IN THE SUPREME COURT OF THE STATE OF NEVADA

Supreme Court Case No. 77320
***Consolidated with* 80508**

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HELIX ELECTRIC OF NEVADA, LLC,

Appellant,

v.

APCO CONSTRUCTION, INC., A NEVADA CORPORATION,

Respondent.

JOINT APPENDIX
VOLUME 82

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Docket 77320 Document 2020-38056

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	Trial Exhibit 177 - Helix Pay Application No. 16713-014 to Camco	JA002772-JA002782	49
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	National Wood/Cabinetec Related Exhibits:		
	Trial Exhibit 184 - Ratification and Amendment of Subcontract Agreement between CabineTec and Camco (fully executed copy)	JA002798-JA002825	49
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01-19-18	**Transcript – Bench Trial (Day 3)**[3]	JA005624-JA005785	80
	Trial Exhibit 231 – Helix Electric's Amended Statement of Facts Constituting Notice of Lien and Third-Party Complaint ***(Admitted)***	JA005786-JA005801	80
	Trial Exhibit 314 - Declaration of Victor Fuchs in support of Helix's Motion for Partial Summary Judgment against Gemstone ***(Admitted)***	JA005802-JA005804	80

[2] Filed January 31, 201879

[3] Filed January 31, 2018

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	Trial Exhibit 320 – June-August Billings—not paid to APCO ***(Admitted)***	JA005805	80
	Trial Exhibit 321 – Overpayments to Cabinetec ***(Admitted)***	JA005806-	80
	Trial Exhibit 536 – Lien math calculations (handwritten) ***(Admitted)***	JA005807-JA005808	80
	Trial Exhibit 804 – Camco Correspondence ***(Admitted)***	JA005809-JA005816	80
	Trial Exhibit 3176 – APCO Notice of Lien ***(Admitted)***	JA005817-JA005819	81
01-24-18	**Transcript – Bench Trial (Day 5)[4]**	**JA005820-JA005952**	81
03-08-18	**Letter to Judge Denton submitting Helix Electric of Nevada, LLC's (Proposed) Findings of Fact and Conclusions of Law**	**JA005953-JA005985**	**81**
03-08-18	**Letter to Judge Denton submitting APCO Construction, Inc.'s Proposed Findings of Fact and Conclusions of Law**	**JA005986-JA006058**	**8/821**
03-08-18	**APCO Construction Inc.'s Post-Trial Brief**	**JA006059-JA006124**	**82/83**
03-23-18	**APCO Opposition to Helix Electric of Nevada, LLC's Findings of Fact and Conclusions of Law**	**JA006125-JA006172**	**83/84**
03-23-18	**Helix Electric of Nevada, LLC's Responses to APCO Construction's Post-Trial Brief**	**JA006173-JA006193**	**84**
04-25-18	**Findings of Fact and Conclusions of Law and Order as the Claims of Helix Electric and Cabinetec Against APCO**	**JA006194-JA006264**	**84/85**

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05-08-18	**APCO Construction, Inc.'s Motion for Attorneys' Fees and Costs Against Helix Electric of Nevada, LLC and Plaintiff in Intervention National Wood Products, Inc**.	**JA006265-JA006284**	**85**
	Exhibit 1 – Findings of Fact and Conclusions of Law as to the Claims of Helix Electric and Cabenetec Against APCO	JA006285-JA006356	85/86
	Exhibit 2 – National Wood Products, Inc.'s Notice of Motion and Motion to Intervene and Memorandum of Points and Authorities in Support Thereof	JA006357-JA006369	86
	Exhibit 3 – Plaintiff in Intervention, National Wood Products, Inc.'s Findings of Fact and Conclusions of Law (Proposed)	JA006370-JA006385	86/87
	Exhibit 4 – Plaintiff in Intervention, National Wood Productions, Inc.'s Findings of Fact and Conclusions of Law Re Camco	JA006386-JA006398	87
	Exhibit 5 – Offer of Judgment to Helix Electric of Nevada, LLC	JA006399-JA006402	87
	Exhibit 6 – Offer of Judgment to Plaintiff in Intervention National Wood Products, Inc.	JA006403-JA006406	87
	Exhibit 7 – Declaration of John Randall Jefferies, Esq. in Support of APCO Construction, Inc.'s Motion for Attorney's Fees and Costs	JA006407-JA006411	87
	Exhibit 7A – Billing Entries	JA006412-JA006442	87/88

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	Exhibit 7B – Time Recap	JA006443-JA006474	88
	Exhibit 8 – Declaration of Cody S. Mounteer, Esq. in Support of Motion for Attorney's Fees and Costs	JA006475-JA006478	88
	Exhibit 9 – APCO Construction, Inc.'s Memorandum of Costs and Disbursements [Against Helix Electric of Nevada, LLC, and Plaintiff in Intervention National Wood Products, LLC]	JA006479-JA006487	88
	Exhibit 10 – Depository Index	JA006488-JA006508	88/89
05-08-18	**Helix Electric of Nevada, LLC's Motion to Retax Costs Re: Defendant APCO Construction's Memorandum of Costs and Disbursements**	**JA006509-JA006521**	**89**
05-31-18	**Notice of Entry of Judgment [As to the Claims of Helix Electric of Nevada, LLC Against Camco Construction, Co., Inc.]**	**JA006522 JA006540**	**89**
06-01-18	**Notice of Entry of Judgment [As to the Claims of Helix Electric of Nevada, LLC and Plaintiff in Intervention National Wood Products, Inc.'s Against APCO Construction, Inc.]**	**JA006541 JA006550**	**90**
06-01-18	**Helix Electric of Nevada, LLC's Motion for Attorneys' Fees, Interest and Costs**	**JA006551-JA006563**	**90**
	Exhibit 1 – Findings of Fact and Conclusions of Law and Order as to the Claims of Helix Electric of Nevada, LLC Against Camco Pacific Construction, Inc.	JA006564-JA006574	90

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	Exhibit 2 – Memorandum of Costs and Disbursements (Helix Electric of Nevada, LLC)	JA006575-JA006580	90
	Exhibit 3 – Prime Interest Rate	JA006581-JA006601	90
	Exhibit 4 – Declaration of Eric B. Zimbelman in Support of Helix Electric of Nevada, LLC's Motion for Attorneys' Fees, Interest and Costs	JA006583-JA006588	90
	Exhibit 5 – Summary of Fees	JA006589-JA006614	90
06-15-18	**APCO Construction, Inc.'s Opposition to Helix Electric of Nevada, LLC and Plaintiff in Intervention National Wood Products, Inc.'s Motions to Retax Costs**	**JA006615-JA006637**	**90/9**1
	Exhibit 1-A Declaration of Mary Bacon in Support of APCO's Supplement to its Motion for Attorney's Fees	JA006635 JA006638	91
	Exhibit 1-B – Declaration of Cody Mounteer in Support of APCO's Supplement to its Motion for Attorney's Fees	JA006639-JA006916	91/92/93 94/95/96
06-15-18	**Helix Electric of Nevada, LLC's Opposition to APCO Construction's Motion for Attorneys' Fees and Costs**	**JA006917 – JA006942**	**96**
	Exhibit 1 – Notice of Entry of Staying the Case, Except for the Sale of the Property, Pending Resolution of the Petition before the Nevada Supreme Court	JA006943-JA006948	96

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	Exhibit 2 – Notice of Entry of Denying APCO Construction's Motion for Partial Summary Judgment Re: Lien Foreclosure Claims	JA006949-JA006954	96
	Exhibit 3 – Supreme Court filing notification Joint Petition for Writ of Mandamus filed	JA006955-JA006958	96
	Exhibit 4 – Order Denying *En Banc* Reconsideration	JA006959-JA006963	96
	Exhibit 5 – Notice of Entry of Order Granting Peel Brimley Lien Claimants' Motion for Partial Summary Judgment Precluding Defenses Based on Pay-if-Paid Agreements	JA006964-JA006978	96
	Exhibit 6A – Interstate Plumbing and Air Conditioning, LLC's Response to Special Master Questionnaire	JA006977-JA006980	96
	Exhibit 6B – Nevada Prefab Engineers, Inc.'s Response to Special Master Questionnaire	JA006981-JA006984	96
	Exhibit 6C – Zitting Brothers Construction, Inc.'s Response to Special Master Questionnaire	JA006985-JA006993	96/97
	Exhibit 6D – Noorda Sheet Metal's Notice of Compliance	JA006994 JA007001	97
	Exhibit 6 E – Unitah Investments, LLC's Special Master Questionnaire	JA007002-JA007005	97
	Exhibit 7A – Motion to Appoint Special Master	JA007006-JA007036	97
	Exhibit 7B – Letter from Floyd A. Hale dated August 2, 2016	JA007037-JA007060	97

