IN THE SUPREME COURT OF THE STATE OF NEVADA

APCO CONSTRUCTION, INC., Appellant. vs. ZITTING BROTHERS CONSTRUCTION, INC, Respondent.	Case No. 75197 District Court Case No. 08A571228

PETITION FOR REHEARING

Marquis Aurbach Coffing
Cody S. Mounteer, Esq.
Nevada Bar No. 11220
10001 Park Run Drive
Las Vegas, Nevada 89145
Telephone: (702) 382-0711
Facsimile: (702) 382-5816
cmounteer@maclaw.com

Fennemore Craig, P.C.
John Randall Jefferies, Esq.
Nevada Bar No. 3512
Christopher H. Byrd, Esq.
Nevada Bar No. 1633
300 S. Fourth Street, Suite 950
Las Vegas, NV 89101
Telephone: (702) 692-8000
Facsimile: (702) 692-8099
rjefferies@fclaw.com
cbyrd@fclaw.com

Attorneys for Appellant, APCO Construction, Inc.

NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the Justices of this Court may evaluate possible disqualification or recusal.

1. APCO Construction, Inc. (APCO), is not a publicly traded company, nor is it owned by a publicly traded company.

2. APCO was represented in the district court by Gwen Rutar-Mullins, Esq. and Wade Gochnour, Esq. of Howard & Howard; Micah Echols, Esq., Cody Mounteer, Esq., and Jack Juan, Esq. of Marquis Aurbach Coffing; and John Mowbray, Esq., John Randall Jefferies, Esq., and Mary Bacon, Esq. of Spencer Fane LLP.

3. Cody Mounteer, Esq., and Kathleen Wilde, Esq. of Marquis Aurbach Coffing; John Randall Jefferies, Esq., of Fennemore Craig; and Christopher H. Byrd, Esq. of Fennemore Craig represent APCO in this Court.

Dated this 23rd day of November, 2020.

FENNEMORE CRAIG, P.C.

By /s/ *Christopher H. Byrd, Esq.*
John Randall Jefferies, Esq. (Bar No. 3512)
Christopher H. Byrd, Esq. (Bar No. 1633)
300 S. Fourth Street, Suite 950
Las Vegas, NV 89101
rjefferies@fclaw.com
cbyrd@spencerfane.com

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I. PRELIMINARY STATEMENT IN SUPPORT OF REHEARING

Pursuant to NRAP 40 Respondent APCO Construction Inc. ("APCO") moves for rehearing of the Panel's decision, entered October 8, 2020 ("Decision"). The Decision holds paid if paid clauses, which require a subcontractor to forgo its right to prompt payment under NRS 624.624 when payment would otherwise be due, are void and against public policy under NRS 624.628(3). This result is a material departure from prior pronouncements of this Court about the enforceability of paid if paid clauses.

The Decision's de novo analysis of the Prompt Payment Act (NRS 624.624-626 hereafter the "Act") also misinterprets the plain language and purpose of the Act. The Decision overlooks sections of the Act, that expressly authorize paid if paid clauses (NRS 624.626(1)(b)) and treat differently subcontracts with those clauses for purposes of stop work and termination for non-payment (NRS 624.626(2)). Because paid if paid clauses are permitted under NRS 624.626(1)(b), they cannot be void as violating public policy under NRS 624.628(3)(a) as the Decision held, particularly, when Zitting's lien rights were not impaired. And, if paid if paid clauses cannot be void under NRS 624.628(3)(a), then APCO was not

required to pay Zitting for the work under NRS 624.624(1) (a).

The Decision also overlooks the harmful effects to APCO and the construction industry from the Decision's attempt to clarify the law surrounding paid if paid clauses. Based upon the Act's acceptance of paid if paid clauses and this Court's prior pronouncements about their enforceability after the Act, general contractors, including APCO, reasonably relied on paid if paid clauses for protection from unpredictable and potentially catastrophic losses when, as in this case, the owner stops paying and there is no equity in a half finished project. The Decision's interpretation of the Act, however, transfers to APCO all of the owner's losses arising from the owner's bad business decisions and the lender's decision to cut off funding. Thus, the Decision overlooks that it made APCO the owner's de-facto partner or lender for the failed project. The Act's provisions do not support such an unfair result.

