POLICY NO. 05111973**

**ISSUED BY**

**Commonwealth Land Title Insurance Company**

The Company insures against loss or damage sustained by the insured by reason of:

- (1) the failure of the land to be contiguous to that certain parcel of real property described in deed recorded in Book as Document No. records of Clark County, State of Nevada.
- (2) the presence of any gaps, strips or gores separating the contiguous boundary line described above.

This endorsement is issued as part of the policy. Except as it expressly states, it does not (i) modify any of the terms and provisions of the policy, (ii) modify any prior endorsements, (iii) extend the Date of Policy, or (iv) increase the Amount of Insurance. To the extent a provision of the policy or a previous endorsement is inconsistent with an express provision of this endorsement, this endorsement controls. Otherwise, this endorsement is subject to all of the terms and provisions of the policy and of any prior endorsements.

Dated: January 25, 2008

By: Therese L. Chandler  
Authorized Signatory

**ENDORSEMENT**  
**ATTACHED TO POLICY NO. 05111973**  
**ISSUED BY**  
**Commonwealth Land Title Insurance Company**

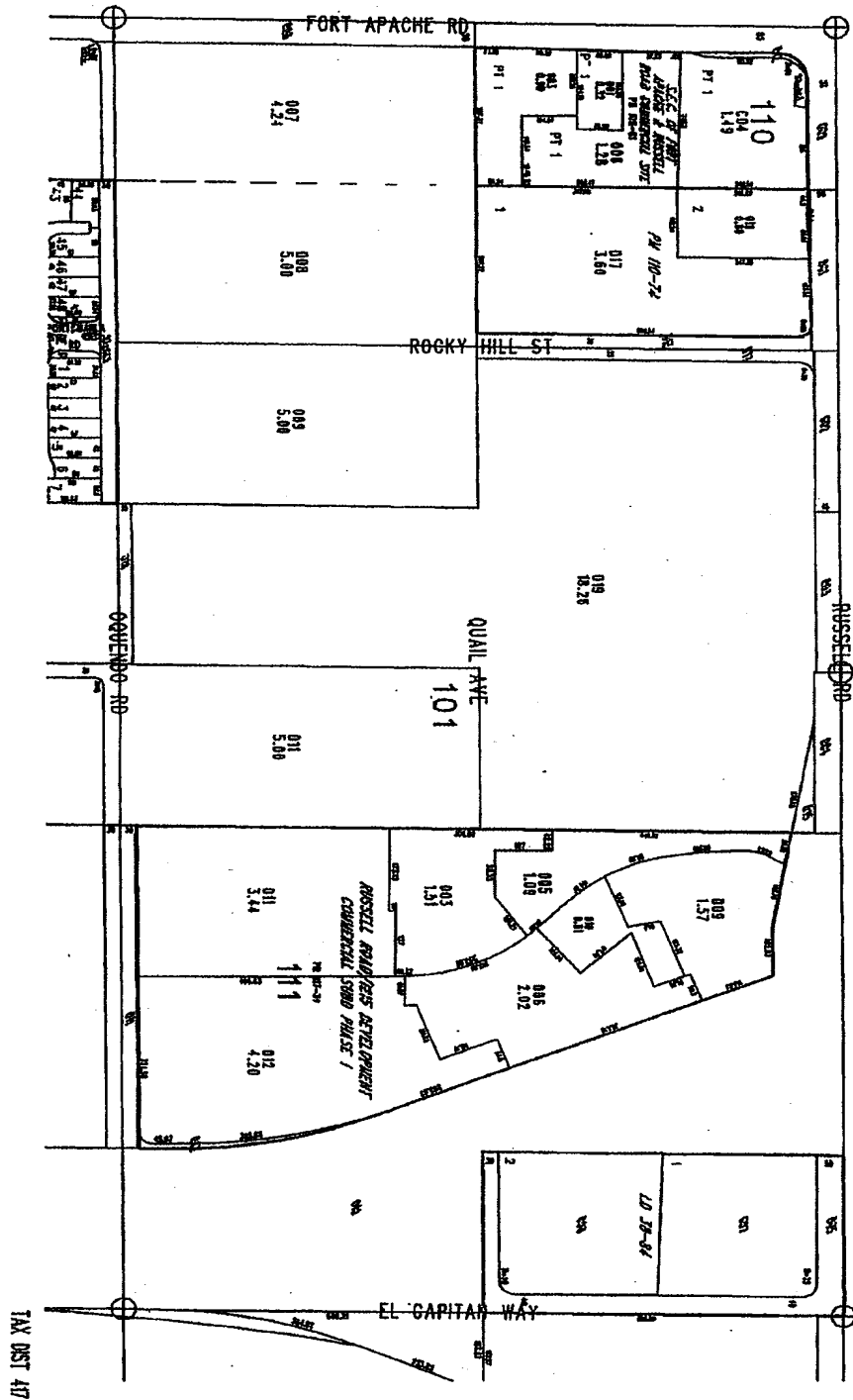
The Company hereby insures the insured against loss or damage which the insured shall sustain by reason of the failure of the land to be the same as that delineated on the plat of a survey made by WRG Design, Inc. on 4/6/2006, designated Job No. Russell Road/I215.

This endorsement is issued as part of the policy. Except as it expressly states, it does not (i) modify any of the terms and provisions of the policy, (ii) modify any prior endorsements, (iii) extend the Date of Policy, or (iv) increase the Amount of Insurance. To the extent a provision of the policy or a previous endorsement is inconsistent with an express provision of this endorsement, this endorsement controls. Otherwise, this endorsement is subject to all of the terms and provisions of the policy and of any prior endorsements.

**Dated:** January 25, 2008

By: Therodine L. Chandler  
Authorized Signatory





### NOTES

This map is for assessment use only and does not represent a survey. Its liability is assumed for the accuracy of the data indicated herein. Information on roads and other non-assessed parcels may be obtained from the local Assessment Listing by the Assessment Office.

This map is copy of from official records, including surveys and deeds. We only guarantee the information reported for assessment. See the recorded documents for more details and legal descriptions.

**FOR THE REGISTRAR AND THE COUNTY TAX MAP BOARD**

This map is for assessment use only and does not represent a survey. Its liability is assumed for the accuracy of the data indicated herein. Information on roads and other non-assessed parcels may be obtained from the local Assessment Listing by the Assessment Office.

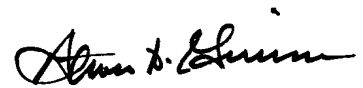
This map is copy of from official records, including surveys and deeds. We only guarantee the information reported for assessment. See the recorded documents for more details and legal descriptions.

**FOR THE REGISTRAR AND THE COUNTY TAX MAP BOARD**

### MAP LEGEND

SYMBOL	DESCRIPTION
	PARCEL BOUNDARY
	ROAD BOUNDARY
	ROAD ELEMENT
	PAID BOUNDARY
	NON-PAID LOT LINE
	WATER LINE / LEVEE LINE
	SNA
	ROAD NUMBER

SYMBOL	DESCRIPTION
	PARCEL NUMBER
	LOT NUMBER
	BLOCK NUMBER
	PAID/SEEN NUMBER
	PAID/RECORDED NUMBER
	LOT NUMBER
	BLOCK NUMBER
	PAID/SEEN NUMBER
	PAID/RECORDED NUMBER
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	PAID/RECORDED NUMBER
	LOT NUMBER



CLERK OF THE COURT

**JOIN**

Michael M. Edwards, Esq.

Nevada Bar No. 006281

Reuben H. Cawley, Esq.

Nevada Bar No. 009384

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

415 South Sixth Street, Suite 300

Las Vegas, NV 89101

(702) 382-1414; FAX (702) 382-1413

[michael.edwards@wilsonelser.com](mailto:michael.edwards@wilsonelser.com)

[reuben.cawley@wilsonelser.com](mailto:reuben.cawley@wilsonelser.com)

Attorneys for Plaintiff

Zitting Brothers Construction, Inc.

**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

ZITTING BROTHERS CONSTRUCTION, INC., a )  
Utah corporation, )

Plaintiff, )

v. )

GEMSTONE DEVELOPMENT WEST, INC., a )  
Nevada Corporation, APCO CONSTRUCTION, a )  
Nevada corporation; and DOES I through X; ROE )  
CORPORATIONS I through X; BOE BONDING )  
COMPANIES I through X and LOE LENDERS I )  
through X, inclusive, )

Defendants. )

AND ALL RELATED MATTERS. )

CASE NO. A571228  
DEPT NO. XIIIV

*Consolidate with:*

A571792

A574391

A577623

A580889

A583289

A584730

A587168

A589195

A589195

A589677

A597089

*(Exception from Arbitration – Concerns Title to Real Estate)*

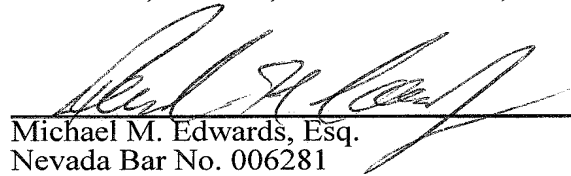
**ZITTING BROTHERS CONSTRUCTION, INC.'S JOINDER TO APCO CONSTRUCTION'S  
MOTION FOR PARTIAL SUMMARY JUDGMENT AS TO PRIORITY OF LIENS**

COMES NOW Plaintiff Zitting Brothers Construction, Inc. ("Zitting Brothers"), by and  
through its attorneys of record, MICHAEL M. EDWARDS, ESQ., and REUBEN H. CAWLEY,  
ESQ., of the law firm of WILSON, ELSE, MOSKOWITZ, EDELMAN & DICKER LLP, and  
hereby files its Joinder to APCO's Opposition to Scott Financial Corporation's Motion for Partial  
Summary Judgment as to Priority of Liens.

1 Zitting Brothers hereby joins in APCO Construction's Motion for Summary Judgment on  
2 Priority for all the reasons set forth therein, which are hereby incorporated herein by this reference.  
3 Zitting Brothers independently and separately asserts all factual and legal positions presented in  
4 APCO's Motion for Summary Judgment and petitions the Court for all appropriate relief resulting  
5 therefrom as it relates to Zitting Brothers in this matter.


6 DATED this 21<sup>st</sup> day of July, 2010.

7  
8 **WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP**

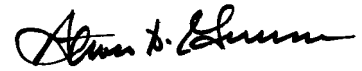
9  
10   
11 Michael M. Edwards, Esq.  
12 Nevada Bar No. 006281  
13 Reuben H. Cawley, Esq.  
14 Nevada Bar No. 009384  
15 415 South Sixth Street, Suite No. 300  
16 Las Vegas, Nevada 89101  
17 Attorneys for Zitting Brothers  
18  
19  
20  
21  
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**CERTIFICATE OF ELECTRONIC SERVICE**

I certify that I am an employee of Wilson, Elser, Moskowitz, Edelman & Dicker LLP, and that on this 21<sup>st</sup> day of July, 2010, I did cause a true copy of the foregoing Joinder to be E-Served through the EFP Vendor System to all registered parties pursuant to the Order for Electronic Filing and Service.



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



CLERK OF THE COURT

1 GLENN F. MEIER, ESQ.  
Nevada Bar No. 006059  
2 **MEIER & FINE, LLC**  
2300 West Sahara Avenue, Suite 430  
3 Las Vegas, Nevada 89102  
Telephone: (702) 673-1000  
4 *Attorneys for Defendant*  
**SCOTT FINANCIAL CORPORATION**

5  
6  
7 **DISTRICT COURT**

8 **CLARK COUNTY, NEVADA**

9  
10 ***In Re Manhattan West Mechanics' Lien***  
***Litigation***

Case No. A571228  
Dept. No. XXV

11 Consolidated Cases

12 A574391  
A574792  
A577623  
A580889  
A584289  
A584730  
A587168  
A589195  
A597089

13  
14  
15  
16  
17 **NOTICE OF ENTRY OF ORDER**  
**GRANTING SCOTT FINANCIAL**  
**CORPORATION'S MOTION TO STAY**  
**FURTHER ACTIVITY IN THIS CASE**  
**UNTIL THE ISSUE OF PRIORITY ISSUE**  
**HAS BEEN RESOLVED**

18  
19  
20  
21 Date: 11-02-10  
Time: 9:00 a.m.

MEIER & FINE, LLC  
2300 West Sahara Avenue, Suite 430  
Las Vegas, Nevada 89102  
Tel: (702) 673-1000  
Fax: (702) 673-1001

MEIER & FINE, LLC  
2300 West Sahara Avenue, Suite 430  
Las Vegas, Nevada 89102  
Tel: (702) 673-1000  
Fax: (702) 673-1001

**NOTICE OF ENTRY OF ORDER GRANTING SCOTT FINANCIAL CORPORATION'S  
MOTION TO STAY FURTHER ACTIVITY IN THIS CASE UNTIL THE ISSUE OF  
PRIORITY HAS BEEN RESOLVED**

PLEASE TAKE NOTICE that on the 13<sup>th</sup> day of December, 2010, an Order Granting Scott Financial Corporation's Motion to Stay Further Activity in this Case Until the Issue of Priority Issue Has Been Resolved was entered in the above captioned matter, a copy of which is attached hereto.

DATED this 14<sup>th</sup> day of December, 2010.

MEIER & FINE, LLC

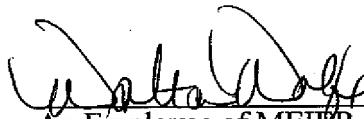
By



GLENN F. MEIER, ESQ.  
Nevada Bar No. 006059  
2300 West Sahara Avenue #430  
Las Vegas, Nevada 89102  
Attorneys for Defendant, SCOTT  
FINANCIAL CORPORATION

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that I am an Employee of the law firm of MEIER & FINE, LLC, and that on this 14<sup>th</sup> day of December, 2010, I served the above and foregoing NOTICE OF ENTRY OF ORDER GRANTING SCOTT FINANCIAL CORPORATION'S MOTION TO STAY FURTHER ACTIVITY IN THIS CASE UNTIL THE ISSUE OF PRIORITY ISSUE HAS BEEN RESOLVED 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.



An Employee of MEIER & FINE, LLC

MEIER & FINE, LLC  
2300 West Sahara Avenue, Suite 430  
Las Vegas, Nevada 89102  
Tel: (702) 673-1000  
Fax: (702) 673-1001

GLENN F. MEIER, ESQ.  
Nevada Bar No. 006059  
J. TAYLOR OBLAD, ESQ  
Nevada Bar No. 011430  
**MEIER & FINE, LLC**  
2300 West Sahara Avenue, Suite 430  
Las Vegas, Nevada 89102  
Telephone: (702) 673-1000  
*Attorneys for Defendant*  
**SCOTT FINANCIAL CORPORATION**

**DISTRICT COURT**  
**CLARK COUNTY, NEVADA**

*In Re Manhattan West Mechanics' Lien  
Litigation*

Case No. A571228  
Dept. No. XXV

Consolidated Cases  
A574391  
A574792  
A577623  
A580889  
A584289  
A584730  
A587168  
A589195  
A597089

**ORDER GRANTING SCOTT FINANCIAL  
CORPORATION'S MOTION TO STAY  
FURTHER ACTIVITY IN THIS CASE  
UNTIL THE ISSUE OF PRIORITY ISSUE  
HAS BEEN RESOLVED**

Date: 11-02-10  
Time: 9:00 a.m.

MEIER & FINE, LLC  
2300 West Sahara Avenue, Suite 430  
Las Vegas, Nevada 89102  
Tel: (702) 673-1000  
Fax: (702) 673-1001

**ORDER GRANTING SCOTT FINANCIAL CORPORATION'S MOTION TO STAY  
FURTHER ACTIVITY IN THIS CASE UNTIL THE ISSUE OF  
PRIORITY HAS BEEN RESOLVED**

THIS MATTER having come on for hearing on the 2<sup>nd</sup> day of November, 2010, before the above-captioned Court; GLENN F. MEIER, ESQ. of the law firm of MEIER & FINE, LLC appearing on behalf of SCOTT FINANCIAL CORPORATION; all other appearances having been duly noted to the Court's record; the Court being advised in the premises, and good cause appearing therefore, it is hereby

ORDERED, ADJUDGED AND DECREED that Scott Financial Corporation's Motion to Stay Further Activity in this Case Until the Issue of Priority Has been Resolved is granted in its entirety. It is further hereby

ORDERED, ADJUDGED AND DECREED that a status conference in this matter will be held on the 9<sup>th</sup> day of December, 2010 at the hour of 9:00 a.m. before the above-captioned Court.

DATED this 10<sup>th</sup> day of ~~November~~ <sup>December</sup>, 2010.

  
DISTRICT COURT JUDGE

Prepared and submitted by:

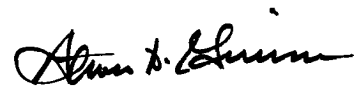
MEIER & FINE, LLC

By 

GLENN F. MEIER, ESQ.  
Nevada Bar No. 006059  
J. TAYLOR OBLAD, ESQ.  
Nevada Bar No. 011430  
2300 West Sahara Avenue, Suite 430  
Las Vegas, Nevada 89102

*Attorneys for Defendant*  
**SCOTT FINANCIAL CORPORATION**





CLERK OF THE COURT

**Marquis Aurbach Coffing**

Jack Chen Min Juan, Esq.  
Nevada Bar No. 6367  
Cody S. Munteer, Esq.  
Nevada Bar No. 11220  
Nikita R. Pierce, Esq.  
Nevada Bar No. 13384  
10001 Park Run Drive  
Las Vegas, Nevada 89145  
Telephone: (702) 382-0711  
Facsimile: (702) 382-5816  
jjuan@maclaw.com  
cmunteer@maclaw.com  
*Attorneys for APCO Construction*

**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.: 13

Consolidated with:

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

AND ALL RELATED MATTERS

**MOTION TO APPOINT SPECIAL MASTER**

Plaintiff APCO Construction ("APCO"), by and through their counsel of record, Marquis Aurbach Coffing, file this MOTION TO APPOINT SPECIAL MASTER. This Motion is made and based on the papers and pleadings on file herein, the attached Memorandum of Points and Authorities, and any oral argument the Court may choose to entertain at the time of hearing.

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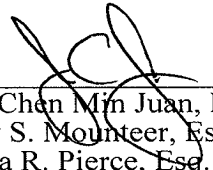
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**NOTICE OF MOTION**

You and each of you, will please take notice that the MOTION TO APPOINT SPECIAL MASTER will come on regularly for hearing on the **09** day of **JUNE**, 2016, **9: 00AM** at the hour of \_\_\_\_m. or as soon thereafter as counsel may be heard, in Department 13 in the above-referenced court.

Dated this 9<sup>th</sup> day of May, 2016.

MARQUIS AURBACH COFFING

By   
Jack Chen Min Juan, Esq.  
Cody S. Mounteer, Esq.  
Nikita R. Pierce, Esq.  
10001 Park Run Drive  
Las Vegas, Nevada 89145  
Attorneys for APCO Construction

**MEMORANDUM OF POINTS AND AUTHORITIES****I. INTRODUCTION**

After the appeal, the remaining portion of this complex litigation involves numerous contractors with respective claims and defenses against each other arising from the Manhattan West Mixed-Use Development Project ("Property"). There are voluminous numbers of pages of documents, countless witnesses and potential need for experts. With the case now coming out of the stay, the parties will be resuming their disclosure of documents, participating in discovery, setting a case agenda/case management and so forth. Odds are there will be the disputes over documents, witnesses and so forth. As such, APCO respectfully requests this Court appoint a Special Master<sup>1</sup> to set a case agenda/case management on the remaining claims, guide the parties in their dealings with each other and resolve any forthcoming disputes.

**II. PROCEDURAL SUPPORT****A. 2012 STAY**

There was a stay ordered on the litigation when the mechanic lien claimants filed a Joint Petition for Writ of Mandamus or, in the Alternative, Prohibition on June 22, 2012 (the "Subcontractors' Writ"). On or about September 24, 2015, the Nevada Supreme Court denied the Subcontractors' Writ holding that the contractual partial subordination by the creditors of a common debtor did not subordinate the first priority lien.<sup>2</sup> Furthermore, the Court indicated that NRS 108.225 did not change the priority of the mechanic's lien to a partially subordinated lien recorded before the mechanic's lien.<sup>3</sup> Accordingly, the Court held that the priority of the mechanic's lien remained junior to the amount secured by the original senior lien holder – Scott Financial Corporation ("SFC").

Thereafter, on or about October 19, 2015 the mechanic lien claimants petitioned the Nevada Supreme Court for a rehearing, which was denied on or about November 24, 2015.<sup>4</sup> On or about December 17, 2015 the mechanic lien claimants then petitioned the Nevada Supreme

<sup>1</sup> APCO proposes Floyd Hale, Esq. as the Special Master.

<sup>2</sup> See *In re Manhattan W. Mechanic's Lien Litig.*, 359 P.3d 125, 125 131 Nev. Adv. Op. 70 (2015).