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	Exhibit 7C – Special Master Report Regarding Remaining Parties to the Litigation, Special Master Recommendation and District Court Order Amended Case Agenda	JA007042-JA007046	97
	Exhibit 8 – Notice of Entry of Order Granting Plaintiff's Motion to Dismiss	JA007047 JA007053	97
	Exhibit 9 – Stipulation and Order for Dismissal with Prejudice	JA007054-JA007056	97
	Exhibit 10 – Stipulation and Order to Dismiss Third-Party Complaint of Interstate Plumbing & Air Conditioning, LLC Against APCO Construction, Inc. with Prejudice	JA007057-JA007059	97
	Exhibit 11 – Notice of Entry of Order Granting in Part and Denying in Part APCO Construction's Omnibus Motion *in Limine*	JA007060-JA007088	97
	Exhibit 12 – Notice of Entry of Order Granting in Part and Denying in Part Helix Electric of Nevada, LLC's Motion in Limine (against APCO Construction)	JA007070-JA007078	97
	Exhibit 13 – Notice of Entry of Order Denying APCO Constructions' Motion for Partial Summary Judgment Re: Lien Foreclosure Claims	JA007079-JA007084	97
	Exhibit 14 – Notice of Entry of Order Denying APCO Construction's Motion for Reconsideration of Order Granting Partial Summary	JA007085-JA007087	97

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	Judgment Precluding Defenses Based on Pay-if-Paid Agreements		
	Exhibit 15 – Notice of Association of Counsel	JA007088-JA007094	97
06-15-18	**Plaintiff in Intervention National Wood Products, Inc.'s Opposition to APCO Construction's Motion for Attorneys' Fees and Costs**	**JA007095-JA007120**	**97/98**
06-15-18	**Declaration of S. Judy Hirahara in support of National Woods's Opposition to APCO Construction's Motion for Attorneys' Fees and Costs**	**JA007121-JA007189**	**98**
06-18-18	**Plaintiff in Intervention National Wood Products, Inc.'s Joinder to Helix Electric of Nevada, LLC's Opposition to APCO Construction's Motion for Attorneys' Fees and Costs**	**JA007190-JA007192**	**99**
06-21-18	**Helix Electric of Nevada, LLC's Notice of Non-Opposition to its Motion for Attorney's Fees, Interest and Costs**	**JA007193-JA007197**	**99**
06-29-18	**APCO Construction, Inc.'s Reply in Support of its Motion for Attorney's Fees and Costs Against Helix Electric of Nevada, LLC and Plaintiff in Intervention National Wood Products, Inc.**	**JA007198-JA007220**	**99**
	Exhibit 1 – Invoice Summary by Matter Selection	JA007221-JA007222	99
	Exhibit 2 – Marquis Aurbach Coffing Invoice to APCO dated April 30, 2018	JA007223-JA007224	99

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06-29-18	Helix Electric of Nevada, LLC's Reply Re: Motion to Retax	JA007225-JA007237	100
07-02-18	Notice of Entry of Order Granting Helix Electric of Nevada, LLC's Motion for Attorneys' Fees, Interest and Costs	JA007238-JA007245	100
07-19-18	Plaintiff-in-Intervention National Wood Products, Inc.'s Surreply to APCO Construction's Reply to Plaintiff-in-Intervention National Wood Products, Inc.'s Opposition to Motion for Attorney's Fees and Costs	JA007246-JA007261	100
08-08-18	Court's Decision on Attorneys' Fees and Cost Motions	JA007262-JA007280	100
09-28-18	Notice of Entry of (1) Granting APCO Construction, Inc.'s Motion for Attorneys' Fees and Costs (2) Granting APCO Construction, Inc.'s Memorandum of Costs in Part (3) Granting Helix Electric of Nevada, LLC's Motion to Retax in Part and Denying in Part (4) Granting Plaintiff in Intervention National Wood Products, LLC's Motion to Retax in Part and Denying in Part and (5) Granting National Wood Products, Inc.'s Motion to File a Surreply	JA007281-JA007299	100
01-24-19	Transcript for All Pending Fee Motions on July 19, 2018	JA007300-JA007312	100/101
07-12-19	Order Dismissing Appeal (Case No. 76276)	JA007313-JA007315	101

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08-06-19	**Helix Electric of Nevada LLC's Motion to (I) Re-Open Statistically Closed Case, (II) Dismiss All Unresolved Claims and/or (III) In the Alternative for a Rule 54(B) Certification as to Helix and APCO**	**JA007316-JA007331**	**101**
	Exhibit 1 – Judgment [As to the Claims of Helix Electric of Nevada, LLC and Plaintiff in Intervention National Wood Products, Inc.'s Against APCO Construction, Inc.	JA007332-JA007335	101
	Exhibit 2 – ORDER: (1) Granting APCO Construction, Inc. Motion for Attorneys Fees and Costs (2) Granting APCO Construction, Inc.'s Memorandum of Costs in Part (3) Granting Helix Electric of Nevada LLC's Motion to Retax in Part and Denying in Part and all related matters (4) Granting Plaintiff in Intervention National Wood Products LLC's Motion to Retax in Part and Denying in Part -and-(5) Granting National Wood Products, Inc.'s Motion to File a Surreply	JA007336-JA007344	101
	Exhibit 3 - Notice of Appeal	JA007345-JA007394	101/102
	Exhibit 4 – Amended Notice of Appeal	JA007395-JA007400	102
	Exhibit 5A – 5F -Notices of Entry of Order as to the Claims of Cactus Rose Construction, Fast Glass, Inc., Heinaman Contract Glazing, Helix Electric of Nevada, LLC, SWPPP Compliance	JA007401-JA007517	102/103

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	Solutions, Inc., E&E Fire Protection		
	Exhibit 6 – Order Dismissing Appeal in Part (Case No. 76276)	JA007518-JA007519	103
	Exhibit 7 – Order to Show Cause	JA007520-JA007542	103
	Exhibit 8 -Order Dismissing Appeal (Case No. 76276)	JA007524-JA007527	103
	Exhibit 9 – Notice of Entry of Order to Consolidate this Action with Case Nos. A574391, A574792, A57623. A58389, A584730, A58716, A580889 and A589195	JA 007528-JA007541	103
	Exhibit 10 (Part One)	JA007537-JA007542	103
	Exhibit 10A – Docket 09A587168 (Accuracy Glass & Mirror v. APCO)	JA007543-JA007585	103
	Exhibit 10B -Docket 08A571228 (APCO v. Gemstone)	JA007586-JA008129	103/104/105/106/107/108/109
	Exhibit 10C – Notice of Entry of Order to Consolidate this Action with Cases Nos A57. 4391, A574792, A577623, A583289, A584730, A587168, A580889 and A589195	JA008130-JA008138	109
	Exhibit 10D – Notice of Entry of Joint Order Granting, in Part, Various Lien Claimants' Motions for Partial Summary Judgment Against Gemstone Development West	JA008139-JA008141	109
	Exhibit 10 (Part Two)	JA008142-JA008149	109

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	Exhibit 10E – 131 Nev. Advance Opinion 70	JA008150-JA008167	109
	Exhibit 10F – Special Master Report Regarding Remaining Parties to the Litigation and Discovery Status	JA008168-JA008170	109
	Exhibit 10EG – Notice of Entry of Granting Plaintiff's Motion to Dismiss	JA008171-JA008177	109
	Exhibit 10H – Complaint re Foreclosure	JA008178-JA008214	109
	Exhibit 10I – First Amended Complaint re Foreclosure	JA008215-JA008230	109
	Exhibit 10J – APCO Construction's Answer to Accuracy Glass & Mirror Company's First Amended Complaint re Foreclosure	JA008231-JA008265	109/110
	Exhibit 10K –Answer to Accuracy Glass & Mirror Company, Inc.'s Complaint and Camco Pacific Construction, Inc.'s Counterclaim	JA008266-JA008285	110
	Exhibit 10L – Accuracy Glass & Mirror Company, Inc.'s Answer to Camco Pacific Construction Company's Counterclaim	JA008286-JA008290	110
	Exhibit 10M – Helix Electric's Amended Statement of Facts Constituting Lien and Third-Party Complaint	JA008291-JA008306	110
	Exhibit 10N – APCO Construction's Answer to Helix Electric's Amended Statement of Facts Constituting Lien and Third-Party Complaint	JA008307-JA008322	110
	Exhibit 10O – Answer to Helix Electric's Statement of Facts	JA008323-JA008338	110