Finally, even if the Court does not overturn the Decision, fairness and equity require prospective application of the Decision because of the unanticipated shift in the law regarding the enforceability of paid if paid clauses.

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II. ISSUES OF FACT AND LAW OVERLOOKED OR MISAPPREHENDED

The Decision overlooked or misapprehended the following facts and points of law:

1. The Decision holds that NRS 624.626(3)(a) makes the paid if paid schedule in the Zitting subcontract unenforceable because it limits Zitting's right to be paid promptly under 624.624(1)(a) for work performed. Decision p. 2. However, the purpose of all paid if paid clauses is to limit the subcontractor's right to payment for work performed when an owner does not pay the general contractor. Because of the purpose of paid if paid clauses, the Decision makes essentially all paid if paid clauses unenforceable, regardless of whether a subcontractor's lien rights are impaired. Therefore, on its face the Decision is a material departure from *Lehrer McGovern Bovis, Inc. v. Bullock Insulation, Inc.*, 124 Nev. 1102,1117, 197 P.3d 1032, 1042 & n. 50 (2008), which concluded that paid if paid clauses could be enforceable under limited circumstances after the enactment of NRS 624.624-626 ("Prompt Payment Act"). Decision p. 2. Furthermore, because of the purpose of paid if paid clauses, the Decision's efforts to clarify *Lehrer* by holding "paid if paid provisions are not per se

void and unenforceable" cannot be reconciled with the holding that paid if paid clauses are void and unenforceable under NRS 624.628(3), particularly when Zitting's lien rights were not impaired. Compare Decision p. 2 with p. 9.

2. The Decision's de novo analysis of the Act fails to give effect to all of the provisions of the Act. APCO Opening Brief ("AOB") p. 35. First, NRS 624.624(1)(a) must be interpreted to mean what it says: the parties can agree to a schedule of payments. The language of NRS 624.624(1)(a) does not limit the parties' right to contractually agree when payment will be due, including making payment due when the owner pays the general contractor. AOB p. 36. There is nothing in the language of NRS 624.624(1) that requires a "schedule of payments" to contain a date certain. APCO Reply Brief ("ARB") p 22. The Decision's interpretation of NRS 624.624(1), which makes a paid if paid schedule unenforceable under NRS 624.628(3)(a), turns the Act into a payment guaranty act for subcontractors; and is inconsistent with the Act's acceptance of paid if paid clauses as discussed below. Furthermore the Decision disregards the parties' bargained for payment terms in the subcontract, including Zitting's agreement to assume with APCO the same risk of owner insolvency. See, Zitting

Subcontract 9 AA 1920-1921.

Second, the Decision's de novo analysis of the Act overlooked the stop work/termination sections of the Act, notably NRS 624.626(1)(b), which expressly authorizes paid if paid clauses in a subcontract, and NRS 624.626(2), which does not provide a termination remedy for non payment when a subcontract contains a paid if paid provision. The Court failed to consider how paid if paid provisions can be void and unenforceable under NRS 624.628(3)(a) for determining the right to payment under NRS 624.624(1)(a), but also be enforceable under NRS 624.626(1)(b) for determining when a subcontractor can stop work and whether a subcontractor can terminate its subcontract for nonpayment under NRS 624.626(2). If paid if paid clauses are enforceable to determine when a subcontractor has the right to stop work or whether a subcontractor has the right to terminate the subcontract, they cannot violate NRS 624.628(3)(a), as the Decision held, nor can they be interpreted as impermissibly denying a subcontractor the right to prompt payment under NRS 624.624(1)(a).

