

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

2 APCO CONSTRUCTION, INC., A
3 NEVADA CORPORATION,

4 Appellant,

5 vs.

6 ZITTING BROTHERS CONSTRUCTION,
7 INC.,

8 Respondent.

Case No. 75197

District Court Case No. A571228

Electronically Filed
Oct 23 2019 02:37 p.m.
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Apr 03 2018 09:14 a.m.
Elizabeth A. Brown
Clerk of Supreme Court

9 **APPENDIX TO DOCKETING STATEMENT**
10 **IN CASE NO. 75197**

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15 *and*

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19 **APPENDIX TO DOCKETING STATEMENT**

20 **DOCUMENTS**

BATE STAMP

VOLUME

| | | NO. | |
|----|----------|---|----------|
| 1 | A | District Court Case Docket | 1-98 |
| 2 | B | September 21, 2017 Notice of Entry of Order Granting Plaintiff's Oral Motion to Dismiss | 99-105 |
| 3 | C | Findings of Fact, Conclusions of Law, and Order Granting Zitting Brothers Construction, Inc.'s Motion for Partial Summary Judgment Against APCO Construction entered on December 27, 2017 | 106-117 |
| 4 | D | Order Denying APCO Construction, Inc.'s Motion for Reconsideration of Court's Order Granting Zitting Brothers Construction, Inc.'s Partial Motion for Summary Judgment entered on January 25, 2018 | 118-120 |
| 5 | E | Notice of Entry of Judgment for the Findings of Fact, Conclusions of Law, and Order Granting Zitting Brothers Construction, Inc.'s Motion for Partial Summary Judgment Against APCO Construction was entered on January 2, 2018 | 121-134 |
| 6 | F | Notice of Entry of Order Denying APCO Construction, Inc.'s Motion for Reconsideration of Court's Order Granting Zitting Brothers Construction, Inc.'s Partial Motion for Summary Judgment entered on January 31, 2018 | 135-139 |
| 7 | G | Last-filed version of all complaints, counterclaims, and/or cross-claims filed in the district court, any tolling motion, the order challenged on appeal and written notice of entry for any attached orders | 140-1066 |
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4/2/2018

<https://www.clarkcountycourts.us/Anonymous/CaseDetail.aspx?CaseID=6680533>

02/25/2013 **Brief**
Scott Financial Corporation And Bradley J. Scott's Evidentiary Hearing Brief

02/25/2013 **Brief**
Tharaldson Parties' Evidentiary Hearing Brief and Limited Joinder to Peel Brimley Lien Claimants' Pre-hearing Brief and Disclosures

02/26/2013 **Joinder**
APCO Construction's Joinder to Peel Brimley Lien Claimants' Pre-Hearing Brief and Disclosures

02/26/2013 **Errata**
Errata To Scott Financial Corporation And Bradley J. Scott's Evidentiary Hearing Brief

03/01/2013 **All Pending Motions** (9:00 AM) (Judicial Officer Scann, Susan)
Parties Present
Minutes
Result: Matter Heard

03/05/2013 **Motion to Withdraw As Counsel**
Motion to Withdraw as Attorney of Record for Harsco Corporation

03/07/2013 **Transcript of Proceedings**
Transcript of Proceedings: Excerpt of Status Check: RE: Sale of Property, Evidentiary Hearing: Real Estate Commission for the Private Sale (Testimony of Bradley Scott) March 1, 2013

03/07/2013 **All Pending Motions** (1:00 PM) (Judicial Officer Scann, Susan)
Parties Present
Minutes
Result: Matter Heard

03/12/2013 **Transcript of Proceedings**
Transcript of Proceedings: Status Check: RE: Sale of Property, Evidentiary Hearing: Real Estate Commission for the Private Sale, March 1, 2013

03/12/2013 **Transcript of Proceedings**
Transcript of Proceedings: Status Check: RE: Sale of Property, Evidentiary Hearing: Real Estate Commission for the Private Sale, March 7, 2013

03/26/2013 **Decision** (10:00 AM) (Judicial Officer Scann, Susan)
03/26/2013, 04/03/2013
Minutes
Result: Continued

04/03/2013 **CANCELED Calendar Call** (10:30 AM) (Judicial Officer Scann, Susan)
Vacated - Superseding Order

04/03/2013 **Decision and Order**
Decision and Order

04/03/2013 **Notice of Entry of Decision and Order**
Notice of Entry of Decision and Order on Motion to Set Hearing

04/04/2013 **Stipulation and Order for Dismissal**
A587168 Stipulation and Order to Dismiss E&E Fire Protection, LLC Only Pursuant to the Terms Stated Below

04/04/2013 **Amended Notice**
Amended Notice of Entry of Decision and Order on Motion to Set Hearing

04/08/2013 **CANCELED Bench Trial** (10:30 AM) (Judicial Officer Scann, Susan)
Vacated - Superseding Order

04/08/2013 **Notice of Entry of Stipulation and Order**
A587168

04/10/2013 **Motion to Withdraw as Counsel** (3:00 AM) (Judicial Officer Scann, Susan)
Donald H. Williams, Esq.'s Motion to Withdraw as Attorney of Record for Harsco Corporation
Minutes
Result: Granted

04/23/2013 **Order**
Order Approving Sale of Property

04/25/2013 **Notice of Entry of Order**
Notice of Entry of Order Approving Sale of Property

04/25/2013 **Motion to Set Aside**
Notice Of Motion And Motion To Set Aside Order Or Judgment

04/25/2013 **Release**
Ahern Rentals, Inc.'s Partial Release of Judgment Lien

04/30/2013 **Ex Parte Application**
Defendant Scott Financial Corporation's Ex Parte Application for Order To Show Cause on Order Shortening Time

05/02/2013 **Order to Show Cause**
Order to Show Cause

05/07/2013 **Order Granting Motion**
Order Granting Donald H. Williams, Esq.'s Motion to Withdraw as Attorney of Record for Harsco Corporation

05/08/2013 **CANCELED Pre Trial Conference** (10:30 AM) (Judicial Officer Scann, Susan)
Vacated - per Judge

05/08/2013 **Affidavit of Service**
Affidavit of Service

05/09/2013 **CANCELED Show Cause Hearing** (10:00 AM) (Judicial Officer Scann, Susan)
Vacated - per Judge

0067

05/09/2013 *Show Cause Hearing*
Notice of Entry of Order
Notice of Entry of Order
 05/15/2013 **CANCELED Calendar Call** (10:30 AM) (Judicial Officer Scann, Susan)
Vacated - per Judge
 05/17/2013 **Release**
PCI Group, LLC's Partial Release of Judgment Lien
 05/20/2013 **CANCELED Jury Trial** (10:30 AM) (Judicial Officer Scann, Susan)
Vacated - per Judge
 05/22/2013 **Release**
PCI Group LLC's Partial Release of Judgment Lien
 05/23/2013 **CANCELED Show Cause Hearing** (10:00 AM) (Judicial Officer Scann, Susan)
Vacated - per Judge
Defendant Scott Financial Corporation's Ex Parte Application for Order to Show Cause on Order Shortening Time
 05/30/2013 **Motion to Set Aside** (9:00 AM) (Judicial Officer Scann, Susan)
Defendant Selina Cisneros' Motion To Set Aside Order or Judgment
Parties Present
Minutes
 Result: Off Calendar
 06/06/2013 **Motion for Judgment**
(1) APCO's Limited Motion to Lift Stay for Purposes of this Motion Only; (2) APCO's Motion for Judgment Against Gemstone Only; and (2) Request for Order Shortening Time
 06/12/2013 **Opposition to Motion**
Scott Financial Corporation's Opposition to (1) Apco Construction, Inc's Limited Motion to Lift Stay (2) Motion for Judgment Against Gemstone only; and (3) Request for Order Shortening Time
 06/13/2013 **Motion** (10:00 AM) (Judicial Officer Scann, Susan)
(1) APCO's Limited Motion to Lift Stay for Purposes of this Motion Only; (2) APCO's Motion for Judgment Against GEMSTONE Only; and (3) Request for Order Shortening Time
Parties Present
Minutes
 Result: Granted
 06/13/2013 **Stipulation**
Stipulation Regarding Reconveyance of Deeds of Trust Encumbering Property
 01/09/2014 **Miscellaneous Filing**
Notice of Screening Device
 03/18/2014 **Consent to Service By Electronic Means**
Consent to Service By Electronic Means
 03/18/2014 **Notice**
Notice of Change of Handling Attorney
 04/22/2014 **Notice of Substitution of Parties**
Substitution of Real Party in Interest
 04/30/2014 **Transcript of Proceedings**
Portion of Transcript: Scott Defendants' Motion to Lift Stay, Allow Sale to Proceed with Deposit of Funds Pending Further Court Order, and for Posting of Bond, July 2, 2012
 04/30/2014 **Transcript of Proceedings**
Transcript of Proceedings: Evidentiary Hearing, July 9, 2012
 04/30/2014 **Transcript of Proceedings**
Transcript of Proceedings: Evidentiary Hearing, July 10, 2012
 05/28/2014 **Motion**
Insulpro Projects, Inc.'s Motion to Lift Stay
 06/16/2014 **Opposition to Motion**
APCO Construction's Opposition to Insulpro Project, Inc.'s Motion to Lift Stay
 06/18/2014 **Stipulation and Order**
Stipulation and Order to Continue the Hearing on Insulpro Projects Inc.'s Motion to Lift Stay
 06/19/2014 **Notice of Entry of Order**
Notice of Entry of Stipulation and Order to Continue Hearing on Insulpro Projects Inc.'s Motion to Lift Stay
 06/20/2014 **Reply to Opposition**
Insulpro Projects, Inc.'s Reply to Apco Construction's Opposition to Motion to Lift Stay
 06/20/2014 **Opposition**
Opposition of Scott Financial Corporation to Insulpro Project, Inc.'s Motion to Lift Stay
 06/23/2014 **Opposition**
Camco Pacific Construction Company, Inc.'s Opposition to Insulpro Projects, Inc.'s Motion to Lift Stay
 07/02/2014 **Reply to Opposition**
Insulpro Projects, Inc.'s Reply to Camco Pacific Construction Company, Inc.'s Opposition to Motion to Lift Stay
 07/15/2014 **Motion** (9:00 AM) (Judicial Officer Scann, Susan)
Insulpro Projects, Inc.'s Motion to Lift Stay
Parties Present
Minutes
 07/01/2014 Reset by Court to 07/15/2014

Result: Denied

07/28/2014 **Order Denying**
Order Denying Insulpro Projects Inc.'s Motion to Lift Stay

07/29/2014 **Notice of Entry of Order**
Notice of Entry of Order Denying Insulpro Projects Inc.'s Motion to Lift Stay

03/11/2015 **Opposition**
Opposition to Affidavit of Renewal of Judgment

07/13/2015 **Motion to Withdraw As Counsel**
Motion to Withdraw as Counsel of Record For Northstar Concrete, Inc.

08/19/2015 **Motion to Withdraw as Counsel** (3:00 AM) (Judicial Officer Scann, Susan)
The Law Firm of Pezzillo Lloyd's Motion to Withdraw as Counsel of Record For Northstar Concrete, Inc.

Minutes

Result: Minute Order - No Hearing Held

08/31/2015 **Order Granting Motion**
Order Granting Motion to Withdraw as Counsel of Record For Northstar Concrete, Inc.

08/31/2015 **Notice of Entry of Order**
Notice of Entry of Order Granting Motion to Withdraw as Counsel of Record for Northstar Concrete Inc.

10/07/2015 **Notice of Hearing**
Notice of Hearing for Status Check

10/21/2015 **Status Check** (9:30 AM) (Judicial Officer Scann, Susan)
10/21/2015, 04/21/2016
Status Check: Disbursement of Sale Proceeds & any other Matters Remaining following the S. CT. Decision 131Nev., Adv. Op. 70

Minutes
04/20/2016 Reset by Court to 04/21/2016

Result: Matter Continued

11/05/2015 **Substitution of Attorney**
Substitution of Attorney

03/14/2016 **Case Reassigned to Department 15**
Reassigned From Judge Susan Scann - Dept 29

03/14/2016 **Notice of Department Reassignment**
Notice of Department Reassignment

03/28/2016 **Motion**
Motion for Order Shortening Time for Hearing on Joint Motion to Release Sale Proceeds from Court-Controlled Escrow Account

03/28/2016 **Motion**
Joint Motion to Release Sale Proceeds from Court Controlled Escrow Account on Order Shortening Time

04/05/2016 **Notice of Appearance**
Notice of Appearance

04/14/2016 **Motion to Release Funds** (9:00 AM) (Judicial Officer Denton, Mark R.)
Club Vista Financial Services, LLC. and Tharaldson Motels II, Inc.'s Motion for Order Shortening Time for Hearing on Joint Motion to Release Sale Proceeds from Court-Controlled Escrow Account

Parties Present

Minutes

Result: Matter Resolved

04/14/2016 **Order**
Order Releasing Sale Proceeds from Court-Controlled Escrow Account

04/14/2016 **Notice of Entry of Order**
Notice of Entry of Order Releasing Sale Proceeds from Court-Controlled Escrow Account

05/06/2016 **Order**
Order RE: Status Check

05/09/2016 **Motion**
Motion to Appoint Special Master

05/18/2016 **Motion to Withdraw As Counsel**
Motion to Withdraw

05/18/2016 **Motion for Summary Judgment**
Renewed Motion for Partial Summary Judgment

05/18/2016 **Opposition to Motion**
Insulpro Project's Limited Opposition to Apco Construction's Motion to Appoint Special Master

05/18/2016 **Application**
Application for Order Shortening Time Re: Motion to Withdraw

05/20/2016 **Order Shortening Time**
Order Granting Movant's Application for Order Shortening Time on its Motion to Withdraw

05/23/2016 **Notice of Entry of Order**
Notice of Entry of Order Granting Movant's Application for Order Shortening Time on its Motion to Withdraw

05/24/2016 **Certificate of Service**
Certificate of Service - Notice of Entry of Order Granting Movant's Application for Order Shortening Time on its Motion to Withdraw

05/25/2016 **Opposition to Motion**
Peel Brimley Lien Claimants' Limited Opposition to APCO's Motion to Appoint Special Master

05/31/2016 **Opposition to Motion**
Zitting Brothers Construction, Inc.'s Joinder to Peel Brimley Lien Claimants' Limited Opposition to APCO's Motion to Appoint Special Master

05/31/2016 **Reply in Support**

4/2/2018

<https://www.clarkcountycourts.us/Anonymous/CaseDetail.aspx?CaseID=6680533>

APCO Construction's Reply in Support of Motion to Appoint Special Master

05/31/2016 **Joinder to Motion For Partial Summary Judgment**
Zitting Brothers Construction, Inc.'s Joinder to Insulpro Projects, Inc.'s Renewed Motion for Partial Summary Judgment

05/31/2016 **Joinder**
Joinder to Peel Brimley Lien Claimants' Limited Opposition to APCO's Motion to Appoint Special Master

06/01/2016 **Initial Appearance Fee Disclosure**
Fee Disclosure for Zitting Brothers Construction, Inc.'s Joinder to Insulpro Projects, Inc.'s Renewed Motion for Partial Summary Judgment

06/02/2016 **Status Check** (9:00 AM) (Judicial Officer Denton, Mark R.)
Result: Matter Heard

06/02/2016 **Motion to Withdraw as Counsel** (9:00 AM) (Judicial Officer Denton, Mark R.)
Smith & Shapiro, PLLC's Motion to Withdraw
06/20/2016 Reset by Court to 06/02/2016
Result: Granted

06/02/2016 **Order to Withdraw as Attorney of Record**
Order Granting Movant's Motion to Withdraw

06/02/2016 **Notice of Entry of Order**
Notice of Entry of Order Granting Movant's Motion to Withdraw

06/02/2016 **Opposition to Motion For Summary Judgment**
Scott Financial Corporation's Limited Opposition to Lien Claimant Insulpro's Projects, Inc.'s Renewed Motion for Partial Summary Judgment

06/02/2016 **All Pending Motions** (9:00 AM) (Judicial Officer Denton, Mark R.)
Minutes
Result: Matter Heard

06/06/2016 **Opposition**
Camco's Opposition to Insulpro's Renewed Motion for Partial Summary Judgment

06/06/2016 **Opposition and Countermotion**
APCO's Opposition to Renewed Motion for Partial Summary Judgment and Joinder thereto; and Countermotion to Dismiss and/or for Summary Judgment Against Insulpro

06/07/2016 **Initial Appearance Fee Disclosure**
Initial Appearance Fee Disclosure

06/09/2016 **Motion** (9:00 AM) (Judicial Officer Denton, Mark R.)
Plaintiff's Motion to Appoint Special Master
Minutes
Result: Motion Granted

06/09/2016 **Order Appointing Special Master**
Order: Appointing Special Master

06/13/2016 **Notice of Entry of Order**
Notice of Entry of Order

06/15/2016 **Reply in Support**
Reply in Support of Renewed Motion for Partial Summary Judgment Re: Apco Opposition

06/15/2016 **Reply in Support**
Reply in Support of Renewed Motion for Partial Summary Judgment re: Camco Opposition

06/20/2016 **Motion for Partial Summary Judgment** (9:00 AM) (Judicial Officer Denton, Mark R.)
Renewed Motion for Partial Summary Judgment
Result: Referred

06/20/2016 **Joinder** (9:00 AM) (Judicial Officer Denton, Mark R.)
Zitting Brothers Construction, Inc.'s Joinder to Insulpro Projects, Inc.'s Renewed Motion for Partial Summary Judgment
Result: Referred

06/20/2016 **Opposition and Countermotion** (9:00 AM) (Judicial Officer Denton, Mark R.)
APCO's Opposition to Renewed Motion for Partial Summary Judgment and Joinder Thereto; and Countermotion to Dismiss and/or for Summary Judgment Against Insulpro
Result: Referred

06/20/2016 **All Pending Motions** (9:00 AM) (Judicial Officer Denton, Mark R.)
Minutes
Result: Matter Heard

06/22/2016 **Notice of Special Master Hearing**
Notice of Special Master Hearing

06/28/2016 **Notice of Special Master Hearing**
Notice of Rescheduled Special Master Hearing

07/01/2016 **Order Denying Motion**

07/01/2016 **Notice of Entry of Order**
Notice of Entry of Order

07/11/2016 **Recorders Transcript of Hearing**
Recorder's Transcript of Proceedings Bench Trial: APCO Construction and Ready Mix, Inc., October 30, 2012

08/02/2016 **Notice of Special Master Hearing**
Notice of Special Master Hearing

08/08/2016 **Special Master Recommendation and District Court Order**
Special Master Report, Recommendation, and District Court Order

08/23/2016 **Notice of Appearance**
Notice of Appearance of Counsel for Plaintiff Uintah Investments, LLC dba Sierra Reinforcing

08/31/2016 **Disclosure of Documents and Witnesses Pursuant to NRCP 16.1**

0070

4/2/2018

<https://www.clarkcountycourts.us/Anonymous/CaseDetail.aspx?CaseID=6680533>

Camco's 16.1 Disclosure

09/01/2016 **Special Master Order**

Special Master Order Requiring Completion of Questionnaire

09/22/2016 **Notice of Compliance**

E&E Fire Protection, LLC's Notice of Compliance

09/23/2016 **Response**

National Wood Products Inc's Response to Special Master Questionnaire

09/26/2016 **Response**

United Subcontractors, Inc. DBA Skyline Insulation's Special Master Questionnaire Response

09/27/2016 **Disclosure of Documents and Witnesses Pursuant to NRCP 16.1**

United Subcontractors, Inc. DBA Skyline Insulation's Consolidated Disclosure Pursuant to NRCP 16.1 and Special Master Order

09/30/2016 **Request**

Request for Leave to Special Master for Approval of Late Filing and Service of Rule 16.1 Disclosures by National Wood Products, Inc., Judgment Creditor and Intervenor of Claimant Cabinetec, Inc.

10/03/2016 **Special Master Order**

Special Master Order authorizing NATIONAL WOOD PRODUCTS, INC., Intervenor of Cabinetec, Inc. to File and Serve its NRCP 16.1 Disclosures within Ten Days

10/07/2016 **Special Master Recommendation and District Court Order**

Special Master Report Regarding Remaining Parties to the Litigation, Special Master Recommendation and District Court Order Amending Case Agenda

10/07/2016 **Special Master Order**

Special Master Order Authorizing United Subcontractors, Inc. dba Skyline Insulation to File and Serve NRCP 16.1 Disclosures

10/12/2016 **Disclosure of Documents and Witnesses Pursuant to NRCP 16.1**

United Subcontractors, Inc. DBA Skyline Insulation's Re-filed, Supplemented and Consolidated Disclosure Pursuant to NRCP 16.1 and Special Master Order

01/06/2017 **Substitution of Attorney**

Substitution of Attorney

01/09/2017 **Proof of Service**

Proof of Service

01/13/2017 **Motion for Order to Show Cause**

Motion for Order to Show Cause Why Grubb & Ellis, Now Known As Newmark Grubb, Should Not be Held in Contempt of Court

01/24/2017 **Certificate of Service**

Certificate of Service (United Subcontractors, Inc. dba Skyline Insulation's Responses to APCO Construction's First Request for Production of Documents)

01/30/2017 **Certificate of Service**

Certificate of Service (United Subcontractors, Inc. dba Skyline Insulation's Responses to APCO Construction's First Set of Interrogatories)

01/30/2017 **Order Setting Civil Non-Jury Trial**

Order Setting Civil Non-Jury Trial And Calendar Call

02/02/2017 **Motion to Associate Counsel**

Motion to Associate Counsel

02/03/2017 **Proof of Service by Mail**

Certificate of Service

02/14/2017 **Stipulation and Order**

Stipulation and Order for Amended Briefing Schedule and to Continue Hearing on Motion for Order to Show Cause

02/15/2017 **Motion to Withdraw As Counsel**

Motion to Withdraw

02/16/2017 **Notice of Entry of Stipulation and Order**

Notice of Entry of Stipulation and Order for Amended Briefing Schedule and to Continue Hearing on Motion for Order to Show Cause

02/16/2017 **Notice of Special Master Hearing**

Notice of Special Master Hearing

02/21/2017 **Certificate of Service**

Certificate of Service

02/23/2017 **Opposition**

Opposition to Motion for Order to Show Cause

02/27/2017 **Special Master Order**

Special Master Report Regarding Remaining Parties to the Litigation and Discovery Status

02/28/2017 **Notice of Motion**

Notice of Motion for Hearing

02/28/2017 **Motion**

Plaintiff Motion to Set Aside Judgment

03/01/2017 **Reply in Support**

Reply in Support of Motion for Order to Show Cause why Grubb & Ellis, now known as Newmark Grubb, Should not be Held in Contempt of Court

03/06/2017 **Motion for Order** (9:00 AM) (Judicial Officer Denton, Mark R.)

Club Vista Financial Services, LLC and Tharaldson Motels II, Inc.'s Motion for Order to Show Cause Why Grubb & Ellis, Now Known As Newmark Grubb, Should Not be Held in Contempt of Court

02/21/2017 Reset by Court to 03/06/2017

Result: Denied

03/06/2017 **Motion to Associate Counsel** (9:00 AM) (Judicial Officer Denton, Mark R.)

Plaintiff's Motion to Associate Counsel - Jonathan S. Dabbieri, Esq.

Result: Granted

0071

03/06/2017 **All Pending Motions** (9:00 AM) (Judicial Officer Denton, Mark R.)
Minutes
 Result: Matter Heard

03/15/2017 **Decision and Order**
Decision and Order

03/15/2017 **Decision** (11:45 AM) (Judicial Officer Denton, Mark R.)
Minutes
 Result: Decision Made

03/17/2017 **Motion for Summary Judgment**
Plaintiff APCO Construction's Motion for Summary Judgment Against Uintah Investments LLC dba Sierra Reinforcing

03/20/2017 **Motion to Withdraw as Counsel** (9:00 AM) (Judicial Officer Denton, Mark R.)
Monica J. Caffaratti, Esq.'s Motion to Withdraw
Minutes
 Result: Granted

03/29/2017 **Notice of Entry**
Notice of Entry of Decision and Order

03/29/2017 **Order Admitting to Practice**
Order admitting to Practice

03/29/2017 **Request**
Request to Submit proposed Order

03/30/2017 **Notice of Entry of Order**
Notice of Entry of Order Approving Motion to Associate Counsel

04/03/2017 **Motion** (9:00 AM) (Judicial Officer Denton, Mark R.)
Notice of Motion for Hearing on Motion to Set Aside
Minutes
 Result: Denied

04/03/2017 **CANCELED Status Check** (9:00 AM) (Judicial Officer Denton, Mark R.)
Vacated
Status Check Re: SCR 42 Compliance (Jonathan S. Dabbieri, Esq.)

04/03/2017 **Opposition to Motion For Summary Judgment**
Uintah Investments LLC dba Sierra Reinforcing's Opposition to APCO Construction's Motion for Summary Judgment

04/07/2017 **Reply in Support**
Plaintiff APCO Construction's Reply in Support of its Motion for Summary Judgment Against Uintah Investments LLC dba Sierra Reinforcing

04/14/2017 **Stipulation and Order**
Stipulation and Order to Continue Hearing on APCO Construction's Motion for Summary Judgment Against Uintah Investments, LLC dba Sierra Reinforcing

04/17/2017 **Notice of Entry of Order**
Notice of Entry of Stipulation and Order to Continue Hearing on APCO Construction's Motion for Summary Judgment Against Uintah Investments, LLC dba Sierra Roofing

04/18/2017 **Minute Order** (2:00 PM) (Judicial Officer Denton, Mark R.)
Minutes
 Result: Decision Made

04/20/2017 **Notice of Bankruptcy**
Notice of Bankruptcy of Accuracy Glass & Mirror Co.

04/27/2017 **Motion to Associate Counsel**
Motion to Associate Counsel

04/27/2017 **Notice of Deposition**
United Subcontractors, Inc. d/b/a Skyline Insulation's Notice of 30(b)(6) Deposition of APCO Construction

04/27/2017 **Notice of Deposition**
United Subcontractors, Inc. d/b/a Skyline Insulation's Notice of 30(b)(6) Deposition of CAMCO Pacific Construction Co. Inc.

04/28/2017 **Motion for Withdrawal**
Motion to Withdraw as Counsel for Accuracy Glass & Mirror Co. and for Order Shortening Time

05/01/2017 **Notice of Deposition**
United Subcontractors, Inc. d/b/a Skyline Insulation's Amended Notice of 30(b)(6) Deposition of APCO Construction

05/08/2017 **Special Master Order**
Special Master Order

05/08/2017 **Special Master Order**
Special Master Report Regarding Discovery Status

05/11/2017 **Motion to Withdraw as Counsel** (9:00 AM) (Judicial Officer Denton, Mark R.)
Eric B. Zimbelman, Esq.'s Motion to Withdraw as Counsel for Accuracy Glass & Mirror Co and for order Shortening Time
Minutes
 Result: Granted

05/11/2017 **Order to Withdraw as Attorney of Record**
Order Granting Motion to Withdraw as Counsel for Accuracy Glass & Mirror Co. and for Order Shortening Time

05/12/2017 **Notice of Entry of Order**
Notice of Entry of Order

05/15/2017 **Motion for Summary Judgment** (9:00 AM) (Judicial Officer Denton, Mark R.)
Plaintiff APCO Construction's Motion for Summary Judgment Against Uintah Investments LLC dba Sierra Reinforcing
Minutes

04/17/2017 Reset by Court to 05/15/2017

Result: Granted

05/25/2017 **Order**
Order

05/25/2017 **Notice of Entry of Order**
Notice of Entry of Order

05/30/2017 **Motion to Associate Counsel** (9:00 AM) (Judicial Officer Denton, Mark R.)
Intervenor, National Wood Products INC's Motion to Associate Counsel
Minutes

Result: Granted

06/09/2017 **Substitution of Attorney**
Substitution of Attorneys

06/14/2017 **Order Denying**
Order Denying Defendant's Motion to Set Aside Judgment

06/16/2017 **Order Admitting to Practice**
Order Admitting to Practice

06/19/2017 **Stipulation and Order for Dismissal With Prejudice**
Stipulation and Order for Dismissal With Prejudice of Insulpro Projects, Inc.

06/20/2017 **Notice of Entry of Stipulation & Order for Dismissal**
Notice of Entry of Stipulation and Order

06/21/2017 **Order Denying Motion**
Order Denying Defendant's Motion to set aside Judgment

06/26/2017 **Notice of Entry of Order**
Notice of Entry of Order

06/26/2017 **Motion To Dismiss - Alternative Motion For Summary Judgment**
APCO Construction's Motion to Dismiss or for Summary Judgment on Lien Claimants' NRS Ch 108 Claim for Foreclosure of Mechanic's Lien

06/26/2017 **Motion**
Motion to Substitute

06/28/2017 **Order to Withdraw as Attorney of Record**
Order Granting Monica Caffaratti's Motion to Withdraw as Attorney

07/05/2017 **Stipulation and Order for Dismissal With Prejudice**
Stipulation and Order for Dismissal With Prejudice of Insulpro Projects, Inc.

07/14/2017 **Motion to Continue**
Joint Motion to Continue Hearing on APCO Construction's Motion to Dismiss or for Summary Judgment on Lien Claimant's NRS CH 108 Claim for Foreclosure of Mechanics Lien on Order Shortening Time (First Request)

07/24/2017 **Motion to Continue** (9:00 AM) (Judicial Officer Denton, Mark R.)
Joint Motion to Continue Hearing on APCO Cosntructions Motion to Dismiss or for Summary Judgment on Lien Claimants NRS Ch 108 Claim for Foreclosure of Mechanics's Lien on Order Shortening Time
Minutes

Result: Granted

07/25/2017 **Minute Order** (5:35 PM) (Judicial Officer Denton, Mark R.)
Minutes

Result: Minute Order - No Hearing Held

07/26/2017 **Opposition to Motion For Summary Judgment**
Peel Brimley Lien Claimants' Opposition to APCO's Motion for Summary Judgment Re: Lien Claims

07/26/2017 **Joinder to Opposition to Motion**
1. Joinder of Interstate Plumbing & Air Conditioning, LLC to Opposition of Helix Electrical of Nevada, LLC to APCO Construction's Motion to Dismiss or for Summary Judgment on Lien Claimants NRS CH 108 Claim for Foreclosure of Mechanic's Lien

07/26/2017 **Opposition**
Zitting Brothers Construction, Inc.'s Opposition to APCO Construction's Motion to Dismiss or For Summary Judgment on Lien Claimant's NRS CH 108 Claim For Foreclosure of Mechanic's Lien

07/27/2017 **CANCELED Motion** (9:00 AM) (Judicial Officer Denton, Mark R.)
Vacated - per Judge
Gerdau Reinforcing Steel's Motion to Substitute

07/31/2017 **Status Check** (9:00 AM) (Judicial Officer Denton, Mark R.)
Status Check Re: SCR 42 Compliance (S. Judy Hirahara, Esq.)
Minutes

Result: Matter Heard

07/31/2017 **Motion for Partial Summary Judgment**
Zitting Brothers Construction, Inc.'s Motion For Partial Summary Judgment Against APCO Construction

08/01/2017 **Order Granting Motion**
Order Granting Gerdau Reinforcing Steel's Motion to Substitute

08/01/2017 **Reply in Support**
Apco Construction's Reply in Support of Motion to Dismiss or for Summary Judgment on Lien Claimants' NRS Ch. 108 Claim for Foreclosure of Mechanic's Lien

08/01/2017 **Notice of Entry**
Notice of Entry of Order Granting Gerdau Reinforcing Steel's Motion to Substitute

08/02/2017 **Motion for Partial Summary Judgment**
Peel Brimley Lien Claimants' Motion for Partial Summary Judgment Precluding Defenses Based on Pay-if-Paid Agreements and Ex-Parte Application for Order Shortening Time

0073

08/03/2017 **Joinder to Motion For Partial Summary Judgment**
Zitting Brothers Construction, Inc.'s Joinder to Peel Brimley Lien Claimants' Motion for Partial Summary Judgment Precluding Defenses Based on Pay-If-Paid Agreements

08/03/2017 **Joinder**
Joinder to Peel Brimley Lien Claimants' Opposition to Apco's Motion for Summary Judgment Re: Lien Claims

08/03/2017 **Joinder**
Joinder to Peel Brimley Lien Claimants' Motion for Partial Summary Judgment Precluding Defenses Based on Pay-If-Paid Agreements and Ex Parte Application for Order Shortening Time

08/04/2017 **Initial Appearance Fee Disclosure**
Initial Appearance Fee Disclosure

08/04/2017 **Joinder to Motion For Partial Summary Judgment**
Joinder of Interstate Plumbing & Air Conditioning, LLC to Peel Brimley Lien Claimants' Motion for Partial Summary Judgment Precluding Defenses Based on Pay-If-Paid Agreements

08/07/2017 **Notice**
Pro Hac Vice Applicant S. Judy Hirahara's Notice of Compliance with SCR 42

08/07/2017 **Notice of Entry of Order**
Notice of Entry of Order

08/07/2017 **Joinder to Motion For Partial Summary Judgment**
Zitting Brothers Construction, Inc.'s Joinder to Peel Brimley Lien Claimants' Opposition to APCO's Motion for Summary Judgment

08/07/2017 **Motion to Associate Counsel**
Motion to Associate Counsel

08/07/2017 **Joinder**
National Wood Products, Inc.'s Joinder to Peel Brimley Lien Claimants' Motion for Partial Summary Judgment Precluding Defenses Based on Pay-If-Paid Agreements and Ex Parte Application Shortening Time; and Memorandum of Points and Authorities in Support Thereof

08/08/2017 **Joinder**
E & E Fire Protection, LLC's Joinder to Peel Brimley Lien Claimants' Motion for Partial Summary Judgment Precluding Defenses Based on Pay-If-Paid Agreements

08/09/2017 **Initial Appearance Fee Disclosure**
Initial Appearance Fee Disclosure

08/09/2017 **Initial Appearance Fee Disclosure**
Initial Appearance Fee Disclosure to Join Motion for Partial Summary Judgment

08/10/2017 **Motion to Dismiss** (9:00 AM) (Judicial Officer Denton, Mark R.)
APCO Construction's Motion to Dismiss or for Summary Judgment on Lien Claimants' NRS Ch 108 Claim for Foreclosure of Mechanic's Lien
Minutes
07/27/2017 Reset by Court to 08/10/2017
Result: Denied Without Prejudice

08/10/2017 **Initial Appearance Fee Disclosure**
Initial Appearance Fee Disclosure (NRS Chapter 19)

08/11/2017 **Pre-Trial Disclosure**
Pre-Trial Disclosures of Interstate Plumbing & Air Conditioning, LLC Pursuant to Rule 16(a)(3) of the Nevada Rules of Civil Procedure

08/11/2017 **Pre-Trial Disclosure**
Amended Pre-Trial Disclosures of Interstate Plumbing & Air Conditioning, LLC Pursuant to Rule 16(a)(3) of the Nevada Rules of Civil Procedure

08/11/2017 **Joinder to Motion For Partial Summary Judgment**
United Subcontractors, Inc. dba Skyline Insulation's Joinder to Peel Brimley Lien Claimants' Motion for Partial Summary Judgment Precluding Defenses Based on Pay-If-Paid Agreements

08/11/2017 **Joinder to Motion For Partial Summary Judgment**
United Subcontractors, Inc. dba Skyline Insulation's Joinder to Peel Brimley Lien Claimants' Motion for Partial Summary Judgment Precluding Defenses Based on Pay-If-Paid Agreements

08/11/2017 **Pre-Trial Disclosure**
Plaintiff in Intervention National Wood Products, Inc.'s Pre-Trial Disclosure Pursuant to NRCP 16.1(a)(3)

08/17/2017 **Opposition**
Camco's Opposition to Lien Claimants' Motion for Partial Summary Judgment

08/21/2017 **Notice**
Notice of Scheduling Settlement Conference

08/21/2017 **Opposition**
APCO Construction's Opposition to Peel Brimley Lien Claimants' Partial Motion for Summary Judgment Precluding Defenses Based on Pay If Paid Agreements

08/21/2017 **Opposition to Motion**
APCO Construction's Opposition to Zitting Brothers Construction Inc.'s Partial Motion for Summary Judgment

08/22/2017 **Ex Parte Application**
Ex Parte Application for Order Shortening Time on Motion to Associate Counsel

08/30/2017 **Order Denying Motion**
Order Denying APCO Construction's Motion for Partial Summary Judgment re: Lien Foreclosure Claims

08/30/2017 **Notice of Entry of Order**
Notice of Entry of Order

08/31/2017 **Order Shortening Time**
Order Shortening Time on Hearing for Motion to Associate Counsel

08/31/2017 **Stipulation and Order**
Stipulation and Order to Continue September 5, 2017 Hearing on Motions for Partial Summary Judgment

09/01/2017 **Notice of Entry of Stipulation and Order**

09/05/2017 **Notice of Entry of Stipulation and Order to Continue September 5, 2017 Hearing on Motions for Partial Summary Judgment Calendar Call** (2:00 PM) (Judicial Officer Denton, Mark R.)
Minutes
 Result: Vacate

09/05/2017 **Motion to Associate Counsel** (9:00 AM) (Judicial Officer Denton, Mark R.)
Intervening Plaintiff, National Wood Products, Inc.'s Order Shortening Time on Hearing for Motion to Associate Counsel (John B. Taylor)
Minutes
 Result: Granted

09/06/2017 **Notice of Entry of Order**
Notice of Entry of Order

09/06/2017 **Order Admitting to Practice**
Order Admitting to Practice

09/06/2017 **Notice of Entry of Order**
Notice of Entry of Order Shortening Time on Hearing for Motion to Associate Counsel

09/06/2017 **Notice of Entry of Order**
Notice of Entry of Order Admitting to Practice

09/07/2017 **Pre-trial Memorandum**
United Subcontractors, Inc. d/b/a Skyline Insulation's Pre-Trial Statement/Memorandum

09/11/2017 **CANCELED Motion to Associate Counsel** (9:00 AM) (Judicial Officer Denton, Mark R.)
Vacated - Duplicate Entry
National Wood Products Inc Motion to Associate Counsel

09/11/2017 **Hearing** (9:00 AM) (Judicial Officer Denton, Mark R.)
Oral Motion to Dismiss
Minutes
 Result: Granted

09/12/2017 **CANCELED Bench Trial** (9:00 AM) (Judicial Officer Denton, Mark R.)
Vacated - per Judge

09/20/2017 **Order Granting Motion**
Order Granting Plaintiff's Motion to Dismiss

09/20/2017 **Notice of Compliance**
Pro Hac Vice Applicant John B. Taylor's Notice of Compliance with SCR 42

09/20/2017 **Stipulation and Order for Dismissal**
Stipulation and Order of Dismissal of All Claims Relating to Cardno WRG, Inc.

09/21/2017 **Settlement Conference** (9:00 AM) ()
Minutes
 Result: Not Settled

09/21/2017 **Notice of Entry of Order**
Notice of Entry of Order

09/21/2017 **Notice of Entry of Stipulation & Order for Dismissal**
Notice of Entry of Stipulation and Order for Dismissal

09/28/2017 **Reply to Opposition**
Peel Brimley Lien Claimants' Reply to Oppositions to Motion for Partial Summary Judgment Precluding Defenses Based on Pay-If-Paid Agreements

09/29/2017 **Notice of Association of Counsel**
Notice of Association of Counsel

09/29/2017 **Notice of Appearance**
Notice of Appearance and Request for Notice

09/29/2017 **Reply in Support**
Zitting Brothers Construction, Inc.'s Reply in Support of Motion for Partial Summary Judgment Against APCO Construction

10/05/2017 **Motion for Partial Summary Judgment** (9:00 AM) (Judicial Officer Denton, Mark R.)
10/05/2017, 11/16/2017
Zitting Brothers Construction Inc's Motion for Partial Summary Judgement Against APCO Construction
09/05/2017 Reset by Court to 10/05/2017
 Result: Continued

10/05/2017 **Motion for Summary Judgment** (9:00 AM) (Judicial Officer Denton, Mark R.)
10/05/2017, 11/16/2017
Peel Brimley Lien Claimants' Motion for Partial Summary Judgment Precluding Defenses Based on Pay-If-Paid Agreements and Ex Parte Application for Order Shortening time
08/24/2017 Reset by Court to 09/05/2017
09/05/2017 Reset by Court to 10/05/2017
 Result: Continued

10/05/2017 **Joinder** (9:00 AM) (Judicial Officer Denton, Mark R.)
10/05/2017, 11/16/2017
Zitting Brothers Construction, Inc.'s Joinder to Peel Brimley Lien Claimants' Motion for Partial Summary Judgment Precluding Defenses Based on Pay-If-Paid Agreements
08/24/2017 Reset by Court to 09/05/2017
09/05/2017 Reset by Court to 10/05/2017
10/16/2017 Reset by Court to 11/16/2017

Result: Continued

10/05/2017 **Opposition and Counter Motion** (9:00 AM) (Judicial Officer Denton, Mark R.)
10/05/2017, 11/16/2017
Steel Structures, Inc., Nevada Prefab Engineering, and Gerdau Reinforcing Steel's Joinder to Peel Brimley Lien Claimants' Opposition to Apco's Motion for Summary Judgment Re: Lien Claims
08/24/2017 Reset by Court to 09/05/2017
09/05/2017 Reset by Court to 10/05/2017

Result: Continued

10/05/2017 **Joinder** (9:00 AM) (Judicial Officer Denton, Mark R.)
10/05/2017, 11/16/2017
William A. Leonard, Jr.'s Joinder of Interstate Plumbing and Air Conditioning LLC to Peel Brimley Lien Claimants' Motion for Partial Summary Judgment Precluding Defenses Based on Pay-If-Paid Agreements
08/24/2017 Reset by Court to 09/05/2017
09/05/2017 Reset by Court to 10/05/2017

Result: Continued

10/05/2017 **Joinder** (9:00 AM) (Judicial Officer Denton, Mark R.)
10/05/2017, 11/16/2017
National Wood Products Inc's Joinder to Peel Brimley Lien Claimants Motion for Partial Summary Judgment Precluding Defenses Based on Pay If Paid Agreements and Ex Parte Application Shortening Time; and Memorandum of Point and Authorities in Support Thereof
08/24/2017 Reset by Court to 09/05/2017
09/05/2017 Reset by Court to 10/05/2017

Result: Continued

10/05/2017 **Joinder** (9:00 AM) (Judicial Officer Denton, Mark R.)
10/05/2017, 11/16/2017
E & E Fire Protection, LLC's Joinder to Peel Brimley Lien Claimants' Motion for Partial Summary Judgment Precluding Defenses Based on Pay-if-Paid Agreements
09/05/2017 Reset by Court to 10/05/2017

Result: Continued

10/05/2017 **Joinder** (9:00 AM) (Judicial Officer Denton, Mark R.)
10/05/2017, 11/16/2017
United Subcontractors, Inc. dba Skyline Insulation's Joinder to Peel Brimley Lien Claimants' Motion for Partial Summary Judgment Precluding Defenses Based on Pay-If-Paid Agreements
09/05/2017 Reset by Court to 10/05/2017

Result: Continued

10/05/2017 **Joinder** (9:00 AM) (Judicial Officer Denton, Mark R.)
10/05/2017, 11/16/2017
United Subcontractors, Inc. dba Skyline Insulation's Joinder to Peel Brimley Lien Claimants' Motion for Partial Summary Judgment Precluding Defenses Based on Pay-If-Paid Agreements
09/05/2017 Reset by Court to 10/05/2017

Result: Continued

10/05/2017 **Status Check** (9:00 AM) (Judicial Officer Denton, Mark R.)
Status Check Re: Resetting Trial

Result: Matter Heard

10/05/2017 **CANCELED Status Check** (9:00 AM) (Judicial Officer Denton, Mark R.)
Vacated
Status Check Re: SCR 42 Compliance (John B. Taylor, Esq.)

10/05/2017 **All Pending Motions** (9:00 AM) (Judicial Officer Denton, Mark R.)
Minutes

Result: Matter Heard

10/13/2017 **Order Setting Civil Non-Jury Trial and Calendar Call**
Order Setting Civil Non- Jury Trial and Calendar Call

10/26/2017 **Motion to Withdraw As Counsel**
Motion to Withdraw as Counsel for Buchele, Inc. and for Order Shortening Time

10/26/2017 **Order**
Order

10/30/2017 **Notice of Entry of Order**
Notice of Entry of Order

11/06/2017 **Supplement to Opposition**
Supplemental Briefing in Opposition to Zitting Brothers Construction, Inc.'s Motion for Partial Summary Judgment Against Apco Construction, Inc.

11/06/2017 **Motion in Limine**
Helix Electric of Nevada's Motions in Limine Nos. 1-4 (Against APCO Construction)

11/06/2017 **Motion in Limine**
Zitting Brothers Construction, Inc.'s Motion In Limine To Limit The Defenses of APCO Construction To The Enforceability of Pay-If-Paid Provision

11/06/2017 **Omnibus Motion In Limine**
APCO Construction Inc.'s Omnibus Motion in Limine

11/06/2017 **Notice of Hearing**

Notice of Hearing on Helix Electric of Nevada's Motions in Limine Nos. 1-4 (Against APCO Construction)

11/06/2017 **Notice of Hearing**
Notice of Hearing on Peel Brimley Lien Claimants' Motions in Limine Nos. 1-6 (Against Camco Pacific Construction, Inc.)

11/06/2017 **Motion in Limine**
Peel Brimley Lien Claimants' Motions in Limine Nos. 1-6 (Against Camco Pacific Construction, Inc.)

11/06/2017 **Motion in Limine**
Plaintiff In Intervention, Natioal Wood Products, Inc.'s Motion in Limine to Exclude Evidence Testimony, Documents and Things not Properly Produced by Defendant APCO Construction in Discovery; Declaration of S.Judy Hirahara; and Memorandum of Points and Authorities in Support Thereof

11/07/2017 **Notice of Hearing**
Notice of Hearing on Plaintiff-In-Intervention, National Wood Products, Inc.'s Motion in Limine to Exclude Evidence, Testimony, Documents and Things not Properly Produced by Defendant APCO Construction in Discovery; Declaration of S. Judy Hirahara; and Memorandum of Points and Authorities in Support Thereof

11/13/2017 **Notice of Deposition**
Plaintiff In Intervention National Wood Products, Inc.'s Notice of Deposition of Deposition of Nicholas Cox, Cabinetec's Representative

11/13/2017 **Notice of Deposition**
Notice of Deposition of Kurt Micek, National Wood Products, Inc.'s Person Most Knowledgeable

11/14/2017 **Objection**
Apco Construction's Objections to National Wood Products, Inc.'s November 13, 2017 Notices of Depositions

11/14/2017 **Notice of Change of Address**
Notice of Change of Address

11/14/2017 **Opposition to Motion in Limine**
National Wood Products, Inc.'s Opposition to APCO Construction's Omnibus Motion in Limine Nos. 3, 6 and 7A

11/14/2017 **Opposition**
Apco Construction, Inc.'s Opposition to Helix Electric of Nevada, LLC's Motions in Limine Nos. 1-4 (Against Apco Construction)

11/14/2017 **Opposition**
Apco Construction's Opposition to Zitting Brothers Construction, Inc.'s Motion in Limine to Limit the Defenses of Apco Construction to the Enforceability of a Pay-If-Paid Provision

11/14/2017 **Opposition**
Apco Construction, Inc.'s Opposition to Plaintiff-In-Intervention, National Wood Products, Inc.'s Motion in Limine to Exclude Evidence, Testimony, Documents and things not Properly Produced by Defendant Apco Construction in Discovery

11/14/2017 **Opposition to Motion**
Zitting Brothers Construction, Inc.'s Opposition to APCO Construction's Omnibus Motion in Limine

11/14/2017 **Joinder**
Peel Brimley Lien Claimants' Joinder to Oppositions to APCO Construction's Omnibus Motion in Limine

11/14/2017 **Opposition to Motion in Limine**
Buchele, Inc.'s Opposition to APCO Construction's Omnibus Motion in Limine

11/14/2017 **Opposition to Motion in Limine**
Helix Electric of Nevada's Opposition to APCO Construction's Omnibus Motion in Limine

11/14/2017 **Joinder**
Camco's Joinder to Apco's Objections t National Wood Products, Inc.'s Notices of Deposition

11/14/2017 **Opposition to Motion in Limine**
Camco's Opposition to Lien CLaimants' Motions in Limine Nos. 1-6

11/15/2017 **Reply in Support**
Apco Construction, Inc.'s Reply in Support of its Omnibus Motion in Limine

11/15/2017 **Joinder**
Zitting Brothers Construction, Inc.'s Joinder To Other Lien Claimants' Opposition To APCO Construction's Omnibus Motion in Limine

11/15/2017 **Joinder**
Zitting Brothers Construction, Inc.'s Joinder To Other Lien Claimants' Motions in Limine Against APCO Construction

11/16/2017 **Motion to Withdraw as Counsel** (9:00 AM) (Judicial Officer Denton, Mark R.)
Eric B. Zimbelman, Esq.'s Motion to Withdraw as Counsel for Buchele, Inc. and for Order Shortening Time
Result: Granted

11/16/2017 **Motion in Limine** (9:00 AM) (Judicial Officer Denton, Mark R.)
Zitting Brothers Construction, Inc.'s Motion in Limine to Limit the Defenses of Apco Construction to the Enforceability of Pay-If-Paid Provision
Result: Granted

11/16/2017 **Omnibus Motion in Limine** (9:00 AM) (Judicial Officer Denton, Mark R.)
Apco Construction, Inc.'s Omnibus Motion in Limine
Result: Granted in Part

11/16/2017 **Motion in Limine** (9:00 AM) (Judicial Officer Denton, Mark R.)
Helix Electric of Nevada's Motions in Limine Nos. 1-4 (Against APCO Construction)
Result: Granted in Part

11/16/2017 **Motion in Limine** (9:00 AM) (Judicial Officer Denton, Mark R.)
Peel Brimley Lien Claimants' Motions in Limine Nos. 1-6 (Against Camco Pacific Construction, Inc.)
Result: Granted

11/16/2017 **Motion in Limine** (9:00 AM) (Judicial Officer Denton, Mark R.)
Plaintiff In Intervention, Natioal Wood Products, Inc.'s Motion in Limine to Exclude Evidence Testimony, Documents and Things not Properly Produced by Defendant APCO Construction in Discovery; Declaration of S.Judy Hirahara; and Memorandum of Points and Authorities in Support Thereof
Result: Granted

11/16/2017 **Motion in Limine** (9:00 AM) (Judicial Officer Denton, Mark R.)
Helix Electric of Nevada's Motions in Limine Nos. 1-4 Against APCO Construction

11/16/2017 **Supplement to Response and Opposition**

Zitting Brothers Construction, Inc. s Response To APCO Construction s Supplemental Opposition To Zitting Brothers Construction, Inc. s Motion For Partial Summary Judgment

11/16/2017 **Reply in Support**

Zitting Brothers Construction, Inc s Reply In Support Of Motion In Limine To Limit The Defenses Of APCO Construction (APCO) To The Enforceability Of Pay-If-Paid Provision

11/16/2017 **All Pending Motions** (9:00 AM) (Judicial Officer Denton, Mark R.)

[Parties Present](#)

[Minutes](#)

Result: Matter Heard

11/20/2017 **Calendar Call** (2:00 PM) (Judicial Officer Denton, Mark R.)

[Parties Present](#)

[Minutes](#)

Result: Vacated and Reset

11/27/2017 **Decision**

Decision

11/27/2017 **Decision**

Decision

11/28/2017 **CANCELED Bench Trial** (9:00 AM) (Judicial Officer Denton, Mark R.)

Vacated - per Judge

11/29/2017 **CANCELED Motion to Compel** (9:30 AM) (Judicial Officer Bulla, Bonnie)

Vacated - On in Error

Plaintiff's Second Motion to Compel Discovery

11/30/2017 **Order Setting Civil Non-Jury Trial**

Order Setting Civil Non-Jury Trial and Calendar Call

12/05/2017 **Minute Order** (5:03 PM) (Judicial Officer Denton, Mark R.)

[Minutes](#)

Result: Minute Order - No Hearing Held

12/05/2017 **Minute Order** (5:03 PM) (Judicial Officer Denton, Mark R.)

[Minutes](#)

Result: Minute Order - No Hearing Held

12/05/2017 **Minute Order** (5:03 PM) (Judicial Officer Denton, Mark R.)

[Minutes](#)

Result: Minute Order - No Hearing Held

12/05/2017 **Minute Order** (5:03 PM) (Judicial Officer Denton, Mark R.)

[Minutes](#)

Result: Minute Order - No Hearing Held

12/05/2017 **Minute Order** (5:03 PM) (Judicial Officer Denton, Mark R.)

[Minutes](#)

Result: Minute Order - No Hearing Held

12/05/2017 **CANCELED Minute Order** (5:03 PM) (Judicial Officer Denton, Mark R.)

Vacated - Duplicate Entry

12/06/2017 **Motion**

Apco Construction, Inc.'s Motion to Request Buchele, Inc. Comply with EDCR 7.42 on Order Shortening Time

12/07/2017 **CANCELED Minute Order** (5:03 PM) (Judicial Officer Denton, Mark R.)

Vacated

12/18/2017 **Certificate of Service**

Certificate of Service

12/21/2017 **Motion** (9:00 AM) (Judicial Officer Denton, Mark R.)

Apco Construction, Inc.'s Motion to Request Buchele, Inc. Comply with EDCR 7.42 on Order Shortening Time

[Parties Present](#)

[Minutes](#)

Result: Granted

12/28/2017 **Order Granting Motion**

Order Granting Peel Brimley Lien Claimants' Motions in Limine Nos. 1-6 (Against Camco Pacific Construction, Inc.)

12/28/2017 **Order**

Order Granting in Part and Denying in Part Helix Electric of Nevada, LLC's Motions in Limine (Against APCO Construction)

12/28/2017 **Order**

Order Granting in Part and Denying in Part APCO Construction's Omnibus Motion in Limine

12/29/2017 **Notice of Entry of Order**

Notice of Entry of Order

12/29/2017 **Notice of Entry of Order**

Notice of Entry of Order

12/29/2017 **Notice of Entry of Order**

Notice of Entry of Order

12/29/2017 **Findings of Fact, Conclusions of Law and Order**

Findings of Fact, Conclusion of Law, and Order Granting Zitting Brothers Construction, Inc.'s Motion for Partial Summary Judgment Against Apco

01/02/2018 **Calendar Call** (2:00 PM) (Judicial Officer Denton, Mark R.)
Parties Present
Minutes
 Result: Trial Date Set

01/02/2018 **Recorders Transcript of Hearing**
Recorders Transcript of Hearing Re: All Pending Motions, October 5, 2017

01/02/2018 **Recorders Transcript of Hearing**
Recorder's Transcript of Hearing Re: All Pending Motions, November 16, 2017

01/02/2018 **Order Granting Motion**
Order Granting Peel Brimley Lien Claimants' Motion for Partial Summary Judgment Precluding Defenses Based on Pay-If-Paid Agreements

01/02/2018 **Notice of Entry**
Notice of Entry of Findings of Fact, Conclusion of Law, and Order Granting Zitting Brothers Construction, Inc.'s Motion for Partial Summary Judgment Against Apco Construction

01/03/2018 **Notice of Entry of Order**
Notice of Entry of Order

01/04/2018 **Amended Order**
Amended Nunc Pro Tunc Order Regarding Apco Construction, Inc.'s Omnibus Motion in Limine - Motion in Limine No. 7

01/04/2018 **Motion**
Motion for Reconsideration of Court's Order Granting Peel Brimley Lien Claimants' Partial Motion for Summary Judgment to Preclude Defenses Based on Pay If Paid Provisions on an Order Shortening Time

01/04/2018 **Notice of Entry of Order**
Notice of Entry of Order on Amended Nunc Pro Tunc Order Regarding Apco Construction, Inc.'s Omnibus Motion in Limine - Motion in Limine No. 7

01/08/2018 **Joinder To Motion**
Camco's Joinder in Apco's Motion for Reconsideration

01/08/2018 **Notice of Attorney Lien**
Notice of Attorney's Lien

01/08/2018 **Motion**
Motion for Reconsideration of Court's Order Granting Zitting Brothers Construction, Inc.'s Partial Motion for Summary Judgment and Ex Parte Application for Order Shortening Time and to Exceed Page Limit

01/09/2018 **CANCELED Non-Jury Trial** (9:00 AM) (Judicial Officer Denton, Mark R.)
Vacated - per Judge

01/09/2018 **Opposition to Motion**
Plaintiff in Intervention, National Wood Products, Inc.'s Opposition to APCO Construction's Motion for Reconsideration of the Court's Order Granting Peel Brimley Lien Claimants' Motion for Partial Summary Judgment to Preclude Defenses of Pay if Paid Provisions

01/09/2018 **Opposition to Motion**
Peel Brimley Lien Claimants' Opposition to APCO Construction's Motion for Reconsideration of Order Granting Partial Summary Judgment Precluding Defenses Based on Pay-If-Paid Agreements

01/09/2018 **Order Granting Motion**
Order Granting Plaintiff In Intervention, National Wood Products, Inc.'s Motion In Limine

01/10/2018 **Reply in Support**
Reply in Support of Motion for Reconsideration of Court's Order Granting Peel Brimley Lien Claimants' Partial Motion for Summary Judgment to Preclude Defenses Based on Pay-If-Paid Provisions on an Order Shortening Time

01/10/2018 **Opposition to Motion**
Zitting Brothers Construction, Inc.'s Opposition to APCO Construction, Inc.'s Motion for Reconsideration of Court's Order Granting Zitting Brothers Construction's Partial Motion for Summary Judgment

01/10/2018 **Notice of Entry of Order**
Notice of Entry of Order Granting Plaintiff In Intervention National Wood Products, Inc.'s Motion In Limine

01/11/2018 **Motion For Reconsideration** (9:00 AM) (Judicial Officer Denton, Mark R.)
Plaintiff's Motion for Reconsideration of Courts Order Granting Peel Brimley Lien Claimants Partial Motion for Summary Judgment to Preclude Defenses Based on Pay if Paid Provisions on and Order Shortening Time
 Result: Denied

01/11/2018 **Joinder** (9:00 AM) (Judicial Officer Denton, Mark R.)
Camco's Joinder to APCO's Motion for Reconsideration of Court's Order Granting Peel Brimley Lien Claimant's Partial Motion for Summary Judgment to Preclude Defenses Based on Pay if Paid Provisions
 Result: Denied

01/11/2018 **Motion For Reconsideration** (9:00 AM) (Judicial Officer Denton, Mark R.)
Plaintiff's Motion for Reconsideration of Court's Order Granting Zitting Brothers Construction, Inc.'s Partial Motion for Summary Judgment and Ex Parte Application for Order Shortening Time and to Exceed Page Limit
 Result: Denied

01/11/2018 **Motion to Stay**
Plaintiff's Motion to Stay Pending Entry of Final Judgment Pursuant to NRCP 62(B) and (62(H) on Order Shortening Time

01/11/2018 **Pre-trial Memorandum**
E&E Fire Protection, LLC's Pretrial Memorandum

01/11/2018 **All Pending Motions** (9:00 AM) (Judicial Officer Denton, Mark R.)
Parties Present
Minutes
 Result: Matter Heard

01/12/2018 **Joint Pre-Trial Memorandum**
Joint Pre-Trial Memorandum (for APCO Construction, Inc., the Peel Brimley Lien Claimants, and National Wood Products, LLC Only)

01/16/2018 **Motion to Stay** (9:00 AM) (Judicial Officer Denton, Mark R.)
01/16/2018, 01/19/2018
Plaintiff's Motion to Stay Pending Entry of Final Judgment Pursuant to NRCP 62(B) and (62(H) on Order Shortening Time
Parties Present
Minutes
Result: Continued

01/16/2018 **Order Granting**
Order Granting Apco Construction, Inc.'s Motion to Request Buchele, Inc. Comply with EDCR 7.42 on Order Shortening Time

01/16/2018 **Notice of Entry**
Notice of Entry of Order Granting Apco Construction, Inc.'s Motion to Request Buchele, Inc. Comply with EDCR 7.42 on Order Shortening Time

01/16/2018 **Trial Brief**
Apco Construction, Inc.'s Trial Brief

01/17/2018 **Bench Trial** (10:00 AM) (Judicial Officer Denton, Mark R.)
01/17/2018, 01/18/2018, 01/19/2018, 01/23/2018, 01/24/2018, 02/06/2018
Parties Present
Minutes
Result: Trial Continues

01/17/2018 **Trial Brief**
Plaintiff In Intervention National Wood Products, Inc.'s Trial Brief

01/18/2018 **Opposition**
Zitting Brothers Construction, Inc.'s Opposition To Motion To Stay Pending Entry Of Final Judgment Pursuant To NRCP 62(B) and 62(H)

01/18/2018 **Stipulation and Order**
Stipulation and Order Regarding Trial Exhibits Admitted into Evidence

01/18/2018 **Notice of Entry of Stipulation and Order**
Notice of Entry of Stipulation and Order Regarding Trial Exhibits Admitted into Evidence

01/19/2018 **Order Denying Motion**
Order Denying APCO Construction's Motion for Reconsideration of Order Granting Partial Summary Judgment Precluding Defenses Based on Pay-if-Paid Agreements

01/19/2018 **Notice of Entry of Order**
Notice of Entry of Order

01/19/2018 **Minute Order** (3:00 AM) (Judicial Officer Williams, Timothy C.)