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	Constituting Lien and Third-Party Complaint and Camco Pacific Construction Company Inc.'s Counterclaim		
	Exhibit 10P – Notice of Entry of Helix Electric of Nevada, LLC's Motion for Attorney's Fees, Interest and Costs	JA008339 JA008347	110
	Exhibit 10Q – Notice of Entry of Judgment [As to the claims of Helix Electric of Nevada, LLC Against Camco Construction Co., Inc.]	JA008348-JA008367	110
	Exhibit 10R – Notice of Entry of Judgment [As to the Claims of Helix Electric of Nevada, LLC and Plaintiff in Intervention National Wood Products, Inc. Against APCO Construction, Inc.]	JA008368-JA008378	110
	Exhibit 10S – Findings of Fact and Conclusions of Law and Order as to the Claims of Helix Electric and Cabenetec Against APCO	JA008379-JA008450	110/111
	Exhibit 10T -WRG Design, Inc.'s Amended Statement of Facts Constituting Notice of Lien and Third-Party Complaint	JA008451-JA008486	111
	Exhibit 10U – APCO Construction's Answer to WRG Design Inc.'s amended Statement of Facts Constituting Lien and Third-Party Complaint	JA008468-JA008483	111
	Exhibit 10V -Answer to WRG Design, Inc.'s Statement of Facts Constituting Lien, Third-Party Complaint and Camco Pacific Construction, Inc's Counterclaim	JA008484-JA008504	111

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	Exhibit 10W – Notice of Entry of Stipulation and Order Dismissal	JA008505-JA008512	111
	Exhibit 10X – WRG Design, Inc.'s Answer to Camco Pacific Construction Company, Inc.'s Counterclaim	JA008513 JA008517	111
	Exhibit 10Y – Heinaman Contract Glazing's Amended Statement of Facts Constituting Lien and Third-Party Complaint	JA008518-JA008549	111
	Exhibit 10Z – Answer to Heinaman Contract Glazing's Statement of Facts Constituting Lien and Third-Party Complaint, and Camco Pacific Construction's Counterclaim	JA008531-JA008551	111
	Exhibit 10AA – Notice of Entry of Granting Heinaman Glazing's Motion for Attorneys's Fees, Interest and Costs	JA008552-JA008579	111/112
	Exhibit 10BB -Notice of Entry of Judgment [As to the Claims of Heinaman Contract Glazing Against Camco Construction Co., Inc.]	JA008561-JA008582	112
	Exhibit 10CC – Heinaman Contract Glazing's Answer to Camco Pacific Construction Company's Counterclaim	JA008583 JA008588	112
	Exhibit 10DD - Bruin Painting Corporation's Amended Statement of Facts Constituting Notice of Lien and Third-Party Complaint	JA008589-JA00861	112
	Exhibit 10EE – Answer to Bruin Painting Corporation's Amended Statement of Facts Constituting Notice of Lien and Third-Party	JA008602-JA008621	112

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	Complaint and Camco Pacific Construction, Inc.'s Counterclaim		
	Exhibit 10FF – Voluntary Dismissal of Fidelity and Deposit Company of Maryland Only from Bruin Painting Corporation's Amended Statement of Facts Constituting Notice of Lien and Third-Party Complaint Without Prejudice	JA008622-JA008624	112
	Exhibit 10GG – HD Supply Waterworks' Amended Statement of Facts Constituting Lien and Third-Party Complaint	JA008625-JA008642	112
	Exhibit 10HH – APCO Construction's Answer to HD Supply Waterworks' Amended Statement of Facts Constituting Lien and Third-Party Complaint	JA008643-JA008657	112
	Exhibit 10II – Amended Answer to HD Supply Waterworks' Amended Statement of Facts Constituting Lien and Third-Party Complaint	JA008658-JA008664	112
	Exhibit 10JJ -Defendants Answer to HD Supply Waterworks' Amended Statement of Facts Constituting Lien and Third-Party Complaint	JA008665-JA008681	112
	Exhibit 10KK – Stipulation and Order to Dismiss E & E Fire Protection, LLC Only Pursuant to the Terms State Below	JA008682-JA008685	112
	Exhibit 10LL – HD Supply Waterworks, LP's Voluntary Dismissal of Platte River Insurance Company Only Without Prejudice	JA008686-JA008693	112

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	Exhibit 10MM – Scott Financial Corporation's Answer to HD Supply Waterworks' Amended Statement of Facts Constituting Lien and Third-Party Complaint	JA008694-JA008717	112/113
	Exhibit 10NN-Notice of Appeal	JA008718 JA008723	113
	Exhibit 10OO – Amended Notice of Appeal	JA008724-JA008729	113
	Exhibit 10PP – Notice of Cross Appeal	JA008730-JA008736	113
	Exhibit 10QQ – Motion to Suspend Briefing Pending Outcome of Order to Show Cause in Supreme Court Case No. 76276	JA008737-JA008746	113
	Exhibit 11 – Order to Consolidate this Action with Case Nos. A574391, A574792, A57623. A58389, A584730, A58716, A580889 and A589195	JA008747-JA008755	113
	Exhibit 12 – Stipulation and Order to Dismiss Third-Party Complaint of Interstate Plumbing & Air Conditioning, LLC Against APCO Construction, Inc. with Prejudice	JA00875-JA008758	113
	Exhibit 13 – Stipulation and Order with Prejudice	JA008759-JA008780	113
	Exhibit 14 – Docket/United Subcontractors, Inc. dba Skyline Insulation's Motion to Enforce Settlement Agreement and Enter Judgment	JA008762-JA008788	113
	Exhibit 15 – Notice of Entry of Order Granting Motion for 54(b) Certification and for Stay Pending Appeal	JA008789-JA008798	113

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	Exhibit 16 – Notice of Appeal	JA008799-JA008810	113
08-16-19	**APCO's Opposition to Helix Electric of Nevada LLC's Motion to (I) Re-Open Statistically Closed Case, (II) Dismiss All Unresolved Claims and/or (III) In the Alternative for a Rule 54(B) Certification as to Helix and APCO**	**JA008811-JA008821**	**114**
	Exhibit 1 – Order to File Amended Docketing Statement	JA008822-JA008824	114
	Exhibit 2 – Order to Show Cause	JA008825-JA008828	114
	Exhibit 3 – Appellant/Cross-Respondent's Response to Order to Show Cause	JA008829-JA008892	114/115/116
	Exhibit 4 – Order Dismissing Appeal	JA008893-JA008896	116
	Exhibit 5 – Chart of Claims	JA008897-JA008924	116
	Exhibit 6 – Answer to Helix Electric's Statement of Facts Constituting Lien and Third-Party Complaint and Camco Pacific Construction Company, Inc.'s Counterclaim	JA008925-JA008947	116/117
	Exhibit 7 – Answer to Cactus Rose's Statement of Facts Constituting Notice of Lien and Complaint and Camco Pacific Construction Company Inc.'s Counterclaim	JA008948-JA008965	117
	Exhibit 8 – Answer to Heinaman Contract Glazing's Statement of Facts Constituting Lien and Third-Party Complaint and Camco	JA008966-JA008986	117/118