By failing to reconcile the provisions of NRS 624.626(1)(b) and NRS 624.626(2) with the Decision's interpretation of NRS 624.624(1)(a) and NRS 624.628(3)(a), the Court violated a fundamental principle of statutory

construction that legislative enactments are read as a whole. *D.R. Horton, Inc. v. Eighth Jud. Dist. Ct. ex rel. County of Clark*, 123 Nev. 468, 476, 168 P.3d 731, 738 (2007). "No part of the statute [may] be rendered meaningless and language should not be read to produce absurd results." *Id. (Internal citations omitted)(Internal quotations omitted).* When interpreting a statue, the Court "shall read each sentence, phrase and word to render it meaningful within the context of the purpose of the legislation." *Harris Assoc. v. Clark County School Dist.* 119 Nev. 638, 642, 81 P.3d 532, 534 (2003). "The Court must look to will of the Legislature as embodied in the statutes to determine the public policy of the state". *Siloam Springs Hotel, LLC v. Century Sur. Co*., 392 P3d 262, 268 (Okla. 2017) (Internal citations omitted). "Courts will exercise their power to nullify contracts made in contravention of public policy only rarely, with great caution and in cases that are free from doubt." *Id*. "Where the Legislature has directly addressed the question…on grounds of public policy the court is bound to carry out the legislative mandate with respect to the enforceability of the term." *Pina v. Gruy Petroleum Mgmt. Co.*, 136 P.3d 1029, 1033 (N.M. Ct. App. 2006)(Internal quotations omitted). Thus, because the Legislature provided separate treatment for subcontracts with paid if paid provisions, the Decision

was not free to ignore the express language of NRS 624.626(1)(b) accepting paid if paid clauses and hold those clauses violate public policy under NRS 624.628(3)(a) without giving meaning to all portions of the Act.

By providing separately for subcontracts with paid if paid clauses in the stop work section of the Act, the Legislature recognized that payment would not be due to a subcontractor, like Zitting, under NRS 624.624(1)(a) if the general contractor has not been paid, even if the subcontractor's work was performed and accepted. [1] To deal with non payment of a subcontractor because of a paid if paid clause and the owner's refusal to pay the general contractor, NRS 624.626(1)(b) created a statutory date after which the subcontractor can nonetheless stop work even though payment is not due from the general contractor. NRS 624.626 provides in pertinent part as follows:

> 1. If:
> (a) A higher-tiered contractor fails to pay the lower-tiered subcontractor within the time provided in subsection 1 or 4 of NRS 624.624;
> (b) **A higher-tiered contractor fails to pay the lower-tiered subcontractor within 45 days after the 25th day of the month in which the lower-tiered subcontractor submits a request for**

[1] Zitting's argument that paid if paid provisions require the Court to apply NRS 624.624(1)(b) to determine a date for payment fails for the same reason. See Decision p. 10.

> **payment**, **even if the higher-tiered contractor has not been paid and the agreement contains a provision which requires the higher-tiered contractor to pay the lower-tiered subcontractor only if or when the higher-tiered contractor is paid**;
>
> **…the lower-tiered subcontractor may stop work under the agreement until payment is received if the lower-tiered subcontractor gives written notice to the higher-tiered contractor at least 10 days before stopping work**. (emphasis added)

But after stopping work under NRS 624.626(1)(b), an unpaid subcontractor with a paid if paid clause does not have a termination right like other unpaid subcontractors because NRS 624.626(2) specifically excludes work stopped under subsection (1)(b) above:

> 2. **If a lower-tiered subcontractor stops work pursuant to paragraph (a), (c) or (d) of subsection 1, the lower-tiered subcontractor may terminate the agreement with the higher-tiered contractor** by giving written notice of the termination to the higher-tiered contractor after stopping work but at least 15 days before the termination of the agreement. (emphasis added)

By deliberately denying a subcontractor with a paid if paid provision the right to terminate after stopping work under NRS 624.626(1)(b), the Legislature recognized that when the owner has not paid the general contractor, there is no breach of the subcontract to justify termination. If

paid if paid clauses are not enforceable as the Decision held, there would be no need for NRS 624.626(1)(b) to establish a separate time frame for stoppage of work when a subcontract contains paid if paid provisions, or to exclude such subcontracts from the termination remedy. In effect, when applied in the stop work/termination context, the Decision would afford Zitting a termination remedy not permitted by the Act. ARB p. 27 fn.14.