01/25/2018 **Notice of Change**
Notice of Change of Firm Affiliation and Address

01/25/2018 **Order Denying Motion**
Oder Denying APCO Construction, Inc.'s Motion for Reconsideration of Court's Order Granting Zitting Brothers Construction, Inc.'s Partial Motion for Summary Judgment

01/29/2018 **Memorandum of Costs and Disbursements**
Zitting Brothers Construction, Inc.'s Verified Memorandum of Costs

01/29/2018 **Memorandum**
Memorandum In Support of APCO Construction, Inc.'s Payment of Attorneys' Fees, Costs, and Interest to Zitting Brothers Construction, Inc.

01/31/2018 **Notice of Entry of Order**
Notice of Entry of Order Denying APCO Contruction, Inc.'s Motion for Reconsideration of Court's Order Granting Zitting Brothers Construction, Inc.'s Partial Motion for Summary Judgment

01/31/2018 **Recorders Transcript of Hearing**
Recorders Transcript of Hearing Re: Bench Trial - Day One, January 17, 2018

01/31/2018 **Recorders Transcript of Hearing**
Recorders Transcript of Hearing Re: Bench Trial - Day Two, January 18, 2018

01/31/2018 **Recorders Transcript of Hearing**
Recorders Transcript of Hearing Re: Bench Trial - Day Three, January 19, 2018

01/31/2018 **Recorders Transcript of Hearing**
Recorders Transcript of Hearing Re: Bench Trial - Day Five, January 24, 2018

02/05/2018 **Stipulation and Order for Dismissal**
Stipulation and Order to Dismiss Third Party Complaint of Interstate Plumbing & Air Conditioning, LLC Against Apco Construction, Inc. with Prejudice

02/15/2018 **Recorders Transcript of Hearing**
Recorders Transcript of Hearing Re: Bench Trial - Day Six, February 6, 2018

02/16/2018 **Notice of Appeal**
Notice of Appeal

02/16/2018 **Case Appeal Statement**
Case Appeal Statement

02/16/2018 **Opposition**
Apco Construction, Inc.'s Opposition to Zitting Brothers, Inc.'s Memorandum In Support of Apco Construction, Inc.'s Payment of Attorneys' Fees, Costs and Interest to Zitting Construction Brothers, Inc.

02/26/2018 **Reply in Support**
Zitting Brothers Construction, Inc.'s Reply in Support of Its Memorandum in Support of APCO Construction, Inc.'s Payment of Attorneys' Fees, Costs, and Interest

02/28/2018 **Stipulation and Order**
Stipulation and Order to Extend Deadline to file Proposed Findings of Fact, Conclusions of Law and Post-Trial Briefs

02/28/2018 **Finding of Fact and Conclusions of Law**

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4/2/2018

<https://www.clarkcountycourts.us/Anonymous/CaseDetail.aspx?CaseID=6680533>

(Proposed) E&E Fire Protections, LLC's Findings of Facts and Conclusions of Law - Proposed

02/28/2018 **Notice of Entry of Stipulation and Order**

Notice of Entry of Stipulation and Order to Extend Deadline to File Proposed Findings of Fact, Conclusions of Law and Post-Trial Briefs

03/01/2018 **Hearing** (9:00 AM) (Judicial Officer Denton, Mark R.)

Hearing Re: ZBCI Attorney's Fees and Costs

Parties PresentMinutes

01/18/2018 Reset by Court to 03/01/2018

Result: Under Advisement

03/08/2018 **Trial Brief**

Plaintiff In Intervention, National Wood Products, Inc.'s Post Trial Brief

03/08/2018 **Trial Brief**

Apco Construction, Inc.'s Post-Trial Brief

03/08/2018 **Trial Brief**

Camco's Post Trial Brief

03/23/2018 **Respondent's Answering Brief**

Plaintiff in Intervention, National Wood Products, Inc.'s Response to CAMCO Pacific Construction Company, Inc.'s Post-Trial Brief

03/23/2018 **Respondent's Answering Brief**

Plaintiff in Intervention, National Wood Products, Inc.'s Response to APCO Construction, Inc.'s Post-Trial Brief

03/23/2018 **Response**

Helix Electric of Nevada, LLC's Response to APCO Construction's Post-Trial Brief

03/23/2018 **Response**

Peel Brimley Lien Claimants' Response to Camco's Post-Trial Brief

03/23/2018 **Opposition to Motion**

APCO Construction, Inc.'s Opposition to Camco Pacific Construction Company's Post-Trial Brief

03/27/2018 **Decision**

Decision

FINANCIAL INFORMATION

Consolidated Case Party New mark Grubb Knight Frank

Total Financial Assessment

7.00

Total Payments and Credits

7.00

Balance Due as of 04/02/2018**0.00**

02/23/2017 Transaction Assessment

3.50

02/23/2017 Efile Payment

Receipt # 2017-18224-CCCLK

New mark Grubb Knight Frank

(3.50)

03/30/2017 Transaction Assessment

3.50

03/30/2017 Efile Payment

Receipt # 2017-30219-CCCLK

New mark Grubb Knight Frank

(3.50)

Conversion Extended Connection Type No Convert Value @ 08A571228

Total Financial Assessment

2,192.00

Total Payments and Credits

2,192.00

Balance Due as of 04/02/2018**0.00**

09/09/2008 Transaction Assessment

2,192.00

09/09/2008 Conversion Payment

Receipt # 01459792

HOWARD & HOWARD ATTORNEYS PC

(148.00)

12/10/2008 Conversion Payment

Receipt # 01477769

HOWARD & HOWARD ATTORNEYS P.C.

(3.00)

01/05/2009 Conversion Payment

Receipt # 01481783

Donald H Williams

(104.00)

01/12/2009 Conversion Payment

Receipt # 01483373

Nevada Construction

(104.00)

01/15/2009 Conversion Payment

Receipt # 01484070

SANTORO DRIGGS WALCH KEARNEY H

(104.00)

01/16/2009 Conversion Payment

Receipt # 01484284

HOLLAND & HART, LLP

(104.00)

01/16/2009 Conversion Payment

Receipt # 01491465

MEIER & FINE LLC

(104.00)

02/09/2009 Conversion Payment

Receipt # 01488844

Watt Tieder Hoffar And Fitzger

(151.00)

02/19/2009 Conversion Payment

Receipt # 01490591

DIXON, TRUMAN, FISHER & CLIFFO

(104.00)

02/19/2009 Conversion Payment

Receipt # 01490592

DIXON, TRUMAN, FISHER & CLIFFO

(3.00)

02/24/2009 Conversion Payment

Receipt # 01491429

PEZZILLO ROBINSON

(151.00)

02/24/2009 Conversion Payment

Receipt # 01491465

PEZZILLO ROBINSON

(3.00)

02/26/2009 Conversion Payment

Receipt # 01491996

T JAMES TRUMAN & ASSOCIATES

(3.00)

02/26/2009 Conversion Payment

Receipt # 01491998

T JAMES TRUMAN & ASSOCIATES

(151.00)

03/12/2009 Conversion Payment

Receipt # 01494924

MCCULLOUGH, PEREZ & ASSOCIATES

(104.00)

03/16/2009 Conversion Payment

Receipt # 01495513

WOODBURY, MORRIS, & BROWN

(104.00)

03/20/2009 Conversion Payment

Receipt # 01496542

CASH ACCOUNT

(17.00)

03/24/2009 Conversion Payment

Receipt # 01497184

DOBBERSTEIN & ASSOCIATES

(151.00)

03/24/2009 Conversion Payment

Receipt # 01497249

DOBBERSTEIN & ASSOCIATES

(3.00)

03/27/2009 Conversion Payment

Receipt # 01498177

T James Truman And Associates

(107.00)

0081

4/2/2018

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| | | | | |
|------------|--------------------|--------------------|--------------------------------|----------|
| 03/27/2009 | Conversion Payment | Receipt # 01498180 | T James Truman And Associates | (107.00) |
| 03/27/2009 | Conversion Payment | Receipt # 01498181 | T James Truman And Associates | (107.00) |
| 04/03/2009 | Conversion Payment | Receipt # 01499512 | HOWARD & HOWARD ATTORNEYS P.C. | (151.00) |
| 04/06/2009 | Conversion Payment | Receipt # 01499770 | DONALD WILLIAMS, ESQ. | (104.00) |

Counter Claimant Camco Pacific Construction Co Inc

Total Financial Assessment 423.00

Total Payments and Credits 423.00

Balance Due as of 04/02/2018 0.00

| | | | | |
|------------|------------------------|----------------------------|-------------------------------|----------|
| 09/11/2009 | Transaction Assessment | | | 223.00 |
| 09/11/2009 | Payment (Window) | Receipt # 2009-05045-CCCLK | Woodbury Morris and Brown LTD | (223.00) |
| 06/28/2010 | Transaction Assessment | | | 200.00 |
| 06/28/2010 | Efile Payment | Receipt # 2010-25575-CCCLK | Camco Pacific Construction Co | (200.00) |

Counter Claimant Insulpro Projects Inc

Total Financial Assessment 21.00

Total Payments and Credits 21.00

Balance Due as of 04/02/2018 0.00

| | | | | |
|------------|------------------------|----------------------------|-----------------------|---------|
| 06/10/2010 | Transaction Assessment | | | 10.00 |
| 06/10/2010 | Efile Payment | Receipt # 2010-22259-CCCLK | Insulpro Projects Inc | (10.00) |
| 10/14/2010 | Transaction Assessment | | | 5.50 |
| 10/14/2010 | Efile Payment | Receipt # 2010-54124-CCCLK | Insulpro Projects Inc | (5.50) |
| 01/19/2012 | Transaction Assessment | | | 5.50 |
| 01/19/2012 | Efile Payment | Receipt # 2012-07332-CCCLK | Insulpro Projects Inc | (5.50) |

Counter Defendant Atlas Construction Supply Inc

Total Financial Assessment 672.50

Total Payments and Credits 672.50

Balance Due as of 04/02/2018 0.00

| | | | | |
|------------|------------------------|-----------------------------|-------------------------------|----------|
| 03/02/2010 | Transaction Assessment | | | 200.00 |
| 03/22/2010 | Efile Payment | Receipt # 2010-16984-FAM | FENNEMORE & CRAIG, PC. | (200.00) |
| 05/06/2010 | Transaction Assessment | | | 6.00 |
| 05/06/2010 | Efile Payment | Receipt # 2010-14897-CCCLK | Atlas Construction Supply Inc | (6.00) |
| 06/10/2010 | Transaction Assessment | | | 206.00 |
| 06/10/2010 | Efile Payment | Receipt # 2010-22003-CCCLK | Atlas Construction Supply Inc | (206.00) |
| 06/10/2010 | Transaction Assessment | | | 6.00 |
| 06/10/2010 | Efile Payment | Receipt # 2010-22034-CCCLK | Atlas Construction Supply Inc | (6.00) |
| 06/21/2010 | Transaction Assessment | | | 6.00 |
| 06/21/2010 | Efile Payment | Receipt # 2010-24210-CCCLK | Atlas Construction Supply Inc | (6.00) |
| 06/22/2010 | Transaction Assessment | | | 206.00 |
| 06/22/2010 | Efile Payment | Receipt # 2010-24665-CCCLK | Atlas Construction Supply Inc | (206.00) |
| 07/19/2010 | Transaction Assessment | | | 6.00 |
| 07/19/2010 | Efile Payment | Receipt # 2010-30911-CCCLK | Atlas Construction Supply Inc | (6.00) |
| 11/08/2011 | Transaction Assessment | | | 5.50 |
| 11/08/2011 | Efile Payment | Receipt # 2011-127393-CCCLK | Atlas Construction Supply Inc | (5.50) |
| 01/04/2012 | Transaction Assessment | | | 5.50 |
| 01/04/2012 | Efile Payment | Receipt # 2012-00781-CCCLK | Atlas Construction Supply Inc | (5.50) |
| 03/28/2012 | Transaction Assessment | | | 5.50 |
| 03/28/2012 | Efile Payment | Receipt # 2012-40645-CCCLK | Atlas Construction Supply Inc | (5.50) |
| 03/29/2012 | Transaction Assessment | | | 5.50 |
| 03/29/2012 | Efile Payment | Receipt # 2012-41289-CCCLK | Atlas Construction Supply Inc | (5.50) |
| 04/12/2012 | Transaction Assessment | | | 3.50 |
| 04/12/2012 | Efile Payment | Receipt # 2012-47816-CCCLK | Atlas Construction Supply Inc | (3.50) |
| 04/16/2012 | Transaction Assessment | | | 5.50 |
| 04/16/2012 | Efile Payment | Receipt # 2012-49022-CCCLK | Atlas Construction Supply Inc | (5.50) |
| 04/17/2012 | Transaction Assessment | | | 5.50 |
| 04/17/2012 | Efile Payment | Receipt # 2012-49058-CCCLK | Atlas Construction Supply Inc | (5.50) |

Counter Defendant Bruin Painting Corporation

Total Financial Assessment 200.00

Total Payments and Credits 200.00

0082

4/2/2018

<https://www.clarkcountycourts.us/Anonymous/CaseDetail.aspx?CaseID=6680533>

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|------------|--|--|-------------|
| | Balance Due as of 04/02/2018 | | 0.00 |
| 05/05/2010 | Transaction Assessment | | 200.00 |
| 05/05/2010 | Efile Payment | Receipt # 2010-14676-CCCLK Bruin Painting Corporation | (200.00) |
| | Counter Defendant Buchele Inc | | |
| | Total Financial Assessment | | 200.00 |
| | Total Payments and Credits | | 200.00 |
| | Balance Due as of 04/02/2018 | | 0.00 |
| 05/05/2010 | Transaction Assessment | | 200.00 |
| 05/05/2010 | Efile Payment | Receipt # 2010-14664-CCCLK Buchele Inc | (200.00) |
| | Counter Defendant Fast Glass Inc | | |
| | Total Financial Assessment | | 200.00 |
| | Total Payments and Credits | | 200.00 |
| | Balance Due as of 04/02/2018 | | 0.00 |
| 04/16/2010 | Transaction Assessment | | 200.00 |
| 04/16/2010 | Efile Payment | Receipt # 2010-10842-CCCLK | (200.00) |
| | Counter Defendant Fast Glass Inc | | |
| | Total Financial Assessment | | 200.00 |
| | Total Payments and Credits | | 200.00 |
| | Balance Due as of 04/02/2018 | | 0.00 |
| 06/28/2010 | Transaction Assessment | | 200.00 |
| 06/28/2010 | Efile Payment | Receipt # 2010-25545-CCCLK Fast Glass Inc | (200.00) |
| | Counter Defendant Ferguson Fire and Fabrication Inc | | |
| | Total Financial Assessment | | 657.00 |
| | Total Payments and Credits | | 657.00 |
| | Balance Due as of 04/02/2018 | | 0.00 |
| 08/27/2009 | Transaction Assessment | | 223.00 |
| 08/27/2009 | Payment (Window) | Receipt # 2009-49806-FAM Rucraft Law Office | (223.00) |
| 06/10/2010 | Transaction Assessment | | 206.00 |
| 06/10/2010 | Efile Payment | Receipt # 2010-22459-CCCLK Ferguson Fire and Fabrication | (206.00) |
| 06/19/2010 | Transaction Assessment | | 6.00 |
| 06/19/2010 | Efile Payment | Receipt # 2010-23999-CCCLK Ferguson Fire and Fabrication | (6.00) |
| 07/09/2010 | Transaction Assessment | | 206.00 |
| 07/09/2010 | Efile Payment | Receipt # 2010-28328-CCCLK Ferguson Fire and Fabrication | (206.00) |
| 07/19/2010 | Transaction Assessment | | 6.00 |
| 07/19/2010 | Efile Payment | Receipt # 2010-30913-CCCLK Ferguson Fire and Fabrication | (6.00) |
| 07/21/2010 | Transaction Assessment | | 10.00 |
| 07/21/2010 | Efile Payment | Receipt # 2010-31698-CCCLK Ferguson Fire and Fabrication | (10.00) |
| | Counter Defendant HD Supply Waterworks LP | | |
| | Total Financial Assessment | | 200.00 |
| | Total Payments and Credits | | 200.00 |
| | Balance Due as of 04/02/2018 | | 0.00 |
| 05/05/2010 | Transaction Assessment | | 200.00 |
| 05/05/2010 | Efile Payment | Receipt # 2010-14693-CCCLK HD Supply Waterworks LP | (200.00) |
| | Counter Defendant Heinaman Contract Glazing | | |
| | Total Financial Assessment | | 200.00 |
| | Total Payments and Credits | | 200.00 |
| | Balance Due as of 04/02/2018 | | 0.00 |

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4/2/2018

<https://www.clarkcountycourts.us/Anonymous/CaseDetail.aspx?CaseID=6680533>

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|---|-------------------------------------|----------------------------|------------------------------|-------------|
| 05/05/2010 | Transaction Assessment | | | 200.00 |
| 05/05/2010 | Efile Payment | Receipt # 2010-14688-CCCLK | Heinaman Contract Glazing | (200.00) |
| Counter Defendant Insulpro Projects Inc | | | | |
| | Total Financial Assessment | | | 210.00 |
| | Total Payments and Credits | | | 210.00 |
| | Balance Due as of 04/02/2018 | | | 0.00 |
| 06/10/2010 | Transaction Assessment | | | 210.00 |
| 06/10/2010 | Efile Payment | Receipt # 2010-22463-CCCLK | Insulpro Projects Inc | (210.00) |
| Counter Defendant Patent Construction Systems | | | | |
| | Total Financial Assessment | | | 200.00 |
| | Total Payments and Credits | | | 200.00 |
| | Balance Due as of 04/02/2018 | | | 0.00 |
| 05/07/2010 | Transaction Assessment | | | 200.00 |
| 05/07/2010 | Efile Payment | Receipt # 2010-15387-CCCLK | Patent Construction Systems | (200.00) |
| Counter Defendant Renaissance Pools & Spas Inc | | | | |
| | Total Financial Assessment | | | 400.00 |
| | Total Payments and Credits | | | 400.00 |
| | Balance Due as of 04/02/2018 | | | 0.00 |
| 05/12/2010 | Transaction Assessment | | | 200.00 |
| 05/12/2010 | Efile Payment | Receipt # 2010-16126-CCCLK | Renaissance Pools & Spas Inc | (200.00) |
| 07/19/2010 | Transaction Assessment | | | 200.00 |
| 07/19/2010 | Efile Payment | Receipt # 2010-30910-CCCLK | Renaissance Pools & Spas Inc | (200.00) |
| Counter Defendant Selectbuild Nevada Inc | | | | |
| | Total Financial Assessment | | | 422.00 |
| | Total Payments and Credits | | | 422.00 |
| | Balance Due as of 04/02/2018 | | | 0.00 |
| 05/14/2010 | Transaction Assessment | | | 200.00 |
| 05/14/2010 | Efile Payment | Receipt # 2010-16711-CCCLK | Selectbuild Nevada Inc | (200.00) |
| 06/26/2010 | Transaction Assessment | | | 200.00 |
| 06/26/2010 | Efile Payment | Receipt # 2010-25454-CCCLK | Selectbuild Nevada Inc | (200.00) |
| 01/09/2012 | Transaction Assessment | | | 5.50 |
| 01/09/2012 | Efile Payment | Receipt # 2012-02855-CCCLK | Selectbuild Nevada Inc | (5.50) |
| 01/17/2012 | Transaction Assessment | | | 5.50 |
| 01/17/2012 | Efile Payment | Receipt # 2012-06163-CCCLK | Selectbuild Nevada Inc | (5.50) |
| 03/21/2012 | Transaction Assessment | | | 5.50 |
| 03/21/2012 | Efile Payment | Receipt # 2012-37097-CCCLK | Selectbuild Nevada Inc | (5.50) |
| 06/12/2012 | Transaction Assessment | | | 5.50 |
| 06/12/2012 | Efile Payment | Receipt # 2012-74173-CCCLK | Selectbuild Nevada Inc | (5.50) |
| Counter Defendant Steel Structures Inc | | | | |
| | Total Financial Assessment | | | 200.00 |
| | Total Payments and Credits | | | 200.00 |
| | Balance Due as of 04/02/2018 | | | 0.00 |
| 08/04/2017 | Transaction Assessment | | | 200.00 |
| 08/04/2017 | Efile Payment | Receipt # 2017-62463-CCCLK | Steel Structures Inc | (200.00) |
| Counter Defendant WRG Design Inc | | | | |
| | Total Financial Assessment | | | 200.00 |
| | Total Payments and Credits | | | 200.00 |
| | Balance Due as of 04/02/2018 | | | 0.00 |

0084

4/2/2018

<https://www.clarkcountycourts.us/Anonymous/CaseDetail.aspx?CaseID=6680533>

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|--|-------------------------------------|----------------------------|-----------------------------------|-------------|
| 05/06/2010 | Transaction Assessment | | | 200.00 |
| 05/06/2010 | Efile Payment | Receipt # 2010-14941-CCCLK | WRG Design Inc | (200.00) |
| Counter Defendant Zitting Brothers Construction Inc | | | | |
| | Total Financial Assessment | | | 1,200.00 |
| | Total Payments and Credits | | | 1,200.00 |
| | Balance Due as of 04/02/2018 | | | 0.00 |
| 05/28/2010 | Transaction Assessment | | | 200.00 |
| 05/28/2010 | Efile Payment | Receipt # 2010-19998-CCCLK | Zitting Brothers Construction | (200.00) |
| 07/23/2010 | Transaction Assessment | | | 200.00 |
| 07/23/2010 | Efile Payment | Receipt # 2010-32573-CCCLK | Zitting Brothers Construction | (200.00) |
| 06/01/2016 | Transaction Assessment | | | 200.00 |
| 06/01/2016 | Efile Payment | Receipt # 2016-52498-CCCLK | Zitting Brothers Construction Inc | (200.00) |
| 08/02/2017 | Transaction Assessment | | | 200.00 |
| 08/02/2017 | Efile Payment | Receipt # 2017-61635-CCCLK | Zitting Brothers Construction Inc | (200.00) |
| 08/04/2017 | Transaction Assessment | | | 200.00 |
| 08/04/2017 | Efile Payment | Receipt # 2017-62282-CCCLK | Zitting Brothers Construction Inc | (200.00) |
| 08/09/2017 | Transaction Assessment | | | 200.00 |
| 08/09/2017 | Efile Payment | Receipt # 2017-63393-CCCLK | Zitting Brothers Construction Inc | (200.00) |
| Defendant Gemstone Development West Inc | | | | |
| | Total Financial Assessment | | | 222.00 |
| | Total Payments and Credits | | | 222.00 |
| | Balance Due as of 04/02/2018 | | | 0.00 |
| 05/04/2009 | Transaction Assessment | | | 9.00 |
| 05/04/2009 | Payment (Window) | Receipt # 2009-18685-FAM | Bowler dixon & Twitcheall LLP | (9.00) |
| 07/29/2009 | Transaction Assessment | | | 203.00 |
| 08/04/2009 | Efile Payment | Receipt # 2009-03738-CCCLK | HOLLAND & HART, LLP | (203.00) |
| 05/24/2013 | Transaction Assessment | | | 5.00 |
| 05/24/2013 | Transaction Assessment | | | 5.00 |
| 05/24/2013 | Payment (Window) | Receipt # 2013-63938-CCCLK | American Legal Investigation | (10.00) |
| Defendant Scott Financial Corporation | | | | |
| | Total Financial Assessment | | | 1,021.50 |
| | Total Payments and Credits | | | 1,021.50 |
| | Balance Due as of 04/02/2018 | | | 0.00 |
| 08/25/2009 | Transaction Assessment | | | 223.00 |
| 08/25/2009 | Efile Payment | Receipt # 2009-49342-FAM | Howard, Meier & Fine | (223.00) |
| 05/07/2010 | Transaction Assessment | | | 10.00 |
| 05/07/2010 | Efile Payment | Receipt # 2010-15307-CCCLK | Scott Financial Corporation | (10.00) |
| 05/14/2010 | Transaction Assessment | | | 10.00 |
| 05/14/2010 | Efile Payment | Receipt # 2010-16819-CCCLK | Scott Financial Corporation | (10.00) |
| 05/14/2010 | Transaction Assessment | | | 10.00 |
| 05/14/2010 | Efile Payment | Receipt # 2010-16820-CCCLK | Scott Financial Corporation | (10.00) |
| 05/14/2010 | Transaction Assessment | | | 10.00 |
| 05/14/2010 | Efile Payment | Receipt # 2010-16821-CCCLK | Scott Financial Corporation | (10.00) |
| 05/14/2010 | Transaction Assessment | | | 10.00 |
| 05/14/2010 | Efile Payment | Receipt # 2010-16823-CCCLK | Scott Financial Corporation | (10.00) |
| 05/14/2010 | Transaction Assessment | | | 10.00 |
| 05/14/2010 | Efile Payment | Receipt # 2010-16825-CCCLK | Scott Financial Corporation | (10.00) |
| 05/14/2010 | Transaction Assessment | | | 10.00 |
| 05/14/2010 | Efile Payment | Receipt # 2010-16827-CCCLK | Scott Financial Corporation | (10.00) |
| 05/14/2010 | Transaction Assessment | | | 10.00 |
| 05/14/2010 | Efile Payment | Receipt # 2010-16828-CCCLK | Scott Financial Corporation | (10.00) |
| 05/14/2010 | Transaction Assessment | | | 10.00 |
| 05/14/2010 | Efile Payment | Receipt # 2010-16830-CCCLK | Scott Financial Corporation | (10.00) |
| 05/14/2010 | Transaction Assessment | | | 10.00 |
| 05/14/2010 | Efile Payment | Receipt # 2010-16832-CCCLK | Scott Financial Corporation | (10.00) |
| 05/14/2010 | Transaction Assessment | | | 10.00 |
| 05/14/2010 | Efile Payment | Receipt # 2010-16833-CCCLK | Scott Financial Corporation | (10.00) |
| 05/14/2010 | Transaction Assessment | | | 10.00 |
| 05/14/2010 | Efile Payment | Receipt # 2010-16835-CCCLK | Scott Financial Corporation | (10.00) |
| 05/18/2010 | Transaction Assessment | | | 10.00 |

0085

4/2/2018

<https://www.clarkcountycourts.us/Anonymous/CaseDetail.aspx?CaseID=6680533>

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|------------|------------------------|-----------------------------|-----------------------------|----------|
| 05/18/2010 | Efile Payment | Receipt # 2010-17318-CCCLK | Scott Financial Corporation | (10.00) |
| 05/18/2010 | Transaction Assessment | | | 10.00 |
| 05/18/2010 | Efile Payment | Receipt # 2010-17321-CCCLK | Scott Financial Corporation | (10.00) |
| 06/10/2010 | Transaction Assessment | | | 210.00 |
| 06/10/2010 | Efile Payment | Receipt # 2010-22473-CCCLK | Scott Financial Corporation | (210.00) |
| 06/12/2010 | Transaction Assessment | | | 10.00 |
| 06/12/2010 | Efile Payment | Receipt # 2010-22859-CCCLK | Scott Financial Corporation | (10.00) |
| 06/12/2010 | Transaction Assessment | | | 10.00 |
| 06/12/2010 | Efile Payment | Receipt # 2010-22893-CCCLK | Scott Financial Corporation | (10.00) |
| 06/12/2010 | Transaction Assessment | | | 10.00 |
| 06/12/2010 | Efile Payment | Receipt # 2010-22895-CCCLK | Scott Financial Corporation | (10.00) |
| 06/12/2010 | Transaction Assessment | | | 10.00 |
| 06/12/2010 | Efile Payment | Receipt # 2010-22911-CCCLK | Scott Financial Corporation | (10.00) |
| 06/16/2010 | Transaction Assessment | | | 10.00 |
| 06/16/2010 | Efile Payment | Receipt # 2010-23410-CCCLK | Scott Financial Corporation | (10.00) |
| 06/17/2010 | Transaction Assessment | | | 10.00 |
| 06/17/2010 | Efile Payment | Receipt # 2010-23804-CCCLK | Scott Financial Corporation | (10.00) |
| 06/23/2010 | Transaction Assessment | | | 6.00 |
| 06/23/2010 | Efile Payment | Receipt # 2010-24810-CCCLK | Scott Financial Corporation | (6.00) |
| 06/25/2010 | Transaction Assessment | | | 6.00 |
| 06/25/2010 | Efile Payment | Receipt # 2010-25260-CCCLK | Scott Financial Corporation | (6.00) |
| 06/30/2010 | Transaction Assessment | | | 10.00 |
| 06/30/2010 | Efile Payment | Receipt # 2010-25906-CCCLK | Scott Financial Corporation | (10.00) |
| 06/30/2010 | Transaction Assessment | | | 10.00 |
| 06/30/2010 | Efile Payment | Receipt # 2010-25907-CCCLK | Scott Financial Corporation | (10.00) |
| 06/30/2010 | Transaction Assessment | | | 10.00 |
| 06/30/2010 | Efile Payment | Receipt # 2010-25908-CCCLK | Scott Financial Corporation | (10.00) |
| 07/09/2010 | Transaction Assessment | | | 10.00 |
| 07/09/2010 | Efile Payment | Receipt # 2010-28546-CCCLK | Scott Financial Corporation | (10.00) |
| 07/19/2010 | Transaction Assessment | | | 10.00 |
| 07/19/2010 | Efile Payment | Receipt # 2010-30810-CCCLK | Scott Financial Corporation | (10.00) |
| 07/22/2010 | Transaction Assessment | | | 10.00 |
| 07/22/2010 | Efile Payment | Receipt # 2010-31997-CCCLK | Scott Financial Corporation | (10.00) |
| 09/04/2010 | Transaction Assessment | | | 10.00 |
| 09/04/2010 | Efile Payment | Receipt # 2010-44313-CCCLK | Scott Financial Corporation | (10.00) |
| 10/02/2010 | Transaction Assessment | | | 5.50 |
| 10/02/2010 | Efile Payment | Receipt # 2010-51382-CCCLK | Scott Financial Corporation | (5.50) |
| 10/05/2010 | Transaction Assessment | | | 5.50 |
| 10/05/2010 | Efile Payment | Receipt # 2010-51919-CCCLK | Scott Financial Corporation | (5.50) |
| 12/15/2010 | Transaction Assessment | | | 5.50 |
| 12/15/2010 | Efile Payment | Receipt # 2010-70226-CCCLK | Scott Financial Corporation | (5.50) |
| 12/17/2010 | Transaction Assessment | | | 5.50 |
| 12/17/2010 | Efile Payment | Receipt # 2010-70634-CCCLK | Scott Financial Corporation | (5.50) |
| 11/07/2011 | Transaction Assessment | | | 5.50 |
| 11/07/2011 | Efile Payment | Receipt # 2011-126523-CCCLK | Scott Financial Corporation | (5.50) |
| 11/08/2011 | Transaction Assessment | | | 5.50 |
| 11/08/2011 | Efile Payment | Receipt # 2011-127208-CCCLK | Scott Financial Corporation | (5.50) |
| 11/09/2011 | Transaction Assessment | | | 5.50 |
| 11/09/2011 | Efile Payment | Receipt # 2011-127436-CCCLK | Scott Financial Corporation | (5.50) |
| 12/13/2011 | Transaction Assessment | | | 5.50 |
| 12/13/2011 | Efile Payment | Receipt # 2011-141761-CCCLK | Scott Financial Corporation | (5.50) |
| 12/13/2011 | Transaction Assessment | | | 5.50 |
| 12/13/2011 | Efile Payment | Receipt # 2011-142197-CCCLK | Scott Financial Corporation | (5.50) |
| 12/15/2011 | Transaction Assessment | | | 5.50 |
| 12/15/2011 | Efile Payment | Receipt # 2011-142818-CCCLK | Scott Financial Corporation | (5.50) |
| 01/13/2012 | Transaction Assessment | | | 5.50 |
| 01/13/2012 | Efile Payment | Receipt # 2012-05434-CCCLK | Scott Financial Corporation | (5.50) |
| 01/19/2012 | Transaction Assessment | | | 5.50 |
| 01/19/2012 | Efile Payment | Receipt # 2012-07902-CCCLK | Scott Financial Corporation | (5.50) |
| 02/15/2012 | Transaction Assessment | | | 5.50 |
| 02/15/2012 | Efile Payment | Receipt # 2012-21516-CCCLK | Scott Financial Corporation | (5.50) |
| 03/06/2012 | Transaction Assessment | | | 5.50 |
| 03/06/2012 | Efile Payment | Receipt # 2012-29995-CCCLK | Scott Financial Corporation | (5.50) |
| 03/16/2012 | Transaction Assessment | | | 5.50 |
| 03/16/2012 | Efile Payment | Receipt # 2012-34488-CCCLK | Scott Financial Corporation | (5.50) |
| 03/16/2012 | Transaction Assessment | | | 5.50 |
| 03/16/2012 | Efile Payment | Receipt # 2012-34853-CCCLK | Scott Financial Corporation | (5.50) |
| 03/20/2012 | Transaction Assessment | | | 5.50 |
| 03/20/2012 | Efile Payment | Receipt # 2012-36471-CCCLK | Scott Financial Corporation | (5.50) |
| 05/07/2012 | Transaction Assessment | | | 5.50 |
| 05/07/2012 | Efile Payment | Receipt # 2012-59115-CCCLK | Scott Financial Corporation | (5.50) |
| 05/08/2012 | Transaction Assessment | | | 5.50 |

0086

<https://www.clarkcountycourts.us/Anonymous/CaseDetail.aspx?CaseID=6680533>

85/97

4/2/2018

<https://www.clarkcountycourts.us/Anonymous/CaseDetail.aspx?CaseID=6680533>

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|------------|------------------------|-----------------------------|-----------------------------|--------|
| 05/08/2012 | Efile Payment | Receipt # 2012-59775-CCCLK | Scott Financial Corporation | (5.50) |
| 05/30/2012 | Transaction Assessment | | | 3.50 |
| 05/30/2012 | Efile Payment | Receipt # 2012-68537-CCCLK | Scott Financial Corporation | (3.50) |
| 05/31/2012 | Transaction Assessment | | | 3.50 |
| 05/31/2012 | Efile Payment | Receipt # 2012-69160-CCCLK | Scott Financial Corporation | (3.50) |
| 05/31/2012 | Transaction Assessment | | | 3.50 |
| 05/31/2012 | Efile Payment | Receipt # 2012-69162-CCCLK | Scott Financial Corporation | (3.50) |
| 05/31/2012 | Transaction Assessment | | | 3.50 |
| 05/31/2012 | Efile Payment | Receipt # 2012-69166-CCCLK | Scott Financial Corporation | (3.50) |
| 05/31/2012 | Transaction Assessment | | | 3.50 |
| 05/31/2012 | Efile Payment | Receipt # 2012-69170-CCCLK | Scott Financial Corporation | (3.50) |
| 06/01/2012 | Transaction Assessment | | | 3.50 |
| 06/01/2012 | Efile Payment | Receipt # 2012-69593-CCCLK | Scott Financial Corporation | (3.50) |
| 06/27/2012 | Transaction Assessment | | | 5.50 |
| 06/27/2012 | Efile Payment | Receipt # 2012-81300-CCCLK | Scott Financial Corporation | (5.50) |
| 06/28/2012 | Transaction Assessment | | | 5.50 |
| 06/28/2012 | Efile Payment | Receipt # 2012-81993-CCCLK | Scott Financial Corporation | (5.50) |
| 07/03/2012 | Transaction Assessment | | | 3.50 |
| 07/03/2012 | Efile Payment | Receipt # 2012-84038-CCCLK | Scott Financial Corporation | (3.50) |
| 08/10/2012 | Transaction Assessment | | | 5.50 |
| 08/10/2012 | Efile Payment | Receipt # 2012-100979-CCCLK | Scott Financial Corporation | (5.50) |
| 08/13/2012 | Transaction Assessment | | | 5.50 |
| 08/13/2012 | Efile Payment | Receipt # 2012-101532-CCCLK | Scott Financial Corporation | (5.50) |
| 10/30/2012 | Transaction Assessment | | | 3.50 |
| 10/30/2012 | Efile Payment | Receipt # 2012-134288-CCCLK | Scott Financial Corporation | (3.50) |
| 01/24/2013 | Transaction Assessment | | | 3.50 |
| 01/24/2013 | Efile Payment | Receipt # 2013-09310-CCCLK | Scott Financial Corporation | (3.50) |
| 01/28/2013 | Transaction Assessment | | | 3.50 |
| 01/28/2013 | Efile Payment | Receipt # 2013-11007-CCCLK | Scott Financial Corporation | (3.50) |
| 01/29/2013 | Transaction Assessment | | | 3.50 |
| 01/29/2013 | Efile Payment | Receipt # 2013-12083-CCCLK | Scott Financial Corporation | (3.50) |
| 01/30/2013 | Transaction Assessment | | | 3.50 |
| 01/30/2013 | Efile Payment | Receipt # 2013-12129-CCCLK | Scott Financial Corporation | (3.50) |
| 01/30/2013 | Transaction Assessment | | | 3.50 |
| 01/30/2013 | Efile Payment | Receipt # 2013-12139-CCCLK | Scott Financial Corporation | (3.50) |
| 01/31/2013 | Transaction Assessment | | | 3.50 |
| 01/31/2013 | Efile Payment | Receipt # 2013-12849-CCCLK | Scott Financial Corporation | (3.50) |
| 01/31/2013 | Transaction Assessment | | | 3.50 |
| 01/31/2013 | Efile Payment | Receipt # 2013-12875-CCCLK | Scott Financial Corporation | (3.50) |
| 01/31/2013 | Transaction Assessment | | | 5.50 |
| 01/31/2013 | Efile Payment | Receipt # 2013-13012-CCCLK | Scott Financial Corporation | (5.50) |
| 01/31/2013 | Transaction Assessment | | | 5.50 |
| 01/31/2013 | Efile Payment | Receipt # 2013-13362-CCCLK | Scott Financial Corporation | (5.50) |
| 02/06/2013 | Transaction Assessment | | | 3.50 |
| 02/06/2013 | Efile Payment | Receipt # 2013-15285-CCCLK | Scott Financial Corporation | (3.50) |
| 02/06/2013 | Transaction Assessment | | | 3.50 |
| 02/06/2013 | Efile Payment | Receipt # 2013-15525-CCCLK | Scott Financial Corporation | (3.50) |
| 02/06/2013 | Transaction Assessment | | | 5.50 |
| 02/06/2013 | Efile Payment | Receipt # 2013-15806-CCCLK | Scott Financial Corporation | (5.50) |
| 02/08/2013 | Transaction Assessment | | | 3.50 |
| 02/08/2013 | Efile Payment | Receipt # 2013-16833-CCCLK | Scott Financial Corporation | (3.50) |
| 02/11/2013 | Transaction Assessment | | | 5.50 |
| 02/11/2013 | Efile Payment | Receipt # 2013-17163-CCCLK | Scott Financial Corporation | (5.50) |
| 02/12/2013 | Transaction Assessment | | | 3.50 |
| 02/12/2013 | Efile Payment | Receipt # 2013-18186-CCCLK | Scott Financial Corporation | (3.50) |
| 02/12/2013 | Transaction Assessment | | | 3.50 |
| 02/12/2013 | Efile Payment | Receipt # 2013-18189-CCCLK | Scott Financial Corporation | (3.50) |
| 02/12/2013 | Transaction Assessment | | | 3.50 |
| 02/12/2013 | Efile Payment | Receipt # 2013-18191-CCCLK | Scott Financial Corporation | (3.50) |
| 02/12/2013 | Transaction Assessment | | | 3.50 |
| 02/12/2013 | Efile Payment | Receipt # 2013-18198-CCCLK | Scott Financial Corporation | (3.50) |
| 02/13/2013 | Transaction Assessment | | | 3.50 |
| 02/13/2013 | Efile Payment | Receipt # 2013-18667-CCCLK | Scott Financial Corporation | (3.50) |
| 02/13/2013 | Transaction Assessment | | | 3.50 |
| 02/13/2013 | Efile Payment | Receipt # 2013-18866-CCCLK | Scott Financial Corporation | (3.50) |
| 02/14/2013 | Transaction Assessment | | | 3.50 |
| 02/14/2013 | Efile Payment | Receipt # 2013-19195-CCCLK | Scott Financial Corporation | (3.50) |
| 02/14/2013 | Transaction Assessment | | | 3.50 |
| 02/14/2013 | Efile Payment | Receipt # 2013-19197-CCCLK | Scott Financial Corporation | (3.50) |
| 02/14/2013 | Transaction Assessment | | | 3.50 |
| 02/14/2013 | Efile Payment | Receipt # 2013-19201-CCCLK | Scott Financial Corporation | (3.50) |
| 02/15/2013 | Transaction Assessment | | | 3.50 |

0087

4/2/2018

<https://www.clarkcountycourts.us/Anonymous/CaseDetail.aspx?CaseID=6680533>

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|------------|------------------------|----------------------------|------------------------------|--------|
| 02/15/2013 | Efile Payment | Receipt # 2013-19776-CCCLK | Scott Financial Corporation | (3.50) |
| 02/15/2013 | Transaction Assessment | | | 3.50 |
| 02/15/2013 | Efile Payment | Receipt # 2013-19781-CCCLK | Scott Financial Corporation | (3.50) |
| 02/15/2013 | Transaction Assessment | | | 3.50 |
| 02/15/2013 | Efile Payment | Receipt # 2013-19784-CCCLK | Scott Financial Corporation | (3.50) |
| 02/15/2013 | Transaction Assessment | | | 3.50 |
| 02/15/2013 | Efile Payment | Receipt # 2013-19786-CCCLK | Scott Financial Corporation | (3.50) |
| 02/15/2013 | Transaction Assessment | | | 3.50 |
| 02/15/2013 | Efile Payment | Receipt # 2013-19796-CCCLK | Scott Financial Corporation | (3.50) |
| 02/15/2013 | Transaction Assessment | | | 3.50 |
| 02/15/2013 | Efile Payment | Receipt # 2013-19800-CCCLK | Scott Financial Corporation | (3.50) |
| 02/25/2013 | Transaction Assessment | | | 5.50 |
| 02/25/2013 | Efile Payment | Receipt # 2013-23282-CCCLK | Scott Financial Corporation | (5.50) |
| 02/27/2013 | Transaction Assessment | | | 5.50 |
| 02/27/2013 | Efile Payment | Receipt # 2013-24000-CCCLK | Scott Financial Corporation | (5.50) |
| 04/26/2013 | Transaction Assessment | | | 3.50 |
| 04/26/2013 | Efile Payment | Receipt # 2013-51562-CCCLK | Scott Financial Corporation | (3.50) |
| 04/30/2013 | Transaction Assessment | | | 3.50 |
| 04/30/2013 | Efile Payment | Receipt # 2013-53288-CCCLK | Scott Financial Corporation | (3.50) |
| 05/02/2013 | Transaction Assessment | | | 3.50 |
| 05/02/2013 | Efile Payment | Receipt # 2013-54107-CCCLK | Scott Financial Corporation | (3.50) |
| 05/20/2013 | Transaction Assessment | | | 3.50 |
| 05/20/2013 | Efile Payment | Receipt # 2013-61335-CCCLK | Scott Financial Corporation | (3.50) |
| 05/24/2013 | Transaction Assessment | | | 3.50 |
| 05/24/2013 | Efile Payment | Receipt # 2013-63900-CCCLK | Scott Financial Corporation | (3.50) |
| 05/24/2013 | Transaction Assessment | | | 5.00 |
| 05/24/2013 | Payment (Window) | Receipt # 2013-64034-CCCLK | American Legal Investigation | (5.00) |
| 06/13/2013 | Transaction Assessment | | | 5.50 |
| 06/13/2013 | Efile Payment | Receipt # 2013-72015-CCCLK | Scott Financial Corporation | (5.50) |
| 06/23/2014 | Transaction Assessment | | | 3.50 |
| 06/23/2014 | Efile Payment | Receipt # 2014-71775-CCCLK | Scott Financial Corporation | (3.50) |

Defendant Scott, Bradley J

| | |
|-------------------------------------|-------------|
| Total Financial Assessment | 1,483.00 |
| Total Payments and Credits | 1,483.00 |
| Balance Due as of 04/02/2018 | 0.00 |

| | | | | |
|------------|------------------------|--------------------------|------------------------|------------|
| 10/09/2009 | Transaction Assessment | | | 1,483.00 |
| 10/16/2009 | Efile Payment | Receipt # 2009-62487-FAM | KEMP JONES & COULTHARD | (1,483.00) |

Doing Business As Helix Electric

| | |
|-------------------------------------|-------------|
| Total Financial Assessment | 400.00 |
| Total Payments and Credits | 400.00 |
| Balance Due as of 04/02/2018 | 0.00 |

| | | | | |
|------------|------------------------|----------------------------|----------------|----------|
| 05/06/2010 | Transaction Assessment | | | 200.00 |
| 05/06/2010 | Efile Payment | Receipt # 2010-14944-CCCLK | Helix Electric | (200.00) |
| 08/02/2017 | Transaction Assessment | | | 200.00 |
| 08/02/2017 | Efile Payment | Receipt # 2017-61853-CCCLK | Helix Electric | (200.00) |

Interpleader Hydropressure Cleaning Inc

| | |
|-------------------------------------|-------------|
| Total Financial Assessment | 200.00 |
| Total Payments and Credits | 200.00 |
| Balance Due as of 04/02/2018 | 0.00 |

| | | | | |
|------------|------------------------|----------------------------|----------------------------|----------|
| 05/19/2010 | Transaction Assessment | | | 200.00 |
| 05/19/2010 | Efile Payment | Receipt # 2010-17677-CCCLK | Hydropressure Cleaning Inc | (200.00) |

Intervenor Cell Crete Fireproofing Of NV Inc

| | |
|-------------------------------------|-------------|
| Total Financial Assessment | 400.00 |
| Total Payments and Credits | 400.00 |
| Balance Due as of 04/02/2018 | 0.00 |

| | | | | |
|------------|------------------------|--|--|--------|
| 06/10/2010 | Transaction Assessment | | | 200.00 |
|------------|------------------------|--|--|--------|

0088

4/2/2018

<https://www.clarkcountycourts.us/Anonymous/CaseDetail.aspx?CaseID=6680533>

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|------------|------------------------|----------------------------|-------------------------------|----------|
| 06/10/2010 | Efile Payment | Receipt # 2010-22472-CCCLK | Cell Crete Fireproofing Of NV | (200.00) |
| 06/28/2010 | Transaction Assessment | | | 200.00 |
| 06/28/2010 | Efile Payment | Receipt # 2010-25577-CCCLK | Cell Crete Fireproofing Of NV | (200.00) |

Intervenor Custom Select Billing Inc

| | |
|-------------------------------------|-------------|
| Total Financial Assessment | 1,683.00 |
| Total Payments and Credits | 1,683.00 |
| Balance Due as of 04/02/2018 | 0.00 |

| | | | | |
|------------|------------------------|----------------------------|--------------------------------|------------|
| 08/31/2009 | Transaction Assessment | | | 1,483.00 |
| 08/31/2009 | Payment (Window) | Receipt # 2009-50877-FAM | Howard & Howard Attorneys PLLC | (1,483.00) |
| 05/19/2010 | Transaction Assessment | | | 200.00 |
| 05/19/2010 | Efile Payment | Receipt # 2010-17668-CCCLK | Custom Select Billing Inc | (200.00) |

Intervenor E & E Fire Protectiong LLC

| | |
|-------------------------------------|-------------|
| Total Financial Assessment | 400.00 |
| Total Payments and Credits | 400.00 |
| Balance Due as of 04/02/2018 | 0.00 |

| | | | | |
|------------|------------------------|----------------------------|----------------------------|----------|
| 07/06/2010 | Transaction Assessment | | | 200.00 |
| 07/06/2010 | Efile Payment | Receipt # 2010-26937-CCCLK | E & E Fire Protectiong LLC | (200.00) |
| 08/09/2010 | Transaction Assessment | | | 200.00 |
| 08/09/2010 | Efile Payment | Receipt # 2010-36894-CCCLK | E & E Fire Protectiong LLC | (200.00) |

Intervenor EZA P C

| | |
|-------------------------------------|-------------|
| Total Financial Assessment | 200.00 |
| Total Payments and Credits | 200.00 |
| Balance Due as of 04/02/2018 | 0.00 |

| | | | | |
|------------|------------------------|----------------------------|---------|----------|
| 05/07/2010 | Transaction Assessment | | | 200.00 |
| 05/07/2010 | Efile Payment | Receipt # 2010-15390-CCCLK | EZA P C | (200.00) |

Intervenor Granite Construction Company

| | |
|-------------------------------------|-------------|
| Total Financial Assessment | 203.00 |
| Total Payments and Credits | 203.00 |
| Balance Due as of 04/02/2018 | 0.00 |

| | | | | |
|------------|------------------------|--------------------------|--------------------------------|----------|
| 07/22/2009 | Transaction Assessment | | | 203.00 |
| 07/22/2009 | Payment (Window) | Receipt # 2009-40516-FAM | Watt, Tieder, Hoffar & Fitzger | (203.00) |

Intervenor Insulpro Projects Inc

| | |
|-------------------------------------|-------------|
| Total Financial Assessment | 276.50 |
| Total Payments and Credits | 276.50 |
| Balance Due as of 04/02/2018 | 0.00 |

| | | | | |
|------------|------------------------|----------------------------|-----------------------|----------|
| 05/05/2010 | Transaction Assessment | | | 6.00 |
| 05/05/2010 | Efile Payment | Receipt # 2010-14806-CCCLK | Insulpro Projects Inc | (6.00) |
| 06/24/2010 | Transaction Assessment | | | 210.00 |
| 06/24/2010 | Efile Payment | Receipt # 2010-24920-CCCLK | Insulpro Projects Inc | (210.00) |
| 07/12/2010 | Transaction Assessment | | | 10.00 |
| 07/12/2010 | Efile Payment | Receipt # 2010-28942-CCCLK | Insulpro Projects Inc | (10.00) |
| 07/12/2010 | Transaction Assessment | | | 10.00 |
| 07/12/2010 | Efile Payment | Receipt # 2010-28945-CCCLK | Insulpro Projects Inc | (10.00) |
| 08/04/2010 | Transaction Assessment | | | 10.00 |
| 08/04/2010 | Efile Payment | Receipt # 2010-35799-CCCLK | Insulpro Projects Inc | (10.00) |
| 02/04/2011 | Transaction Assessment | | | 3.50 |
| 02/04/2011 | Efile Payment | Receipt # 2011-10033-CCCLK | Insulpro Projects Inc | (3.50) |
| 02/04/2011 | Transaction Assessment | | | 3.50 |
| 02/04/2011 | Efile Payment | Receipt # 2011-10035-CCCLK | Insulpro Projects Inc | (3.50) |
| 04/26/2011 | Transaction Assessment | | | 3.50 |
| 04/26/2011 | Efile Payment | Receipt # 2011-41856-CCCLK | Insulpro Projects Inc | (3.50) |
| 04/27/2011 | Transaction Assessment | | | 5.50 |

0089.

4/2/2018

<https://www.clarkcountycourts.us/Anonymous/CaseDetail.aspx?CaseID=6680533>

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|------------|------------------------|-----------------------------|-----------------------|--------|
| 04/27/2011 | Efile Payment | Receipt # 2011-42531-CCCLK | Insulpro Projects Inc | (5.50) |
| 06/29/2011 | Transaction Assessment | | | 3.50 |
| 06/29/2011 | Efile Payment | Receipt # 2011-68948-CCCLK | Insulpro Projects Inc | (3.50) |
| 11/07/2011 | Transaction Assessment | | | 5.50 |
| 11/07/2011 | Efile Payment | Receipt # 2011-126780-CCCLK | Insulpro Projects Inc | (5.50) |
| 01/04/2012 | Transaction Assessment | | | 5.50 |
| 01/04/2012 | Efile Payment | Receipt # 2012-00971-CCCLK | Insulpro Projects Inc | (5.50) |

Intervenor National Wood Products, Inc.'s

| | |
|-------------------------------------|-------------|
| Total Financial Assessment | 1,683.00 |
| Total Payments and Credits | 1,683.00 |
| Balance Due as of 04/02/2018 | 0.00 |

| | | | | |
|------------|------------------------|----------------------------|--------------------------------|------------|
| 08/09/2017 | Transaction Assessment | | | 1,483.00 |
| 08/09/2017 | Efile Payment | Receipt # 2017-63409-CCCLK | National Wood Products, Inc.'s | (1,483.00) |
| 08/09/2017 | Transaction Assessment | | | 200.00 |
| 08/09/2017 | Efile Payment | Receipt # 2017-63414-CCCLK | National Wood Products, Inc.'s | (200.00) |

Intervenor Nevada Prefab Engineers Inc

| | |
|-------------------------------------|-------------|
| Total Financial Assessment | 200.00 |
| Total Payments and Credits | 200.00 |
| Balance Due as of 04/02/2018 | 0.00 |

| | | | | |
|------------|------------------------|----------------------------|-----------------------------|----------|
| 02/06/2012 | Transaction Assessment | | | 200.00 |
| 02/06/2012 | Efile Payment | Receipt # 2012-17150-CCCLK | Nevada Prefab Engineers Inc | (200.00) |

Intervenor Patent Construction Systems

| | |
|-------------------------------------|-------------|
| Total Financial Assessment | 104.00 |
| Total Payments and Credits | 104.00 |
| Balance Due as of 04/02/2018 | 0.00 |

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|------------|------------------------|----------------------------|--------------------------------|----------|
| 06/04/2009 | Transaction Assessment | | | 104.00 |
| 06/04/2009 | Payment (Window) | Receipt # 2009-00657-CCCLK | Law Offices of Donald H Willia | (104.00) |

Intervenor Pressure Grout Co

| | |
|-------------------------------------|-------------|
| Total Financial Assessment | 104.00 |
| Total Payments and Credits | 104.00 |
| Balance Due as of 04/02/2018 | 0.00 |

| | | | | |
|------------|------------------------|--------------------------|------------------------------|----------|
| 04/25/2009 | Transaction Assessment | | | 104.00 |
| 04/25/2009 | Payment (Mail) | Receipt # 2009-15664-FAM | Bowler Dixon & Twitchell LLP | (104.00) |

Intervenor Professional Doors & Millworks LLC

| | |
|-------------------------------------|-------------|
| Total Financial Assessment | 200.00 |
| Total Payments and Credits | 200.00 |
| Balance Due as of 04/02/2018 | 0.00 |

| | | | | |
|------------|------------------------|----------------------------|--------------------------------|----------|
| 08/09/2010 | Transaction Assessment | | | 200.00 |
| 08/09/2010 | Efile Payment | Receipt # 2010-36900-CCCLK | Professional Doors & Millworks | (200.00) |

Intervenor Steel Structures Inc

| | |
|-------------------------------------|-------------|
| Total Financial Assessment | 200.00 |
| Total Payments and Credits | 200.00 |
| Balance Due as of 04/02/2018 | 0.00 |

| | | | | |
|------------|------------------------|----------------------------|----------------------|----------|
| 02/06/2012 | Transaction Assessment | | | 200.00 |
| 02/06/2012 | Efile Payment | Receipt # 2012-17149-CCCLK | Steel Structures Inc | (200.00) |

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|------------|------------------------|--|--------------------------------|-------------|
| | | Intervenor Steel Structures Inc | | |
| | | Total Financial Assessment | | 200.00 |
| | | Total Payments and Credits | | 200.00 |
| | | Balance Due as of 04/02/2018 | | 0.00 |
| 08/04/2017 | Transaction Assessment | | | 200.00 |
| 08/04/2017 | Efile Payment | Receipt # 2017-62455-CCCLK | Steel Structures Inc | (200.00) |
| | | Intervenor Tri-City Dryw all Inc | | |
| | | Total Financial Assessment | | 200.00 |
| | | Total Payments and Credits | | 200.00 |
| | | Balance Due as of 04/02/2018 | | 0.00 |
| 06/10/2010 | Transaction Assessment | | | 200.00 |
| 06/10/2010 | Efile Payment | Receipt # 2010-22476-CCCLK | Tri-City Dryw all Inc | (200.00) |
| | | Intervenor Defendant Accuracy Glas & Mirror Company Inc | | |
| | | Total Financial Assessment | | 200.00 |
| | | Total Payments and Credits | | 200.00 |
| | | Balance Due as of 04/02/2018 | | 0.00 |
| 05/05/2010 | Transaction Assessment | | | 200.00 |
| 05/05/2010 | Efile Payment | Receipt # 2010-14667-CCCLK | Accuracy Glas & Mirror Company | (200.00) |
| | | Intervenor Defendant APCO Construction | | |
| | | Total Financial Assessment | | 0.00 |
| | | Total Payments and Credits | | 0.00 |
| | | Balance Due as of 04/02/2018 | | 0.00 |
| 07/17/2009 | Efile Payment | Receipt # 2009-39174-FAM | R. Scott Rasmussen, PC | (203.00) |
| 07/17/2009 | Efile Payment | Receipt # 2009-39175-FAM | R. Scott Rasmussen | (203.00) |
| 07/17/2009 | Efile Payment | Receipt # 2009-39176-FAM | How ard & How ard | (203.00) |
| 07/17/2009 | Efile Payment | Receipt # 2009-39177-FAM | How ard & How ard | (203.00) |
| | | Intervenor Defendant Camco Pacific Construction Co Inc | | |
| | | Total Financial Assessment | | 223.00 |
| | | Total Payments and Credits | | 223.00 |
| | | Balance Due as of 04/02/2018 | | 0.00 |
| 09/17/2009 | Transaction Assessment | | | 223.00 |
| 09/17/2009 | Efile Payment | Receipt # 2009-55230-FAM | WOODBURY MORRIS & BROWN | (223.00) |
| | | Intervenor Defendant Club Vista Financial Services LLC | | |
| | | Total Financial Assessment | | 1,483.00 |
| | | Total Payments and Credits | | 1,483.00 |
| | | Balance Due as of 04/02/2018 | | 0.00 |
| 08/18/2009 | Transaction Assessment | | | 1,483.00 |
| 08/18/2009 | Payment (Window) | Receipt # 2009-47258-FAM | Albright Stoddard Warnick & Al | (1,483.00) |
| | | Intervenor Defendant Edelstein, Alex | | |
| | | Total Financial Assessment | | 1,483.00 |
| | | Total Payments and Credits | | 1,483.00 |
| | | Balance Due as of 04/02/2018 | | 0.00 |
| 12/19/2011 | Transaction Assessment | | | 1,483.00 |
| 12/19/2011 | Efile Payment | Receipt # 2011-143789-CCCLK | Edelstein, Alex | (1,483.00) |

4/2/2018

<https://www.clarkcountycourts.us/Anonymous/CaseDetail.aspx?CaseID=6680533>**Intervenor Defendant Fidelity & Deposit Company Of Maryland**

| | |
|-------------------------------------|-------------|
| Total Financial Assessment | 223.00 |
| Total Payments and Credits | 223.00 |
| Balance Due as of 04/02/2018 | 0.00 |

| | | | |
|------------|------------------------|----------------------------|--|
| 09/11/2009 | Transaction Assessment | | 223.00 |
| 09/11/2009 | Payment (Window) | Receipt # 2009-05047-CCCLK | Woodbury Morris and Brown LTD (223.00) |

Intervenor Defendant Fidelity & Deposit Company Of Maryland

| | |
|-------------------------------------|-------------|
| Total Financial Assessment | 223.00 |
| Total Payments and Credits | 223.00 |
| Balance Due as of 04/02/2018 | 0.00 |

| | | | |
|------------|------------------------|----------------------------|--|
| 09/11/2009 | Transaction Assessment | | 223.00 |
| 09/11/2009 | Payment (Window) | Receipt # 2009-05060-CCCLK | Woodbury morris and Brown Ltd (223.00) |

Intervenor Defendant Jeff Heit Plumbing Co LLC

| | |
|-------------------------------------|-------------|
| Total Financial Assessment | 223.00 |
| Total Payments and Credits | 223.00 |
| Balance Due as of 04/02/2018 | 0.00 |

| | | | |
|------------|------------------------|--------------------------|---------------------------------------|
| 08/10/2009 | Transaction Assessment | | 223.00 |
| 08/10/2009 | Payment (Window) | Receipt # 2009-45218-FAM | Keith E Gregory & Associates (223.00) |

Intervenor Defendant Old Republic Surety

| | |
|-------------------------------------|-------------|
| Total Financial Assessment | 30.00 |
| Total Payments and Credits | 30.00 |
| Balance Due as of 04/02/2018 | 0.00 |

| | | | |
|------------|------------------------|--------------------------|--------------------------------------|
| 08/10/2009 | Transaction Assessment | | 30.00 |
| 08/10/2009 | Payment (Window) | Receipt # 2009-45221-FAM | Keith E Gregory & Associates (30.00) |

Intervenor Defendant Scott Financial Corporation

| | |
|-------------------------------------|-------------|
| Total Financial Assessment | 10.00 |
| Total Payments and Credits | 10.00 |
| Balance Due as of 04/02/2018 | 0.00 |

| | | | |
|------------|------------------------|----------------------------|-------------------------------------|
| 07/07/2010 | Transaction Assessment | | 10.00 |
| 07/07/2010 | Efile Payment | Receipt # 2010-27258-CCCLK | Scott Financial Corporation (10.00) |

Intervenor Defendant Scott Financial Corporation

| | |
|-------------------------------------|-------------|
| Total Financial Assessment | 25.00 |
| Total Payments and Credits | 25.00 |
| Balance Due as of 04/02/2018 | 0.00 |

| | | | |
|------------|------------------------|----------------------------|---|
| 06/04/2015 | Transaction Assessment | | 25.00 |
| 06/04/2015 | Payment (Window) | Receipt # 2015-58504-CCCLK | Brownstein Hyatt Farber Schreck (25.00) |