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	Pacific Construction's Counterclaim		
	Exhibit 9 – Findings of Fact and Conclusions of Law as to the Claims of Helix Electric of Nevada, LLC Against Camco Pacific Construction, Inc.	JA008987-JA008998	118
	Exhibit 10 – Findings of Fact and Conclusions of Law as to the Claims of Cactus Rose Construction Co., Inc.	JA008998-JA009010	118
	Exhibit 11 – Findings of Fact and Conclusions of Law as to the Claims of Heinaman Contract Glazing	JA009011-JA009024	118
	Exhibit 12 – Notice of Entry of Decision, Order and Judgment on Defendant Scott Financial Corporation's Motion for Summary Judgment as to Priority of Liens	JA009025-JA009038	118
	Exhibit 13 – Findings of Fact and Conclusions of Law as to the Claims of Helix Electric and Cabenetec Against APCO	JA009039-JA009110	118/119
	Exhibit 14 – Order Granting Motion to Deposit Bond Penal Sum with Court, Exoneration of Bond and Dismissal	JA009111-JA009113	119
	Exhibit 15 – Order Approving Distribution of Fidelity and Deposit Company of Maryland's Bond	JA009114-JA009116	119
08-29-19	**Helix Electric of Nevada LLC's Reply to APCO's Opposition to Helix Electric of Nevada LLC's Motion to (I) Re-Open Statistically Closed Case, (II)**	**JA009117-JA009123**	**119**

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	Dismiss All Unresolved Claims and/or (III) In The Alternative for a Rule 54(B) Certification as to Helix and APCO		
01-03-20	**Notice of Entry of Order Granting Helix Electric of Nevada, LLC's Motion for Rule 54(b) Certification**	**JA009124-JA009131**	**119**
01-29-20	**Notice of Appeal**	**JA009132-JA009136**	**119/120**
	Exhibit A – Notice of Entry of Judgment [As to the Claims of Helix Electric of Nevada, LLC and Plaintiff in Intervention National Wood Products, Inc.'s Against APCO Construction, Inc.]	JA009137-JA009166	120
	Exhibit [C] – Notice of Entry of Order Granting Helix Electric of Nevada's Rule 54(b) Certification	JA009148-JA009156	120
02-11-20	**Case Appeal Statement**	**JA009157-JA009163**	120
02-11-20	**APCO's Notice of Cross Appeal**	**JA009164-JA010310**	120
	Exhibit 1 – Notice of Entry of Order (1) Granting APCO Construction, Inc.'s Motion for Attorney's Fees and Costs; (2) Granting APCO Construction, Inc.'s Memorandum of Costs in Part (3) Granting Helix Electric of Nevada, LLC's Motion to Retax in Party (4) Granting Plaintiff-in-Intervention National Wood Productions, LLC's Motion to Retax in Part and Denying in Part and (5) Granting National Wood Products, Inc.'s Motion to File a Surreply	JA009168-JA009182	120

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	Exhibit 2 – Notice of Entry of Order Granting Helix Electric of Nevada's Motion for Rule 54(b) Certification	JA009183-JA00991	120

ALPHABETICAL APPENDIX OF EXHIBITS

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08-05-09	**APCO's Answer to Helix's Amended Statement of Facts Constituting Notice of Lien and Third-Party Complaint**	**JA000016 – JA000030**	**1**
05-08-18	**APCO Construction, Inc.'s Motion for Attorneys' Fees and Costs Against Helix Electric of Nevada, LLC and Plaintiff in Intervention National Wood Products, Inc.**	**JA006265-JA006284**	**85**
	Exhibit 1 – Findings of Fact and Conclusions of Law as to the Claims of Helix Electric and Cabenetec Against APCO	JA006285-JA006356	85/86
	Exhibit 2 – National Wood Products, Inc.'s Notice of Motion and Motion to Intervene and Memorandum of Points and Authorities in Support Thereof	JA006357-JA006369	86
	Exhibit 3 – Plaintiff in Intervention, National Wood Products, Inc.'s Findings of Fact and Conclusions of Law (Proposed)	JA006370-JA006385	86/87
	Exhibit 4 – Plaintiff in Intervention, National Wood Productions, Inc.'s Findings of Fact and Conclusions of Law Re Camco	JA006386-JA006398	87
	Exhibit 5 – Offer of Judgment to Helix Electric of Nevada, LLC	JA006399-JA006402	87
	Exhibit 6 – Offer of Judgment to Plaintiff in Intervention National Wood Products, Inc.	JA006403-JA006406	87
	Exhibit 7 – Declaration of John Randall Jefferies, Esq. in Support of APCO Construction, Inc.'s Motion for Attorney's Fees and Costs	JA006407-JA006411	87
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	Exhibit 7B – Time Recap	JA006443-JA006474	88
	Exhibit 8 – Declaration of Cody S. Mounteer, Esq. in Support of Motion for Attorney's Fees and Costs	JA006475-JA006478	88
	Exhibit 9 – APCO Construction, Inc.'s Memorandum of Costs and Disbursements [Against Helix Electric of Nevada, LLC, and Plaintiff in Intervention National Wood Products, LLC]	JA006479-JA006487	88
	Exhibit 10 – Depository Index	JA006488-JA006508	88/89
06-06-13	**APCO's Limited Motion to Lift Stay for Purposes of this Motion Only; (2) APCO's Motion for Summary Judgment Against Gemstone Only; and (3) Request for Order Shortening Time**	**JA000044-JA000054**	**1**
	Exhibit 1 – Affidavit of Randy Nickerl in Support of (I) APCO's Limited Motion to Lift Sta for Purposes of this Motion Only; (2) APCO's Motion for Judgment Against Gemstone Only	JA000055-JA000316	1/2/4/5/6
	Exhibit 2 – Findings of Fact and Conclusions of Law and Judgment in Favor of APCO Construction Against Gemstone Development West, Inc. Only	JA000317-JA000326	6
02-11-20	**APCO's Notice of Cross Appeal**	**JA009164-JA010310**	120
	Exhibit 1 – Notice of Entry of Order (1) Granting APCO Construction, Inc.'s Motion for Attorney's Fees and Costs; (2) Granting APCO Construction, Inc.'s Memorandum of Costs in Part (3) Granting Helix Electric of Nevada, LLC's	JA009168-JA009182	114

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	Exhibit 2 – Zitting Brothers Construction, Inc.'s Motion for Partial Summary Judgment Against APCO Construction	JA000625-JA000646	9
	Exhibit 3 – Excerpts from Samuel Zitting's Deposition Transcript taken October 27, 2017	JA000647-JA000678	9/10
	Exhibit 4 – Statement of Facts Constituting Lien on Behalf of Buchele, Inc.	JA000679-JA000730	10
	Exhibit 5 – Subcontract Agreement dated April 17, 2007	JA000731-JA000808	10/11
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	Exhibit 7 – Email from Mary Bacon dated October 16, 2017	JA000827-JA000831	12
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	Exhibit 13 – Amended Notice of Taking NRCP Rule 30(b)(6) Deposition of Person Most Knowledgeable for Helix Electric of Nevada, LLC	JA000865-JA000873	12
	Exhibit 14 – Excerpts from Helix Electric of Nevada, LLC's 30(b)(6) Witness Deposition Transcript taken July 20, 2017	JA000874-JA000897	12
03-23-18	**APCO Opposition to Helix Electric of Nevada, LLC's Findings of Fact and Conclusions of Law**	**JA006125-JA006172**	**83/84**
08-16-19	**APCO's Opposition to Helix Electric of Nevada LLC's Motion to (I) Re-Open Statistically Closed Case, (II) Dismiss All Unresolved Claims and/or (III) In the Alternative for a Rule 54(B) Certification as to Helix and APCO**	**JA008811-JA008821**	**114**
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11-14-17	**APCO Construction, Inc.'s Opposition to Helix Electric of Nevada, LLC's Motions *in Limine* Nos. 1-4**	**JA000929-JA000940**	**13/14**
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11-14-17	**Camco Pacific Construction Company, Inc.'s Opposition to Lien Claimants' Motions in Limine Nos. 1-6**	**JA000898-JA000905**	**12**
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05-08-18	**Helix Electric of Nevada, LLC's Motion to Retax Costs Re: Defendant APCO Construction's Memorandum of Costs and Disbursements**	**JA006509-JA006521**	**89**
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	Exhibit 9 - Amended *nunc pro tunc* order regarding APCO Construction, Inc.'s Omnibus Motion *in Limine* No. 7	JA001648-JA001650	28
	Exhibit 10 - Order Granting in Part and Denying in part Helix Electric of Nevada, LLC's Motions *in Limine* 1-4 (Against APCO Construction)	JA001651-JA001653	28
	Exhibit 11 - order granting Peel Brimley Lien Claimants' Motion in Limine Nos.1-6 (against Camco Pacific Construction, Inc.)	JA001654-JA001657	28
	Exhibit 12 - Order Granting Plaintiff in Intervention, National Wood Products, Inc.'s Motion *in Limine*	JA001658-JA001660	28
	Exhibit 13 - Order Granting Peel Brimley Lien Claimants' Motion for Partial Summary Judgment Precluding Defenses Based on Pay-if-Paid Agreements	JA001661-JA00167	28/9/29
03-08-18	**Letter to Judge Denton submitting APCO Construction, Inc.'s Proposed Findings of Fact and Conclusions of Law**	**JA005986-JA006058**	**8/821**
03-08-18	**Letter to Judge Denton submitting Helix Electric of Nevada, LLC's (Proposed) Findings of Fact and Conclusions of Law**	**JA005953-JA005985**	**81**
01-04-18	**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 provision on an Order Shortening Time**	**JA001199-JA001217**	**22**
	Exhibit 1 – Subcontract Agreement (Helix Electric of Nevada, LLC)	JA001218-JA001245	22/23/24
	Exhibit 2 – Subcontract Agreement (Zitting Brothers)	JA001246-JA001263	24