The Legislature's separate treatment of subcontracts that contain paid if paid clauses demonstrates that paid if paid clauses do not violate the provisions of Act or its underlying public policy. If paid if paid clauses are enforceable to determine when a subcontractor has the right to stop work or whether a termination right exists, they cannot violate NRS 624.628(3)(a), as the Decision held, nor can such clauses be interpreted to impermissibly deny a subcontractor the right to prompt payment under NRS 624.624(1).

If paid if paid clauses are invalid under NRS 624.628(3)(a) they would have to be invalid for all purposes under the Act. Instead, the Legislature struck a balance between the right of the subcontractor to stop work and the right of the general contractor to use paid if paid clauses for protection from claims when owner does not pay. The right to stop work under NRS 624.626(1)(b) provides the subcontractor leverage to induce the

owner to pay the general contractor, and, at the same time, by denying the right to terminate under NRS 624.626(2), the Act protects the general contractor from a suit for payment by the subcontractor, which would turn the general contractor into owner's partner or lender.

The Legislature approved the use of paid if paid clauses when it enacted NRS 624.626. Therefore, because the Decision's de novo review of the Act fails to reconcile the Act's separate treatment of subcontracts containing paid if paid clauses with the holding that paid if paid clauses are void under NRS 624.628(3)(a), the Decision should be reversed.

3. The Decision's holding that APCO was liable under NRS 108.239(12) as the party "legally liable" when proceeds from the sale of property are insufficient is the result of Decision's refusal to enforce the paid if paid provisions of Zitting's subcontract. Decision pp. 14-15; 4 AA 801-804. Thus, this portion of the Decision must be reversed for the reasons above.

The Decision also overlooks that by not enforcing paid if paid clauses and holding APCO "legally liable" under NRS 108.239(12) it makes APCO the owner's partner or guarantor when the project fails. The Decision's reasoning that APCO should be liable to Zitting despite the paid if paid

clause because APCO had recourse against the owner overlooks that the owner was insolvent. Decision p. 14-15. The Decision makes APCO responsible for the owner's bad business decisions and the lender's decision to stop funding and to take all of the equity in the property through foreclosure. As the Decision correctly noted, the Court's decision in *In Re Manhattan West Lien Litigation*, 359 P.3d 125 (2015), awarded all of proceeds from the sale of the partially completed project to Scott Financial, leaving APCO and Zitting unpaid. Decision fn. 1 p.4. As a result, APCO lost nearly $8,000,000 on this project, not including claims totaling more than $1,000,000 by Zitting and other subcontractors.[2] 17 AA 368-369; AOB p.15.

Moreover, the Decision's suggestion that public policy requires APCO, as the general contractor, to be liable to its subcontractor, Zitting, because APCO can pursue the owner for recovery fails to consider that Zitting also had the right to pursue the owner for non-payment under a theory of unjust enrichment. *Leasepartners Corp. v. Robert L. Brooks Tr.*

[2] APCO went to trial against other subcontractors and prevailed. Opening Brief p.4 fn 4. Case 77320 *Helix Electrical v. APCO* is currently on appeal. The Helix subcontract was similar to Zitting's subcontract. Helix seeks to overturn the judgment in favor of APCO based, in part, on the holding of the Decision. A reversal in the Helix case would add to APCO's already substantial losses on this project.

Dated November 12, 1975, 113 Nev. 747, 756, 942 P.2d 182, 187 (1997). Thus, there is no public policy that is served by shifting the burden of an insolvent owner to APCO based upon APCO's right to recover from the owner. ARB p. 29. Zitting had the same right to recover from the owner, just under a different legal theory and Zitting agreed in the subcontract to accept the same risk of owner insolvency as APCO. 9 AA 1920-1921.

4. The Decision holds that the paid if paid provisions in Zitting's subcontract impaired Zitting's mechanics' lien rights, but offers no explanation for the finding. Decision p. 10. However, the Decision overlooks that unlike the subcontract in *Lehrer*, Zitting's subcontract did not require Zitting to waive its lien rights. Compare, *Lehrer*, 197 P.3d 1040-1044 (subcontractor promised not to have any liens filed against the property) with Zitting Subcontract 9 AA 1918-1950; AOB p. 35.