Intervenor Defendant Tharaldson Motels II Inc

| | |
|-------------------------------------|-------------|
| Total Financial Assessment | 30.00 |
| Total Payments and Credits | 30.00 |
| Balance Due as of 04/02/2018 | 0.00 |

| | | | |
|------------|------------------------|--------------------------|--|
| 08/18/2009 | Transaction Assessment | | 30.00 |
| 08/18/2009 | Payment (Window) | Receipt # 2009-47258-FAM | Albright Stoddard Warnick & Al (30.00) |

Intervenor Plaintiff Ahern Rental Inc

| | |
|----------------------------|--------|
| Total Financial Assessment | 400.00 |
|----------------------------|--------|

0092

91/97

<https://www.clarkcountycourts.us/Anonymous/CaseDetail.aspx?CaseID=6680533>

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|------------|--|----------------------------|--------------------------------|-------------|
| | Total Payments and Credits | | | 400.00 |
| | Balance Due as of 04/02/2018 | | | 0.00 |
| 02/26/2010 | Transaction Assessment | | | 200.00 |
| 02/26/2010 | Efile Payment | Receipt # 2010-03457-CCCLK | Ahern Rental Inc | (200.00) |
| 06/10/2010 | Transaction Assessment | | | 200.00 |
| 06/10/2010 | Efile Payment | Receipt # 2010-22465-CCCLK | Ahern Rental Inc | (200.00) |
| | Intervenor Plaintiff Arch Aluminum And Glass Co | | | |
| | Total Financial Assessment | | | 800.00 |
| | Total Payments and Credits | | | 800.00 |
| | Balance Due as of 04/02/2018 | | | 0.00 |
| 05/14/2010 | Transaction Assessment | | | 200.00 |
| 05/14/2010 | Efile Payment | Receipt # 2010-16658-CCCLK | Arch Aluminum And Glass Co | (200.00) |
| 05/14/2010 | Transaction Assessment | | | 200.00 |
| 05/14/2010 | Efile Payment | Receipt # 2010-16673-CCCLK | Arch Aluminum And Glass Co | (200.00) |
| 06/21/2010 | Transaction Assessment | | | 200.00 |
| 06/21/2010 | Efile Payment | Receipt # 2010-24359-CCCLK | Arch Aluminum And Glass Co | (200.00) |
| 06/24/2010 | Transaction Assessment | | | 200.00 |
| 06/24/2010 | Efile Payment | Receipt # 2010-24918-CCCLK | Arch Aluminum And Glass Co | (200.00) |
| | Intervenor Plaintiff Cactus Rose Construction Inc | | | |
| | Total Financial Assessment | | | 1,683.00 |
| | Total Payments and Credits | | | 1,683.00 |
| | Balance Due as of 04/02/2018 | | | 0.00 |
| 04/13/2010 | Transaction Assessment | | | 1,483.00 |
| 04/13/2010 | Efile Payment | Receipt # 2010-10164-CCCLK | | (1,483.00) |
| 05/05/2010 | Transaction Assessment | | | 200.00 |
| 05/05/2010 | Efile Payment | Receipt # 2010-14684-CCCLK | Cactus Rose Construction Inc | (200.00) |
| | Intervenor Plaintiff Harsco Corporation | | | |
| | Total Financial Assessment | | | 400.00 |
| | Total Payments and Credits | | | 400.00 |
| | Balance Due as of 04/02/2018 | | | 0.00 |
| 05/06/2010 | Transaction Assessment | | | 200.00 |
| 05/06/2010 | Efile Payment | Receipt # 2010-14992-CCCLK | Harsco Corporation | (200.00) |
| 06/21/2010 | Transaction Assessment | | | 200.00 |
| 06/21/2010 | Efile Payment | Receipt # 2010-24397-CCCLK | Harsco Corporation | (200.00) |
| | Intervenor Plaintiff Inquipo | | | |
| | Total Financial Assessment | | | 107.00 |
| | Total Payments and Credits | | | 107.00 |
| | Balance Due as of 04/02/2018 | | | 0.00 |
| 06/24/2009 | Transaction Assessment | | | 104.00 |
| 06/24/2009 | Payment (Window) | Receipt # 2009-32184-FAM | Pezzillo and Robinson | (104.00) |
| 06/24/2009 | Transaction Assessment | | | 3.00 |
| 06/24/2009 | Payment (Window) | Receipt # 2009-32185-FAM | Pezzillo and Robinson | (3.00) |
| | Intervenor Plaintiff Interstate Plumbing & Air Conditioning Inc | | | |
| | Total Financial Assessment | | | 1,683.00 |
| | Total Payments and Credits | | | 1,683.00 |
| | Balance Due as of 04/02/2018 | | | 0.00 |
| 04/13/2010 | Transaction Assessment | | | 1,483.00 |
| 04/13/2010 | Efile Payment | Receipt # 2010-10163-CCCLK | | (1,483.00) |
| 05/05/2010 | Transaction Assessment | | | 200.00 |
| 05/05/2010 | Efile Payment | Receipt # 2010-14657-CCCLK | Interstate Plumbing & Air Cond | (200.00) |

Intervenor Plaintiff Las Vegas Pipeline LLC

| | |
|-------------------------------------|-------------|
| Total Financial Assessment | 555.00 |
| Total Payments and Credits | 555.00 |
| Balance Due as of 04/02/2018 | 0.00 |

| | | | |
|------------|------------------------|----------------------------|---|
| 06/15/2009 | Transaction Assessment | | 104.00 |
| 06/15/2009 | Transaction Assessment | | 47.00 |
| 06/15/2009 | Payment (Window) | Receipt # 2009-29672-FAM | Gerrard and Cox a Professional (151.00) |
| 06/15/2009 | Transaction Assessment | | 4.00 |
| 06/15/2009 | Payment (Window) | Receipt # 2009-29675-FAM | Gerrard and Cox a Professional (4.00) |
| 06/10/2010 | Transaction Assessment | | 200.00 |
| 06/10/2010 | Efile Payment | Receipt # 2010-22479-CCCLK | Las Vegas Pipeline LLC (200.00) |
| 06/28/2010 | Transaction Assessment | | 200.00 |
| 06/28/2010 | Efile Payment | Receipt # 2010-25558-CCCLK | Las Vegas Pipeline LLC (200.00) |

Intervenor Plaintiff Northstar Concrete, Inc.

| | |
|-------------------------------------|-------------|
| Total Financial Assessment | 453.00 |
| Total Payments and Credits | 453.00 |
| Balance Due as of 04/02/2018 | 0.00 |

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|------------|------------------------|----------------------------|-----------------------------------|
| 07/09/2009 | Transaction Assessment | | 250.00 |
| 07/09/2009 | Payment (Window) | Receipt # 2009-37088-FAM | Pezzillo Robinson (250.00) |
| 07/09/2009 | Transaction Assessment | | 3.00 |
| 07/09/2009 | Payment (Window) | Receipt # 2009-37089-FAM | Pezzillo Robinson (3.00) |
| 07/06/2010 | Transaction Assessment | | 200.00 |
| 07/06/2010 | Efile Payment | Receipt # 2010-26935-CCCLK | Northstar Concrete, Inc. (200.00) |

Intervenor Plaintiff Pape Material Handling

| | |
|-------------------------------------|-------------|
| Total Financial Assessment | 104.00 |
| Total Payments and Credits | 104.00 |
| Balance Due as of 04/02/2018 | 0.00 |

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|------------|------------------------|--------------------------|---|
| 05/29/2009 | Transaction Assessment | | 104.00 |
| 05/29/2009 | Payment (Window) | Receipt # 2009-25556-FAM | Jolley Urga Wirth Woodbury & S (104.00) |

Intervenor Plaintiff S R Bray Corp

| | |
|-------------------------------------|-------------|
| Total Financial Assessment | 1,683.00 |
| Total Payments and Credits | 1,683.00 |
| Balance Due as of 04/02/2018 | 0.00 |

| | | | |
|------------|------------------------|----------------------------|--------------------------|
| 04/26/2010 | Transaction Assessment | | 1,483.00 |
| 04/26/2010 | Efile Payment | Receipt # 2010-12399-CCCLK | S R Bray Corp (1,483.00) |
| 05/05/2010 | Transaction Assessment | | 200.00 |
| 05/05/2010 | Efile Payment | Receipt # 2010-14687-CCCLK | S R Bray Corp (200.00) |

Intervenor Plaintiff Sunstate Companies Inc

| | |
|-------------------------------------|-------------|
| Total Financial Assessment | 1,483.00 |
| Total Payments and Credits | 1,483.00 |
| Balance Due as of 04/02/2018 | 0.00 |

| | | | |
|------------|------------------------|----------------------------|-----------------------------------|
| 04/14/2010 | Transaction Assessment | | 1,483.00 |
| 04/14/2010 | Efile Payment | Receipt # 2010-10343-CCCLK | Sunstate Companies Inc (1,483.00) |

Intervenor Plaintiff SWPPP Compliance Solutions LLC

| | |
|-------------------------------------|-------------|
| Total Financial Assessment | 1,683.00 |
| Total Payments and Credits | 1,683.00 |
| Balance Due as of 04/02/2018 | 0.00 |

| | | | |
|------------|------------------------|----------------------------|---|
| 04/26/2010 | Transaction Assessment | | 1,483.00 |
| 04/26/2010 | Efile Payment | Receipt # 2010-12464-CCCLK | SWPPP Compliance Solutions LLC (1,483.00) |

4/2/2018

<https://www.clarkcountycourts.us/Anonymous/CaseDetail.aspx?CaseID=6680533>

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|---|-------------------------------------|----------------------------|--------------------------------|-------------|
| 05/08/2010 | Transaction Assessment | | | 200.00 |
| 05/08/2010 | Efile Payment | Receipt # 2010-15596-CCCLK | SWPPP Compliance Solutions LLC | (200.00) |
| Other Chapter 7 Trustee | | | | |
| | Total Financial Assessment | | | 200.00 |
| | Total Payments and Credits | | | 200.00 |
| | Balance Due as of 04/02/2018 | | | 0.00 |
| 08/07/2017 | Transaction Assessment | | | 200.00 |
| 08/07/2017 | Efile Payment | Receipt # 2017-62766-CCCLK | Chaper 7 Trustee | (200.00) |
| Other Graybar Electric Company | | | | |
| | Total Financial Assessment | | | 400.00 |
| | Total Payments and Credits | | | 400.00 |
| | Balance Due as of 04/02/2018 | | | 0.00 |
| 07/06/2010 | Transaction Assessment | | | 200.00 |
| 07/06/2010 | Efile Payment | Receipt # 2010-26931-CCCLK | Graybar Electric Company | (200.00) |
| 07/06/2010 | Transaction Assessment | | | 200.00 |
| 07/06/2010 | Efile Payment | Receipt # 2010-27219-CCCLK | Graybar Electric Company | (200.00) |
| Other HD Supply Construction Supply LP | | | | |
| | Total Financial Assessment | | | 200.00 |
| | Total Payments and Credits | | | 200.00 |
| | Balance Due as of 04/02/2018 | | | 0.00 |
| 06/26/2010 | Transaction Assessment | | | 200.00 |
| 06/26/2010 | Efile Payment | Receipt # 2010-25455-CCCLK | HD Supply Construction Supply | (200.00) |
| Other United Subcontractors Inc | | | | |
| | Total Financial Assessment | | | 400.00 |
| | Total Payments and Credits | | | 400.00 |
| | Balance Due as of 04/02/2018 | | | 0.00 |
| 08/12/2017 | Transaction Assessment | | | 200.00 |
| 08/12/2017 | Efile Payment | Receipt # 2017-64144-CCCLK | United Subcontractors Inc | (200.00) |
| 08/12/2017 | Transaction Assessment | | | 200.00 |
| 08/12/2017 | Efile Payment | Receipt # 2017-64237-CCCLK | United Subcontractors Inc | (200.00) |
| Other Wiss, Janney, Eistner Associates, Inc. | | | | |
| | Total Financial Assessment | | | 200.00 |
| | Total Payments and Credits | | | 200.00 |
| | Balance Due as of 04/02/2018 | | | 0.00 |
| 06/30/2010 | Transaction Assessment | | | 200.00 |
| 06/30/2010 | Efile Payment | Receipt # 2010-25904-CCCLK | Wiss, Janney, Eistner Associat | (200.00) |
| Plaintiff Apco Construction | | | | |
| | Total Financial Assessment | | | 1,536.50 |
| | Total Payments and Credits | | | 1,536.50 |
| | Balance Due as of 04/02/2018 | | | 0.00 |
| 01/12/2010 | Transaction Assessment | | | 5.00 |
| 01/12/2010 | Payment (Window) | Receipt # 2010-01898-FAM | Pezzillo & Robinson | (5.00) |
| 04/01/2010 | Transaction Assessment | | | 6.00 |
| 04/01/2010 | Efile Payment | Receipt # 2010-08098-CCCLK | Apco Construction | (6.00) |
| 04/09/2010 | Transaction Assessment | | | 6.00 |
| 04/09/2010 | Efile Payment | Receipt # 2010-09403-CCCLK | Apco Construction | (6.00) |
| 04/13/2010 | Transaction Assessment | | | 6.00 |
| 04/13/2010 | Efile Payment | Receipt # 2010-09861-CCCLK | Apco Construction | (6.00) |

0095

4/2/2018

<https://www.clarkcountycourts.us/Anonymous/CaseDetail.aspx?CaseID=6680533>

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|------------|------------------------|----------------------------|-----------------------------|----------|
| 04/13/2010 | Transaction Assessment | | | 6.00 |
| 04/13/2010 | Efile Payment | Receipt # 2010-09870-CCCLK | Apco Construction | (6.00) |
| 04/13/2010 | Transaction Assessment | | | 6.00 |
| 04/13/2010 | Efile Payment | Receipt # 2010-09889-CCCLK | Apco Construction | (6.00) |
| 04/13/2010 | Transaction Assessment | | | 6.00 |
| 04/13/2010 | Efile Payment | Receipt # 2010-09890-CCCLK | Apco Construction | (6.00) |
| 04/13/2010 | Transaction Assessment | | | 6.00 |
| 04/13/2010 | Efile Payment | Receipt # 2010-09891-CCCLK | Apco Construction | (6.00) |
| 04/13/2010 | Transaction Assessment | | | 6.00 |
| 04/13/2010 | Efile Payment | Receipt # 2010-09934-CCCLK | Apco Construction | (6.00) |
| 04/13/2010 | Transaction Assessment | | | 6.00 |
| 04/13/2010 | Efile Payment | Receipt # 2010-09935-CCCLK | Apco Construction | (6.00) |
| 04/13/2010 | Transaction Assessment | | | 6.00 |
| 04/13/2010 | Efile Payment | Receipt # 2010-09936-CCCLK | Apco Construction | (6.00) |
| 04/13/2010 | Transaction Assessment | | | 6.00 |
| 04/13/2010 | Efile Payment | Receipt # 2010-09937-CCCLK | Apco Construction | (6.00) |
| 04/13/2010 | Transaction Assessment | | | 6.00 |
| 04/13/2010 | Efile Payment | Receipt # 2010-09938-CCCLK | Apco Construction | (6.00) |
| 04/13/2010 | Transaction Assessment | | | 6.00 |
| 04/13/2010 | Efile Payment | Receipt # 2010-09939-CCCLK | Apco Construction | (6.00) |
| 04/13/2010 | Transaction Assessment | | | 6.00 |
| 04/13/2010 | Efile Payment | Receipt # 2010-09940-CCCLK | Apco Construction | (6.00) |
| 04/16/2010 | Transaction Assessment | | | 6.00 |
| 04/16/2010 | Efile Payment | Receipt # 2010-10903-CCCLK | Apco Construction | (6.00) |
| 04/16/2010 | Transaction Assessment | | | 6.00 |
| 04/16/2010 | Efile Payment | Receipt # 2010-10904-CCCLK | Apco Construction | (6.00) |
| 04/16/2010 | Transaction Assessment | | | 6.00 |
| 04/16/2010 | Efile Payment | Receipt # 2010-10905-CCCLK | Apco Construction | (6.00) |
| 04/16/2010 | Transaction Assessment | | | 6.00 |
| 04/16/2010 | Efile Payment | Receipt # 2010-10906-CCCLK | Apco Construction | (6.00) |
| 04/16/2010 | Transaction Assessment | | | 6.00 |
| 04/16/2010 | Efile Payment | Receipt # 2010-10907-CCCLK | Apco Construction | (6.00) |
| 04/16/2010 | Transaction Assessment | | | 6.00 |
| 04/16/2010 | Efile Payment | Receipt # 2010-10908-CCCLK | Apco Construction | (6.00) |
| 04/16/2010 | Transaction Assessment | | | 6.00 |
| 04/16/2010 | Efile Payment | Receipt # 2010-10909-CCCLK | Apco Construction | (6.00) |
| 04/16/2010 | Transaction Assessment | | | 6.00 |
| 04/16/2010 | Efile Payment | Receipt # 2010-10910-CCCLK | Apco Construction | (6.00) |
| 04/16/2010 | Transaction Assessment | | | 6.00 |
| 04/16/2010 | Efile Payment | Receipt # 2010-10911-CCCLK | Apco Construction | (6.00) |
| 04/16/2010 | Transaction Assessment | | | 6.00 |
| 04/16/2010 | Efile Payment | Receipt # 2010-10912-CCCLK | Apco Construction | (6.00) |
| 04/16/2010 | Transaction Assessment | | | 6.00 |
| 04/16/2010 | Efile Payment | Receipt # 2010-10913-CCCLK | Apco Construction | (6.00) |
| 04/16/2010 | Transaction Assessment | | | 6.00 |
| 04/16/2010 | Efile Payment | Receipt # 2010-10914-CCCLK | Apco Construction | (6.00) |
| 04/16/2010 | Transaction Assessment | | | 6.00 |
| 04/16/2010 | Efile Payment | Receipt # 2010-10915-CCCLK | Apco Construction | (6.00) |
| 04/16/2010 | Transaction Assessment | | | 6.00 |
| 04/16/2010 | Efile Payment | Receipt # 2010-10916-CCCLK | Apco Construction | (6.00) |
| 04/16/2010 | Transaction Assessment | | | 12.00 |
| 04/16/2010 | Payment (Window) | Receipt # 2010-22821-FAM | T James Truman & Associates | (12.00) |
| 04/16/2010 | Transaction Assessment | | | 3.00 |
| 04/16/2010 | Payment (Window) | Receipt # 2010-22843-FAM | T James Truman & Associates | (3.00) |
| 04/19/2010 | Transaction Assessment | | | 6.00 |
| 04/19/2010 | Efile Payment | Receipt # 2010-11283-CCCLK | Apco Construction | (6.00) |
| 04/19/2010 | Transaction Assessment | | | 6.00 |
| 04/19/2010 | Efile Payment | Receipt # 2010-11284-CCCLK | Apco Construction | (6.00) |
| 04/19/2010 | Transaction Assessment | | | 6.00 |
| 04/19/2010 | Efile Payment | Receipt # 2010-11285-CCCLK | Apco Construction | (6.00) |
| 04/19/2010 | Transaction Assessment | | | 6.00 |
| 04/19/2010 | Efile Payment | Receipt # 2010-11286-CCCLK | Apco Construction | (6.00) |
| 04/27/2010 | Transaction Assessment | | | 6.00 |
| 04/27/2010 | Efile Payment | Receipt # 2010-12554-CCCLK | Apco Construction | (6.00) |
| 04/27/2010 | Transaction Assessment | | | 6.00 |
| 04/27/2010 | Efile Payment | Receipt # 2010-12555-CCCLK | Apco Construction | (6.00) |
| 04/28/2010 | Transaction Assessment | | | 10.00 |
| 04/28/2010 | Efile Payment | Receipt # 2010-12870-CCCLK | Apco Construction | (10.00) |
| 04/28/2010 | Transaction Assessment | | | 10.00 |
| 04/28/2010 | Efile Payment | Receipt # 2010-12871-CCCLK | Apco Construction | (10.00) |
| 06/22/2010 | Transaction Assessment | | | 200.00 |
| 06/22/2010 | Efile Payment | Receipt # 2010-24659-CCCLK | Apco Construction | (200.00) |

0096

95/97

<https://www.clarkcountycourts.us/Anonymous/CaseDetail.aspx?CaseID=6680533>

4/2/2018

<https://www.clarkcountycourts.us/Anonymous/CaseDetail.aspx?CaseID=6680533>

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|------------|------------------------|-----------------------------|--------------------------------|----------|
| 07/09/2010 | Transaction Assessment | | | 200.00 |
| 07/09/2010 | Efile Payment | Receipt # 2010-28651-CCCLK | Apco Construction | (200.00) |
| 08/30/2010 | Transaction Assessment | | | 3.00 |
| 08/30/2010 | Payment (Window) | Receipt # 2010-44107-FAM | Dixon Truman Fisher & Clifford | (3.00) |
| 06/06/2012 | Transaction Assessment | | | 5.00 |
| 06/06/2012 | Payment (Window) | Receipt # 2012-71258-CCCLK | Dixon Truman Fisher & Clifford | (5.00) |
| 07/06/2012 | Transaction Assessment | | | 3.50 |
| 07/06/2012 | Efile Payment | Receipt # 2012-85450-CCCLK | Apco Construction | (3.50) |
| 07/18/2012 | Transaction Assessment | | | 22.00 |
| 07/18/2012 | Payment (Window) | Receipt # 2012-90177-CCCLK | Peel & Brimley | (22.00) |
| 07/18/2012 | Transaction Assessment | | | 33.00 |
| 07/18/2012 | Payment (Window) | Receipt # 2012-90189-CCCLK | Peel & Brimley | (33.00) |
| 12/12/2012 | Transaction Assessment | | | 9.00 |
| 12/12/2012 | Payment (Window) | Receipt # 2012-152184-CCCLK | LEE MOHEN | (9.00) |
| 02/15/2013 | Transaction Assessment | | | 3.50 |
| 02/15/2013 | Efile Payment | Receipt # 2013-19772-CCCLK | Apco Construction | (3.50) |
| 02/15/2013 | Transaction Assessment | | | 3.50 |
| 02/15/2013 | Efile Payment | Receipt # 2013-19774-CCCLK | Apco Construction | (3.50) |
| 02/15/2013 | Transaction Assessment | | | 3.50 |
| 02/15/2013 | Efile Payment | Receipt # 2013-19778-CCCLK | Apco Construction | (3.50) |
| 02/15/2013 | Transaction Assessment | | | 3.50 |
| 02/15/2013 | Efile Payment | Receipt # 2013-19790-CCCLK | Apco Construction | (3.50) |
| 02/15/2013 | Transaction Assessment | | | 3.50 |
| 02/15/2013 | Efile Payment | Receipt # 2013-19792-CCCLK | Apco Construction | (3.50) |
| 02/15/2013 | Transaction Assessment | | | 3.50 |
| 02/15/2013 | Efile Payment | Receipt # 2013-19794-CCCLK | Apco Construction | (3.50) |
| 02/28/2013 | Transaction Assessment | | | 20.00 |
| 02/28/2013 | Payment (Window) | Receipt # 2013-24798-CCCLK | Dixon Truman Fisher & Clifford | (20.00) |
| 03/11/2013 | Transaction Assessment | | | 10.00 |
| 03/11/2013 | Payment (Window) | Receipt # 2013-29119-CCCLK | Dixon Truman Fisher & Clifford | (10.00) |
| 03/27/2013 | Transaction Assessment | | | 10.00 |
| 03/27/2013 | Payment (Window) | Receipt # 2013-37341-CCCLK | Dixon Truman Fisher & Clifford | (10.00) |
| 05/20/2013 | Transaction Assessment | | | 20.00 |
| 05/20/2013 | Payment (Window) | Receipt # 2013-61451-CCCLK | Meier & Fine, LLC | (20.00) |
| 05/21/2013 | Transaction Assessment | | | 10.00 |
| 05/21/2013 | Payment (Window) | Receipt # 2013-62135-CCCLK | American Legal Investigation | (10.00) |
| 03/18/2014 | Transaction Assessment | | | 3.50 |
| 03/18/2014 | Efile Payment | Receipt # 2014-31944-CCCLK | Apco Construction | (3.50) |
| 04/05/2016 | Transaction Assessment | | | 3.50 |
| 04/05/2016 | Efile Payment | Receipt # 2016-33556-CCCLK | Apco Construction | (3.50) |
| 05/09/2016 | Transaction Assessment | | | 3.50 |
| 05/09/2016 | Efile Payment | Receipt # 2016-44796-CCCLK | Apco Construction | (3.50) |
| 06/01/2016 | Transaction Assessment | | | 3.50 |
| 06/01/2016 | Efile Payment | Receipt # 2016-52392-CCCLK | Apco Construction | (3.50) |
| 06/07/2016 | Transaction Assessment | | | 203.50 |
| 06/07/2016 | Efile Payment | Receipt # 2016-54407-CCCLK | Apco Construction | (200.00) |
| 06/07/2016 | Efile Payment | Receipt # 2016-54408-CCCLK | Apco Construction | (3.50) |
| 06/07/2016 | Transaction Assessment | | | 3.50 |
| 06/07/2016 | Efile Payment | Receipt # 2016-54410-CCCLK | Apco Construction | (3.50) |
| 06/09/2016 | Transaction Assessment | | | 3.50 |
| 06/09/2016 | Efile Payment | Receipt # 2016-55595-CCCLK | Apco Construction | (3.50) |
| 06/13/2016 | Transaction Assessment | | | 3.50 |
| 06/13/2016 | Efile Payment | Receipt # 2016-56398-CCCLK | Apco Construction | (3.50) |
| 07/01/2016 | Transaction Assessment | | | 3.50 |
| 07/01/2016 | Efile Payment | Receipt # 2016-63555-CCCLK | Apco Construction | (3.50) |
| 07/01/2016 | Transaction Assessment | | | 3.50 |
| 07/01/2016 | Efile Payment | Receipt # 2016-63702-CCCLK | Apco Construction | (3.50) |
| 03/17/2017 | Transaction Assessment | | | 203.50 |
| 03/17/2017 | Efile Payment | Receipt # 2017-25896-CCCLK | Apco Construction | (200.00) |
| 03/17/2017 | Efile Payment | Receipt # 2017-25897-CCCLK | Apco Construction | (3.50) |
| 04/10/2017 | Transaction Assessment | | | 3.50 |
| 04/10/2017 | Efile Payment | Receipt # 2017-33488-CCCLK | Apco Construction | (3.50) |
| 05/25/2017 | Transaction Assessment | | | 3.50 |
| 05/25/2017 | Efile Payment | Receipt # 2017-46023-CCCLK | Apco Construction | (3.50) |
| 05/26/2017 | Transaction Assessment | | | 3.50 |
| 05/26/2017 | Efile Payment | Receipt # 2017-46146-CCCLK | Apco Construction | (3.50) |
| 06/09/2017 | Transaction Assessment | | | 0.50 |
| 06/09/2017 | Payment (Window) | Receipt # 2017-49503-CCCLK | Stephen Kopolow Attorney | (0.50) |
| 06/20/2017 | Transaction Assessment | | | 3.50 |
| 06/20/2017 | Efile Payment | Receipt # 2017-51596-CCCLK | Apco Construction | (3.50) |
| 06/21/2017 | Transaction Assessment | | | 3.50 |
| 06/21/2017 | Efile Payment | Receipt # 2017-51974-CCCLK | Apco Construction | (3.50) |

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<https://www.clarkcountycourts.us/Anonymous/CaseDetail.aspx?CaseID=6680533>

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|------------|------------------------|----------------------------|-------------------|----------|
| 06/27/2017 | Transaction Assessment | | | 203.50 |
| 06/27/2017 | Efile Payment | Receipt # 2017-53265-CCCLK | Apco Construction | (203.50) |
| 08/02/2017 | Transaction Assessment | | | 3.50 |
| 08/02/2017 | Efile Payment | Receipt # 2017-61590-CCCLK | Apco Construction | (3.50) |
| 08/22/2017 | Transaction Assessment | | | 3.50 |
| 08/22/2017 | Efile Payment | Receipt # 2017-66175-CCCLK | Apco Construction | (3.50) |
| 08/22/2017 | Transaction Assessment | | | 3.50 |
| 08/22/2017 | Efile Payment | Receipt # 2017-66179-CCCLK | Apco Construction | (3.50) |
| 09/21/2017 | Transaction Assessment | | | 3.50 |
| 09/21/2017 | Efile Payment | Receipt # 2017-73371-CCCLK | Apco Construction | (3.50) |
| 09/21/2017 | Transaction Assessment | | | 3.50 |
| 09/21/2017 | Efile Payment | Receipt # 2017-73429-CCCLK | Apco Construction | (3.50) |
| 10/30/2017 | Transaction Assessment | | | 3.50 |
| 10/30/2017 | Efile Payment | Receipt # 2017-82295-CCCLK | Apco Construction | (3.50) |
| 10/30/2017 | Transaction Assessment | | | 3.50 |
| 10/30/2017 | Efile Payment | Receipt # 2017-82543-CCCLK | Apco Construction | (3.50) |
| 11/07/2017 | Transaction Assessment | | | 3.50 |
| 11/07/2017 | Efile Payment | Receipt # 2017-84287-CCCLK | Apco Construction | (3.50) |
| 11/07/2017 | Transaction Assessment | | | 3.50 |
| 11/07/2017 | Efile Payment | Receipt # 2017-84449-CCCLK | Apco Construction | (3.50) |
| 01/11/2018 | Transaction Assessment | | | 3.50 |
| 01/11/2018 | Efile Payment | Receipt # 2018-02741-CCCLK | Apco Construction | (3.50) |
| 01/16/2018 | Transaction Assessment | | | 3.50 |
| 01/16/2018 | Efile Payment | Receipt # 2018-03127-CCCLK | Apco Construction | (3.50) |
| 02/20/2018 | Transaction Assessment | | | 27.50 |
| 02/20/2018 | Efile Payment | Receipt # 2018-12275-CCCLK | Apco Construction | (27.50) |

Third Party Plaintiff E & E Fire Protection LLC

Total Financial Assessment

200.00

Total Payments and Credits

200.00

Balance Due as of 04/02/2018**0.00**

08/11/2017 Transaction Assessment

200.00

08/11/2017 Efile Payment Receipt # 2017-63784-CCCLK

E & E Fire Protection LLC

(200.00)

Third Party Plaintiff Insulpro Projects Inc

Total Financial Assessment

200.00

Total Payments and Credits

200.00

Balance Due as of 04/02/2018**0.00**

05/18/2016 Efile Payment Receipt # 2016-48150-CCCLK

Insulpro Projects Inc

(200.00)

06/28/2016 Transaction Assessment

200.00

EXHIBIT B



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DISTRICT COURT**CLARK COUNTY, NEVADA**

9 APCO CONSTRUCTION, a Nevada
 10 corporation,

11 Plaintiff,

12 vs.

13 GEMSTONE DEVELOPMENT WEST, INC., A
 14 Nevada corporation,

15 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

16 AND ALL RELATED MATTERS

NOTICE OF ENTRY OF ORDER

18 PLEASE TAKE NOTICE that the Order Granting Plaintiff's Motion to Dismiss was
 19 entered in the above captioned matter on September 20, 2017, a copy of which is attached hereto.

20 Dated this 21st day of September, 2017.

21
 22 MARQUIS AURBACH COFFING

23
 24 By /s/Jack Juan, Esq.
 25 Jack Chen Min Juan, Esq.
 26 Nevada State Bar No. 6367
 27 Cody S. Mounteer, Esq.
 28 Nevada State Bar No. 11220
 10001 Park Run Drive
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CERTIFICATE OF SERVICE

I hereby certify that the foregoing **NOTICE OF ENTRY OF ORDER** was submitted electronically for filing and/or service with the Eighth Judicial District Court on the 21st day of September, 2017. Electronic service of the foregoing document shall be made in accordance with the E-Service List as follows:¹

Party: Apco Construction - Plaintiff

Rosie Wesp rwesp@maclaw.com

Party: Camco Pacific Construction Co Inc - Intervenor Defendant

Steven L. Morris steve@gmdlegal.com

Party: Camco Pacific Construction Co Inc - Counter Claimant

Steven L. Morris steve@gmdlegal.com

Party: Fidelity & Deposit Company Of Maryland - Intervenor Defendant

Steven L. Morris steve@gmdlegal.com

Party: Interstate Plumbing & Air Conditioning Inc - Intervenor Plaintiff

Jonathan S. Dabbieri dabbieri@sullivanhill.com

Party: Cactus Rose Construction Inc - Intervenor Plaintiff

Eric B. Zimbelman ezimbelman@peelbrimley.com

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

Richard L Tobler rltldck@hotmail.com

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

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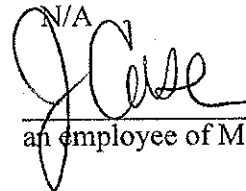
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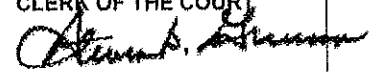
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16 I further certify that I served a copy of this document by mailing a true and correct copy
17 thereof, postage prepaid, addressed to:

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19 

an employee of Marquis Aurbach Coffing



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12 *Attorneys for APCO Construction*

**DISTRICT COURT
CLARK COUNTY, NEVADA**

9 APCO CONSTRUCTION, a Nevada
10 corporation,

Plaintiff,

Case No.: A571228
Dept. No.: XIII

vs.

11 GEMSTONE DEVELOPMENT WEST, INC., A
12 Nevada corporation,

Defendant.

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

13
14 **AND ALL RELATED MATTERS**

ORDER GRANTING PLAINTIFF'S MOTION TO DISMISS

16 This matter having come on for hearing before this court on September 11, 2017, the
17 Court having heard the oral arguments, no opposition having been filed, and for good cause
18 shown:

19 1. On September 5, 2017, there was calendar call on the claims of the remaining
20 parties of this case;

21 2. During this calendar call, APCO, CAMCO, Helix and Zitting orally moved
22 pursuant to NRCP 7(b) to dismiss, with prejudice, those parties that have not filed their Pre-Trial
23 Disclosures;

24 3. The Court set the final Pre-Trial Disclosure date to Friday, September 8th, 2017 at
25 5:00pm, with a follow up hearing set for September 11, 2017 at 9:00am on the NRCP 7(b) oral
26 motion to dismiss;
27
28

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DISTRICT COURT DEPT#13

1 4. At the hearing on Monday, September 11, 2017, the Court granted the oral
2 Motion to Dismiss the following parties:

3 Accuracy Glass and Mirror Company; Noorda Sheet Metal; and
4 Tri-City Drywall Inc.;

5 5. The parties remaining in this litigation are thus:

6 APCO Construction; Camco Pacific Construction Co.;
7 Steel Structures, Inc.; Unitah Investments, LLC;
8 E&E Fire Protection, LLC; SWPP Compliance Solutions, LLC;
9 Helix Electric of Nevada, Inc.; Fast Glass, Inc.; Buchele, Inc.;
10 Zitting Brothers Construction, Inc.; Nevada Prefab Engineers, Inc.;
11 Heinaman Contract Glazing, Inc.; Cactus Rose Construction, Inc.;
12 National Wood Products, Inc.; United Subcontractors dba Sky Line Insulation; and
13 Interstate Plumbing and Air Conditioning LLC;

14 6. All other parties and claims were previously resolved pursuant to a separate
15 stipulation and order and/or separate settlement; and

16 7. The remaining parties may now proceed to a settlement conference or mediation.

17 **ORDER**

18 IT IS SO ORDERED.

19 Dated: September 19, 2017

20 
DISTRICT COURT JUDGE

21 Respectfully submitted by:

22 MARQUIS AURBACH COFFING

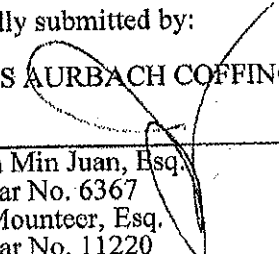
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Steven D. Grierson

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14 Zitting Brothers Construction, Inc.

DISTRICT COURT
CLARK COUNTY, NEVADA

10 APCO CONSTRUCTION, a Nevada
11 corporation,

12 Plaintiff,

13 vs.

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

16 Defendant.

17 AND ALL RELATED MATTERS

CASE NO. A571228
DEPT. NO. XIII

Consolidated with:

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

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

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

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

20 JUDGMENT AGAINST APCO CONSTRUCTION

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

//

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DISTRICT COURT DEPT XIII

1 FINDINGS OF FACT

2 A. APCO's Subcontract with ZBCI

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

28

1 C. Procedural History

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

6 **ORDER**

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

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

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

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

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

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

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

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

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

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

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

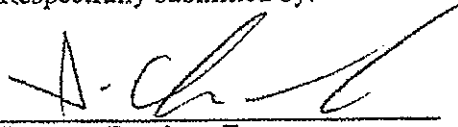
4 **IT IS FURTHER ORDERED** that the trial on ZBCI's complaint and all pending hearings
5 associated with ZBCI's complaint are vacated.

6 **IT IS SO ORDERED.**

7 Dated this 26th day of December, 2017.

8 
9
10 DISTRICT COURT JUDGE

11 Respectfully submitted by:

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

21 Approved as to form and content by:

22 *declined to sign*

23 John H. Mowbray, Esq.
24 John Randall Jefferies, Esq.
25 Mary E. Bacon, Esq.
26 **SPENCER FANE LLP**
27 300 South Fourth Street, Suite 700
28 Las Vegas, Nevada 89101

and

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

EXHIBIT D



1 **ORDR**

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2 Nevada Bar No. 6787

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7 *Attorneys for Lien Clamant,*

Zitting Brothers Construction, Inc.

8 **DISTRICT COURT**

9 **CLARK COUNTY, NEVADA**

10 APCO CONSTRUCTION, a Nevada
11 corporation,

12 Plaintiff,

13 vs.

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

16 Defendant.

CASE NO. 08A571228
DEPT. NO. XIII

Consolidated with:

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

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

17 AND ALL RELATED MATTERS

18
19 **ORDER DENYING APCO CONSTRUCTION, INC.'S MOTION FOR**
20 **RECONSIDERATION OF COURT'S ORDER GRANTING ZITTING BROTHERS**
21 **CONSTRUCTION, INC.'S PARTIAL MOTION FOR SUMMARY JUDGMENT**

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

Dated this 29 day of January, 2018,

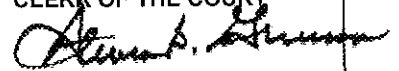
DISTRICT COURT JUDGE

Zitting Brothers Construction, Inc.

Las Vegas, Nevada 89101

Attorneys for APCO Construction, Inc.

EXHIBIT E



1 NEO
2 JORGE A. RAMIREZ, ESQ.
3 Nevada Bar No. 6787
4 I-CHE LAI, ESQ.
5 Nevada Bar No. 12247
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13 Attorneys for Lien Clamant,
14 Zitting Brothers Construction, Inc.

9 DISTRICT COURT
10 CLARK COUNTY, NEVADA

10 APCO CONSTRUCTION, a Nevada
11 corporation,

12 Plaintiff,

13 vs.

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

16 Defendant.

17 AND ALL RELATED MATTERS

CASE NO. A571228
DEPT. NO. XIII

Consolidated with:

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


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

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

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

23 Dated this 2nd day of January, 2018.

24 WILSON, ELSER, MOSKOWITZ,
25 EDELMAN & DICKER LLP

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

CERTIFICATE OF SERVICE

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

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



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

Steven D. Grierson

1 FFCO
2 JORGE A. RAMIREZ, ESQ.
3 Nevada Bar No. 6787
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13 Attorneys for Lien Clamant,
14 Zitting Brothers Construction, Inc.
15

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

18 APCO CONSTRUCTION, a Nevada
19 corporation,

20 Plaintiff,

21 vs.

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

24 Defendant.

25 AND ALL RELATED MATTERS

CASE NO. A571228
DEPT. NO. XIII

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

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

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

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

28 **JUDGMENT AGAINST APCO CONSTRUCTION**

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

36 //

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DISTRICT COURT DEPT. XIII

1 FINDINGS OF FACT

2 A. APCO's Subcontract with ZBCI

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 **C. Procedural History**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

27

28

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

6 **ORDER**

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

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

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

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

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

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

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

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

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

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

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

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

6 **IT IS SO ORDERED.**

7 Dated this 26th day of December, 2017.

8 
9
10 DISTRICT COURT JUDGE

11 Respectfully submitted by:

12 
13

14 Jorge A. Ramirez, Esq.

15 I-Che Lai, Esq.

16 **WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP**

17 300 South Fourth Street, 11th Floor

18 Las Vegas, Nevada 89101

19 Attorneys for Lien Clamant,

20 Zitting Brothers Construction, Inc.

21 Approved as to form and content by:

22 declined to sign

23 John H. Mowbray, Esq.

24 John Randall Jefferies, Esq.

25 Mary E. Bacon, Esq.

26 **SPENCER FANE LLP**

27 300 South Fourth Street, Suite 700

28 Las Vegas, Nevada 89101

and

Cody S. Mounteer, Esq.

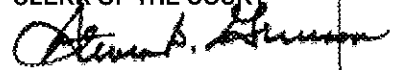
MARQUIS AURBACH COFFING

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Attorneys for APCO Construction, Inc.

EXHIBIT F



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

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

17 APCO CONSTRUCTION, a Nevada
18 corporation,

19 Plaintiff,

20 vs.

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

23 Defendant.

24 AND ALL RELATED MATTERS

CASE NO. 08A571228
DEPT. NO. XIII

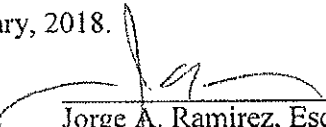
**NOTICE OF ENTRY OF ORDER
DENYING APCO CONSTRUCTION,
INC.'S MOTION FOR
RECONSIDERATION OF COURT'S
ORDER GRANTING ZITTING
BROTHERS CONSTRUCTION, INC.'S
PARTIAL MOTION FOR SUMMARY
JUDGMENT**

Consolidated with:

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

25 PLEASE TAKE NOTICE that an Order was entered in the above entitled action on the 25th
26 day of January, 2018, a true and correct copy of which is attached hereto.

27 Dated this 30th day of January, 2018.

28 
Jorge A. Ramirez, Esq.
I-Che Lai, Esq.

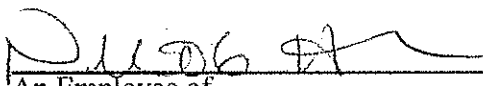
**WILSON, ELSER, MOSKOWITZ, EDELMAN
& DICKER LLP**

300 South Fourth Street, 11th Floor
Las Vegas, Nevada 89101
Attorneys for Lien Clamant,
Zitting Brothers Construction, Inc.

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of WILSON ELSEER MOSKOWITZ
EDELMAN & DICKER LLP, and that on this 30 day of January, 2018, I served a true
and correct copy of the foregoing document as follows:

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



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

Steven D. Grierson

1 **ORDR**

2 JORGE A. RAMIREZ, ESQ.

3 Nevada Bar No. 6787

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11 Jorge.Ramirez@wilsonelser.com

12 I-Che.Lai@wilsonelser.com

13 Attorneys for Lien Claimant,

14 Zitting Brothers Construction, Inc.

15 **DISTRICT COURT**

16 **CLARK COUNTY, NEVADA**

17 APCO CONSTRUCTION, a Nevada
18 corporation,

19 Plaintiff,

20 vs.

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

23 Defendant.

CASE NO. 08A571228
DEPT. NO. XIII

Consolidated with:

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

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

24 AND ALL RELATED MATTERS

25 **ORDER DENYING APCO CONSTRUCTION, INC.'S MOTION FOR**

26 **RECONSIDERATION OF COURT'S ORDER GRANTING ZITTING BROTHERS**

27 **CONSTRUCTION, INC.'S PARTIAL MOTION FOR SUMMARY JUDGMENT**

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

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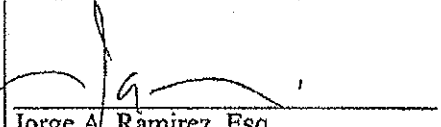
DISTRICT COURT DEPT. XIII

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

3 Dated this 24th day of January, 2018.

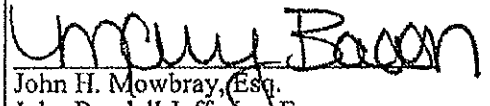
4
5
6 
DISTRICT COURT JUDGE 

7 Respectfully submitted by:

8
9 
Jorge A. Ramirez, Esq.
I-Che Lai, Esq.

10 **WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP**
11 300 South Fourth Street, 11th Floor
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13 Attorneys for Lien Clamant,
 Zitting Brothers Construction, Inc.

14 Approved as to form and content by:

15 
16 John H. Mowbray, Esq.
17 John Randall Jefferies, Esq.
18 Mary E. Bacon, Esq.

19 **SPENCER FANE LLP**
20 300 South Fourth Street, Suite 700
21 Las Vegas, Nevada 89101

22 and

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

EXHIBIT G

MOT

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-and-

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Attorneys for APCO Construction, Inc.

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

DISTRICT COURT

CLARK COUNTY, NEVADA

APCO CONSTRUCTION, a Nevada
corporation,

Plaintiff,

v.

GEMSTONE DEVELOPMENT WEST, INC., A
Nevada corporation,

Defendant.

Case No.: A571228

Dept. No.: XIII

Consolidated with:

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

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

AND ALL RELATED MATTERS

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

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DISTRICT COURT DEPT#13

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

15 DATED: January 5th, 2018.

16 SPENCER FANE LLP

17 By: 
18 John H. Mowbray, Esq. (Bar No. 1140)
19 John Randall Jefferies, Esq. (Bar No. 3512)
20 Mary E. Bacon, Esq. (Bar No. 12686)
21 300 S. Fourth Street, Suite 700
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23 Telephone: (702) 408-3400
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25 Attorneys for APCO Construction, Inc.

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1 **Declaration of Mary Bacon, Esq. in Support of an Order Shortening Time**
2 **to Hear Motion for Reconsideration**

3 Mary Bacon, Esq. hereby declares under penalty of perjury under the laws of the State of
4 Nevada that the foregoing is true and correct and if called upon to testify, would do so.

- 5 1. I am an attorney at the law firm of Spencer Fane, LLP, co-counsel for APCO Construction,
6 Inc. ("APCO"). I have personal knowledge of the information contained in this declaration
7 and could testify as a witness if called upon to do so.
- 8 2. I am making this declaration in support of an Order Shortening Time for the Court to hear
9 its Motion for Reconsideration of the Court's ruling on Zitting Brothers Construction,
10 Inc.'s ("Zitting") Motion for Partial Summary Judgment.
- 11 3. APCO makes this Motion for Reconsideration on an order shortening time in the interest
12 of judicial economy before trial starts on the remaining claims. Additionally, in the event
13 the Court grants the instant Motion for Reconsideration, it would give the parties a fair
14 chance to prepare for trial since Zitting would likely proceed to trial with the other
15 subcontractors on January 17, 2018.
- 16 4. I declare under penalty of perjury as provided under the laws of the State of Nevada that
17 the foregoing is true and correct and if called upon to testify, would do so.

18 DATED: January 5th 2018.

19 
20 MARY BACON, ESQ.

TABLE OF CONTENTS

| SECTION NUMBER | SECTION TITLE | PAGE NUMBER |
|-------------------|--|----------------|
| I. | Procedural History. | 6 |
| II. | Legal Standard. | 10 |
| III. | Apco's Original Opposition raised Material Issues of Fact. | 11 |
| IV. | Zittings subsequent deposition testimony undermined the basis of Zitting's Motion. | 11 |
| V. | The additional discovery authorized by this Court should be considered. | 25 |
| VI. | Zitting's surreply contained many inaccuracies. | 31 |
| VII. | Lastly, material misstatements regarding the critical <i>Padilla v. Big-D Construction</i> case were made at the November 16, 2017 abbreviated hearing on this matter. | 35 |
| VIII. | Pay-if-Paid Defenses. | 38 |
| IX. | The Court's strong policy on deciding cases on the merits. | 38 |

TABLE OF AUTHORITIES

Cases

- *ABN Amro Mortgage Group, Inc. v. Maximum Mortgage, Inc., et al*, No. 1:04cv492, 2006 U.S. Dist. LEXIS 64455, 2006 WL 2598034, *7 (N.D.Ind. Sept.8, 2006)
- *Advanced Fiber Techs. Tr. v. J&L Fiber Servs., Inc.*, No. 1:07-CV-1191 (LEK/DRH), 2010 U.S. Dist. LEXIS 45938, at *39 (N.D.N.Y. May 11, 2010)
- *Atlantic Marine Florida, LLC. V. Evanston Ins. Co.*, 2010 U.S. Dist. LEXIS 56067, 2010 WL 1930977 (M.D. Fla. May 13, 2010)
- *Boyd v. Etchebehere*, No. 1:13-01966-LJO-SAB (PC), 2015 U.S. Dist. LEXIS 152584 (E.D. Cal. Nov. 9, 2015)
- *Bridell v. Saint Gobain Abrasives Inc.*, 233 F.R.D. 57, 60 (D. Mass. 2005).
- *Borgerson v. Scanlon*, 117 Nev. 216, 220, 19 P.3d 236, 238 (2001)
- *Colony Ins. Co. v. Kuehn*, No. 2:10-cv-01943-KJD-GWF, 2011 U.S. Dist. LEXIS 155198 (D. Nev. Dec. 22, 2011)
- *DeValk Lincoln Mercury, Inc. v. Ford Motor Co.*, 811 F.2d 326, 336 (7th Cir. 1987)
- *Douglas Disposal, Inc. v. Wee Haul, LLC*, 123 Nev. 552, 558 (2007)
- *EEOC v. Autozone, Inc.*, 248 F.R.D. 542, 543 (W.D. Tenn. 2008)
- *Fertilizer v. Davis*, 567 So. 2d 451, 455, 15 Fla. L. Weekly 2171 (Dist. Ct. App. 1990)
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- *Great Am. Ins. Co. of New York v. Vegas Const. Co.*, 251 F.R.D. 534, 538 (D. Nev. 2008).
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- *Harvey's Wagon Wheel, Inc. v. MacSween*, 96 Nev. 215, 217-18, 606 P.2d 1095, 1097 (1980)
- *Havas v. Bank of Nev.*, 96 Nev. 567, 613 P.2d 706 (1980).
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- 1 ▪ *Hotel Last Frontier Corp. v. Frontier Props.*, 79 Nev. 150, 155, 380 P.2d 293, 295 (1963).
- 2 ▪ *Kahn v. Orme*, 108 Nev. 510, 516, 835 P.2d 790, 794 (1992)
- 3 ▪ *Indianapolis Minority Contractors Ass'n.*, 1998 U.S. Dist. LEXIS 23349, 1998 WL 1988826.
- 4 ▪ *Lehrer McGovern Bovis v. Bullock Insulation*, 124 Nev. 1102, 1117-1118, 197 P.3d 1032 (2008)
- 5 ▪ *Laughlin Recreational Enters. v. Zab Dev. Co.*, 98 Nev. 285, 287, 646 P.2d 555, 556 (1982).
- 6 ▪ *Lorraine v. Markel Am. Ins. Co.*, 241 F.R.D. 534, 552 (D. Md. 2007)
- 7 ▪ *Lucini-Parish Ins. v. Buck*, 108 Nev. 617, 620, 836 P.2d 627, 629 (1992)
- 8 ▪ *Mansur v. Mansur*, No. 63868, 2014 Nev. Unpub. LEXIS 790, at *4 n.1 (May 14, 2014)
- 9 ▪ *Masonry & Tile Contractors Ass'n of S. Nev. v. Jolley, Urga & Wirth, Ltd.*, 113 Nev. 737, 741, 941 P.2d 486, 489 (1997)
- 10 ▪ *MB Am., Inc. v. Alaska Pac. Leasing Co.*, 367 P.3d 1286, 1288 (Nev. 2016)
- 11 ▪ *McDonald v. Shamrock Invs., LLC*, No. 54852, 2011 Nev. Unpub. LEXIS 1628, at *1 (Sep. 29, 2011)
- 12 ▪ *Morgan v. D&S Mobile Home Ctr., Inc.*, Nos. 07-09-0315-CV, 07-09-0354-CV, 2010 Tex. App. LEXIS 7498, at *8-9 n.4 (App. Sep. 10, 2010)
- 13 ▪ *Nev. Nat'l Bank v. Snyder*, 108 Nev. 151, 157, 826 P.2d 560, 563 (1992)
- 14 ▪ *Padilla Construction Company of Nevada v. Big-D Construction, Corp.* 386 P.3d 982, 2016 Nev. Unpub. LEXIS 958.
- 15 ▪ *Pulliam v. Tallapoosa Cty. Jail*, 185 F.3d 1182, 1185 (11th Cir. 1999)
- 16 ▪ *Schettler v. RalRon Capital Corp.*, 128 Nev. 209, 221 n.7 (2012)
- 17 ▪ *Sunbelt Worksite Mktg. v. Metro. Life Ins. Co.*, No. 8:09-cv-02188-EAK-MAP, 2011 U.S. Dist. LEXIS 87387, at *5-6 (M.D. Fla. Aug. 8, 2011)
- 18 ▪ *Theriault v. State*, 92 Nev. 185, 547 P.2d 668, 1976 Nev. LEXIS 561 (Nev. 1976),
- 19 ▪ *Visa Int'l Serv. Ass'n v. JSL Corp.*, No. 02:01-CV-0294-LRH (LRL), 2006 U.S. Dist. LEXIS 81923, at *10 (D. Nev. Nov. 3, 2006)
- 20 ▪ *Williams v. Cottonwood Cove Dev. Co.*, 96 Nev. 857, 619 P.2d 1219, (1980)
- 21 ▪ *Young v. Johnny Ribeiro Bldg.*, 106 Nev. 88, 787 P.2d 777 (1990)

22 **Statutes and Other Authorities**

- 23 ▪ NRCP 15(b)
- 24 ▪ Fed.R.Civ.P. 16(e)
- 25 ▪ NRCP 30(b)
- 26 ▪ NRS 624
- 27 ▪ NRS 624.624
- 28 ▪ NRS 624.626

29 **I. PROCEDURAL HISTORY**

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

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

17
18 ¹ Exhibit 1, Zitting Complaint against APCO.

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

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

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

27 ⁵ *Id.*

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

⁷ See Exhibit 4, Order Appointing Special Master.

⁸ Exhibit 5, Special Master Order.

⁹ See Docket.

¹⁰ See Special Master Hearing Order.

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

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

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

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

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

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

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

25 ¹⁵ See docket.

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

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

¹⁸ See Minutes from October 5, 2017 Hearing.

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

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

²¹ See Exhibit 7, Deposition of S. Zitting.

1 Zitting's original Motion.

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

12 Following issuance of the Court's minute order, APCO followed up with counsel for
13 Zitting to acquire a draft order on Zitting's motion for Partial Summary Judgment. Zitting finally
14 provided the order on Wednesday, December 20, 2017. Subsequent to receiving the draft order, it
15 became apparent that the Parties fundamentally disagreed with regard to the interpretation of the
16 language in the Decision. Specifically, the minute order states that "the Court still has before it
17 the question of whether there are genuine issues going to breach of the contract related to Zitting's
18 performance of the same."²⁶ Yet, then provides that "the subject Motion is GRANTED in its
19 entirety."²⁷ As the Court's Decision reads, it is APCO's position that the Court specifically found
20 "genuine issues" of material fact remain as to Zitting's "performance" and breach of the contract
21 that must be presented at trial. Conversely, Zitting asserts that regardless of the above finding, the
22 Court granted the Motion in its entirety and, as such, Zitting is effectively removed from the case
23 and there are no issues of fact to present at trial. As evidenced by the instant Motion, it is clear
24 that the Court, in fact, "still has before it the question of whether there are genuine issues going to
25

26 ²² See Docket at November 6, 2017.

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

28 ²⁴ See Docket at November 15, 2017.

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

²⁶ *Id.*

²⁷ *Id.*

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

4 **II. LEGAL STANDARD.**

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

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

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

24
25 ²⁸ *Id.*

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

27 ³⁰ *See EDCR 2.24(b)*.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

12 A. It appears that way, yes.

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

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

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

16 A. Performed under their direction.⁴²

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

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

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

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

28 ⁴¹ Zitting Deposition at 42.

⁴² Zitting Deposition at 54.

⁴³ Reply at 11:23-24.

⁴⁴ See Zitting deposition at 42, 54.

⁴⁵ Reply at 11:25-27.

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

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

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

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

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

18 A. Okay.

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

20 A. Okay.

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

25 A. I don't.⁴⁹

26
27 ⁴⁶ See Zitting Deposition at 42 and 54.

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

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

⁴⁹ Zitting Deposition at 93:6-94:15.

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

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

5 A. It appears that they had.⁵⁰

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

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

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

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

20
21 ⁵⁰ Zitting Deposition at 51:22-52:1.

22 ⁵¹ See Zitting's Reply at 3-5.

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

24 ⁵³ Zitting's Reply at 3-5.

25 ⁵⁴ 251 F.R.D. 534, 538 (D. Nev. 2008) (internal quotation marks omitted).

26 ⁵⁵ *Id.*

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

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

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

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

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

⁵⁸ Exhibit 13, Declaration of Mary Jo Allen.

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

⁶⁰ Exhibit 13, Declaration of Mary Jo Allen.

⁶¹ See Declaration of Mary Jo Allen.

| | | |
|--|--|---|
| 1 provided or received 2 Zitting's alleged pay 3 applications dated 4 06/30/2008 and 5 11/30/2008 that are 6 collectively attached to 7 the Opposition as 8 Exhibit 4." | deposition statement. | never provided or received the referenced pay applications by reviewing Project documents, and speaking with APCO employees. |
| 9 Exhibit 1 at paragraph 7. 10 "Zitting still had a 11 remaining part of its 12 scope of work to 13 complete at the Project 14 when APCO stopped 15 work and turned the 16 Project over to Camco in 17 August 2008." | No personal knowledge of the Project's construction | Ms. Allen made herself aware of these facts as the NRCP 30(b)(6) representative through speaking with Joe Pelan and Brian Benson and reviewing the Project's records, including the drywaller's billings. ⁶² And as cited above, 30(b)(6) designees do not need to have personal knowledge for their declarations on behalf of the company. |
| 18 Exhibit 2 (photographs 19 of buildings 8 and 9). | Authentication and admissibility, APCO didn't have personal knowledge of the construction since it left the project before November 2008 when the photos were taken | As APCO's NRCP 30(b)(6) designee, Ms. Allen familiarized herself with APCO's business records to make her affidavit. She was able to confirm that the photos in question were taken by Brian Benson in the regular course of business. ⁶³ |
| 20 Exhibit 6 (Camco's 21 Payment Application) | Authentication and admissibility, no evidence documents are what they claim to be, no declaration to authenticate, no personal knowledge. | These were documents produced by Camco, a party to this litigation. "[D]ocuments provided to a party during discovery by an opposing party are presumed to be authentic, shifting the burden to the producing party to demonstrate that the evidence that they produced was not authentic." <i>Lorraine v. Markel Am. Ins. Co.</i> , ⁶⁴ citing <i>Indianapolis Minority Contractors Ass'n.</i> , ⁶⁵ ("The act of production is an implicit authentication of documents produced..."). |

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

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

26
27 ⁶² Exhibit 13, Declaration of Mary Jo Allen.

⁶³ Exhibit 13, Declaration of Mary Jo Allen.

⁶⁴ 241 F.R.D. 534, 552 (D. Md. 2007)

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

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

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

7 **SECOND AFFIRMATIVE DEFENSE**

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

10 **THIRD AFFIRMATIVE DEFENSE**

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

14 **FIFTH AFFIRMATIVE DEFENSE**

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

20 **EIGHTH AFFIRMATIVE DEFENSE**

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

23 **TENTH AFFIRMATIVE DEFENSE**

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

25 **TWELFTH AFFIRMATIVE DEFENSE**

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

28 **SIXTEENTH AFFIRMATIVE DEFENSE**

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

EIGHTEENTH AFFIRMATIVE DEFENSE

ZBCI has failed to comply with the requirements of NRS 624.⁷⁰

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

⁶⁷ Reply at 5.

⁶⁸ Reply at 7:16-17.

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

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

7 Q. What is your understanding of a retention?

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

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

16 A. Yes, sir.

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

19 A. Yes, sir.

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

22 A. Yes, sir.

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

25 A. No.

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

28 A. When completed by all subcontractors.

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

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

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

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

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

1 A. The bank.

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

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

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

13 A. The job in its entirety.

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

16 A. Yes.⁷²

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

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

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

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

25 A. Sorry.

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

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

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

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

A. F, down here, sir?

Q. Yes.

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

...

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

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

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

3 A. No.

4 Q. Not that you're aware of?

5 A. No, sir.

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

7 A. Yes, sir.

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

9 A. No, sir.

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

11 A. That is correct.⁷⁴

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

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

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

19 A. Not without papers in front of me.

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

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

22 Q. And approved, correct?

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

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

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

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

27 A. Correct.⁷⁵

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

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

⁷⁵ Allen Volume II at 146:1-23.

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

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

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

23 ⁷⁷ 106 Nev. 88, 93, 787 P.2d 777, 780 (1990).⁷⁷

24 ⁷⁸ *Id.*

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

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

⁸¹ NRCP 15(b).

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

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

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

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

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

28 ⁸⁴ *Id.* at 7.

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

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

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

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

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

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

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

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

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

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

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

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

⁹⁰ *Id.* at 157.

⁹¹ *Id.* at 157.

⁹² *Id.* at 157.

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

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

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

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

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

19 “The timing of discovery as established in the Rules may be modified through the parties’
20 stipulation or by court or discovery commissioner order in most instances.”¹⁰⁰ In this case, Zitting
21 and APCO (and other parties) agreed to postpone depositions.¹⁰¹ The subsequent depositions are
22

23
24 ⁹³ *Id.* at 157.

25 ⁹⁴ Exhibit 13, Declaration of Mary Jo Allen.