Date	**Description**	**Bates Number**	**Volume(s)**
	Exhibit 3 – Subcontract Agreement (CabineTec)	JA001264-JA001281	24/25
	Exhibit 4 – Amended Notice of Lien	JA001282-JA001297	25
	Exhibit 5 - Amended NOL	JA001298-JA001309	25
	Exhibit 6 – Notice of Lien	JA001310-JA001313	25
	Exhibit 7 – Order Approving Sale of Property	JA001314-JA001376	25/26
	Exhibit 8 – Order Releasing Sale Proceeds from Court Controlled Escrow Account	JA001377-JA001380	26
	Exhibit 9 – Order Denying *En Banc* Reconsideration	JA001381-JA001385	26
	Exhibit 10 – Order Granting Peel Brimley Lien Claimants' Motion for Partial Summary Judgment Precluding Defenses Based on Pay-if-Paid Agreements	JA001386-JA001392	26
	Exhibit 11 – Notice of Entry of Findings of Fact and Conclusions of Law and Judgment	JA001393-JA001430	26
	Exhibit 12 – Order Big D Construction Corp.'s Motion for Attorney's Fees, Costs and Interest Pursuant to Judgment	JA001431-JA001435	26
	Exhibit 13 – Appellant's Opening Brief (Padilla v. Big D)	JA001436-JA001469	26
	Exhibit 14 – Respondent's Answering Brief	JA001470-JA001516	26/27
	Exhibit 15 – Appellant's Reply Brief (Padilla v. Big D)	JA001517-JA001551	27
01-29-20	**Notice of Appeal**	**JA009132-JA009136**	**119/120**
	Exhibit A – Notice of Entry of Judgment [As to the Claims of Helix Electric of Nevada, LLC and Plaintiff in Intervention	JA009137-JA009166	120

Date	Description	Bates Number	Volume(s)
	National Wood Products, Inc.'s Against APCO Construction, Inc.]		
	Exhibit [C] – Notice of Entry of Order Granting Helix Electric of Nevada's Rule 54(b) Certification	JA009148-JA009156	120
05-31-18	**Notice of Entry of Judgment [As to the Claims of Helix Electric of Nevada, LLC Against Camco Construction, Co., Inc.]**	**JA006522 JA006540**	**89**
06-01-18	**Notice of Entry of Judgment [As to the Claims of Helix Electric of Nevada, LLC and Plaintiff in Intervention National Wood Products, Inc.'s Against APCO Construction, Inc.]**	**JA006541 JA006550**	**90**
09-28-18	**Notice of Entry of Order (1) Granting APCO Construction, Inc.'s Motion for Attorneys' Fees and Costs (2) Granting APCO Construction, Inc.'s Memorandum of Costs in Part (3) Granting Helix Electric of Nevada, LLC's Motion to Retax in Part and Denying in Part (4) Granting Plaintiff in Intervention National Wood Products, LLC's Motion to Retax in Part and Denying in Part and (5) Granting National Wood Products, Inc.'s Motion to File a Surreply**	**JA007281-JA007299**	**100**
12-29-17	**Notice of Entry of Order Granting in Part and Denying in Part APCO Construction's Omnibus Motion *in Limine***	**JA001178-JA001186**	**22**
07-02-18	**Notice of Entry of Order Granting Helix Electric of Nevada, LLC's Motion for Attorneys' Fees, Interest and Costs**	**JA007238-JA007245**	**100**
01-03-20	**Notice of Entry of Order Granting Helix Electric of Nevada, LLC's Motion for Rule 54(b) Certification**	**JA009124-JA009131**	**119**

Date	Description	Bates Number	Volume(s)
01-03-18	**Notice of Entry of Order Granting Peel Brimley Lien Claimants' Motion for Partial Summary Judgment Precluding Defenses Based on Pay-if-Paid Agreements**	**JA001187-JA001198**	**22**
12-29-17	**Notice of Entry of Order Granting in Part and Denying in Part Helix Electric of Nevada, LLC's Motion *in Limine* 1-4**	**JA001170-JA001177**	**22**
12-29-17	**Notice of Entry of Order Granting Peel Brimley Lien Claimants' Motion *in Limine* 1-6**	**JA001161-JA001169**	**22**
01-19-18	**Order Denying APCO Construction's Motion for Reconsideration of Order Granting Partial Summary Judgment Precluding Defenses Based on Pay-if-Paid Agreements**	**JA005282-JA005283**	**78**
07-12-19	**Order Dismissing Appeal (Case No. 76276)**	**JA007332-JA007334**	**101**
07-02-10	**Order Striking Defendant Gemstone Development West, Inc.'s Answer and Counterclaim and Entering Default**	**JA000042-JA000043**	**1**
08-02-17	**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**	**JA000328-JA000342**	**6**
	Exhibit 1 – APCO Construction's Answers to Helix Electric of Nevada, LLC's First Request for Interrogatories	JA000343-JA00379	6
	Exhibit 2 – Camco Pacific Construction Company, Inc.'s Responses to Helix Electric of Nevada, LLC's Interrogatories	JA000380-JA000392	6
11-06-17	**Peel Brimley Lien Claimants' Motion in Limine Nos. 1-6**	**JA000419-JA000428**	**7**
	Exhibit 1 – Notice of Entry of Order	JA000429	7

Date	Description	Bates Number	Volume(s)
		JA000435	
	Exhibit 2 – Amended Notices of 30(b)(6) Deposition of Camco Pacific Construction Company, Inc. from Cactus Rose Construction, Inc., Fast Glass, Inc.'s, Heinaman Contract Glazing, Inc. and Helix Electric of Nevada, LLC's	JA000436-JA000472	7/8
	Exhibit 3 – Excerpt from David E. Parry's Deposition Transcript taken June 20, 2017	JA000473 JA00489	8
	Exhibit 4 – Cactus Rose Construction, Inc.'s First Set of Request for Admissions to Camco Pacific Construction	JA00490 JA000500	8
	Exhibit 5 – Fast Glass, Inc.'s First Set of Request for Admissions to Camco Pacific Construction	JA000501-JA000511	8
	Exhibit 6 – Heinaman Contract Glazing, Inc.'s First Set of Request for Admissions to Camco Pacific Construction	JA000512-JA000522	8
	Exhibit 7 – Helix Electric of Nevada, LLC's First Set of Request for Admissions to Camco Pacific Construction	JA000523-JA000533	8
09-28-17	**Peel Brimley Lien Claimants' Reply to Oppositions to Motion for Partial Summary Judgment Precluding Defenses Based on Pay-if-Paid Agreements**	**JA000413-JA00418**	**7**
01-09-18	**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**	**JA001552-JA001560**	**27**
06-18-18	**Plaintiff in Intervention National Wood Products, Inc.'s Joinder to Helix Electric of Nevada, LLC's Opposition**	**JA007190-JA007192**	**99**