<sup>3</sup> *Id.*

<sup>4</sup> See a copy of the Order Denying Rehearing attached as **Exhibit 1**.

1 Court for an en banc reconsideration, which was denied on or about February 16, 2016.<sup>5</sup> Thus,  
2 with this Litigation coming out of a stay, various parties will be resuming discovery, including  
3 but not limited to, the disclosure of voluminous documents; propounding discovery requests;  
4 conducting depositions; and potentially disclosing experts. This case is now in need of a Special  
5 Master.

6 **B. THIS COURT PREVIOUSLY DEEMED THIS LITIGATION COMPLEX**  
7 **AND ENTERED A CASE MANAGEMENT ORDER.**

8 This Court has already deemed the Litigation complex and entered into a Case  
9 Management Order on or about January 28, 2010 in the lead case (“Case Management Order”).<sup>6</sup>  
10 This Court identified that the purpose of the Discovery Plan and Case Management Order was to  
11 hopefully reduce the costs of litigation as follows:

12 1.1 Purpose. This construction action *is deemed complex*, in that it *shall*  
13 *involve a large number of parties and claims*, and trial, if it occurs, is likely to be  
14 prolonged. This Case Management Order (“Order”) is entered to reduce the costs  
15 of litigation, to *assist the parties in resolving their disputes if possible* and if not,  
16 to reduce the costs and difficulties of discovery and trial.<sup>7</sup>

17 As the Court suspected, this Litigation necessitated the inclusion of countless subcontractors  
18 with various mechanic lien claims against the Property. Notably, this Court identified that this  
19 Litigation would require the consolidation of numerous lawsuits addressing mechanic’s lien  
20 claims to the Property and additionally the joinder of parties with claims to the Property.<sup>8</sup> Due to  
21 the inevitable consolidation of numerous lawsuits and joinder of various parties, the Case  
22 Management Order identifies procedures for discovery to hopefully reduce the costs and  
23 difficulty of discovery and trial. However, all of those deadlines due to the Stay have passed.

24 Finally, the Case Management Order explicitly identifies that “[n]othing herein shall  
25 prevent any party, upon a showing of good cause, from filing a motion to modify or amend any  
26 provision of this Case Management Order.” As such, by this Motion APCO is seeking that his  
27 Court not only enter a new case management order but also appoint a special master to guide the  
28 Parties in their dealings with each other to resolve any forthcoming disputes.

<sup>5</sup> See a copy of the Order Denying En Banc Reconsideration attached hereto as **Exhibit 2**.

<sup>6</sup> See a copy of the Case Management Order attached hereto as **Exhibit 3**.

<sup>7</sup> *Id.* at 1.1 (emphasis added).

<sup>8</sup> *Id.* at 3.2 and 3.3.

### III. THIS COURT SHOULD APPOINT A SPECIAL MASTER

The Nevada rules empower this Court to appoint a special master to guide the Parties in their dealings with each other to resolve any forthcoming disputes. Specifically, NRCP 53(a) allows for the appointment of special masters as follows:

#### (a) Appointment and Compensation.

(1) The court in which any action is pending may appoint a special master therein. As used in these rules the word “master” includes a referee, an auditor, an examiner and an assessor. The compensation to be allowed to a master shall be fixed by the court, and shall be charged upon such of the parties or paid out of any fund or subject matter of the action, which is in the custody and control of the court as the court may direct. The master shall not retain the master's report as security for the master's compensation; but when the party ordered to pay the compensation allowed by the court does not pay it after notice and within the time prescribed by the court, the master is entitled to a writ of execution against the delinquent party.

Additionally, NRS 108.239(7) permits the use of special masters in mechanics’ lien cases. It provides, in pertinent part, that “[t]he court shall ..., by decree, proceed to hear and determine the claims in a summary way, or may, if it be the district court, refer the claims to a special master to ascertain and report upon the liens and the amount justly due thereon.”<sup>9</sup>

The Nevada Supreme Court has appointed a special master in a similar litigation involving subcontractors’ claims on its mechanics’ liens to the subject property.<sup>10</sup> The *CSA* Court identified that special masters are appointed to:

regulate all proceedings ... and ... do all acts and take all measures necessary or proper for the efficient performance of the master's duties under the order. NRCP 53(c). They are appointed when necessary and in matters of account and of difficult computation of damages ... upon a showing that some exceptional condition requires it. NRCP 53(b). In lien matters, the special master may only report on the liens and the amount due, whereas the district court determines the lien's validity.<sup>11</sup>

In accordance with NRCP 53 and NRS 108.239(7), the district Court in *CSA* appointed a special master to resolve “the calculation, computation of damages, and amount owing, including principal, interest, attorney’s fees and lien costs, as to each lien claimant” and to further

<sup>9</sup> See NRS 108.239(7).

<sup>10</sup> See *CSA Service Center, LLC v. Air Design Systems, LLC*, 2013 WL 3272479 (2013).

<sup>11</sup> *Id.* at \* 5 (internal quotations omitted).

1 determine the lien priority.<sup>12</sup> The Nevada Supreme Court determined that the *CSA* District Court  
2 did not abuse its discretion in appointing a special master because complex civil matters with  
3 various parties are:

4 exactly the type where it is proper to use a special master because litigation  
5 involves matters of account that would reach substantial proportions and **would**  
***potentially consume an inordinate amount of judicial resources.***<sup>13</sup>

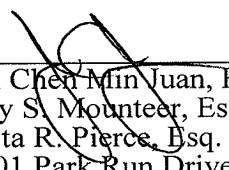
6 Like *CSA*, this Court should appoint a special master to carry out the normal duties and  
7 obligations associated with special masters in complex construction defect cases. The parties  
8 should equally share in the cost and expense of the special master. Ultimately, it would not be  
9 improper for this Court to assign a special master in this consolidated complex case involving  
10 various subcontractors with claims to the Property as it could potentially ***consume inordinate***  
11 ***amount of judicial resources.***<sup>14</sup>

12 **IV. CONCLUSION**

13 Based on the above, APCO moves for a Special Master to guide the Parties in their  
14 dealings with each other to resolve any forthcoming disputes.

15  
16 Dated this 9<sup>th</sup> day of May, 2016.

17 MARQUIS AURBACH COFFING

18  
19 By   
20 Jack Chen Min Juan, Esq.  
21 Cody S. Mounteer, Esq.  
22 Nikita R. Pierce, Esq.  
23 10001 Park Run Drive  
24 Las Vegas, Nevada 89145  
25 Attorneys for APCO Construction

26  
27 <sup>12</sup> *Id.* at \* 6.

28 <sup>13</sup> *Id.* (internal quotations omitted) (*citing to Venetian Casino Resort, LLC v. Eighth Judicial District Ct.*,  
118 Nev. 124, 41 P.3d 327 (2002)) (emphasis added).

<sup>14</sup> *Id.*

**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing MOTION TO APPOINT SPECIAL MASTER was submitted electronically for filing and/or service with the Eighth Judicial District Court on the 1<sup>st</sup> day of May, 2016. Electronic service of the foregoing document shall be made in accordance with the E-Service List as follows:<sup>15</sup>

**Bennett Tueller Johnson & Deere****Contact**

Benjamin D. Johnson

**Email**

ben.johnson@btjd.com

**Brian K. Berman, Chtd.****Contact**

Brian K. Berman, Esq.

**Email**

b.k.berman@att.net

**Cadden & Fuller LLP****Contact**

Dana Y. Kim

**Email**

dkim@caddenfuller.com

S. Judy Hirahara

jhirahara@caddenfuller.com

Tammy Cortez

tcortez@caddenfuller.com

**David J. Merrill P.C.****Contact**

David J. Merrill

**Email**

david@djmerillpc.com

**Dickinson Wright, PLLC****Contact**

Cheri Vandermeulen

**Email**

cvandermeulen@dickinsonwright.com

Christine Spencer

cspencer@dickinsonwright.com

Donna Wolfbrandt

dwolfbrandt@dickinsonwright.com

Eric Dobberstein

edobberstein@dickinsonwright.com

**Durham Jones & Pinegar****Contact**

Brad Slighting

**Email**

bslighting@djplaw.com

Gina LaCascia

glacascia@djplaw.com

**Fox Rothschild****Contact**

Jineen DeAngelis

**Email**

jdeangelis@foxrothschild.com

Richard I. Dreitzer

rdreitzer@foxrothschild.com

**GERRARD COX & LARSEN****Contact**

Aaron D. Lancaster

**Email**

alancaster@gerrard-cox.com

Douglas D. Gerrard

dgerrard@gerrard-cox.com

Kanani Gonzales

KGonzales@Gerrard-cox.com

<sup>15</sup> Pursuant to EDCR 8.05(a), each party who submits an E-Filed document through the E-Filing System consents to electronic service in accordance with NRCP 5(b)(2)(D).

Kaytlyn Bassett	kbassett@gerrard-cox.com
-----------------	--------------------------

**Gibbs, Giden, Locher, Turner & Senet LLP**

<b>Contact</b>	<b>Email</b>
Becky Pintar	bpintar@gglt.com
Linda Compton	lcompton@gglt.com

**Gordon & Rees**

<b>Contact</b>	<b>Email</b>
Marie Ogella	mogella@gordonrees.com
Robert Schumacher	rschumacher@gordonrees.com

**Gordon & Rees LLP**

<b>Contact</b>	<b>Email</b>
Brian Walters	bwalters@gordonrees.com

**GRANT MORRIS DODDS**

<b>Contact</b>	<b>Email</b>
Steven Morris	steve@gmdlegal.com

**Greenberg Traurig, LLP**

<b>Contact</b>	<b>Email</b>
6085 Joyce Heilich	heilichj@gtlaw.com
7132 Andrea Rosehill	rosehilla@gtlaw.com
7368 Sandy Jackson	jacksonsa@gtlaw.com
CNN Cynthia Ney	neyc@gtlaw.com
IGH Bethany Rabe	rabeb@gtlaw.com
IOM Mark Ferrario	lvlitdock@gtlaw.com
LVGTDocketing	lvlitdock@gtlaw.com
MOK Moorea Katz	katzmo@gtlaw.com
OSN Shayna Noyce	noyces@gtlaw.com
WTM Tami Cowden	cowdent@gtlaw.com

**Holley, Driggs, Walch, Puzey & Thompson**

<b>Contact</b>	<b>Email</b>
Jeffrey R. Albregts, Esq.	jalbregts@nevadafirm.com

**Howard & Howard**

<b>Contact</b>	<b>Email</b>
Gwen Rutar Mullins	grm@h2law.com
Kellie Piet (Legal Assistant)	kdp@h2law.com
Wade B. Gochnour	wbg@h2law.com

**Jolley Urga Woodbury & Little**

<b>Contact</b>	<b>Email</b>
Kelly McGee	kom@juww.com
Martin A. Little, Esq.	mal@juww.com
Michael R. Ernst	mre@juww.com

**Kemp, Jones & Coulthard**

<b>Contact</b>	<b>Email</b>
Erica Bennett	e.bennett@kempjones.com
J. Randall Jones	irj@kempjones.com



Janet Griffin	janetjamesmichael@gmail.com
Janet Griffin	jlg@kempjones.com
Mark M. Jones	mmj@kempjones.com
Matt Carter	msc@kempjones.com
Matthew Carter	m.carter@kempjones.com
Pamela Montgomery	pym@kempjones.com

**Koch & Scow LLC**

Contact	Email
David R. Koch	dkoch@kochscow.com

**Law Offices of Sean P. Hillin, P.C.**

Contact	Email
Caleb Langsdale, Esq.	caleb@langsdalelaw.com

**Litigation Services & Technologies**

Contact	Email
Calendar	calendar@litigation-services.net
Depository	Depository@litigation-services.net

**McDonald Carano Wilson, LLP**

Contact	Email
Kathleen Morris	kmorris@mcdonaldcarano.com
Ryan Bellows	rbellows@mcdonaldcarano.com

**Meier Fine & Wray, LLC**

Contact	Email
Receptionist	Reception@nvbusinesslawyers.com

**Morrill & Aronson**

Contact	Email
Christine Taradash	CTaradash@maazlaw.com

**Morrill & Aronson P.L.C.**

Contact	Email
Debra Hitchens	dhitchens@maazlaw.com

**Peel Brimley LLP**

Contact	Email
Eric Zimbelman	ezimbelman@peelbrimley.com
Kathy Gentile	kgentile@peelbrimley.com

**Pezzillo Lloyd**

Contact	Email
Jennifer R. Lloyd	Jlloyd@pezzillolloyd.com
Marisa L. Maskas, Esq.	mmaskas@pezzillolloyd.com

**Procopio Cory**

Contact	Email
Timothy E. Salter	tim.salter@procopio.com

**Procopio Cory Hargreaves & Savitch**

Contact	Email
---------	-------

Andrew J. Kessler	andrew.kessler@procopio.com
Carla Clark, Legal Secretary	carla.clark@procopio.com
Rebecca Chapman	rebecca.chapman@procopio.com
Rebecca Chapman, Legal Secretary	rebecca.chapman@procopio.com
Scott R. Omohundro	scott.omohundro@procopio.com
Timothy E. Salter	tim.salter@procopio.com

**Procopio Cory Hargreaves & Savitch LLP**

<b>Contact</b>	<b>Email</b>
Cori Mandy, Legal Secretary	cori.mandy@procopio.com

**Procopio, Cory, Hargreaves & Savitch**

<b>Contact</b>	<b>Email</b>
Joseph Frank	joseph.frank@procopio.com

**Procopio, Cory, Heagreaves & Savitch**

<b>Contact</b>	<b>Email</b>
Lenore Joseph	calendaring@procopio.com

**Richard L. Tobler, Ltd.**

<b>Contact</b>	<b>Email</b>
Richard Tobler	rltldck@hotmail.com

**Rooker Rawlins**

<b>Contact</b>	<b>Email</b>
Legal Assistant	rrlegalassistant@rookerlaw.com
Michael Rawlins	mrawlins@rookerlaw.com

**Smith & Shapiro**

<b>Contact</b>	<b>Email</b>
Jill Berghammer	jberghammer@smithshapiro.com

**Smith & Shapiro, PLLC**

<b>Contact</b>	<b>Email</b>
Aimee M. Cannon, Esq.	acannon@smithshapiro.com
James E. Shapiro	jshapiro@smithshapiro.com
Sheldon Herbert	sherbert@smithshapiro.com

**T. James Truman & Associates**

<b>Contact</b>	<b>Email</b>
District filings	district@trumanlegal.com

**The Langsdale Law Firm**

<b>Contact</b>	<b>Email</b>
Caleb Langsdale	Caleb@Langsdalelaw.com

**Varricchio Law Firm**

<b>Contact</b>	<b>Email</b>
Paralegal	paralegal@varricchiolaw.com
Philip T. Varricchio	phil@varricchiolaw.com

**Watt, Tieder, Hoffar & Fitzgerald, L.L.P.**

**Contact**

David R. Johnson

Jennifer MacDonald

**Email**

djohnson@watttieder.com

imacdonald@watttieder.com

**Williams & Associates****Contact**

Donald H. Williams, Esq.

**Email**

dwilliams@dhwlawlv.com

**Wilson Elser Moskowitz Edelman & Dicker****Contact**

E-File Desk

Hrustyk Nicole

Reuben H. Cawley

**Email**

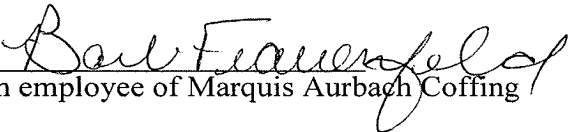
EfileLasVegas@wilsonelser.com

Nicole.Hrustyk@wilsonelser.com

Reuben.Cawley@wilsonelser.com

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

Northstar Concrete  
5145 Rogers Street, Suite A  
Las Vegas, NV 89118

  
an employee of Marquis Aurbach Coffing

# Exhibit 1

IN THE SUPREME COURT OF THE STATE OF NEVADA

IN RE: MANHATTAN WEST  
MECHANIC'S LIEN LITIGATION

No. 61131

APCO CONSTRUCTION, A NEVADA  
CORPORATION; ACCURACY GLASS &  
MIRROR COMPANY, INC.; BUCHELE,  
INC.; BRUIN PAINTING  
CORPORATION; CACTUS ROSE  
CONSTRUCTION; FAST GLASS, INC.;  
HD SUPPLY WATERWORKS, LP;  
HEINAMAN CONTRACT GLAZING;  
HELIX ELECTRIC OF NEVADA, LLC;  
INTERSTATE PLUMBING & AIR  
CONDITIONING; SWPPP  
COMPLIANCE SOLUTIONS, LLC; AND  
WRG DESIGN, INC.,

Petitioners,

vs.

THE EIGHTH JUDICIAL DISTRICT  
COURT OF THE STATE OF NEVADA,  
IN AND FOR THE COUNTY OF  
CLARK; AND THE HONORABLE  
SUSAN SCANN, DISTRICT JUDGE,  
Respondents,

and

SCOTT FINANCIAL CORPORATION, A  
NORTH DAKOTA CORPORATION;  
AHERN RENTALS, INC.; ARCH  
ALUMINUM AND GLASS CO.; ATLAS  
CONSTRUCTION SUPPLY, INC.;  
BRADLEY J. SCOTT; CABINETEC,  
INC.; CELLCRETE FIREPROOFING OF  
NEVADA, INC.; CAMCO PACIFIC  
CONSTRUCTION CO., INC.; CLUB  
VISTA FINANCIAL SERVICES, LLC;  
CONCRETE VISIONS, INC.; CREATIVE  
HOME THEATRE, LLC; CUSTOM  
SELECT BILLING, INC.; DAVE  
PETERSON FRAMING, INC.; E&E  
FIRE PROTECTION, LLC; EZA, P.C.;  
FERGUSON FIRE AND FABRICATION,

FILED

NOV 24 2015

TRADIE K. LINDEMANN  
CLERK OF SUPREME COURT  
BY *[Signature]*  
CHIEF DEPUTY CLERK

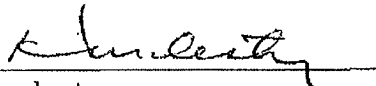
15-35998

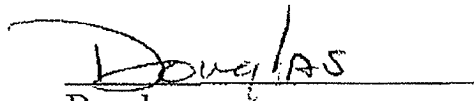
INC.; GEMSTONE DEVELOPMENT  
WEST, INC.; GRANITE  
CONSTRUCTION COMPANY; HARSCO  
CORPORATION; HYDROPRESSURE  
CLEANING; INQUIPCO; INSULPRO  
PROJECTS, INC.; JEFF HEIT  
PLUMBING, CO., LLC; JOHN DEERE  
LANDSCAPE, INC.; LAS VEGAS  
PIPELINE, LLC; NEVADA PREFAB  
ENGINEERS; NOORDA SHEET  
METAL COMPANY; NORTHSTAR  
CONCRETE, INC.; PAPE MATERIAL  
HANDLING; PATENT  
CONSTRUCTION SYSTEMS;  
PROFESSIONAL DOOR AND MILL  
WORKS, LLC; READY MIX, INC.;  
RENAISSANCE POOLS & SPAS, INC.;  
REPUBLIC CRANE SERVICE, LLC;  
STEEL ENGINEERS, INC.; SUPPLY  
NETWORK, INC.; SUNSTATE  
COMPANIES, INC.; THARALDSON  
MOTELS II, INC.; THE PRESSURE  
GROUT, COMPANY; TRI CITY  
DRYWALL, INC.; UINTAH  
INVESTMENTS, LLC; AND ZITTING  
BROTHERS CONSTRUCTION, INC.,  
Real Parties in Interest.

*ORDER DENYING REHEARING*

Rehearing denied. NRAP 40(c).

It is so ORDERED.

 CJ.  
Hardesty

 J.  
Douglas

CHERRY, J., dissenting: I would grant rehearing in this matter, for the reasons set forth in my previous dissent.

Cherry J.  
Cherry

cc: Sterling Law, LLC  
Howard & Howard Attorneys PLLC  
Marquis Aurbach Coffing  
Peel Brimley LLP/Henderson  
Maupin Naylor Braster  
Andrew J. Kessler  
Brian K. Berman  
Watt, Tieder, Hoffar & Fitzgerald, LLP  
Koch & Scow, LLC  
Fennemore Craig Jones Vargas/Las Vegas  
Williams & Associates  
Dickinson Wright PLLC  
Law Office of Hayes & Welsh  
Meier & Fine, LLC  
Kemp, Jones & Coulthard, LLP  
Smith & Shapiro, LLC  
Holley, Driggs, Walch, Fine Wray Puzey & Thompson/Las Vegas  
Keith E. Gregory & Associates  
Greenberg Traurig, LLP/Las Vegas  
Jolley Urga Wirth Woodbury & Little  
Hutchison & Steffen, LLC  
Varricchio Law Firm  
Premier Legal Group  
Wilson, Elser, Moskowitz, Edelman & Dicker, LLP/Las Vegas  
Snell & Wilmer, LLP/Las Vegas  
Grant Morris Dodds PLLC  
T. James Truman & Associates  
Tony Ditty, Esq.