26 ⁹⁵ See Exhibit 13, Declaration of Mary Jo Allen.

27 ⁹⁶ See Exhibit 13, Declaration of Mary Jo Allen.

28 ⁹⁷ See Docket at October 5, 2017 entry.

⁹⁸ Exhibit 14, October 5, 2017 Minutes. (“Further, [APCO’s counsel] requested discovery be extended another 45 days to finish up depositions, which resulted in colloquy as to deferring the hearing on the motions pending depositions... COURT FURTHER ORDERED that the deadline for taking depositions is October 30, 2017.”)

⁹⁹ *Id.*

¹⁰⁰ 1-13 Nevada Civil Practice Manual § 13.03 (2017).

¹⁰¹ See Affidavit of Cody Mounteer, Esq.

1 new evidence.¹⁰² As such, both Zitting and this Court knew that additional information could
2 come to light, and would need to be considered. This is obvious from the Court's ruling to defer a
3 hearing on the pending dispositive motions. By agreeing to, and allowing its deposition, Zitting
4 waived any argument it had to dispute the timeliness of APCO submitting any new deposition
5 testimony to the Court.¹⁰³

6 Further, APCO's supplemental briefing was necessitated by Zitting's conduct. When the
7 Court reopened deposition discovery, everyone understood that the parties would be permitted to
8 utilize any new evidence. Zitting cannot cry foul when APCO pointed out inconsistencies
9 between the new deposition testimony and the prior affidavit submitted to the Court. Those patent
10 inconsistencies and factual questions independently preclude summary judgment.

11 When discovery is re-opened, courts typically acknowledge that corresponding deadlines
12 need to be adjusted to account for the change in discovery.¹⁰⁴ *Cf. Visa Int'l Serv. Ass'n v. JSL*
13 *Corp.*,¹⁰⁵ (discovery was re-opened and the District Court for the District of Nevada concluded
14 there was good cause to extend the deadline for filing dispositive motions). Under these
15 circumstances the new deposition testimony should be considered by the Court. *See Morgan v.*
16 *D&S Mobile Home Ctr., Inc.*,¹⁰⁶ (where the trial court considered the decision to reopen discovery
17 as "implicitly negating" its previously issued order denying appellant the opportunity to proffer
18 evidence on damages. The court cautioned litigants that reopening discovery "may change
19 everything," that parties may have to "resubmit motions for Summary Judgment" and that by
20 doing so, it may allow the opposing party to "create factual issues"). As in *Morgan*, once
21
22

23 ¹⁰² *Fertilizer v. Davis*, 567 So. 2d 451, 455, 15 Fla. L. Weekly 2171 (Dist. Ct. App. 1990)

24 ¹⁰³ "A waiver is an intentional relinquishment of a known right . . . To be effective, a waiver must occur with full
25 knowledge of all material facts." *State v. Sutton*, 120 Nev. 972, 987, 103 P.3d 8, 18, 2004 Nev. LEXIS 129, 27, 120
26 Nev. Adv. Rep. 99 (Nev. 2004).

27 ¹⁰⁴ *See EEOC v. Autozone, Inc.*, 248 F.R.D. 542, 543 (W.D. Tenn. 2008) ("After the court granted in part the
28 corporation's motion for summary judgment, it conducted a status conference during which it reopened discovery, set
a new date for trial, and set new deadlines for discovery and dispositive motions."); *Boyd v. Etchebehere*, No. 1:13-
01966-LJO-SAB (PC), 2015 U.S. Dist. LEXIS 152584, at *6 (E.D. Cal. Nov. 9, 2015) ("After Defendant's motion for
summary judgment was denied, the Court reopened discovery and extended the discovery and dispositive motion
deadlines.").

¹⁰⁵ No. 02:01-CV-0294-LRH (LRL), 2006 U.S. Dist. LEXIS 81923, at *10 (D. Nev. Nov. 3, 2006)

¹⁰⁶ Nos. 07-09-0315-CV, 07-09-0354-CV, 2010 Tex. App. LEXIS 7498, at *8-9 n.4 (App. Sep. 10, 2010)

1 deposition discovery was reopened, several critical material issues were brought to light, and
2 APCO was able to clarify and magnify the factual issues it confirmed in its original Opposition.

3 **A. Zitting's own testimony confirmed numerous factual issues that preclude**
4 **summary judgment.**

5 APCO deposed Zitting on October 27, 2017. At its deposition, APCO confirmed several
6 material discrepancies between Zitting's deposition testimony and the affidavit Zitting submitted
7 in support of its request for summary judgment to this Court. As such, it was incumbent upon
8 APCO to highlight these contradictory statements to the Court.

9 **B. Zitting always knew it was not entitled to payment under the retention and**
10 **change order pay schedules.**

11 It is undisputed that in order to be entitled to retention, Zitting had to meet five
12 preconditions as described in Section 3.8 of the subcontract.¹⁰⁷ The first precondition for retention
13 is that the building be complete. Zitting clarified the completion definition by further defining it
14 as the completion of drywall.¹⁰⁸

15 Zitting's July 31, 2017 affidavit swore to this Court as follows: "By the time the Project
16 shut down, Zitting had completed its scope of work for two buildings on the Project—Buildings 8
17 and 9. The drywall was complete for those two buildings."¹⁰⁹ As quoted previously in section II of
18 this Motion, three months later, Zitting's deposition testimony confirmed the opposite. So
19 Zitting's 30(b)(6) designee confirmed drywall was not complete.

20 The second precondition is that the Owner must give final acceptance of APCO's or
21 Zitting's work. Zitting's affidavit also represented that the Owner accepted and approved Zitting
22 Brother's work: "I am not aware of any complaints with the timing or quality of Zitting's work on
23 the Project. As far as I am aware, Gemstone Development West, Inc., the owner of the Project, has
24
25
26

27 ¹⁰⁷ See Section 3.8 of Subcontract.

28 ¹⁰⁸ Exhibit 15, Subcontract at Section 3.8.

¹⁰⁹ See Zitting Brother's Motion for Partial Summary Judgment Against APCO Construction, Inc. at Exhibit A, ¶ 7, on
file herein.

1 approved the timing and quality of Zitting's work."¹¹⁰ Three months later, Zitting Brother's NRCP
2 30(b)(6) designee testified he had no knowledge of the Owner's acceptance:

3 "Q. While you -- let's look back at paragraph 3.8 of the subcontract,
4 Exhibit 1. We've talked about subparagraph A, the completion as
5 you further defined it in subparagraph F. Subparagraph B was the
6 approval and final acceptance of the building work by owner. While
7 you were working for APCO, did that occur, to your knowledge?
8 A. I have no knowledge of that."¹¹¹

9 "...
10 "Q. Do you know if there was ever a certificate of occupancy for
11 Building 8?

12 A. I didn't -- I do not know.

13 Q. Do you know if there was ever a certificate of occupancy for
14 Building 9?

15 A. I do not know."

16 The third precondition was that APCO had to receive the final payment from the Owner.
17 Zitting's deposition designee did not have any knowledge of this condition being met:

18 Q. Okay. Next item is, receipt of final payment by contractor from
19 owner. Do you have any personal knowledge or information to
20 suggest whether that occurred?

21 A. I do not.¹¹²

22 In fact, APCO disclosed documentation showing it was not paid any of Zitting's retention or
23 unapproved change order work by the Owner.¹¹³

24 The fourth precondition was Zitting providing its as-built drawings and other close out
25 documentation related to its work. Zitting's affidavit swore to this Court that, "Zitting had
26 submitted close-out documents for its scope of work, including as-built drawings and releases of
27 claims for Zitting's vendors."¹¹⁴ Once again, three months later, the story changed:

28 Q. Item D [within Section 3.8 of Subcontract] is delivery to
contractor from subcontractor, all as-built drawings for its scope of
work, and other closeout documents. Did Zitting ever satisfy that
requirement?

A. I don't recall.

¹¹⁰ See Zitting Brother's Motion for Partial Summary Judgment Against APCO Construction, Inc. at Exhibit A, ¶ 7, on file herein.

¹¹¹ Zitting Deposition.

¹¹² Exhibit 7, Zitting's NRCP 30(b)(6) Deposition at 31: 17-20.

¹¹³ Exhibit 18, Accounting Records Confirming Owner Never Paid APCO Zitting Brothers' Retention.

¹¹⁴ See Zitting Brother's Motion for Partial Summary Judgment Against APCO Construction, Inc. at Exhibit A, ¶ 7, on file herein.

1 Q. Do you know?

2 A. I don't recall.

3 Q. Prior to today, have you seen any records in your file that would
4 reflect the transmittal of that type of closeout documentation and as-

5 built?
6 A. Not that I recall.¹¹⁵

7 In fact, the Zitting's designee summarized its failure to meet these last three preconditions to be
8 entitled to its retention payment as follows:

9 Q. Sitting here today as the corporate designee, are you aware
10 of any documents, facts, information to suggest that Zitting met the
11 conditions of subparagraphs B, C, and D of paragraph 3.8?

12 A. I'm not aware of any.¹¹⁶

13 During its deposition, Zitting also acknowledged that it did not meet the conditions
14 precedent to be entitled to payment for some of its change orders. Section 3.9 of the Subcontract
15 delineated the following change order payment schedule:

16 Subcontractor agrees that Contractor shall have no obligation to pay
17 Subcontractor for any changed or extra work performed by
18 Subcontractor until or unless Contractor has actually been paid for
19 such work by the Owner **unless Contractor has executed and**
20 **approved change order directing subcontractor to perform**
21 **certain changes in writing and certain changes have been**
22 **completed by subcontractor.**¹¹⁷

23 Zitting has acknowledged this is the payment schedule for change orders.¹¹⁸ In fact, Zitting added
24 the language in bold confirming that Zitting had to have an "executed and approved change order"
25 to be entitled to payment for change orders if the Owner did not pay APCO for the change
26 order.¹¹⁹

27 Q. So your -- if I understand your testimony, your
28 entitlement to a change order could be determined separate, apart
29 from whether the owner paid APCO, if you had executed approved
30 change orders?

31 A. That was my intention here.

32 Q. My statement is correct, yes?

33 ¹¹⁵ Zitting Deposition pp. 31-32.

34 ¹¹⁶ Zitting Depo. pp. 34-35.

35 ¹¹⁷ Exhibit 15, Section 3.9 of Subcontract.

36 ¹¹⁸ Exhibit 7, Zitting Deposition at p. 37:1-5 ("Q. Sitting here today as the corporate designee, would you agree that
37 Zitting accepted that payment schedule for change orders? A. With some changes and modifications, it appears that I
38 did.").

39 ¹¹⁹ Exhibit 7, Zitting Deposition at 37:6-16.

1 A. Yes.¹²⁰

2 Zitting then confirmed that it did not have information to suggest that either APCO was paid for
3 the change orders that Zitting submitted, or that it had "executed and approved change orders" for
4 some of the change orders it is seeking:

5 Q. -- okay -- do you have executed and approved change order
6 forms from APCO on those?

7 A. Not on all of them.

8 Q. On some of them do you?

9 A. I believe so.

10
11 Q. (By Mr. Jefferies) Sir, do you have -- as the corporate
12 designee, do you have any information, documentation, evidence to
13 suggest that APCO was paid your retention that you're seeking in
14 this action?

15 A. Not that I know of.

16 Q. As you sit here today as the corporate designee, do you have
17 any documents, facts, information to suggest that APCO received
18 payment for the change orders you're seeking payment for in this
19 action?

20 A. Not that I know of.¹²¹

21 Additionally, Zitting also agreed that it would list any alleged claims it had against APCO on its
22 progress releases:

23 As a condition precedent to receiving partial payments from
24 Contractor for Work performed, Subcontractor shall execute and
25 deliver to Contractor, with its application for payment, a full and
26 complete release (Forms attached) of all claims and causes of action
27 Subcontractor may have against Contractor and Owner through the
28 date of the execution of said release, **save and except those claims
specifically listed on said release and described in a manner
sufficient for Contractor to identify such claim or claims with
certainty.**¹²²

29 Zitting did not list any change order claims in its progress releases.¹²³

30 As such, Zitting has not earned the right to any change order payment because it has not
31 meet the preconditions in the Subcontract and because it did not list and reserve any alleged claims

32 ¹²⁰ Exhibit 7, Zitting Deposition at 38:9-13.

33 ¹²¹ Exhibit 7, Zitting Deposition at 39:16-40:8.

34 ¹²² Exhibit 15, Zitting Subcontract at Section 3.4 (emphasis added).

35 ¹²³ Exhibit 19, Zitting's Progress Releases.

1 against APCO in its progress releases. So not only was Zitting always on notice of APCO's
2 defenses, it has known that it could not meet the necessary conditions precedent to payment for
3 either retention or its change orders. By granting Zitting's Motion, the Court is awarding money
4 that the original briefing and new evidence confirm was never due.

5 Further, as is proven above, it appears that Exhibit A to Zitting's Motion, a declaration
6 from Sam Zitting, who was also the recent corporate designee, appears to be nothing more than a
7 sham affidavit and should not be given any weight. *Nutton v. Sunset Station, Inc.*,¹²⁴ ("Even where
8 a summary judgment motion has already been filed and a party seeks to defeat it by presenting
9 last-minute inconsistent testimony, under federal jurisprudence, the general rule is that an apparent
10 contradiction between an affidavit submitted in opposition to a summary judgment motion and the
11 same witness's prior deposition testimony presents a question of credibility for the jury, unless the
12 court affirmatively concludes that the later affidavit constitutes a sham.")

13 Awarding Zitting summary judgment in light of the inconsistencies between its affidavit
14 and its deposition testimony constitutes legal error.

15 **C. APCO supplemented its interrogatory responses after Zitting's deposition.**

16 Zitting was deposed in this case for the first time on Friday, October 27, 2017.¹²⁵ After the
17 deposition, APCO supplemented its interrogatory responses to reiterate its defenses given Zitting's
18 critical admissions less than two weeks later, on Wednesday, November 8, 2017.¹²⁶ Zitting has
19 acknowledged that APCO specifically reserved the right to supplement or amend its interrogatory
20 answers as investigation, discovery, disclosure and analysis of the case continued.¹²⁷ Further,
21 APCO did not need to amend its Answer since these defenses were already listed in its answer.
22

23 **VI. Zitting's surreply contained many inaccuracies.**

24 Zitting's surreply filed the day before the November 15, 2017 oral argument contained
25

26
27 ¹²⁴ 2015 Nev. LEXIS 4, *31-33, 357 P.3d 966, 977, 131 Nev. Adv. Rep. 34 App. (internal citations and quotations
omitted).

28 ¹²⁵ Exhibit 7, Zitting Deposition.

¹²⁶ APCO CONSTRUCTION'S SUPPLEMENTAL ANSWERS TO ZITTING BROTHERS CONSTRUCTION
INC.'S FIRST REQUEST FOR INTERROGATORIES at 6-7.

1 many inaccuracies, including: (1) its interpretation of Section 9.4 of the Subcontract, (2) whether
2 or not Zitting met the conditions precedent to be entitled to retention or payments for change
3 orders, (3) the state of conditions precedent under Nevada law, (4) what a “schedule of payments”
4 is under NRS 624, and (5) whether or not Zitting could unilaterally waive the condition that
5 change orders had to be approved and in writing to be entitled to payment from APCO for change
6 orders.

7 **A. APCO’s departure from the project does not trigger payment under Section 9.4**
8 **of the Subcontract.**

9 On November 15, 2017, Zitting filed a Reply to APCO’s Supplemental Brief.¹²⁸ In it,
10 Zitting contends that APCO’s payment obligation was triggered under Section 9.4 when APCO’s
11 contract with the owner was terminated. Zitting is incorrect. By its terms that section only applies
12 to terminations for convenience. No one associated with this project can seriously contend, and
13 certainly has not provided any evidence, that the Owner or APCO terminated the prime contract
14 for convenience. Also, Section 9.4 confirms that APCO’s payment obligation would only be
15 triggered when APCO received payment from the Owner for Zitting’s work, and per the Contract
16 Documents:

17 9.4 Effect of Owner’s Termination of Contractor. If there has been a
18 termination of the Contractor’s contract with the Owner, the
19 Subcontractor shall be paid the amount due from the Owner to the
20 Contractor for the Subcontractor’s completed work, as provided in
the Contract Documents, after payment by the Owner to the
Contractor.¹²⁹

21 So it is clear that APCO’s payment obligation was not triggered by Section 9.4 of the Subcontract
22 because there was not a convenience termination and the Owner never paid APCO for Zitting’s
23 work. The Contract Documents confirm that Zitting has to meet certain preconditions to be
24 entitled to payment for retention and change orders under Sections 3.8 and 3.9 and Section 5 of the
25 Contract Documents.¹³⁰

26
27 ¹²⁷ See Zitting’s MIL at 8:25-27 and 9:16-18, on file herein.

28 ¹²⁸ See Zitting’s Reply to APCO’s Supplemental Brief, on file herein.

¹²⁹ Exhibit 15, Zitting Subcontract at 9.4.

¹³⁰ See Zitting Subcontract.

1 **B. Zitting did not comply with the conditions precedent for payment of its retention**
2 **and change orders.**

3 Zitting argues “Under Nevada law, compliance with a valid condition precedent requires
4 only substantial performance” citing *Laughlin Recreational Enters. v. Zab Dev. Co.*¹³¹ Zitting is
5 wrong. The case it cited does not analyze, opine on, or even mention conditions precedent.
6 Instead, the case addresses whether a construction contract was substantially performed and
7 whether there was substantial evidence to support the court’s findings on appeal.¹³²

8 In *MB Am., Inc. v. Alaska Pac. Leasing Co.*,¹³³ the Nevada Supreme Court directly
9 considered conditions precedent. In *MB Am., Inc.*, the contract between the parties contained a
10 condition precedent to mediate disputes before proceeding to litigation. The plaintiff did not
11 comply with this condition precedent, and initiated litigation before attempting mediation. The
12 defendant filed a motion for summary judgment alleging that MBA prematurely initiated the
13 litigation since it had not complied with the condition precedent, and awarded MBA attorneys fees
14 as the prevailing party. The Supreme Court of Nevada affirmed both the motion for summary
15 judgment and the award of attorneys fees. It cited to and adopted the position taken in *DeValk*
16 *Lincoln Mercury, Inc. v. Ford Motor Co.*,¹³⁴ where that court specifically required “strict
17 compliance” with a condition precedent. See also *Lucini-Parish Ins. v. Buck*,¹³⁵ (A party who
18 seeks to recover on a contract has the burden of establishing any condition precedent to the
19 respective contract).

20 Zitting had to strictly comply with the contractual conditions precedent to be entitled to
21 retention. Next, contrary to Zitting’s contention, the Nevada Supreme Court has ruled that a
22 “schedule of payments” includes a situation where an owner has to first accept the subcontractor’s
23 work, and the prime contractor has to be paid for subcontractor’s work. See *Padilla v. Big-D*,¹³⁶
24 (“Because the parties’ subcontract contained a payment schedule that required that Padilla be

25
26 ¹³¹ 98 Nev. 285, 287, 646 P.2d 555, 556 (1982).

27 ¹³² *Id.* at 287.

28 ¹³³ 367 P.3d 1286, 1288 (Nev. 2016)

¹³⁴ 811 F.2d 326, 336 (7th Cir. 1987)

¹³⁵ 108 Nev. 617, 620, 836 P.2d 627, 629 (1992)

¹³⁶ 386 P.3d 982, 2016 Nev. Unpub. LEXIS 958.

1 paid within ten days after IGT accepted Padilla's work and paid Big-D for that work and it
2 is undisputed that IGT never accepted Padilla's work and never paid Big-D for Padilla's work,
3 the district court correctly found that payment never became due to Padilla under the
4 subcontract or *NRS 624.624(1)(a)*.”).

5 **C. Zitting effectively acknowledges that it did not meet the preconditions for**
6 **retention.**

7 Tellingly, Zitting’s Surreply does not dispute that the drywall was not complete and the
8 owner had not accepted Zitting’s work when APCO left the Project. If Zitting competed the
9 Project under replacement general contractor Camco as it contends, and the owner accepted that
10 work, Zitting’s remedy is against Camco, not against APCO. Zitting does not dispute that APCO
11 was never paid by the owner for Zitting’s work, and Zitting does not have any evidence within the
12 record to show that it provided close-out documents to APCO. If it had them, it had the
13 responsibility to produce these documents in this litigation, and attach them as an exhibit to its
14 motion. It did neither.

15 **D. The condition precedent of an executed and approved change order was not only**
16 **for Zitting’s benefit.**

17 Zitting’s Surreply contends that since Zitting added the language entitling it to payment if
18 it had an executed and approved change order could be waived by Zitting since the provision was
19 only for Zitting’s benefit. This is incorrect. The addition of an “executed and approved change
20 order” was for APCO’s benefit as well since APCO would not be subject to erroneous and
21 unjustified claims without a change order.

22 Zitting’s argument that its change orders were approved by operation of law is also
23 incorrect. Zitting’s PMK admitted APCO rejected its change orders in its deposition:

24 Q. So as the corporate designee, would you agree that APCO
25 rejected certain change order requests because it objected to your
26 labor rate?

27 A. Based on an e-mail chain that I read, it appeared that that was the
28 case.

Q. So that's a yes?

A. I don't have a memory of it. So I'm just going off of this limited
e-mail chain and what was going on in it. I don't know if there was
other conversation had outside. I don't know if somebody got mad
and picked up the phone and called and had a discussion. I don't

1 recall that. And the e-mail chain isn't inclusive of -- of a conclusion,
2 but that looks like that's the direction it was going. And I just --
3 unfortunately, it's been so long and there's so many -- so many
4 phone conversations and so forth that -- that I don't have the benefit
5 of recalling.

6 Q. Okay. Isn't it true, sir, that as the corporate representative for
7 Zitting today, that APCO -- whether you agreed or not, APCO did
8 reject some change order requests. Correct?

9 A. It appeared that they had.

10 Q. Okay. And as a result, Zitting repriced certain change order
11 requests using a labor rate of \$30 an hour. Correct?

12 A. Correct.¹³⁷

13 In fact, Zitting admitted that some of the change orders it is seeking payment for were completed
14 under Camco's direction, not APCO's.¹³⁸

15 Accordingly, Zitting's supplemental brief confirms it is not entitled to summary judgment.

16 **VII. Lastly, material misstatements regarding the critical *Padilla v. Big-D Construction***
17 **case were made at the November 16, 2017 abbreviated hearing on this matter.**

18 At the November 16, 2017 hearing on Zitting's Motion for Summary Judgment, Helix's
19 counsel represented to the Court that the Nevada Supreme Court's decision in *Padilla v. Big-D* did
20 not account for pay-if-paid arguments in its decision.¹³⁹ This is incorrect. Both Padilla's and Big-
21 D's Supreme Court briefs argued their respective interpretations of pay-if-paid provisions, and
22 specifically addressed the applicability of dicta from the *Lehrer McGovern Bovis v. Bullock*
23 *Insulation*,¹⁴⁰ decision. This clarification is necessary because the Court may have considered the
24 incorrect information provided by Helix in its decision.

25 **A. The *Padilla v. Big-D* District Court Action**

26 In *Padilla v. Big-D*,¹⁴¹ Big-D was hired as the general contractor for a construction project
27 and subcontracted with Padilla to install a stucco system on the building. While the stucco was
28 being installed, separation issues developed and the owner rejected Padilla's work. Padilla filed a
complaint against Big-D for non-payment. After trial, this Court found that: (1) Padilla's signed

¹³⁷ Exhibit 17, S. Zitting Deposition at 51-52.

¹³⁸ See Zitting's Deposition at 53-56.

¹³⁹ Exhibit 20, Transcript of November 16, 2017 hearing at 12.

¹⁴⁰ 124 Nev. 1102, 1117-1118, 197 P.3d 1032 (2008).

¹⁴¹ 386 P.3d 982 (Nev. 2016).

1 subcontract bound it to the owner's decisions,¹⁴² (2) NRS 624.624 was designed to ensure that
2 general contractors pay subcontractors **after** the owner pays the general,¹⁴³ (3) NRS 624.624
3 yields to a schedule of payments,¹⁴⁴ (4) the subcontract confirmed that Padilla would get paid after
4 the owner accepted and paid the prime contractor for the work,¹⁴⁵ and (5) the owner never
5 accepted the work so Big-D's payment to Padilla never became due.¹⁴⁶ Then this court awarded
6 Big-D damages and attorneys fees.¹⁴⁷ In the subsequent appeal, Padilla's opening brief, Big-D's
7 responding brief, and Padilla's reply brief each made arguments regarding pay-if-paid provisions.

8 **B. The Nevada Supreme Court**

9 Padilla argued that the Court erred because it found that Padilla was to be paid after the
10 owner paid the general contractor, and cited *Lehrer McGovern Bovis* for the proposition that pay-
11 if-paid provisions are illegal under Nevada law.¹⁴⁸ So it is clear that the Nevada Supreme Court
12 was aware of Padilla's pay-if-paid arguments since Padilla's opening brief.

13 Big-D addressed pay-if-paid provisions in its responding brief and argued that NRS
14 624.624 does not change when payment is due, and that payment was not due until: (1) the owner
15 accepted Padilla's work, and (2) the owner paid Big-D for Padilla's work under the subcontract:

16 The Subcontract provided that Padilla was to be paid within ten
17 (10) days after IGT paid Big-D **and** after IGT accepted the Padilla
18 Work. Specifically, Big-D "must have first received from the Owner
19 the corresponding periodic payment, **including the approved**
20 **portion of your monthly billing**, unless the Owner's failure to make
payment was caused exclusively by us." *Id.* at Section 4.2.

21 ¹⁴² See Exhibit 21, Findings of Fact and Conclusions of Law and Judgment at 19:15-18 ("9A. In the Subcontract
22 Agreement, Padilla agreed to be subject to the Owner's decisions and actions and that Big-D 'shall have the rights,
remedies, powers and privileges as to, or against You which the Owner has against us.'").

23 ¹⁴³ See *Id.* at 21:14-16 (emphasis added). ("NRS 624.624 is designed to ensure that general subcontractors promptly
pay subcontractor after the general contractor receives payment from the Owner associated with work performed by
the subcontract.").

24 ¹⁴⁴ *Id.* at 21: 17-19. ("By its own terms, NRS 624.624 yields to (a) payment schedules contained in subcontract
agreements and (b) contractual rights to withhold payments from a subcontractor after arising from deficient work.");
25 *Id.* at 22:6-9. ("Here, it is undisputed that the Subcontract Agreement is a written agreement between Big-D and
Padilla. Accordingly, pursuant to NRS 624.624(1)(a) payment is due to Padilla on the date specified in the
Subcontract Agreement.").

26 ¹⁴⁵ *Id.* at 22:9-11. ("The Subcontract provided that Padilla was to be paid within ten (10) days after IGT paid Big-D
and after IGT accepted the Padilla work.").

27 ¹⁴⁶ See *Id.* at 23:2-3 ("Here, it is undisputed that IGT never accepted the Padilla work. Accordingly, payment to
Padilla never became due.").

28 ¹⁴⁷ Exhibit 22, Order Granting Motion for Attorney's Fees.

¹⁴⁸ Exhibit 23, Padilla's Opening Brief at 26 (internal citations to the record omitted).

1 NRS 624.624 does not change the timing of when payment is due
2 under a subcontract. The statute is designed to ensure that general
3 subcontractors promptly pay subcontractors after the general
4 contractor receives payment from the Owner associated with work
performed by the subcontractor. NRS 624.624 is clear that its
provisions yields to (a) payment schedules contained in subcontract
agreements...¹⁴⁹

5 Big-D also addressed *Lehrer McGovern Bovis* in its responding brief and argued that
6 *Lehrer McGovern Bovis* was not at issue in *Padilla v. Big-D*, the issue was the payment schedule
7 in the subcontract:

8 First, NRS 624 was not in effect or being interpreted in *Lehrer*
9 *McGovern Bovis, Inc. v. Bullock Insulation, Inc.* 124 Nev. 1102,
10 1117 (2008). Second, the issue here is not whether the payment
11 schedule in the Big-D subcontract is a pay-if-paid clause that
12 would excuse Big-D's obligation to pay Padilla if the owner
13 failed to pay Big-D for Padilla's work. Rather, the issue is, for
the purposes of NRS 624.624 notice of withholding, when was
the payment from Big-D to Padilla due. The Subcontract
Agreement contained a schedule for payments-payment to
Padilla was due after IGT approved Padilla's work *and* after
Big-D received payment attributable to Padilla's work.¹⁵⁰
14 Padilla's reply brief reargued that *Lehrer McGovern Bovis* prohibits pay if paid provisions, and
15 that there was not a schedule of payments in the subcontract.¹⁵¹ This Court and the Nevada
16 Supreme Court disagreed and applied the subcontract provision as written. That is exactly the
17 case here with APCO's subcontract. So it is clear the Nevada Supreme Court had the
18 opportunity to consider pay-if-paid clauses and *Lehrer McGovern Bovis* in its decision and still
19 enforced agreed upon payment schedules.

20 The Nevada Supreme Court issued its decision on November 18, 2016 confirming that the
21 Big-D/ Padilla subcontract contained a schedule of payments, and that payment obligation to the
22 subcontractor never became due because the owner: (1) never accepted the subcontractor's work,
23 and (2) never paid the general for the subcontractor's work:

24 Because the parties' subcontract contained a payment schedule
25 that required that Padilla be paid within ten days after IGT

26 ¹⁴⁹ Exhibit 24, Big D's responding brief at 28-29.

¹⁵⁰ See Exhibit 24, Big-D's responding brief at 32 (citations to the record omitted).

27 ¹⁵¹ See Exhibit 25, Padilla's Reply Brief at 13 ("According to *Lehrer McGovern Bovis v. Bullock Insulation*, 124 Nev.
28 1102, 1117-1118, 197 P.3d 1032 (2008), 'pay-if-paid provisions are unenforceable because they violate public policy.'
Big-D's reliance on the NRS 624.624(1)(a) provision for agreements "that includes a schedule for payments"
is inconsistent with the plain language of the Big-D – Padilla Subcontract; which does not contain a schedule of
payments. Instead of a Schedule of Payments, the Subcontract provides for monthly payments.").

1 accepted Padilla's work and paid Big-D for that work and it is
2 undisputed that **IGT never accepted Padilla's work and never**
3 **paid Big-D for Padilla's work**, the district court correctly found
 that payment never became due to Padilla under the subcontract
 or *NRS 624.624(1)(a)*.¹⁵²

4 So the decision recognized that payment schedules that are triggered after owner payment are not
5 unenforceable pay-if-paid provisions.

6 In the present action, the subcontract that APCO had with each subcontractor: (1)
7 confirmed that the subcontractor would be bound to the owner to the same extent APCO was,¹⁵³
8 (2) contained a schedule of payments for both retention and change orders with preconditions that
9 were clearly not met,¹⁵⁴ and (3) APCO was not paid for the subcontractor's work. Accordingly,
10 APCO's payment obligation to the subcontractors never became due. NRS 624.624 was never
11 intended to make the general contractor the owner's guarantor.

12 13 **VIII. Pay-if-Paid Defenses**

14 The Court's order on Zitting's motion for summary judgment incorporated the Court's
15 order on the Peel Brimley's Partial Motion for Summary Judgment to Preclude Defenses Based on
16 Pay-if-Paid Provisions. For the sake of judicial economy, APCO incorporates the arguments in its
17 August 21, 2017 opposition and January 4, 2018 motion for reconsideration of the Peel Brimley
18 motion by this reference. APCO believes the language in the contract requiring the owner's
19 payment to APCO before APCO had an obligation to pay Zitting to be a valid condition precedent
20 to payment.

21 **IX. The Court's strong policy on deciding cases on the merits.**

22 "This court has held that good public policy dictates that cases be adjudicated on their
23 merits."¹⁵⁵ In fact, Nevada has a "judicial policy favoring the disposition of cases on their
24 merits."¹⁵⁶ "[A]s a proper guide to the exercise of discretion, the basic underlying policy to have
25 each case decided upon its merits. In the normal course of events, justice is best served by such a
26

27 ¹⁵² 386 P.3d 982, 2016 Nev. Unpub. LEXIS 958.

28 ¹⁵³ Exhibit 15, Subcontract at 3.4.

¹⁵⁴ Exhibit 15, Subcontract at Section 3.8.

¹⁵⁵ *Kahn v. Orme*, 108 Nev. 510, 516, 835 P.2d 790, 794 (1992)

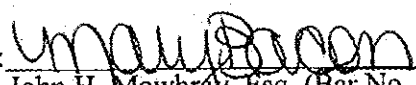
1 policy."¹⁵⁷ *Cf. Mansur v. Mansur*,¹⁵⁸ ("In regard to appellant's argument that the district court
2 should not have considered respondent's untimely opposition to his motion, we conclude that that
3 argument lacks merit" citing Nevada has a basic underlying policy in favor of deciding cases on
4 their merits).

5 Thus, despite Zitting's argument about APCO's defenses (despite APCO's answer, its
6 NRCP 30(b)(6) deposition and supplemental interrogatory answers), this case should be decided at
7 a trial on the merits.

8 In light of the foregoing, and for the reasons set forth in APCO's original opposition,
9 APCO respectfully requests that this Court grant the instant Motion for Reconsideration, set aside
10 its related Order and deny Zitting's Motion for Summary Judgment.

11 DATED: January ~~5th~~, 2018.

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28 ¹⁵⁶ *Havas v. Bank of Nev.*, 96 Nev. 567, 613 P.2d 706 (1980).

¹⁵⁷ *Hotel Last Frontier Corp. v. Frontier Props.*, 79 Nev. 150, 155, 380 P.2d 293, 295 (1963).

¹⁵⁸ No. 63868, 2014 Nev. Unpub. LEXIS 790, at *4 n.1 (May 14, 2014)

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of SPENCER FANE LLP and that a copy of the foregoing **MOTION FOR RECONSIDERATION OF COURT'S ORDER GRANTING ZITTING BROTHERS CONSTRUCTION, INC.'S PARTIAL MOTION FOR SUMMARY JUDGMENT AND EX PARTE APPLICATION FOR ORDER SHORTENING TIME AND TO EXCEED PAGE LIMIT** was served by electronic transmission through the E-Filing system pursuant to NEFCR 9, NRCP 5(b) and EDCR 7.26 or by mailing a copy to their last known address, first class mail, postage prepaid for non-registered users, on this 8 day of January, 2018, as follows:

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9 Tammy Cortez . (tcortez@caddenfuller.com)
10 Taylor Fong . (tfong@marquisaurbach.com)
11 Terri Hansen . (thansen@peelbrimley.com)
12 Timothy E. Salter . (tim.salter@procopio.com)
13 Wade B. Gochnour . (wbgochnour@h2law.com)

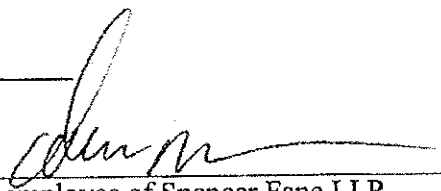

An employee of Spencer Fane LLP

EXHIBIT 1

1 **COMP**
2 **MICHAEL M. EDWARDS**
3 Nevada Bar No. 006281
4 **REUBEN H. CAWLEY**
5 Nevada Bar No. 009384
6 **LEWIS BRISBOIS BISGAARD & SMITH LLP**
7 400 South Fourth Street, Suite 500
8 Las Vegas, Nevada 89101
9 (702) 893-3383
10 FAX: (702) 893-3789
11 E-Mail: medwards@lbbslaw.com
12 E-Mail: cawley@lbbslaw.com
13 Attorneys for Plaintiff
14 Zitting Brothers Construction, Inc.

FILED

APR 30 2 04 PM '09

Ed Smith
CLERK OF THE COURT

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

11
12 **ZITTING BROTHERS CONSTRUCTION, INC.,**
13 a Utah corporation,

14 Plaintiff,

15 v.

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

22 Defendants.

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

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

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

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

26 **THE PARTIES**

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

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

**LEWIS
BRISBOIS
BISGAARD
& SMITH LLP**
ATTORNEYS AT LAW

4813-0009-7539.1

-1-

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

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

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

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

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

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

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

1 8. Zitting Brothers furnished the Work for the benefit of and at the specific instance and
2 request of APCO.

3 9. Pursuant to the Agreement, Zitting Brothers was to be paid an amount in excess of Ten
4 Thousand Dollars (\$10,000) (hereinafter "Outstanding Balance") for the Work.

5 10. Zitting Brothers furnished the Work and has otherwise performed its duties and
6 obligations as required by the Agreement.

7 11. APCO and/or Gemstone as well as Doe/Roe Defendants, have breached the Agreement
8 by, among other things:

- 9 a. failing and/or refusing to pay the monies owed to Zitting Brothers for the Work.
- 10 b. failing to adjust the Agreement price to account for extra work and/or changed
11 work, as well as suspensions, delays of Work caused or ordered by APCO,
12 Gemstone, and/or their representatives.
- 13 c. failing and/or refusing to comply with the Agreement; and
- 14 d. negligently or intentionally preventing, obstructing, hindering, or interfering
15 with Zitting Brothers performance of the Work.

16 12. Zitting Brothers is owed an amount in excess of Ten Thousand Dollars (\$10,000) for the
17 Work.

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

21 **SECOND CAUSE OF ACTION**
22 **(Breach of Implied Covenant of Good Faith & Fair Dealing - Against All Defendants)**

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

25 15. There is a covenant of good faith and fair dealing implied in every agreement, including
26 the Agreement between Zitting Brothers and APCO and/or Gemstone.

27 ...

28 ...

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

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

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

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

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

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

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

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

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

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

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

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

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

28 ...

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

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

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

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

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

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

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

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

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

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

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

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

...

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

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

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

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

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

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

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

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

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

21 **WHEREFORE**, Zitting Brothers prays that this Honorable Court:

- 22 1. Enters judgment against the Defendants, and each of them, jointly and severally, for
23 Zitting Brothers's reasonable costs and attorney's fees incurred in the collection of the
24 Outstanding Balance;
25 2. Enters a judgment against Defendants, and each of them, jointly and severally, for
26 Zitting Brothers's reasonable costs and attorney's fees incurred in the collection of the
27 Outstanding Balance, as well as an award of interest thereon;
28 ...

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

11 Dated this 30th day of April, 2009.

12 LEWIS BRISBOIS BISGAARD & SMITH LLP

13
14 By 

15 Michael M. Edwards, Esq.
16 Nevada Bar No. 006281
17 Reuben H. Cawley, Esq.
18 Nevada Bar No. 009384
19 400 South Fourth Street, Suite 500
20 Las Vegas, Nevada 89101
21 Attorneys for Plaintiff
22 Zitting Brothers Construction, Inc.
23
24
25
26
27
28

EXHIBIT 1

EXHIBIT 1

4815-6730-1889.1

Recorded at the Request of and Return
Recorded Document to:

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

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

NOTICE OF LIEN

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

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

Dated this 23 day of December, 2008.




Ryan B. Simpson
Agent for Zitting Brothers Construction

STATE OF UTAH)
COUNTY OF SALT LAKE)ss

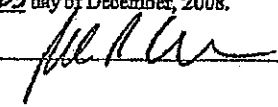
Ryan R. Simpson, being first duly sworn on oath according to law deposes and says: I have read the foregoing Notice of Intent to Lien, know the contents thereof and state that the same is true of my own personal knowledge, except those matters stated upon the information and belief, and, as to those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





Ryan R. Simpson
Agent for Zitting Brothers Construction

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



**EXHIBIT A
LEGAL DESCRIPTION**

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

PARCEL 1:

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

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

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

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

PARCEL 2:

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

EXCEPTING THEREFROM the Southerly 396 feet thereof.

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

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

PARCEL 3:

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

PARCEL 4:

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

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

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

PARCEL 5:

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

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

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

SENDER: COMPLETE THIS SECTION

Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.

Print your name and address on the reverse so that we can return the card to you.

Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:
APCO
4420 Oceanview Blvd
LV, NV 89103

2. Article Number
(Transfer from service label)
7008 1140 0003 8596 4275

PS Form 3811, February 2004 Domestic Return Receipt

COMPLETE THIS SECTION ON DELIVERY

A. Signature
☒ Agent
☐ Addressee

B. Received by (Printed Name)
C. Date of Delivery

D. Is delivery address different from item 1? ☐ Yes
If YES, enter delivery address below: ☐ No

3. Service Type
☒ Certified Mail ☐ Express Mail
☐ Registered ☐ Return Receipt for Merchandise
☐ Insured Mail ☐ G.O.D.

4. Restricted Delivery? (Date Recd) ☐ Yes ☐ No

SENDER: COMPLETE THIS SECTION

Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.

Print your name and address on the reverse so that we can return the card to you.

Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:
APCO
3432 N. Fifth St.
LV, NV 89072

2. Article Number
(Transfer from service label)
7008 1140 0003 8596 4265

PS Form 3811, February 2004 Domestic Return Receipt

COMPLETE THIS SECTION ON DELIVERY

A. Signature
☒ Agent
☐ Addressee

B. Received by (Printed Name)
C. Date of Delivery

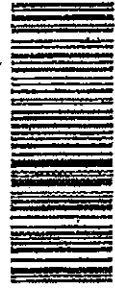
D. Is delivery address different from item 1? ☐ Yes
If YES, enter delivery address below: ☐ No

3. Service Type
☒ Certified Mail ☐ Express Mail
☐ Registered ☐ Return Receipt for Merchandise
☐ Insured Mail ☐ G.O.D.

4. Restricted Delivery? (Date Recd) ☐ Yes ☐ No

2116 SOUTH DALLIN STREET, SALT LAKE CITY, UTAH 84106

TURNER & SIMPSON
ATTORNEYS AT LAW



7008 1140 0003 8596 426A



0000020043



APCO

3432 North Fifth Street
Las Vegas, Nevada 89032

2116 SOUTH DALLIN STREET, SALT LAKE CITY, UTAH 84106

TURNER & SIMPSON
ATTORNEYS AT LAW



7008 1140 0003 8596 4275



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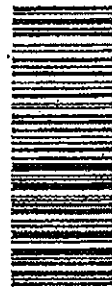


APCO

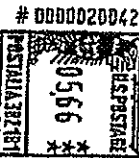
4420 Decatur Blvd
Las Vegas, Nevada 89103

2716 SOUTH DALIN STREET, SALT LAKE CITY, UT 84108

TURNER & SIMPSON
ATTORNEYS AT LAW



7008 1140 0003 8595 4282



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

| SENDER COMPLETE THIS SECTION | | COMPLETE THIS SECTION ON DELIVERY | |
|---|--|--|--|
| <p>1. Article Addressed to:</p> <p><i>Camstone Development</i> <i>West Inc.</i> <i>9121 W. Russell Road</i> <i>#417</i> <i>LV, NV 89143</i></p> | | <p>A. Signature <input checked="" type="checkbox"/> Agent <input type="checkbox"/> Addressee</p> | |
| <p>2. Article Number (Transfer from service label) PS Form 3811, February 2004</p> | | <p>B. Received by (Printed Name) C. Date of Delivery</p> | |
| <p>3. Article Addressed to:</p> | | <p>D. Is delivery address different from item 1? If YES, enter delivery address below: <input type="checkbox"/> Yes <input type="checkbox"/> No</p> | |
| <p>4. Restricted Delivery? (Extra Fee) <input type="checkbox"/> Yes <input type="checkbox"/> No</p> | | <p>5. Service Type <input checked="" type="checkbox"/> Certified Mail <input type="checkbox"/> Express Mail <input type="checkbox"/> Registered <input type="checkbox"/> Return Receipt for Merchandise <input type="checkbox"/> Insured Mail <input type="checkbox"/> O.D.D.</p> | |
| <p>Article Number 7003 1340 0003 8576 4252</p> | | <p>6. Restricted Delivery? (Extra Fee) <input type="checkbox"/> Yes <input type="checkbox"/> No</p> | |
| <p>PS Form 3811, February 2004</p> | | <p>Domestic Return Receipt</p> | |

1 **NOTC**

2 **MICHAEL M. EDWARDS**

3 Nevada Bar No. 006281

4 **REUBEN H. CAWLEY**

5 Nevada Bar No. 009384

6 **LEWIS BRISBOIS BISGAARD & SMITH LLP**

7 400 South Fourth Street, Suite 500

8 Las Vegas, Nevada 89101

9 (702) 893-3383

10 FAX: (702) 893-3789

11 E-Mail: medwards@lbbslaw.com

12 E-Mail: cawley@lbbslaw.com

13 Attorneys for Plaintiff

14 Zitting Brothers Construction, Inc.

FILED

APR 30 2 05 PM '09

E. J. Smith
CLERK OF THE COURT

9 **DISTRICT COURT**

10 **CLARK COUNTY, NEVADA**

11
12 **ZITTING BROTHERS CONSTRUCTION, INC.,**
13 a Utah corporation,

14 Plaintiff,

15 v.

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

22 Defendants.

Case No. *A-09-589195-C*
Dept. No. ✓

**NOTICE
OF LIS PENDENS**

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

21 PLEASE TAKE NOTICE that an action was commenced and is pending in the above-entitled
22 Court to enforce that certain Notices and Claims of Lien recorded by Lien Claimant Zitting Brothers
23 Construction, Inc., in the Official Records of Clark County on September 10, 2008, in book 20080910,
24 as instrument number 0002029 and December 11, 2008, in book number 20081211, instrument number
25 0002636 effecting certain real property or portions thereof, owned or reputedly owned by Defendants
26 and commonly referred to as the Manhattan West mixed use development project generally located at
27 9205 W. Russell Road, Clark County, Nevada and more particularly described as Assessor's Parcel
28 Number 163-32-101-019.

**LEWIS
BRISBOIS
BISGAARD
& SMITH LLP**
ATTORNEYS AT LAW

4842-6455-5267.1

1 Plaintiff Zitting Brothers Construction, Inc., hereby places a Lis Pendens against the same
2 affecting real properties referenced herein, located in Clark County, State of Nevada.

3 Dated this 30th day of April, 2009.
4

5 LEWIS BRISBOIS BISGAARD & SMITH LLP
6

7 By 
8

Michael M. Edwards, Esq.
Nevada Bar No. 006281
Reuben H. Cawley, Esq.
Nevada Bar No. 009384
400 South Fourth Street, Suite 500
Las Vegas, Nevada 89101
Attorneys for Plaintiff
Zitting Brothers Construction, Inc.
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10
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16
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19
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21
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23
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25
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28

EXHIBIT 2

ORIGINAL

1 ANSW

2 Gwen Mullins, Esq.

3 Nevada Bar No. 3146

4 Wade B. Gochmour, Esq.

5 Nevada Bar No. 6314

6 **Howard & Howard Attorneys PLLC**

7 3800 Howard Hughes Parkway

8 Suite 1400

9 Las Vegas, NV 89169

10 Telephone (702) 257-1483

11 Facsimile (702) 567-1568

12 E-mails: grm@h2law.com

13 wbg@h2law.com

14 Attorneys for APCO Construction

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06/10/2009 02:45:36 PM


CLERK OF THE COURT

10 DISTRICT COURT
11 CLARK COUNTY, NEVADA

12 APCO CONSTRUCTION, a Nevada
13 corporation,

14 Plaintiff,

15 vs.

16 GEMSTONE DEVELOPMENT WEST, INC.,
17 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,

25 Defendants.

26 ZITTING BROTHERS CONSTRUCTION,
27 INC., a Utah corporation,

28 Plaintiff,

vs.

GEMSTONE DEVELOPMENT WEST, INC.,

CASE NO.: 08-A-571228

DEPT. NO.: X

Consolidated with: A574391, A574792,
A577623, A583289, A584730, A587168 and
A589195

**APCO CONSTRUCTION'S ANSWER TO
ZITTING BROTHERS
CONSTRUCTION, INC.'S COMPLAINT**

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

1 a Nevada corporation; APCO
2 CONSTRUCTION, a Nevada corporation; and
3 DOES I through X; ROE CORPORATIONS I
4 through X; BOE BONDING COMPANIES I
5 through X and LOE LENDERS I through X,
6 inclusive

7 Defendants.

8 AND ALL RELATED CASES AND
9 MATTERS.

10 **APCO CONSTRUCTION'S ANSWER TO**
11 **ZITTING BROTHERS CONSTRUCTION, INC.'S COMPLAINT**

12 Date: N/A

13 Time: N/A

14 APCO CONSTRUCTION ("APCO"), by and through its attorneys, Gwen Rutar
15 Mullins, Esq. and Wade B. Gochmour of the law firm of Howard and Howard Attorneys PLLC,
16 hereby files this Answer to Zitting Brothers Construction, Inc.'s Complaint (hereinafter
17 "Complaint") and hereby responds and alleges as follows:

18 **THE PARTIES**

19 1. Answering Paragraph 1, 3, and 5 of the Complaint, APCO does not have
20 sufficient knowledge or information upon which to base a belief as to the truth of the
21 allegations contained therein, and upon said grounds, denies each and every allegation
22 contained therein.

23 2. Answering Paragraph 2 of the Complaint, APCO, upon information and belief
24 admits that Gemstone Development West, Inc. is, and at all times relevant to this action, the
25 owner of the real property commonly referred to as Manhattan West Mixed Use Development
26 Project, initially identified by the Assessor's Parcel Number 163-32-101-019 (the "Property").
27 As to the remaining allegations of Paragraph 2 of the Complaint, APCO does not have
28

1 sufficient knowledge or information upon which to base a belief as to the truth of these
2 allegations and upon said grounds, denies them.

3 3. Answering Paragraph 4 of the Complaint, APCO admits that APCO was at all
4 times relevant to this action, doing business as a licensed contractor authorized to conduct
5 business in Clark County, Nevada. As to the remaining allegations of Paragraph 4 of the
6 Complaint, APCO does not have sufficient knowledge or information upon which to base a
7 belief as to the truth of these allegations and upon said grounds, denies them.

8 **FIRST CAUSE OF ACTION**

9 **(Breach of Contract Against All Defendants)**

10 4. Answering Paragraph 6 of the Complaint, APCO repeats and realleges each and
11 every allegation contained in paragraphs 1 through 3 of this Answer to the Complaint as though
12 fully set forth herein.

13 5. Answering Paragraph 7 of the Complaint, APCO admits the allegations
14 contained therein.

15 6. Answering Paragraph 8 of the Complaint, APCO admits that Zitting Brothers
16 Construction, Inc. ("ZBCI") furnished construction work on the Project. As to the remaining
17 allegations of Paragraph 8 of the Complaint, APCO does not have sufficient knowledge or
18 information upon which to base a belief as to the truth of these allegations and upon said
19 grounds, denies them.

20 7. Answering Paragraph 9 of the Complaint, APCO does not have sufficient
21 knowledge or information upon which to base a belief as to the truth of the allegations
22 contained therein, and upon said grounds, denies each and every allegation contained therein.

23 8. Answering Paragraphs 10, 11, 12 and 13 of the Complaint, APCO denies all the
24 allegations as they pertain to, or as they are alleged against, APCO. With respect to any
25 allegations that have been asserted against the remaining Defendants, APCO does not have
26 sufficient knowledge or information upon which to base a belief as to the truth of the
27 allegations contained therein, and upon said grounds, denies each and every allegation
28 contained therein.

SECOND CAUSE OF ACTION

(Breach of Implied Covenant of Good Faith & Fair Dealing – Against All Defendants)

9. Answering Paragraph 14 of the Complaint, APCO repeats and realleges each and every allegation contained in paragraphs 1 through 8 of this Answer to the Complaint as though fully set forth herein.

10. Answering Paragraph 15 of the Complaint, APCO admits the allegations contained therein.

11. Answering Paragraphs 16, 17, and 18 of the Complaint, APCO denies all the allegations as they pertain to, or as they are alleged against, APCO. With respect to any allegations that have been asserted against the remaining Defendants, APCO does not have sufficient knowledge or information upon which to base a belief as to the truth of the allegations contained therein, and upon said grounds, denies each and every allegation contained therein.

THIRD CAUSE OF ACTION

(Unjust Enrichment or in the Alternative Quantum Meruit – Against All Defendants)

12. Answering Paragraph 19 of the Complaint, APCO repeats and realleges each and every allegation contained in paragraphs 1 through 11 of this Answer to the Complaint as though fully set forth herein.

13. Answering Paragraphs 20, 22, 23, 26 and 27 of the Complaint, APCO denies all the allegations as they pertain to, or as they are alleged against, APCO. With respect to any allegations that have been asserted against the remaining Defendants, APCO does not have sufficient knowledge or information upon which to base a belief as to the truth of the allegations contained therein, and upon said grounds, denies each and every allegation contained therein.

14. Answering Paragraph 21 and 24 of the Complaint, APCO does not have sufficient knowledge or information upon which to base a belief as to the truth of these allegations and upon said grounds, denies them.

1 15. Answering Paragraph 25 of the Complaint, APCO admits that APCO has not
2 paid ZBCI the Outstanding Balance but denies the fact that such sums are due to ZBCI. As to
3 the remaining allegations of Paragraph 25 of the Complaint, APCO does not have sufficient
4 knowledge or information upon which to base a belief as to the truth of these allegations and
5 upon said grounds, denies them.

6 **FOURTH CAUSE OF ACTION**

7 **(Foreclosure of Mechanic's Lien- Against All Defendants)**

8 16. Answering Paragraph 28 of the Complaint, APCO repeats and realleges each
9 and every allegation contained in paragraphs 1 through 15 of this Answer to the Complaint as
10 though fully set forth herein.

11 17. Answering Paragraph 29 of the Complaint, APCO admits that ZBCI provided its
12 Work on the Project. As to the remaining allegations of Paragraph 29, APCO does not have
13 sufficient knowledge or information upon which to base a belief as to the truth of these
14 allegations and upon said grounds, denies them.

15 18. Answering Paragraph 30 of the Complaint, APCO admits that APCO had
16 knowledge that ZBCI was performing work on the Property. As to the remaining allegations of
17 Paragraph 30, APCO does not have sufficient knowledge or information upon which to base a
18 belief as to the truth of these allegations and upon said grounds, denies them.

19 19. Answering Paragraphs 31, 32, 33, 34 and 35 of the Complaint, APCO denies all
20 the allegations as they pertain to, or as they are alleged against, APCO. With respect to any
21 allegations that have been asserted against the remaining Defendants, APCO does not have
22 sufficient knowledge or information upon which to base a belief as to the truth of the
23 allegations contained therein, and upon said grounds, denies each and every allegation
24 contained therein.

25 ...

26 ...

27 ...

28 ...

FIFTH CAUSE OF ACTION

(Claim for Priority- Against LOE LENDER Defendants)

20. Answering Paragraph 36 of the Complaint, APCO repeats and realleges each and every allegation contained in paragraphs 1 through 19 of this Answer to the Complaint as though fully set forth herein.

21. Answering Paragraph 37 of the Complaint, APCO admits that allegations contained therein.

22. Answering Paragraph 38 of the Complaint, APCO admits that the mechanic's liens filed against the Property are superior to the claims of Loe Lenders. As to remaining allegations of Paragraph 38, APCO does not have sufficient knowledge or information upon which to base a belief as to the truth of the allegations contained therein, and upon said grounds, denies them.

23. Answering Paragraph 39 of the Complaint, APCO denies all the allegations as they pertain to, or as they are alleged against, APCO. With respect to any allegations that have been asserted against the remaining Defendants, APCO does not have sufficient knowledge or information upon which to base a belief as to the truth of the allegations contained therein, and upon said grounds, denies each and every allegation contained therein.

SIXTH CAUSE OF ACTION

(Violation of NRS 624)

24. Answering Paragraph 40 of the Complaint, APCO repeats and realleges each and every allegation contained in paragraphs 1 through 23 of this Answer to the Complaint as though fully set forth herein.

25. Answering Paragraph 41 of the Complaint, APCO asserts that NRS 624.606 to 624.630 speak for themselves. As to the remaining allegations of Paragraph 41, APCO does not have sufficient knowledge or information upon which to base a belief as to the truth of the allegations contained therein, and upon said grounds, denies them.

26. Answering Paragraphs 42, 43, 44, and 45 of the Complaint, APCO denies each and every allegation contained therein.

FIRST AFFIRMATIVE DEFENSE

ZBCI has failed to state a claim against APCO upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

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

THIRD AFFIRMATIVE DEFENSE

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

FOURTH AFFIRMATIVE DEFENSE

Any and all damages sustained by ZBCI are the result of negligence, breach of contract and/or breach of warranty, express and/or implied, of a third-party over whom APCO has no control, and for whose acts APCO is not responsible or liable to ZBCI.

FIFTH AFFIRMATIVE DEFENSE

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

SIXTH AFFIRMATIVE DEFENSE

Whatever damages, if any, were sustained by ZBCI, were caused in whole or in part or were contributed to by reason of ZBCI's own actions.

SEVENTH AFFIRMATIVE DEFENSE

The liability, if any, of APCO must be reduced by the percentage of fault of others, including ZBCI.

EIGHTH AFFIRMATIVE DEFENSE

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

...

...

NINTH AFFIRMATIVE DEFENSE

The alleged damages complained of by ZBCI were caused in whole or in part by a new, independent and intervening cause over which APCO had no control. Said independent, intervening cause was the result of any alleged damages resulting to ZBCI.

TENTH AFFIRMATIVE DEFENSE

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

ELEVENTH AFFIRMATIVE DEFENSE

ZBCI failed to perform their work in workmanlike manner thus causing damages in excess to the sums ZBCI claim are due under the subcontract with APCO.

TWELFTH AFFIRMATIVE DEFENSE

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

THIRTEENTH AFFIRMATIVE DEFENSE

The claims, and each of them, are premature.

FOURTEENTH AFFIRMATIVE DEFENSE

ZBCI should indemnify APCO for any and all losses, damages or expenses APCO sustains as a result of any claims by Gemstone for damages that Gemstone allegedly sustained due to ZBCI's improper workmanship on the Manhattan West Project, including, but not limited to, any damage amount and the attorney's fees and costs incurred by APCO relative thereto.

FIFTEENTH AFFIRMATIVE DEFENSE

APCO is entitled to an offset or a setoff of any damages that APCO sustains as a result of ZBCI's failure to complete the work in a workmanlike manner and/or breach of contract.

SIXTEENTH AFFIRMATIVE DEFENSE

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

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

SEVENTEENTH AFFIRMATIVE DEFENSE

APCO has been forced to retain the services of an attorney to defend this action and therefore is entitled to reasonable attorneys' fees and costs.

EIGHTEENTH AFFIRMATIVE DEFENSE

ZBCI has failed to comply with the requirements of NRS 624.

NINETIETH AFFIRMATIVE DEFENSE

ZBCI may have failed to comply with all requirements of NRS 108 to perfect its lien.

TWENTY AFFIRMATIVE DEFENSE

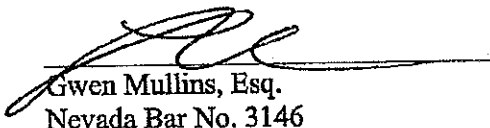
Pursuant to NRCP Rule 8 and 11, as amended, all possible affirmative defenses may not have been alleged herein insofar as sufficient facts were not available after reasonable inquiry upon the filing of this Answer to the Complaint, and therefore, APCO reserves the right to amend their Answer to allege additional affirmative defenses if subsequent investigation so warrants.

WHEREFORE, APCO prays for judgment as follows:

1. That ZBCI take nothing by way of its Complaint on file herein and that the same be dismissed with prejudice against APCO;
2. For an award of attorneys' fees and costs incurred herein by APCO; and
3. For such other and further relief as this Court may deem just and proper.

DATED this 9th day of June, 2009.

HOWARD & HOWARD ATTORNEYS PLLC


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Wade B. Gochnour, Esq.
Nevada Bar No. 6314
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Suite 1400
Las Vegas, NV 89169
Attorneys for APCO Construction

CERTIFICATE OF MAILING

On the 9th day of June, 2009, the undersigned served a true and correct copy of the foregoing APCO CONSTRUCTION'S ANSWER TO ZITTING BROTHERS CONSTRUCTION, INC.'S COMPLAINT, by U.S. Mail, postage prepaid, upon the following:

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Christopher R. McCullough, Esq.
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Attorneys for Cell-Crete Fireproofing of Nevada, Inc.

| | |
|--|---|
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| 10 Mark M. Jones, Esq. 11 KEMP, JONES, & COULTHARD, LLP 12 3800 Howard Hughes Pkwy., 17th Floor 13 Las Vegas, NV 89169 14 <i>Attorney for Scott Financial Corporation</i> | G. Mark Albright, Esq. D. Chris Albright, Esq. ALBRIGHT, STODDARD, WARNICK & ALBRIGHT 801 South Rancho Dr., Bldg. D-4 Las Vegas, Nevada 89106 <i>Attorney for Club Vista Financial Group. Tharaldson Motels II, Inc. And Gary D. Tharaldson</i> |
| 16 K. Layne Morrill, Esq. 17 Martin A. Aronson, Esq. 18 MORRILL & ARONSON 19 One E. Camelback Road, Suite 340 20 Phoenix, AZ 85012 21 <i>Attorney for Club Vista Financial Group. Tharaldson Motels II, Inc. And Gary D. Tharaldson</i> | Von S. Heinz, Esq. Abran E. Vigil, Esq. Ann Marie McLoughlin, Esq. LEWIS AND ROCA LLP 3993 Howard Hughes Parkway, Ste. 600 Las Vegas, Nevada 89169 <i>Attorneys for Bank of Oklahoma, N.A.</i> |
| 22 J. Randall Jones, Esq. 23 Mark M. Jones, Esq. 24 Matthew S. Carter, Esq. 25 KEMP, JONES & COULTHARD, LLP 26 3800 Howard Hughes Pkwy. 17 th Floor 27 Las Vegas, Nevada 89169 28 <i>Attorneys for Scott Financial Corporation and Bradley J. Scott</i> | Gwen Rutar Mullins Wade B. Gochnour, Esq. HOWARD & HOWARD 3800 Howard Hughes Pkwy., Ste. 1400 Las Vegas, Nevada 89169 <i>Attorneys for Hydropressure</i> |

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5 *Sierra Reinforcing*

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An employee of Howard and Howard Attorneys PLLC

EXHIBIT 3

ORIGINAL

Alvin L. Blum

CLERK OF THE COURT

1 **ORDER**

2 Mark E. Ferrario (NV Bar No. 1625)
3 Tami D. Cowden (NV Bar No. 8994)
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5 3773 Howard Hughes Parkway
6 Suite 400 North
7 Las Vegas, Nevada 89109
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9 Telephone: (702) 792-3773
10 Facsimile: (702) 792-9002
11 *Attorneys for Defendants Club Vista Financial Services, LLC*
12 *and Tharaldson Motels II, Inc.*

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

15 **APCO CONSTRUCTION, a Nevada**
16 **corporation,**

17 **Plaintiffs,**

18 **v.**

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

Defendants.