Date	Description	Bates Number	Volume(s)
	to APCO Construction's Motion for Attorneys' Fees and Costs		
06-15-18	**Plaintiff in Intervention National Wood Products, Inc.'s Opposition to APCO Construction's Motion for Attorneys' Fees and Costs**	**JA007095-JA007120**	**97/98**
07-19-18	**Plaintiff-in-Intervention National Wood Products, Inc.'s Surreply to APCO Construction's Reply to Plaintiff-in-Intervention National Wood Products, Inc.'s Opposition to Motion for Attorney's Fees and Costs**	**JA007246-JA007261**	**100**
01-10-18	**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**	**JA001561-JA001573**	**27**
01-18-18	**Stipulation and Order Regarding Trial Exhibit Admitted into Evidence**	**JA002199-JA002201**	**36**
	Exhibit 1 – Exhibit List APCO	JA002208-JA002221	36
	Exhibit 2 – Helix Trial Exhibits	JA002222-JA002223	36
	Exhibit 3 – Exhibit List Plaintiff in Intervention National Wood Products, Inc.	JA002224-JA002242	36/37
	APCO TRIAL EXHIBITS:		
	APCO Related Exhibits:		
	Trial Exhibit 7 - Letter from Scott Financial to APCO re: Loan Status	JA002243	37
	Trial Exhibit 8 - APCO Pay Application No. 10 as submitted to Owner	JA002244-JA002282	37/38
	Trial Exhibit 12 and 107 - Email from C. Colligan to Subcontractors re: Subcontractor Concerns	JA002283-JA002284	38

Date	Description	Bates Number	Volume(s)
	Trial Exhibit 17 – Video (Construction Project)	JA002285	N/A
	Trial Exhibit 18 – Video (Construction Project)	JA002286	N/A
	Trial Exhibit 19 – Video (Construction Project)	JA002287	N/A
	Trial Exhibit 20 – Video (Construction Project)	JA002288	N/A
	Trial Exhibit 21 – Video (Construction Project)	JA002289	N/A
	Trial Exhibit 22 – Video (Construction Project)	JA002290	N/A
	Trial Exhibit 29 - Email from J. Robbins to Subcontractors re: Billing Cut-Off for August Billing	JA002285	39
	Trial Exhibit 30 - Camco Pay Application No. 11 NCS-Owner Approved with NCS Draw Request	JA002286-JA002306	39
	Trial Exhibit 32 and 125 - Photo re: Building 8 & 9, Interior (Showing drywall still not completed and no electrical trim or fixture installed)	JA002307-JA002308	39
	Trial Exhibits 33 and 126 - Photo re: Building 8 & 9, Interior (Showing drywall still not completed)	JA002309-JA002310	39
	Exhibit 34 and 128 - Photo re: Building 8 & 9, Interior (Showing drywall still not completed)	JA002311-JA002312-	40
	Trial Exhibit 35 - Photo re: Building 8 & 9, Interior (Showing drywall still not completed and no electrical trim or fixtures installed)	JA002313-JA002314	40
	Exhibit 36 and 130 -Photo re: Building 8 & 9, Interior (Showing drywall still not completed and no electrical trim or fixtures installed)	JA002315-JA002316	40

Date	Description	Bates Number	Volume(s)
	Trial Exhibits 37 and 131 -Photo re: Building 8 & 9, Interior (Showing drywall still not completed and no electrical trim or fixtures installed)	JA002317-JA002318	40
	Trial Exhibits 38 and 132 - Photo re: Building 8 & 9, Interior (Showing drywall still not completed and no electrical trim or fixtures installed)	JA002319-JA002320	41
	Trial Exhibit 39 -Email from K. Costen to Subcontractors informing that Manhattan West Project no longer open	JA002321-JA002322	41
	Trial Exhibit 40- Letter from D. Parry to Subcontractors Re: Funding Withdrawn	JA002323 JA002326	41
	HELIX Related Exhibits:		41
	Trial Exhibit 46 - Helix Pay Application No. 16713-008R1 with Proof of Payment	JA002327-JA002345	41
	Trial Exhibit 47 - Helix Pay Application No. 16713-009R1 with Proof of Payment	JA002346-JA002356	41
	Trial Exhibit 48 - Email from R. Nickerl to B. Johnson Re: Work Suspension Directive	JA002357-JA002358	41
	Trial Exhibit 49 -Helix Pay Application No. 16713-010R2 with Proof of Payment	JA002359-JA002364	41/42
	Trial Exhibit 50 - Unconditional Waiver and Release re: Pay Application No. 8 with Copy of Payment	JA002365-JA002366	42
	Trial Exhibit 51 - Photo re: Building 8 & 9, South (No Exterior fixtures installed. Helix billed out at 90%)	JA002367-JA002368	42
	Trial Exhibit 52 -Photo re: Building 8 & 9, North (No Exterior fixtures installed. Helix billed out at 90%)	JA002369-JA002370	42
	Trial Exhibit 53 -Photo re: Building - 2 & 3, West (No Exterior fixtures installed. Helix billed out at 90%)	JA002371-JA002372	42

Date	Description	Bates Number	Volume(s)
	Trial Exhibit 54 - Photo re: Building - 2 & 3, East (No Exterior fixtures installed. Helix billed out at 90%)	JA002373-JA002374	42
	Trial Exhibit 55 - Photo re: Building 2 & 3, East (No Exterior fixtures installed. Helix billed out at 90%)	JA002375-JA002376	42
	Trial Exhibit 56 - Photo re: Building 8 & 9, North (No Exterior fixtures installed. Helix billed out at 90%)	JA002377-JA002378	42
	Trial Exhibit 57 - Photo re: Building 2 & 3, and 8 & 9, North (No Exterior fixtures installed. Helix billed out at 90%)	JA002379-JA002381	42
	Trial Exhibit 58 - Helix Pay Application No. 16713-011R1 submitted to Owner	JA002382-JA002391	42
	Trial Exhibit 59 - Helix Pay Application No. 16713-011R1 given to Camco with Proof of Payment	JA002392-JA002405	43
	Trial Exhibit 60 - Helix Retention Rolled to Camco	JA002406-JA002415	43
	Trial Exhibit 61 - Unconditional Waiver and Release re: all Invoices through June 30, 2008 with Proof of Payment	JA002413-JA002415	43
	Trial Exhibit 62 - Photo re: Building 8 & 9, South	JA002416-JA002417	43
	Trial Exhibit 63 - Photo re: Building 2 & 3, West	JA002418-JA002419	43
	Trial Exhibit 64 - Photo re: Building 2 & 3, West	JA002420-JA002421	43
	Trial Exhibit 65 - Photo re: Building 2 & 3, South	JA002422-JA002423	43
	Trial Exhibit 66 - Letter of transmittal from Helix to APCO re: Helix Pay Application No. 16713-011R1	JA002424-JA002433	43
	Trial Exhibit 67 - Photo re: Building 8 & 9, West (No exterior fixtures installed. Helix billed out 90%)	JA002435-JA002436	43

Date	Description	Bates Number	Volume(s)
	Trial Exhibit 68 -Photo re: Building 8 & 9, West (No exterior fixtures installed. Helix billed out 90%)	JA002437-JA002438	43
	Trial Exhibit 69 - Photo re: Building 2 & 3, East (No exterior fixtures installed. Helix billed out 90%)	JA002439-JA002440	43
	Trial Exhibit 70 - Photo re: Building 8 & 9, South (No exterior fixtures installed. Helix billed out 90%)	JA002441-JA002442	43
	Trial Exhibit 71 - Photo re: Building 8 & 9, West (No exterior fixtures installed. Helix billed out 90%)	JA002443-JA002444	43
	Trial Exhibit 72 - Photo re: Building 2 & 3, East (No exterior fixtures installed. Helix billed out 90%)	JA002445-JA002446	43
	Trial Exhibit 73 - Photo re: Building 8 & 9, West (No exterior fixtures installed. Helix billed out 90%)	JA002447-JA002448	43
	Trial Exhibit 74 - Photo re: Building 2 & 3, East (No exterior fixtures installed. Helix billed out 90%)	JA002448-JA002449	43
	Trial Exhibit 75 - Unconditional Release re: Pay Application No. 16713-011R1 with Proof of Payment	JA002450-JA002456	43
	Exhibit 77 - Helix Statement of Facts Constituting Notice of Lien and Third-Party Complaint	JA002457-JA002494	43
	Zitting Brothers Related Exhibits:		
	Trial Exhibit 100 - Check No. 14392 payable to Zitting ($27,973.80); Progress Payment No. 7	JA002495-JA002497	44
	Trial Exhibit 101 - Email from R. Nickerl to R. Zitting re: Change Orders	JA002498-JA002500	44
	Trial Exhibit 102 -Email from L. Lynn to J. Griffith, et al. re: Change Order No. 00011 “pending”	JA002501-JA002503	44