# Exhibit 2



IN THE SUPREME COURT OF THE STATE OF NEVADA

IN RE: MANHATTAN WEST  
MECHANIC'S LIEN LITIGATION

No. 61131

**FILED**

FEB 19 2016

TRACIE K. LINDSEMAN  
CLERK OF SUPREME COURT  
BY *[Signature]*  
DEPUTY CLERK

APCO CONSTRUCTION, A NEVADA  
CORPORATION; ACCURACY GLASS &  
MIRROR COMPANY, INC.; BUCHELE,  
INC.; BRUIN PAINTING  
CORPORATION; CACTUS ROSE  
CONSTRUCTION; FAST GLASS, INC.;  
HD SUPPLY WATERWORKS, LP;  
HEINAMAN CONTRACT GLAZING;  
HELIX ELECTRIC OF NEVADA, LLC;  
INTERSTATE PLUMBING & AIR  
CONDITIONING; SWPPP  
COMPLIANCE SOLUTIONS, LLC; AND  
WRG DESIGN, INC.,

Petitioners,

vs.

THE EIGHTH JUDICIAL DISTRICT  
COURT OF THE STATE OF NEVADA,  
IN AND FOR THE COUNTY OF  
CLARK; AND THE HONORABLE  
SUSAN SCANN, DISTRICT JUDGE,  
Respondents,

and

SCOTT FINANCIAL CORPORATION, A  
NORTH DAKOTA CORPORATION;  
AHERN RENTALS, INC.; ARCH  
ALUMINUM AND GLASS CO.; ATLAS  
CONSTRUCTION SUPPLY, INC.;  
BRADLEY J. SCOTT; CABINETEC,  
INC.; CELLCRETE FIREPROOFING OF  
NEVADA, INC.; CAMCO PACIFIC  
CONSTRUCTION CO., INC.; CLUB  
VISTA FINANCIAL SERVICES, LLC;

116-05423

CONCRETE VISIONS, INC.; CREATIVE HOME THEATRE, LLC; CUSTOM SELECT BILLING, INC.; DAVE PETERSON FRAMING, INC.; E&E FIRE PROTECTION, LLC; EZA, P.C.; FERGUSON FIRE AND FABRICATION, INC.; GEMSTONE DEVELOPMENT WEST, INC.; GRANITE CONSTRUCTION COMPANY; HARSCO CORPORATION; HYDROPRESSURE CLEANING; INQUIPCO; INSULPRO PROJECTS, INC.; JEFF HEIT PLUMBING, CO., LLC; JOHN DEERE LANDSCAPE, INC.; LAS VEGAS PIPELINE, LLC; NEVADA PREFAB ENGINEERS; NOORDA SHEET METAL COMPANY; NORTHSTAR CONCRETE, INC.; PAPE MATERIAL HANDLING; PATENT CONSTRUCTION SYSTEMS; PROFESSIONAL DOOR AND MILL WORKS, LLC; READY MIX, INC.; RENAISSANCE POOLS & SPAS, INC.; REPUBLIC CRANE SERVICE, LLC; STEEL ENGINEERS, INC.; SUPPLY NETWORK, INC.; SUNSTATE COMPANIES, INC.; THARALDSON MOTELS II, INC.; THE PRESSURE GROUT, COMPANY; TRI CITY DRYWALL, INC.; UINTAH INVESTMENTS, LLC; AND ZITTING BROTHERS CONSTRUCTION, INC.,  
Real Parties in Interest.

*ORDER DENYING EN BANC RECONSIDERATION*

Having considered the petition on file herein, we have

concluded that en banc reconsideration is not warranted. NRAP 40A.  
Accordingly, we

ORDER the petition DENIED.<sup>1</sup>

Hardesty, A.C.J.  
Hardesty

Douglas, J.  
Douglas

Saitta, J.  
Saitta

Gibbons, J.  
Gibbons

Pickering, J.  
Pickering

CHERRY, J., dissenting: I would grant reconsideration in this matter, for  
the reasons set forth in my previous dissents.

Cherry, J.  
Cherry

<sup>1</sup>The Honorable Ron Parraguirre, Chief Justice, did not participate  
in the decision of this matter.

cc: Sterling Law, LLC  
Peel Brimley LLP/Seattle  
Howard & Howard Attorneys PLLC  
Marquis Aurbach Coffing  
Peel Brimley LLP/Henderson  
Maupin Naylor Braster  
Andrew J. Kessler  
Brian K. Berman  
Watt, Tieder, Hoffar & Fitzgerald, LLP  
Koch & Scow, LLC  
Fennemore Craig Jones Vargas/Las Vegas  
Williams & Associates  
McCullough, Perez & Dobberstein, Ltd.  
Law Office of Hayes & Welsh  
Holley, Driggs, Walch, Fine Wray Puzey & Thompson/Las Vegas  
Kemp, Jones & Coulthard, LLP  
Smith & Shapiro, LLC  
Keith E. Gregory & Associates  
Greenberg Traurig, LLP/Las Vegas  
Jolley Urga Wirth Woodbury & Little  
Hutchison & Steffen, LLC  
Varricchio Law Firm  
Premier Legal Group  
Wilson, Elser, Moskowitz, Edelman & Dicker, LLP/Las Vegas  
Snell & Wilmer, LLP/Las Vegas  
Grant Morris Dodds PLLC  
T. James Truman & Associates  
Tony Ditty, Esq.  
Eighth District Court Clerk

# Exhibit 3

MEIER & FINE  
2300 West Sahara Avenue, Suite 430  
Las Vegas, Nevada 89102  
Tel: (702) 673-1000  
Fax: (702) 673-1001

CMO  
GLENN F. MEIER, ESQ.  
Nevada Bar No. 006059  
TAYLOR OBLAD, ESQ.  
Nevada Bar No. 011430  
MEIER & FINE, LLC  
2300 West Sahara Avenue, Suite 430  
Las Vegas, Nevada 89102  
Telephone: (702) 673-1000  
Attorneys for Defendant  
SCOTT FINANCIAL CORPORATION

Electronically Filed  
01/26/2010 09:53:36 AM

  
CLERK OF THE COURT

DISTRICT COURT  
CLARK COUNTY, NEVADA

APCO CONSTRUCTION, INC., a Nevada  
corporation,

Case No. A571228  
Dept. No. XXV

Plaintiff,

vs.

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

CASE MANAGEMENT ORDER

Date: N/A  
Time: N/A

Defendants.

*and all consolidated matters*

SUMMARY OF AMENDED CASE AGENDA DATES AND DEADLINES

1. Deadline to Serve Standard Interrogatories and Requests for Admission	February 22, 2009
2. Deadline to File Objections to Standard Interrogatories and Requests for Admission	March 8, 2010
3. Deadline to File Responses to Standard Interrogatories and Requests for Admission	April 7, 2010
4. Deadline For Lien Claimants to Identify All Documents Supporting The Proper Perfection of Liens	April 7, 2010
5. Deadline for All Parties to Identify All Documents Relating to Commencement of Construction and Lien Priority	April 7, 2010
6. Deadline For Owner/Lenders to Identify And Serve OSC On All Non-Participating Lien Holders	March 1, 2010
7. OSC Hearing To Finalize Lien Claimants	rd by Court

MEIER & FINE  
 2300 West Sahara Avenue, Suite 430  
 Las Vegas, Nevada 89102  
 Tel: (702) 673-1888  
 Fax: (702) 673-1881

8. Close of Discovery Relating To, Perfection of Liens, Commencement of Work and Lien Priority.	May 10, 2010
9. Deadline For Dispositive Motions Relating To Perfection Of Liens, Commencement Of Work, And Lien Priority	June 10, 2010
10. Hearing On Motions Relating To Perfection Of Liens, Commencement Of Work	tbd by Court
11. Deadline For All Lien Claimants To Submit Statements of Claims	August 10, 2010
12. Deadline for All Defendants to Submit Statements of Defenses in Response to Lien Claimants Statement of Claims	September 8, 2010
13. Depositions Of Percipient Witnesses On All Remaining Issues	September 22 - December 21, 2010
14. Mediation	first January, 2011
15. Last Day To Join Additional Parties	November 9, 2010
16. Initial Expert Disclosures	March 29, 2011
17. Rebuttal Expert Disclosures	June 14, 2011
18. Expert Depositions	July 6 - September 5, 2011
19. DISCOVERY CUT-OFF	September 6, 2011
20. Second Mediation	October, 2011
21. Deadline for Dispositive Motions	November 29, 2011
22. TRIAL	Tbd, after February 2, 2012

#### DISCOVERY PLAN AND CASE MANAGEMENT ORDER

##### 1. GENERAL PURPOSE

1.1 Purpose. This construction action is deemed complex, in that it shall involve a large number of parties and claims, and trial, if it occurs, is likely to be prolonged. This Case Management Order (the "Order") is entered to reduce the costs of litigation, to assist the parties in resolving their disputes if possible and if not, to reduce the costs and difficulties of discovery and trial.

1.2 Code Governs Where Silent. On any matter as to which this Order is silent, the Nevada Revised Statutes, the Nevada Rules of Civil Procedure, and the Eighth Judicial District Court Rules shall be controlling.

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2300 West Sahara Avenue, Suite 400  
Las Vegas, Nevada 89102  
Tel: (702) 675-1000  
Fax: (702) 675-1001

2. TRIAL

Trial is not yet scheduled in this matter, but is requested and anticipated to be set in February 2012. The parties anticipate trial may last sixty to ninety days.

3. PARTIES

3.1 Case Caption: To simplify the captioning of this case, the consolidated cases shall be identified as "In Re Manhattan West Mechanics' Lien Litigation" in the caption. The caption should be prepared with the case number of the lead case -- and the notation "and all consolidated cases."

3.2 Consolidation: The Court finds that numerous lawsuits have been filed addressing the issue of mechanics' lien claims for the project commonly known as the Manhattan West project in Clark County, Nevada. The Court finds that all such cases share sufficient common questions of law and fact that all such cases should be consolidated for purposes of discovery and trial. To the extent any case currently pending before the Eighth Judicial District Court brings a cause of action seeking to foreclose mechanics lien on the property that is the subject of these consolidated cases, such case is ordered consolidated for purposes of discovery and trial with this litigation without need for further motion. If future cases are filed seeking to foreclose mechanics' liens on the property that is the subject of this litigation, such case shall be directly consolidated into this litigation without need for further motion. Such consolidation shall be accomplished by filing a notice of consolidation along with a copy of this order in the case being consolidated.

3.3 Joinder of Any Additional Lien Claimants: The Court finds that in order to achieve a resolution of this case that is most consistent with judicial economy that it is necessary for all parties who seek to pursue mechanics' lien claims against this property to be joined in this litigation. To that end, the Court is concerned that there may be certain parties who have recorded liens against the property but who have not yet filed an action to foreclose on their liens (hereinafter "Non-Participating Lien Holders"). Accordingly, the Court orders that Gemstone Development West, Inc. (hereinafter the "Owner Defendant"), and/or Scott Financial Corporation (hereinafter the "Lender Defendant") shall, on or before March 1, 2010



MEIER & FINE  
2300 West Sahara Avenue, Suite 405  
Las Vegas, Nevada 89102  
Tel: (702) 675-1000  
Fax: (702) 675-1001

1 identify any Non Participating Lien Holders and serve such parties with an Order to Show  
2 Cause why their liens should not be expunged. The Court will conduct a hearing on any such  
3 Orders, and at that time any Non Participating Lien Holder that does not commit to  
4 participating in this litigation shall have its lien expunged.

5 3.4 Subsequently Appearing Parties: When a party subsequently makes an appearance  
6 in this case, the party who sued the subsequently appearing party is responsible for serving a  
7 copy of this order within 10 days after the subsequently appearing party files its first  
8 responsive pleading or answer.

9 4. DISCOVERY ISSUES

10 Due to the need for enhanced case management in this litigation the Court shall hear all  
11 motion practice in this case including discovery motions. Discovery motions in this litigation  
12 may be filed directly with the Court instead of with the Discovery Commissioner. Nothing  
13 contained herein shall relieve counsel for any party of their obligations pursuant to EDCR 2.34.

14 5. DOCUMENT PRODUCTION

15 The parties agree to produce all documents in electronic images. The following protocol  
16 shall apply to the documents produced in this case:

17 a. The documents shall be scanned in .tif format for documents and .jpeg format for  
18 photographs.

19 b. All document images shall have bates numbers embedded in the document. The  
20 image files shall be named in a way that corresponds with the bates number (e.g., document  
21 ABC00001 shall bear the file name ABC0001.tif).

22 c. Each party shall be responsible producing documents in accordance with this  
23 order by generating or causing to be generated by a third party electronic images of the  
24 documents. Once a party has arranged for the imaging of its documents the party shall serve  
25 the remaining parties in the case with notice that documents have been imaged. The notice  
26 shall specify the vendor who performed the imaging and shall state the cost of obtaining copies  
27 of the imaged documents. Serving all parties with notice that documents have been imaged  
28 and may be obtained from a third party shall constitute the production of those documents for

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2380 West Sahara Avenue, Suite 430  
Las Vegas, Nevada 89102  
Tel: (702) 673-1000  
Fax: (702) 673-0001

1 purposes of this litigation. Any party wishing to obtain a copy of another party's documents  
2 shall bear the responsibility for obtaining the copy directly from the third party who prepared  
3 the document images.

4 d. The production of plans shall be through vellums or CDs of the originals. Plans  
5 should include the bid set, approved set, field set, as built set, and any amendments thereto.

6 c. Any party not producing all documents in its possession, custody or control, shall  
7 serve a privilege log with its production of documents that will:

8 (i) Identify any documents withheld with sufficient particularity to support a  
9 Motion to Compel; and

10 (ii) State the basis for refusing to produce each document.

11 f. Documents that are designated as "Confidential" or that may contain confidential  
12 information shall not be required to be produced until a protective order has been entered by  
13 the Court with respect to those documents.

14 All parties agree to maintain the original documents, which shall be made available for  
15 inspection upon reasonable notice of counsel pursuant to Nevada law. All parties are under a  
16 continuing obligation to produce all non-privileged documents discovered after the initial  
17 production as contemplated by Rule 16.1. In the event that a party subsequently discovers  
18 documents, that party shall follow the same procedures as set forth above including the  
19 preparation of a Supplemental Notice that additional documents have been imaged and are  
20 available for parties to obtain. Failure to comply and/or rectify any deficiency in a deposit may  
21 be reported to the Court and may result in the imposition of sanctions.

## 22 6. WRITTEN DISCOVERY

23 Counsel for Owner and Counsel for any Lenders shall jointly prepare standard  
24 interrogatories and requests for admission to the lien claimants in this case. Counsel for all lien  
25 claimants shall jointly prepare standard interrogatories and requests for admission to the  
26 lenders and property owner. The standard written discovery shall be served on all parties and  
27 the Court on or before January 18, 2010. Any objections to the written discovery requests shall  
28 be filed with the Court on or before January 29, 2010. Unless there is a sustained objection to

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2388 West Sahara Avenue, Suite 430  
Las Vegas, Nevada 89102  
Tel (702) 672-4300  
Fax (702) 672-1001

1 any of the written discovery requests, all responses to the written discovery requests shall be  
2 served, without objection, on or before March 1, 2010. No written discovery requests other  
3 than the standard interrogatories and requests for admission will be permitted without first  
4 obtaining leave from the Court which leave will require a showing of good cause.

#### 5 7. PHASING OF DISCOVERY AND MOTION PRACTICE

6 7.1 Need for Phased Discovery and Motion Practice: The Court finds that limiting  
7 discovery to certain defined subjects at certain times will facilitate the efficient resolution of  
8 this litigation and is therefore in the interests of all parties and the Court.

9 7.2 Document Production and Written Discovery shall be accomplished in  
10 accordance with Sections 5 and 6 of this Order respectively. No order regarding the phasing of  
11 discovery shall modify any requirement for document production or written discovery set forth  
12 previously in this order.

13 7.3 Lien Perfection & Priority: The first phase of discovery in this case shall be  
14 limited to the subject of determining whether any lien claimant has failed to properly perfect a  
15 mechanics' lien pursuant to Nevada law and to adjudicating the priority of the mechanics' lien  
16 claims asserted against the property as opposed to the security interests asserted by the lenders  
17 in the property. The parties may conduct any depositions limited to that subject matter  
18 beginning on March 1, 2010. Such discovery will conclude no later than April 5, 2010. The  
19 parties will file any dispositive motions relating to the issues of whether liens have been  
20 properly perfected and as to the relative priority between mechanics lien claims and the  
21 lenders' security interests no later than May 3, 2010. Oppositions to such motions will be due  
22 no later than May 17, 2010. Reply briefs will be due not later than May 31, 2010. The Court  
23 will conduct a hearing on the issues of lien perfection during the week of June 7 through 11,  
24 2010 or as soon thereafter as the Court can accommodate the hearing.

25 7.4 Following the hearing, if any on the lien perfection and priority issues, the second  
26 phase of discovery shall relate to the substance of the lien claims including, but not limited to,  
27 the adjudication of any amounts purportedly due to any contractor, any issues relating to the  
28 quality of work performed by any contractor, and any construction delay claims that any party

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Las Vegas, Nevada 89102  
Tel: (702) 673-1000  
Fax: (702) 673-1001

1 may wish to assert. To assist in framing the issues for this phase of litigation, each party  
2 asserting affirmative claims in this litigation shall file a detailed statement of such claims,  
3 including a calculation of damages for such claims on or before, July 6, 2010. Each party  
4 asserting defenses to affirmative claims shall file a detailed statement of such defenses on or  
5 before August 9, 2010.

6 7.5 Remaining Percipient Witnesses: The third phase of discovery in this case shall  
7 be limited to discovery of percipient witnesses with knowledge relevant to any remaining  
8 issues in the case (including third party discovery). The parties may conduct any depositions  
9 limited to that subject matter beginning on August 25, 2010. Such discovery will conclude no  
10 later than November 29, 2010.

11 7.6 Expert Depositions: The final discovery phase in this case shall be devoted to  
12 expert discovery if necessary. All parties are required to make initial expert disclosures on or  
13 before February 14, 2011. Rebuttal expert disclosures are due on or before May 2, 2011.  
14 Expert depositions shall commence no earlier than May 18, 2011 and shall be concluded not  
15 later than July 5, 2011.

#### 16 8. NON-PARTY DISCOVERY

17 Any party shall be allowed to conduct non-party document discovery upon proper notice  
18 to all parties, and are required to produce any such discovery pursuant to the terms of this order  
19 within fourteen (14) days of obtaining such discovery. Depositions of any non-parties must be  
20 conducted in accordance with the phased discovery schedule set forth in Section 7 of this  
21 Order.

#### 22 9. EXPERT INFORMATION EXCHANGE

23 Initial Expert Disclosures and Rebuttal Expert Disclosures shall be made in accordance  
24 and in compliance with NRCP 16.1(a)(2). Initial disclosures of experts and reports shall be  
25 due no later than February 14, 2011 and disclosures of rebuttal experts and reports shall be due  
26 no later May 2, 2011. An expert that is not timely identified shall be precluded as a witness for  
27 all purposes, unless good cause is shown.

28 All parties shall produce and serve their complete expert job files no later than one (1)

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1130 West Sahara Avenue, Suite 420  
Las Vegas, Nevada 89103  
Tel: (702) 673-1000  
Fax: (702) 673-1001

1 week prior to the expert's deposition. All parties are required to submit an expert report for  
2 each final expert identified.

3 All expert disclosure shall comply with NRCP 26(b)(4)(A)(i) and NRCP 26(b)(5).

4 10. MEDIATION/SETTLEMENT CONFERENCE

5 The parties shall participate in two rounds of mediation and/or settlement conferences in  
6 this case. The first round shall take place following the completion of percipient witness  
7 depositions. The second shall take place after the discovery cutoff and prior to the deadline for  
8 filing of dispositive motions.

9 11. DEPOSITIONS

10 The parties agree upon Litigation Services for all depositions in this matter who shall be  
11 required to maintain one set of complete exhibits which shall be available at all depositions that  
12 are taken in Las Vegas, Nevada.

13 The costs of preparation of the original transcript shall be borne by the party noticing the  
14 deposition.

15 12. DEPOSITIONS TO BE TAKEN IN LAS VEGAS, NEVADA

16 All depositions of individual parties and Rule 30(b)(6) (PMK) designated persons of  
17 corporate parties shall take place in Las Vegas, Nevada. With respect to any fact witness  
18 employee of a corporate party, to the extent that such witness does not agree to Las Vegas,  
19 Nevada as the place for his or her deposition, and the parties are unable to agree upon a  
20 suitable locale for that deposition, then any party reserves the right to seek relief from the  
21 Court as may be appropriate for the deposition locale. The depositions of other fact witnesses  
22 shall take place in Las Vegas, Nevada, unless after a request has been made, the witness refuses  
23 to appear in Las Vegas, Nevada, in which event any party may seek whatever relief as may be  
24 appropriate under the circumstances.