The Decision also overlooks that NRS Chapter 108 does not require money to be immediately "due" in order to record a mechanics' lien. NRS 108.22136 defines "lienable amount" as "the principal amount of a lien to which lien claimant is entitled pursuant to subsection 1 of 108.222." NRS 108.222(1)(a) defines the amount of the lien to be the "unpaid balance of the price agreed upon" for the work. Thus, in order to record its lien Zitting

only had to be able to calculate the agreed upon price for the work for which it had not been paid. The fact that a paid if paid clause resulted in nonpayment to Zitting when APCO was not paid by the owner for work performed, would not affect Zitting's calculation of the lien amount or preclude Zitting from recording its lien. In concluding that Zitting's lien rights were impaired the Court also overlooked the fact that Zitting, as well as other subcontractors, recorded and pursued their lien rights in this case.

5. The Decision represents a material shift from *Lehrer*, the express provisions of the Act, as discussed above, and the case cited in the Decision, *Padilla Constr. Of Nevada v. Big D Constr. Corp*., Docket Nos. 67397 & 68683 (Order of Affirmance, November 18, 2016)(Court held Padilla's negligence per se claim failed. Non-payment of Padilla did not violate NRS 624.624(1)(a) because the subcontract contained a paid when paid clause and owner did not accept the work.). ARB p. 27. Based upon this Court's prior pronouncements and the terms of the Act, contractors were entitled to rely on the enforceability of paid if paid provisions as long as the subcontractor's lien rights were not impaired.

The Decision overlooks the damage to general contractors and the construction industry as a whole caused by its departure from prior

precedent. Thus, the Court's public policy analysis, should also have considered whether fairness and equity require that the Decision be given only prospective application and not apply to the parties in this case.

In determining whether the Decision should be limited to prospective application, this Court considers three factors:

> (1) the decision to be applied non-retroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed; (2) the court must "weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation; and (3) courts consider whether retroactive application "could produce substantial inequitable results.

Breithaupt v. USAA Prop. & Cas. Ins. Co., 110 Nev. 31, 35, 867 P.2d 402, 405 (1994) (internal quotations omitted) citing *Chevron Oil Co. v. Huson*, 92 S.Ct. 349, 355 (1971). Each of the three factors weighs heavily in favor of prospective application of this Decision.

The first factor requires that the new ruling either overrules prior precedent or is one of first impression that was not clearly foreshadowed. The Decision itself outlines the history affecting paid if paid clauses and the

need for clarification. Decision p.2. The effect of the Decision declaring essentially all paid if paid provisions void represents a material departure from *Lehrer,* and the plain language of the Act. Given that the Act permits paid if paid clauses, and *Lehrer* indicated that after the Act such clauses were enforceable unless lien rights were impaired, no one could have anticipated a decision that made paid if paid clauses void and against public policy. Thus, factor one is satisfied.

The second factor requires the Court to analyze each case individually to determine whether retroactive application will further operation of the rule announced. The Decision's stated purpose was to clarify the rule on paid if paid clauses in construction contracts, thus providing guidance for drafting construction contracts in the future. Decision p. 2. Parties with existing contracts cannot change their agreements. Retroactive application would only lead to more inequitable results for general contractors with existing contracts containing paid if paid clauses, who reasonably relied upon this Court's prior decisions and the terms of the Act. Thus, retroactive application will not further the purposes of the rule announced in the Decision.

The third factor is whether the results of the Decision are inequitable.

The Decision makes every general contractor the financial partner of the owner, even though the general contractor has no equity in the project and no financial upside if the project is successful. Without the protection of a paid if paid clause, when the owner runs out of money and does not pay the general contractor, the Decision forces the general contractor to step into the owner's shoes and pay for all the completed work on a project even though the general contractor has not been paid. The Act was not intended to make owners and general contractors business partners and to make general contractors pay for the owners' mistakes in either building or financing the project. Without paid if paid clauses in a subcontract, a general contractor has no protection from such a result and the extraordinary, unpredictable losses that follow.