Date	Description	Bates Number	Volume(s)
	Trial Exhibit 103- Email from R. Zitting to R. Nickerl re: change orders adjusted to $30 per hour	JA002504-JA002505	44
	Trial Exhibit 104 - Email from R. Zitting to R. Nickerl re: change orders adjusted to $30 per hour with copies of change orders	JA002506-JA002526	44
	Trial Exhibit 105 - Ex. C to the Ratification – Zitting Quotes	JA002527-JA002528	44
	Trial Exhibit 106 - Unconditional Lien Release – Zitting ($27,973.80)	JA002529	44
	Trial Exhibit 108 - Photo of Video (Construction Project)	JA002530-JA002531	44
	Trial Exhibit 109 - Photo of Video (Construction Project)	JA002532-JA002533	44
	Trial Exhibit 110 - Photo of Video (Construction Project)	JA002534-JA002535	44
	Trial Exhibit 111 - Photo of Video (Construction Project)	JA002536-JA002537	44
	Trial Exhibit 112 - Photo of Video (Construction Project)	JA002538-JA002539	44
	Trial Exhibit 113 -Photo of Video (Construction Project)	JA002550-JA002541	44
	Trial Exhibit 114 -Photo of Video (Construction Project)	JA002542-JA002543	44
	Trial Exhibit 115 - Progress Payment No. 9 Remitted to Zitting	JA002544-JA002545	44
	Trial Exhibit 116 - Ratification and Amendment of Subcontract Agreement between Buchele and Camco	JA002546-JA002550	44
	Trial Exhibit 117 - C to the Ratification	JA002551-JA002563	44
	Trial Exhibit 118 - Q&A from Gemstone to subcontracts	JA002564-JA002567	44
	Trial Exhibit 119 - Check No. 528388 payable to APCO ($33,847.55) – Progress Payment No. 8.1 and 8.2	JA002568-JA002571	44

Date	Description	Bates Number	Volume(s)
	Trial Exhibit 120 - Tri-City Drywall Pay Application No. 7 to APCO as submitted to Owner. Show percentage complete for Zitting	JA002572-JA002575	44/45
	Trial Exhibit 127 - Photo of Video (Construction Project)	JA002576-JA002577	45/46
	Trial Exhibit 128 - Photo of Video (Construction Project)	JA002578-JA002579	46
	Trial Exhibit 129 - Photo of Video (Construction Project)	JA002580-JA002581	46
	Trial Exhibit 138 - Memo from Scott Financial to Nevada State Contractors Board Re: Explanation of Project Payment Process	JA002582-JA002591	46
	Trial Exhibit 152 -Terms & Conditions modified by APCO, Invoices and Check Payment	JA002592-JA002598	46
	National Wood Products Related Exhibits:		
	Trial Exhibit 160 - Documents provided for settlement	JA002599-JA002612	46
	CAMCO Related Exhibits:		
	Trial Exhibit 163 - Camco Pay Application No. 12 to Gemstone	JA002613-JA002651	46/47
	Trial Exhibit 165 - Letter from D. Parry to A. Edelstein re: Gemstone losing funding for project	JA002652-JA002653	47
	Trial Exhibit 166 - Letter from D. Parry to G. Hall re: withdrawal of funding	JA002654 JA002656	47
	Helix Related Exhibits:		47
	Trial Exhibit 169 - Helix Exhibit to Standard Subcontract Agreement with Camco	JA 002665 JA002676	47/48
	Trial Exhibit 170 - Subcontract Agreement between Helix and Camco (unsigned)	JA002677-JA002713	48

Date	Description	Bates Number	Volume(s)
	Trial Exhibit 171 - Work Order No. 100	JA002714-JA002718	48
	Trial Exhibit 172 - Letter from J. Griffith to Victor Fuchs Re: Gemstone's intention to continue retention of Helix w/copy of Ratification and Amendment of Subcontract Agreement	JA002719-JA002730	48
	Trial Exhibit 173 - Helix Pay Application No. 16713-012 to Camco with proof of payment	JA002731-JA002745	48
	Trial Exhibit 174 - Helix Change Order Request No. 28	JA002746-JA002747	48
	Trial Exhibit 175 - Change Notice No. 41	JA002748-JA002751	48
	Trial Exhibit 176 - Helix Pay Application No. 16713-013 to Camco	JA002752-JA002771	48/49
	Trial Exhibit 177 - Helix Pay Application No. 16713-014 to Camco	JA002772-JA002782	49
	Trial Exhibit 178 - Camco's letter to Helix rejecting Pay Application No. 16713-015 with attached copy of Pay Application	JA002783 JA002797	49
	National Wood/Cabinetec Related Exhibits:		
	Trial Exhibit 184 - Ratification and Amendment of Subcontract Agreement between CabineTec and Camco (fully executed copy)	JA002798-JA002825	49
	General Related Exhibits:		
	Trial Exhibit 218 - Camco/Owner Pay Application No. 11 w/Backup	JA002826-JA003028	50/51/52
	Trial Exhibit 220 - Camco/Owner Pay Application No. 12 w/Backup	JA003029-JA003333	52/53/54/55
	Trial Exhibit 313 - Letter from A. Edelstein to R. Nickerl re: NRS 624 Notice	JA003334-JA003338	55
	Helix Trial Exhibits:		

Date	**Description**	**Bates Number**	**Volume(s)**
	Trial Exhibit 501 - Payment Summary	JA003339 – JA003732	55/56/57/ 58/59/60
	Trial Exhibit 508 – Helix Pay Application	JA003733- JA003813	60/61
	Trial Exhibit 510 - Unsigned Subcontract	JA003814- JA003927	61/62
	Trial Exhibit 512 - Helix's Lien Notice	JA003928- JA004034	62/63
	Trial Exhibit 522 - Camco Billing	JA004035- JA005281	63/64/65/66/67/ 68/69/70 /71/72 /73/74/75/ 76/77
01-17-18	**Transcript Bench Trial (Day 1)**[5]	**JA001668- JA001802**	**29/30**
	Trial Exhibit 1 - Grading Agreement ***(Admitted)***	JA001803- JA001825	30
	Trial Exhibit 2 – APCO/Gemstone General Construction Agreement ***(Admitted)***	JA001826- JA001868	30
	Trial Exhibit 3 - Nevada Construction Services /Gemstone Cost Plus/GMP Contract Disbursement Agreement ***(Admitted)***	JA001869- JA001884	30
	Trial Exhibit 4 - APCO Pay Application No. 9 Submitted to Gemstone ***(Admitted)***	JA001885- JA001974	30/31/32
	Trial Exhibit 5 - Letter from J. Barker to A. Edelstein re: APCO's Notice of Intent to Stop Work ***(Admitted)***	JA001975- JA001978	32
	Trial Exhibit 6 - Letter from J. Barker to A. Edelstein re: APCO's Notice of Intent to Stop Work ***(Admitted)***	JA001979- JA001980	32
	Trial Exhibit 10 - Letter from J. Barker to A. Edelstein Re: Notice of Intent to Stop Work (Second Notice) ***(Admitted)***	JA001981- JA001987	32

[5] Filed January 31, 2018

Date	**Description**	**Bates Number**	**Volume(s)**
	Trial Exhibit 13 - Letter from A. Edelstein to Re. Nickerl Re: Termination for Cause (Gemstone) ***(Admitted)***	JA001988-JA002001	32
	Trial Exhibit 14 - Letter from W. Gochnour to Sean Thueson Re: [APCO's] Response to [Gemstone's] Termination for Cause ***(Admitted)***	JA002002-JA002010	33
	Trial Exhibit 15 - Letter from R. Nickerl to A. Edelstein Re: 48-Hour Notices ***(Admitted)***	JA002011-JA002013	33
	Trial Exhibit 16 - Email from J. Horning to A. Berman and J. Olivares re: Joint Checks ***(Admitted)***	JA002014	33
	Trial Exhibit 23 - APCO Subcontractor Notice of Stopping Work and Letter from J. Barker to A. Edelstein Re: Notice of Stopping Work and Notice of Intent to Terminate Contract ***(Admitted)***	JA002015-JA002016	33
	Trial Exhibit 24 - Letter from R. Nickerl to Clark County re: Notification of APCO's withdrawal as General Contractor of Record ***(Admitted)***	JA002017-JA002023	33
	Trial Exhibit 26 - Email from J. Gisondo to Subcontractors re: June checks ***(Admitted)***	JA002024	34
	Trial Exhibit 27 - Letter from A. Edelstein to R. Nickerl re: June Progress Payment ***(Admitted)***	JA002025-JA002080	34
	Trial Exhibit 28 - Letter from J. Barker to A. Edelstein Re: Termination of Agreement for GMP ***(Admitted)***	JA002081	34
	Trial Exhibit 31 - Transmission of APCO's Pay Application No. 11 as Submitted to Owner ***(Admitted)***	JA002082-JA002120	34/35
	Trial Exhibit 45 - Subcontractor Agreement ***(Admitted)***	JA002121-JA002146	35