25 13. EFFECT OF THIS ORDER IN SUBSEQUENTLY APPEARING PARTIES

26 This Order shall apply to all subsequently appearing parties.

27 14. REVISIONS TO CASE MANAGEMENT ORDER

28 Nothing herein shall prevent any party, upon a showing of good cause, from filing a

MEIER & FINE  
2300 West Sahara Avenue, Suite 430  
Las Vegas, Nevada 89102  
Tel: (702) 673-1000  
Fax: (702) 673-1001

1 motion to modify or amend any provision of this Case Management Order.

2 15. SERVICE OF PAPER/ELECTRONIC FILING


3 All parties to this litigation shall register for electronic service of documents for this case  
4 with the Eighth Judicial District Court. Service of all pleadings and papers in this case shall be  
5 made through that method.

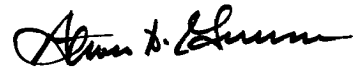
6 DATED this 25<sup>th</sup> <sup>January 2010</sup> day of ~~December~~, 2009.

7  
8   
9 DISTRICT COURT

10 Submitted by:

11 MEIER & FINE, LLC

12 By   
13 GLENN F. MEIER, ESQ.  
14 Nevada Bar No. 006059  
TAYLOR OBLAD, ESQ.  
15 Nevada Bar No. 011430  
2300 West Sahara Avenue, Suite 430  
16 Las Vegas, Nevada 89102  
Attorneys for Defendant  
SCOTT FINANCIAL CORPORATION  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28



CLERK OF THE COURT

**Marquis Aurbach Coffing**  
Jack Chen Min Juan, Esq.  
Nevada Bar No. 6367  
Cody S. Mounteer, Esq.  
Nevada Bar No. 11220  
10001 Park Run Drive  
Las Vegas, Nevada 89145  
Telephone: (702) 382-0711  
Facsimile: (702) 382-5816  
jjuan@maclaw.com  
cmounteer@maclaw.com  
*Attorneys for APCO Construction*

**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.: 13

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 on the 9th day of June, 2016 an Order was entered in the  
above-referenced Court. A copy of which is attached hereto.

Dated this 10 day of June, 2016.

MARQUIS AURBACH COFFING

By   
Jack Chen Min Juan, Esq.  
Cody S. Mounteer, Esq.  
10001 Park Run Drive  
Las Vegas, Nevada 89145  
Attorneys for APCO Construction

**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing TITLE was submitted electronically for filing and/or service with the Eighth Judicial District Court on the 10<sup>th</sup> day of June, 2016. Electronic service of the foregoing document shall be made in accordance with the E-Service List as follows:<sup>1</sup>

**Bennett Tueller Johnson & Deere****Contact**

Benjamin D. Johnson

**Email**

ben.johnson@btjd.com

**Brian K. Berman, Chtd.****Contact**

Brian K. Berman, Esq.

**Email**

b.k.berman@att.net

*Attorneys for Read Mix Inc.***Cadden & Fuller LLP****Contact**

Dana Y. Kim

**Email**

dkim@caddenfuller.com

S. Judy Hirahara

jhirahara@caddenfuller.com

Tammy Cortez

tcortez@caddenfuller.com

**David J. Merrill P.C.****Contact**

David J. Merrill

**Email**

david@dimerrillpc.com

**Dickinson Wright, PLLC****Contact**

Cheri Vandermeulen

**Email**

cvandermeulen@dickinsonwright.com

Christine Spencer

cspencer@dickinsonwright.com

Donna Wolfbrandt

dwolfbrandt@dickinsonwright.com

Eric Dobberstein

edobberstein@dickinsonwright.com

**Durham Jones & Pinegar****Contact**

Brad Slighting

**Email**

bslighting@diplaw.com

Gina LaCascia

glacascia@diplaw.com

**Fox Rothschild****Contact**

Jineen DeAngelis

**Email**

jdeangelis@foxrothschild.com

Richard I. Dreitzer

rdreitzer@foxrothschild.com

**GERRARD COX & LARSEN****Contact**

Aaron D. Lancaster

**Email**

alancaster@gerrard-cox.com

Douglas D. Gerrard

dgerrard@gerrard-cox.com

Kanani Gonzales

KGonzales@Gerrard-cox.com

Kaytlyn Bassett

kbassett@gerrard-cox.com

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



**Gibbs, Giden, Locher, Turner & Senet LLP**

Contact	Email
Becky Pintar	bpintar@gglt.com
Linda Compton	lcompton@gglt.com

*Attorneys for Masonry Group Nevada Inc.*

**Gordon & Rees**

Contact	Email
Marie Ogella	mogella@gordonrees.com
Robert Schumacher	rschumacher@gordonrees.com

*Attorneys for Selectbuild Nevada Inc.*

**Gordon & Rees LLP**

Contact	Email
Brian Walters	bwalters@gordonrees.com

**GRANT MORRIS DODDS**

Contact	Email
Steven Morris	steve@gmdlegal.com

*Attorneys for Camco Pacific Construction Co Inc; Fidelity & Depository Company of Maryland; and Cellcrete Fireproofing of Nevada Inc*

**Greenberg Traurig, LLP**

Contact	Email
6085 Joyce Heilich	heilichj@gtlaw.com
7132 Andrea Rosehill	rosehilla@gtlaw.com
7368 Sandy Jackson	jacksonsa@gtlaw.com
CNN Cynthia Ney	neyc@gtlaw.com
IGH Bethany Rabe	rabeb@gtlaw.com
IOM Mark Ferrario	lvlitdock@gtlaw.com
LVGTDocketing	lvlitdock@gtlaw.com
MOK Moorea Katz	katzmo@gtlaw.com
OSN Shayna Noyce	noyces@gtlaw.com
WTM Tami Cowden	cowdent@gtlaw.com

*Attorneys for Club Vista Financial Services LLC*

**Holley, Driggs, Walch, Puzey & Thompson**

Contact	Email
Jeffrey R. Albrechts, Esq.	jaltbrechts@nevadafirm.com

*Attorneys for Arch Aluminum and Glass Co.*

**Howard & Howard**

Contact	Email
Gwen Rutar Mullins	grm@h2law.com
Kellie Piet (Legal Assistant)	kdp@h2law.com
Wade B. Gochnour	wbg@h2law.com

*Attorneys for APCO Construction; Hydropressure Cleaning Inc; Custom Select Billing Inc; and Wiss, Janney, Elstner Associates, Inc.*

**Jolley Urga Woodbury & Little**

Contact	Email
Elizabeth J. Martin	em@juww.com
Kelly McGee	kom@juww.com
Martin A. Little, Esq.	mal@juww.com
Michael R. Ernst	mre@juww.com

*Attorneys for Pape Material Handling, Steel Structures Inc., Nevada Prefab Engineers Inc, Pape Rents*

**Kemp, Jones & Coulthard**

1	<b>Contact</b>	<b>Email</b>
2	Erica Bennett	e.bennett@kempjones.com
3	J. Randall Jones	irj@kempjones.com
4	Janet Griffin	jlg@kempjones.com
5	Mark M. Jones	mmj@kempjones.com
6	Matt Carter	msc@kempjones.com
7	Matthew Carter	m.carter@kempjones.com
8	Pamela Montgomery	pym@kempjones.com
9	<i>Attorneys for Bradley J. Scott</i>	
10	<b>Law Offices of Sean P. Hillin, P.C.</b>	
11	<b>Contact</b>	<b>Email</b>
12	Caleb Langsdale, Esq.	caleb@langsdalelaw.com
13	<b>Litigation Services &amp; Technologies</b>	
14	<b>Contact</b>	<b>Email</b>
15	Calendar	calendar@litigation-services.net
16	Depository	Depository@litigation-services.net
17	<b>McCullough, Perez &amp; Dobberstein, Ltd.</b>	
18	<b>Contact</b>	<b>Email</b>
19	Eric Dobberstein, Esq.	edobberstein@mcpalaw.com
20	Christine Spencer	cspencer@mcpalaw.com
21	<i>Attorneys for Imsulpro Projects Inc.</i>	
22	<b>McDonald Carano Wilson, LLP</b>	
23	<b>Contact</b>	<b>Email</b>
24	Kathleen Morris	kmorris@mcdonaldcarano.com
25	Ryan Bellows	rbellows@mcdonaldcarano.com
26	<b>Meier Fine &amp; Wray, LLC</b>	
27	<b>Contact</b>	<b>Email</b>
28	Receptionist	Reception@nvbusinesslawyers.com
29	<i>Attorneys for Scott Financial Corporation</i>	
30	<b>Morrill &amp; Aronson</b>	
31	<b>Contact</b>	<b>Email</b>
32	Christine Taradash	CTaradash@maazlaw.com
33	<b>Morrill &amp; Aronson P.L.C.</b>	
34	<b>Contact</b>	<b>Email</b>
35	Debra Hitchens	dhitchens@maazlaw.com
36	<b>Peel Brimley LLP</b>	
37	<b>Contact</b>	<b>Email</b>
38	Eric Zimbelman	ezimbelman@peelbrimley.com
39	Gina Dillingham	gdillingham@peelbrimley.com
40	Kathy Gentile	kgentile@peelbrimley.com
41	Ronnie Cox	rcox@peelbrimley.com
42	<i>Attorneys for Various Lien Claimants, S R Bray Corp, and SWPPP Compliance Solutions LLC</i>	
43	<b>Pezzillo Lloyd</b>	
44	<b>Contact</b>	<b>Email</b>
45	Jennifer R. Lloyd	Jlloyd@pezzillolloyd.com
46	Marisa L. Maskas, Esq.	mmaskas@pezzillolloyd.com

**Procopio Cory**

Contact	Email
Timothy E. Salter	tim.salter@procopio.com

*Attorneys for Unitah Investments LLC*

**Procopio Cory Hargreaves & Savitch**

Contact	Email
Andrew J. Kessler	andrew.kessler@procopio.com
Carla Clark, Legal Secretary	carla.clark@procopio.com
Rebecca Chapman	rebecca.chapman@procopio.com
Rebecca Chapman, Legal Secretary	rebecca.chapman@procopio.com
Scott R. Omohundro	scott.omohundro@procopio.com
Timothy E. Salter	tim.salter@procopio.com

*Attorneys for Unitah Investments LLC*

**Procopio Cory Hargreaves & Savitch LLP**

Contact	Email
Cori Mandy, Legal Secretary	cori.mandy@procopio.com

*Attorneys for Unitah Investments LLC*

**Procopio, Cory, Hargreaves & Savitch**

Contact	Email
Elmer Flores	elmer.flores@procopio.com
Joseph Frank	joseph.frank@procopio.com

*Attorneys for Unitah Investments LLC*

**Procopio, Cory, Hargreaves & Savitch**

Contact	Email
Lenore Joseph	calendaring@procopio.com

*Attorneys for Unitah Investments LLC*

**Richard L. Tobler, Ltd.**

Contact	Email
Richard Tobler	rltldck@hotmail.com

*Attorneys for National Wood Products, Inc.*

**Rooker Rawlins**

Contact	Email
Legal Assistant	rrlegalassistant@rookerlaw.com
Michael Rawlins	mrrawlins@rookerlaw.com

**T. James Truman & Associates**

Contact	Email
District filings	district@trumanlegal.com

*Attorneys for Professional Doors & Millworks LLC, Noorda Sheet Metal Company, E & E Fire Protection LLC, Pressure Grout Co*

**The Langsdale Law Firm**

Contact	Email
Caleb Langsdale	Caleb@Langsdalelaw.com

**Varricchio Law Firm**

Contact	Email
Paralegal	paralegal@varricchiolaw.com
Philip T. Varricchio	phil@varricchiolaw.com

*Attorneys for Supply Network Inc.*

**Watt, Tieder, Hoffar & Fitzgerald, L.L.P.**

Contact	Email
David R. Johnson	djohnson@watttieder.com
Jennifer MacDonald	jmacdonald@watttieder.com

---

*Attorneys for Granite Construction Company*

---

**Williams & Associates****Contact****Email**

Donald H. Williams, Esq.

dwilliams@dhwlawlv.com

*Attorneys EZA P.C., Patent Construction Systems, Oz Architecture of Nevada Inc*

---

**Wilson Elser Moskowitz Edelman & Dicker****Contact****Email**

E-File Desk

EfileLasVegas@wilsonelser.com

Hrustyk Nicole

Nicole.Hrustyk@wilsonelser.com

Reuben H. Cawley

Reuben.Cawley@wilsonelser.com

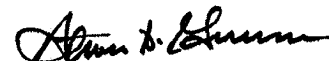
I-Che Lai

I-Che.Lai@wilsonelser.com

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

  
an employee of Marquis Aurbach Coffing



CLERK OF THE COURT

1 **Marquis Aurbach Coffing**  
 2 Jack Chen Min Juan, Esq.  
 3 Nevada Bar No. 6367  
 4 Cody S. Mounteer, Esq.  
 5 Nevada Bar No. 11220  
 6 10001 Park Run Drive  
 7 Las Vegas, Nevada 89145  
 8 Telephone: (702) 382-0711  
 9 Facsimile: (702) 382-5816  
 10 jjuan@maclaw.com  
 11 cmounteer@maclaw.com  
 12 *Attorneys for APCO Construction*

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

15 APCO CONSTRUCTION, a Nevada  
 16 corporation,

Plaintiff,

vs.

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

Defendant.

19 AND ALL RELATED MATTERS

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

Hearing Date: June 20, 2016  
 Hearing Time: 9:00 a.m.

**ORDER: APPOINTING SPECIAL MASTER**

20 This matter came before the Court on APCO's Motion to Appoint Special Master, with  
 21 Limited Oppositions by Insulpro and the parties represented by Peel Brimley, LLP. All parties  
 22 appeared through their respective counsel of record. Having reviewed all the pleadings, exhibits  
 23 and oral arguments of counsel, the Court hereby adjudicates, finds and orders as follows:

24 1. APCO's Motion to Appoint Special Master is Granted;

25 a. Floyd Hale, Esq. shall be appointed as the Special Master;

26 b. All the parties shall meet with Special Master Hale within 10 days or as  
 27 soon as the Special Master is available to set the case management order, coordinate the  
 28 discovery / depositions and address related matters;

c. After completion of such discovery as the Special Master may allow, the  
 Special Master, upon the request of any party, shall conduct hearings to ascertain and report

1 upon the liens and the amount justly due thereon, if any, that is owed to the parties and on other  
2 respective claims and defenses;

3 2. It is also ordered that the Special Master appointed pursuant to this Order shall be  
4 compensated at an hourly rate of \$350.00 per hour. The compensation of the Special Master shall  
5 be paid 25% by APCO, 25% by Camco, and 50% by the remaining lien claimants;

6 3. It is further ordered that to the fullest extent permitted by NRS 108.239 and  
7 NRCP 53, Special Master shall, without limitation, have the power and authority to, among other  
8 things:

9 a. Review all pleadings, papers or documents filed with the Court concerning  
10 the action, and coordinated and enter Case Management Order and amendments thereto;

11 b. Coordinate and make orders concerning discovery of any books,  
12 photographs, records, papers or other documents by the parties, including the disclosure of  
13 witnesses and the taking of deposition of any party;

14 c. Order any inspections of records, site of the property, by a party and any  
15 consultants or experts of a party;

16 d. Order mediation or settlement conferences, and attendance a those  
17 conferences by counsel and any representatives of the insurer of a party;

18 e. Require any attorney representing a party to provide statements of legal  
19 and factual issues concerning the action; and

20 f. Refer to the Court which the action is commenced on any matter requiring  
21 assistance from the Court.

22 ////

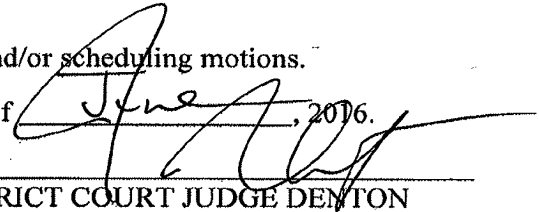
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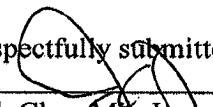
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g. Hear all discovery and/or scheduling motions.  
IT IS SO ORDERED this 9<sup>th</sup> day of June, 2016.

  
DISTRICT COURT JUDGE DENTON

Respectfully submitted by:

  
\_\_\_\_\_  
Jack Chen/Min Juan, Esq.  
Nevada Bar No. 6367  
Cody S. Mounteer, Esq.  
Nevada Bar No. 11220  
10001 Park Run Drive  
Las Vegas, Nevada 89145  
Telephone: (702) 382-0711  
Facsimile: (702) 382-5816  
jjuan@maclaw.com  
cmounteer@maclaw.com  
*Attorneys for APCO Construction*

**NDEP**  
JORGE RAMIREZ, ESQ.  
Nevada Bar No. 6787  
I-CHE LAI, ESQ.  
Nevada Bar No. 12247  
WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP  
300 South 4<sup>th</sup> Street, 11<sup>th</sup> Floor  
Las Vegas, NV 89101-6014  
Telephone: (702) 727-1400  
Facsimile: (702) 727-1401  
Jorge.Ramirez@wilsonelser.com  
I-Che.Lai@wilsonelser.com  
*Attorneys for Lien Clamant,  
Zitting Brothers Construction, Inc.*

**DISTRICT COURT**  
**CLARK COUNTY, NEVADA**

APCO CONSTRUCTION, a Nevada  
corporation,

Plaintiff,

vs.

GEMSTONE DEVELOPMENT WEST, INC.,  
a Nevada corporation,

Defendant.