AND ALL RELATED CASES AND
MATTERS

Case No.: A571228
Dept. No.: XXIX

CONSOLIDATED CASES:
A571792, A574397, A574792,
A577623, A579963, A580889,
A583289, A584730, A587168,
A589195, A589677, A590319,
A592826, A596924, A597089,
A606730, A608717, and A608718

ORDER APPROVING SALE OF
PROPERTY

Evidentiary hearings were held in the above-entitled matter on July 9 and 11, 2012 before the Honorable Susan Scann, Department 29, District Court, Clark County, on Scott Financial Corporation's Motion to Lift Stay, Allow Sale to Proceed with Deposit of Funds Pending Further Court Order, and for Posting of Bond on Order Shortening Time ("Motion"). At that time, the Seller, Gemstone Development West, Inc. ("Gemstone"), the Purchaser, WGH Acquisitions, Inc. ("WGH"), and lender Scott Financial Corporation ("Scott") sought Court approval of a Purchase and Sale Agreement ("the PSA") dated May 12, 2012. On July 31, 2012, this Court issued an

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1 Order Granting In Part And Denying In Part Scott Financial Corporation's Motion To Lift Stay,
2 Allow Sale To Proceed With Deposit Of Funds Pending Further Court Order And For Posting Of
3 Bond On Order Shortening Time. Among other things, the Court:

- 4 • Denied Scott's request to approve the sale of the Property to WGH for \$18,050,000.00;
- 5 • Deemed the PSA to be "unenforceable and of no further effect;" and
- 6 • Decided to hold additional hearings to "determine the best and most appropriate way to
7 proceed to the expeditious sale of the property in the event the parties cannot agree on a
8 stipulated method of sale."

9 On July 11, 2012, this Court issued an Order to Show Cause Re: Summary
10 Determination of Lien Amounts; and the Possible Sale of the Property, and a hearing on the
11 same was held on July 18, 2012. At the July 18, 2012 hearing, the Court granted the Motion in
12 Part, ordering the sale of the property, and scheduled a hearing for July 26, 2012, which was
13 continued to August 16, 2012, to determine the bidding and sale procedures. At the August 16,
14 2012 hearing, the Court scheduled an auction for the sale of the Manhattan West Property
15 ("Property") for October 9, 2012.

16 At a September 26, 2012 telephonic conference with the Court, the parties informed the
17 Court of the possibility the parties would consent to the sale of the Property to a specific buyer,
18 without need for an auction, provided the price was acceptable to all parties. On September
19 28, 2012, the Court issued an Order Vacating the Auction Set for October 9, 2012 and set an
20 Order to Show Cause Re: Sale of the Property. The September 28, 2012 Order to Show Cause
21 Re: Sale of the Property decreed that all interested parties to the action appear on October 9,
22 2012 to show cause why an Order allowing the sale of the Property free of liens and
23 establishment of a fund as replacement security for the liens should not be entered by the
24 Court.

25 On October 9, 2012, the Court held a hearing on the Order to Show Cause Re: Sale of
26 the Property. The Court subsequently continued the hearing to allow the parties the opportunity
27 to review and clarify the terms of the proposed sale and to propose a written Order approving
28

1 the sale of the Property to WGH for \$20,000,000, preserving the net proceeds of the sale and
2 otherwise setting forth terms and conditions under which the Court would approve the sale.

3 In or about October 2012, Gemstone, WGH, and Scott executed a First Amendment to
4 the PSA ("First Amendment") as a convenient method to memorialize Gemstone's agreement
5 to sell the Property to WGH, with Scott's consent, for \$20,000,000. The First Amendment
6 purports to ratify the terms of the PSA, except as modified by the First Amendment. In or
7 about November 2012, Gemstone, WGH, and Scott executed a Second Amendment to the PSA
8 ("Second Amendment"), which by its terms supersedes and replaces the First Amendment to
9 the PSA, but which also purports to ratify the terms of the PSA, except as modified by the
10 Second Amendment.

11 By way of a Motion to Set Hearing, certain lien claimants raised concerns they had
12 with the PSA and Amendments and requested a hearing to discuss the same. The Court held a
13 hearing regarding such issues on January 3, 2013, which hearing was continued for further
14 consideration on January 16, 2013.

15 ACCORDINGLY, IT IS HEREBY ORDERED that:

16 A reasonable opportunity to object or be heard regarding the requested relief has been
17 afforded to all interested persons and there being no objection, the Court finds:

18 1. Compelling circumstances exist requiring the Property to be sold on the terms
19 outlined herein. The sale of the Property is in the best interest of all parties holding liens on the
20 Property.

21 2. The Purchase and Sale Agreement dated as of May 10, 2012 and the Second
22 Amendment to Purchase and Sale Agreement and Escrow Instructions dated as of November 7,
23 2012, which supersedes and replaces the First Amendment (collectively, the "Purchase and
24 Sale Agreement") between Gemstone Development West, Inc. and WGH Acquisitions, LLC
25 constitutes the best offer for the Property. The Court hereby approves the Purchase and Sale
26 Agreement, except as modified or amended by the terms of this Order, as follows:

27 3. Paragraph 2 of the Second Amendment is amended, modified and superseded as
28

CONFIDENTIAL TRANSMISSION
1750 Howard Hughes Parkway, Suite 400 North
Las Vegas, Nevada 89119
Telephone: (702) 796-5773
Facsimile: (702) 796-6002

1 follows: All contingencies shall be satisfied or waived by, the Property shall close escrow by,
2 and the Closing Date shall be, no later than June 17, 2013 unless extended by further Order of
3 this Court upon application prior to the Closing Date for good cause shown and with notice to
4 all parties.

5 4. Paragraph 4 of the Second Amendment is amended, modified and superseded as
6 follows: the sale of the Property is subject to approval of this Court as set forth in this Order.

7 5. Paragraph 9 of the Second Amendment is amended, modified and superseded as
8 follows: the amount of the broker commissions payable from the proceeds of the sale shall be
9 \$200,000.00 (Two Hundred Thousand U.S. Dollars).

10 6. The Property shall be sold free and clear of all liens including but not limited to
11 all liens as shown on the Preliminary Title Report No. 12-02-1358-KR prepared by Nevada
12 Title Company on March 12, 2013 and amended on April 3, 2013 attached hereto as Exhibit A.
13 Those existing liens on the Property, identified in the attached Exhibit "D," will be transferred
14 to the net proceeds from the sale and will retain the same force, effect, validity and priority that
15 previously existed against the Property subject to the determination of priority by the Supreme
16 Court of Nevada in the Writ Petition procedure discussed below. For purposes of this Order
17 "net proceeds from the sale" shall mean the sale proceeds available after the payment of sales
18 commissions (as determined by the Court), and other ordinary closing costs and any unpaid
19 property taxes.

20 7. The net proceeds from the sale (including any deposit under the Purchase and
21 Sale Agreement) are to be held in an interest-bearing account ("Account") pending final
22 resolution of the mechanic lien claimants' Joint Petition for Writ of Mandamus or, in the
23 Alternative, Prohibition filed in the Supreme Court of Nevada on June 22, 2012, or upon
24 resolution of any appeal brought with respect to the net proceeds from the sale. The contents
25 of the Account are to remain subject to Court control until the Court orders the distribution of
26 the contents to the party or parties the Nevada Supreme Court determines has a first priority
27 lien on the proceeds or as may otherwise be agreed upon by the parties. Nothing in the
28

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Purchase and Sale Agreement or this Order shall be deemed to be a waiver of any party's legal arguments or positions regarding priority.

IT IS SO ORDERED.


DATED this 23rd day of April, 2013.



DISTRICT COURT JUDGE


Respectfully submitted,

By: 
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Tami D. Cowden (Bar No. 8994)
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Approved as to form and content:

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Facsimile: (702) 793-6551

1 Purchase and Sale Agreement or this Order shall be deemed to be a waiver of any party's legal
2 arguments or positions regarding priority.

3 **IT IS SO ORDERED.**

4 DATED this ____ day of April, 2013.

6 DISTRICT COURT JUDGE

7 Respectfully submitted,

8 By:

9 Mark E. Ferrario (Bar No. 1625)
10 Tami D. Cowden (Bar No. 8994)
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and Tharaldson Motels II, Inc.

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28

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2 arguments or positions regarding priority.

3 **IT IS SO ORDERED.**

4 DATED this ____ day of April, 2013.

6 DISTRICT COURT JUDGE

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8 By:

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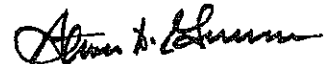
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EXHIBIT 4



CLERK OF THE COURT

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12 *Attorneys for APCO Construction*

DISTRICT COURT

CLARK COUNTY, NEVADA

10 APCO CONSTRUCTION, a Nevada
11 corporation,

12 Plaintiff,

13 vs.

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

16 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


17 AND ALL RELATED MATTERS

NOTICE OF ENTRY OF ORDER

18 PLEASE TAKE NOTICE that on the 9th day of June, 2016 an Order was entered in the
19 above-referenced Court. A copy of which is attached hereto.

20 Dated this 10 day of June, 2016.

21 MARQUIS AURBACH COFFING

22 By 
23 Jack Chen Min Juan, Esq.
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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 10th day of June, 2016. Electronic service of the foregoing document shall be made in accordance with the E-Service List as follows:¹

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.netAttorneys for Read Mix Inc.**Cadden & Fuller LLP****Contact**Dana Y. Kim**Email**dkim@caddenfuller.comS. Judy Hiraharajhirahara@caddenfuller.comTammy Corteztcortez@caddenfuller.com**David J. Merrill P.C.****Contact**David J. Merrill**Email**david@dimerrillpc.com**Dickinson Wright, PLLC****Contact**Cheri Vandermeulen**Email**cvandermeulen@dickinsonwright.comChristine Spencercspencer@dickinsonwright.comDonna Wolfbrandtdwolfbrandt@dickinsonwright.comEric Dobbersteinedobberstein@dickinsonwright.com**Durham Jones & Pinegar****Contact**Brad Slighting**Email**bslighting@diplaw.comGina LaCasciaglacascia@diplaw.com**Fox Rothschild****Contact**Jineen DeAngelis**Email**jideangelis@foxrothschild.comRichard I. Dreitzerrdreitzer@foxrothschild.com**GERRARD COX & LARSEN****Contact**Aaron D. Lancaster**Email**alancaster@gerrard-cox.comDouglas D. Gerrarddgerrard@gerrard-cox.comKanani GonzalesKGonzales@Gerrard-cox.comKaytlyn Bassettkbassett@gerrard-cox.com

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

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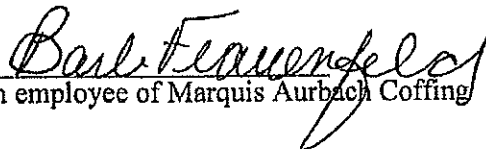
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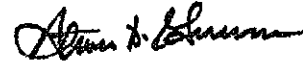
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I further certify that I served a copy of this document by mailing a true and correct copy thereof, postage prepaid, addressed to:

N/A


an employee of Marquis Aurbach Coffing



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DISTRICT COURT
CLARK COUNTY, NEVADA

9 APCO CONSTRUCTION, a Nevada
10 corporation,

Plaintiff,

vs.

11 GEMSTONE DEVELOPMENT WEST, INC., A
12 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

14 AND ALL RELATED MATTERS

Hearing Date: June 20, 2016
Hearing Time: 9:00 a.m.

ORDER: APPOINTING SPECIAL MASTER

17 This matter came before the Court on APCO's Motion to Appoint Special Master, with
18 Limited Oppositions by Insulpro and the parties represented by Peel Brimley, LLP. All parties
19 appeared through their respective counsel of record. Having reviewed all the pleadings, exhibits
20 and oral arguments of counsel, the Court hereby adjudicates, finds and orders as follows:

1. APCO's Motion to Appoint Special Master is Granted;

a. Floyd Hale, Esq. shall be appointed as the Special Master;

b. All the parties shall meet with Special Master Hale within 10 days or as
soon as the Special Master is available to set the case management order, coordinate the
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 ////

23 ////

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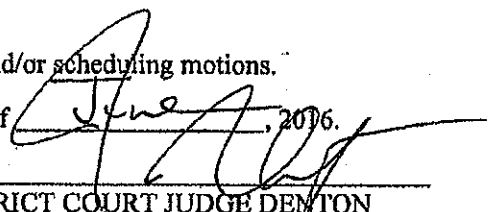
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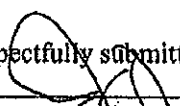
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g. Hear all discovery and/or scheduling motions.

IT IS SO ORDERED this 9th day of June, 2016.


DISTRICT COURT JUDGE DENTON

Respectfully submitted by:



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Fax: (702) 437-5267
Special Master

DISTRICT COURT

CLARK COUNTY, NEVADA

| | | |
|--|---|-------------------------------------|
| APCO CONSTRUCTION, a Nevada corporation, |) | CASE NO. A571228 |
| |) | DEPT NO. XIII |
| |) | |
| Plaintiff, |) | |
| |) | Consolidated with: |
| v. |) | |
| |) | A574391; A574792; A577623; A583289; |
| GEMSTONE DEVELOPMENT WEST, INC., |) | A587168; A580889; A584730; A589195; |
| a Nevada corporation, |) | A595552; A597089; A592826; A589677; |
| |) | A596924; A584960; A608717; A608718; |
| Defendant. |) | and A590319 |
| |) | |
| AND ALL RELATED MATTERS, |) | |
| |) | |

SPECIAL MASTER REPORT REGARDING DISCOVERY STATUS

This litigation was initiated by APCO Construction seeking damages for construction services performed for the construction of the Manhattan West mixed use development project located at 9205 West Russell Road, Clark County, Nevada. The APCO Complaint also sought a declaration ranking the priority of all lien claimants and secured claims. The Special Master and counsel drafted a Questionnaire for all parties to document what parties remain in the litigation, with a completed Questionnaire being required to continue in the lawsuit. On October 7, 2016, a Special Master Recommendation and District Court Order was entered confirming the only remaining 20 lien claimants.

This matter is set for trial on September 12, 2017. A Special Master Hearing was conducted on May 4, 2017, to confirm that discovery will be completed prior to the trial. Counsel for the parties agreed that the majority of discovery will be completed by the end of May, 2017. A Special Master Order will be entered allowing the remaining depositions and discovery to be completed by June 30, 2017. There will be no additional Special Master Hearings scheduled unless requested by the parties.

RESPECTFULLY SUBMITTED this 8th day of May, 2017.

By: /s/ Floyd A. Hale
 FLOYD A. HALE, Esq.
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 3800 Howard Hughes Pkwy, 11th Fl.
 Las Vegas, NV 89169
 Special Master

EXHIBIT 6

DECLARATION OF CODY S. MOUNTEER, ESQ. IN SUPPORT OF MOTION FOR RECONSIDERATION

Cody S. Mounteer, declares as follows:

1. I am over the age of 18 years and have personal knowledge of the facts stated herein, except for those stated upon information and belief, and as to those, I believe them to be true. I am competent to testify as to the facts stated herein in a court of law and will so testify if called upon.

2. While APCO noticed Zitting's deposition on March 29, 2017, APCO and Zitting agreed to continue the deposition to permit the parties to spend less on attorneys fees, and more time engaging in settlement discussions.

3. Three months later, APCO noticed Zitting's deposition for June 28, 2017.

4. Following APCO re-noticing Zitting's deposition on June 28, 2017, APCO and Zitting, on or about July 12, 2017, again agreed to continue the deposition of Zitting's NRCP 30(b)(6) witness to engage in further settlement discussions that ultimately lead to the Settlement Conference conducted through the Court's settlement program that occurred on September 21, 2017. (See Notice of Scheduling Settlement Conference on file with the Court dated August 21, 2017).

5. Furthermore, to evidence the above and Zitting's willingness to delay its renoticed deposition in furtherance of settlement discussions, APCO and Zitting agreed to continue the hearing on APCO's Motion to Dismiss or for Summary Judgment on Lien Claimant's NRS CH 108 Claim for Foreclosure of Mechanics Lien. (See Joint Stipulation prepared and submitted by Zitting on file with the Court dated July 14, 2017).

Pursuant to NRS § 53.045, I declare under penalty of perjury under the laws of the State of Nevada that the foregoing is true and correct.

Dated this 5th day of January, 2018.

/s/ Cody Mounteer
Cody S. Mounteer

EXHIBIT 7

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DISTRICT COURT
CLARK COUNTY, NEVADA

APCO CONSTRUCTION, a Nevada
corporation,

Plaintiff,

vs.

GEMSTONE DEVELOPMENT WEST, INC., A
Nevada corporation,

Defendant.

AND ALL RELATED MATTERS

CASE NO: A571228
DEPT NO: 13

DEPOSITION OF SAMUEL ZITTING
PERSON MOST KNOWLEDGEABLE OF
ZITTING BROTHERS CONSTRUCTION COMPANY
LAS VEGAS, NEVADA
FRIDAY, OCTOBER 27, 2017

REPORTED BY: VANESSA LOPEZ, CCR NO. 902
JOB NO.: 427127

1 DEPOSITION OF SAMUEL ZITTING, PERSON MOST
2 KNOWLEDGEABLE OF ZITTING BROTHERS CONSTRUCTION COMPANY, held
3 at Litigation Services & Technologies, located at 3770
4 Howard Hughes Parkway, Suite 300, Las Vegas, Nevada, on
5 Friday, October 27, 2017, at 9:00 a.m., before Vanessa
6 Lopez, Certified Court Reporter, in and for the State of
7 Nevada.

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Also Present: Lisa Lynn, APCO
Joe Pelan

| | | | |
|---|------------|---|-----|
| 1 | Exhibit 12 | APCO00044651 | 89 |
| 2 | Exhibit 13 | APCO00044636 | 90 |
| 3 | Exhibit 14 | NVPE000247-NVPE000248 | 90 |
| 4 | Exhibit 15 | Amended and Restated Manhattan West General Construction Agreement | 92 |
| 5 | Exhibit 16 | APCO00044625-APCO00044627 | 95 |
| 6 | Exhibit 17 | E-mail from Randy Nickerl | 111 |
| 7 | Exhibit 18 | E-mails | 113 |

INDEX

2 WITNESS: SAMUEL ZITTING

3 EXAMINATION

4 By Mr. Jefferies
5 By Mr. Dreitzer

PAGE
5, 112
109, 115

EXHIBITS

| 11 | NUMBER | | PAGE |
|----|------------|--|------|
| 12 | Exhibit 1 | ZBCI000131-ZBCI000147 | 13 |
| 13 | Exhibit 2 | Second Amended Notice of Taking Deposition | 30 |
| 14 | | | |
| 15 | Exhibit 3 | ZBCI178 | 41 |
| 16 | Exhibit 4 | ZBCI002082, ZBCI002085, ZBCI002078, ZBCI002079, ZBCI002089, and ZBCI002086 | 41 |
| 17 | | | |
| 18 | Exhibit 5 | Exhibit C to the Ratification and Bid Forms. | 61 |
| 19 | Exhibit 6 | Ratification and Amendment of Subcontract Agreement Buchele | 61 |
| 20 | | | |
| 21 | Exhibit 7 | E-mail | 67 |
| 22 | Exhibit 8 | ZBCI000117-ZBCI000121 | 77 |
| 23 | Exhibit 9 | ZBCI002098 | 88 |
| 24 | Exhibit 10 | APCO00044771 | 88 |
| 24 | Exhibit 11 | Stack of Documents | 88 |

1 LAS VEGAS, NEVADA; FRIDAY, OCTOBER 27, 2017

| | |
|---|-----------|
| 2 | 9:00 A.M. |
|---|-----------|

3

-000-

4 (The Reporter was relieved of her duties
5 under NRC 30(b) (4) .)

6 Whereupon.

7 SAMUEL ZITTING.

8 having been first duly sworn by the court reporter to
9 testify to the truth, the whole truth, and nothing but the
10 truth, was examined and testified under oath as follows:

EXAMINATION

13 BY MR. JEFFERIES:

14 Q. Sir, will you state your full name for the record
15 please.

16 A. Samuel Zitting.

17 Q. Have you had your deposition taken before?

18 A. Yes.

19 Q. How many times?

20 A. I don't recall.

21 Q. More than five?

22 A. Possibly.

23 Q. Okay. So you're familiar with the process?

24 A. Yes.

25 0. I'm not going to waste time going through all of

| | |
|---|---|
| <p style="text-align: right;">Page 6</p> <p>1 the ground rules. There are a few that are important to me, 2 but I do want to emphasize -- you understand you're under 3 oath -- 4 A. Yes. 5 Q. -- and is -- your testimony today -- as if you 6 were testifying in a court of law? 7 A. Yes. 8 Q. If you don't understand my questions, let me know. 9 I'll try and clarify it for you. If you answer the 10 question, I'm going to assume that you understood it as 11 asked. Okay? 12 A. Okay. 13 Q. In conversation, we tend to know where the other 14 person is going. So if you let me finish my question before 15 you start your answer, I'm going to let you finish your 16 answer before I move on to my next question. Okay? 17 A. Fair enough. 18 Q. So if I say, Were you through with your answer? 19 I'm not trying to be rude. I just want to make sure you 20 were done, because when I ask my questions, I have some 21 awkward pauses in my head. And so if you're answering the 22 same way, I just want to make sure we're through with the 23 answer. Okay? 24 A. Okay. 25 Q. What is your position with Zitting Brothers</p> | <p style="text-align: right;">Page 7</p> <p>1 Construction, Inc.? 2 A. President. 3 Q. How long have you held that position? 4 A. Around 25 years. 5 Q. Are you an owner of the company? 6 A. Yes. 7 Q. Are you the sole owner? 8 A. No. 9 Q. Who are the other owners? 10 A. Leroy Zitting, Jared Zitting, and William Zitting. 11 Q. Brothers? 12 A. Yes. 13 Q. What type of business is Zitting Brothers in? 14 A. Wood framing subcontractor. 15 Q. I'm going to shorthandedly use the term "the 16 project." And when I do, please understand I'm referring to 17 the Manhattan West project that brings us here today. Okay? 18 A. Okay. 19 Q. And unless I specify otherwise, as I use the term 20 "project," it will refer to work that I believe Zitting did 21 pre and post APCO being involved with the project. Okay? 22 A. Okay. 23 Q. What did you do to prepare for your deposition 24 today? 25 A. Went over some of the documents that were</p> |
| <p style="text-align: right;">Page 8</p> <p>1 provided. 2 Q. Which documents? 3 A. I think -- I think the subcontract was in there, 4 the schedule of -- the original schedule of change orders 5 that is outstanding and the retention amount owing that's 6 outstanding. 7 Q. When you say "schedule of change orders," what are 8 you referring to? 9 A. There's a -- somewhere there was produced a list 10 of change orders that we were saying we were still owed for 11 when the project shut down. 12 Q. Is that something that you transmitted to APCO? 13 A. I think it's something that was produced -- 14 produced in document production. 15 Q. Fair enough. Let me make sure my record is clear. 16 The list that you're talking about, is it something that you 17 transmitted to APCO prior to the litigation? 18 A. I believe so. 19 Q. Do you know how it was transmitted? 20 A. I don't without looking at it. 21 Q. Do you guys, by chance, have a copy of what you're 22 referring to here today? 23 MR. DREITZER: That's exactly what I'm looking for 24 right now. Let's see if I can -- I do know it had a Bates 25 stamp number on it.</p> | <p style="text-align: right;">Page 9</p> <p>1 MR. JEFFERIES: All right. 2 MR. DREITZER: So it was produced. 3 MR. JEFFERIES: Okay. I -- again, for my 4 purposes, I'm going to try and clarify it pre and post 5 litigation. 6 Q. (By Mr. Jefferies) Okay. So while Rich is 7 looking, you looked at the subcontract, schedule of change 8 orders, and then? 9 A. Some e-mails. 10 Q. E-mail, okay. Do you recall what the e-mails -- 11 and in asking you all these questions, I do intend to 12 exclude e-mails with your counsel and discussions you had 13 with your counsel. So please understand that. Okay? 14 A. Okay. 15 Q. Do you recall what e-mails you looked at? 16 A. I believe there were some e-mails between my 17 office and Joe -- Joe Pelo (phonetic), I believe. I don't 18 remember who all was included in the e-mail chain. 19 Q. Do you recall what the subject was? 20 A. Getting together final change order amounts and 21 final contract amounts. 22 Q. Would this have been a list or a submission after 23 you revised the labor rate? 24 A. It was actually some e-mails that were dealing 25 with the labor rate.</p> |

Page 10

1 MR. DREITZER: Go off the record for just one
2 moment?

3 MR. JEFFERIES: Sure.
4 (Pause in proceedings.)

5 Q. (By Mr. Jefferies) You understand, sir, you're
6 here today as the corporate designee for the topics in my
7 FMX designation?

8 A. Yes.

9 Q. Okay. What was your personal role on the project,
10 if any?

11 A. I mostly managed the office and made sure that
12 change orders and payments were being processed
13 appropriately, and came down, did job walks every couple
14 weeks --

15 Q. Okay.

16 A. -- to make sure that things were running smoothly.

17 Q. So when you say you managed the office, you're
18 doing it from your office in Utah?

19 A. Hurricane, yes.

20 Q. Who -- strike that.

21 How did your company staff the project on-site?

22 A. My brother Roy was the on-site project
23 superintendent.

24 Q. Okay.

25 A. And he had a group of superintendents under him

Page 12

1 Q. What are you referring to?

2 A. He would direct -- direct you to do stuff on-site
3 and then didn't seem like he was being transparent with the
4 owner on the owner's side. And so it seemed like we could
5 never get approval for the things he was directing us to do
6 in an appropriate time.

7 Q. What type of things was he directing you to do?

8 A. The changes that are in question that he would
9 never approve.

10 Q. Okay. Anything else in terms of a complaint
11 against APCO?

12 A. No.

13 Q. Okay. Did you negotiate the subcontract --

14 A. Yes.

15 Q. -- with APCO? Who did you negotiate with?

16 A. I believe it was with Shawn and Joe.

17 Q. Okay. Are you the person that assumes that role
18 for your company?

19 A. Yes.

20 Q. How many -- prior to the project, how many
21 subcontracts would you say you negotiated, estimate?

22 A. In the hundreds.

23 Q. Okay.

24 MR. JEFFERIES: Mark that.
25 (Pause in proceedings.)

Page 11

1 and then a bunch of carpenters under them that were all
2 Zitting Brothers employees.

3 Q. So Roy, if I can call him Roy --

4 A. Yeah.

5 Q. Just for clarity, Roy was the most senior person
6 on your project?

7 A. That was on a day-to-day basis. I was more
8 senior, but I wasn't there every day.

9 Q. Who had responsibility for documenting changes in
10 the supporting cost labor time?

11 A. Roy.

12 Q. Roy, okay. Have you worked with APCO before?

13 A. Yes.

14 Q. How many times?

15 A. I thought we did one other job with APCO. So
16 probably just one other job and it was actually successful.

17 Q. Okay. Obviously there were problems on the
18 project with the owner, its financing. As you sit here
19 today, do you have any complaints of APCO that are unrelated
20 to the owner?

21 A. Yes.

22 Q. What are those?

23 A. They had a project manager named Shawn that was
24 absolutely, in my mind, horrible -- what he was doing -- and
25 unethical.

Page 13

1 (Exhibit 1 was marked.)

2 Q. (By Mr. Jefferies) Sir, I'm going to show you
3 what I've marked as Exhibit 1 to your deposition. Can you
4 tell me what this is?

5 A. Looks like a subcontract agreement.

6 Q. Okay. There are handwritten changes in the text.
7 Is that your handwriting?

8 A. I believe these are my initials, but I don't know
9 if this is my handwriting or not. I don't believe that this
10 is my handwriting. It's just my initials.

11 Q. Would this handwriting have been inserted at your
12 request?

13 MR. DREITZER: Objection. Calls for speculation.
14 You can answer.

15 MR. JEFFERIES: Well, that's fair. Let me
16 rephrase.

17 Q. (By Mr. Jefferies) Do the handwritten changes
18 reflect modifications to the subcontract that Zitting
19 requested from APCO?

20 A. It appears to.

21 Q. Okay. And is that an SZ that represents your
22 signature?

23 A. Yes.

24 Q. Okay. Do you know whose signature that is for
25 APCO?

Page 14

1 A. I do not.

2 MR. JEFFERIES: Who is that?

3 MS. LYNN: Shawn.

4 MR. JEFFERIES: Shawn.

5 Q. (By Mr. Jefferies) Okay. Some of these changes

6 have Shawn's initials next to yours. Some of them don't.

7 Do you see that?

8 A. Yes.

9 Q. Do you attribute any significance to the fact that

10 Shawn did not initial any of those changes -- strike that.

11 Do you attribute any significance to the fact that

12 Shawn did not initial some of your changes?

13 A. I do not, because he still initialed the bottom of

14 each page.

15 Q. Can you explain why he even -- on the same page --

16 I'm looking at page 2 as an example -- he would have

17 initialed specifically your change in the right-hand margin

18 to paragraph 3.1 but not 2.1?

19 A. I don't -- I don't know why he would have done it.

20 Q. Did you ever discuss that with him?

21 A. No, not that I recall. I know that my -- my

22 changes and markups were done prior to him initialing the

23 pages at the bottom. So everything that I marked up

24 happened previous to him in initialing the bottom of the

25 page. So by initialing that page, you're essentially

Page 16

1 only other one.

2 Q. Did you do any work for Alex or any of his related

3 entities after the project?

4 A. No.

5 Q. Would you agree that Exhibit 1 to your deposition

6 reflects the final negotiated terms and conditions for your

7 work on the project?

8 A. It would not.

9 Q. And why do you disagree with that statement?

10 A. Well, it's not the final -- it's not the final

11 dollar amount, because it doesn't include any changes that

12 were requested throughout, for -- for one -- for instance.

13 Other than -- other than that, I would agree that it's the

14 agreement that we settled on.

15 Q. Okay. Pursuant to Article 1.2, prior to starting

16 work on the project, did Zitting review the design documents

17 for sufficiency and accuracy?

18 A. I would assume we did.

19 Q. That's a yes?

20 A. Yes.

21 Q. Okay. And do you recall reporting any issues

22 regarding the design documents to APCO prior to the start of

23 your construction on-site?

24 A. I don't recall.

25 Q. Are you aware of any such paperwork in your

Page 15

1 agreeing to what's on that page previous to it. So I didn't

2 deem it as significant.

3 Q. Had you or your company done work for Gemstone

4 prior to the project?

5 A. We had never contracted with Gemstone, but we had

6 worked on a Gemstone owned project.

7 Q. What is that?

8 A. We had worked on a different project that Gemstone

9 owned, but we didn't contract directly with Gemstone before.

10 Q. What was the name of that other Gemstone project?

11 A. Manhattan Condominiums or Manhattan Apartments.

12 Q. When was that in relation to the project?

13 A. It was previous to this project by a couple

14 years --

15 Q. Okay.

16 A. -- if I recall.

17 Q. Other than Gemstone, had you done work for any of

18 Gemstone's principals prior to the project?

19 A. Other than Gemstone?

20 Q. Yeah, like Alex -- I'm drawing a blank on his

21 name. You know who Alex is?

22 A. Edelstein?

23 Q. Yes. Had you done work for him before?

24 A. I had done a project, like I said earlier, that he

25 was an owner of. The -- the Manhattan, but that was the

Page 17

1 company files?

2 A. I don't recall.

3 Q. My question is a little different. Are you aware

4 of the existence of any such documents?

5 A. I'm not.

6 Q. Okay. Pursuant to subparagraph 1.3, you

7 understood that Zitting was bound to APCO to the same extent

8 that APCO was bound to the owner. Correct?

9 A. As far as Nevada law allows.

10 Q. What do you mean by that?

11 A. I'm not an attorney, but there's certain statutes

12 that require the contracting parties to be bound to each

13 other, regardless of what happens with APCO or with -- with

14 Gemstone.

15 Q. Give me an example.

16 MR. DEETZER: I'm going to object to the line of

17 questioning as calling for a legal conclusion, but you can

18 answer.

19 MR. JEFFERIES: It did spin off into one.

20 THE WITNESS: For instance, a pay if paid.

21 MR. JEFFERIES: Okay.

22 THE WITNESS: Or pay when paid.

23 MR. JEFFERIES: All right.

24 THE WITNESS: They're welcome to put that kind of

25 stuff in writing, but it's not supported by Nevada statute.

Page 18

1 Q. (By Mr. Jefferies) And did you know that before
2 you negotiated and signed the subcontract?
3 A. I don't recall.
4 Q. Well, this is -- when did you sign this? On
5 April 17, 2007. Prior to that time, were you aware that
6 Nevada law precluded or somehow dealt with pay if paid
7 provisions?
8 A. I don't recall.
9 MR. DREITZER: Same objection. Sorry. You can
10 answer.
11 Q. (By Mr. Jefferies) When did you -- this contract
12 says April of 2007. When did you actually start work on the
13 project?
14 A. I don't recall.
15 Q. Okay. In paragraph 1.3, tell me what those first
16 two sentences meant to you when you agreed to be bound to
17 APCO to the same extent that APCO was bound to the owner?
18 A. I don't recall.
19 Q. Okay. Sir, you do realize you're the designee of
20 the company to testify about these things?
21 A. I do.
22 Q. Okay. And --
23 A. We covered that earlier.
24 Q. Okay. And you're telling me you can't answer my
25 question?

Page 20

1 Q. Now, as I understand it, the work you did for APCO
2 was called phase 1, which was Buildings 8 and 9. Is that
3 right?
4 A. I don't recall how they phased it. I know that,
5 primarily, our scope was in 8 and 9.
6 Q. For APCO?
7 A. Yes.
8 Q. Would you go to paragraph 3.4 within Exhibit 1.
9 I've got a jump on you guys because mine's highlighted.
10 Looking at about the third of the way down, it starts, As a
11 condition precedent. Do you see that?
12 A. Yes.
13 Q. Why don't you read that to yourself.
14 A. Okay.
15 Q. Are you -- strike that.
16 As the corporate representative, you understand
17 that, to the extent Zitting had outstanding claims -- that
18 those were to be listed on the releases that you signed.
19 Correct?
20 A. I didn't -- I didn't have that understanding.
21 Q. Do you see that language in paragraph 3.4?
22 A. I do.
23 Q. Okay. Did Zitting ever identify any outstanding
24 claims, CORs on any of the releases that it signed?
25 A. I don't recall.

Page 19

1 A. I told you I don't recall what that meant to me at
2 the time I signed this.
3 Q. Okay. Well, sitting here as the corporate
4 designee, what does that mean to you?
5 A. What does it mean to me now --
6 Q. Yeah.
7 A. -- or when I signed it?
8 Q. Well --
9 A. Because that's a different question.
10 Q. It is and that's fair. You're telling me you
11 don't recall what it meant to you at the time you signed it.
12 I get that.
13 But sitting here as the corporate designee, what
14 does that sentence mean, that subcontractor is bound to the
15 contractor to the same extent and duration that contractor
16 is bound to owner?
17 MR. DREITZER: Same objection. It calls for a
18 legal conclusion, but you can answer.
19 THE WITNESS: I think it means exactly what it
20 says.
21 Q. (By Mr. Jefferies) How does it relate to APCO's
22 obligation to pay you?
23 A. I -- I don't know. That's --
24 Q. Okay.
25 A. That's above my pay grade.

Page 21

1 Q. The last two sentences reference the fact that,
2 Any payments to subcontractors shall be conditioned upon
3 receipt of the actual payments by contractor from owner.
4 Subcontractor herein agrees to assume the same risks that
5 the owner may become insolvent that contractor has assumed
6 by entering into the prime contract with the owner.
7 Do you recall assuming that risk when you signed
8 this subcontract?
9 A. I don't.
10 Q. As you sit here today as the corporate designee,
11 do you agree that Zitting assumed that risk of owner
12 nonpayment or insolvency?
13 A. I do not.
14 Q. Why not?
15 A. Because I -- at this point, sitting here today, I
16 have the knowledge of a statute that exists that says the
17 pay if paid, which this basically is, is not supported by
18 Nevada law.
19 Q. You signed a lot of those type of pay if/pay when
20 paid clauses, haven't you?
21 A. I don't know.
22 Q. Wouldn't you agree, sir, that in the hundreds of
23 subcontract forms that you negotiated, that that is a pretty
24 standard clause?
25 A. I don't --

Page 22

1 MR. DREITZER: Objection.

2 THE WITNESS: -- recall.

3 MR. DREITZER: Calls for a legal conclusion.

4 THE WITNESS: I don't recall.

5 Q. (By Mr. Jefferies) Would you look at paragraph

6 3.5. First two sentences of Exhibit 1 state, Progress

7 payments will be made by contractor to subcontractor

8 within 15 days after contractor actually receives payment

9 for subcontractor's work from owner.

10 A. Yes.

11 Q. Progress payment to subcontractor shall be 100

12 percent of the value of subcontract work completed, less 10

13 percent retention during the preceding month, as determined

14 by the owner.

15 Would you agree that Zitting agreed to that

16 payment schedule for the progress payments?

17 A. I agree that it's in this contract.

18 Q. Yes?

19 A. I agree that it's -- I -- I agree with what you --

20 I agree that what you just read exists in this contract.

21 Q. Okay. And that was the payment schedule that

22 Zitting agreed to at the time. Correct?

23 A. Apparently.

24 Q. Is that a yes?

25 A. It appears that that was the case, yes.

Page 24

1 payment schedule for the retention?

2 A. I signed this document.

3 Q. Is that a yes?

4 A. I signed the document. You can take that however

5 you want it.

6 Q. All right. As the corporate designee for today's

7 deposition, would you agree that, by signing this document,

8 Zitting agreed to that payment schedule for retention?

9 A. I would not.

10 Q. And why do you disagree with what I said?

11 A. I -- just saying that I signed this document the

12 way -- the way it's stated, the way it's changed.

13 Q. Okay. I thought I was accounting for that in my

14 question. So I'm going to have her re-read my question.

15 I'm not trying to be difficult. So --

16 MR. JEFFERIES: And when you do the transcript,

17 don't just say, Question re-read. Actually plug it in, so I

18 have his answer, if you would. You know what I mean?

19 All right. I'm going to have her re-read my last

20 question to you. Okay?

21 A. Okay.

22 MS. REPORTER: Let me know if this is the

23 question.

24 (Question on page 24, line 6 was read back.)

25 THE WITNESS: Sorry. Yes.

Page 23

1 Q. The bottom of page 3, still within paragraph 3.5,

2 the subcontract states, Any payments to subcontractor shall

3 be conditioned upon receipt of the actual payments by

4 contractor from owner. Zitting agreed to that precondition

5 at the time. Correct?

6 A. It appears that it was in the document I signed

7 when I signed it.

8 Q. So that's a yes?

9 A. Yes.

10 Q. The next sentence, you -- do you agree that

11 Zitting knowingly assumed the risk that the owner may become

12 insolvent?

13 MR. DREITZER: Objection. Calls for a legal

14 conclusion.

15 THE WITNESS: I agree that I signed this document

16 that had this verbiage in it.

17 Q. (By Mr. Jefferies) Okay. Would you look at

18 paragraph 3.8. Why don't you take a minute and review that

19 provision. Then I'm going to ask you about it.

20 MR. JEFFERIES: Now you're giving me the sniffles.

21 MR. DREITZER: Sorry.

22 MR. JEFFERIES: It's all in my head.

23 MR. DREITZER: It's actually allergies.

24 THE WITNESS: All right. I've read it.

25 Q. (By Mr. Jefferies) Did Zitting agree to this

Page 25

1 MR. JEFFERIES: Okay. And that's why I like it

2 plugged back in, so you and I know what you're re-reading.

3 Thank you.

4 Q. (By Mr. Jefferies) You actually -- strike that.

5 There are five requirements for the release of

6 retention, subparagraphs A through E. Agreed?

7 A. It appears to be.

8 Q. And to your -- your change actually clarified the

9 handwritten addition of F, actually. You clarified when a

10 building is to be considered complete for purposes of your

11 retention. Right?

12 A. It appears so.

13 Q. Okay. I mean, that is a change you requested.

14 Right?

15 A. Yes.

16 Q. Okay. As we sit here today, have -- strike that.

17 As we sit here today, has Zitting satisfied those

18 requirements for release of retention?

19 A. To my knowledge, we did.

20 Q. Okay. Let's go through them. Maybe what I should

21 do -- let's look in -- during what dates approximately -- I

22 don't need specific, but if you can give me month and

23 year -- did Zitting work for APCO on the project?

24 A. I don't recall.

25 Q. Is there somebody else at the company that would

Page 26

1 know this type of information? Because this was within the
 2 scope of my PMX designation.

3 A. I'm your guy, but it's been roughly ten years. So
 4 for me to give accurate dates is difficult.

5 Q. And I respect that. The reason we lawyers do PMX
 6 notices is because, in my view of the world -- Rich doesn't
 7 have to agree or disagree -- you kind of -- it's incumbent
 8 on the person to kind of get prepared to talk about those
 9 topics.

10 So as I -- as you sit here today, are you prepared
 11 or able to tell me when Zitting worked for APCO on the
 12 project?

13 A. To the best of my memory.

14 Q. Okay. Tell me what that is.

15 A. I don't recall if we started before 2007 ended on
 16 this project or if we started in 2008.

17 Q. Okay.

18 A. I also don't recall if we did anything for APCO,
 19 specifically, into 2009 or not. So it's in the time frame
 20 of 2007 to 2009.

21 Q. Okay. Now we're getting somewhere.

22 A. The bulk of it was 2008.

23 Q. Okay.

24 A. So for me to tell you anything more finite than
 25 that, I wouldn't remember.

Page 28

1 knowledge, not complete was some soffits in the kitchens,
 2 that there was an issue with the assembly -- the fire
 3 assembly or something. So they were not done, but they had
 4 done flooring under them and they had even done some
 5 cabinets in some areas.

6 And so there was some open soffits that they were
 7 still waiting for clarification or design on. And to my
 8 knowledge, that's the only thing that was not complete, in
 9 terms of drywall.

10 Q. So the bottom line is the drywall was not complete
 11 when you stopped working for APCO. Correct?

12 MR. DREITZER: Objection. Calls for a legal
 13 conclusion.

14 THE WITNESS: My belief is that the drywall was
 15 complete, but they had to add some more soffit steel. So
 16 the drywall was still doing whatever changes he was being
 17 directed to do or whatever changes the assembly needed. So
 18 I don't know how -- how to really dice that any different
 19 than that.

20 Q. (By Mr. Jefferies) So based on your answer, the
 21 drywall wasn't finished. Right?

22 MR. DREITZER: Objection. Misstates his
 23 testimony. You can answer.

24 THE WITNESS: I'm not -- I'm not the one that was
 25 administering his contract. So APCO would be a little

Page 27

1 Q. Are you able to testify today -- well, strike
 2 that.

3 Your addition F to paragraph 3.8, tell me what
 4 that was intended to mean.

5 A. That was intended to mean that we -- we were
 6 entitled to being paid our retention when drywall was
 7 substantially complete, not when the entire project,
 8 including landscaping and furniture, was complete, like this
 9 contract originally stated.

10 So we were clarifying that, really, the rough
 11 carpentry retention didn't have any right to be held after
 12 it was all covered up. And if it's covered up, it's
 13 accepted.

14 Q. Okay. And that's your language in subparagraph F,
 15 Building is considered complete as soon as drywall is
 16 completed. Right?

17 A. Yes.

18 Q. Okay. Doesn't say "substantially complete," does
 19 it?

20 A. No, it doesn't.

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

24 A. I can testify that the first layer, if you will,
 25 of drywall was complete and the only thing that was, to my

Page 29

1 better person to ask that question to.

2 MR. JEFFERIES: Okay.

3 THE WITNESS: I know the building was covered up
 4 with drywall, which was the intent of this -- this change in
 5 this contract. So the intent of what was written was
 6 complied with.

7 Q. (By Mr. Jefferies) Okay. Did you go to work for
 8 CAMCO after APCO?

9 MR. DREITZER: Objection. Calls for a legal
 10 conclusion.

11 THE WITNESS: I remember -- I remember CAMCO
 12 coming onto the site and we were pretty much done with
 13 everything in our scope. And I believe they asked us to do
 14 a few things for them which we did. I don't remember if
 15 there was any kind of a formal agreement or anything or any
 16 understanding that they would be paying us versus APCO
 17 paying us. I don't recall any of that, but I do remember,
 18 for instance, like, they asked us to put up some safety
 19 rails which we complied with. I don't remember what the
 20 arrangements were though.

21 Q. (By Mr. Jefferies) Okay. One of my topics in the
 22 notice -- I think we've got . . . the notice . . .

23 MR. DREITZER: Counsel, is that the second
 24 amended --

25 MR. JEFFERIES: Yes.

Page 30

1 MR. DREITZER: Okay. I've got it.

2 MR. JEFFERIES: I'm just going to mark it, just so

3 I got it tagging along with the depo.

4 MR. DREITZER: So that will be 2.

5 (Exhibit 2 was marked.)

6 Q. (By Mr. Jefferies) Sir, showing you what I've

7 marked as Exhibit 2 to your deposition, just for the record,

8 this is the topics. Topic 9. Did you -- it relates to

9 CAMCO. Did you have a ratification agreement with CAMCO?

10 MR. DREITZER: Objection. Calls for a legal

11 conclusion.

12 THE WITNESS: I don't know of any. I don't recall

13 any ratification agreement with CAMCO.

14 Q. (By Mr. Jefferies) How much work did you do after

15 APCO left the project for CAMCO or Gemstone?

16 A. Almost none. Very little.

17 Q. Okay. Were you paid for that work you did after

18 APCO?

19 A. I don't believe so.

20 Q. Do you have any photographs, video, or other

21 documentation that would show the state of the drywall at

22 the point that you stopped work for APCO?

23 A. I believe that we've turned over any -- any

24 documentation that we have along those lines, if any.

25 Q. Okay. My question was a little different. Are

Page 32

1 Q. Do you know?

2 A. I don't recall.

3 Q. Prior to today, have you seen any records in your

4 file that would reflect the transmittal of that type of

5 closeout documentation and as-builts?

6 A. Not that I recall.

7 Q. Subparagraph E, it says, Delivery to contractor

8 from subcontractor, release and waiver of all claims from

9 all subcontractors, laborers, material and equipment

10 suppliers, and subcontractors providing labor or materials

11 or services to the project. Did you do that?

12 A. I don't recall.

13 Q. Do you know if you did that?

14 A. I don't recall if I did or not.

15 MR. JEFFERIES: Rich, it seems like as the

16 corporate designee, he should be better prepared to talk

17 about some of this --

18 MR. DREITZER: Well, I think he is prepared and I

19 think that as you -- as you rephrased a couple of questions

20 before and you got into the topic, he was able to kind of

21 meet you where you wanted to go on some of the stuff. So I

22 think if you rephrase it, he may be able to get there.

23 MR. JEFFERIES: Fair enough.

24 Q. (By Mr. Jefferies) As the corporate designee --

25 strike that. And that's probably a fair clarification.

Page 31

1 you aware of any photos that would show the state of the

2 drywall when you stopped working for APCO?

3 A. I don't believe so.

4 Q. Okay.

5 A. It would be interesting to see how much of the --

6 there's -- the drywall's scope they had billed APCO for.

7 Q. Okay.

8 A. I don't know if that's ever been produced.

9 Q. While you -- let's look back at paragraph 3.8 of

10 the subcontract, Exhibit 1. We've talked about subparagraph

11 A, the completion as you further defined it in subparagraph

12 F. Subparagraph B was the approval and final acceptance of

13 the building work by owner.

14 While you were working for APCO, did that occur,

15 to your knowledge?

16 A. I have no knowledge of that.

17 Q. Okay. Next item is, See receipt of final payment

18 by contractor from owner. Do you have any personal

19 knowledge or information to suggest whether that occurred?

20 A. I do not.

21 Q. Item D is delivery to contractor from

22 subcontractor, all as-built drawings for its scope of work,

23 and other closeout documents.

24 Did Zitting ever satisfy that requirement?

25 A. I don't recall.

Page 33

1 So what I'm going to try and do is ask a question

2 that I think that accounts for his comment, that I don't

3 have to reask paragraphs -- question about paragraphs B

4 through E. Okay?

5 A. Okay.

6 Q. As the corporate designee sitting here today, are

7 you aware of any documentation or other information to

8 suggest that the conditions referenced in B through E were

9 satisfied by Zitting?

10 A. I know that every draw request that we put in, we

11 had to submit conditional labors for the period we were

12 submitting from any supplier, sub, and -- and a final for

13 the period previous to that. So I know that we complied

14 with that. I just don't recall specific ones that I've

15 seen.

16 Q. Okay. And, admittedly, I think the record

17 reflects there are periodic conditionals and unconditionals.

18 I get that. You would agree, though, that this subparagraph

19 E in paragraph 3.8 is dealing with a final from your lower

20 tier people. Right?

21 A. Yes.

22 Q. Okay. So since you called out the releases, let

23 me make sure my record is clear. Sitting here today as the

24 corporate designee, do you have any information to suggest

25 that Zitting satisfied the conditions in B, C, and D of

Page 34

1 paragraph 3.8?

2 A. I believe that I could go to my files and find

3 lien waivers from all the suppliers --

4 Q. Okay.

5 A. -- for the draws that we submitted.

6 Q. No, I respect that. I -- I carved E out. E

7 relates -- E relates to the releases. Do you see that?

8 A. Yeah, I do.

9 Q. Okay. So I'm carving those out. I hear your

10 words and I understand what you're telling me. So I'm going

11 to exclude that. So let me make sure my record is clear.

12 Sitting here as the corporate designee, are you

13 aware of any documents, facts, information to suggest that

14 Zitting met the conditions of subparagraphs B, C, and D of

15 paragraph 3.8?

16 A. Let me re-read them.

17 (Pause in proceedings.)

18 THE WITNESS: I don't know of any documents that

19 we have in our files that pertain to these sections.

20 Q. (By Mr. Jefferies) All right. So our record is

21 clear for both of us, I'm going to have her re-read the

22 question now that you've reviewed the document and I think

23 you're able to answer it.

24 MR. JEFFERIES: So, again, plug it in here.

25 MR. DREITZER: Thank you.

Page 35

1 (Question on page 34, line 9 was read back.)

2 THE WITNESS: I'm not aware of any.

3 Q. (By Mr. Jefferies) And then with regard to E,

4 there are periodic releases that I have seen in the file.

5 A. Okay.

6 Q. So my question is: Prior to today, do you have

7 any facts, information, documents to suggest that Zitting

8 has tendered final releases from its lower tier subs or

9 suppliers?

10 A. I believe there has been final releases submitted

11 for lower tier suppliers.

12 Q. Okay.

13 A. We actually paid our bills. That's not where the

14 problem occurred.

15 Q. Sitting here today, do you have any personal

16 knowledge as to -- well, strike that.

17 Describe for me, sir, what you understood to be

18 the payment application process on the project?

19 A. I understood it to be each month on a designated

20 date. We submit progress billing for work that was

21 completed for the previous period. And along with that, we

22 submitted conditional waivers from all of our lower tier

23 subs and suppliers and then we also submitted final labors

24 for the previous period from -- from the same set of people.

25 Q. Okay. And you were paid by APCO or the owner

Page 36

1 through funds control?

2 A. I don't recall how the -- how that was set up on

3 the job.

4 Q. Okay. Do you recall there being a Nevada

5 Construction Services that facilitated the release? Is that

6 the proper name?

7 MS. LYNN: Mm-hm.

8 Q. (By Mr. Jefferies) Release of money.

9 A. I don't recall how this particular job was handled

10 that way.

11 Q. Okay. Do you recall, over the last approximate

12 two months that APCO was on the project, there was joint

13 checks being issued?

14 A. I don't recall that.

15 Q. Now -- strike that.

16 What was your standard practice for delivering the

17 pay applications to APCO?

18 A. I believe back then we were just using a good old

19 fax.

20 Q. In paragraph 3.9 of Exhibit 1, it states,

21 Subcontractor agrees that contractor shall have no

22 obligation to pay subcontractor for any changed or extra

23 work performed by subcontractor, until or unless contractor

24 has actually been paid for such work by the owner.

25 Did you agree to that -- strike that.

Page 37

1 Sitting here as the corporate designee, would you

2 agree that Zitting accepted that payment schedule for change

3 orders?

4 A. With some changes and modifications, it appears

5 that I did.

6 Q. Okay. Tell me -- so that our record is clear,

7 what did you add to that paragraph 3.9?

8 A. Unless a contractor has executed and approved

9 change order directing subcontractor to pull -- perform

10 certain changes in writing and certain changes have been

11 completed by subcontractor.

12 Q. What was your intention in adding that language?

13 A. Intention was to state that, if I'm directed to do

14 a change by APCO, then I'm going to get paid for that

15 change, regardless of whether the owner pays them for it or

16 not.

17 Q. I don't see the reference to owner payment in

18 there, in that language.

19 A. But it was a continuation of the first sentence

20 in 3.9. So it was finishing that thought that was expressed

21 in 3.9.

22 Q. Oh, I see. So you're saying it's a continuation

23 of the sentence before or is it -- and I'm not trying to be

24 argumentative. I want to make sure I understand what your

25 intent was.

Page 38

1 A. Yeah, that's why I started with, Unless.
 2 Q. Okay. So you're -- unless what?
 3 A. Unless subcontractor has an executed or approved
 4 change order.
 5 Q. Okay.
 6 A. So I was trying to continue the sentence.
 7 Q. All right.
 8 A. The first sentence of 3.9.
 9 Q. So your -- if I understand your testimony, your
 10 entitlement to a change order could be determined separate,
 11 apart from whether the owner paid APCO, if you had executed
 12 approved change orders?
 13 A. That was my intention here.
 14 Q. My statement is correct, yes?
 15 A. Yes.
 16 Q. Okay. Did you --
 17 MR. DREITZER: Hold on one second. Go -- you
 18 don't have to go off. Do you need a break, because we're
 19 about at an hour.
 20 THE WITNESS: Yeah, whatever is --
 21 MR. DREITZER: Do you mind if we take a minute?
 22 MR. JEFFERIES: Sure. No, we can do that.
 23 (Pause in proceedings.)
 24 MR. JEFFERIES: Let me ask it.
 25 Q. (By Mr. Jefferies) Did you get -- I'm going to

Page 40

1 documentation, evidence to suggest that APCO was paid your
 2 retention that you're seeking in this action?
 3 A. Not that I know of.
 4 Q. As you sit here today as the corporate designee,
 5 do you have any documents, facts, information to suggest
 6 that APCO received payment for the change orders you're
 7 seeking payment for in this action?
 8 A. Not that I know of.
 9 Q. Did you ever prepare any correspondence to APCO,
 10 transmitting claims or change order requests?
 11 A. I'm sorry. Can you re-ask that?
 12 MR. JEFFERIES: Why don't you read it. I can
 13 never do it the same twice. So I'm going to have her
 14 repeat.
 15 (Question on page 40, line 9 was read back.)
 16 THE WITNESS: I believe so. I believe they've
 17 been produced.
 18 Q. (By Mr. Jefferies) A letter where you asserted a
 19 claim against APCO?
 20 A. Well, we filed a lien.
 21 Q. I respect that. I have the lien. Did you ever
 22 submit a written notice of claim to APCO?
 23 A. I believe we sent them a change order log which
 24 was a claim, yes.
 25 Q. Okay.

Page 39

1 use your term -- executed and approved changers from APCO?
 2 A. On some stuff we did. On other stuff, we got --
 3 we got asked to do -- do the work and we were told that it
 4 would be approved and -- by Shawn and told it would be
 5 approved and told that it was approved, but he would never
 6 produce a document showing that it was approved. And so we
 7 had that struggle throughout the second part of the project
 8 with him. So verbally, yes, he approved them.
 9 MR. JEFFERIES: Okay. I'll make this the last
 10 one. Then we can break.
 11 MR. DREITZER: Sure.
 12 Q. (By Mr. Jefferies) Given the list of schedule and
 13 change orders that you reviewed -- that you contend you
 14 weren't paid for, I assume --
 15 A. Yes.
 16 Q. -- okay -- do you have executed and approved
 17 change order forms from APCO on those?
 18 A. Not on all of them.
 19 Q. On some of them do you?
 20 A. I believe so.
 21 MR. JEFFERIES: All right. Let's take a break.
 22 (Pause in proceedings.)
 23 MR. JEFFERIES: Let's go back on the record.
 24 Q. (By Mr. Jefferies) Sir, do you have -- as the
 25 corporate designee, do you have any information,

Page 41

1 A. I believe we were looking at it earlier.
 2 MR. JEFFERIES: Do you mind if we mark that, just
 3 because he keeps referring to it?
 4 MR. DREITZER: No, let me fish it out. For the
 5 record, it's document ZBC1178.
 6 MR. JEFFERIES: Thank you.
 7 MR. DREITZER: Sure.
 8 MR. JEFFERIES: Why don't you mark it. I'll see
 9 if we can get a copy of it.
 10 (Exhibit 3 was marked.)
 11 (Exhibit 4 was marked.)
 12 (Pause in proceedings.)
 13 Q. (By Mr. Jefferies) Sir, showing you what I've
 14 marked as Exhibit 4 to your deposition, have you seen this
 15 before today? And by "this," I will represent to you
 16 Exhibit 4 -- I have pulled some -- some handwritten notes.
 17 It's just one of a few in the file that I saw. And then I
 18 also pulled what looked to be, like, some field change
 19 directives and change requests that look -- so they're
 20 not -- you can tell by the Bates they're not sequential. I
 21 just pulled some examples to ask you about. Okay?
 22 A. Okay.
 23 MR. DREITZER: Oh, I thought they were.
 24 MR. JEFFERIES: No, they're not.
 25 MR. DREITZER: Okay. Glad you mentioned that.

| | |
|---|---|
| <p style="text-align: right;">Page 42</p> <p>1 Q. (By Mr. Jefferies) So please take a minute and 2 look at these and then I want to ask you some general 3 questions about it. 4 MR. DREITZER: Counsel, would it be okay if I just 5 put the Bates number on the record really quick? 6 MR. JEFFERIES: Absolutely. 7 MR. DREITZER: So for Exhibit 4, it's ZBC2082, 8 2085, 2078, 2079, 2089, and 2086. 9 MR. JEFFERIES: Thank you. 10 MR. DREITZER: Thank you. Thanks. 11 THE WITNESS: Okay. 12 Q. (By Mr. Jefferies) Okay. So it's my 13 understanding that, by at least September 6 of '08, Zitting 14 was doing work for CAMCO. Would you agree with that? 15 A. It appears that way, yes. 16 Q. Okay. And tell me what the first page of 17 Exhibit 4 is. 18 A. It appears to be an accounting of hours spent by 19 Zitting employees doing change order work that was signed 20 off by somebody with CAMCO, it looks like. 21 Q. Okay. As the corporate designee, do you have 22 similar type of source documents for the change order 23 requests that you have made against APCO, as are summarized 24 in Exhibit 3? 25 A. Which is Exhibit 3? Oh, thanks. I believe we've</p> | <p style="text-align: right;">Page 43</p> <p>1 turned over all the source documents we have in our files. 2 So whatever has been turned over is what we have. I don't 3 believe there's any documentation we've withheld in regards 4 to any of these change orders. 5 Q. So if I understand your answer, to the extent this 6 type of source document or -- documentation or support for 7 the amounts in a change order request -- those would be in 8 the Bates-labeled documents that have been produced in this 9 litigation? 10 A. Correct. 11 Q. Second page of Exhibit 4 is a field change 12 directive. Actually, pages 2 and 3 of the exhibit are just 13 different examples of the same form. Field change 14 directive. Do you have any similar field change directives 15 signed off by APCO for any of the change order requests that 16 you're seeking in this action? 17 A. Anything that I have has been submitted as -- in 18 the document request. 19 Q. Okay. Go to the last three pages of Exhibit 4 and 20 tell me what form that is. 21 A. That's a change request form that's generated in 22 our software system. 23 Q. What -- how do you use this form? 24 A. We use it as a way to document changes. 25 Q. Okay. As you sit here today as the corporate</p> |
| <p style="text-align: right;">Page 44</p> <p>1 designee, do you have any such forms issued to APCO for the 2 change order requests that are outstanding in this 3 litigation? 4 A. Anything that we have has been submitted in the 5 document request. 6 Q. Okay. So it would have been Bates labeled and 7 produced prior to today? 8 A. Yes. 9 Q. As the corporate designee today, have you seen any 10 change order requests form, field directive form, or field 11 notes that would support any of the change order requests 12 you're seeking from APCO? 13 A. I don't recall. 14 Q. You don't recall seeing any? 15 A. I don't. It's been a long time. 16 Q. The -- what is the difference between a quote form 17 and a change order request form? 18 A. Can you show me a quote form. 19 Q. Sure. 20 MR. JEFFERIES: Let's mark this. 21 MR. DREITZER: Exhibit 5? 22 MR. JEFFERIES: I think so. 23 Q. (By Mr. Jefferies) Sir, I'm showing you what I've 24 marked as Exhibit 5, which this is an example of -- you'll 25 see some of the Zitting forms.</p> | <p style="text-align: right;">Page 45</p> <p>1 MR. DREITZER: Right. No, I see that the -- this 2 is roughly a eight- or nine-page exhibit. The cover page 3 has a Bates on it of 2098, but everything else -- it's 4 obviously Zitting paperwork, but it's unbatesed. So I'm 5 assuming it has been produced and I'm assuming it lies 6 elsewhere in the case, but we don't have Bates numbers for 7 it at this point. 8 MR. JEFFERIES: That's my assumption as well. I 9 don't want to -- the other thing I will represent to you is 10 these were not sequential. I pulled these together -- 11 MR. DREITZER: Okay. 12 MR. JEFFERIES: -- so that I could try and make 13 some semblance of what I think is the summary sheet. And we 14 will have them all together in one. 15 MR. DREITZER: Could I ask this just so -- as a 16 favor of -- as you're talking about each document, if you 17 can, you know, refer to dates and amounts just so we can key 18 it back to something that's been Batesed later on. And if 19 we have that as part of the record, we should be able to do 20 that. 21 MR. JEFFERIES: Sure. Fair enough. 22 MR. DREITZER: Thank you. 23 Q. (By Mr. Jefferies) Okay. Sir, I assembled 24 Exhibit 5. I was going to get to this, but you asked a 25 question. If you go -- pick one of these, I believe these</p> |

Page 46

1 are Zitting Brother bid forms. Is that right?