Prospective application of a ruling is particularly appropriate when the court clarifies an area of the law or issues affecting a practice reasonably relied upon by an entire industry. *SASCO 1997 NI, LLC v. Zudkewich*, 767 A.2d 469, 477 (N.J. 2001) (clarified statute of limitations for claims under Uniform Fraudulent Transfer Act). The *SASCO* Court applied its ruling prospectively because it was unfair to penalize a party for a reasonable interpretation of the law:

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> Prospective application is proper when a court renders a first-instance or clarifying decision in a murky or uncertain area of the law,' or when a member of the public could reasonably have 'relied on a different conception of the state of the law. Penalizing SASCO, which relied on a reasonable interpretation of the law, is inequitable.

Id. (Internal citations and quotations omitted). In this case, the Decision's efforts to clarify the law unfairly exposed APCO to substantial damages that APCO could not have anticipated when it executed its subcontract with Zitting. As discussed above, the notion that APCO could protect itself from substantial damage by suing the owner or filing its own lien on the property are rights with no practical remedy in this case. Decision p 15. In this case, the project was half finished, the owner was broke, the lender stopped funding and this Court held that the lender was entitled to all of the sale proceeds.

The Decision also unfairly permits Zitting to disregard the bargained for terms of its subcontract and force APCO to pay when the project failed, even though Zitting agreed to a subcontract with a paid if paid clause and agreed to assume the risk of owner insolvency with APCO. The Decision unfairly shifts that risk solely to APCO. If the Court decides that the

Decision should not be reversed, equity and fairness, nevertheless, require that it be applied prospectively and not to these parties so that APCO and Zitting share the risk of the project's failure as they agreed in the subcontract.

III. CONCLUSION

The Court should either reverse the Decision and find that the paid if paid clauses in Zitting's subcontract are enforceable and not void under NRS 624.628(3)(a). In the alternative, the Court should apply the Decision prospectively, and not in this case. Under either result, the Court should find that APCO is not liable to Zitting because the owner did not pay APCO and reverse the Judgment accordingly.

Dated this 23rd day of November, 2020.

FENNEMORE CRAIG, P.C.

/s/Christopher H. Byrd, Esq.

_____

John Randall Jefferies, Esq. (No. 3512)
Christopher H. Byrd, Esq. (No. 1633)
-and-
Marquis Aurbach Coffing
Cody S. Mounteer, Esq. (No. 11220)
Kathleen A. Wilde, Esq. (No.12522)
Attorneys for Appellant

IV. CERTIFICATE OF COMPLIANCE

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

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 40(b)(3) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either:

X proportionally spaced, has a typeface of 14 points or more and contains 3,792 words; or

__ does not exceed 10 pages.

3. Finally, I hereby certify that I have read this brief, and to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 40(a)(2) which requires any claim that the court overlooked a material fact be supported be supported by a reference to the page of the transcript appendix or record where the matter may be found;

any claim that the court has overlooked a material question of law or has overlooked or misapprehended or failed to consider controlling authority shall be supported by a reference to the page of the brief where petitioner raised the issue. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 23rd day of November, 2020.

FENNEMORE CRAIG, P.C.

/s/Christopher H. Byrd, Esq.

_____

John Randall Jefferies, Esq. (No. 3512)
Christopher H. Byrd, Esq. (No. 1633)
300 South Fourth St. 14th Floor
Las Vegas, NV 89101
-and-
Marquis Aurbach Coffing
Cody S. Mounteer, Esq. (No. 11220)
10001 Park Run Drive
Las Vegas, NV 89145
Attorneys for Cross-Appellant/Respondent

V. CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 23rd day of November, 2020 and was served electronically in accordance with the Master Service List and via the United States Mail, first class, postage prepaid, addressed as follows:

WILSON ELSER MOSKOWITZ EDELMAN & DICKER LLP

Jorge A. Ramirez
(jorge.ramirez@wilsonelser.com)
I-Che Lai
(I-Che.Lai@wilsonelser.com)

SPENCER FANE LLP

Mary Bacon
(mbacon@fclaw.com)

MARQUIS AURBACH COFFING

Cody S. Mounteer
(cmounteer@macklaw.com)

/s/Trista Day

An employee of Fennemore Craig P.C.

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