CASE NO. A571228  
DEPT. NO. XIII

Consolidated with:

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

AND ALL RELATED MATTERS

**ZITTING BROTHERS CONSTRUCTION,  
INC.'S NOTICE OF DEPOSITION OF  
APCO CONSTRUCTION PURSUANT TO  
NRCp 30(b)(6)**

**DATE: May 12, 2017**  
**TIME: 10:00 a.m.**

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

3 **TO: APCO CONSTRUCTION**

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

6 **TO: ALL PARTIES AND THEIR RESPECTIVE ATTORNEYS OF RECORD**

7 PLEASE TAKE NOTICE that pursuant to NRCP 30(b)(6), ZITTING BROTHERS  
8 CONSTRUCTION, INC., ("ZBCI"), by and through its counsel of record, Jorge A. Ramirez, Esq.,  
9 and I-Che Lai, Esq., of the law firm of WILSON ELSEER MOSKOWITZ EDELMAN & DICKER,  
10 LLP, will take the oral deposition of one or more designated representatives for  
11 APCO CONSTRUCTION ("APCO") on the 12<sup>th</sup> day of May, 2017, at the hour of 10:00 a.m. at the  
12 law offices of WILSON ELSEER MOSKOWITZ EDELMAN & DICKER LLP, located at 300 South  
13 Fourth Street, 11<sup>th</sup> Floor, Las Vegas, NV 89101. ZBCI plans to depose APCO's designated  
14 representative(s) on each of the numbered categories identified below. The deposition will take place  
15 before an officer duly authorized by law to administer oaths and record testimony. This deposition  
16 will be recorded by stenographic means and will be taken pursuant to all applicable provisions of the  
17 Nevada Rules of Civil Procedure pertaining to the taking of and use of depositions. You are invited  
18 to attend and cross-examine.  
19

20 **DEFINITIONS**

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

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

24 2. The term "Gemstone" refers to Gemstone Development West, Inc., its employees,  
25 agents, representatives, attorneys, experts, and all other persons acting or purporting to act on its  
26 behalf  
27

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

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

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

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

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

11  
12 **Areas of Examination Pursuant to Nev. R. Civ. P. 30(b)(6)**

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

- 16
- 17 1. All facts fact related to the Contract;
  - 18 2. All facts fact related to the Sub-Contract;
  - 19 3. All facts related to ZBCI's work under the Sub-Contract, including but not limited to  
20 the scope and quality of ZBCI's work;
  - 21 4. All facts related to your process for obtaining payment under the Contract;
  - 22 5. All facts related to your process for paying sub-contractors under the Sub-Contract  
23 and sub-contracts with other sub-contractors;
  - 24 6. All facts related to all payments you received in connection with the Manhattan West  
25 Project;
  - 26 7. All facts related to all payments you made to ZBCI in connection with the Manhattan  
27 West Project;
  - 28

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

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

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

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

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

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

13           DATED this 26<sup>th</sup> day of April, 2017.

14  
15  
16 WILSON ELSER MOSKOWITZ EDELMAN &  
DICKER LLP

17  
18 By: 

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

**CERTIFICATE OF SERVICE**

Pursuant to NRCP 5(b), I certify that I am an employee of Wilson Elser Moskowitz Edelman & Dicker LLP, and that on this 26<sup>th</sup> day of April, 2017, I served a true and correct copy of the foregoing **ZITTING BROTHERS CONSTRUCTION, INC.'S NOTICE OF DEPOSITION OF APCO CONSTRUCTION PURSUANT TO NRCP 30(b)(6)** document as follows:

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

---

**Bennett Tueller Johnson & Deere**

Contact	Email
Benjamin D. Johnson	<a href="mailto:ben.johnson@btjd.com">ben.johnson@btjd.com</a>
Chalise Walsh	<a href="mailto:cwalsh@btjd.com">cwalsh@btjd.com</a>

---

**Brian K. Berman, Chtd.**

Contact	Email
Brian K. Berman, Esq.	<a href="mailto:b.k.berman@att.net">b.k.berman@att.net</a>

---

**Cadden & Fuller LLP**

Contact	Email
Dana Y. Kim	<a href="mailto:dkim@caddenfuller.com">dkim@caddenfuller.com</a>
S. Judy Hirahara	<a href="mailto:jhirahara@caddenfuller.com">jhirahara@caddenfuller.com</a>
Tammy Cortez	<a href="mailto:tcortez@caddenfuller.com">tcortez@caddenfuller.com</a>

---

**David J. Merrill P.C.**

Contact	Email
David J. Merrill	<a href="mailto:david@djmerrillpc.com">david@djmerrillpc.com</a>

---

**Dickinson Wright, PLLC**

Contact	Email
Cheri Vandermeulen	<a href="mailto:cvandermeulen@dickinsonwright.com">cvandermeulen@dickinsonwright.com</a>
Christine Spencer	<a href="mailto:cspencer@dickinsonwright.com">cspencer@dickinsonwright.com</a>
Donna Wolfbrandt	<a href="mailto:dwolfbrandt@dickinsonwright.com">dwolfbrandt@dickinsonwright.com</a>
Eric Dobberstein	<a href="mailto:edobberstein@dickinsonwright.com">edobberstein@dickinsonwright.com</a>



---

**Durham Jones & Pinegar****Contact****Email**

Brad Slighting

[bslighting@djplaw.com](mailto:bslighting@djplaw.com)

Cindy Simmons

[csimmons@djplaw.com](mailto:csimmons@djplaw.com)

---

**Fox Rothschild****Contact****Email**

Jineen DeAngelis

[jdeangelis@foxrothschild.com](mailto:jdeangelis@foxrothschild.com)

---

**G.E. Robinson Law****Contact****Email**

George Robinson

[grobinson@pezzilloloyd.com](mailto:grobinson@pezzilloloyd.com)

---

**GERRARD COX & LARSEN****Contact****Email**

Aaron D. Lancaster

[alancaster@gerrard-cox.com](mailto:alancaster@gerrard-cox.com)

Douglas D. Gerrard

[dgerrard@gerrard-cox.com](mailto:dgerrard@gerrard-cox.com)

Kaytlyn Bassett

[kbassett@gerrard-cox.com](mailto:kbassett@gerrard-cox.com)

---

**Gibbs, Giden, Locher, Turner & Senet LLP****Contact****Email**

Becky Pintar

[bpintar@gglt.com](mailto:bpintar@gglt.com)

Linda Compton

[lcompton@gglts.com](mailto:lcompton@gglts.com)

---

**Gordon & Rees****Contact****Email**

Robert Schumacher

[rschumacher@gordonrees.com](mailto:rschumacher@gordonrees.com)

---

**Gordon & Rees LLP****Contact****Email**

Andrea Montero

[amontero@gordonrees.com](mailto:amontero@gordonrees.com)

Brian Walters

[bwalters@gordonrees.com](mailto:bwalters@gordonrees.com)

Marie Ogella

[mogella@gordonrees.com](mailto:mogella@gordonrees.com)

---

**GRANT MORRIS DODDS****Contact****Email**

Steven Morris

[steve@gmdlegal.com](mailto:steve@gmdlegal.com)

---

**Greenberg Traurig, LLP****Contact****Email**

6085 Joyce Heilich

[heilichj@gtlaw.com](mailto:heilichj@gtlaw.com)

7132 Andrea Rosehill

[rosehilla@gtlaw.com](mailto:rosehilla@gtlaw.com)

CNN Cynthia Ney

[neyc@gtlaw.com](mailto:neyc@gtlaw.com)

IGH Bethany Rabe

[rabeb@gtlaw.com](mailto:rabeb@gtlaw.com)

IOM Mark Ferrario

[lvlitdock@gtlaw.com](mailto:lvlitdock@gtlaw.com)

LVGTDocketing	<a href="mailto:lvlitdock@gtlaw.com">lvlitdock@gtlaw.com</a>
MOK Moorea Katz	<a href="mailto:katzmo@gtlaw.com">katzmo@gtlaw.com</a>
WTM Tami Cowden	<a href="mailto:cowdent@gtlaw.com">cowdent@gtlaw.com</a>

---

**HOLLEY DRIGGS WALCH FINE WRAY PUZEY & THOMPSON**

Contact	Email
Glenn F. Meier	<a href="mailto:gmeier@nevadafirm.com">gmeier@nevadafirm.com</a>
Renee Hoban	<a href="mailto:rhoban@nevadafirm.com">rhoban@nevadafirm.com</a>

---

**Holley Driggs Walch Fine Wray Puzey & Thompson**

Contact	Email
Cynthia Kelley	<a href="mailto:ckelley@nevadafirm.com">ckelley@nevadafirm.com</a>
Rachel E. Donn	<a href="mailto:rdonn@nevadafirm.com">rdonn@nevadafirm.com</a>

---

**Howard & Howard**

Contact	Email
Gwen Rutar Mullins	<a href="mailto:grm@h2law.com">grm@h2law.com</a>
Kellie Piet (Legal Assistant)	<a href="mailto:kdp@h2law.com">kdp@h2law.com</a>
Wade B. Gochnour	<a href="mailto:wbg@h2law.com">wbg@h2law.com</a>

---

**Jolley Urga Woodbury & Little**

Contact	Email
Agnes Wong	<a href="mailto:aw@juww.com">aw@juww.com</a>
Elizabeth J. Martin	<a href="mailto:em@juww.com">em@juww.com</a>
Kelly McGee	<a href="mailto:kom@juww.com">kom@juww.com</a>
Martin A. Little, Esq.	<a href="mailto:mal@juww.com">mal@juww.com</a>
Martin A. Little, Esq.	<a href="mailto:mal@juww.com">mal@juww.com</a>
Michael R. Ernst	<a href="mailto:mre@juww.com">mre@juww.com</a>
Michael R. Ernst, Esq.	<a href="mailto:mre@juww.com">mre@juww.com</a>

---

**Kemp, Jones & Coulthard**

Contact	Email
Erica Bennett	<a href="mailto:e.bennett@kempjones.com">e.bennett@kempjones.com</a>
J. Randall Jones	<a href="mailto:r.jones@kempjones.com">r.jones@kempjones.com</a>
Janet Griffin	<a href="mailto:jlg@kempjones.com">jlg@kempjones.com</a>
Mark M. Jones	<a href="mailto:mmj@kempjones.com">mmj@kempjones.com</a>
Matt Carter	<a href="mailto:msc@kempjones.com">msc@kempjones.com</a>
Matthew Carter	<a href="mailto:m.carter@kempjones.com">m.carter@kempjones.com</a>
Pamela Montgomery	<a href="mailto:pym@kempjones.com">pym@kempjones.com</a>

---

**Law Offices of Floyd Hale**

Contact	Email
Debbie Holloman	<a href="mailto:dholloman@jamsadr.com">dholloman@jamsadr.com</a>
Floyd Hale	<a href="mailto:fhale@floydhale.com">fhale@floydhale.com</a>

---

**Law Offices of Sean P. Hillin, P.C.**



	<b>Contact</b>	<b>Email</b>
	Caleb Langsdale, Esq.	<a href="mailto:caleb@langsdaletlaw.com">caleb@langsdaletlaw.com</a>
	<b>Litigation Services &amp; Technologies</b>	
	<b>Contact</b>	<b>Email</b>
	Calendar	<a href="mailto:calendar@litigation-services.net">calendar@litigation-services.net</a>
	Depository	<a href="mailto:Depository@litigation-services.net">Depository@litigation-services.net</a>
	<b>Marquis Aurbach Coffing</b>	
	<b>Contact</b>	<b>Email</b>
	Cally Hatfield	<a href="mailto:chatfield@maclaw.com">chatfield@maclaw.com</a>
	Cody Mounteer, Esq.	<a href="mailto:cmounteer@marquisaurbach.com">cmounteer@marquisaurbach.com</a>
	Courtney Peterson	<a href="mailto:cpeterson@maclaw.com">cpeterson@maclaw.com</a>
	Jack Juan	<a href="mailto:jjuan@marquisaurbach.com">jjuan@marquisaurbach.com</a>
	Jennifer Case	<a href="mailto:jcase@maclaw.com">jcase@maclaw.com</a>
	Phillip Aurbach	<a href="mailto:paurbach@maclaw.com">paurbach@maclaw.com</a>
	Taylor Fong	<a href="mailto:tfong@marquisaurbach.com">tfong@marquisaurbach.com</a>
	<b>McCullough, Perez &amp; Dobberstein, Esq.</b>	
	<b>Contact</b>	<b>Email</b>
	Eric Dobberstein, Esq.	<a href="mailto:edobberstein@mcpalaw.com">edobberstein@mcpalaw.com</a>
	<b>McCullough, Perez &amp; Dobberstein, Ltd.</b>	
	<b>Contact</b>	<b>Email</b>
	Christine Spencer	<a href="mailto:cspencer@mcpalaw.com">cspencer@mcpalaw.com</a>
	<b>McDonald Carano Wilson, LLP</b>	
	<b>Contact</b>	<b>Email</b>
	Kathleen Morris	<a href="mailto:kmorris@mcdonaldcarano.com">kmorris@mcdonaldcarano.com</a>
	Ryan Bellows	<a href="mailto:rbellows@mcdonaldcarano.com">rbellows@mcdonaldcarano.com</a>
	<b>Meier Fine &amp; Wray, LLC</b>	
	<b>Contact</b>	<b>Email</b>
	Receptionist	<a href="mailto:Reception@nvbusinesslawyers.com">Reception@nvbusinesslawyers.com</a>
	<b>Morrill &amp; Aronson</b>	
	<b>Contact</b>	<b>Email</b>
	Christine Taradash	<a href="mailto:CTaradash@maazlaw.com">CTaradash@maazlaw.com</a>
	<b>Morrill &amp; Aronson P.L.C.</b>	
	<b>Contact</b>	<b>Email</b>
	Debra Hitchens	<a href="mailto:dhitchens@maazlaw.com">dhitchens@maazlaw.com</a>
	<b>Peel Brimley LLP</b>	
	<b>Contact</b>	<b>Email</b>
	Amanda Armstrong	<a href="mailto:aarmstrong@peelbrimley.com">aarmstrong@peelbrimley.com</a>

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Eric Zimbelman	<a href="mailto:ezimbelman@peelbrimley.com">ezimbelman@peelbrimley.com</a>
Kathy Gentile	<a href="mailto:kgentile@peelbrimley.com">kgentile@peelbrimley.com</a>
Ronnie Cox	<a href="mailto:rcox@peelbrimley.com">rcox@peelbrimley.com</a>
Rosey Jeffrey	<a href="mailto:rjeffrey@peelbrimley.com">rjeffrey@peelbrimley.com</a>

---

**Pezzillo Lloyd**

Contact	Email
Jennifer R. Lloyd	<a href="mailto:jlloyd@pezzillolloyd.com">jlloyd@pezzillolloyd.com</a>
Marisa L. Maskas, Esq.	<a href="mailto:mmaskas@pezzillolloyd.com">mmaskas@pezzillolloyd.com</a>

---

**Procopio Cory**

Contact	Email
Timother E. Salter	<a href="mailto:tim.salter@procopio.com">tim.salter@procopio.com</a>

---

**Procopio Cory Hargreaves & Savitch**

Contact	Email
Andrew J. Kessler	<a href="mailto:andrew.kessler@procopio.com">andrew.kessler@procopio.com</a>
Carla Clark, Legal Secretary	<a href="mailto:carla.clark@procopio.com">carla.clark@procopio.com</a>
Rebecca Chapman	<a href="mailto:rebecca.chapman@procopio.com">rebecca.chapman@procopio.com</a>
Rebecca Chapman, Legal Secretary	<a href="mailto:rebecca.chapman@procopio.com">rebecca.chapman@procopio.com</a>
Scott R. Omohundro	<a href="mailto:scott.omohundro@procopio.com">scott.omohundro@procopio.com</a>
Timothy E. Salter	<a href="mailto:tim.salter@procopio.com">tim.salter@procopio.com</a>

---

**Procopio Cory Hargreaves & Savitch LLP**

Contact	Email
Cori Mandy, Legal Secretary	<a href="mailto:cori.mandy@procopio.com">cori.mandy@procopio.com</a>

---

**Procopio, Cory, Hargreaves & Savitch**

Contact	Email
Elmer Flores	<a href="mailto:elmer.flores@procopio.com">elmer.flores@procopio.com</a>
Joseph Frank	<a href="mailto:joseph.frank@procopio.com">joseph.frank@procopio.com</a>

---

**Procopio, Cory, Hargreaves & Savitch**

Contact	Email
Lenore Joseph	<a href="mailto:calendar@procopio.com">calendar@procopio.com</a>

---

**Richard L. Tobler, Ltd.**

Contact	Email
Richard Tobler	<a href="mailto:rltldck@hotmail.com">rltldck@hotmail.com</a>

---

**Rooker Rawlins**

Contact	Email
Legal Assistant	<a href="mailto:rlegalassistant@rookerlaw.com">rlegalassistant@rookerlaw.com</a>
Michael Rawlins	<a href="mailto:mrawlins@rookerlaw.com">mrawlins@rookerlaw.com</a>



---

**T. James Truman & Associates****Contact**

District filings

**Email**[district@trumanlegal.com](mailto:district@trumanlegal.com)

---

**The Langsdale Law Firm****Contact**

Caleb Langsdale

**Email**[Caleb@Langsdalelaw.com](mailto:Caleb@Langsdalelaw.com)

---

**Varricchio Law Firm****Contact**

Paralegal

Philip T. Varricchio

**Email**[paralegal@varricchiolaw.com](mailto:paralegal@varricchiolaw.com)[phil@varricchiolaw.com](mailto:phil@varricchiolaw.com)

---

**Watt, Tieder, Hoffar & Fitzgerald, L.L.P.****Contact**

David R. Johnson

Jennifer MacDonald

**Email**[djohnson@watttieder.com](mailto:djohnson@watttieder.com)[jmacdonald@watttieder.com](mailto:jmacdonald@watttieder.com)


---

**Williams & Associates****Contact**

Donald H. Williams, Esq.

**Email**[dwilliams@dhwlawlv.com](mailto:dwilliams@dhwlawlv.com)

BY

  
An Employee of WILSON ELSEER MOSKOWITZ  
EDELMAN & DICKER LLP

**ANTD**  
JORGE RAMIREZ, ESQ.  
Nevada Bar No. 6787  
I-CHE LAI, ESQ.  
Nevada Bar No. 12247  
WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP  
300 South 4<sup>th</sup> Street, 11<sup>th</sup> Floor  
Las Vegas, NV 89101-6014  
Telephone: (702) 727-1400  
Facsimile: (702) 727-1401  
Jorge.Ramirez@wilsonelser.com  
I-Che.Lai@wilsonelser.com  
*Attorneys for Lien Clamant,  
Zitting Brothers Construction, Inc.*

**DISTRICT COURT  
CLARK COUNTY, NEVADA**

APCO CONSTRUCTION, a Nevada  
corporation,

Plaintiff,

vs.

GEMSTONE DEVELOPMENT WEST, INC.,  
a Nevada corporation,

Defendant.

CASE NO. A571228  
DEPT. NO. XIII

Consolidated with:

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

AND ALL RELATED MATTERS

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

**DATE: June 5, 2017  
TIME: 9:00 a.m.**

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

**TO: APCO CONSTRUCTION**

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

**TO: ALL PARTIES AND THEIR RESPECTIVE ATTORNEYS OF RECORD**

PLEASE TAKE NOTICE that pursuant to NRCP 30(b)(6), ZITTING BROTHERS CONSTRUCTION, INC., ("ZBCI"), by and through its counsel of record, Jorge A. Ramirez, Esq., and I-Che Lai, Esq., of the law firm of WILSON ELSEER MOSKOWITZ EDELMAN & DICKER, LLP, will take the oral deposition of one or more designated representatives for APCO CONSTRUCTION ("APCO") on the 5<sup>th</sup> day of June, 2017, at the hour of 9:00 a.m. at Esquire Deposition Solutions, located at 2300 W. Sahara Ave., Suite 770, Las Vegas, NV 89102. ZBCI plans to depose APCO's designated representative(s) on each of the numbered categories identified below. The deposition will take place before an officer duly authorized by law to administer oaths and record testimony. This deposition will be recorded by stenographic means and will be taken pursuant to all applicable provisions of the Nevada Rules of Civil Procedure pertaining to the taking of and use of depositions. You are invited to attend and cross-examine.

**DEFINITIONS**

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

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

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

3. The term "ZBCI" refers to Zitting Brothers Construction, Inc., its employees, agents, representatives, attorneys, experts, and all other persons acting or purporting to act on its behalf.

1           4.       The term "Manhattan West Project" refers to the real property commonly referred to  
2 as Manhattan West mixed used development project at issue in this case and generally located at  
3 9205 West Russell Road, Clark County, Nevada.

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

7           6.       The term "Sub-Contract" refers to the agreement you entered into with ZBCI  
8 regarding the Manhattan West Project, including but not limited to the original contact(s), change  
9 orders, and any ratification agreements.  
10

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

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

- 15           1.       All facts fact related to the Contract;  
16           2.       All facts fact related to the Sub-Contract;  
17           3.       All facts related to ZBCI's work under the Sub-Contract, including but not limited to  
18 the scope and quality of ZBCI's work;  
19           4.       All facts related to your process for obtaining payment under the Contract;  
20           5.       All facts related to your process for paying sub-contractors under the Sub-Contract  
21 and sub-contracts with other sub-contractors;  
22           6.       All facts related to all payments you received in connection with the Manhattan West  
23 Project;  
24           7.       All facts related to all payments you made to ZBCI in connection with the Manhattan  
25 West Project;  
26           8.       All facts related to all payments you made to sub-contractors other than ZBCI in  
27  
28

1 connection with the Manhattan West Project;

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

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

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

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

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

12  
13 DATED this 11<sup>th</sup> day of May, 2017.

14  
15 WILSON ELSEER MOSKOWITZ EDELMAN &  
DICKER LLP

16  
17 By: 

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

**CERTIFICATE OF SERVICE**

Pursuant to NRCP 5(b), I certify that I am an employee of Wilson Elser Moskowitz Edelman & Dicker LLP, and that on this 11th day of May, 2017, I served a true and correct copy of the foregoing **ZITTING BROTHERS CONSTRUCTION, INC.'S AMENDED NOTICE OF DEPOSITION OF APCO CONSTRUCTION PURSUANT TO NRCP 30(b)(6)** document as follows:

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

---

**Bennett Tueller Johnson & Deere**

**Contact**

Benjamin D. Johnson  
Chalise Walsh

**Email**

[ben.johnson@btjd.com](mailto:ben.johnson@btjd.com)  
[cwalsh@btjd.com](mailto:cwalsh@btjd.com)

---

**Brian K. Berman, Chtd.**

**Contact**

Brian K. Berman, Esq.