2 A. Yes.

3 Q. And they say "quote" in the upper right-hand

4 corner, after -- or before a numerical designation. Do you

5 see that?

6 A. Yes.

7 Q. Okay. What are these forms?

8 A. These are a field change form or a quote form. So

9 when Roy was asked by APCO to do -- perform a certain

10 change, he would summarize it in this form. And then if

11 they told him to go ahead and do the work and -- then he

12 would send these forms to me, and then I would typically

13 summarize it into a change request form in our system or

14 into a change order form.

15 Q. Okay.

16 A. So it would eventually get from the field copy

17 into the software, basically.

18 Q. Okay. So these particular forms, because they say

19 "quote" and then some of the language says "bid includes,"

20 this is -- this is kind of what your estimate of what this

21 change could --

22 A. I don't know if this is reflecting an estimate or

23 actual time and he was just using a form that said "quote"

24 on it.

25 Q. Okay.

Page 48

1 contract amount. So this is a little more preliminary than

2 a change order --

3 Q. The change request --

4 A. -- in our system.

5 Q. Okay. So the progression would be from the . . .

6 Document has "quote" written on it in Exhibit 5 to

7 potentially either a change request, like we have in

8 Exhibit 4, or a change order form?

9 A. Correct.

10 Q. All right. Okay. I'm going to come back to this,

11 Exhibit 5, just because I want to understand -- well, shoot,

12 we can do it while we're here. Do you have Exhibit 5 in

13 front of you?

14 A. I do.

15 Q. Seen this document before today. Right?

16 A. I don't recall seeing it before today or before

17 the topics. And I actually went over it today, this

18 morning.

19 Q. Exhibit 5?

20 A. Yeah, this (gesturing) document.

21 MR. DREITZER: Do you mean the first page or the

22 entire document?

23 THE WITNESS: First page. First page.

24 Q. (By Mr. Jefferies) I wasn't that nice to send

25 over all my exhibits. So you wouldn't have seen Exhibit 5

Page 47

1 A. But it appears that he was actually summarizing

2 actual time that was spent.

3 Q. How can you --

4 A. But I -- I'm just assuming that.

5 Q. That was going to be my question is: How can

6 somebody tell whether this work has been done or not?

7 Strike that.

8 Procedurally, given your standard practice, if

9 this -- if the purported or extra change order work was

10 actually performed, would you have processed it from these

11 forms that are included in Exhibit 5 into a change order

12 request like I have, for example, in Exhibit 4?

13 A. I would -- if -- if this -- if -- if this was

14 actually performed, I would either put it into a change

15 order request or write into a change order.

16 Q. And do you have change order -- okay. Strike

17 that.

18 Change order form different than Bates label 2086,

19 within Exhibit 4, or is that your change order form?

20 A. That's a change request.

21 Q. Okay.

22 A. And a change request -- the only difference,

23 really, between a change request and a change order is a

24 change request doesn't adjust our contract amount. Once you

25 switch it into a change order, then that adjusts the

Page 49

1 in its entirety. Okay. Tell me what the first page of

2 Exhibit 5 is?

3 A. It looks like an Exhibit C to the ratification.

4 Submitted change orders.

5 Q. Okay. What ratification?

6 A. I do not know.

7 Q. Somebody on the first page of Exhibit 5 has

8 been -- has gone through and listed change order requests,

9 and some of them have an AR by them which is APCO

10 responsibility. Do you see that?

11 A. I do.

12 Q. Do you know what that represents?

13 A. It appears that it represents somebody's

14 interpretation of which ones were APCO responsibilities.

15 Q. Okay.

16 A. I don't know who generated this document

17 originally though. I don't recognize it previous to today.

18 Q. Okay. As the corporate designee today, do you

19 know if Zitting received payment for those items that are

20 not designated AR on the first page of Exhibit 5?

21 A. I don't believe so.

22 Q. Did Zitting submit those items -- strike that.

23 Did Zitting submit any of the items on the first

24 page of Exhibit 5 to CMCO or Geostone for payment?

25 A. I don't recall.

Page 50

1 Q. As the corporate designee, do you know if Zitting
2 received any payments from CAMCO or Genstones after Zitting
3 stopped working for APCO?

4 A. I don't believe so.

5 Q. Did you agree to reduce your labor rate down to
6 \$30 per hour for your change order request?

7 A. I saw some documentation in e-mails of such this
8 morning that appears that I did.

9 Q. Is that a yes?

10 A. It appears that I did.

11 Q. Okay.

12 A. I don't have a personal memory of it, but based on
13 the e-mails that I reviewed, it appears that I did.

14 Q. Okay. As the corporate designee, would you agree
15 that Zitting agreed to reduce its labor rate to \$30 per hour
16 on whatever the outstanding change order requests were?

17 A. From the -- from the e-mails that I -- the e-mail
18 chain that I reviewed this morning, it appears that . . .

19 MR. DREITZER: Counsel, could we possibly identify
20 which e-mails we're talking about? I mean, if there's
21 e-mails that firm that up, I'd like to have that part of the
22 record.

23 MR. JEFFERIES: I don't know what -- he keeps
24 referring to e-mails. I'm just trying to establish the
25 fact.

Page 52

1 A. It appeared that they had.

2 Q. Okay. And as a result, Zitting repriced certain
3 change order requests using a labor rate of \$30 an hour.
4 Correct?

5 A. Correct.

6 Q. Okay. Can you identify any -- well, let's see.
7 I'm not sure how the list of change order requests . . . in
8 Exhibit 3 and 5 . . .

9 MR. DREITZER: Well, Counsel, I can show you -- I
10 can say that on Exhibit 3, No. 15 for 155,896 --

11 MR. JEFFERIES: I'm sorry. One more time.

12 MR. DREITZER: Sure. In Exhibit 3, Item 15 for
13 155,896 --

14 MR. JEFFERIES: Yeah.

15 MR. DREITZER: -- can be found on Exhibit 5, third
16 line from the bottom, but I haven't matched them up one to
17 one though.

18 THE WITNESS: Does anyone know who generated this
19 document originally?

20 Q. (By Mr. Jefferies) Exhibit 5?

21 A. The cover of Exhibit 5.

22 Q. I can't personally represent to you. I found it
23 in your document production. It has your Bates on it.

24 A. Okay.

25 MR. DREITZER: Can we go off the record for a

Page 51

1 MR. DREITZER: Okay.

2 MR. JEFFERIES: So that's why I'm asking it the
3 way I am.

4 Q. (By Mr. Jefferies) I don't care what you looked
5 at. I'm just trying to -- for purposes of today -- make
6 sure we're on the same page. So as the corporate designee,
7 would you agree that APCO rejected certain change order
8 requests because it objected to your labor rate?

9 A. Based on an e-mail chain that I read, it appeared
10 that that was the case.

11 Q. So that's a yes?

12 A. I don't have a memory of it. So I'm just going
13 off of this limited e-mail chain and what was going on in
14 it. I don't know if there was other conversation had
15 outside. I don't know if somebody got mad and picked up the
16 phone and called and had a discussion. I don't recall that.

17 And the e-mail chain isn't inclusive of -- of a
18 conclusion, but that looks like that's the direction it was
19 going. And I just -- unfortunately, it's been so long and
20 there's so many -- so many phone conversations and so forth
21 that -- that I don't have the benefit of recalling.

22 Q. Okay. Isn't it true, sir, that as the corporate
23 representative for Zitting today, that APCO -- whether you
24 agreed or not, APCO did reject some change order requests.
25 Correct?

Page 53

1 moment.

2 MR. JEFFERIES: Sure.

3 (Pause in proceedings.)

4 Q. (By Mr. Jefferies) Just while we were off the
5 record, we compared the summary in Exhibit 3 and the summary
6 in Exhibit 5, and it appears what you're designating as
7 Nos. 22, 23, 24, and 25 on Exhibit 3 are not included in
8 Exhibit 5. Correct?

9 A. Correct.

10 Q. And just looking at the timing, would you agree
11 that Change Order Request 22, 23, 24, and 25 were done at
12 the direction of CAMCO?

13 A. I would come to that conclusion based off of
14 Exhibit 5 -- is it Exhibit 5? Somewhere I saw some actual
15 CAMCO verbiage.

16 Q. I think it was Exhibit 4.

17 A. Is it Exhibit 4?

18 Q. First page.

19 A. Well -- but if you look further in, you've
20 got . . .

21 MR. DREITZER: Oh, you're right.

22 THE WITNESS: CAMCO somewhere.

23 MR. DREITZER: Actually, in Exhibit 4, if you go
24 to the fourth page in, which is Z9C2079, that's Change
25 Request 24 which -- with a dollar figure of 19,9 and then --

| | |
|---|---|
| <p style="text-align: right;">Page 54</p> <p>1 MS. REPORTER: I'm sorry? Which will then?</p> <p>2 MR. DREITZER: With -- which -- with a dollar</p> <p>3 figure of 19,900 that matches up to No. 22 on Exhibit 3.</p> <p>4 THE WITNESS: And then going down, you get the</p> <p>5 same thing on the next page, 3750. So it would appear that</p> <p>6 these -- these last four changes were done after CAMCO</p> <p>7 showed up on-site.</p> <p>8 Q. (By Mr. Jefferies) Okay. Let me make sure my</p> <p>9 record is clear. We've got a lot of rambling in there when</p> <p>10 we read this. Would you agree, sir, that what you're</p> <p>11 showing is Change Order Request 22, 23, 24, and 25 in</p> <p>12 Exhibit 3 were actually performed for CAMCO?</p> <p>13 A. Performed under their direction. I don't know,</p> <p>14 contractually, how -- how that works. To my knowledge, I</p> <p>15 didn't have a contractual obligation to CAMCO. I had a</p> <p>16 contractual obligation to APCO. And so I don't know -- I</p> <p>17 don't know where that -- we did work for the project, work</p> <p>18 for the project under the contract that I had signed.</p> <p>19 And I don't know if I had a real clear</p> <p>20 understanding of how APCO and CAMCO were interacting with</p> <p>21 each other or if they were interacting with each other, but</p> <p>22 it does appear that those were done after CAMCO showed up</p> <p>23 on-site.</p> <p>24 Q. Okay. Let me -- let me -- I'm going to try and</p> <p>25 account for your answer in this next question. Would you</p> | <p style="text-align: right;">Page 55</p> <p>1 agree, sir, that the items that are designated 22, 23, 24,</p> <p>2 and 25 on Exhibit 3 were performed after APCO stopped</p> <p>3 working on the project and after CAMCO came onboard?</p> <p>4 A. I would agree with that.</p> <p>5 Q. Didn't you receive copies of correspondence from</p> <p>6 APCO and/or Gemstone -- words to the effect, There's a</p> <p>7 dispute between those two parties and APCO was stopping work</p> <p>8 on the project?</p> <p>9 A. I don't recall.</p> <p>10 Q. Did you take any steps to confirm what CAMCO's</p> <p>11 role was on the project?</p> <p>12 A. I don't recall.</p> <p>13 Q. Just given the issues on the project, you would</p> <p>14 have likely had to have confirmed their involvement before</p> <p>15 you performed extra work. Correct?</p> <p>16 A. Correct. I just don't recall what their</p> <p>17 involvement, in my understanding, was.</p> <p>18 Q. Was Zitting paid for Items 22 through 25 on</p> <p>19 Exhibit 3?</p> <p>20 A. I don't believe so.</p> <p>21 Q. May save us a lot of time with this question. As</p> <p>22 the corporate designee here today, if I were to walk you</p> <p>23 through the individual change order requests that are</p> <p>24 outlined Items 3 through 20, would you be able to explain to</p> <p>25 me the underlying factual basis as to why it was a change in</p> |
| <p style="text-align: right;">Page 56</p> <p>1 scope?</p> <p>2 A. All I could do is rely on the description to lead</p> <p>3 me to believe what it was, but I would have to have a set of</p> <p>4 plans in front of me to -- to see what was -- what was shown</p> <p>5 or not shown and what prompted the change.</p> <p>6 Q. Would you -- okay. So you can't do that sitting</p> <p>7 here today, other than just reading to me what I can read --</p> <p>8 A. Mm-hmm.</p> <p>9 Q. -- as the heading. Right?</p> <p>10 A. Correct.</p> <p>11 Q. Okay. Do you, as the corporate designee today,</p> <p>12 have the ability to explain to me how the amounts reflected</p> <p>13 in Change Order Request 3 through 20 on Exhibit 3 were</p> <p>14 calculated?</p> <p>15 A. Without going and finding the supporting</p> <p>16 documentation, I don't have that ability.</p> <p>17 Q. Okay. If you look at Exhibit 5 -- we can pick an</p> <p>18 example. Go to Quote No. 18 for \$3,300.</p> <p>19 A. What page is that? Oh, I'm sorry. It's not . . .</p> <p>20 3300?</p> <p>21 Q. Yes.</p> <p>22 A. Okay. I got it.</p> <p>23 Q. Can you tell, looking at this, if this work was</p> <p>24 actually performed?</p> <p>25 A. I cannot, other than it says "presnap lines" on</p> | <p style="text-align: right;">Page 57</p> <p>1 No. 7, as per Herschel and Shawn's instructions. So this</p> <p>2 indicates that the work was done. And it was instructed</p> <p>3 verbally by John -- by Shawn. So beyond that, I can't</p> <p>4 verify it. From this document, that is.</p> <p>5 Q. And go to the Quote No. 3, page before it, in the</p> <p>6 amount of \$30,412. Can you tell, looking at this, whether</p> <p>7 this work was actually done or is this an estimate?</p> <p>8 A. I can tell this work was actually done.</p> <p>9 Q. Okay. How?</p> <p>10 A. Because the description here says, Install,</p> <p>11 tighten screws for 8 and 9 in concrete, as directed by Shawn</p> <p>12 Bounds, in order to eliminate the problem with finishing the</p> <p>13 concrete around them and having them kicked out of place and</p> <p>14 not end up in the wall. This also fixes the problem of</p> <p>15 having the bolts come up under the studs.</p> <p>16 Q. Okay.</p> <p>17 A. So I know that that work was done. All the</p> <p>18 inspections were passed off. The bolts had to be in there</p> <p>19 in order to be passed off.</p> <p>20 Q. Okay. Should there be a change order request</p> <p>21 or -- in your system or your files implementing this change</p> <p>22 or --</p> <p>23 A. Not necessarily.</p> <p>24 Q. No? Do you recall that APCO had rejected change</p> <p>25 order requests because of a lack of supporting</p> |

Page 58

1 documentation?

2 A. I don't recall that.

3 Q. Do you recall the owner receiving copies of --

4 communications from the owner to APCO, that APCO then

5 forwarded to you, that the owner was requesting further

6 support for certain change order requests?

7 A. I don't recall that. Unfortunately, probably for

8 everyone, in a sense, Shawn Bounds' method was verbal

9 request, oftentimes. And he, oftentimes, failed to go and

10 put his request in writing. Sometimes it's kind of a

11 challenge to get as complete a picture of his changes as

12 would -- otherwise would have.

13 Q. Well, you knew from your own change to the

14 subcontract that, in order for you to get paid, you needed

15 to have something signed off on by APCO. Correct?

16 A. That's what the contract states and that's why we

17 kept pushing for something more than verbal. All the way

18 through the job, we kept pushing him to get something more

19 than verbal. Yeah, I'll get it. Yeah, I'll get it. Yeah,

20 I'll get it. Do the work. I'll get it. Do the work. I'll

21 get it. All the way through.

22 Q. Didn't you reach a point where you actually

23 advised APCO that you're not performing any change order

24 work unless you get something in writing?

25 A. I don't recall, but that sounds like something

Page 60

1 one, 3300 bucks. Can you tell?

2 A. That was performed.

3 Q. Okay. How about Quote 16?

4 A. That was performed.

5 Q. How about Quote 15?

6 A. That was performed. That was per Joe's

7 instruction.

8 MR. PELAN: Wrong Joe. Joe Dehaas.

9 THE WITNESS: Oh, you're right.

10 Q. (By Mr. Jefferies) So you're concluding that

11 these were performed because what, they have a date?

12 A. I'm concluding they were performed because of the

13 inscription down here that says who instructed them to do

14 it. And I'm also saying that based on the fact that I know

15 that the work was completed which allowed the framing

16 portion of the work to be -- receive final inspection pass

17 off.

18 Q. Looking at the first page of Exhibit 5, I want to

19 make sure the record is clear. You don't know who prepared

20 this?

21 A. I don't recall who prepared this.

22 Q. Did you see a ratification agreement during the

23 course of the project?

24 A. I don't recall any kind of a ratification

25 agreement. Ratification of what?

Page 59

1 that we possibly could have done based on the frustration we

2 were having from them not -- from Shawn not producing

3 something in writing for what he was asking us to do.

4 Q. Is it your testimony that, despite your saying

5 that, you went ahead and continued to do change order work

6 without anything in writing?

7 A. There may be some instances where we did changes

8 without anything in writing, just verbally. And that's the

9 frustrating thing about a contract is that verbiage relates

10 to both parties.

11 Is APCO -- is APCO denying that this work was

12 done?

13 MR. DREITZER: Let me -- let's let him ask the

14 questions.

15 THE WITNESS: Okay.

16 Q. (By Mr. Jefferies) That's the nice thing about

17 this process is I get to ask the questions.

18 A. Fine.

19 MR. DREITZER: We'll have our day.

20 THE WITNESS: All right.

21 Q. (By Mr. Jefferies) Okay. Why don't we flip

22 through these. So you think Quote 3 has been performed

23 historically?

24 A. Yes.

25 Q. Okay. I wasn't clear on Quote 18, the next

Page 61

1 Q. Well, I'm going to . . .

2 MR. JEFFERIES: Let's mark this.

3 MS. LYNN: Yeah.

4 MR. DREITZER: You need copies? Or we can take a

5 minute.

6 MR. JEFFERIES: I have --

7 MS. LYNN: No, we have it.

8 MR. JEFFERIES: Thank you.

9 (Exhibit 5 was marked.)

10 (Exhibit 6 was marked.)

11 Q. (By Mr. Jefferies) Sir, I'm going to show you

12 what I've marked as Exhibit 6 and this was in some

13 Bates-numbered production.

14 MR. DREITZER: Okay.

15 Q. (By Mr. Jefferies) But showing you what's

16 entitled Ratification and Amendment of Subcontract

17 Agreement. This one is for . . .

18 MS. LYNN: Buckley.

19 MR. JEFFERIES: Buckley.

20 THE WITNESS: Really? I wouldn't have never come

21 to that.

22 Q. (By Mr. Jefferies) Do you see that?

23 A. I do.

24 Q. Okay. In fact, if you look at the first page

25 under change orders --

| | |
|--|---|
| <p style="text-align: right;">Page 62</p> <p>1 A. Mm-hmm.</p> <p>2 Q. -- it references, Change orders. And attached</p> <p>3 hereto as Exhibit C are all the change orders that have been</p> <p>4 submitted by subcontractor to APCO prior to the effective</p> <p>5 date of this agreement which will correspond to what I</p> <p>6 marked as Exhibit 5, the first page.</p> <p>7 A. Okay.</p> <p>8 Q. Which is what prompted the question in my mind:</p> <p>9 Did Zitting have a ratification agreement like Exhibit 6 for</p> <p>10 the project?</p> <p>11 A. I don't believe so.</p> <p>12 Q. Have you ever seen a document form of agreement</p> <p>13 like this in relation to the project?</p> <p>14 A. I don't believe so.</p> <p>15 Q. Now, if you look at -- would you put Exhibit 3 in</p> <p>16 front of you and also Exhibit 5. Put that out of the way.</p> <p>17 And if you go to the Quote No. 3 within Exhibit 5, it totals</p> <p>18 30,412. And if I'm reading the description, it says,</p> <p>19 Install, tighten screws. Do you see that?</p> <p>20 A. Yes.</p> <p>21 Q. Does that correspond with Item 20 on Exhibit 3?</p> <p>22 A. I don't know if it's inclusive of, because the</p> <p>23 dollar amount changed. So apparently there was some</p> <p>24 jockeying back and forth between the time this was generated</p> <p>25 and the time this was generated.</p> | <p style="text-align: right;">Page 63</p> <p>1 Q. Well, that's why I'm asking the question: Would</p> <p>2 the difference be the difference in the labor rate?</p> <p>3 A. I don't know the answer to that right off the bat.</p> <p>4 Might be a completely different scenario. I'm not sure.</p> <p>5 Q. Well, let's look at -- go to the next one, Presnap</p> <p>6 lines.</p> <p>7 A. Okay.</p> <p>8 Q. I think it's Item 19 on Exhibit 3 and then Quote</p> <p>9 No. 18 within Exhibit 5. That number that looks to be the</p> <p>10 same scope of work, but it's now been reduced to 3300. Do</p> <p>11 you see that?</p> <p>12 A. Yes.</p> <p>13 Q. And would you agree that is based on the change in</p> <p>14 the labor rate?</p> <p>15 A. It would appear to be. I'd have to take a</p> <p>16 calculator and see --</p> <p>17 Q. If you don't mind --</p> <p>18 A. -- what the labor rate would be.</p> <p>19 Q. -- if you could back into it. If you're able to</p> <p>20 answer the question --</p> <p>21 A. It appears to be the same change with a different</p> <p>22 price amount. And I know this one states \$30 an hour. So</p> <p>23 it appears that that's the case. I just -- I haven't done</p> <p>24 the math backwards to --</p> <p>25 Q. Do you mind?</p> |
| <p style="text-align: right;">Page 64</p> <p>1 A. No. It appears that this one was based off of \$50</p> <p>2 an hour for 110 hours and this one is based off of \$30 an</p> <p>3 hour for 110 hours.</p> <p>4 Q. Would you be able to do that same calculation on</p> <p>5 the first one we looked at for the tightened screws?</p> <p>6 A. Let's try that. It appears that that's the case</p> <p>7 as well.</p> <p>8 Q. Okay. I don't want to take the time to walk</p> <p>9 through all of these in Exhibit 5, but the numbers in</p> <p>10 Exhibit 5 do appear to be different from what you're showing</p> <p>11 on Exhibit 3, generally. Correct?</p> <p>12 A. It -- it appears to be. It appears that there was</p> <p>13 some reduction in the field that didn't get translated into</p> <p>14 the office for work that was completed, on at least some of</p> <p>15 them.</p> <p>16 Q. Well, all of the items that I included in</p> <p>17 Exhibit 5 are all based on the \$30 rate, as you've</p> <p>18 calculated it.</p> <p>19 A. Okay.</p> <p>20 Q. Do you see that?</p> <p>21 A. Yes.</p> <p>22 Q. Isn't it true, sir, that you understood that APCO</p> <p>23 was rejecting your change order request unless and until</p> <p>24 they would get owner approval for those items?</p> <p>25 A. It is not.</p> | <p style="text-align: right;">Page 65</p> <p>1 Q. And why do you say that?</p> <p>2 A. That wasn't my understanding.</p> <p>3 Q. APCO did reject your change orders. Right?</p> <p>4 A. I don't recall.</p> <p>5 Q. I thought we went through this.</p> <p>6 A. There was some of them that they wanted a</p> <p>7 reduction in rate; they didn't reject it. And then there's</p> <p>8 some that were approved. So to throw them all in that one</p> <p>9 basket --</p> <p>10 Q. Okay.</p> <p>11 A. -- I don't agree with.</p> <p>12 Q. Fair enough. Which ones do you believe were</p> <p>13 approved by APCO?</p> <p>14 A. I'd have to go through them individually. I</p> <p>15 assure there was some that they actually approved early on</p> <p>16 that we billed for. And then I believe that there was some</p> <p>17 that they approved verbally that we were waiting to bill for</p> <p>18 until they brought their paperwork through which Shawn was</p> <p>19 horrible at. So they verbally approved all of them. So</p> <p>20 when you say "approved," then I have to try to define what</p> <p>21 that means.</p> <p>22 Q. Okay. Would you look at Exhibit 1, the</p> <p>23 subcontract.</p> <p>24 A. Okay.</p> <p>25 Q. Paragraph 5 talks about changes and claims.</p> |

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|---|--|
| <p style="text-align: right;">Page 66</p> <p>1 A. Which section?</p> <p>2 Q. Five. Page 6.</p> <p>3 A. Okay. Okay.</p> <p>4 Q. Did -- does that comply with paragraph 5.1 and 5.2</p> <p>5 by providing written notice of these claims to APCO?</p> <p>6 A. This documentation shows that we did.</p> <p>7 Q. Okay.</p> <p>8 A. And the problem is we couldn't get anything in</p> <p>9 writing from APCO. So it kind of takes two parties to make</p> <p>10 a contract work. It's just not fair for APCO to list all of</p> <p>11 the terms of the contract and then not uphold any of the</p> <p>12 terms themselves and then hold us liable for that.</p> <p>13 Q. Describe for me the process that you would go by,</p> <p>14 in terms of what change orders you would bill on a pay</p> <p>15 application.</p> <p>16 A. Typically we wouldn't bill for any change orders</p> <p>17 until we've got a change order form from APCO that shows</p> <p>18 they've adjusted our contract amount. Then we would put it</p> <p>19 in our system as a change order which would change our</p> <p>20 contract amount and then we'd immediately bill for it if it</p> <p>21 was done.</p> <p>22 Unfortunately, APCO, mostly Shawn, was not keeping</p> <p>23 up his end of that process. So it stalled our ability to</p> <p>24 bill them out, but he was still directing us to do</p> <p>25 everything and verbally approving them. And so all we could</p> | <p style="text-align: right;">Page 67</p> <p>1 do is send them a piece of paper from our side and . . .</p> <p>2 Q. Why did Zitting comply with directions that it</p> <p>3 considered to be changes in scope if it wasn't getting</p> <p>4 anything in writing?</p> <p>5 A. Because he was verbally telling us to do it and</p> <p>6 verbally telling us he'd get it in writing.</p> <p>7 MR. JEFFERIES: No.</p> <p>8 MS. LYNN: No, I just had it out . . .</p> <p>9 MR. DREITZER: This one has the -- okay.</p> <p>10 MR. JEFFERIES: Has all the answers on it.</p> <p>11 THE WITNESS: Cheat sheet.</p> <p>12 MR. DREITZER: Is this Exhibit 7?</p> <p>13 (Exhibit 7 was marked.)</p> <p>14 Q. (By Mr. Jefferies) Sir, showing you what I've</p> <p>15 marked as Exhibit 7. Appears to be an e-mail exchange,</p> <p>16 starts on April 2, 2008. Do you see that?</p> <p>17 A. Yes.</p> <p>18 Q. And at the bottom -- Roy, that's your brother? --</p> <p>19 A. Yes.</p> <p>20 Q. -- is stating one approved change order on this</p> <p>21 job. If we can't get this resolved in the next week, we</p> <p>22 will stop all extra work on Manhattan West. Is it your</p> <p>23 testimony that you proceeded with extra work from and after</p> <p>24 April 2, 2008, even without anything in writing?</p> <p>25 A. I -- we may have gotten some stuff in writing, but</p> |
| <p style="text-align: right;">Page 68</p> <p>1 for the most part, we did not get change orders revising our</p> <p>2 contract amount from APCO after this date.</p> <p>3 Q. Did you ever bill APCO for retention?</p> <p>4 A. I believe so.</p> <p>5 Q. Did you ever send APCO an invoice or pay</p> <p>6 application for retention while APCO was working on the</p> <p>7 project?</p> <p>8 A. I don't believe so.</p> <p>9 Q. Don't believe so?</p> <p>10 A. I don't believe so.</p> <p>11 Q. Did you ever send any correspondence or</p> <p>12 communications to APCO indicating that it was your position</p> <p>13 that APCO was somehow responsible for retention to Zitting?</p> <p>14 A. I believe I sent them an invoice. That would</p> <p>15 suggest that I feel like they're responsible to pay it.</p> <p>16 Q. Did you ever send any follow-up e-mail letter</p> <p>17 after you sent that invoice?</p> <p>18 A. A lien.</p> <p>19 Q. Okay. The lien went to the owner. Right?</p> <p>20 A. I believe APCO got a copy of it.</p> <p>21 Q. Let me make sure my record is clear. And when</p> <p>22 you're -- do you know what date you sent the pay application</p> <p>23 for the retention?</p> <p>24 A. I don't recall.</p> <p>25 MR. JEFFERIES: You got this?</p> | <p style="text-align: right;">Page 69</p> <p>1 MS. LYNN: Is it this one . . .</p> <p>2 Q. (By Mr. Jefferies) Do you have proof that you</p> <p>3 delivered the pay application for retention to APCO?</p> <p>4 A. I don't recall.</p> <p>5 Q. Okay. Sitting here today as the corporate</p> <p>6 designee, do you have proof that Zitting delivered an</p> <p>7 application for payment for retention to APCO?</p> <p>8 A. I don't know of proof right -- just from sitting</p> <p>9 here, but I'm under the assumption that we e-mailed it to</p> <p>10 them.</p> <p>11 Q. E-mail, okay.</p> <p>12 A. Or, excuse me, faxed probably back then.</p> <p>13 Q. Did you -- that's why I was asking the question.</p> <p>14 When that amount obviously didn't get paid, did you send any</p> <p>15 follow-up letter or e-mail to APCO saying, APCO, you're</p> <p>16 somehow responsible for retention?</p> <p>17 A. A lien.</p> <p>18 Q. Other than the lien document?</p> <p>19 A. I don't recall.</p> <p>20 Q. Are you aware of any --</p> <p>21 A. I don't --</p> <p>22 Q. -- such --</p> <p>23 A. -- recall any.</p> <p>24 Q. All right.</p> <p>25 A. If I was aware of it, I'd recall it,</p> |

Page 70

1 theoretically.

2 Q. As the corporate designees here today, are you

3 presently aware of any communications, letters, e-mails to

4 APCO saying, You owe me retention, you haven't paid it,

5 other than the lien?

6 A. None that I recall. None that I'm aware of.

7 Q. I'm going to show you, sir, what was previously

8 marked as Exhibits 85 and 86 to Mr. Allen's deposition.

9 MR. DREITZER: Counsel?

10 MR. JEFFERIES: Yes.

11 MR. DREITZER: Go off the record for a second.

12 MR. JEFFERIES: Yeah.

13 (Pause in proceedings.)

14 Q. (By Mr. Jefferies) Okay. Do you have Allen

15 Exhibit 85 in front of you?

16 A. Yes.

17 Q. Tell me what you're billing here.

18 A. Looks like we're billing for window installation

19 and change orders.

20 Q. Okay. Can you walk me through the items you're

21 billing here?

22 A. On the very last page --

23 Q. Okay.

24 A. -- down under the first place, it says Subtotal.

25 And if you go across the top heading, it says, This period.

Page 72

1 Q. The next item says, Changes to plans, and then you

2 have star AR. Do you see that?

3 A. Yes.

4 Q. Does that refer to APCO responsibility?

5 A. That appears to be kind of what has been going on

6 throughout the documents.

7 Q. Okay. So that -- so that my record is clear, that

8 AR reference, 257,957, is the same AR that is reflected on

9 Exhibit 5. Correct?

10 A. I'd have to do a calculation to see if the two

11 correlate amount-wise.

12 Q. Well, we can do that. I was trying to --

13 A. Because there's not a total on this exhibit.

14 Q. Okay. I was trying to simplify our respective

15 lives. The AR designation is consistent between your pay

16 application, 509, Allen Exhibit 85, and the AR designation

17 in Exhibit 5. Correct?

18 A. Appears to be. I just don't know if the dollar

19 amounts correlate.

20 MR. DREITZER: Counsel, can I just clarify? So

21 are you asking him whether he's conceding that AR, as used

22 in Allen Exhibit 85, stands for APCO's responsibility as it

23 does in Exhibit 5?

24 MR. JEFFERIES: Yes.

25 MR. DREITZER: Oh, okay. Do you understand that

Page 71

1 Q. Yep.

2 A. Everything under this period.

3 Q. So \$20,500 for window installation?

4 A. Yes.

5 Q. Is that change order work or . . .

6 A. I'm not sure. The description is cut off, but it

7 appears that it is, yes.

8 Q. The reason I ask, because it doesn't say changes.

9 It just says, Window installation.

10 A. I think it's cut off. I think the description is

11 cut off, but window installation was not in our original

12 scope. So I would assume it's a change order.

13 Q. And you're only billing half, again, some schedule

14 value?

15 A. Where are you seeing that?

16 Q. Well, if you look at --

17 A. Oh, I got you. Yeah, we had previously billed

18 half. So we were billing the -- the final half.

19 Q. When was this work completed?

20 A. I don't recall.

21 Q. Your -- you didn't sign this pay application until

22 January 30, 2009. Correct?

23 A. Correct.

24 Q. Why did you wait so long to submit this?

25 A. I don't recall.

Page 73

1 question?

2 THE WITNESS: And I -- yeah, I understand that

3 question. I believe it does.

4 Q. (By Mr. Jefferies) Okay. Was Exhibit Allen 85

5 the first time that you formally did a pay application for

6 those change order requests to the tune of 257,957?

7 A. I don't recall.

8 Q. You have another item, Options on Buildings 8, 9,

9 7 -- that's not being billed this period. Strike that.

10 If I go further down, you've got changes to plans.

11 Looks like it should be GR. Is that right?

12 A. Yes.

13 Q. Okay. Is that Geostore responsibility?

14 A. That's consistent with some of the -- well, I

15 don't see GR here. I see APCO. So I don't know the answer

16 to that.

17 Q. Well, that's your -- isn't that what you intended

18 by "GR"?

19 A. I don't know.

20 Q. What did you mean when you used the term "changes

21 to plans"?

22 A. That would mean change orders that were -- plan

23 change orders. So revisions to the plan. So it looks to me

24 like -- and -- it looks to me like everything was split up

25 between AR and GR and it would -- it would -- it would make

Page 74

1 sense that that's a Gemstone responsibility designation. I
 2 just don't know that indefinitely. And that would possibly
 3 be a way for APCO to split the stuff that they're paying for
 4 in-house and the stuff that they're billing Gemstone for,
 5 but I just don't know the answer to that.

6 Q. Okay. But however you did it, it was Zitting that
 7 did the AR and the GR designations on Allen Exhibit 85.
 8 Correct?

9 A. I don't know. I -- and I don't know what the
 10 GR -- I don't know for sure what that even stands for. We
 11 could make assumptions here.

12 Q. Well --

13 A. But I don't know if this is the right exercise for
 14 assumptions.

15 MR. DREITZER: And that also assumes that's an
 16 abbreviation, because it's cut off. It could be a whole
 17 other word.

18 MR. JEFFERIES: Yeah. Well, let me make sure my
 19 record is clear. I thought we did this earlier.

20 Q. (By Mr. Jefferies) You would agree that it looks
 21 like it's GR. Correct?

22 A. It looks like it could be an R, yeah. It looks
 23 like it's GR. I'm just making assumptions as to what that
 24 would mean. I don't know who created Exhibit C in
 25 Exhibit 5, but at the bottom they gave a little key that

Page 76

1 outstanding change order requests either on your Exhibit 3
 2 that we marked today or Exhibit 5. Would you agree?

3 A. That's probably because it wasn't outstanding. It
 4 was approved, potentially.

5 Q. Okay. Maybe I'm not being clear. I'm just trying
 6 to find an apple to an apple.

7 A. Okay.

8 Q. I recognize the dollars don't tie out, but
 9 topically and substantively, are those the same claims, if
 10 you will -- the difference in bid set to permitted
 11 construction set depicted on Exhibit 5 and what you've
 12 billed as changes to plans for 107,000 on Allen Exhibit 85?

13 A. I don't know the answer to that.

14 Q. Okay. In looking at Allen Exhibit 85, how much
 15 had you been paid as of January 30, 2009?

16 A. I don't think this reflects how much I've been
 17 paid. I think it reflects how much I've billed. So I don't
 18 think I can answer that question from this document.

19 Q. Okay. Let's look at Allen Exhibit 86. Now you're
 20 showing the billing period still under Application No. 509,
 21 but you're showing November 30, 2008. Do you know why you
 22 picked that date?

23 A. I don't.

24 Q. But you signed this document on January 30, 2009.
 25 Correct?

Page 75

1 says, AR equals APCO's responsibility. So I don't see a key
 2 anywhere that there's anything about that.

3 Q. Okay. If I asked you this, I apologize. In Allen
 4 Exhibit 85, you say Period 2, 6/30/2008. Why did you pick
 5 that time period?

6 A. I don't know the answer to that.

7 Q. And do you know why you waited until the end of
 8 January 2009 to submit this pay application?

9 A. I don't know if this was the first time this was
 10 submitted or not. I may have been repetitively billing it
 11 with no response. I just don't know.

12 Q. Are you able to tell me where the 423,654.85 comes
 13 on Allen Exhibit 85 for change orders?

14 A. I'd have to do a calculation, but I'm assuming
 15 it's those bottom two subtotals.

16 Q. The 107 and the 316?

17 A. Mm-hmm. That is correct. That's -- that total
 18 correlates.

19 Q. Would the 107,589.30 that is shown for changes to
 20 plans on Allen Exhibit 85 correspond to the item difference
 21 in bid set to permitted construction set on Exhibit 5?

22 A. Well, that's 155,000 on Exhibit 5. So the dollar
 23 amounts don't correlate.

24 Q. I respect that. I'm asking because I don't see
 25 any other reference to plan changes on your itemization of

Page 77

1 A. It appears so, yes.

2 Q. What are you billing in this pay application?

3 A. Retention.

4 Q. Is this the first time you've sought to bill
 5 retention?

6 A. I don't know the answer to that. I don't recall.

7 Q. What documentation do you have to confirm how much
 8 you've been paid on the project?

9 A. I believe any documentation that I would have for
 10 that would have been submitted in document request.

11 MS. LYNN: What's the date on the document . . .

12 MR. JEFFERIES: Before that, I think.
 13 (Exhibit 8 was marked.)

14 Q. (By Mr. Jefferies) Sir, showing you what I've
 15 marked as Exhibit 8 to your deposition, can you identify
 16 that for me, please.

17 A. Looks like a statement of account for the
 18 Manhattan West project.

19 Q. Are these -- well, the first page shows an invoice
 20 dated 6/30/2008 for 347,441.67. Do you see that?

21 A. I do.

22 Q. That's the number reflected in Allen Exhibit 85.
 23 Right?

24 A. Yes.

25 Q. And it wasn't billed on June 30, 2008, was it?

Page 78

1 A. I don't believe it was. I believe that it's an
 2 error. When you go in to create an invoice, you -- you can
 3 change the period.
 4 Q. Okay.
 5 A. And I believe someone failed to do that.
 6 Q. Now, if you go to the second page of Exhibit 8,
 7 this doesn't have the cutoff on some of the letters we were
 8 looking at earlier. Is this a summary of all of the
 9 outstanding change orders in your mind?
 10 A. It appears to be.
 11 Q. Okay. Can you -- the first item is window
 12 installation. And I'm not asking you this to be obnoxious.
 13 Is there any way that you can find that reference in either
 14 Exhibit 3 or 5 or was it a prior change order that was
 15 actually signed?
 16 A. I believe it was one that actually did get sent
 17 all the way through the system.
 18 Q. Okay.
 19 A. So it wasn't hanging out there.
 20 Q. Okay. Item No. 2 is changes to plans and it has
 21 the AR. Now, this is your terminology in your system. So
 22 that's APCO responsibility, in your mind. Right?
 23 A. I don't know where that came from. I don't know
 24 if that came off of this document, and I was just trying to
 25 conform with this document.

Page 80

1 processed through and our contract amount increased on
 2 APCO's books.
 3 Q. Okay.
 4 A. So I don't believe that it would have a reason to
 5 be on either of these lists.
 6 Q. Three and five?
 7 A. Correct.
 8 Q. Then the last item is -- well, strike that.
 9 Before I -- the APCO responsibility -- strikes
 10 that.
 11 Item No. 2 that has the AR designated on page 2 of
 12 Exhibit 8 -- when we take a break for lunch and so we don't
 13 have to do it on the record, would you all be willing to at
 14 least see if that 257,957 ties out to the ARs on Exhibit 5?
 15 A. Yes.
 16 Q. Okay. And which brings me to the last item and
 17 that was changes to plans, GR on page 2 of Exhibit 8. And
 18 I'm -- still have this lingering question as to whether that
 19 topical, slash, substantive issue is the item that was
 20 priced out at 155,896. So I'm rasbbling. I don't even think
 21 that's a question.
 22 Does any of this refresh your recollection as to
 23 whether those two tie out?
 24 A. It does not.
 25 Q. Okay. If you go to page 3 of Exhibit 8, what does

Page 79

1 Q. Exhibit --
 2 A. And I don't know who created this (gesturing)
 3 document. So this (gesturing) document says AR equals
 4 APCO's responsibility. So I don't know if -- if we sent all
 5 the changes into APCO and they -- they internally sorted and
 6 decided, Okay. This one goes to the owner, this one's us,
 7 this is owner, this is us, sent this back to us and said,
 8 Bill these in separate line items, so that we can bill the
 9 owner for this one. I just don't recall that. That seems
 10 logical.
 11 Q. Okay. I didn't want to interrupt you, but in your
 12 answer, you were pointing to this document. You were
 13 pointing to Exhibit 5. Right?
 14 A. Yes.
 15 Q. Okay. As the corporate designee here today, would
 16 it be reasonable for us to conclude that the AR, as used in
 17 Zitting's internal accounting, corresponds to those items
 18 that you're designating as APCO's responsibility, consistent
 19 with Exhibit 5?
 20 A. I would say yes.
 21 Q. Okay. The next item in Exhibit 8 in the change
 22 order summary says, Options at Buildings 8 and 9. Is there
 23 a corresponding item in Exhibits 3 or 5 or do you believe
 24 that to be a change order?
 25 A. I believe that to be something that was actually

Page 81

1 this show that Zitting was paid on the project?
 2 A. This document shows that we paid 3. -- \$3,282,849.
 3 Q. Okay. Which ties out pretty closely to the dollar
 4 amount on the less previous certificates for payment of
 5 Allen Exhibit 65. Correct?
 6 A. Correct.
 7 Q. Okay. So given the fact that those two numbers
 8 tie out, would it be fair to conclude prior to the July --
 9 strike that.
 10 Given those two payment numbers, between
 11 Exhibit 8, page 3 and Allen Exhibit 85, that, in fact,
 12 Zitting was paid everything that had billed prior to
 13 November -- excuse me, prior to January 30, 2009?
 14 MR. JEFFERIES: Can you fix that? Fix that.
 15 Q. (By Mr. Jefferies) Correct?
 16 A. It shows there's an open amount of 750,807.
 17 So . . .
 18 Q. I get that. I'm asking a different question.
 19 Given the fact that the numbers for payments received
 20 correspond, wouldn't it be fair to conclude that prior to
 21 you signing Allen Exhibits 85 and 86 on or about January 30,
 22 2009, that everything you had submitted in the pay
 23 application had been paid?
 24 A. I don't think that I would draw that conclusion.
 25 I'd rather go and look up actual cash receipts and come to a

Page 82

1 number based off of that, in case there's an accounting
 2 error with accounts -- with the receivables. We may have
 3 been paid more than that at that point. I mean, payments to
 4 date, 3.2. As of 2 -- 4/6 of 2010, it seems too low on a
 5 \$14 million contract.

6 Q. Well, as far as APCO goes, your -- the scope you
 7 did -- worked on for APCO was only Building 8 and 9 and
 8 that --

9 A. That was 14 million.

10 Q. -- original scope --

11 A. No.

12 Q. -- was approximately 3.6 million --

13 A. Oh, I'm sorry. Where is the subcontract?

14 MR. DREITZER: Exhibit 1.

15 MR. JEFFERIES: Or 3.2.

16 THE WITNESS: Where is the amount? What page is
 17 your dollar amount on, Joe?

18 MS. LYNN: I think 16.

19 MR. JEFFERIES: Sixteen.

20 THE WITNESS: What am I missing? I'm seeing a
 21 \$14 million contract here.

22 Q. (By Mr. Jefferies) Well, I think you're right.
 23 When you -- when you factor in all the buildings, but --

24 A. So you're referring to Buildings 8 and 9?

25 Q. Yeah, but I don't want to talk you into anything.

Page 84

1 (An off-the-record discussion was had.)

2 Q. (By Mr. Jefferies) Sir, while we were off the
 3 record, we had a discussion about -- while you're pricing in
 4 the original scope of Exhibit 1, the subcontract included in
 5 excess of \$14 million, you would agree that your original
 6 scope, as directed, only included Buildings 8 and 9 which
 7 would be one Building Type 4 and two Type 5?

8 A. Yeah, that's my understanding.

9 Q. Okay. For an approximate 3,600,000 original
 10 contract price for phase 1?

11 A. That's what it appears to me, yes.

12 Q. All right. So we started down this path because I
 13 get these thoughts in my brain, but to firm up that -- you
 14 had been paid \$3,282,849 as of April 6, 2010, the date of
 15 Exhibit 8, which --

16 A. Sorry. Which exhibit?

17 Q. Right.

18 A. That appears to be correct.

19 Q. Which, given the billings, Allens Exhibit 85
 20 and 86 would mean you had been paid everything you had
 21 submitted in a pay application. Correct?

22 A. Up to this point, correct.

23 Q. This point being April 6, 2010?

24 A. The only -- the only things that I show open are
 25 these -- are Exhibits Allen 86 and Exhibits Allen 85.

Page 83

1 I want to make sure our record is clear. Your phase 1 that
 2 brought us to this point was your work on Buildings 8 and 9
 3 under the APCO subcontract. Correct?

4 A. Yes.

5 Q. Okay. So I'm showing you a document. APCO's
 6 position is that the original contract amount, based on your
 7 subcontract pricing, was 3 million --

8 A. 310.

9 Q. -- 610,000. Do you agree with that?

10 A. I'd have to go back and verify it, because I'm --
 11 I've got the contract set up for the full 14,400,000.

12 So . . .

13 Q. Can you confirm it based on page 16 and 17 of
 14 Exhibit 1?

15 A. So how does Building Type 4 and 5 correlate with
 16 Buildings 8 and 9? Does anyone know? Was Buildings 8
 17 and 9 Building Type -- Building Types 4 and 5?

18 Q. If he answers, I'll have to swear him in. So we
 19 can do it off the record.

20 A. I was just thinking out loud. I was talking out
 21 loud. So 3.6 -- 311. What was that amount that APCO was
 22 claiming?

23 MR. JEFFERIES: Oh, let's go off the record. Do
 24 you mind?

25 MR. DREITZER: No.

Page 85

1 Q. Okay.

2 A. Everything else I show as paid.

3 Q. Okay. That's why I asked you this the way I did.
 4 Then I'm going to close this out, we'll go grab something to
 5 eat real quick.

6 A. Okay.

7 Q. So given your answer, Allen 80 -- Exhibit 85, it
 8 shows almost the exact amount that you -- showing you got
 9 paid in Exhibit 8. Right?

10 A. That is correct.

11 Q. Okay. Given that fact, doesn't that confirm to
 12 you that, as of January 30, 2009, you have been paid
 13 everything you had invoiced in a pay application prior to
 14 your issuance of Allen Exhibits 85 and 86?

15 A. That would appear to be the case.

16 Q. All right. Okay. I -- before we end, let's
 17 finish Exhibit 8. Go to the next two pages. Am I
 18 understanding that, in fact, Zitting has written off the
 19 retention and the change order billings?

20 A. It appears that I made a note of such. I don't --
 21 I'd have to verify whether that actually happened on our
 22 books or not.

23 Q. That's what you're showing here. Right?

24 A. It appears that that was -- that's what I was
 25 shown, but I'd have to verify if that happened or not.

Page 86

1 Q. What would you need to look at, because it
 2 actually looks like it's being done here in this aging
 3 detail. Would you agree?
 4 A. It looks like the aging detail's showing a
 5 write-off of 403,365.
 6 Q. Okay. That would be the retention?
 7 A. I believe that number correlates with retention.
 8 Q. Okay. And then go to page Bates label 120 within
 9 Exhibit 8. It looks like that 347,441 for change orders
 10 has, in fact, been written off. Correct?
 11 A. It appears that way.
 12 Q. Okay. All right.
 13 A. The thing I would have to verify is our tax
 14 returns to make sure that, in terms of IRS purposes, it
 15 truly was written off. It appears that -- that it was on
 16 this document, but I'd have to verify.
 17 Q. Okay. Let's grab a quick bite. If you guys --
 18 before we go off the record, if you guys could -- if you
 19 wouldn't mind -- looking at Exhibit 5 and seeing if the ARs
 20 equate to the numbers you were showing on Exhibit 8.
 21 A. Okay.
 22 Q. And what I will do is make the corresponding
 23 commitment to go through my stack of remaining documents,
 24 seeing how much I truly need or what I can save for trial.
 25 THE WITNESS: Okay.

Page 88

1 need to run through it. So we'll do that.
 2 (Exhibit 9 was marked.)
 3 (Exhibit 10 was marked.)
 4 Q. (By Mr. Jefferies) Sir, showing you what I've
 5 marked as Exhibit 10. Is -- it's Mr. Pelan's letter of
 6 April 18, 2008. I think I alluded to this earlier. Do you
 7 recall seeing this before today?
 8 A. Let me read it real quick. I don't recall seeing
 9 this.
 10 MR. JEFFERIES: Okay. Let's do this one.
 11 (Exhibit 11 was marked.)
 12 MR. DREITZER: Thanks.
 13 Q. (By Mr. Jefferies) Sir, showing you what I've
 14 marked as Exhibit 11, is that your signature? No, that's --
 15 A. That's my brother Roy's --
 16 Q. -- Roy's.
 17 A. -- signature.
 18 Q. Roy's.
 19 MS. LYNN: Roy's signature.
 20 Q. (By Mr. Jefferies) Do you recognize that being
 21 Roy's signature?
 22 A. Yes.
 23 Q. Okay. Have you seen this before today?
 24 A. Let me look through it.
 25 Q. Not all of them are yours, if you go to the next

Page 87

1 MR. JEFFERIES: Let's go off the record.
 2 (A lunch recess was taken.)
 3 Q. (By Mr. Jefferies) Okay. Sir, while we were off
 4 the record for our lunch break, I had shown you my cheat
 5 sheet that's included in my version of Exhibit 5, and I will
 6 represent to you that what we did is we had Mary Jo put the
 7 corresponding August 8th, 2008, quote from you, from
 8 Zitting -- that, to my understanding, is based on the
 9 \$30-an-hour rate and those quotes are what I've included in
 10 Exhibit 5.
 11 So I know it's not fair to ask you this today, but
 12 as I understand it, based on our discussion off the record,
 13 you all will confirm or look at this and get back to me
 14 on -- because, by our calculation, even the 257 in
 15 Exhibit --
 16 MR. DREITZER: Five?
 17 MR. JEFFERIES: -- 8 --
 18 MR. DREITZER: Oh, 8.
 19 MR. JEFFERIES: -- would actually -- using your
 20 revised pricing -- go down to 176. That's -- you don't have
 21 to respond to that. That's just me popping off for the
 22 record.
 23 MR. DREITZER: Okay.
 24 MR. JEFFERIES: Okay.
 25 MR. DREITZER: I understand how you get there. We

Page 89

1 page.
 2 MR. DREITZER: Oh, by the way, I should -- while
 3 we're on the record, I do want to raise the same concern
 4 about this not having been Batesed anywhere, but, you know,
 5 we're confident it's got to be in the record somewhere with
 6 a stamp on it.
 7 MR. JEFFERIES: Well, I hope so. Obviously,
 8 that's -- he's confirmed that's Roy's signature. So I don't
 9 think there's any question that --
 10 MR. DREITZER: Well, there's no -- yeah, I mean, I
 11 get that, but I just -- the issue is that if it had never
 12 been produced before today, that's my concern, but we'll see
 13 where it turns up.
 14 THE WITNESS: I don't recall seeing this before
 15 today.
 16 MR. JEFFERIES: Okay.
 17 (Exhibit 12 was marked.)
 18 Q. (By Mr. Jefferies) Sir, showing you what I've
 19 marked as Exhibit 12. You know what, I'm going to
 20 withdraw 12.
 21 MR. DREITZER: Okay.
 22 Q. (By Mr. Jefferies) Just leave it in. I'm not
 23 going to ask you about it. There's a cleaner one that's
 24 more worth our time. And let's go with this one.
 25 MR. JEFFERIES: Could you be a little quicker next

Page 90

1 time.

2 THE WITNESS: Chop, chop.

3 MR. JEFFERIES: Man, why don't you just do this.

4 (Exhibit 13 was marked.)

5 Q. (By Mr. Jefferies) Sir, showing you what I've

6 marked as Exhibit 13, is that your signature?

7 A. Yes.

8 Q. Okay. Tell me what this is.

9 A. It's a lien. Unconditional lien waiver --

10 Q. Up through what date?

11 A. -- upon progress payment. Through May of 2008 is

12 what it says.

13 Q. And did you make any attempt to itemize any

14 pending or unresolved claims or change order requests?

15 A. It doesn't appear that I did on this document.

16 Q. Would you have done so in any corresponding

17 letter, e-mail, transmitting Exhibit 13 to APCO?

18 A. I don't -- I don't recall. I -- I could have.

19 (Exhibit 14 was marked.)

20 Q. (By Mr. Jefferies) Sir, showing you what I've

21 marked as Exhibit 14, for the record, is an August 12, 2008,

22 e-mail from Gemstone to various subcontractors. And if you

23 look a couple of lines from the bottom, you'll see Roy

24 Zitting. See that?

25 A. Oh, yeah.

Page 92

1 (Exhibit 15 was marked.)

2 Q. (By Mr. Jefferies) Sir, showing you what I've

3 marked as Exhibit 15, which I'll represent to you is the

4 executed agreement between Gemstone and CAMCO after APCO

5 left the project. Do you see that?

6 A. That's what -- if that's what you represent.

7 I . . .

8 Q. I will represent -- it is -- you can tell on the

9 first paragraph -- Gemstone and CAMCO. It's signed on

10 page 19.

11 A. Okay.

12 Q. Have you seen this document before today?

13 A. Never.

14 Q. Okay. If you go to the second page, it talks

15 about third party service providers, and you will note that

16 there is a list of third party service providers that the

17 general contractor is to engage to continue working on the

18 project in Exhibit C.

19 If you go to page 23 within the exhibit, you'll

20 see a listing of existing third party service providers.

21 And you'll see Zitting Construction at the bottom. Do you

22 see that?

23 A. I do.

24 Q. Does that refresh your recollection as to any

25 discussions you may have had with Gemco [sic] -- I don't

Page 91

1 Q. Just confirming --

2 A. Yes.

3 Q. Tell me if you've seen this before today.

4 A. I don't recall seeing this.

5 Q. Does it refresh your recollection as to any --

6 well, strike that.

7 You'll notice in the e-mail Gemstone says, We're

8 going to start reaching out to the subcontractor to try and

9 resolve change orders, at cetera. Does it refresh your

10 recollection as to discussions you may have had with

11 Gemstone about some of your change order requests?

12 A. It doesn't.

13 MR. DREITZER: Counsel, while we're on the record

14 on this one, it looks like it references an attachment. Do

15 we know what -- do we have that or know what it is?

16 MR. JEFFERIES: I don't have it with me.

17 MR. DREITZER: Okay.

18 MR. JEFFERIES: We didn't copy it.

19 MR. DREITZER: Okay. I just wanted to note that.

20 Q. (By Mr. Jefferies) Do you recall after APCO left

21 that the permits -- I don't know what the right word is --

22 were rescinded or cancelled in APCO's name for the project?

23 A. I don't recall anything about that.

24 MR. JEFFERIES: Let's do this one.

25

Page 93

1 know why I want to say that. Strike that.

2 Does that refresh your recollection as to any

3 discussions you may have had with Gemstone and/or CAMCO in

4 August 2008 about continuing on after APCO?

5 A. Does not.

6 Q. Okay. If you go to page 6 of the agreement,

7 Exhibit 15, paragraph 5.02, you'll see a completed work

8 reference. And the document says, Set forth on Exhibit E

9 hereto is an update of the status of the work as of the

10 effective date. Then if you would, sir, go to Exhibit E.

11 It's found on page 26 of Exhibit 15.

12 A. Which building did we decide I was working on?

13 Q. Well, that's what I was going to ask you. I think

14 we --

15 MR. JEFFERIES: Yeah, but . . .

16 Q. (By Mr. Jefferies) I believe it's 8 and 9.

17 A. Okay.

18 Q. My question was: Did you do any work on

19 Buildings 2, 3, or 7?

20 A. There's a potential that I installed some windows

21 in one of the other buildings. I just don't know right now.

22 Q. Okay. Go to page 27. And, again, I've got a head

23 start on you. Mine's highlighted, but if you look under

24 Buildings 8 and 9, you'll see references to drywall.

25 A. Okay.

| | |
|---|--|
| <p style="text-align: right;">Page 94</p> <p>1 Q. And there's some percentages complete for the 2 various floors in those two buildings, 8 and 9. 3 A. Okay. 4 Q. Continuing on to the next page, 28, under 5 Building 9, it says, Corridors, drywall has not started. 6 First floor corridor lid framing is 70 percent complete and 7 then the drywall itself is shown as being 55 to 70 percent 8 complete depending upon the building. 9 My question to you is: Sitting here as the 10 corporate designee for Zitting, do you have any facts, 11 documents, or information to rebut these purported 12 percentages of completion for the drywall on Buildings 8 13 and 9? 14 A. I don't. I can't help but notice that it shows 15 framing complete on both Buildings 8 and 9 too. 16 Q. Did you have -- did you do any of the soffits -- 17 framing for the soffits? 18 A. I don't recall. That could have been done by the 19 drywaller, light gauge steel. 20 Q. Then how about the shafts? Did you do any framing 21 for the shafts? 22 A. That could have been drywall, light gauge steel. 23 It typically is. 24 Q. If I asked you this, I apologize. How about first 25 floor lid framing? Is that something you would do?</p> | <p style="text-align: right;">Page 95</p> <p>1 A. That would be drywall. 2 Q. Okay. 3 MR. JEFFERIES: Let's mark this. 4 (Exhibit 16 was marked.) 5 MR. DREITZER: Sixteen? 6 Q. (By Mr. Jefferies) Sir, I marked as Exhibit 16 7 what I believe is a payment -- well, strike that. 8 Why don't you tell me what Exhibit 16 is. 9 A. Looks like some sort of accounting report on a 10 couple checks that were cut to Zitting for the Manhattan 11 West project and then a copy of a check that corresponds. 12 Q. If you go to the last page, I think I need to 13 clear up the record, because I was mistaken when I read your 14 subcontract pricing in those pods we went over -- 15 A. Mm-hmm. 16 Q. -- to get to the -- if you look at the top of the 17 third page of Exhibit 16, it shows lump -- one lump sum for 18 Building 8, Building 9 at 1.805 million. The total is 19 3,610,000. Would you agree that's how your original phase 1 20 contract price was arrived at? 21 A. I'd have to go back in this contract. This number 22 is different than these two added together. 23 Q. It is. I think I screwed the record up when I 24 said that earlier. 25 A. I would -- I would have to say that this looks</p> |
| <p style="text-align: right;">Page 96</p> <p>1 like how the contract amount was derived. 2 Q. Okay. Let me make sure my record is clear. Your 3 phase 1 pricing under the subcontract for Buildings 8 and 9 4 totaled \$3,610,000 based on one building each at \$1,805,000. 5 Correct? 6 A. Correct. 7 Q. All right. 8 A. Previous to change orders, of course. 9 Q. Sure. 10 A. And then I'm noticing here, Install windows on 2 11 and 3. So I did do some work on other buildings, as I had 12 thought. 13 Q. Okay. Which I wanted to ask you. You're getting 14 this check for \$33,847. Does this resolve the 17,000 that 15 you were shown as owed in Exhibit 8? 16 A. Which page are you referring to? 17 Q. Page 2 of Exhibit 8 shows -- 18 A. Well, this isn't saying what's owed. It's saying 19 what's approved. 20 Q. But I'm -- I guess my point is, through 21 Exhibit 16, if I'm reading this correctly, you were paid 22 the 17108. 23 A. It appears that's the case. 24 Q. Okay. 25 A. Yeah, it shows it in this draw request it was</p> | <p style="text-align: right;">Page 97</p> <p>1 previously drawn . . . 2 Q. In which one? 3 A. In -- 4 MR. DREITZER: Allen 85. 5 THE WITNESS: Eighty-five. 6 MR. JEFFERIES: Okay. 7 Q. (By Mr. Jefferies) I guess what threw me -- why 8 is it showing up in Exhibit 8? Do you know? 9 A. It's just an approved change order log. 10 Q. But -- 11 A. It's not talking about payment status in 12 Exhibit 8. 13 Q. All right. 14 A. So they did actually approve some change orders 15 and it's reflected in Exhibit A -- 8 in writing and the rest 16 were just verbally approved and in the process of approval. 17 Q. Okay. Exhibit 5. I know you told me that you 18 didn't prepare it. Did you have negotiations concerning 19 Exhibit 5 with CAMCO and/or Geostone? 20 A. I don't recall any at this time. 21 Q. If you had received verbal directions from Shawn, 22 did Zitting ever follow up with any type of e-mail 23 confirmation or -- or letter or fax? 24 A. I think that these work orders we've been 25 discussing is evidence that we did follow up in writing.</p> |

Page 98

1 Q. Okay. Prior to performing the work, would you
2 have -- would Zitting have -- strike that.
3 Would it have been Zitting's company practice to
4 confirm verbal directions to perform what you consider to be
5 extra work prior to the work being performed?
6 A. Not always.
7 Q. Okay. Did you -- did Zitting do that on this
8 project?
9 A. Do what?
10 Q. Send a fax, letter, e-mail confirming verbal
11 direction before you did the work?
12 A. Not always.
13 Q. Are you aware of any?
14 A. None that I can think of right now.
15 Q. Isn't it true, sir, that you filed the lien before
16 you billed APCO for the retention in those change orders,
17 Allen Exhibits 85 and 86?
18 A. I don't recall the date of the lien.
19 Q. Did you ever provide APCO with actual invoices for
20 the materials you used for claimed extra work?
21 A. I don't recall. I don't recall being asked for
22 them.
23 Q. How did you track disputed change order requests
24 in your accounting system?
25 A. The only ones that I put in my accounting system

Page 100

1 A. Maybe as a reminder that we still need it paid.
2 MR. DREITZER: Did you want to see the mechanics
3 lien? Would that help you at all?
4 THE WITNESS: No.
5 MR. DREITZER: Okay. Just want to make sure.
6 Q. (By Mr. Jefferies) Do you know if APCO ever
7 received final payment from the owner?
8 A. I don't know.
9 Q. Are you aware of when APCO last received a payment
10 from Gerstene?
11 A. I'm not.
12 Q. In looking at the paperwork that I marked as
13 Exhibit 16, does that confirm for you that that project used
14 construction funds control?
15 A. It does.
16 Q. And you're familiar -- generally familiar with
17 that process?
18 A. Yes.
19 Q. And given the mechanics of those systems, APCO, as
20 the general contractor, would not have received your
21 retention until final completion of the project. Correct?
22 A. I don't know their arrangement with the owner in
23 regards to retention.
24 Q. Okay. Did you review the prime contract between
25 Gerstene and APCO?