**Email**

[b.k.berman@att.net](mailto:b.k.berman@att.net)

---

**Cadden & Fuller LLP**

**Contact**

Dana Y. Kim  
S. Judy Hirahara  
Tammy Cortez

**Email**

[dkim@caddenfuller.com](mailto:dkim@caddenfuller.com)  
[jhirahara@caddenfuller.com](mailto:jhirahara@caddenfuller.com)  
[tcortez@caddenfuller.com](mailto:tcortez@caddenfuller.com)

---

**David J. Merrill P.C.**

**Contact**

David J. Merrill

**Email**

[david@djmerillpc.com](mailto:david@djmerillpc.com)

---

**Dickinson Wright, PLLC**

**Contact**

Cheri Vandermeulen  
Christine Spencer

**Email**

[cvandermeulen@dickinsonwright.com](mailto:cvandermeulen@dickinsonwright.com)  
[cspencer@dickinsonwright.com](mailto:cspencer@dickinsonwright.com)

1  
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5  
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17  
18  
19  
20  
21  
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24  
25  
26  
27  
28

Donna Wolfbrandt                      [dwolfbrandt@dickinsonwright.com](mailto:dwolfbrandt@dickinsonwright.com)  
Eric Dobberstein                      [edobberstein@dickinsonwright.com](mailto:edobberstein@dickinsonwright.com)

**Durham Jones & Pinegar**

Contact	Email
Brad Slighting	<a href="mailto:bslighting@djplaw.com">bslighting@djplaw.com</a>
Cindy Simmons	<a href="mailto:csimmons@djplaw.com">csimmons@djplaw.com</a>

**Fox Rothschild**

Contact	Email
Jineen DeAngelis	<a href="mailto:jideangelis@foxrothschild.com">jideangelis@foxrothschild.com</a>

**G.E. Robinson Law**

Contact	Email
George Robinson	<a href="mailto:grobinson@pezzilloloyd.com">grobinson@pezzilloloyd.com</a>

**GERRARD COX & LARSEN**

Contact	Email
Aaron D. Lancaster	<a href="mailto:alancaster@gerrard-cox.com">alancaster@gerrard-cox.com</a>
Douglas D. Gerrard	<a href="mailto:dgerrard@gerrard-cox.com">dgerrard@gerrard-cox.com</a>
Kaytlyn Bassett	<a href="mailto:kbassett@gerrard-cox.com">kbassett@gerrard-cox.com</a>

**Gibbs, Giden, Locher, Turner & Senet LLP**

Contact	Email
Becky Pintar	<a href="mailto:bpintar@gglt.com">bpintar@gglt.com</a>
Linda Compton	<a href="mailto:lcompton@gglt.com">lcompton@gglt.com</a>

**Gordon & Rees**

Contact	Email
Robert Schumacher	<a href="mailto:rschumacher@gordonrees.com">rschumacher@gordonrees.com</a>

**Gordon & Rees LLP**

Contact	Email
Andrea Montero	<a href="mailto:amontero@gordonrees.com">amontero@gordonrees.com</a>
Brian Walters	<a href="mailto:bwalters@gordonrees.com">bwalters@gordonrees.com</a>
Marie Ogella	<a href="mailto:mogella@gordonrees.com">mogella@gordonrees.com</a>

**GRANT MORRIS DODDS**

Contact	Email
Steven Morris	<a href="mailto:steve@gmdlegal.com">steve@gmdlegal.com</a>

**Greenberg Traurig, LLP**

Contact	Email
6085 Joyce Heilich	<a href="mailto:heilichj@gtlaw.com">heilichj@gtlaw.com</a>
7132 Andrea Rosehill	<a href="mailto:rosehilla@gtlaw.com">rosehilla@gtlaw.com</a>
CNN Cynthia Ney	<a href="mailto:neyc@gtlaw.com">neyc@gtlaw.com</a>

IGH Bethany Rabe	<a href="mailto:rabeb@gtlaw.com">rabeb@gtlaw.com</a>
IOM Mark Ferrario	<a href="mailto:lvlitdock@gtlaw.com">lvlitdock@gtlaw.com</a>
LVGTDocketing	<a href="mailto:lvlitdock@gtlaw.com">lvlitdock@gtlaw.com</a>
MOK Moorea Katz	<a href="mailto:katzmo@gtlaw.com">katzmo@gtlaw.com</a>
WTM Tami Cowden	<a href="mailto:cowdent@gtlaw.com">cowdent@gtlaw.com</a>

---

**HOLLEY DRIGGS WALCH FINE WRAY PUZEY & THOMPSON**

---

Contact	Email
Glenn F. Meier	<a href="mailto:gmeier@nevadafirm.com">gmeier@nevadafirm.com</a>
Renee Hoban	<a href="mailto:rhoban@nevadafirm.com">rhoban@nevadafirm.com</a>

---

**Holley Driggs Walch Fine Wray Puzey & Thompson**

---

Contact	Email
Cynthia Kelley	<a href="mailto:ckelley@nevadafirm.com">ckelley@nevadafirm.com</a>
Rachel E. Donn	<a href="mailto:rdonn@nevadafirm.com">rdonn@nevadafirm.com</a>

---

**Howard & Howard**

---

Contact	Email
Gwen Rutar Mullins	<a href="mailto:grm@h2law.com">grm@h2law.com</a>
Kellie Piet (Legal Assistant)	<a href="mailto:kdp@h2law.com">kdp@h2law.com</a>
Wade B. Gochnour	<a href="mailto:wbg@h2law.com">wbg@h2law.com</a>

---

**Jolley Urga Woodbury & Little**

---

Contact	Email
Agnes Wong	<a href="mailto:aw@juww.com">aw@juww.com</a>
Elizabeth J. Martin	<a href="mailto:em@juww.com">em@juww.com</a>
Kelly McGee	<a href="mailto:kom@juww.com">kom@juww.com</a>
Martin A. Little, Esq.	<a href="mailto:mal@juww.com">mal@juww.com</a>
Martin A. Little, Esq.	<a href="mailto:mal@juww.com">mal@juww.com</a>
Michael R. Ernst	<a href="mailto:mre@juww.com">mre@juww.com</a>
Michael R. Ernst, Esq.	<a href="mailto:mre@juww.com">mre@juww.com</a>

---

**Kemp, Jones & Coulthard**

---

Contact	Email
Erica Bennett	<a href="mailto:e.bennett@kempjones.com">e.bennett@kempjones.com</a>
J. Randall Jones	<a href="mailto:r.jones@kempjones.com">r.jones@kempjones.com</a>
Janet Griffin	<a href="mailto:jlg@kempjones.com">jlg@kempjones.com</a>
Mark M. Jones	<a href="mailto:mmj@kempjones.com">mmj@kempjones.com</a>
Matt Carter	<a href="mailto:msc@kempjones.com">msc@kempjones.com</a>
Matthew Carter	<a href="mailto:m.carter@kempjones.com">m.carter@kempjones.com</a>
Pamela Montgomery	<a href="mailto:pym@kempjones.com">pym@kempjones.com</a>

---

**Law Offices of Floyd Hale**

---

Contact	Email
Debbie Holloman	<a href="mailto:dholloman@jamsadr.com">dholloman@jamsadr.com</a>
Floyd Hale	<a href="mailto:fhale@floydhale.com">fhale@floydhale.com</a>



---

**Law Offices of Sean P. Hillin, P.C.**

Contact	Email
Caleb Langsdale, Esq.	<a href="mailto:caleb@langsdalelaw.com">caleb@langsdalelaw.com</a>

---

**Litigation Services & Technologies**

Contact	Email
Calendar	<a href="mailto:calendar@litigation-services.net">calendar@litigation-services.net</a>
Depository	<a href="mailto:Depository@litigation-services.net">Depository@litigation-services.net</a>

---

**Marquis Aurbach Coffing**

Contact	Email
Cally Hatfield	<a href="mailto:chatfield@maclaw.com">chatfield@maclaw.com</a>
Cody Mounteer, Esq.	<a href="mailto:cmounteer@marquisaurbach.com">cmounteer@marquisaurbach.com</a>
Courtney Peterson	<a href="mailto:cpeterson@maclaw.com">cpeterson@maclaw.com</a>
Jack Juan	<a href="mailto:jjuan@marquisaurbach.com">jjuan@marquisaurbach.com</a>
Jennifer Case	<a href="mailto:jcase@maclaw.com">jcase@maclaw.com</a>
Phillip Aurbach	<a href="mailto:paurbach@maclaw.com">paurbach@maclaw.com</a>
Taylor Fong	<a href="mailto:tfong@marquisaurbach.com">tfong@marquisaurbach.com</a>

---

**McCullough, Perez & Dobberstein, Esq.**

Contact	Email
Eric Dobberstein, Esq.	<a href="mailto:edobberstein@mcpalaw.com">edobberstein@mcpalaw.com</a>

---

**McCullough, Perez & Dobberstein, Ltd.**

Contact	Email
Christine Spencer	<a href="mailto:cspencer@mcpalaw.com">cspencer@mcpalaw.com</a>

---

**McDonald Carano Wilson, LLP**

Contact	Email
Kathleen Morris	<a href="mailto:kmorris@mcdonaldcarano.com">kmorris@mcdonaldcarano.com</a>
Ryan Bellows	<a href="mailto:rbellows@mcdonaldcarano.com">rbellows@mcdonaldcarano.com</a>

---

**Meier Fine & Wray, LLC**

Contact	Email
Receptionist	<a href="mailto:Reception@nvbusinesslawyers.com">Reception@nvbusinesslawyers.com</a>

---

**Morrill & Aronson**

Contact	Email
Christine Taradash	<a href="mailto:CTaradash@maazlaw.com">CTaradash@maazlaw.com</a>

---

**Morrill & Aronson P.L.C.**

Contact	Email
Debra Hitchens	<a href="mailto:dhitchens@maazlaw.com">dhitchens@maazlaw.com</a>

---

---

**Peel Brimley LLP**

Contact	Email
Amanda Armstrong	<a href="mailto:aarmstrong@peelbrimley.com">aarmstrong@peelbrimley.com</a>
Eric Zimbelman	<a href="mailto:ezimbelman@peelbrimley.com">ezimbelman@peelbrimley.com</a>
Kathy Gentile	<a href="mailto:kgentile@peelbrimley.com">kgentile@peelbrimley.com</a>
Ronnie Cox	<a href="mailto:rcox@peelbrimley.com">rcox@peelbrimley.com</a>
Rosey Jeffrey	<a href="mailto:rjeffrey@peelbrimley.com">rjeffrey@peelbrimley.com</a>

---

**Pezzillo Lloyd**

Contact	Email
Jennifer R. Lloyd	<a href="mailto:jlloyd@pezzillolloyd.com">jlloyd@pezzillolloyd.com</a>
Marisa L. Maskas, Esq.	<a href="mailto:mmaskas@pezzillolloyd.com">mmaskas@pezzillolloyd.com</a>

---

**Procopio Cory**

Contact	Email
Timothy E. Salter	<a href="mailto:tim.salter@procopio.com">tim.salter@procopio.com</a>

---

**Procopio Cory Hargreaves & Savitch**

Contact	Email
Andrew J. Kessler	<a href="mailto:andrew.kessler@procopio.com">andrew.kessler@procopio.com</a>
Carla Clark, Legal Secretary	<a href="mailto:carla.clark@procopio.com">carla.clark@procopio.com</a>
Rebecca Chapman	<a href="mailto:rebecca.chapman@procopio.com">rebecca.chapman@procopio.com</a>
Rebecca Chapman, Legal Secretary	<a href="mailto:rebecca.chapman@procopio.com">rebecca.chapman@procopio.com</a>
Scott R. Omohundro	<a href="mailto:scott.omohundro@procopio.com">scott.omohundro@procopio.com</a>
Timothy E. Salter	<a href="mailto:tim.salter@procopio.com">tim.salter@procopio.com</a>

---

**Procopio Cory Hargreaves & Savitch LLP**

Contact	Email
Cori Mandy, Legal Secretary	<a href="mailto:cori.mandy@procopio.com">cori.mandy@procopio.com</a>

---

**Procopio, Cory, Hargreaves & Savitch**

Contact	Email
Elmer Flores	<a href="mailto:elmer.flores@procopio.com">elmer.flores@procopio.com</a>
Joseph Frank	<a href="mailto:joseph.frank@procopio.com">joseph.frank@procopio.com</a>

---

**Procopio, Cory, Hargreaves & Savitch**

Contact	Email
Lenore Joseph	<a href="mailto:calendar@procopio.com">calendar@procopio.com</a>

---

**Richard L. Tobler, Ltd.**

Contact	Email
Richard Tobler	<a href="mailto:rltldck@hotmail.com">rltldck@hotmail.com</a>

---

---

**Rooker Rawlins**

Contact	Email
Legal Assistant	<a href="mailto:rrlegalassistant@rookerlaw.com">rrlegalassistant@rookerlaw.com</a>
Michael Rawlins	<a href="mailto:mrawlins@rookerlaw.com">mrawlins@rookerlaw.com</a>

---

**T. James Truman & Associates**

Contact	Email
District filings	<a href="mailto:district@trumanlegal.com">district@trumanlegal.com</a>

---

**The Langsdale Law Firm**

Contact	Email
Caleb Langsdale	<a href="mailto:Caleb@Langsdalelaw.com">Caleb@Langsdalelaw.com</a>

---

**Varricchio Law Firm**

Contact	Email
Paralegal	<a href="mailto:paralegal@varricchiolaw.com">paralegal@varricchiolaw.com</a>
Philip T. Varricchio	<a href="mailto:phil@varricchiolaw.com">phil@varricchiolaw.com</a>

---

**Watt, Tieder, Hoffar & Fitzgerald, L.L.P.**

Contact	Email
David R. Johnson	<a href="mailto:djohnson@watttieder.com">djohnson@watttieder.com</a>
Jennifer MacDonald	<a href="mailto:jmacdonald@watttieder.com">jmacdonald@watttieder.com</a>

---

**Williams & Associates**

Contact	Email
Donald H. Williams, Esq.	<a href="mailto:dwilliams@dhwlawlv.com">dwilliams@dhwlawlv.com</a>

---

BY

  
An Employee of WILSON ELSER MOSKOWITZ  
EDELMAN & DICKER LLP

MARQUIS AURBACH COFFING

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

**Marquis Aurbach Coffing**  
Jack Chen Min Juan, Esq.  
Nevada Bar No. 6367  
Cody S. Mounteer, Esq.  
Nevada Bar No. 11220  
10001 Park Run Drive  
Las Vegas, Nevada 89145  
Telephone: (702) 382-0711  
Facsimile: (702) 382-5816  
jjuan@maclaw.com  
cmounteer@maclaw.com  
Attorneys for APCO CONSTRUCTION

**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.: 13

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

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

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1 Pursuant to NRCP 30(b)(6), Plaintiffs are to required to designate one or more officers,  
2 directors, managing agents or other consenting persons most knowledgeable to testify on its  
3 behalf with respect to the topics set forth in the attached **Exhibit A**.

4 The deposition will be recorded by stenographic means, and oral examination will  
5 continue from day to day until completed. You are invited to attend and cross-examine.

6 Dated this 22nd day of May, 2017.

7  
8 MARQUIS AURBACH COFFING

9  
10 By

11 Jack Chen Min Juan, Esq.

12 Nevada Bar No. 6367

13 Cody S. Munteer, Esq.

14 Nevada Bar No. 11220

15 10001 Park Run Drive

16 Las Vegas, Nevada 89145

17 Attorney(s) for APCO

18 CONSTRUCTION APCO CONSTRUCTION  
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**EXHIBIT A****RULE 30. DEPOSITIONS BY ORAL EXAMINATION****(B) NOTICE OF EXAMINATION: GENERAL REQUIREMENTS; SPECIAL NOTICE; METHOD OF PRODUCTION OF DOCUMENTS AND THINGS; DEPOSITION OF ORGANIZATION; DEPOSITION BY TELEPHONE.**

(6) A party may in the party's notice and in a subpoena name as the deponent a public or private corporation or a partnership or association or governmental agency and describe with reasonable particularity the matters on which examination is requested. In that event, the organization so named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. A subpoena shall advise a nonparty organization of its duty to make such a designation. The persons so designated shall testify as to matters known or reasonably available to the organization. This subdivision (b)(6) does not preclude taking a deposition by any other procedure authorized in these rules.

[As amended; effective January 1, 2005.]

**TOPICS**

1. Your claims and facts as alleged against APCO;
2. Documents that you have disclosed in support of your claims against APCO;
3. Your assertion that APCO is liable for any portions of your general and/or lien claims;
4. The percentage/allocation of your general and/or lien claims against APCO versus CAMCO;
5. The payment process, payment details, scope of payments, parties involved, and standard practices of payment, including, but not limited to, all payment applications, approvals, amounts, checks, and releases;
6. Each fact related to your contract agreement with APCO in regard to the Manhattan West Project ("Project") at issue in this matter, including, but not limited to original contact(s), change orders, and ratification agreement(s);
7. Each fact related to your scope of work at the Project;
8. The structure of your business; and
9. Your viability and business status from the time you entered into the subject contract until the date of your deposition, including, but not limited to, whether your company has been sold, transferred control, wound down, and/or claimed bankruptcy.

**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing **NOTICE OF TAKING NRCP RULE 30(b)(6) DEPOSITION OF PERSON MOST KNOWLEDGEABLE FOR ZITTING BROTHERS CONSTRUCTION, INC.** was submitted electronically for service with the Eighth Judicial District Court on the 22nd day of May, 2017. Electronic service of the foregoing document shall be made in accordance with the E-Service List as follows:<sup>1</sup>

Wilson, Elser, Moskowitz, Edelman & Dicker LLP  
300 S. 4th St., 11th Floor  
Las Vegas, NV 89101

caleb@langsdaletlaw.com

"Cody Mounter, Esq." . cmounter@marquisaurbach.com

"Cori Mandy, Legal Secretary" . cori.mandy@procopio.com

"Donald H. Williams, Esq." . dwilliams@dhwlawlv.com

"Eric Dobberstein, Esq." . edobberstein@mcpalaw.com

"Marisa L. Maskas, Esq." . mmaskas@pezzilloloyd.com

"Martin A. Little, Esq." . mal@juww.com

"Martin A. Little, Esq." . mal@juww.com

6085 Joyce Heilich . heilichj@gtlaw.com

7132 Andrea Rosehill . rosehilla@gtlaw.com

Aaron D. Lancaster . alancaster@gerrard-cox.com

Agnes Wong . aw@juww.com

Amanda Armstrong . aarmstrong@peelbrimley.com

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

**MARQUIS AURBACH COFFING**

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

1	Andrea Montero .	amontero@gordonrees.com
2		
3	Andrew J. Kessler .	andrew.kessler@procopio.com
4	Becky Pintar .	bpintar@gglt.com
5	Benjamin D. Johnson .	ben.johnson@btjd.com
6	Beverly Roberts .	broberts@trumanlegal.com
7		
8	Brad Slighting .	bslighting@djplaw.com
9	Brian Walters .	bwalters@gordonrees.com
10	Caleb Langsdale .	Caleb@Langsdalelaw.com
11	Calendar .	calendar@litigationsservices.com
12	Cheri Vandermeulen .	cvandermeulen@dickinsonwright.com
13	Christine Spencer .	cspencer@dickinsonwright.com
14	Christine Spencer .	cspencer@mcpalaw.com
15	Christine Taradash .	CTaradash@maazlaw.com
16	Cindy Simmons .	csimmons@djplaw.com
17	CNN Cynthia Ney .	neyc@gtlaw.com
18	Courtney Peterson .	cpeterson@maclaw.com
19		
20	Cynthia Kelley .	ckelley@nevadafirm.com
21		
22	Dana Y. Kim .	dkim@caddenfuller.com
23	David J. Merrill .	david@djmerillpc.com
24	David R. Johnson .	djohnson@watttieder.com
25	Debbie Holloman .	dholloman@jamsadr.com
26		
27	Debbie Rosewall .	dr@juww.com
28	Debra Hitchens .	dhitchens@maazlaw.com



**MARQUIS AURBACH COFFING**

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

1	Depository .	Depository@litigationsservices.com
2		
3	District filings .	district@trumanlegal.com
4	Donna Wolfbrandt .	dwolfbrandt@dickinsonwright.com
5	Douglas D. Gerrard .	dgerrard@gerrard-cox.com
6	E-File Desk .	EfileLasVegas@wilsonelser.com
7		
8	Eric Dobberstein .	edobberstein@dickinsonwright.com
9	Eric Zimbelman .	ezimbelman@peelbrimley.com
10	Erica Bennett .	e.bennett@kempjones.com
11	Floyd Hale .	fhale@floydhale.com
12	George Robinson .	grobenson@pezzilloloyd.com
13	Glenn F. Meier .	gmeier@nevadafirm.com
14		
15	Gwen Rutar Mullins .	grm@h2law.com
16	Hrustyk Nicole .	Nicole.Hrustyk@wilsonelser.com
17	I-Che Lai .	I-Che.Lai@wilsonelser.com
18	IGH Bethany Rabe .	rabeb@gtlaw.com
19	IOM Mark Ferrario .	lvlitdock@gtlaw.com
20		
21	Jack Juan .	jjuan@marquisaurbach.com
22	Jennifer Case .	jcase@maclaw.com
23	Jennifer MacDonald .	jmacdonald@watttieder.com
24	Jennifer R. Lloyd .	Jlloyd@pezzilloloyd.com
25	Jineen DeAngelis .	jdeangelis@foxrothschild.com
26		
27	Jorge Ramirez .	Jorge.Ramirez@wilsonelser.com
28	Kathleen Morris .	kmorris@mcdonaldcarano.com

# MARQUIS AURBACH COFFING

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

1	Kaytlyn Bassett .	kbassett@gerrard-cox.com
2		
3	Kelly McGee .	kom@juww.com
4	Kenzie Dunn .	kdunn@btjd.com
5	Lani Maile .	Lani.Maile@wilsonelser.com
6	Legal Assistant .	rrlegalassistant@rookerlaw.com
7		
8	Linda Compton .	lcompton@gglts.com
9	LVGTDocketing .	lvlitdock@gtlaw.com
10	Marie Ogella .	mogella@gordonrees.com
11	Mark M. Jones .	mmj@kempjones.com
12	Matt Carter .	msc@kempjones.com
13	Matthew Carter .	m.carter@kempjones.com
14		
15	Michael R. Ernst .	mre@juww.com
16	Michael Rawlins .	mrawlins@rookerlaw.com
17	Pamela Montgomery .	pym@kempjones.com
18	Phillip Aurbach .	paurbach@maclaw.com
19		
20	Rachel E. Donn .	rdonn@nevadafirm.com
21	Rebecca Chapman .	rebecca.chapman@procopio.com
22	Receptionist .	Reception@nvbusinesslawyers.com
23	Renee Hoban .	rhoban@nevadafirm.com
24	Richard I. Dreitzer .	rdreitzer@foxrothschild.com
25		
26	Richard Tobler .	rtitldck@hotmail.com
27	Robert Schumacher .	rschumacher@gordonrees.com
28	Rosey Jeffrey .	rjeffrey@peelbrimley.com

**MARQUIS AURBACH COFFING**

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

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
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12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

Ryan Bellows .

rbellows@mcdonaldcarano.com

S. Judy Hirahara .

jhirahara@caddenfuller.com

Sarah A. Mead .

sam@juww.com

Steven Morris .

steve@gmdlegal.com

Tammy Cortez .

tcortez@caddenfuller.com

Taylor Fong .

tfong@marquisaurbach.com

Terri Hansen .

thansen@peelbrimley.com

Timothy E. Salter .