Page 99

1 were the ones that were approved. And the ones that were
2 still being disputed were in the little worksheets that
3 we've been looking at.
4 MR. JEFFERIES: I'm not going to mark this.
5 MR. DREITZER: What is it?
6 MR. JEFFERIES: It's your complaint for
7 foreclosure.
8 MR. DREITZER: Okay.
9 MR. JEFFERIES: Exhibit 1.
10 MR. DREITZER: Ma-hmm. You're going after the
11 date it was recorded? I mean, we can stipulate that it was
12 recorded on December 23rd of 2008. So . . .
13 MR. JEFFERIES: The lien?
14 MR. DREITZER: Yeah, the lien. Mechanics lien.
15 Yeah, that's when it was recorded.
16 Q. (By Mr. Jefferies) Given that stipulation, would
17 you agree that you recorded the lien before you billed
18 retention in change orders to APCO in a pay application?
19 A. There may have been a previous pay application
20 sent to them previous to this one. I don't know, but that
21 certainly is previous to the date that's on these two pay
22 applications. The date on these is January 30th, 2009.
23 Q. Why would you have done Allen Exhibits 85
24 and 86 -- i.e., those pay applications -- on January 30,
25 2009, if you had previously billed those?

Page 101

1 A. I don't recall.
2 Q. Ever?
3 A. I don't recall ever doing it.
4 Q. Exhibit 16 reflects a joint check from funds
5 control to Zitting and APCO. Correct?
6 A. Correct.
7 Q. How did Zitting learn that CAYCO was going to be
8 acting as a replacement contractor for APCO?
9 A. I don't recall.
10 Q. Do you know if there was ever a certificate of
11 occupancy for Building 8?
12 A. I didn't -- I do not know.
13 Q. Do you know if there was ever a certificate of
14 occupancy for Building 9?
15 A. I do not know.
16 Q. Do you know if those buildings were ever completed
17 to the point where they could have been beneficially used
18 and occupied?
19 A. They're being lived in right now. Is that what
20 you're asking?
21 Q. No.
22 A. I'm sure they got a C of O in order to do that.
23 Q. Did you do any work on the project after Gerstene
24 lost the project and it was sold?
25 A. No.

Page 102

1 Q. Are you aware of Buildings 8 and 9 ever being
2 completed in 2009?

3 A. They were not.

4 Q. Did your field crews prepare daily reports?

5 A. I don't recall -- I -- on this job, if they did or
6 not.

7 Q. Would it have been Zitting's standard practice and
8 procedure for its field crews and/or project superintendents
9 or project manager to prepare daily reports for a project
10 like this one?

11 A. Typically we do.

12 Q. That's a yes?

13 A. Yes.

14 Q. I'm going to represent to you that, in the
15 documents that have been produced in this case, there are
16 only Zitting daily reports between January and April 2008.
17 Can you explain why there would be gaps and the lack of
18 daily reports?

19 A. I cannot.

20 Q. You would agree that your daily reports have a
21 spot for extra work that's being either directed and/or
22 tracked. Correct?

23 A. Yes.

24 Q. As the company designee, have you seen any of the
25 Zitting daily reports where that extra work that is being

Page 104

1 Q. If I were to represent to you that the Zitting
2 records produced to us in this case show that Zitting
3 actually performed over \$200,000 in work after APCO left the
4 project, would you have any reason to dispute that?

5 A. I would have to add up the change orders that --
6 that we identified as CAMCO change orders to quantify that
7 number. I thought it was less than that.

8 Q. And you're referring to the non-AR items in
9 Exhibit 5?

10 A. I believe it was Exhibit 5. Scattered, it looks
11 like. Thank you. Okay. There's some back here that
12 actually say CAMCO on them, I thought.

13 Q. Well, I may have misled you. I think you're
14 referring to -- Exhibit 3 has CAMCO.

15 A. Okay. That's --

16 Q. Let me strike the question.

17 A. That's the only place that I've seen it.

18 Q. Look at Exhibit 3, if you would. You're killing
19 me, Szalla. Here.

20 A. I got it, man.

21 MR. DREITZER: Exhibit 3, Counsel?

22 MR. JEFFERIES: Yeah.

23 Q. (By Mr. Jefferies) And let me ask you a question.
24 That's usually how this proceeds best, instead of me just
25 talking. In looking at Exhibit 3 -- it looks like we went

Page 103

1 performed is being noted on a daily report and/or being
2 tracked for compensation?

3 A. We typically don't utilize that piece of the form.
4 We typically utilize an external document.

5 Q. Did you assemble the change order -- I don't know
6 what to call them. They're not change order requests.
7 They're not field directives. The bids or quote
8 designations that are included in Exhibit 5, did you do the
9 quantification for those items?

10 A. That was typically done by Roy on this job.

11 Q. Did you do any of them?

12 A. I don't believe so.

13 Q. If Ms. Allen testified that every pay application
14 that was submitted by Zitting during the course of
15 construction -- and by "course of construction," I mean when
16 APCO was on the project into August of '08 -- was actually
17 received from Zitting via e-mail, do you have any reason to
18 dispute that?

19 A. No, this job was happening kind of in that whole
20 e-mail/fax transition. So we did some of each.

21 Q. You say you did some of each. Some projects were
22 fax; some were e-mail?

23 A. Some people in the office were faxing. Some
24 people were e-mailing. Some customers wanted to receive
25 them via fax or via e-mail.

Page 105

1 through this -- Nos. 22, 23, 24, and 25 are the change
2 orders you did for CAMCO. Right?

3 A. I wouldn't say that I did them for CAMCO. I'd say
4 I did them while CAMCO was on-site.

5 Q. Fair enough. Those approximate 28 grand?

6 A. Yeah, which is a lot less than the number you're
7 trying to quantify here.

8 Q. So back to my question. Do you have any reason to
9 dispute that Zitting did over \$200,000 in work after APCO
10 left the project?

11 A. I don't believe we did.

12 Q. Did Zitting ever punch list phase 1, Buildings 8
13 and 9?

14 A. Yes.

15 Q. Wouldn't it be true, sir, that -- well, strike
16 that.

17 MR. JEFFERIES: Why don't we go off the record and
18 let's take a quick break and I think I'm close to done.

19 MR. DREITZER: Okay.

20 (Pause in proceedings.)

21 Q. (By Mr. Jefferies) Sir, I'm going to show you
22 Exhibit 11.

23 A. Okay.

24 Q. And one of the large change orders that Zitting
25 submitted was a change order regarding the differences

Page 106

1 between the bid set and -- bid set and the permanent set, I
 2 believe. That's your position. Right? It's the largest
 3 change order.
 4 A. I'd have to -- which exhibit are you referring to?
 5 Q. We could do it on any. We could do it on
 6 Exhibit 3 if you wanted.
 7 A. Seems to be the only one -- here we go.
 8 MR. DREITZER: Are you talking about Item 15?
 9 MR. JEFFERIES: Yeah.
 10 Q. (By Mr. Jefferies) And you recall seeing that
 11 Gemstone approved, like, \$16,000 for that?
 12 A. I don't recall seeing that.
 13 Q. It was on Exhibit 5. See that reference to
 14 16,000?
 15 A. Okay.
 16 Q. My question to you is: After Zitting was advised
 17 that that change order was rejected, did Zitting ever
 18 respond back and support the balance of that change order?
 19 A. Well, the whole change order's still listed as
 20 155,000. It's just only -- only 16,000 is being allocated
 21 to Gemstone in this -- in Exhibit 5. The rest is being
 22 allocated to APCO.
 23 Q. Okay. Go to -- do you have Exhibit 11?
 24 A. Yes. Okay.
 25 Q. This is the transmittal from APCO back to Zitting,

Page 108

1 Q. (By Mr. Jefferies) -- through 1733. And my
 2 question to you is: Anywhere in your job cost for the
 3 project do you track time or materials for the disputed
 4 change order request at issue?
 5 A. No.
 6 Q. Do you want to look at it before --
 7 A. No, we don't.
 8 MR. JEFFERIES: Okay. All right. Sir, I think
 9 that's all the questions I have. I will ask that you read
 10 and sign.
 11 MR. DREITZER: That's fine.
 12 MR. JEFFERIES: So she will get -- you've been
 13 through this before.
 14 Q. (By Mr. Jefferies) She'll get the draft to your
 15 counsel.
 16 A. Okay.
 17 Q. And I ask that you read and sign it and make any
 18 changes you deem necessary or proper. Understand that at
 19 trial I'll be able to comment on any changes you might make.
 20 A. Okay.
 21 MR. JEFFERIES: Okay.
 22 MR. DREITZER: Just have a few questions. Very
 23 briefly.
 24 MR. JEFFERIES: You do or don't?
 25 MR. DREITZER: I do.

Page 107

1 enclosing the owner's review of Change Order 11. Do you
 2 see -- at the bottom of page --
 3 A. Yes.
 4 Q. -- 3 of the exhibit? And if you look at the
 5 writeup, you can see the owner and APCO are rejecting it
 6 because there's no breakout of cost. I won't read all that
 7 on the record for time's sake. And they -- Gemco confirms
 8 the structural portion is 8,056 and consists of header and
 9 beam revisions to after 5/25/07 set. So if they're going to
 10 double that for the two buildings, that's where you get the
 11 16,000?
 12 A. Right.
 13 Q. Do you get that?
 14 A. Yeah, I get that.
 15 Q. Okay. So my question is: From and after the
 16 point that you got this rejection, did Zitting ever respond
 17 back to APCO saying, The balance of COR 11 is justified
 18 because of X, Y, or Z?
 19 A. I don't have anything in front of me that says
 20 that we did, and I don't recall anything.
 21 Q. Okay. I'm going to show you -- I don't mean this
 22 to sound unreasonable, as it's going to initially. I have
 23 your job cost, Bates label ZEC11231 --
 24 MR. JEFFERIES: Is it consecutive?
 25 MS. LYNN: Yeah.

Page 109

1 MR. JEFFERIES: Okay.
 2 MR. DREITZER: Just a couple.
 3
 4 EXAMINATION
 5 BY MR. DREITZER:
 6 Q. Earlier on in the deposition, counsel showed you
 7 documents with regard to the change in the labor rate. Is
 8 it your recollection that the labor rate was, in fact,
 9 changed or are you just relying on the documents that were
 10 put in front of you?
 11 A. I'm just relying on the documents that are put in
 12 front of me.
 13 Q. So is it possible that there was history either
 14 before those documents or after it which changes the
 15 contours of what was agreed on, as far as the labor rate is
 16 concerned?
 17 A. Yeah, absolutely. And a lot of -- unfortunately,
 18 a lot of our communication on change orders on this job was
 19 verbal, because we couldn't get Shawn to do his job and put
 20 it in writing.
 21 Q. Right. Okay. And then if you go back to
 22 Exhibit 3, which is right in front of you, with regard to
 23 Items 22, 23, 24, 25, those have dates in the date column of
 24 10/9/08 and 10/10/08. What does the date refer to on this
 25 document?

Page 110

1 A. That would be the date that I would -- I believe
 2 that's the date that the actual change request was entered
 3 into our system.
 4 Q. Okay. But that is not the date -- is that the
 5 date the work was performed?
 6 A. No.
 7 Q. Okay. So do you know what kind of lag time there
 8 is between when the work is performed and when the date the
 9 change order is submitted or could -- does that vary?
 10 A. It could be months and months, because we were
 11 trying to wait for Shawn to approve them in writing before
 12 we put them in our system.
 13 Q. Okay.
 14 A. But when we got to the point where we realized he
 15 wasn't going to do that, then we just put them in the system
 16 and billed for them.
 17 Q. So just because item -- counsel before talked to
 18 you in terms of change orders that were the responsibility
 19 of APCO and change orders that -- what they claim were the
 20 responsibility of CAMCO. And so what I'm wondering is: Is
 21 it possible that the CAMCO change orders he was discussing
 22 with you could reference work that was done while APCO was
 23 still the general on the project?
 24 A. Yes.
 25 Q. Okay. Then if you go to Exhibit 15, please --

Page 112

1 EXAMINATION
 2 BY MR. JEFFERIES:
 3 Q. Sir, showing you what's been marked as Exhibit 17,
 4 I think. Take a minute and look at that.
 5 MR. DREITZER: And, again, I voiced the same
 6 concern before about this being an unBates-stamped document.
 7 Notwithstanding that, it appears to be involved Mr. Zitting.
 8 THE WITNESS: Okay.
 9 Q. (By Mr. Jefferies) Okay. Are you -- in light of
 10 Exhibit 17, are you standing behind your \$30 hourly rate
 11 that you quoted?
 12 A. It appears that he gave them a one-week time frame
 13 to pay them -- to pay -- pay the \$30 rate. And obviously
 14 that didn't happen. So . . .
 15 Q. That's why I asked you the question the way I did.
 16 Are you honoring the \$30 as you sit here today?
 17 A. In light of this new exhibit that I'm seeing, it
 18 looks like it had a one-week offer which expired, so no.
 19 Q. So you understood that APCO rejected the change
 20 orders because it rejected the \$50 per hour that was
 21 claimed. Right?
 22 A. I don't believe that I've seen that. Does it
 23 state that in the -- in -- in the exhibit we were just
 24 looking at?
 25

Page 111

1 MS. LYNN: What's the date of that? Sorry.
 2 Q. (By Mr. Dreitzer) Yep, that's the one.
 3 A. Okay.
 4 Q. Then if you go to page 26 --
 5 A. Okay.
 6 Q. -- where it talks about previously completed
 7 work --
 8 A. Yes.
 9 Q. -- we -- do you know how this was compiled?
 10 A. I assure that --
 11 Q. Do you have any knowledge how this was --
 12 A. I don't.
 13 Q. Is it possible that as of August 25th, 2008, that
 14 this -- the information in Exhibit E might be incorrect?
 15 A. That's possible.
 16 Q. Okay. And -- but you were never consulted as far
 17 as what your percentages were --
 18 A. Not that I recall.
 19 MR. DREITZER: Okay. I have no more questions.
 20 MR. JEFFERIES: I've got one follow-up. I'm going
 21 to show you -- there's . . .
 22 (Exhibit 17 was marked.)
 23 MR. DREITZER: Is this 19?
 24 (An off-the-record discussion was had.)
 25 ///

Page 113

1 (Exhibit 18 was marked.)
 2 MR. DREITZER: This will be 18?
 3 MR. JEFFERIES: Yeah.
 4 Q. (By Mr. Jefferies) Take a minute, sir, and review
 5 Exhibit 18.
 6 A. Okay.
 7 Q. You'll note that APCO is rejecting the \$50,
 8 because, at least in APCO's position or mind, the \$50 didn't
 9 comply with the contract. Right?
 10 A. That's what it appears as, yes.
 11 Q. Okay. So it was actually Roy who explained how
 12 the \$50 was calculated and then proposed the \$30. Right?
 13 A. Yes.
 14 Q. There's no -- strike that.
 15 Is it your testimony that the \$50 is supported by
 16 the contract or the \$30?
 17 MR. DREITZER: Objection. Calls for a legal
 18 conclusion.
 19 THE WITNESS: I don't believe the contract
 20 called -- calls for either dollar amount, does it?
 21 Q. (By Mr. Jefferies) Well, you'll see down below
 22 where Ms. Lynn is quoting the contract or paraphrasing the
 23 contract, stating that it calls for actual costs -- actual
 24 cost plus 10 percent markup plus your labor burden. Do you
 25 see that?

1 STATE OF NEVADA)

) SS:

2 COUNTY OF CLARK)

3 CERTIFICATE OF REPORTER

4 I, Vanessa Lopez, a duly commissioned and licensed
5 court reporter, Clark County, State of Nevada, do hereby
6 certify: That I reported the taking of the deposition of
7 SAMUEL ZITTING, commencing on Friday, October 27, 2017, at
8 the hour of 9:00 a.m.;

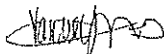
9 That the witness was, by me, duly sworn to testify
10 to the truth and that I thereafter transcribed my said
11 shorthand notes into typewriting, and that the typewritten
12 transcript of said deposition is a complete, true, and
13 accurate transcription of said shorthand notes;

14 I further certify that I am not a relative or
15 employee of any of the parties involved in said action, nor
16 a relative or employee of an attorney involved in said
17 action, nor a person financially interested in said action;

18 That the reading and signing of the transcript was
19 requested.

20 IN WITNESS WHEREOF, I have hereunto set my hand in
21 my office in the County of Clark, State of Nevada, this 30th
22 day of October, 2017.

23



24

VANESSA LOPEZ, CCR NO. 902

25

EXHIBIT 8

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26 **DISTRICT COURT**

27 **CLARK COUNTY, NEVADA**

28 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

**APCO CONSTRUCTION'S SUPPLEMENTAL ANSWERS TO ZITTING BROTHERS
CONSTRUCTION INC.'S FIRST REQUEST FOR INTERROGATORIES**

1 In accordance with NRCP 33, and following additional discovery, APCO Construction
2 (hereinafter referred to as "APCO" or "Plaintiff"), by and through its attorneys, Marquis
3 Aurbach Coffing, and Spencer Fane, LLP, hereby supplement its answer to Zitting Brothers
4 Construction, Inc.'s (hereinafter referred to as "Defendant" or "Zitting Brothers") Request for
5 Interrogatories as follows: **(Supplements appear in bold type)**

6 **GENERAL RESPONSES AND OBJECTIONS**

7 1. Plaintiff objects to Defendant's First Set of Interrogatories to the extent that they
8 attempt to impose burdens greater than those imposed by Rules 26 and 33 of the Nevada Rules
9 of Civil Procedure and/or to the extent they infringe upon the attorney-client privilege and/or the
10 attorney work-product doctrine.

11 2. Answers will be made on the basis of information and writings available to and
12 located by the Plaintiff upon reasonable investigation of its records. There may be other and
13 further information respecting the Interrogatories propounded by Defendant of which the
14 Plaintiff, despite its reasonable investigation and inquiry, are presently unaware. Thus, the
15 Plaintiff reserves the right to modify or enlarge any answer with such pertinent additional
16 information as it may subsequently discover.

17 3. Many of the Interrogatories set forth herein are extremely, indeed unreasonably,
18 broad; therefore, responding to all generally requested information and the production of all
19 possible documents responsive to the Interrogatory would be an unreasonable burden upon the
20 Plaintiff. Likewise, many of the Interrogatories are compound, cumulative, vague, ambiguous,
21 lack proper foundation and/or seek information that is protected by the attorney-client privilege
22 and/or attorney-work product doctrine or other privileges or exemptions.

23 4. The Plaintiff objects to these Interrogatories to the extent that they impose upon
24 the Plaintiff greater duties than are contemplated under the Nevada Rules of Civil Procedure.

25 5. No incidental or implied admissions will be made nor shall be construed by the
26 answers. The fact that the Plaintiff may respond or object to any Interrogatory, or any part
27 thereof, shall not be deemed an admission that the Plaintiff accepts or admit the existence of any
28 fact set forth therein or assumed by such Interrogatory, or that such answer constitutes

1 admissible evidence. The fact that the Plaintiff responds to part of any Interrogatory is not to be
2 deemed a waiver by the Plaintiff of its objections, including privilege, to any other part of such
3 an Interrogatory.

4 6. Each Response to the Interrogatories will be subject to all objections as to the
5 competence, relevance, materiality, propriety and admissibility, and to any and all other
6 objections on any ground which would require the exclusion from evidence of any statement
7 herein as if any such statements were made by a witness present and testifying at a hearing or
8 trial in this matter, all of which objections and grounds are expressly reserved and may by
9 interposed at such hearings and trial as necessary.

10 7. The Plaintiff hereby adopts, by reference, the above General Objections and
11 incorporate each such objection as if it were fully set forth in each of the responses below.

12 8. Pursuant to Nevada law the Plaintiff reserves the right to amend/supplement its
13 answers herein as additional information becomes known to the Plaintiff through the discovery
14 process, including expert witness reports/opinions.

15 9. Further, the Plaintiffs specifically reserve the right to amend/supplement their
16 Responses herein as additional information becomes known to them through the discovery
17 process, including but not limited to, expert witness reports/opinions. Hence, no answer should
18 be construed to contain all responsive documents available to the Parties that could be utilized at
19 trial, or the current absence of a document should not be construed as any form of admission or
20 fodder for a motion to dismiss or for summary judgment. Last, as additional information
21 becomes available to the Parties, the nature and meaning of various documents previously
22 disclosed by Plaintiffs may further become responsive to any given Interrogatory, and as such,
23 the Plaintiffs reserves the right to amend their answers accordingly.

24 **ANSWER TO INTERROGATORIES**

25 **INTERROGATORY NO. 1:**

26 Identify and state with specificity the facts that you intend to rely upon to refute each
27 cause of action in Zitting Brothers' Complaint.
28

1 ANSWER TO INTERROGATORY NO. 1:

2 Objection. APCO objects to this Interrogatory on the grounds that this Interrogatory is
3 vague, ambiguous, overly broad, unduly burdensome and oppressive because it seeks to force
4 APCO to "Identify and state with specificity the facts that you intend to rely upon to refute each
5 cause of action in Zitting Brothers' Complaint." Broad ranging interrogatories are improper
6 when they essentially subsume every fact in the case or every person having knowledge. See
7 Hiskett v. Wal-Mart Stores, Inc., 180 F.R.D. 403, 404 (D. Kan. 1998). ("Interrogatories should
8 not require the answering party to provide a narrative account of its case."). Parties can hardly
9 know when they have identified "all" facts, persons, and documents with respect to anything –
10 particularly before the close of discovery. "How can the court make enforceable orders with
11 reference to 'all' of anything?" Often, the relevance of a particular fact to a particular issue is not
12 known until clarified and put into context by testimony at deposition or trial. Such a question
13 places the responding party in an impossible position. See id.; Safeco of Am. V. Rawstron, 181
14 F.R.D. 441, 447-48 (C.D. Cal. 1998)(finding unreasonable an interrogatory calling for all facts
15 supporting denial of a request for admission); Lawrence v. First Kan. Bank & Trust Co., 169
16 F.R.D. 657, 660-63 (D. Kan. 1996)(same); Hilt v. SFC, Inc., 170 F.R.D. 182, 186-87 (D. Kan.
17 1997)(finding unduly burdensome an interrogatory seeking to require plaintiff to state 'each and
18 every fact' supporting allegations of a complaint). APCO further objects on the grounds that to
19 answer this Interrogatory would result in annoyance, embarrassment, or oppression to APCO in
20 that the question is overly broad, vague, ambiguous, indefinite as to time and without reasonable
21 limitation in its scope. APCO further objects on the basis that the question is oppressive,
22 harassing and burdensome; the information sought seeks APCO's counsel's legal analysis and
23 theories regarding laws, ordinances, safety orders, etc., which are equally available to Zitting
24 Brothers; the question also invades the attorney's work product privilege. APCO further objects
25 on the basis that the question calls for information which is available to all parties equally, and is
26 therefore oppressive and burdensome to APCO. APCO further objects on the basis that the
27 question seeks information which is protected from disclosure by the attorney's work product
28 privilege. APCO further objects on the basis that the question seeks to invade APCO's counsel's

1 work product privilege in that it calls for him to provide an analysis of written data. APCO
2 further objects on the basis that the question seeks to ascertain all facts and other data which
3 APCO intends to offer at trial and, as such, is violative of the attorney work product privilege.
4 APCO objects on the basis that the attorney-client privilege protects disclosure of the
5 information sought. APCO further objects to this Interrogatory on the grounds that it calls for
6 legal conclusions, and that the contract documents at issue speak for themselves.

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

1 In further clarification of the above, but not specifically limited to the following, it
2 has been determined through additional discovery, and specifically, but not limited to the
3 deposition of Zitting's NRCP 30(b)(6) witness, that Zitting is seeking damages for its
4 retention and various change orders that Zitting purports are owed by APCO despite
5 Zitting having continued to conduct over \$200,000 in work for Camco following the
6 assignment of the project to Camco.¹ Project documentation confirms that Zitting's
7 retention was rolled over to into Camco's scope and billing as it was always a Project
8 Owner obligation. Zitting is not entitled to any further change orders that were not
9 approved by APCO or the Owner of the Project, were late in submission, were for work
10 not completed, were for work conducted after APCO left the Project, and/or which was
11 conducted with no written authorization, field change directives, or change orders, as
12 required by the Subcontract. Moreover, with each lien release, Zitting failed to comply
13 with the Subcontract and did not identify or reserve its claims for disputed and
14 unacknowledged purported change orders, as each payment was made by APCO. It has
15 further been determined that Zitting's change orders were properly rejected due to lack of
16 backup information being provide to support the entitlement to the requested amounts.
17 Not only did Zitting not provide the proper support, it failed to resubmit change order
18 requests after rejection. Zitting's own NRCP 30(B)(6) witness admitted during deposition
19 that the subcontract provisions were not complied with, *e.g.*, but not limited to, the
20 conditions precedent detailed in various subsections (3.1 – 3.10) of section 3 entitled
21 "Contract Price and Payments" of the subcontract between APCO and Zitting. With
22 specific regard to retention, which APCO never held or received, Zitting admittedly failed
23 to satisfy the preconditions to release of retention specified in paragraph 3.8 of the
24 subcontract. Specifically, clause 3.8(a) states in pertinent part:

25 The 10 percent withheld retention shall be payable to Subcontractor upon,
26 and only upon the occurrence of all the following events, each of which is
27 condition precedent to Subcontractor's right to receive final payment
28 hereunder and payment of such retention: (a) Completion of the entire

¹ See generally the deposition of Zitting's NRCP 30(b)(6) witness taken on October 27, 2017.

1 project Building described in the Contract Documents; (b) The approval and
2 final acceptance of the project Building Work by Owner; (c) Receipt of final
3 payment by Contractor from Owner; (d) Delivery to Contractor from
4 Subcontractor all as-built drawings for its scope of work and other close out
5 documents; (e) Delivery to Contractor from Subcontractor a Release and
Waiver of Claims from all Subcontractor's laborers, material and equipment
suppliers, and subcontractors providing labor, materials or services to the
Project (Forms Attached). . . (F) Building is considered complete as soon as
drywall is completed.

6 APCO has no record of receiving any billing from Zitting for the retention or disputed
7 change orders. Zitting also is not entitled to payment for disputed changes, because such
8 payments are not due under the Change Order payment schedule. There is also no factual
9 scenario where APCO could have been enriched, as it never received any value for
10 Zitting's purported retention and change orders. Further, Zitting admitted during
11 deposition that it has no knowledge as to whether it followed up on any request for
12 payment short of filing the lien against the Property. Moreover, due to Zitting's direct
13 assertions at deposition, and as determined throughout discovery, it has also been
14 discovered that Zitting has written off some, if not all, of the damages it currently asserts it
15 is purportedly owed by APCO².

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

18 **INTERROGATORY NO. 2:**

19 State the procedure by which you and/or Gemstone Development West, Inc.
20 ("Gemstone") paid Zitting Brothers for its work, material, and/or equipment furnished at the
21 Project.

22
23 ² See generally the deposition of Zitting's NRCP 30(b)(6) witness taken on October 27, 2017; See
24 generally the deposition of APCO 30(b)(6) witness taken on June 5, 2017, more specific, but not
25 limited to, see pgs. 10, 20, 22-26, 29-30, 36-41, and 90-92; See generally APCO 30(b)(6) witness
26 taken on July 18, 2017, more specific, but not limited to, pgs. 106, 113, 117-121, 123-217, 133, 135-
27 140, 142-147, 149-153, 165-168, 171-172, 179-184, 186-189, and 191-193; See also APCO's Motion
28 to Dismiss or For Summary Judgment on Lien Claimants' NRS CH 108 Claims for Foreclosure on
Mechanic's lien filed June 26, 2017; See also APCO's Answer to Zitting's Complaint, specifically,
but not limited to, APCO's affirmative defenses asserted therein; APCO's prior 10th and 11th
Supplemental Discourse of Witnesses and Documents, and Zitting's Notice of Deposition to APCO's
NRCP 30(b)(6) Witness.

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

2 APCO paid Zitting Brothers pursuant to the terms of the Subcontract. More specifically,
3 see Section 3 of the Subcontract. Basically the procedure for payment was as follows: Pursuant
4 to the terms of the Subcontract, Zitting Brothers submitted to APCO its monthly billing, no later
5 than the 25th of each month, showing quantities of subcontract work that has been satisfactorily
6 completed in the preceding month, as well as backup material. In the event that Zitting Brothers
7 failed to timely submit its monthly billing with the necessary backup material that resulted in that
8 monthly payment application being rolled over to the following month. In turn, APCO submitted
9 its Application for Payment, which included the subcontractor's monthly billing and backup
10 documentation to Gemstone for payment. Upon actual receipt of payment by APCO from
11 Gemstone, APCO then paid the amount that APCO received for Zitting Brothers work to Zitting
12 Brothers as required under the Subcontract. Discovery is ongoing. APCO reserves the right to
13 supplement or amend its response to this Interrogatory as investigation, discovery, disclosure and
14 analysis continues. (See also further clarification supplement to APCO's Answer to
15 Interrogatory 1).

16 **INTERROGATORY NO. 3:**

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

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

21 To date, APCO has paid Zitting Brothers the sum of \$3,282,848.55. More specifically,
22 APCO paid Zitting Brothers as follows: See Exhibit I attached hereto for the breakdown. See
23 also documents identified by Bate Stamp No. APC000044563 through APC000044784, which
24 APCO deposited into a depository established by APCO for this litigation matter with Litigation
25 Services located at 3770 Howard Hughes Pkwy, Ste 300, Las Vegas, NV 89169-0935 and/or are
26 hereby made available for review and copying (at requestor's expense) at a mutually agreeable
27 time and place. APCO does not have any information as to what payments may have been made
28 by Gemstone directly to Zitting Brother after APCO terminated its prime contract with

1 Gemstone. However, from the information obtained through Zitting Brothers discovery requests
2 propounded upon APCO, it appears that Gemstone may have paid Zitting Brothers at least
3 \$364,760.00. Discovery is ongoing. APCO reserves the right to supplement or amend its
4 response to this Interrogatory as investigation, discovery, disclosure and analysis continues. (See
5 also further clarification supplement to APCO's Answer to Interrogatory 1).

6 **INTERROGATORY NO. 4:**

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

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

11 Objection. APCO objects to this Interrogatory on the grounds that this Interrogatory is
12 vague, ambiguous, overly broad, unduly burdensome and/or oppressive. Subject to, and without
13 waiving any objections, APCO responds as follows: See documents located at Litigation
14 Services that are made available for review and copying (at requestor's expense). More
15 specifically, see documents identified by Bate Stamp No. APC000033494 through
16 APC000035651. Discovery is ongoing. APCO reserves the right to supplement or amend its
17 response to this Interrogatory as investigation, discovery, disclosure and analysis continues. (See
18 also further clarification supplement to APCO's Answer to Interrogatory 1).

19 **INTERROGATORY NO. 5:**

20 Do you contend that the value of the unpaid work, material, and/or equipment furnished
21 or supplied by Zitting Brothers is less than the amount set forth in Zitting Brothers' Amended
22 Notice of Lien, Bates stamped ZBC1001976 and produced as part of Zitting Brothers' initial
23 disclosures? If so, please state:

24 a. the basis for your contention including all facts, witnesses, or documents you rely on in
25 support of your contention;

26 b. how much you contend the work and equipment provided by Zitting Brothers is
27 actually valued at; and
28

1 e. the manner in which you calculated the value of the work, materials, and/or equipment
2 provided by Zitting Brothers.

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

4 Objection. APCO objects to this Interrogatory on the grounds that this Interrogatory is
5 vague, ambiguous, overly broad, unduly burdensome and oppressive. More specifically APCO
6 objects on the grounds that it is vague and ambiguous in that "value of the unpaid work, material
7 and/or equipment furnished or supplied by Zitting Brothers" and "the amount set forth in Zitting
8 Brothers' mechanic's lien" are not defined. APCO further reiterates its General Objections and
9 adds that as this action is in the initial stages of discovery and APCO has not yet determined
10 which witnesses will testify or what evidence will be used in support of APCO's assertions or
11 denials; therefore, this Interrogatory is premature. APCO further objects as the Interrogatory
12 seeks information which is protected from disclosure by the attorney's work product privilege.
13 APCO further objects on the basis that the Interrogatory seeks disclosure of trial witnesses (other
14 than experts) and is therefore violative of the attorney work product privilege. APCO further
15 objects on the basis that the Interrogatory seeks to ascertain the anticipated testimony of
16 witnesses who are not "experts" and as such violate the attorney work product privilege. APCO
17 further objects on the basis that the question seeks to ascertain all facts and other data which
18 APCO intends to offer at trial and, as such, is violative of the attorney work product privilege.
19 Furthermore, APCO objects to this Interrogatory insofar as it purports to require APCO to
20 describe the substance of each person's knowledge for the reason that such a requirement seeks
21 to impose burdens on APCO beyond those permitted by the Nevada Rules of Civil Procedure,
22 calls for APCO to speculate, is overly broad and unduly burdensome and seeks information
23 protected from disclosure by the attorney-client, work product, party communications,
24 investigative, and consulting expert privileges.

25 Subject to and without waiving any objections, APCO responds as follows: See
26 documents identified by Bate Stamp No. APC000000001³ through APC000078992 and

27 ³ Please note that documents bate stamped APC000000001 through APC000001557 are not being
28 produced by APCO as those documents were delivered by APCO to Gemstone Development West

1 APCO104200 through 104234, which APCO has deposited into a depository established by
2 APCO for this litigation matter with Litigation Services and/or are hereby made available for
3 review and copying (at requestor's expense) at a mutually agreeable time and place. Discovery is
4 ongoing; APCO reserves the right to supplement or amend its response to this Interrogatory as
5 investigation, discovery, disclosure and analysis continues. (See also further clarification
6 supplement to APCO's Answer to Interrogatory 1).

7 **INTERROGATORY NO. 6:**

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

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

11 Pursuant to the terms of the Subcontract any payments to Zitting Brothers were
12 specifically conditioned upon APCO's actual receipt of payment from Gemstone for Zitting
13 Brothers' work. Moreover, the Subcontract specifically provides that Zitting Brothers was
14 assuming the same risk that Gemstone may become insolvent and not be paid for its work as
15 APCO assumed in entering into prime contract with Gemstone. Zitting Brothers further agreed
16 that APCO had no obligation to pay Zitting Brothers for any work performed by Zitting Brothers
17 until or unless APCO had actually been paid for such work by Gemstone. In fact, due to non-
18 payment, APCO exercised its rights pursuant to NRS Chapter 624 and terminated the prime
19 contract with Gemstone and further terminated the Subcontract with Zitting Brothers. Discovery
20 is ongoing; APCO reserves the right to supplement or amend its response to this Interrogatory as
21 investigation, discovery, disclosure and analysis continues. (See also further clarification
22 supplement to APCO's Answer to Interrogatory 1).

23 **INTERROGATORY NO. 7:**

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

26 ("Gemstone") on September 3 2008, around the time of termination of APCO's prime contract so that
27 Gemstone could continue with the construction of the Project. APCO does not have a copy of these
28 documents as they remain in Gemstone's possession. Furthermore, due to clerical error, the following
Bate Stamp Nos. were not used, APC000005841, APC000024165 and APC000033296 and are thus not
being produced.

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

2 Objection. APCO objects to this Interrogatory on the grounds that this Interrogatory is
3 overly broad, unduly burdensome and oppressive because it seeks to force APCO to identify
4 "each and every fact" that APCO relied upon to support its position that any claim for "unjust
5 enrichment against you is invalid." Broad ranging written discovery is improper when it
6 essentially subsumes every fact in the case. See Hiskett v. Wal-Mart Stores, Inc., 180 F.R.D.
7 403, 404 (D. Kan. 1998); Safeco of Am. V. Rawstron, 181 F.R.D. 441, 447048 (C.D. Cal. 1998);
8 Lawrence v. First Kan. Bank & Trust Co., 169 F.R.D. 657, 660-63 (D. Kan. 1996)(same); Hilt v.
9 SFC, Inc., 170 F.R.D. 182, 186-87 (D. Kan. 1997). APCO further objects to this Interrogatory on
10 the grounds of attorney client privilege and/or attorney work product. APCO further objects that
11 this Interrogatory is premature, as discovery has just commenced on this matter and APCO has
12 not yet identified what documents it may decide to utilize or offer as exhibits against Zitting
13 Brothers at the time of trial.

14 Subject to and without waiving any objections, See Response to Interrogatory No. 1 and
15 6 above, which are incorporated herein by this reference. Also, see documents identified by Bate
16 Stamp No. APC000000001⁴ through APC000078992 and APC0104200 through 104234, which
17 APCO has deposited into a depository established by APCO for this litigation matter with
18 Litigation Services and/or are hereby made available for review and copying (at requestor's
19 expense) at a mutually agreeable time and place. Discovery is ongoing; APCO reserves the right
20 to supplement or amend its Response to this Interrogatory as investigation, discovery, disclosure
21 and analysis continues. (See also further clarification supplement to APCO's Answer to
22 Interrogatory 1).

23 **INTERROGATORY NO. 8:**

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

27
28 ⁴ See Footnote No. 3.

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

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

14 Subject to and without waiving any objections, See Response to Interrogatory No. 1, 6,
15 and 7 above, which are incorporated herein by this reference. Moreover, it is APCO's
16 understanding that after APCO terminated its prime contract with Gemstone for nonpayment,
17 Gemstone requested all subcontractors, including Zitting Brothers, to continue their work on the
18 Project. Further, it is APCO's understanding that Zitting Brothers elected not to complete its
19 work and insure that their work was accepted by the inspectors and Gemstone. As such, Zitting
20 Brothers failed to put themselves in the position to receive payment for the work that allegedly
21 remains unpaid at this time. Also, see documents identified by Bate Stamp No. APC000000001⁵
22 through APC000078992 and APCO104200 through 104234, which APCO has deposited into a
23 depository established by APCO for this litigation matter with Litigation Services and/or are
24 hereby made available for review and copying (at requestor's expense) at a mutually agreeable
25 time and place. Discovery is ongoing; APCO reserves the right to supplement or amend its
26 Response to this Interrogatory as investigation, discovery, disclosure and analysis continues.

27 _____
28 ⁵ See Footnote No. 3.

1 (See also further clarification supplement to APCO's Answer to Interrogatory 1).

2 **INTERROGATORY NO. 9:**

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

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

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

20 Subject to and without waiving any objections, See Response to Interrogatory No. 1, 6, 7,
21 and 8 above, which are incorporated herein by this reference. Also, see documents identified by
22 Bate Stamp No. APC000000001⁶ through APC000078992 and APCO104200 through 104234,
23 which APCO has deposited into a depository established by APCO for this litigation matter with
24 Litigation Services and/or are hereby made available for review and copying (at requestor's
25 expense) at a mutually agreeable time and place. Discovery is ongoing. APCO reserves the right
26 to supplement or amend its Response to this Interrogatory as investigation, discovery, disclosure

27 ⁶ See Footnote No. 3.
28

1 and analysis continues. (See also further clarification supplement to APCO's Answer to
2 Interrogatory 1).

3 **INTERROGATORY NO. 10:**

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

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

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

21 Subject to and without waiving any objections, See Response to Interrogatory No. 1, 6,
22 and 7 above, which are incorporated herein by this reference. Discovery is ongoing. APCO
23 reserves the right to supplement or amend its Response to this Interrogatory as investigation,
24 discovery, disclosure and analysis continues. (See also further clarification supplement to
25 APCO's Answer to Interrogatory 1).

26 **INTERROGATORY NO. 11:**

27 State each and every fact that you intend to rely upon to support your position that any
28 obligation or duty, contractual or otherwise that Zitting Brothers' claims to be owed by APCO

1 has been replaced, terminated, voided, cancelled or otherwise released as asserted in your
2 Sixteenth Affirmative Defense.

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

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

17 Subject to and without waiving any objections, See Response to Interrogatory No. 1, 6,
18 and 7 above, which are incorporated herein by this reference. Also, see documents identified by
19 Bate Stamp No. APC000000001⁷ through APC000078992 and APC0104200 through 104234,
20 which APCO has deposited into a depository established by APCO for this litigation matter with
21 Litigation Services and/or are hereby made available for review and copying (at requestor's
22 expense) at a mutually agreeable time and place. Discovery is ongoing. APCO reserves the right
23 to supplement or amend its Response to this Interrogatory as investigation, discovery, disclosure
24 and analysis continues. (See also further clarification supplement to APCO's Answer to
25 Interrogatory 1).

26
27 ⁷ See Footnote No. 3.
28

1 **INTERROGATORY NO. 12:**

2 If you contend that Zitting Brothers entered into any independent agreement or
3 ratification with Cameo Pacific Construction Company, Inc. ("Cameo") or Gemstone, state each
4 and every fact that you rely on to support your position and on what basis any such agreement
5 relieves APCO of its contractual duties to Zitting Brothers.

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

7 It is APCO's understanding that after APCO's termination of the prime contract with
8 Gemstone for non-payment, Gemstone, through Camco Pacific Construction Company
9 ("Camco"), its replacement contractor, entered into independent and/or ratification agreements.
10 APCO is aware that several of its subcontractors have entered into such independent and/or
11 ratification agreement. APCO does not have personal knowledge of which subcontractors have
12 entered into such agreements. APCO objects that this Interrogatory is premature, as discovery
13 has just commenced on this matter and APCO has not yet identified all subcontractors who may
14 have entered into such agreements and whether or not Zitting Brothers was one of such
15 subcontractors. Discovery is ongoing. APCO reserves the right to supplement or amend its
16 Response to this Interrogatory as investigation, discovery, disclosure and analysis continues.
17 (See also further clarification supplement to APCO's Answer to Interrogatory 1).

18 **INTERROGATORY NO. 13:**

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

23 **ANSWER TO INTERROGATORY NO. 13:**

24 Objection. APCO objects to this Interrogatory on the grounds that this Interrogatory is
25 overly broad, unduly burdensome and oppressive because it seeks to force APCO to identify
26 "each and every fact" that APCO relied upon to support its position "that the damages sustained
27 by Zitting Brothers are the result of the acts, omission to act, or negligence of Zitting Brothers or
28 third party(ies) over whom APCO has no control as asserted in your Fourth Affirmative

1 Defense". Broad ranging written discovery is improper when it essentially subsumes every fact
2 in the case. See Hiskett v. Wal-Mart Stores, Inc., 180 F.R.D. 403, 404 (D. Kan. 1998); Safeco of
3 Am. V. Rawstron, 181 F.R.D. 441, 447048 (C.D. Cal. 1998); Lawrence v. First Kan. Bank &
4 Trust Co., 169 F.R.D. 657, 660-63 (D. Kan. 1996)(same); Hilt v. SFC, Inc., 170 F.R.D. 182, 186-
5 87 (D. Kan. 1997). APCO further objects to this Interrogatory on the grounds of attorney client
6 privilege and/or attorney work product. APCO further objects that this Interrogatory is
7 premature, as discovery has just commenced on this matter and APCO has not yet identified all
8 facts that it intends to use relative the Zitting Brothers' action.

9 Subject to and without waiving any objections, See Response to Interrogatory No. 1, 6,
10 and 7 above, which are incorporated herein by this reference. Also, see documents identified by
11 Bate Stamp No. APC000000001⁸ through APC000078992 and APCO104200 through 104234,
12 which APCO has deposited into a depository established by APCO for this litigation matter with
13 Litigation Services and/or are hereby made available for review and copying (at requestor's
14 expense) at a mutually agreeable time and place. Discovery is ongoing. APCO reserves the right
15 to supplement or amend its Response to this Interrogatory as investigation, discovery, disclosure
16 and analysis continues. (See also further clarification supplement to APCO's Answer to
17 Interrogatory 1).

18 **INTERROGATORY NO. 14:**

19 State each and every fact that you rely on to support your position that damages sustained
20 by Zitting Brothers were caused solely by a breach of contract, breach of warranty, expressed
21 and implied, and acts or omissions of Zitting Brothers or some third party(ies) over whom APCO
22 had no control as asserted in your Fourth Affirmative Defense.

23 ///

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

25 Objection. APCO objects to this Interrogatory on the grounds that Interrogatory is overly
26 broad, unduly burdensome and oppressive because it seeks to force APCO to identify "each and
27

28 ⁸ See Footnote No. 3.

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

13 Subject to and without waiving any objections, See Response to Interrogatory No. 1, 6,
14 and 7 above, which are incorporated herein by this reference. Also, see documents identified by
15 Bate Stamp No. APC000000001⁹ through APC000078992 and APC0104200 through 104234,
16 which APCO has deposited into a depository established by APCO for this litigation matter with
17 Litigation Services and/or are hereby made available for review and copying (at requestor's
18 expense) at a mutually agreeable time and place. Discovery is ongoing. APCO reserves the right
19 to supplement or amend its Response to this Interrogatory as investigation, discovery, disclosure
20 and analysis continues. (See also further clarification supplement to APCO's Answer to
21 Interrogatory 1).

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28 ⁹ See Footnote No. 3.

1 **INTERROGATORY NO. 15:**

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

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

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

18 Subject to and without waiving any objections, See Response to Interrogatory No. 1, 6,
19 and 7 above, which are incorporated herein by this reference. Also, see documents identified by
20 Bate Stamp No. APC000000001¹⁰ through APC000078992 and APC0104200 through 104234,
21 which APCO has deposited into a depository established by APCO for this litigation matter with
22 Litigation Services and/or are hereby made available for review and copying (at requestor's
23 expense) at a mutually agreeable time and place. Discovery is ongoing. APCO reserves the right
24 to supplement or amend its Response to this Interrogatory as investigation, discovery, disclosure
25 and analysis continues. (See also further clarification supplement to APCO's Answer to
26 Interrogatory 1).

27 ¹⁰ See Footnote No. 3.
28

1 **INTERROGATORY NO. 16:**

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

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

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

17 Subject to and without waiving any objections, See Response to Interrogatory No. 1, 6,
18 and 7 above, which are incorporated herein by this reference. Also, see documents identified by
19 Bate Stamp No. APC000000001¹¹ through APC000078992 and APCO104200 through 104234,
20 which APCO has deposited into a depository established by APCO for this litigation matter with
21 Litigation Services located at and/or are hereby made available for review and copying (at
22 requestor's expense) at a mutually agreeable time and place. Discovery is ongoing. APCO
23 reserves the right to supplement or amend its Response to this Interrogatory as investigation,
24 discovery, disclosure and analysis continues. (See also further clarification supplement to
25 **APCO's Answer to Interrogatory 1).**

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28 ¹¹ See Footnote No. 3.

1 **INTERROGATORY NO. 17:**

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

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

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

20 Subject to and without waiving any objections, See Response to Interrogatory No. 1, 6,
21 and 7 above, which are incorporated herein by this reference. Also, see documents identified by
22 Bate Stamp No. APC000000001¹² through APC000078992 and APCO104200 through 104234,
23 which APCO has deposited into a depository established by APCO for this litigation matter with
24 Litigation Services and/or are hereby made available for review and copying (at requestor's
25 expense) at a mutually agreeable time and place. Discovery is ongoing. APCO reserves the right
26 to supplement or amend its Response to this Interrogatory as investigation, discovery, disclosure

27 ¹² See Footnote No. 3.
28

1 and analysis continues. (See also further clarification supplement to APCO's Answer to
2 Interrogatory 1).

3 **INTERROGATORY NO. 18:**

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

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

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

21 Subject to and without waiving any objections, APCO responds as follows: Discovery is
22 ongoing. APCO reserves the right to supplement or amend its Response to this Interrogatory as
23 investigation, discovery, disclosure and analysis continues. (See also further clarification
24 supplement to APCO's Answer to Interrogatory 1).

25 **INTERROGATORY NO. 19:**

26 Identify and describe any and all complaints you made either verbally or in writing
27 regarding the quality of work, materials, and/or equipment furnished by Zitting Brothers at the
28 Project prior to the initiation of this lien action.

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

2 Objection. APCO objects to this Interrogatory on the grounds that this Interrogatory is
3 vague, ambiguous, overly broad, unduly burdensome and oppressive because it seeks to force
4 APCO to identify "all complaints you have regarding the quality of work materials, and/or
5 equipment furnished by Zitting Brothers at the Project." Broad ranging interrogatories are
6 improper when they essentially subsume every fact in the case or every person having
7 knowledge. See Hiskett v. Wal-Mart Stores, Inc., 180 F.R.D. 403, 404 (D. Kan. 1998).
8 ("Interrogatories should not require the answering party to provide a narrative account of its
9 case."). Parties can hardly know when they have identified "all" facts, persons, and documents
10 with respect to anything — particularly before the close of discovery. "How can the court make
11 enforceable orders with reference to 'all' of anything?" Often, the relevance of a particular fact
12 to a particular issue is not known until clarified and put into context by testimony at deposition
13 or trial. Such a question places the responding party in an impossible position. See id.; Safeco of
14 Am. V. Rawstron, 181 F.R.D. 441, 447048 (C.D. Cal. 1998)(finding unreasonable an
15 interrogatory calling for all facts supporting denial of a request for admission); Lawrence v. First
16 Kan. Bank & Trust Co., 169 F.R.D. 657, 660-63 (D. Kan. 1996)(same); Hilt v. SFC, Inc., 170
17 F.R.D. 182, 186-87 (D. Kan. 1997)(finding unduly burdensome an interrogatory seeking to
18 require plaintiff to state 'each and every fact' supporting allegations of a complaint).

19 Subject to, and without waiving the foregoing objections, Gemstone has asserted various
20 complaints about the quality of the work performed by APCO and its subcontractors. As of this
21 time, Gemstone has not identified specific issues that Gemstone has with APCO's or its
22 subcontractor's work, including that of Zitting Brothers. However, as a result of Gemstone's
23 assertions that there are issues with the quality of the work performed on the Project, Gemstone
24 has failed to pay APCO for the work that APCO performed including the work that was
25 performed by Zitting Brothers. Discovery is ongoing. APCO reserves the right to supplement or
26 amend its response to this Interrogatory as investigation, discovery, disclosure and analysis
27 continues. (See also further clarification supplement to APCO's Answer to Interrogatory 1).

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1 INTERROGATORY NO. 20:

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

5 ANSWER TO INTERROGATORY NO. 20:

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

18 Subject to and without waiving any objections, See Response to Interrogatory No. 1, 6
19 and 7 above, which are incorporated herein by this reference. Also, see documents identified by
20 Bate Stamp No. APC000000001¹³ through APC000078992 and APCO104200 through 104234,
21 which APCO has deposited into a depository established by APCO for this litigation matter with
22 Litigation Services and/or are hereby made available for review and copying (at requestor's
23 expense) at a mutually agreeable time and place. Discovery is ongoing. APCO reserves the right
24 to supplement or amend its Response to this Interrogatory as investigation, discovery, disclosure
25 and analysis continues. (See also further clarification supplement to APCO's Answer to
26 Interrogatory 1).

27 ¹³ See Footnote No. 3.
28

1 **INTERROGATORY NO. 21:**

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

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

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

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

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

- 5 1. Brian Benson
6 APCO Construction
7 Marquis Aurbach Coffing
8 10001, Park Run Drive
9 Las Vegas, Nevada 89145

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

- 15 2. Joe Pelan
16 APCO Construction
17 Marquis Aurbach Coffing
18 10001, Park Run Drive
19 Las Vegas, Nevada 89145

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

- 25 3. Lisa Lynn
26 APCO Construction
27 Marquis Aurbach Coffing
28 10001, Park Run Drive
Las Vegas, Nevada 89145

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

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- 1 4. Mary Jo Allen
2 APCO Construction
3 Marquis Aurbach Coffing
4 10001 Park Run Drive
5 Las Vegas, Nevada 89145

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

- 9 5. Person Most Knowledgeable - APCO
10 c/o Gwen Rutar Mullins, Esq.
11 Marquis Aurbach Coffing
12 10001, Park Run Drive
13 Las Vegas, Nevada 89145

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

- 18 6. The Person Most Knowledgeable
19 Gemstone Development West, Inc.
20 c/o Alexander Edelstein, registered Agent
21 10170 W. Tropicana Ave., Suite 156-169
22 Las Vegas, Nevada 89147

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

- 25 7. Alexander Edelstein
26 10170 W. Tropicana Ave., Suite 156-169
27 Las Vegas, Nevada 89147

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

- 30 8. Pete Smith
31 Gemstone Development West, Inc.
32 Address unknown

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

- 1 9. Craig Colligan
2 Address unknown

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

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

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

- 10 11. Bradley J. Scott
11 c/o Kemp, Jones & Coulthard
12 3800 Howard Hughes Pkwy., 17th Floor
 Las Vegas, Nevada 89169

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

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

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

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

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

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

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

3
4 15. Gary D. Tharaldson
5 c/o Cooksey, Toolen, Gage, Duffy & Woog
6 3930 Howard Hughes Pkwy., Ste. 200
7 Las Vegas, Nevada 89169

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

10 16. Aaron Davis
11 Insulpro Projects, Inc.
12 c/o Eric Dobberstein, Esq.
13 DOBBERSTEIN & ASSOCIATES
14 8965 S. Eastern Avenue, Suite 280
15 Las Vegas, Nevada 89123

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

18 17. Cheryl Johnson
19 Insulpro Projects, Inc.
20 c/o Eric Dobberstein, Esq.
21 DOBBERSTEIN & ASSOCIATES
22 8965 S. Eastern Avenue, Suite 280
23 Las Vegas, Nevada 89123

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

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

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

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19. The Person Most Knowledgeable
Pressure Grout Company, Inc.
c/o T. James Truman, Esq.
T. James Truman & Associates
3654 North Rancho Drive
Las Vegas, Nevada 89130

The Person Most Knowledgeable for PGC is expected to testify as regarding the
circumstances of this matter forming the basis of PGC's claims against APCO.

20. H.R. Alalusi
Pressure Grout Company, Inc.
c/o T. James Truman, Esq.
T. James Truman & Associates
3654 North Rancho Drive
Las Vegas, Nevada 89130

H.R. Alalusi is expected to testify as regarding the circumstances of this matter forming
the basis of PGC's claims against APCO and regarding the PGC's work on the Projects and
issues relating thereto.

21. Jim Thompson
REI/Structural
700 17th Street, Ste. 1900
Denver, CO 80202
(303)575-9510

Mr. Thompson is expected to testify regarding the circumstances of this matter including
the improper workmanship of PGC on the Project which resulted in findings that some of the
columns capitals on Buildings 8 and 9 needed to be demolished or reconstructed. Mr.
Thompson is further expected to testify about the defective work performed by PGC on the
Project.

22. Robert D. Redwine
Civil Structural Engineer
700 17th Street, Ste. 1900
Denver, CO 80202
(303)575-9510

Mr. Redwine is expected to testify regarding the circumstances of this matter including
the improper workmanship of PGC on the Project which resulted in findings that some of the
columns capitals on Buildings 8 and 9 needed to be demolished or reconstructed. Mr. Redwine

1 is further expected to testify about the defective work performed by PGC on the Project.

2 23. The Person Most Knowledgeable
3 Zitting Brothers Construction
4 c/o Jorge Ramirez, Esq.
5 WILSON, ELSER, MOSKOWITZ, EDLEMAN & DICKER LLP
6 415 South Sixth Street, Ste. 300
7 Las Vegas, Nevada 89101

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

11 APCO further expects that each of the subcontractors who are participating in this action
12 will also testify as to his/her understanding of the facts on this matter and to support their claims
13 that were asserted in this action. Also, see APCO's disclosure of witnesses previously served on
14 this matter. Discovery is ongoing. APCO reserves the right to supplement or amend its response
15 to this Interrogatory as investigation, discovery, disclosure and analysis continues. (See also
16 further clarification supplement to APCO's Answer to Interrogatory 1).

17 **INTERROGATORY NO. 22:**

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

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

21 Objection. APCO objects to this Interrogatory as being overly broad, unduly burdensome
22 and oppressive because it seeks to force APCO to identify "all documents, records, writings, etc.,
23 that support your Answers to these Interrogatories and your responses to Requests for
24 Admission." Broad ranging written discovery is improper when it essentially subsumes every
25 fact in the case. See Hiskett v. Wal-Mart Stores, Inc., 180 F.R.D. 403, 404 (D. Kan. 1998);
26 Safeco of Am. V. Rawstron, 181 F.R.D. 441, 447048 (C.D. Cal. 1998); Lawrence v. First Kan.
27 Bank & Trust Co., 169 F.R.D. 657, 660-63 (D. Kan. 1996)(same); Hilt v. SFC, Inc., 170 F.R.D.
28 182, 186-87 (D. Kan. 1997). APCO further objects to this Interrogatory on the grounds of
attorney client privilege and/or attorney work product. APCO further objects that this
Interrogatory is premature, as discovery has just commenced on this matter and APCO has not

1 yet identified all facts that it intends to use relative the Zitting Brothers' action.

2 Subject to and without waiving any objections, see documents identified by Bate Stamp
3 No. APC000000001¹⁴ through APC000078992 and APCO104200 through 104234, which APCO
4 has deposited into a depository established by APCO for this litigation matter with Litigation
5 Services and/or are hereby made available for review and copying (at requestor's expense) at a
6 mutually agreeable time and place. Discovery is ongoing. APCO reserves the right to supplement
7 or amend its Response to this Interrogatory as investigation, discovery, disclosure and analysis
8 continues. (See also further clarification supplement to APCO's Answer to Interrogatory 1).

9 **INTERROGATORY NO. 23:**

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

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

14 Objection. APCO objects to this Interrogatory on basis that it is overly broad, unduly
15 burdensome and oppressive because it seeks to force APCO to identify "each and every
16 individual known to you who has knowledge of the facts involved in this matter including, but
17 not limited to, Zitting Brothers' work, material, and/or equipment at the Project." Broad ranging
18 written discovery is improper when it essentially subsumes every fact in the case. See Hiskett v.
19 Wal-Mart Stores, Inc., 180 F.R.D. 403, 404 (D. Kan. 1998); Safeco of Am. V. Rawstron, 181
20 F.R.D. 441, 447048 (C.D. Cal. 1998); Lawrence v. First Kan. Bank & Trust Co., 169 F.R.D. 657,
21 660-63 (D. Kan. 1996)(same); Hilt v. SFC, Inc., 170 F.R.D. 182, 186-87 (D. Kan. 1997). APCO
22 further objects to this Interrogatory on the grounds of attorney client privilege and/or attorney
23 work product. APCO further objects that this Interrogatory is premature, as discovery has just
24 commenced on this matter and APCO has not yet identified all individuals that have facts
25 relative this matter. (See also further clarification supplement to APCO's Answer to
26 Interrogatory 1).