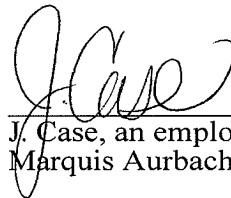
tim.salter@procopio.com

Wade B. Gochmour .

wbg@h2law.com

WTM Tami Cowden .

cowdent@gtlaw.com



J. Case, an employee of  
Marquis Aurbach Coffing

**NDEP**  
JORGE RAMIREZ, ESQ.  
Nevada Bar No. 6787  
I-CHE LAI, ESQ.  
Nevada Bar No. 12247  
WILSON, ELSE, MOSKOWITZ, EDELMAN & DICKER LLP  
300 South 4<sup>th</sup> Street, 11<sup>th</sup> Floor  
Las Vegas, NV 89101-6014  
Telephone: (702) 727-1400  
Facsimile: (702) 727-1401  
Jorge.Ramirez@wilsonelser.com  
I-Che.Lai@wilsonelser.com  
*Attorneys for Lien Clamant,*  
*Zitting Brothers Construction, Inc.*

**DISTRICT COURT**  
**CLARK COUNTY, NEVADA**

APCO CONSTRUCTION, a Nevada  
corporation,

Plaintiff,

vs.

GEMSTONE DEVELOPMENT WEST, INC.,  
a Nevada corporation,

Defendant.

CASE NO. A571228  
DEPT. NO. XIII

Consolidated with:

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

AND ALL RELATED MATTERS

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

**DATE: July 19, 2017**  
**TIME: 9:00 a.m.**

**(DATE CHANGE ONLY)**

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1173923v.1

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

3        **TO:    APCO CONSTRUCTION**

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

6        **TO:    ALL PARTIES AND THEIR RESPECTIVE ATTORNEYS OF RECORD**

7        PLEASE TAKE NOTICE that pursuant to NRCP 30(b)(6), ZITTING BROTHERS  
8        CONSTRUCTION, INC., ("ZBCI"), by and through its counsel of record, Jorge A. Ramirez, Esq.,  
9        and I-Che Lai, Esq., of the law firm of WILSON ELSEER MOSKOWITZ EDELMAN & DICKER,  
10        LLP, will take the oral deposition of one or more designated representatives for  
11        APCO CONSTRUCTION ("APCO") on the 19<sup>th</sup> day of July, 2017, at the hour of 9:00 a.m. at  
12        Esquire Deposition Solutions, located at 2300 W. Sahara Ave., Suite 770, Las Vegas, NV 89102.  
13        ZBCI plans to depose APCO's designated representative(s) on each of the numbered categories  
14        identified below. The deposition will take place before an officer duly authorized by law to  
15        administer oaths and record testimony. This deposition will be recorded by stenographic means and  
16        will be taken pursuant to all applicable provisions of the Nevada Rules of Civil Procedure pertaining  
17        to the taking of and use of depositions. You are invited to attend and cross-examine.  
18

19                                **DEFINITIONS**

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

21                                1.        The term "you" or "your" refers to APCO Construction, its employees, agents,  
22        representatives, attorneys, experts, and all other persons acting or purporting to act on its behalf.  
23

24                                2.        The term "Gemstone" refers to Gemstone Development West, Inc., its employees,  
25        agents, representatives, attorneys, experts, and all other persons acting or purporting to act on its  
26        behalf  
27

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

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

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

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

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

11  
12 **Areas of Examination Pursuant to Nev. R. Civ. P. 30(b)(6)**

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

16 1. All facts fact related to the Contract;  
17 2. All facts fact related to the Sub-Contract;  
18 3. All facts related to ZBCI's work under the Sub-Contract, including but not limited to  
19 the scope and quality of ZBCI's work;

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

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

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

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

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

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

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

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

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

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

13           DATED this 17<sup>th</sup> day of July, 2017.

14  
15  
16           WILSON ELSEER MOSKOWITZ EDELMAN &  
17           DICKER LLP

18           By: 

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

**CERTIFICATE OF SERVICE**

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

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

**Bennett Tueller Johnson & Deere**

**Contact**

Benjamin D. Johnson  
Chalise Walsh

**Email**

[ben.johnson@btjd.com](mailto:ben.johnson@btjd.com)  
[cwalsh@btjd.com](mailto:cwalsh@btjd.com)

**Brian K. Berman, Chtd.**

**Contact**

Brian K. Berman, Esq.

**Email**

[b.k.berman@att.net](mailto:b.k.berman@att.net)

**Cadden & Fuller LLP**

**Contact**

Dana Y. Kim  
S. Judy Hirahara  
Tammy Cortez

**Email**

[dkim@caddenfuller.com](mailto:dkim@caddenfuller.com)  
[jhirahara@caddenfuller.com](mailto:jhirahara@caddenfuller.com)  
[tcortez@caddenfuller.com](mailto:tcortez@caddenfuller.com)

**David J. Merrill P.C.**

**Contact**

David J. Merrill

**Email**

[david@djmerrillpc.com](mailto:david@djmerrillpc.com)

**Dickinson Wright, PLLC**

**Contact**

Cheri Vandermeulen  
Christine Spencer

**Email**

[cvandermeulen@dickinsonwright.com](mailto:cvandermeulen@dickinsonwright.com)  
[cspencer@dickinsonwright.com](mailto:cspencer@dickinsonwright.com)



Donna Wolfbrandt [dwolfbrandt@dickinsonwright.com](mailto:dwolfbrandt@dickinsonwright.com)  
Eric Dobberstein [edobberstein@dickinsonwright.com](mailto:edobberstein@dickinsonwright.com)

---

**Durham Jones & Pinegar**

Contact	Email
Brad Slighting	<a href="mailto:bslighting@djplaw.com">bslighting@djplaw.com</a>
Cindy Simmons	<a href="mailto:csimmons@djplaw.com">csimmons@djplaw.com</a>

---

**Fox Rothschild**

Contact	Email
Jineen DeAngelis	<a href="mailto:jideangelis@foxrothschild.com">jideangelis@foxrothschild.com</a>

---

**G.E. Robinson Law**

Contact	Email
George Robinson	<a href="mailto:grobinson@pezzilloloyd.com">grobinson@pezzilloloyd.com</a>

---

**GERRARD COX & LARSEN**

Contact	Email
Aaron D. Lancaster	<a href="mailto:alancaster@gerrard-cox.com">alancaster@gerrard-cox.com</a>
Douglas D. Gerrard	<a href="mailto:dgerrard@gerrard-cox.com">dgerrard@gerrard-cox.com</a>
Kaytlyn Bassett	<a href="mailto:kbassett@gerrard-cox.com">kbassett@gerrard-cox.com</a>

---

**Gibbs, Giden, Locher, Turner & Senet LLP**

Contact	Email
Becky Pintar	<a href="mailto:bpintar@gglt.com">bpintar@gglt.com</a>
Linda Compton	<a href="mailto:lcompton@ggls.com">lcompton@ggls.com</a>

---

**Gordon & Rees**

Contact	Email
Robert Schumacher	<a href="mailto:rschumacher@gordonrees.com">rschumacher@gordonrees.com</a>

---

**Gordon & Rees LLP**

Contact	Email
Andrea Montero	<a href="mailto:amontero@gordonrees.com">amontero@gordonrees.com</a>
Brian Walters	<a href="mailto:bwalters@gordonrees.com">bwalters@gordonrees.com</a>
Marie Ogella	<a href="mailto:mogella@gordonrees.com">mogella@gordonrees.com</a>

---

**GRANT MORRIS DODDS**

Contact	Email
Steven Morris	<a href="mailto:steve@gmdlegal.com">steve@gmdlegal.com</a>

---

**Greenberg Traurig, LLP**

Contact	Email
6085 Joyce Heilich	<a href="mailto:heilichj@gtlaw.com">heilichj@gtlaw.com</a>
7132 Andrea Rosehill	<a href="mailto:rosehilla@gtlaw.com">rosehilla@gtlaw.com</a>
CNN Cynthia Ney	<a href="mailto:neyc@gtlaw.com">neyc@gtlaw.com</a>

IGH Bethany Rabe	<a href="mailto:rabeb@gtlaw.com">rabeb@gtlaw.com</a>
IOM Mark Ferrario	<a href="mailto:lvlitdock@gtlaw.com">lvlitdock@gtlaw.com</a>
LVGTDocketing	<a href="mailto:lvlitdock@gtlaw.com">lvlitdock@gtlaw.com</a>
MOK Moorea Katz	<a href="mailto:katzmo@gtlaw.com">katzmo@gtlaw.com</a>
WTM Tami Cowden	<a href="mailto:cowdent@gtlaw.com">cowdent@gtlaw.com</a>

---

**HOLLEY DRIGGS WALCH FINE WRAY PUZEY & THOMPSON**

---

Contact	Email
Glenn F. Meier	<a href="mailto:gmeier@nevadafirm.com">gmeier@nevadafirm.com</a>
Renee Hoban	<a href="mailto:rhoban@nevadafirm.com">rhoban@nevadafirm.com</a>

---

**Holley Driggs Walch Fine Wray Puzey & Thompson**

---

Contact	Email
Cynthia Kelley	<a href="mailto:ckelley@nevadafirm.com">ckelley@nevadafirm.com</a>
Rachel E. Donn	<a href="mailto:rdonn@nevadafirm.com">rdonn@nevadafirm.com</a>

---

**Howard & Howard**

---

Contact	Email
Gwen Rutar Mullins	<a href="mailto:grm@h2law.com">grm@h2law.com</a>
Kellie Piet (Legal Assistant)	<a href="mailto:kdp@h2law.com">kdp@h2law.com</a>
Wade B. Gochnour	<a href="mailto:wbg@h2law.com">wbg@h2law.com</a>

---

**Jolley Urga Woodbury & Little**

---

Contact	Email
Agnes Wong	<a href="mailto:aw@juww.com">aw@juww.com</a>
Elizabeth J. Martin	<a href="mailto:em@juww.com">em@juww.com</a>
Kelly McGee	<a href="mailto:kom@juww.com">kom@juww.com</a>
Martin A. Little, Esq.	<a href="mailto:mal@juww.com">mal@juww.com</a>
Martin A. Little, Esq.	<a href="mailto:mal@juww.com">mal@juww.com</a>
Michael R. Ernst	<a href="mailto:mre@juww.com">mre@juww.com</a>
Michael R. Ernst, Esq.	<a href="mailto:mre@juww.com">mre@juww.com</a>

---

**Kemp, Jones & Coulthard**

---

Contact	Email
Erica Bennett	<a href="mailto:e.bennett@kempjones.com">e.bennett@kempjones.com</a>
J. Randall Jones	<a href="mailto:r.jones@kempjones.com">r.jones@kempjones.com</a>
Janet Griffin	<a href="mailto:jlg@kempjones.com">jlg@kempjones.com</a>
Mark M. Jones	<a href="mailto:mmj@kempjones.com">mmj@kempjones.com</a>
Matt Carter	<a href="mailto:msc@kempjones.com">msc@kempjones.com</a>
Matthew Carter	<a href="mailto:m.carter@kempjones.com">m.carter@kempjones.com</a>
Pamela Montgomery	<a href="mailto:pym@kempjones.com">pym@kempjones.com</a>

---

**Law Offices of Floyd Hale**

---

Contact	Email
Debbie Holloman	<a href="mailto:dholloman@jamsadr.com">dholloman@jamsadr.com</a>
Floyd Hale	<a href="mailto:fhale@floydhale.com">fhale@floydhale.com</a>

---

**Law Offices of Sean P. Hillin, P.C.**

Contact	Email
Caleb Langsdale, Esq.	<a href="mailto:caleb@langsdalelaw.com">caleb@langsdalelaw.com</a>

---

**Litigation Services & Technologies**

Contact	Email
Calendar	<a href="mailto:calendar@litigation-services.net">calendar@litigation-services.net</a>
Depository	<a href="mailto:Depository@litigation-services.net">Depository@litigation-services.net</a>

---

**Marquis Aurbach Coffing**

Contact	Email
Cally Hatfield	<a href="mailto:chatfield@maclaw.com">chatfield@maclaw.com</a>
Cody Mounteer, Esq.	<a href="mailto:cmounteer@marquisaurbach.com">cmounteer@marquisaurbach.com</a>
Courtney Peterson	<a href="mailto:cpeterson@maclaw.com">cpeterson@maclaw.com</a>
Jack Juan	<a href="mailto:jjuan@marquisaurbach.com">jjuan@marquisaurbach.com</a>
Jennifer Case	<a href="mailto:jcase@maclaw.com">jcase@maclaw.com</a>
Phillip Aurbach	<a href="mailto:paurbach@maclaw.com">paurbach@maclaw.com</a>
Taylor Fong	<a href="mailto:tfong@marquisaurbach.com">tfong@marquisaurbach.com</a>

---

**McCullough, Perez & Dobberstein, Esq.**

Contact	Email
Eric Dobberstein, Esq.	<a href="mailto:edobberstein@mcpalaw.com">edobberstein@mcpalaw.com</a>

---

**McCullough, Perez & Dobberstein, Ltd.**

Contact	Email
Christine Spencer	<a href="mailto:cspencer@mcpalaw.com">cspencer@mcpalaw.com</a>

---

**McDonald Carano Wilson, LLP**

Contact	Email
Kathleen Morris	<a href="mailto:kmorris@mcdonaldcarano.com">kmorris@mcdonaldcarano.com</a>
Ryan Bellows	<a href="mailto:rbellows@mcdonaldcarano.com">rbellows@mcdonaldcarano.com</a>

---

**Meier Fine & Wray, LLC**

Contact	Email
Receptionist	<a href="mailto:Reception@nvbusinesslawyers.com">Reception@nvbusinesslawyers.com</a>

---

**Morrill & Aronson**

Contact	Email
Christine Taradash	<a href="mailto:CTaradash@maazlaw.com">CTaradash@maazlaw.com</a>

---

**Morrill & Aronson P.L.C.**

Contact	Email
Debra Hitchens	<a href="mailto:dhitchens@maazlaw.com">dhitchens@maazlaw.com</a>

---

---

**Peel Brimley LLP**

Contact	Email
Amanda Armstrong	<a href="mailto:aarmstrong@peelbrimley.com">aarmstrong@peelbrimley.com</a>
Eric Zimbelman	<a href="mailto:ezimbelman@peelbrimley.com">ezimbelman@peelbrimley.com</a>
Kathy Gentile	<a href="mailto:kgentile@peelbrimley.com">kgentile@peelbrimley.com</a>
Ronnie Cox	<a href="mailto:rcox@peelbrimley.com">rcox@peelbrimley.com</a>
Rosey Jeffrey	<a href="mailto:rjeffrey@peelbrimley.com">rjeffrey@peelbrimley.com</a>

---

**Pezzillo Lloyd**

Contact	Email
Jennifer R. Lloyd	<a href="mailto:jlloyd@pezzillolloyd.com">jlloyd@pezzillolloyd.com</a>
Marisa L. Maskas, Esq.	<a href="mailto:mmaskas@pezzillolloyd.com">mmaskas@pezzillolloyd.com</a>

---

**Procopio Cory**

Contact	Email
Timothy E. Salter	<a href="mailto:tim.salter@procopio.com">tim.salter@procopio.com</a>

---

**Procopio Cory Hargreaves & Savitch**

Contact	Email
Andrew J. Kessler	<a href="mailto:andrew.kessler@procopio.com">andrew.kessler@procopio.com</a>
Carla Clark, Legal Secretary	<a href="mailto:carla.clark@procopio.com">carla.clark@procopio.com</a>
Rebecca Chapman	<a href="mailto:rebecca.chapman@procopio.com">rebecca.chapman@procopio.com</a>
Rebecca Chapman, Legal Secretary	<a href="mailto:rebecca.chapman@procopio.com">rebecca.chapman@procopio.com</a>
Scott R. Omohundro	<a href="mailto:scott.omohundro@procopio.com">scott.omohundro@procopio.com</a>
Timothy E. Salter	<a href="mailto:tim.salter@procopio.com">tim.salter@procopio.com</a>

---

**Procopio Cory Hargreaves & Savitch LLP**

Contact	Email
Cori Mandy, Legal Secretary	<a href="mailto:cori.mandy@procopio.com">cori.mandy@procopio.com</a>

---

**Procopio, Cory, Hargreaves & Savitch**

Contact	Email
Elmer Flores	<a href="mailto:elmer.flores@procopio.com">elmer.flores@procopio.com</a>
Joseph Frank	<a href="mailto:joseph.frank@procopio.com">joseph.frank@procopio.com</a>

---

**Procopio, Cory, Hargreaves & Savitch**

Contact	Email
Lenore Joseph	<a href="mailto:calendar@procopio.com">calendar@procopio.com</a>

---

**Richard L. Tobler, Ltd.**

Contact	Email
Richard Tobler	<a href="mailto:rltldck@hotmail.com">rltldck@hotmail.com</a>

---

---

**Rooker Rawlins**

Contact	Email
Legal Assistant	<a href="mailto:rlegalassistant@rookerlaw.com">rlegalassistant@rookerlaw.com</a>
Michael Rawlins	<a href="mailto:mrawlins@rookerlaw.com">mrawlins@rookerlaw.com</a>

---

**T. James Truman & Associates**

Contact	Email
District filings	<a href="mailto:district@trumanlegal.com">district@trumanlegal.com</a>

---

**The Langsdale Law Firm**

Contact	Email
Caleb Langsdale	<a href="mailto:Caleb@Langsdalelaw.com">Caleb@Langsdalelaw.com</a>

---

**Varricchio Law Firm**

Contact	Email
Paralegal	<a href="mailto:paralegal@varricchiolaw.com">paralegal@varricchiolaw.com</a>
Philip T. Varricchio	<a href="mailto:phil@varricchiolaw.com">phil@varricchiolaw.com</a>

---

**Watt, Tieder, Hoffar & Fitzgerald, L.L.P.**

Contact	Email
David R. Johnson	<a href="mailto:djohnson@watttieder.com">djohnson@watttieder.com</a>
Jennifer MacDonald	<a href="mailto:jmacdonald@watttieder.com">jmacdonald@watttieder.com</a>


---

**Williams & Associates**

Contact	Email
Donald H. Williams, Esq.	<a href="mailto:dwilliams@dhwlawlv.com">dwilliams@dhwlawlv.com</a>

---

BY

  
An Employee of WILSON ELSEER MOSKOWITZ  
EDELMAN & DICKER LLP

**Marquis Aurbach Coffing**  
Jack Chen Min Juan, Esq.  
Nevada Bar No. 6367  
Cody S. Mounteer, Esq.  
Nevada Bar No. 11220  
10001 Park Run Drive  
Las Vegas, Nevada 89145  
Telephone: (702) 382-0711  
Facsimile: (702) 382-5816  
jjuan@maclaw.com  
cmounteer@maclaw.com  
Attorneys for APCO CONSTRUCTION

**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.: 13

Consolidated with:

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

AND ALL RELATED MATTERS

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

PLEASE TAKE NOTICE that pursuant to Rule 30(b)(6) of the Nevada Rules of Civil Procedure, Plaintiff, APCO Construction, by and through its attorneys, Marquis Aurbach Coffing, will take the deposition of Zitting Brothers Construction, Inc. upon oral examination on **October 27, 2017 at 9:00a.m.** before a Notary Public, or before some other officer authorized by law to administer oaths. The deposition will take place at Marquis Aurbach Coffing located at 10001 Park Run Drive, Las Vegas, Nevada 89145.