27 ¹⁴ See Footnote No. 3.
28

1 Subject to and without waiving any objections, see Response to Interrogatory No. 21
2 above. Also, see APCO's disclosure of witnesses previously served on this matter. Discovery is
3 ongoing. APCO reserves the right to supplement or amend its Response to this Interrogatory as
4 investigation, discovery, disclosure and analysis continues.

5 **INTERROGATORY NO. 24:**

6 State each and every fact that supports your position that you are not legally liable for
7 payment to Zitting Brothers for the work, material, and/or equipment that it furnished on the
8 Project. (See also further clarification supplement to APCO's Answer to Interrogatory 1).

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

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

22 Subject to and without waiving any objections, See Responses to Interrogatory No. 1, 6,
23 and 7 above, which are incorporated herein by this reference. Also, see documents identified by
24 Bate Stamp No. APC000000001¹⁵ through APC000078992 and APCO104200 through 104234,
25 which APCO has deposited into a depository established by APCO for this litigation matter with
26 Litigation Services and/or are hereby made available for review and copying (at requestor's

27 ¹⁵ See Footnote No. 3.
28

1 expense) at a mutually agreeable time and place. Discovery is ongoing. APCO reserves the right
2 to supplement or amend its Response to this Interrogatory as investigation, discovery, disclosure
3 and analysis continues. (See also further clarification supplement to APCO's Answer to
4 Interrogatory 1).

5 **INTERROGATORY NO. 25:**

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

8 a. the subject matter on which the expert is expected to testify, the substance of the facts
9 and opinions to which each expert is expected to testify;

10 b. a summary of the grounds for each opinion;

11 c. whether written document was prepared by such expert;

12 d. the professional title, educational background, qualifications and work experience of
13 each such expert.

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

15 Objection. APCO objects to this Interrogatory on the grounds that it is premature. APCO
16 has not yet decided on which, if any, expert witnesses might be called at trial. In fact, APCO has
17 not yet retained any expert witness on this matter. Discovery is ongoing. APCO reserves the
18 right to supplement this Response when APCO has retained an expert witness on this matter.
19 (See also further clarification supplement to APCO's Answer to Interrogatory 1).

20 **INTERROGATORY NO. 26:**

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

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

25 Objection. APCO objects to this Interrogatory on the grounds that it is premature. APCO
26 has yet to determine the exhibits to be produced at trial. See also Response to Interrogatory No. 1
27 above, which is incorporated herein by this reference. Subject to and without waiving any
28

1 objections, see documents identified by Bate Stamp No. APC000000001¹⁶ through
2 APC000078992 and APCO104200 through 104234, which APCO has deposited into a
3 depository established by APCO for this litigation matter with Litigation Services and/or are
4 hereby made available for review and copying (at requestor's expense) at a mutually agreeable
5 time and place. See also documents produced by other parties to this action, including any
6 documents produced by Zitting Brothers in this action. Discovery is ongoing. APCO reserves the
7 right to supplement or amend its Response to this Interrogatory as investigation, discovery,
8 disclosure and analysis continues. (See also further clarification supplement to APCO's
9 Answer to Interrogatory 1).

10 **INTERROGATORY NO. 27:**

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

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

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

26 Subject to and without waiving any objections, APCO, in view of the claims that have

27 ¹⁶ See Footnote No. 3.
28

1 been asserted by Gemstone, APCO is evaluating all of its options, including asserting claims
2 against Zitting Brothers, including, but not limited to, breach of contract, unjust enrichment,
3 indemnity, set off, and contribution. Discovery is ongoing. APCO reserves the right to
4 supplement or amend its response to this Interrogatory as investigation, discovery, disclosure and
5 analysis continues. (See also further clarification supplement to APCO's Answer to
6 Interrogatory 1).

7 **INTERROGATORY NO. 28:**

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

10 **ANSWER TO INTERROGATORY NO. 28:**

11 Objection. APCO objects on the basis that the Interrogatory is oppressive, harassing and
12 burdensome as the information sought information that is equally available to Zitting Brothers.

13 Subject to and without waiving any objections, APCO responds as follows: Zitting
14 Brothers commenced with its work on the Project sometime in November 2007. APCO does not
15 know the last date that Zitting Brothers performed work on the Project. APCO understands that
16 Zitting Brothers continued to perform work on the Project after APCO ceased its work and
17 terminated the prime contract with Gemstone. Discovery is ongoing. APCO reserves the right to
18 supplement or amend its response to this Interrogatory as investigation, discovery, disclosure and
19 analysis continues. (See also further clarification supplement to APCO's Answer to
20 Interrogatory 1).

21 **INTERROGATORY NO. 29:**

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

25 **ANSWER TO INTERROGATORY NO. 29:**

26 Objection. This Interrogatory calls for multiple responses as there were denials made by
27 APCO to Zitting Brothers' Requests for Admissions. APCO objects to any attempt by Zitting
28 Brothers to evade any numerical limitations set on interrogatories by asking multiple

1 independent questions within single individual questions and subparts. APCO further objects on
2 the grounds of relevance and that this Interrogatory is vague, ambiguous, overly broad, unduly
3 burdensome and oppressive because it seeks to force APCO to identify "each and every denial."
4 See also Response to Interrogatory No. 1 above, which is incorporated herein by this reference.
5 Subject to and without waiving any objections, see APCO's Responses to Zitting Brothers'
6 Requests for Admissions. See also, Responses to Interrogatory No. 1, 6, and 7 above, which are
7 incorporated herein by this reference. Also, see documents identified by Bate Stamp No.
8 APC000000001¹⁷ through APC000078992 and APC0104200 through 104234, which APCO has
9 deposited into a depository established by APCO for this litigation matter with Litigation
10 Services and/or are hereby made available for review and copying (at requestor's expense) at a
11 mutually agreeable time and place. Discovery is ongoing. APCO reserves the right to supplement
12 or amend its Response to this Interrogatory as investigation, discovery, disclosure and analysis
13 continues. (See also further clarification supplement to APCO's Answer to Interrogatory 1).

14 **INTERROGATORY NO. 30:**

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

18 **ANSWER TO INTERROGATORY NO. 30:**

19 Objection. APCO objects to this request for Interrogatory is overly broad, unduly
20 burdensome and oppressive because it seeks to force APCO to identify "all facts and
21 circumstances leading up to your issuance of the stop work order to Zitting Brothers and describe
22 any and all reasons you believe you were justified you in taking such action." Broad ranging
23 written discovery is improper when it essentially subsumes every fact in the case. See Hiskett v.
24 Wal-Mart Stores, Inc., 180 F.R.D. 403, 404 (D. Kan. 1998); Safeco of Am. V. Rawstron, 181
25 F.R.D. 441, 447048 (C.D. Cal. 1998); Lawrence v. First Kan. Bank & Trust Co., 169 F.R.D. 657,
26 660-63 (D. Kan. 1996)(same); Hilt v. SFC, Inc., 170 F.R.D. 182, 186-87 (D. Kan. 1997). APCO

27 ¹⁷ See Footnote No. 3.
28

1 further objects to this Interrogatory on the grounds of attorney client privilege and/or attorney
2 work product. APCO further objects that this Interrogatory is premature, as discovery has just
3 commenced on this matter and APCO has not yet identified all facts that it intends to use relative
4 the Zitting Brothers' action.

5 Subject to and without waiving any objections, APCO responds as follows: After APCO
6 was not paid by Gemstone for work that was being performed by APCO and its subcontractors,
7 APCO, pursuant to Nevada law, gave notice to Gemstone of its intent to stop work and terminate
8 the prime contract unless payment was made. APCO provided a copy of such notice to its
9 subcontractors, including Zitting Brothers, so that the subcontractors, including Zitting Brother,
10 could take whatever action they deemed necessary to protect their respective rights under
11 Nevada law. After payment from Gemstone was not made, APCO, as allowed under Nevada law,
12 terminated its prime contract with Gemstone and further notified its subcontractors, including
13 Zitting Brothers of such termination. See also, Responses to Interrogatory No. 1, 6, and 7 above,
14 which are incorporated herein by this reference. Also, see documents identified by Bate Stamp
15 No. APC000000001¹⁸ through APC000078992 and APCO104200 through 104234, which APCO
16 has deposited into a depository established by APCO for this litigation matter with Litigation
17 Services and/or are hereby made available for review and copying (at requestor's expense) at a
18 mutually agreeable time and place. Discovery is ongoing. APCO reserves the right to supplement
19 or amend its Response to this Interrogatory as investigation, discovery, disclosure and analysis
20 continues. (See also further clarification supplement to APCO's Answer to Interrogatory 1).

21 **INTERROGATORY NO. 31:**

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

26
27
28 ¹⁸ See Footnote No. 3.

1 **ANSWER TO INTERROGATORY NO. 31:**

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

10 Subject to and without waiving any objections, APCO, during the course of construction,
11 had numerous conversations with Zitting Brothers relative Zitting Brothers' work and the Project
12 in general. APCO is unable to recall each and every conversation and their contents. Discovery is
13 ongoing. APCO reserves the right to supplement or amend its response to this Interrogatory as
14 investigation, discovery, disclosure and analysis continues. (See also further clarification
15 supplement to APCO's Answer to Interrogatory 1).

16 **INTERROGATORY NO. 32:**

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

21 **ANSWER TO INTERROGATORY NO. 32:**

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

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

1 APCO reserves the right to supplement or amend its response to this Interrogatory as
2 investigation, discovery, disclosure and analysis continues. (See also further clarification
3 supplement to APCO's Answer to Interrogatory 1).

4 **INTERROGATORY NO. 33:**

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

9 **ANSWER TO INTERROGATORY NO. 33:**

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

15 Subject to and without waiving any objections, APCO, during the course of construction,
16 undoubtedly had some conversations with Gemstone relative Zitting Brothers' work and the
17 Project in general. APCO is unable to recall each and every conversation and their contents.
18 Discovery is ongoing. APCO reserves the right to supplement or amend its response to this
19 Interrogatory as investigation, discovery, disclosure and analysis continues. (See also further
20 clarification supplement to APCO's Answer to Interrogatory 1).

21 **INTERROGATORY NO. 34:**

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

26 **ANSWER TO INTERROGATORY NO. 34:**

27 Objection. APCO objects on the grounds of relevance and further objects that this
28 Interrogatory is vague, ambiguous, overly broad, unduly burdensome and oppressive because it

1 seeks to force APCO to identify any conversations that APCO may have had with a Third Party
2 including the dates of each conversation, persons involved and the contents of the conversations.
3 See also Response to Interrogatory No. 2 above, which is incorporated herein by this reference.

4 Subject to and without waiving any objections, APCO does not recall having any
5 conversations with a "Third-Party" regarding Zitting Brothers' work or otherwise. Discovery is
6 ongoing. APCO reserves the right to supplement or amend its response to this Interrogatory as
7 investigation, discovery, disclosure and analysis continues. (See also further clarification
8 supplement to APCO's Answer to Interrogatory 1).

9 **INTERROGATORY NO. 35:**

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

12 **ANSWER TO INTERROGATORY NO. 35:**

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

18 Subject to and without waiving any objections, APCO responds as follows: APCO has
19 asserted priority over the deeds of trust that are of record against the Manhattan West Project
20 pursuant to NRS 108.225. Priority over the deeds of trusts is based on the fact that APCO first
21 performed work under the Grading Agreement on or about May 2007. APCO first performed
22 work under the ManhattanWest General Construction Agreement for GMP or about September
23 5, 2007. The deeds of trust on the property attached after construction work commenced. APCO
24 has further asked the Court to declare the rank of mechanic's liens pursuant to NRS 108.236. See
25 also documents identified by Bate Stamp No. APC000000001¹⁹ through APC000078992 and
26 APC0104200 through 104234, which APCO has deposited into a depository established by

27 _____
28 ¹⁹ See Footnote No. 3.

APCO for this litigation matter with Litigation Services and/or are hereby made available for review and copying (at requestor's expense) at a mutually agreeable time and place. Discovery is ongoing; APCO reserves the right to supplement or amend its Response to this Interrogatory as investigation, discovery, disclosure and analysis continues. (See also further clarification supplement to APCO's Answer to Interrogatory 1).

INTERROGATORY NO. 36:

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

ANSWER TO INTERROGATORY NO. 36:

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

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

Discovery is ongoing. APCO reserves the right to supplement or amend its Response to

1 this Interrogatory as investigation, discovery, disclosure and analysis continues. (See also
2 further clarification supplement to APCO's Answer to Interrogatory 1).

3 **INTERROGATORY NO. 37:**

4 Identify the date you started construction on the Project and describe the work that was
5 performed during the first three months of the Project.

6 **ANSWER TO INTERROGATORY NO. 37:**

7 Objection. APCO objects on the grounds of relevance and further objects that this
8 Interrogatory is vague, ambiguous, overly broad, unduly burdensome and oppressive because it
9 seeks to force APCO to describe "the work that was performed during the first three months of
10 the Project." APCO further objects on the grounds that it is vague and ambiguous in that
11 "construction", "work" and "first three months of the Project" are not defined. See also Response
12 to Interrogatory No. 2 above, which is incorporated herein by this reference. Subject to and
13 without waiving any objections, APCO responds as follows: APCO first performed work under
14 the Grading Agreement on or about May 2007. APCO first performed work under the Manhattan
15 West General Construction Agreement for GMP or about September 5, 2007. See also
16 documents identified by Bate Stamp No. APC000000001²⁰ through APC000078992 and
17 APCO104200 through 104234, which APCO has deposited into a depository established by
18 APCO for this litigation matter with Litigation Services and/or are hereby made available for
19 review and copying (at requestor's expense) at a mutually agreeable time and place. Discovery is
20 ongoing; APCO reserves the right to supplement or amend its Response to this Interrogatory as
21 investigation, discovery, disclosure and analysis continues. (See also further clarification
22 supplement to APCO's Answer to Interrogatory 1).

23 **INTERROGATORY NO. 38:**

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

26
27
28 ²⁰ See Footnote No. 3.

ANSWER TO INTERROGATORY NO. 38:

None. APCO has not received any payments for work, materials and/or equipment furnished by Zitting Brothers at the Project for which Zitting Brother has not been paid by APCO. (See also further clarification supplement to APCO's Answer to Interrogatory 1).

INTERROGATORY NO. 39:

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

ANSWER TO INTERROGATORY NO. 39:

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

1 in that it calls for him to provide an analysis of written data and/or law.

2 APCO further objects to this Interrogatory on the ground that it calls for legal
3 conclusions. See also Response to Interrogatory No. 2 above, which is incorporated herein by
4 this reference. Subject to and without waiving any objections, APCO responds as follows:
5 Gemstone has asserted various complaints about the quality of the work performed by APCO
6 and its subcontractors. As of this time, Gemstone has not identified specific issues that Gemstone
7 has with APCO's or its subcontractor's work, including that of Zitting Brothers. However, as a
8 result of Gemstone's assertions that there are issues with the quality of the work performed on
9 the Project, Gemstone has failed to pay APCO for the work that APCO performed, including the
10 work that was performed by Zitting Brothers. Pursuant to the terms of the Subcontract
11 Agreement, any payments to Zitting Brothers were specifically conditioned upon APCO's actual
12 receipt of payment from Gemstone for Zitting Brothers' work. Moreover, the Subcontract
13 specifically provided that Zitting Brothers was assuming the same risk that Gemstone may
14 become insolvent and not be paid for its work as APCO assumed in entering into prime contract
15 with Gemstone. Zitting Brothers further agreed that APCO had no obligation to pay Zitting
16 Brothers for any work performed by Zitting Brothers until or unless APCO had actually been
17 paid for such work by Gemstone. To date, APCO has not been paid for the work performed,
18 including the work performed by Zitting Brothers. In fact, due to non-payment, APCO exercised
19 its rights pursuant to NRS Chapter 624 and terminated the prime contract with Gemstone and
20 further terminated the Subcontract with Zitting Brothers. After APCO ceased work on the
21 Project, Zitting Brothers may have negotiated with Camco, the replacement general contractor,
22 and/or Gemstone and may have entered into a ratification agreement, wherein APCO was
23 replaced as the general contractor under the Subcontract and Camco and/or Gemstone became
24 liable for any monies due Zitting Brothers on the Project. Discovery is ongoing. APCO reserves
25 the right to supplement or amend its response to this Interrogatory as investigation, discovery,
26 disclosure and analysis continues. (See also further clarification supplement to APCO's
27 Answer to Interrogatory 1).

1 INTERROGATORY NO. 40:

2 Identify and explain what sections or provisions, if any, of your contractors license
3 absolves you of your obligation to pay Zitting Brothers, your subcontractor, the owed and
4 outstanding amounts for the work, material, and/or equipment furnished by Zitting Brothers at
5 the Project irrespective of whether the owner has paid you.

6 ANSWER TO INTERROGATORY NO. 40:

7 Objection. APCO objects to this Interrogatory on the grounds that this Interrogatory is
8 vague, ambiguous, overly broad, unduly burdensome and oppressive because it seeks to force
9 APCO to identify "explain what sections or provisions, if any, of your "contractors license"
10 absolves you of your obligation to pay Zitting Brothers, your subcontractor, the owed and
11 outstanding amounts for the work, material, and/or equipment furnished by Zitting Brothers at
12 the Project irrespective of whether the owner has paid you." Broad ranging interrogatories are
13 improper when they essentially subsume every fact in the case or every person having
14 knowledge. See Hiskett v. Wal-Mart Stores, Inc., 180 F.R.D. 403, 404 (D. Kan. 1998).
15 ("Interrogatories should not require the answering party to provide a narrative account of its
16 case."). Parties can hardly know when they have identified "all" facts, persons, and documents
17 with respect to anything — particularly before the close of discovery. "How can the court make
18 enforceable orders with reference to 'all' of anything?" Often, the relevance of a particular fact
19 to a particular issue is not known until clarified and put into context by testimony at deposition
20 or trial. Such a question places the responding party in an impossible position. See id.; Safeco of
21 Am. V. Rawstron, 181 F.R.D. 441, 447048 (C.D. Cal. 1998)(finding unreasonable an
22 interrogatory calling for all facts supporting denial of a request for admission); Lawrence v. First
23 Kan. Bank & Trust Co., 169 F.R.D. 657, 660-63 (D. Kan. 1996)(same); Hilt v. SFC, Inc., 170
24 F.R.D. 182, 186-87 (D. Kan. 1997)(finding unduly burdensome an interrogatory seeking to
25 require plaintiff to state 'each and every fact' supporting allegations of a complaint).

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

MARQUIS AURBACH COFFING

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

1 Bate Stamp No. APC000000001²¹ through APC000078992 and APC0104200 through 104234,
2 which APCO has deposited into a depository established by APCO for this litigation matter with
3 Litigation Services and/or are hereby made available for review and copying (at requestor's
4 expense) at a mutually agreeable time and place. Discovery is ongoing. APCO reserves the right
5 to supplement or amend its Response to this Interrogatory as investigation, discovery, disclosure
6 and analysis continues. (See also further clarification supplement to APCO's Answer to
7 Interrogatory 1).

8 Dated this 7th day of November, 2017.

9 MARQUIS AURBACH COFFING

10
11 By /s/ Cody S. Mounteer, Esq.
12 Jack Chen Min Juan, Esq.
13 Nevada Bar No. 6367
14 Cody S. Mounteer, Esq.
15 Nevada Bar No. 11220
16 10001 Park Run Drive
17 Las Vegas, Nevada 89145
18 Attorneys for APCO Construction
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21
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28 ²¹ See Footnote No. 3.

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **APCO CONSTRUCTION'S SUPPLEMENTAL ANSWERS TO ZITTING BROTHERS CONSTRUCTIONS FIRST SET OF REQUESTS FOR INTERROGATORIES** was submitted electronically for filing and/or service with the Eighth Judicial District Court on the 7th day of November, 2017. Electronic service of the foregoing document shall be made in accordance with the E-Service List as follows:²²

| Select All Select None | | | |
|--|-----------------------------------|-------------------------------------|-------------------------------------|
| Bennett Tueller Johnson & Deere | | | |
| Name | Email | <input checked="" type="checkbox"/> | Select |
| Benjamin D. Johnson | ben.johnson@btjd.com | <input checked="" type="checkbox"/> | <input checked="" type="checkbox"/> |
| Kenzie Dunn | kdunn@btjd.com | <input checked="" type="checkbox"/> | <input checked="" type="checkbox"/> |
| Cadden & Fuller LLP | | | |
| Name | Email | <input checked="" type="checkbox"/> | Select |
| Dana Y. Kim | dkim@caddenfuller.com | <input checked="" type="checkbox"/> | <input checked="" type="checkbox"/> |
| S. Judy Hirahara | jhirahara@caddenfuller.com | <input checked="" type="checkbox"/> | <input checked="" type="checkbox"/> |
| Tammy Cortez | tcortez@caddenfuller.com | <input checked="" type="checkbox"/> | <input checked="" type="checkbox"/> |
| David J. Merrill P.C. | | | |
| Name | Email | <input checked="" type="checkbox"/> | Select |
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²² Pursuant to EDCR 8.05(a), each party who submits an E-Filed document through the E-Filing System consents to electronic service in accordance with NRCP 5(b)(2)(D).

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/s/ Taylor Fong
an employee of Marquis Aurbach Coffing

EXHIBIT 9

Steven D. Grierson

1 DECN

DISTRICT COURT

2 CLARK COUNTY, NEVADA

3
4 APCO CONSTRUCTION, a Nevada
corporation,

5 Plaintiff(s),

6 vs.

7 GEMSTONE DEVELOPMENT WEST, INC., a
8 Nevada corporation, et al.,

9 Defendant(s).

10 AND ALL RELATED CLAIMS.

) CASE NO. A571228

) DEPT. NO. XIII

) (Consolidated with A574391;

) A574792; A577623; A580889;

) A583289; A584730; A587168;

) A589195; A592826; A596924;

) A597089; A606730; A608717;

) A608718)

11
12 DECISION

13 THIS MATTER having come before the Court on November 16,
14 2017 for hearing on "Zitting Brothers Construction, Inc.'s Motion
15 for Partial Summary Judgment Against APCO Construction," with
16 appearances as noted in the Minutes and to be reflected in the
17 proposed order to be submitted as directed hereinbelow;

18 AND, the Court having heard the argument of counsel and
19 having then taken such items under advisement for further
20 consideration, and being now fully advised in the premises;

21 NOW, THEREFORE, the Court decides the submitted issues
22 as follows:

23
24 The subject Motion has been well briefed and argued with
25 the parties' contentions. In the interest of time, the Court will
26 make its ruling with instructions hereinbelow to counsel to submit
27 a proposed order consistent with the briefing and argument
28

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

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supportive of the same.

The "pay-if-paid" aspect of Zitting's Motion has been the subject of another recent Decision of the Court. However, putting that aspect of the Motion aside, the Court still has before it the question of whether there are genuine issues going to breach of contract related to Zitting's performance of the same.

The Court is persuaded that, in what is one of the oldest cases pending in this Court, what APCO has provided is "too little too late." It is simply unfair to require Zitting to address supposed issues that have been drawn out at the last minute.

All things considered, the subject Motion is GRANTED in its entirety.

Counsel for Zitting is directed to submit a proposed order consistent with the foregoing and which sets forth the underpinnings of the same in accordance herewith and with the aspects of counsel's briefing and argument supportive of the same. Such proposed order should be submitted to opposing counsel for review and signification of approval/disapproval. Instead of seeking to clarify or litigate meaning or any disapproval through correspondence directed to the Court or to counsel with copies to the Court, any such clarification or disapproval should be the subject of appropriate motion practice.

This Decision sets forth the Court's intended disposition

.
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1 on the subject, but it anticipates further order of the Court to
2 make such disposition effective as an order or judgment.

3 DATED this 21st day of November, 2017.

4
5 
6 MARK R. DENTON
DISTRICT JUDGE

7
8 CERTIFICATE

9 I hereby certify that on or about the date filed, this
10 document was Electronically Served to the Counsel on Record on the
11 Clark County E-File Electronic Service List.

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13 
14 LORRAINE TASHIRO
15 Judicial Executive Assistant
16 Dept. No. XIII
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EXHIBIT 10

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13 *Attorneys for Lien Claimant,*
14 *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 MOTION FOR
PARTIAL SUMMARY JUDGMENT AGAINST APCO CONSTRUCTION**

Under Nev. R. Civ. P. 56(b), Zitting Brothers Construction, Inc. ("Zitting"), a lien-claimant, respectfully requests that this Court grant summary judgment against APCO Construction ("APCO") on its breach of contract claim and claim under Chapter 108 of the Nevada Revised Statutes. The undisputed material facts show that APCO breached its contract with Zitting by refusing to pay the full amount owed for Zitting's work on the Manhattan West Condominiums (the "Project"). Zitting explains this further in the supporting memorandum of points and authorities, which is supported by the attached exhibits, the records of this Court, and any oral arguments that this Court may entertain at the hearing on this motion.

1 DATED this 31st day of July, 2017

2 WILSON ELSEER MOSKOWITZ EDELMAN &
3 DICKER LLP

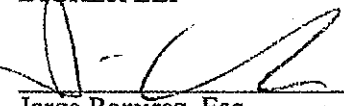
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14 Zitting Brothers Construction, Inc.

11 **NOTICE OF HEARING ON ZITTING BROTHERS CONSTRUCTION, INC.'S MOTION**
12 **FOR PARTIAL SUMMARY JUDGMENT**

13 Please take notice that Zitting will bring its Motion for Partial Summary Judgment for
14 hearing in Department XIII of the above-captioned court on September 5, 2017, at 9:00
15 a.m., or as soon thereafter as this matter may be heard.

16 DATED this 31st day of July, 2017.

17 WILSON ELSEER MOSKOWITZ EDELMAN &
18 DICKER LLP

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1 MEMORANDUM OF POINTS AND AUTHORITIES

2 I. INTRODUCTION

3 This case involves the construction of the Project, which was owned and developed by
4 Gemstone Development West, Inc. ("Gemstone"). Zitting was one of the many sub-contractors hired
5 by APCO to provide material and labor for the Project. After Zitting completed its approved scope
6 of work on two buildings for the Project, but before Zitting received full payment for that work,
7 Gemstone stopped construction on the Project due to its purported loss of financing for the
8 construction.

9 Although APCO does not dispute the unpaid balance owed for Zitting's work on the Project,
10 APCO has repeatedly refused to pay Zitting that balance. This refusal arises solely from APCO's
11 misplaced reliance on the "pay-if-paid" provisions in the subcontract between APCO and Zitting.
12 Those provisions only require APCO's payment to Zitting when APCO receives actual payment
13 from Gemstone. The provisions relied upon by APCO, however, are void and unenforceable under
14 Nevada law. Therefore, there is no triable issue of APCO's breach of the subcontract, and Zitting is
15 entitled to judgment on its breach of contract claim and claim under Chapter 108 of the Nevada
16 Revised Statutes as a matter of law.

17 II. STATEMENT OF UNDISPUTED MATERIAL FACTS

18 On September 6, 2007, Gemstone entered into a written contract with APCO for APCO to
19 serve as the prime contractor for the Project. (Ex. C at ZBCI002103.) About two months later,
20 APCO and Zitting entered into a written subcontract for Zitting to provide framing materials and
21 labor for the Project. (Ex. D at APCO00044592, APCO0044607.) Under the terms of the
22 subcontract, APCO would pay Zitting 90% of the amount owed for satisfactory work completed on a
23 periodic basis. (*Id.* at APCO00044593-APCO00044595.) The remaining 10% of the amount owed to
24 Zitting would be withheld as the "retention amount." (*Id.* at APCO00044595.) APCO would pay
25 Zitting the retention amount for work on a building once the building is "complete." (*Id.*) The
26 subcontract deemed Zitting's work on a building to be "complete" as soon as "drywall [for the
27 building] is completed." (*Id.*) Nevertheless, in the event that APCO's contract with Gemstone is
28 terminated, APCO would pay Zitting the entire amount owed for the work completed. (*Id.* at

1 APCO00044601.) APCO could only terminate its subcontract with Zitting for cause upon written
2 notice. (*Id.* at APCO00044600.)

3 Zitting began its work under the subcontract around November 19, 2007, and continued its
4 work until approximately December 15, 2008, when Zitting received notice that the Project was
5 shutting down. (Ex. A (Zitting Decl.) at ¶ 6.) By the time the Project shut down, Zitting completed
6 its contracted work that cost \$4,033,654.85, including \$423,654.85 in owner-requested change
7 orders that was approved by operation of law. (*Id.* at ¶ 10.) The completed work included Zitting's
8 entire scope of work for Buildings 8 and 9 of the Project. (*Id.* at ¶ 7.) The drywall was completed in
9 those two buildings, and Zitting had submitted close-out documents for its work, including as-built
10 drawings. (*Id.* at ¶¶ 7-8.)

11 To date, Zitting only received \$3,282,849.00 in payment. (*Id.* ¶ 14.) APCO refused to pay
12 Zitting \$750,807.16 of the amount remaining owed for Zitting's work completed prior to APCO's
13 departure from the Project, including \$347,441.67 in unpaid change orders and \$403,365.49 in
14 unpaid retention amount. (*Id.* ¶¶ 12-13, 15; Ex. F at ZBCI002037; Ex. G at ZBCI002032.)

15 Gemstone had terminated its contract with APCO for cause in August 2008. (Ex. B (Benson
16 Dep.) at 34:7-36:13.) Zitting never received a written notice of termination for cause from APCO.
17 (Ex. A at ¶ 16.)

18 Zitting took steps to comply with all requirement of Chapter 108 of the Nevada Revised
19 Statutes for the perfection of its lien:

- 20 ▪ On January 14, 2008, Zitting served its Notice of Right to Lien to APCO and Gemstone
21 via certified mail. (Ex. J; Ex. U at 9:1-24.)
- 22 ▪ On December 4, 2008, Zitting served its Notice of Intent to Lien to APCO and Gemstone
23 via certified mail. (Ex. K; Ex. U at 9:1-24.)
- 24 ▪ On December 23, 2008, Zitting recorded its Notice of Lien on the Project and served the
25 document on APCO and Gemstone via certified mail on December 24, 2008. (Ex. L; Ex.
26 U at 9:1-24.)

- 1 ▪ On April 30, 2009, Zitting filed its complaint for foreclosure and a Notice of Lis
2 Pendens—approximately five months after recording the notice of lien. (Ex. M; Ex. N;
3 Ex. U at 9:1-24.)
- 4 ▪ Around June 16, 2009, Zitting provided a Notice of Foreclosure, and this notice was
5 published in accordance in accordance with Nev. Rev. Stat. 108.239. (Ex. O; Ex. U at
6 9:1-24.)
- 7 ▪ On April 7, 2010, Zitting recorded its Amended Notice of Lien and served the same on
8 APCO and Gemstone via certified mail. (Ex. P; Ex. U at 9:1-24.)

9 **III. STANDARD FOR SUMMARY JUDGMENT**

10 Summary judgment is proper “if the pleadings, depositions, answers to interrogatories, and
11 admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any
12 material fact and that the moving party is entitled to a judgment as a matter of law” on any issues.
13 Nev. R. Civ. P. 56(b), (c). The purpose of summary judgment is to obviate the need for trials when
14 they would serve no useful purpose. *Short v. Hotel Riviera, Inc.*, 79 Nev. 94, 96, 378 P.2d 979, 980
15 (1963). Similarly, the United States Supreme Court, citing Nev. R. Civ. P. 56’s federal equivalent,¹
16 has explained that “[s]ummary judgment procedure is properly regarded not as a disfavored
17 procedural shortcut, but rather as an integral part of the federal rules as a whole, which are designed
18 to secure the just, speedy and inexpensive determination of every action.” *Celotex Corp. v. Catrett*,
19 477 U.S. 317, 327, 106 S. Ct. 2548, 2555 (1986) (internal quotations omitted).

20 Once the moving party meets its burden of demonstrating an absence of evidence to support
21 the non-moving party’s case, the burden shifts to the non-moving party to set forth specific facts
22 demonstrating that there exists a genuine issue of material fact for trial. *Id.* at 325, 106 S. Ct. at
23 2554. Moreover, the non-moving party must raise factual disputes which are material—defined as
24 those required to prove a basic element of a claim. *Id.* A failure to show that a dispute of material
25 fact exists as to any of the basic elements of the non-moving party’s claim effectively “renders all
26 other facts immaterial.” *Id.* at 323, 106 S. Ct. at 2552.

27
28 ¹ The Nevada Supreme Court has adopted the federal standard for summary judgment as Nevada’s standard. *See Wood v. Safeway, Inc.*, 121 Nev. 724, 731, 121 P.3d 1026, 1031 (2005).

1 A "genuine issue of material fact is one where the evidence is such that a reasonable jury
2 could return a verdict for the non-moving party." *Posadas v. City of Reno*, 109 Nev. 448, 452, 851
3 P.2d 438, 441-42 (1993). But the non-moving party cannot build its case on "gossamer threads of
4 whimsy, speculation and conjecture." *Id.* at 452; *see also Garvey v. Clark County*, 91 Nev. 127, 130,
5 532 P.2d 269, 271 (1975) (holding that mere allegations are insufficient to defeat summary
6 judgment). Thus, "[a]lthough evidence presented in support of a motion for summary judgment is to
7 be construed in the light most favorable to the nonmoving party, [the non-moving] party must set
8 forth facts demonstrating the existence of a genuine issue in order to withstand a disfavorable
9 summary judgment." *Sustainable Growth Initiative Committee v. Jumpers, LLC*, 122 Nev. 53, 61,
10 128 P.3d 452, 458 (2006).

11 IV. ARGUMENT

12 A. APCO breached its contract with Zitting by refusing to pay the full amount owed 13 for Zitting's work on the Project.

14 There is no triable issue that APCO breached its contract with Zitting. To establish a breach
15 of contract under Nevada law, there must be (1) the existence of a valid contract, (2) a breach by the
16 defendant, and (3) damage as a result of the breach. *Richardson v. Jones*, 1 Nev. 405, 408 (1865). In
17 this case, all of these elements are present.

18 1. Zitting had a valid and enforceable contract with APCO from about 19 November 19, 2007 to about December 15, 2008.

20 The undisputed evidence establishes a contract between APCO and Zitting. Exhibit D is the
21 written subcontract executed by APCO and Zitting on November 17, 2007. (Ex. A at ¶ 5; Ex. D.)
22 Under the subcontract, APCO could only terminate it for cause upon written notice. (Ex. D at
23 APCO00044598-44601.) Prior to the Project's shutdown, Zitting did not receive a written notice for
24 termination of its contract for cause. (Ex. A at ¶ 16.) Although APCO's contract with Gemstone
25 ended around August 2008 and the Project completely shut down in December 2008, (*Id.*; Ex. B at
34:7-36:13, 40:13-15), the subcontract between Zitting and APCO is still valid and enforceable.

26 //

27 //

28 //

1 **2. APCO's failure to pay the amount owed for Zitting's work on the Project**
2 **constitutes a breach of contract.**

3 APCO breached its subcontract with Zitting by refusing to pay Zitting all amounts owed
4 under the subcontract. Under the subcontract, Zitting was required to provide framing materials and
5 labor for certain buildings of the Project, and APCO was required to pay Zitting on a periodic basis
6 for satisfactory work. (Ex. D at APCO00044593-APCO00044595, APCO00044607.) Zitting
7 completed its scope of work on two buildings—Buildings 8 and 9 of the Project—without any issues
8 with the timing or quality of the work. (Ex. A. at ¶¶ 7-9; Ex. B at 28:15-29:1.) However, as of today,
9 APCO has not paid Zitting for the work completed on the owner-requested change orders before
10 APCO left the Project and continues to withhold the retention amount. (Ex. A at ¶ 15; Ex. I.)

11 First, Zitting had requested payment of \$347,441.67 for satisfactory work on owner-
12 requested change order completed before APCO left the Project. (Ex. A at ¶ 12; Ex. F.) This arose
13 from Zitting's previous request for change orders from Gemstone and APCO to address owner-
14 requested changes to the plans. (Ex. A at ¶¶ 10-12; Ex. E; Ex. F.) APCO and Gemstone failed to
15 submit a written notice rejecting the change order after Zitting's request for the change orders. (Ex.
16 A at ¶ 11; Ex. H at ZBCI001153.) As APCO must concede, by operation of law, its failure to reject
17 the change order resulted in the approval of the change orders. (See Ex. H at ZBCI001153
18 (discussing Nev. Rev. 624.626).) With statutory approval of the change orders, APCO owed Zitting
19 \$347,441.67 for Zitting's completed work on the change orders.

20 Second, Zitting had requested payment of its retention amount—\$403,365.49—for its work
21 on the completed Buildings 8 and 9. (Ex. A at ¶ 13; Ex. G.) Under Zitting's subcontract, Zitting
22 would only receive 90% of the payment for its satisfactory work on the Project. (Ex. D at
23 APCO00044594.) The subcontract called for the payment of the remaining 10%—the retention
24 amount—upon completion of the building for which the work was done. (*Id.* at APCO00044595.)
25 The contract considered work on a building to be "complete" as soon as "drywall [for the building]
26 is completed." (*Id.*)

27 Before the Project shut down, Zitting provided work that qualified for \$4,033,654.85 in
28 payment, and \$403,365.49 of that amount was withheld as the retention amount for work on

1 Buildings 8 and 9 of the Project. (Ex. A at ¶ 10; Ex. G.) However, Zitting completed its scope of
2 work on Buildings 8 and 9 and submitted its closeout documents to APCO. (Ex. A at ¶¶ 7-8.) The
3 drywall was also completed for those buildings. (*Id.* at ¶ 7.) Zitting was therefore entitled to payment
4 of the retention amount because they never received notice that the work done was not satisfactory.
5 To the contrary, Zitting's "satisfactory" work was utilized for the completion of the drywall work.
6 (See Ex. A at ¶¶ 5, 7.)

7 In any event, the termination of APCO's contract with Gemstone entitles Zitting to the
8 payment of the retention amount. The contract was terminated in August 2008, and by that time,
9 Zitting had completed its scope of work on Buildings 8 and 9. (Ex. A at ¶¶ 6-8.) Moreover, Section
10 9.4 of Zitting's subcontract expressly requires payment for Zitting's completed work on the Project
11 if there was a termination of the contract between Gemstone and APCO. (Ex. D at APCO00044601.)
12 APCO therefore owes Zitting \$403,365.49 in retention amount.

13 **3. Zitting has suffered damages due to APCO's refusal to pay the amount owed**
14 **under the contract.**

15 As a result of APCO's refusal to pay the amount owed for Zitting's work on the Project,
16 Zitting has suffered damages. There is no dispute that \$750,807.16 remained unpaid for Zitting's
17 work on the Project prior to APCO's departure from the Project. (Ex. A at ¶¶ 6-15; Ex. I.) APCO
18 has compounded Zitting's damages by forcing Zitting to commence this action to recover the
19 amount owed. Now, the damages suffered include attorney fees, cost, and interest.

20 **4. APCO's attempt to use the "pay-if-paid" provision of its contract with**
21 **Zitting is disingenuous because it because it violates Nevada law.**

22 APCO relies on the "pay-if-paid" provision in its subcontract with Zitting as the sole basis
23 for refusing to pay the amount owed for Zitting's work on the Project. (Ex. B at 40:16-41:4; Ex. T
24 at 10:14-11:5.) This provision conditions APCO's payments to Zitting only "upon receipt of the
25 actual payments by [APCO] from [Gemstone]." (Ex. D at APCO00044594.) But this provision is
26 void by operation of Nevada law.

27 Nevada Supreme Court has held that "pay-if-paid" provisions are valid and "enforceable only
28 in [the] limited circumstances" set forth in Nev. Rev. Stat. 624.624 through 624.626. *Lehrer*
McGovern Bovis v. Bullock Insulation, Inc. ("Lehrer II"), 124 Nev. 1102, 1117 n. 50, 197 P.3d 1032,

1 1042 n. 50 (2008). This restriction arises from the strong public policy favoring “securing payment
2 for labor and material contractors.” *Id.* at 1117, 197 P.3d at 1042. “Because a pay-if-paid provision
3 limits a subcontractor’s ability to be paid for work already performed, such a provision impairs the
4 subcontractor’s statutory right to place a mechanic’s lien on the construction project” and therefore
5 violate public policy. *Id.* at 1117-18, 197 P.3d at 1042.

6 For a “written agreement with a lower-tiered subcontractor that does not contain a schedule
7 for payments,” Nev. Rev. Stat. 624.626 requires the “higher-tiered contractor” to pay the “lower-
8 tiered subcontractor”

9 (1) [w]ithin 30 days after the date the lower-tiered subcontractor
10 submits a request for payment; or

11 (2) [w]ithin 10 days after the date the higher-tiered contractor receives
12 payment for all or a portion of the work, labor, materials, equipment or
services described in a request for payment submitted by the lower-
tiered subcontractor, *whichever is earlier.*

13 Nev. Rev. Stat. 624.626(1)(b) (emphasis added). Any attempts to impair or waive such rights “is
14 void and unenforceable.” Nev. Rev. Stat. 624.628(3).

15 Here, because APCO’s “pay-if-paid” provision fails to provide payment within the statutory
16 period after a request for payment, the provision violates Nev. Rev. Stat. 624.624. This Court must
17 therefore void the provision. Contrary to the contractual provision, APCO should have paid Zitting
18 no later than 30 days after Zitting’s request for payment. *See* Nev. Rev. Stat. 624.624(1)(b). Since
19 Zitting has yet to receive the payment owed, it is entitled to summary judgment on its breach of
20 contract claim.

21 **B. Zitting is entitled to summary judgment on its claim under Chapter 108 of the**
22 **Nevada Revised Statutes.**

23 Zitting’s claim under Chapter 108 of the Nevada Revised Statutes seeks to foreclose on
24 Zitting’s lien against the Property and to recover “reasonable attorney’s fees, costs[,] and interest on
25 the unpaid amount owed for Zitting’s work on the improvement to the Property. (Ex. M at ¶¶ 28-35.)
26 APCO does not dispute that Zitting complied with all requirements to create, perfect, and foreclose
27 on its lien under Chapter 108. (*See* Ex. Q at 4:19-8:8.) APCO only disputes that the Property subject
28

1 to the lien has already been foreclosed upon and therefore Chapter 108 is inapplicable. This
2 argument is misguided and falls short of a comprehensible reading of lien foreclosure law.

3 This Court previously ordered the sale of the Property, which precludes Zitting from
4 continuing its foreclosure of the Property, and the distribution of the entire proceeds from the sale to
5 Scott Financial Corporation. (See Ex. R at 3:18-20, 4:10-19; Ex. S at 2:7-16, 3:1-4.) In other words,
6 Zitting did not receive any of the sale proceeds, so it cannot apply such proceeds towards the amount
7 owed under its contract with APCO. Nevertheless, Nev. Rev. Stat. 108.239(12) allows Zitting to
8 pursue a "personal judgment for the residue against the party legally liable for it." Therefore, Zitting
9 is entitled to a personal judgment against APCO under Chapter 108 for the residual amount owed
10 including those statutory provisions granting attorney fees, costs and interest.

11 **C. Zitting is entitled to judgment against APCO in the amount of the unpaid balance of**
12 **\$750,807.16, interest, attorney's fees, and costs incurred to obtain the amount owed.**

13 This Court should award Zitting the amount owed for its completed work on the Project in
14 the amount of \$750,807.16 plus interest, attorney's fees, and costs incurred to obtain the amount
15 owed. Both Zitting's contract and Nevada law allow an award of interest and reasonable attorney's
16 fees and costs in addition to the \$750,807.16 in unpaid work. Under the contract, "the prevailing
17 party [in a lawsuit for any cause arising out of the subcontract is] entitled to all costs, attorney's
18 fees[,] and any other reasonable expenses incurred therein." (Ex. D at APCO00044606.) Likewise,
19 Nev. Rev. Stat. 108.237(1) awards the prevailing lien claimant "the cost of preparing and recording
20 the notice of lien" and "the costs of the proceedings," including attorney's fees and interest. Courts
21 calculate the interest based on

22 (a) The rate of interest agreed upon in the lien claimant's contract; or

23 (b) If a rate of interest is not provided in the lien claimant's contract,
24 interest at a rate equal to the prime rate at the largest bank in Nevada,
25 as ascertained by the Commissioner of Financial Institutions, on
26 January 1 or July 1, as the case may be, immediately preceding the
27 date of judgment, plus 4 percent, on the amount of the lien found
28 payable. The rate of interest must be adjusted accordingly on each
January 1 and July 1 thereafter until the amount of the lien is paid.
Interest is payable from the date on which the payment is found to
have been due, as determined by the court.

Nev. Rev. Stat. 108.237(2).

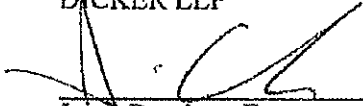
1 Although Zitting can successfully argue that the amount owed by APCO was due by the time
2 APCO departed the Project, it is indisputable that the full unpaid balance—the lien amount—was
3 due by the Project's shutdown date of December 15, 2008. Consequently, in order to simplify the
4 analysis, Zitting uses this date by which interest is calculated under the statute. Judicial notice is
5 requested of the fact that the prime rate has as determined by the Commissioner of Financial
6 Institutions for the time period from December 15, 2008, to the present to be 3.75%.² See Nev. Rev.
7 Stat. 47.130, 47.140, 47.170. As such, the rate to be used for the calculation of the applicable interest
8 is 4% plus 7.75% or 7.75%. Based on this rate, the amount of interest accrued per day on the
9 \$750,807.16 due to Zitting is \$159.31. Additionally, Zitting has incurred attorney's fees and costs.
10 Thus, Zitting hereby requests a judgment against APCO in this amount plus \$159.31 per day in
11 interest from December 15, 2008 until the lien is paid as well as all attorney's fees and costs incurred
12 after that date.³

13 **V. CONCLUSION**

14 For the foregoing reasons, this Court should grant Zitting's motion in its entirety and enter
15 summary judgment in Zitting's favor on its breach of contract claim and Chapter 108 claim.

16 DATED this 31st day of July, 2017

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26 ² See This Nevada State Bar Website at
27 [http://fid.nv.gov/uploadedFiles/fidnv.gov/content/Resources/Prime%20Interest%20Rate%20January%201,%202017-](http://fid.nv.gov/uploadedFiles/fidnv.gov/content/Resources/Prime%20Interest%20Rate%20January%201,%202017-PDF.pdf)
28 PDF.pdf

28 ³ Zitting requests leave to submit a memorandum of fees and costs if this Court grants summary judgment in favor of
Zitting.

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 31st day of July, 2017, I served a true and correct copy of the foregoing **ZITTING BROTHERS CONSTRUCTION, INC.'S MOTION FOR PARTIAL SUMMARY JUDGMENT AGAINST APCO CONSTRUCTION** 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;
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- ☐ by transmitting via email the document listed above to the email address set forth below on this date before 5:00 p.m.

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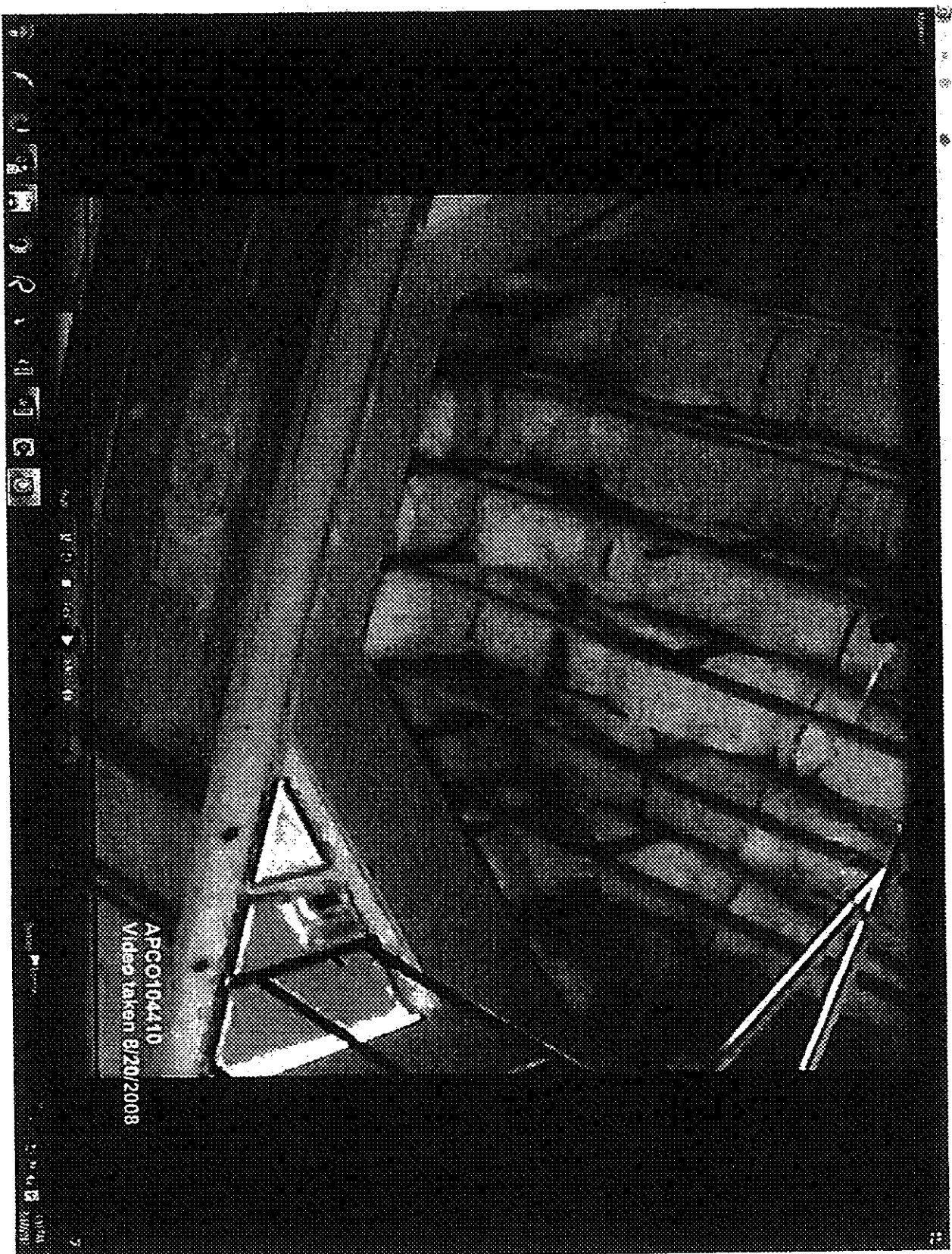
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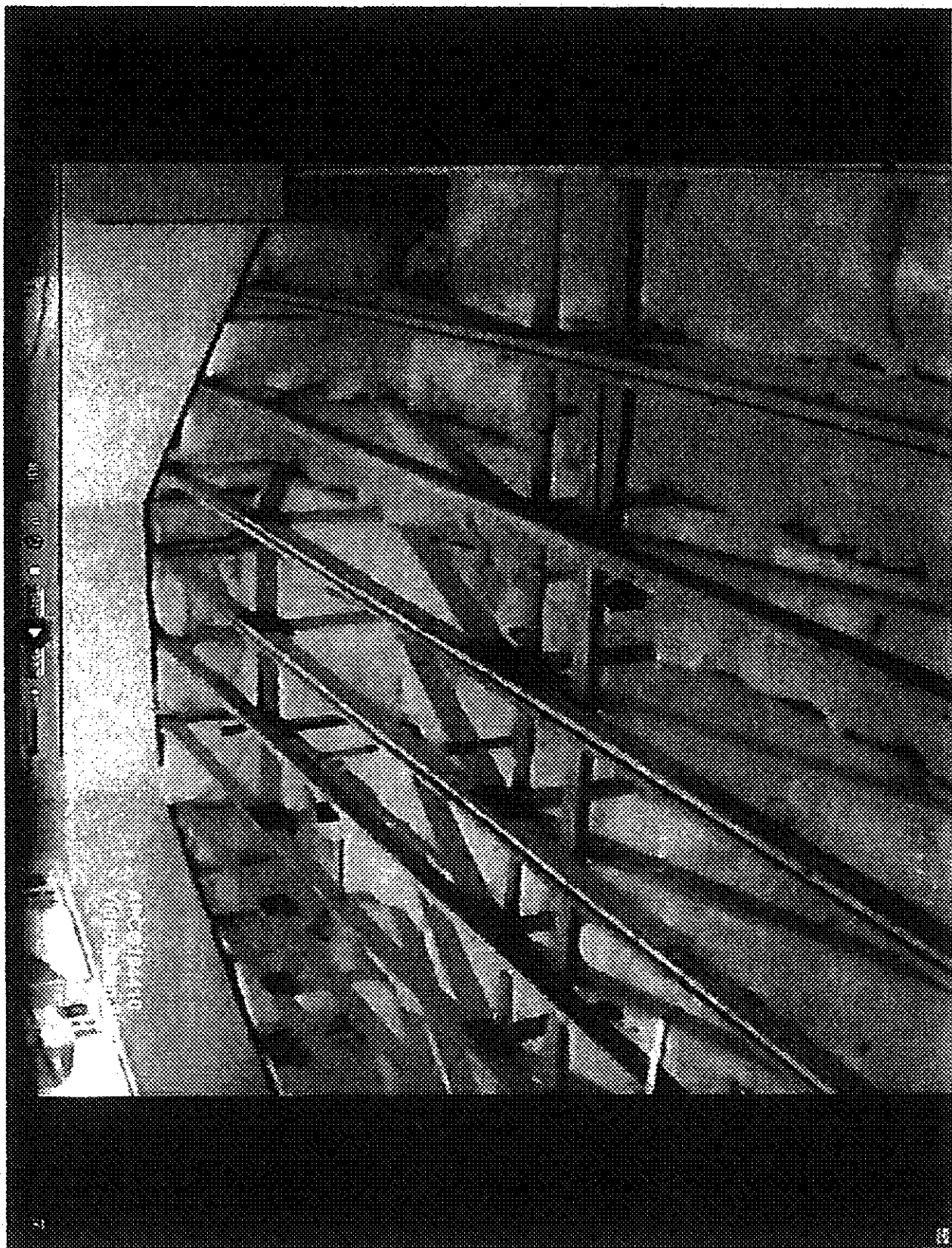
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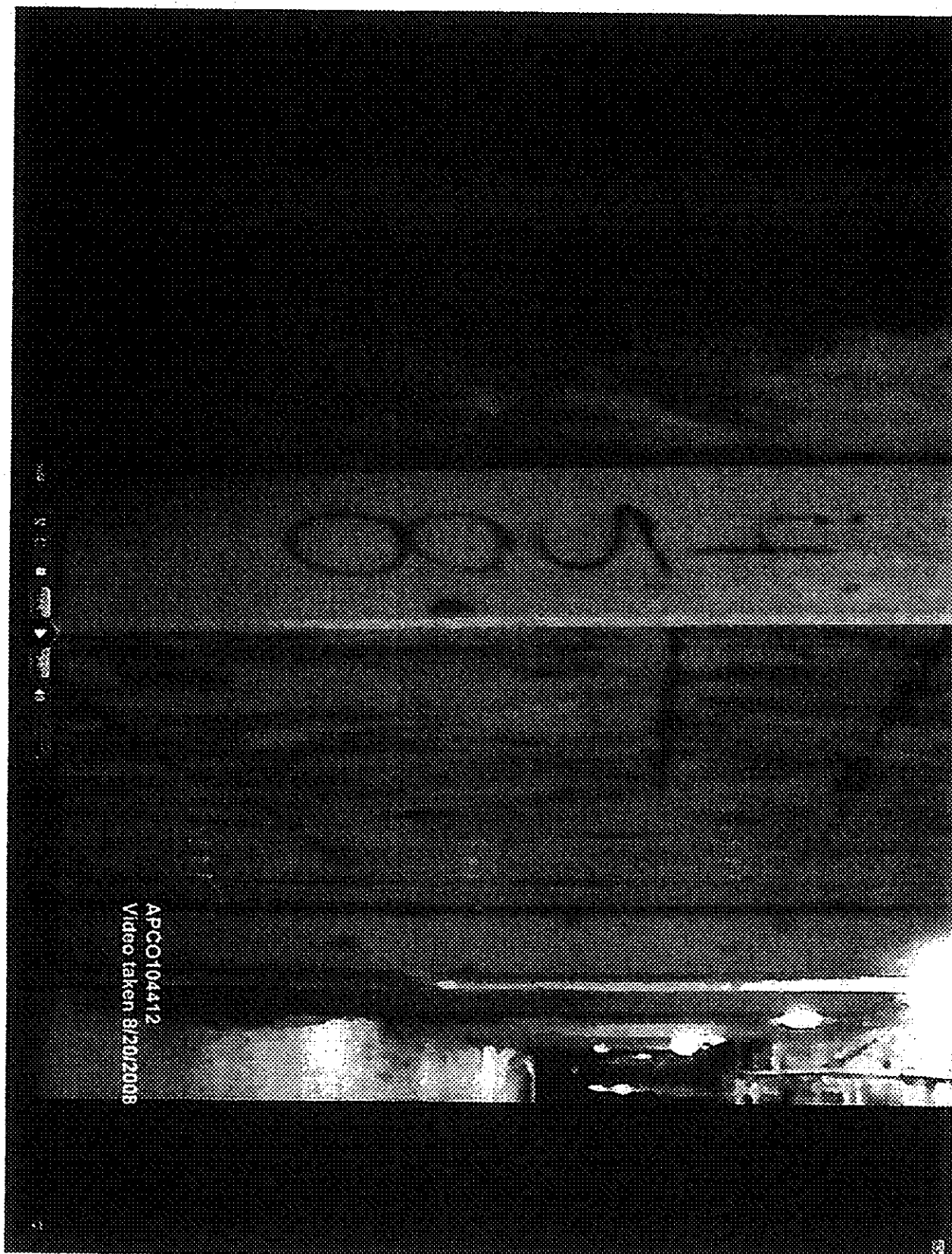
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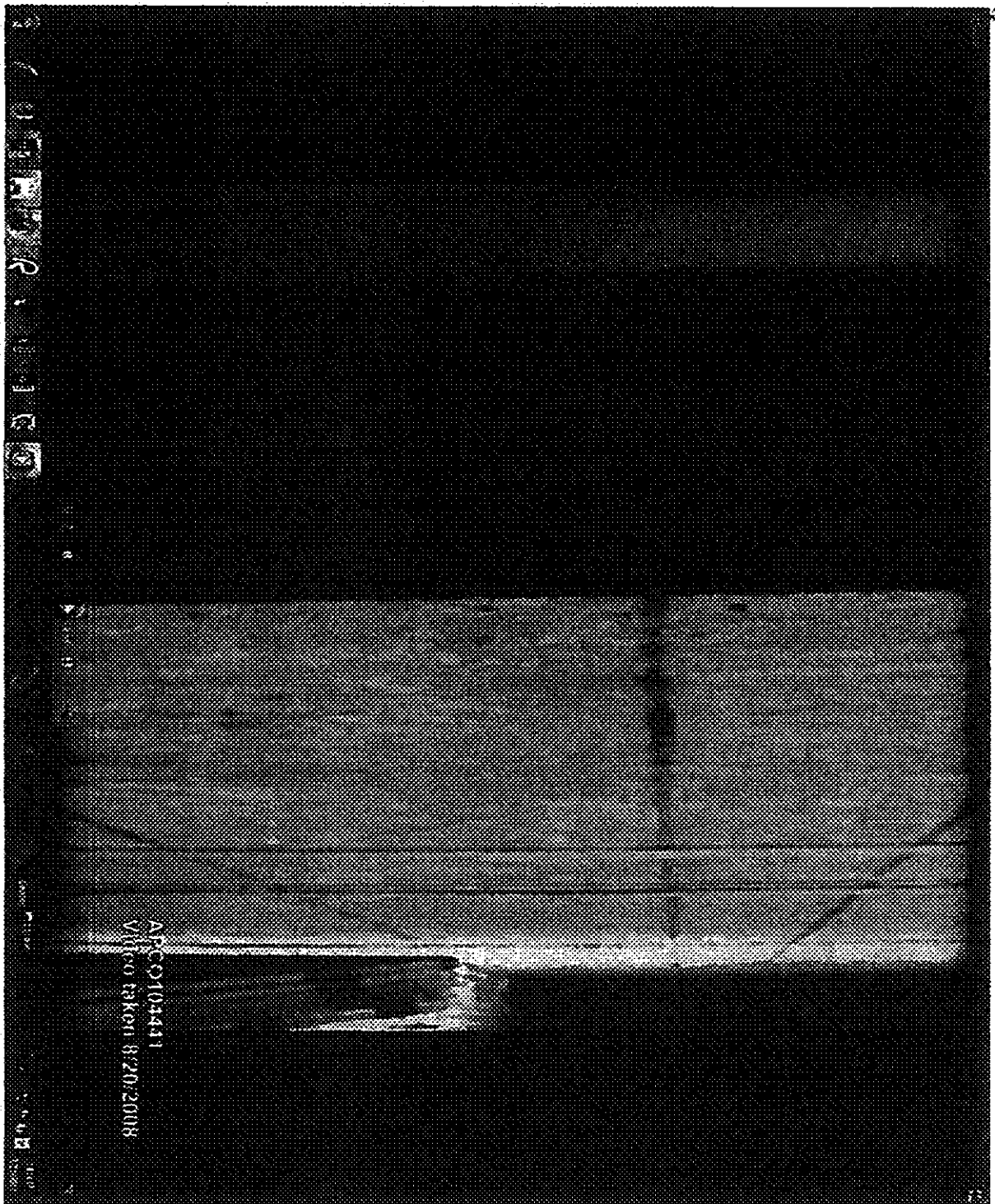
EXHIBIT 11







APCO104412
Video taken 8/20/2008



APCO10441
Video taken 8/20/2008