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1 Pursuant to NRCP 30(b)(6), Plaintiffs are to required to designate one or more officers,  
2 directors, managing agents or other consenting persons most knowledgeable to testify on its  
3 behalf with respect to the topics set forth in the attached **Exhibit A**.

4 The deposition will be recorded by stenographic means, and oral examination will  
5 continue from day to day until completed. You are invited to attend and cross-examine.

6 Dated this 18<sup>th</sup> day of October, 2017.

7 MARQUIS AURBACH COFFING

8  
9 By 

10 Jack Chen Min Juan, Esq.

11 Nevada Bar No. 6367

12 Cody S. Mounteer, Esq.

13 Nevada Bar No. 11220

14 10001 Park Run Drive

15 Las Vegas, Nevada 89145

16 Attorney(s) for APCO

17 CONSTRUCTION APCO CONSTRUCTION  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**EXHIBIT A****RULE 30. DEPOSITIONS BY ORAL EXAMINATION****(B) NOTICE OF EXAMINATION: GENERAL REQUIREMENTS; SPECIAL NOTICE; METHOD OF PRODUCTION OF DOCUMENTS AND THINGS; DEPOSITION OF ORGANIZATION; DEPOSITION BY TELEPHONE.**

(6) A party may in the party's notice and in a subpoena name as the deponent a public or private corporation or a partnership or association or governmental agency and describe with reasonable particularity the matters on which examination is requested. In that event, the organization so named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. A subpoena shall advise a nonparty organization of its duty to make such a designation. The persons so designated shall testify as to matters known or reasonably available to the organization. This subdivision (b)(6) does not preclude taking a deposition by any other procedure authorized in these rules.

[As amended; effective January 1, 2005.]

**TOPICS**

1. Your claims and facts as alleged against APCO either in the lawsuit or statement of claim;
2. Documents that you have disclosed in support of your claims or damages against APCO;
3. Your assertion that APCO is liable for any portions of your general and/or lien claims;
4. The percentage/allocation of your general and/or lien claims against APCO versus CAMCO;
5. The payment process, payment details, scope of payments, parties involved, and standard practices of payment, including, but not limited to, all payment applications, approvals, amounts, checks, and releases related to the Manhattan West Project ("Project");
6. Each fact related to your contract agreement with APCO in regard to the Project at issue in this matter, including, but not limited to original contact(s), change orders, and ratification agreement(s);
7. Each fact related to your scope of work at the Project;
8. The structure of your business; and your viability and business status from the time you entered into the subject contract until the date of your deposition, including, but not



1 limited to, whether your company has been sold, transferred control, wound down, and/or  
2 claimed bankruptcy.

3 9. All facts and documents that support your entitlement and amount of claim  
4 against APCO, all lien releases signed by your company in favor of APCO, or that otherwise  
5 relate to the project, and all billing to and payments from Camco, and the discussions related to  
6 the ratification agreements.

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**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing **AMENDED NOTICE OF TAKING NRCP RULE 30(b)(6) DEPOSITION OF PERSON MOST KNOWLEDGEABLE FOR ZITTING BROTHERS CONSTRUCTION, INC.** was submitted electronically for service with the Eighth Judicial District Court on the 17th day of October, 2017. Electronic service of the foregoing document shall be made in accordance with the E-Service List as follows:<sup>1</sup>

caleb@langsdaletlaw.com

"Cody Mounteer, Esq." .

cmounteer@marquisaurbach.com

"Cori Mandy, Legal Secretary" .

cori.mandy@procopio.com

"Donald H. Williams, Esq." .

dwilliams@dhwlawlv.com

"Eric Dobberstein, Esq." .

edobberstein@mcpalaw.com

"Marisa L. Maskas, Esq." .

mmaskas@pezzilloloyd.com

"Martin A. Little, Esq." .

mal@juww.com

"Martin A. Little, Esq." .

mal@juww.com

6085 Joyce Heilich .

heilichj@gtlaw.com

7132 Andrea Rosehill .

rosehilla@gtlaw.com

Aaron D. Lancaster .

alancaster@gerrard-cox.com

Agnes Wong .

aw@juww.com

Amanda Armstrong .

aarmstrong@peelbrimley.com

Andrea Montero .

amontero@gordonrees.com

Andrew J. Kessler .

andrew.kessler@procopio.com

Becky Pintar .

bpintar@gglt.com

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

**MARQUIS AURBACH COFFING**

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

1	Benjamin D. Johnson .	ben.johnson@btjd.com
2		
3	Beverly Roberts .	broberts@trumanlegal.com
4	Brad Slighting .	bslighting@djplaw.com
5	Brian Walters .	bwalters@gordonrees.com
6	Caleb Langsdale .	Caleb@Langsdalelaw.com
7	Calendar .	calendar@litigationervices.com
8		
9	Cheri Vandermeulen .	cvandermeulen@dickinsonwright.com
10	Christine Spencer .	cspencer@dickinsonwright.com
11	Christine Spencer .	cspencer@mcpalaw.com
12	Christine Taradash .	CTaradash@maazlaw.com
13	Cindy Simmons .	csimmons@djplaw.com
14	CNN Cynthia Ney .	neyc@gtlaw.com
15		
16	Courtney Peterson .	cpeterson@maclaw.com
17	Cynthia Kelley .	ckelley@nevadafirm.com
18	Dana Y. Kim .	dkim@caddenfuller.com
19	David J. Merrill .	david@djmerillpc.com
20		
21	David R. Johnson .	djohnson@watttieder.com
22	Debbie Holloman .	dholloman@jamsadr.com
23	Debbie Rosewall .	dr@juww.com
24	Debra Hitchens .	dhitchens@maazlaw.com
25	Depository .	Depository@litigationervices.com
26		
27	District filings .	district@trumanlegal.com
28	Donna Wolfbrandt .	dwolfbrandt@dickinsonwright.com

**MARQUIS AURBACH COFFING**

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

1	Douglas D. Gerrard .	dgerrard@gerrard-cox.com
2		
3	E-File Desk .	EfileLasVegas@wilsonelser.com
4	Eric Dobberstein .	edobberstein@dickinsonwright.com
5	Eric Zimbelman .	ezimbelman@peelbrimley.com
6	Erica Bennett .	e.bennett@kempjones.com
7		
8	Floyd Hale .	fhale@floydhale.com
9	George Robinson .	grobinson@pezzillolloyd.com
10	Glenn F. Meier .	gmeier@nevadafirm.com
11	Gwen Rutar Mullins .	grm@h2law.com
12	Hrustyk Nicole .	Nicole.Hrustyk@wilsonelser.com
13	I-Che Lai .	I-Che.Lai@wilsonelser.com
14		
15	IGH Bethany Rabe .	rabeb@gtlaw.com
16	IOM Mark Ferrario .	lvitdock@gtlaw.com
17	Jack Juan .	jjuan@marquisaurbach.com
18	Jennifer Case .	jcase@maclaw.com
19	Jennifer MacDonald .	jmacdonald@watttieder.com
20		
21	Jennifer R. Lloyd .	Jlloyd@pezzillolloyd.com
22	Jineen DeAngelis .	jdeangelis@foxrothschild.com
23	Jorge Ramirez .	Jorge.Ramirez@wilsonelser.com
24	Kathleen Morris .	kmorris@mcdonaldcarano.com
25	Kaytlyn Bassett .	kbassett@gerrard-cox.com
26		
27	Kelly McGee .	kom@juww.com
28	Kenzie Dunn .	kdunn@btjd.com

**MARQUIS AURBACH COFFING**

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

1	Lani Maile .	Lani.Maile@wilsonelser.com
2		
3	Legal Assistant .	rrlegalassistant@rookerlaw.com
4	Linda Compton .	lcompton@gglts.com
5	LVGTDocketing .	lvlitdock@gtlaw.com
6	Marie Ogella .	mogella@gordonrees.com
7		
8	Mark M. Jones .	mmj@kempjones.com
9	Matt Carter .	msc@kempjones.com
10	Matthew Carter .	m.carter@kempjones.com
11	Michael R. Ernst .	mre@juww.com
12	Michael Rawlins .	mrawlins@rookerlaw.com
13	Pamela Montgomery .	pym@kempjones.com
14	Phillip Aurbach .	paurbach@maclaw.com
15		
16	Rachel E. Donn .	rdonn@nevadafirm.com
17	Rebecca Chapman .	rebecca.chapman@procopio.com
18	Receptionist .	Reception@nvbusinesslawyers.com
19	Renee Hoban .	rhoban@nevadafirm.com
20		
21	Richard I. Dreitzer .	rdreitzer@foxrothschild.com
22	Richard Tobler .	rltldck@hotmail.com
23	Robert Schumacher .	rschumacher@gordonrees.com
24	Rosey Jeffrey .	rjeffrey@peelbrimley.com
25		
26	Ryan Bellows .	rbellows@mcdonaldcarano.com
27	S. Judy Hirahara .	jhirahara@caddenfuller.com
28	Sarah A. Mead .	sam@juww.com

**MARQUIS AURBACH COFFING**

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

1 Steven Morris .

steve@gmdlegal.com

2 Tammy Cortez .

tcortez@caddenfuller.com

3 Taylor Fong .

tfong@marquisaurbach.com

4 Terri Hansen .

thansen@peelbrimley.com

5 Timothy E. Salter .

tim.salter@procopio.com

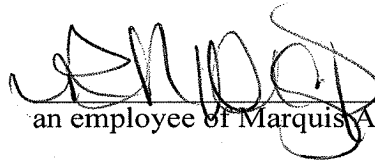
6 Wade B. Gochnour .

wbg@h2law.com

7 WTM Tami Cowden .

cowdent@gtlaw.com

8  
9  
10  
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13  
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16  
17  
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19  
20  
21  
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28



an employee of Marquis Aurbach Coffing

MARQUIS AURBACH COFFING

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

1 **Marquis Aurbach Coffing**  
2 Jack Chen Min Juan, Esq.  
3 Nevada Bar No. 6367  
4 Cody S. Munteer, Esq.  
5 Nevada Bar No. 11220  
6 10001 Park Run Drive  
7 Las Vegas, Nevada 89145  
8 Telephone: (702) 382-0711  
9 Facsimile: (702) 382-5816  
10 jjuan@maclaw.com  
11 cmunteer@maclaw.com  
12 Attorneys for APCO CONSTRUCTION

DISTRICT COURT

CLARK COUNTY, NEVADA

13 APCO CONSTRUCTION, a Nevada  
14 corporation,

15 Plaintiff,

16 vs.

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

19 Defendant.

Case No.: A571228  
Dept. No.: 13

Consolidated with:

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

20 AND ALL RELATED MATTERS

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

21 PLEASE TAKE NOTICE that pursuant to Rule 30(b)(6) of the Nevada Rules of Civil  
22 Procedure, Plaintiff, APCO Construction, by and through its attorneys, Marquis Aurbach  
23 Coffing, will take the deposition of Zitting Brothers Construction, Inc. upon oral examination on  
24 **October 27, 2017 at 9:00a.m.** before a Notary Public, or before some other officer authorized  
25 by law to administer oaths. The deposition will take place at **Litigation Services located at  
3770 Howard Hughes Parkway, Suite 300, Las Vegas, Nevada 89169.**

26 //

27 //

28 //

1 Pursuant to NRCP 30(b)(6), Plaintiffs are to required to designate one or more officers,  
2 directors, managing agents or other consenting persons most knowledgeable to testify on its  
3 behalf with respect to the topics set forth in the attached **Exhibit A**.

4 The deposition will be recorded by stenographic means, and oral examination will  
5 continue from day to day until completed. You are invited to attend and cross-examine.

6 Dated this 23<sup>rd</sup> day of October, 2017.

7  
8 MARQUIS AURBACH COFFING

9  
10 By 

11 Jack Chen Min Juan, Esq.

12 Nevada Bar No. 6367

13 Cody S. Munteer, Esq.

14 Nevada Bar No. 11220

15 10001 Park Run Drive

16 Las Vegas, Nevada 89145

17 Attorney(s) for APCO

18 CONSTRUCTION APCO CONSTRUCTION  
19  
20  
21  
22  
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**EXHIBIT A****RULE 30. DEPOSITIONS BY ORAL EXAMINATION****(B) NOTICE OF EXAMINATION: GENERAL REQUIREMENTS; SPECIAL NOTICE: METHOD OF PRODUCTION OF DOCUMENTS AND THINGS; DEPOSITION OF ORGANIZATION; DEPOSITION BY TELEPHONE.**

(6) A party may in the party's notice and in a subpoena name as the deponent a public or private corporation or a partnership or association or governmental agency and describe with reasonable particularity the matters on which examination is requested. In that event, the organization so named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. A subpoena shall advise a nonparty organization of its duty to make such a designation. The persons so designated shall testify as to matters known or reasonably available to the organization. This subdivision (b)(6) does not preclude taking a deposition by any other procedure authorized in these rules.

[As amended; effective January 1, 2005.]

**TOPICS**

1. Your claims and facts as alleged against APCO either in the lawsuit or statement of claim;
2. Documents that you have disclosed in support of your claims or damages against APCO;
3. Your assertion that APCO is liable for any portions of your general and/or lien claims;
4. The percentage/allocation of your general and/or lien claims against APCO versus CAMCO;
5. The payment process, payment details, scope of payments, parties involved, and standard practices of payment, including, but not limited to, all payment applications, approvals, amounts, checks, and releases related to the Manhattan West Project ("Project");
6. Each fact related to your contract agreement with APCO in regard to the Project at issue in this matter, including, but not limited to original contact(s), change orders, and ratification agreement(s);
7. Each fact related to your scope of work at the Project;
8. The structure of your business; and your viability and business status from the time you entered into the subject contract until the date of your deposition, including, but not

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limited to, whether your company has been sold, transferred control, wound down, and/or claimed bankruptcy.

9. All facts and documents that support your entitlement and amount of claim against APCO, all lien releases signed by your company in favor of APCO, or that otherwise relate to the project, and all billing to and payments from Camco, and the discussions related to the ratification agreements.

**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing **SECOND AMENDED NOTICE OF TAKING NRCP RULE 30(b)(6) DEPOSITION OF PERSON MOST KNOWLEDGEABLE FOR ZITTING BROTHERS CONSTRUCTION, INC.** was submitted electronically for service with the Eighth Judicial District Court on the \_\_\_\_ day of October, 2017. Electronic service of the foregoing document shall be made in accordance with the E-Service List as follows:<sup>1</sup>

caleb@langsdaletlaw.com

"Cody Munteer, Esq." . cmounteer@marquisaurbach.com

"Cori Mandy, Legal Secretary" . cori.mandy@procopio.com

"Donald H. Williams, Esq." . dwilliams@dhwlawlv.com

"Eric Dobberstein, Esq." . edobberstein@mcpalaw.com

"Marisa L. Maskas, Esq." . mmaskas@pezzillolloyd.com

"Martin A. Little, Esq." . mal@juww.com

"Martin A. Little, Esq." . mal@juww.com

6085 Joyce Heilich . heilichj@gtlaw.com

7132 Andrea Rosehill . rosehill@gtlaw.com

Aaron D. Lancaster . alancaster@gerrard-cox.com

Agnes Wong . aw@juww.com

Amanda Armstrong . aarmstrong@peelbrimley.com

Andrea Montero . amontero@gordonrees.com

Andrew J. Kessler . andrew.kessler@procopio.com

Becky Pintar . bpintar@gglt.com

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

**MARQUIS AURBACH COFFING**

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

1	Benjamin D. Johnson .	ben.johnson@btjd.com
2		
3	Beverly Roberts .	broberts@trumanlegal.com
4	Brad Slighting .	bslighting@djplaw.com
5	Brian Walters .	bwalters@gordonrees.com
6	Caleb Langsdale .	Caleb@Langsdalelaw.com
7	Calendar .	calendar@litigationervices.com
8		
9	Cheri Vandermeulen .	cvandermeulen@dickinsonwright.com
10	Christine Spencer .	cspencer@dickinsonwright.com
11	Christine Spencer .	cspencer@mcpalaw.com
12	Christine Taradash .	CTaradash@maazlaw.com
13	Cindy Simmons .	csimmons@djplaw.com
14	CNN Cynthia Ney .	neyc@gtlaw.com
15		
16	Courtney Peterson .	cpeterson@maclaw.com
17	Cynthia Kelley .	ckelley@nevadafirm.com
18	Dana Y. Kim .	dkim@caddenfuller.com
19		
20	David J. Merrill .	david@djmerillpc.com
21	David R. Johnson .	djohnson@watttieder.com
22	Debbie Holloman .	dholloman@jamsadr.com
23	Debbie Rosewall .	dr@juww.com
24	Debra Hitchens .	dhitchens@maazlaw.com
25	Depository .	Depository@litigationervices.com
26		
27	District filings .	district@trumanlegal.com
28	Donna Wolfbrandt .	dwolfbrandt@dickinsonwright.com

**MARQUIS AURBACH COFFING**

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

1	Douglas D. Gerrard .	dgerrard@gerrard-cox.com
2	E-File Desk .	EfileLasVegas@wilsonelser.com
3	Eric Dobberstein .	edobberstein@dickinsonwright.com
4	Eric Zimbelman .	ezimbelman@peelbrimley.com
5	Erica Bennett .	e.bennett@kempjones.com
6	Floyd Hale .	fhale@floydhale.com
7	George Robinson .	grobinson@pezzilloloyd.com
8	Glenn F. Meier .	gmeier@nevadafirm.com
9	Gwen Rutar Mullins .	grm@h2law.com
10	Hrustyk Nicole .	Nicole.Hrustyk@wilsonelser.com
11	I-Che Lai .	I-Che.Lai@wilsonelser.com
12	IGH Bethany Rabe .	rabeb@gtlaw.com
13	IOM Mark Ferrario .	lvitdock@gtlaw.com
14	Jack Juan .	jjuan@marquisaurbach.com
15	Jennifer Case .	jcase@maclaw.com
16	Jennifer MacDonald .	jmacdonald@watttieder.com
17	Jennifer R. Lloyd .	Jlloyd@pezzilloloyd.com
18	Jineen DeAngelis .	jdeangelis@foxrothschild.com
19	Jorge Ramirez .	Jorge.Ramirez@wilsonelser.com
20	Kathleen Morris .	kmorris@mcdonaldcarano.com
21	Kaytlyn Bassett .	kbassett@gerrard-cox.com
22	Kelly McGee .	kom@juww.com
23	Kenzie Dunn .	kdunn@btjd.com

**MARQUIS AURBACH COFFING**

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

1	Lani Maile .	Lani.Maile@wilsonelser.com
2		
3	Legal Assistant .	rrlegalassistant@rookerlaw.com
4	Linda Compton .	lcompton@gglts.com
5	LVGTDocketing .	lvitdock@gtlaw.com
6	Marie Ogella .	mogella@gordonrees.com
7		
8	Mark M. Jones .	mmj@kempjones.com
9	Matt Carter .	msc@kempjones.com
10	Matthew Carter .	m.carter@kempjones.com
11	Michael R. Ernst .	mre@juww.com
12	Michael Rawlins .	mrawlins@rookerlaw.com
13	Pamela Montgomery .	pym@kempjones.com
14	Phillip Aurbach .	paurbach@maclaw.com
15		
16	Rachel E. Donn .	rdonn@nevadafirm.com
17	Rebecca Chapman .	rebecca.chapman@procopio.com
18	Receptionist .	Reception@nvbusinesslawyers.com
19	Renee Hoban .	rhoban@nevadafirm.com
20		
21	Richard I. Dreitzer .	rdreitzer@foxrothschild.com
22	Richard Tobler .	rltldck@hotmail.com
23	Robert Schumacher .	rschumacher@gordonrees.com
24	Rosey Jeffrey .	rjeffrey@peelbrimley.com
25		
26	Ryan Bellows .	rbellows@mcdonaldcarano.com
27	S. Judy Hirahara .	jhirahara@caddenfuller.com
28	Sarah A. Mead .	sam@juww.com

**MARQUIS AURBACH COFFING**

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

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20  
21  
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23  
24  
25  
26  
27  
28

Steven Morris .

steve@gmdlegal.com

Tammy Cortez .

tcortez@caddenfuller.com

Taylor Fong .

tfong@marquisaurbach.com

Terri Hansen .

thansen@peelbrimley.com

Timothy E. Salter .

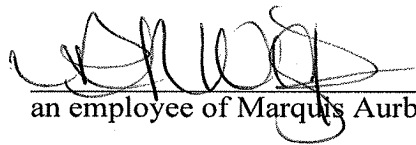
tim.salter@procopio.com

Wade B. Gochmour .

wbg@h2law.com

WTM Tami Cowden .

cowdent@gtlaw.com



an employee of Marquis Aurbach Coffing