Date	**Description**	**Bates Number**	**Volume(s)**
	Trial Exhibit 162 - Amended and Restated General Construction Agreement between Gemstone and CAMCO ***(Admitted)***	JA002147-JA002176	35/36
	Trial Exhibit 212 - Letter from Edelstein to R. Nickerl re: NRS 624 Notice ***(Admitted)***	JA002177-JA002181	36
	Trial Exhibit 215 - Email from C. Colligan to Subcontractors re: 48-hour Termination Notice ***(Admitted)***	JA002182-JA002185	36
	Trial Exhibit 216 - Email from C. Colligan re: Meeting with Subcontractors ***(Admitted)***	JA002186-JA002188	36
	Trial Exhibit 506 – Email and Contract Revisions ***(Admitted)***	JA002189 – JA002198	36
01-18-18	**Transcript – Bench Trial (Day 2)**[6]	JA005284-JA005370	78
	Trial Exhibit 535 – Deposition Transcript of Andrew Rivera (Exhibit 99) ***(Admitted)***	JA005371-JA005623	78/79/80
01-19-18	**Transcript – Bench Trial (Day 3)**[7]	JA005624-JA005785	80
	Trial Exhibit 231 – Helix Electric's Amended Statement of Facts Constituting Notice of Lien and Third-Party Complaint ***(Admitted)***	JA005786-JA005801	80
	Trial Exhibit 314 - Declaration of Victor Fuchs in support of Helix's Motion for Partial Summary Judgment against Gemstone ***(Admitted)***	JA005802-JA005804	80
	Trial Exhibit 320 – June-August Billings—not paid to APCO ***(Admitted)***	JA005805	80
	Trial Exhibit 321 – Overpayments to Cabinetec ***(Admitted)***	JA005806-	80

[6] Filed January 31, 201879
[7] Filed January 31, 2018

Date	**Description**	**Bates Number**	**Volume(s)**
	Trial Exhibit 536 – Lien math calculations (handwritten) ***(Admitted)***	JA005807-JA005808	80
	Trial Exhibit 804 – Camco Correspondence ***(Admitted)***	JA005809-JA005816	80
	Trial Exhibit 3176 – APCO Notice of Lien ***(Admitted)***	JA005817-JA005819	81
01-24-18	**Transcript – Bench Trial (Day 5)**[8]	**JA005820-JA005952**	81
01-24-19	**Transcript for All Pending Fee Motions on July 19, 2018**	**JA007300-JA007312**	**100/101**

[8] Filed January 31, 2018

131. Camco's Steve Parry confirmed that Exhibit E to the Camco contract represented the state of the Project when Camco took over.[139]

132. Gemstone and Camco estimated the Project to be 74% complete for Phase 1.[140] Those estimates also confirmed that:

- The first floor drywall taping in building 8 was 70% complete.[141]
- The first floor drywall taping in building 9 was 65% complete.[142]

133. Among other things, the Camco contract required that Camco "shall engage the Third-Party Service Providers listed on Exhibit C (the "Existing Third-Party Service Providers)."[143]

134. Helix and CabineTec are both listed as Existing Third-Party Service Providers on Exhibit C.[144]

135. And Camco had worked with Helix before.[145]

136. Camco's Steve Parry admitted that Camco was assuming the subcontracts that APCO had with Helix and CabineTec:

> [Exhibit 162 was on the elmo]
> Q. ..I've highlighted a sentence that says, "General contractor shall engage third-party service providers." Do you see that?
> A. Yes.
> Q. Okay. What did you understand that to mean?
> A. That we would use subcontractors on the site that had already been under contract to perform work on the project.
> Q. Okay. So you were assuming the Subcontracts that APCO had issued on the Project; is that right?
> A. Yes.
> Q. And, sir, if you would, turn to Exhibit C within the exhibit. Those assumed contracts from APCO included CabineTec and

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[138] Testimony of Steve Parry (Camco) Day 5, p. 37.
[139] Testimony of Steve Parry (Camco) Day 5, p. 27.
[140] Exhibit 218, p. 10; Testimony of Steven Parry (Camco) Day 5, p. 31-32.
[141] Exhibit 160-3.
[142] Exhibit 160-3.
[143] Exhibit 162-2.
[144] Exhibit 162-23.
[145] Testimony of Steve Parry (Camco) Day 5, pp. 13-14.

Helix; correct?
A. Yes.
Q. And, sir, if you would, turn to Exhibit C within the exhibit. Those assumed subcontracts from APCO included CabineTec and Helix; correct?
A. Yes.
Q.[146]

137. After Camco became the general contractor, APCO was not responsible to pay subcontractors for work performed under Camco.[147]

138. Camco never had any contact or involvement with APCO on the Project,[148] nor did APCO provide any direction or impose any scheduling requirements on subcontractors proceeding with their work.[149]

139. APCO played no role in the pay application process or the actual field work on the Project from September-December 2008.[150]

140. And no Helix or CabineTec representative ever approached APCO with questions or concerns about proceeding with work on the Project after APCO's termination.[151]

141. So APCO did not receive any benefit from the work or materials that Helix or CabineTec performed or provided to the Project after August 21, 2008.[152]

142. Camco's first pay application was for the period through August 31, 2008.[153]

143. That billing reflected Gemstone retainage account for APCO's work:

Q. Now, I have highlighted the retainage line item of $5,337,982.74 [on Exhibit 218]. Do you see that?
A. Yes.
Q. What did that figure represent?
A. The retainage that was being withheld on the Project.

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[146] Testimony of Steve Parry (Camco) Day 5, p. 26.
[147] Testimony of Joe Pelan (APCO) Day 1, p. 99.
[148] Testimony of Steve Parry (Camco) Day 5, p. 27.
[149] Testimony of Joe Pelan (APCO) Day 1, p. 97; Testimony of Joe Pelan (APCO) Day 3, p. 150; Testimony of Steve Parry (Camco) Day 5, p. 27.
[150] Testimony of Joe Pelan (APCO) Day 1, p. 98.
[151] Testimony of Joe Pelan (APCO) Day 1, p. 98.
[152] Testimony of Joe Pelan (APCO) Day 3, pp. 149-150.
[153] Testimony of Steve Parry (Camco) Day 5, p. 29.

> Q. And who was the retainage being withheld by?
>
> A. Gemstone, the owner.
>
> . . .
>
> Q. Okay. So my point simply was what you're depicting here in the retainage is the accounting of the retainage that was withheld from APCO as you're going forward on the Project.
>
> A. That's correct.[154]

So all parties knew that the subcontract retention amounts were maintained with Gemstone after APCO was terminated.

K. Cabinetec's entered into a ratification agreement with Camco.

144. After APCO left the Project, CabineTec signed a ratification agreement with Camco whereby CabineTec agreed to complete its original scope of work for Camco.[155]

145. CabineTec understood the ratification to mean that "you guys [APCO] were stepping out and Camco was stepping in."[156]

146. CabineTec further clarified its understanding of the ratification agreement as follows:

> Q. Okay. Sir, but going forward from and after the point that CabineTec signed the ratification agreement with Camco, you knew and understood that Camco was going to be the "contractor", as that term was used in the original subcontract that CabinetTec had for the project, correct?
>
> A. So APCO was going away and Camco was coming on. That's what was happening.[157]

147. In addition, the signed ratification agreement contained the following terms:

- "B. Subcontractor and Camco desire to acknowledge, ratify and agree to the terms of the Subcontract Agreement, whereby Camco will replace APCO as the "Contractor" under the Subcontract Agreement but, subject to the terms of this Ratification, all other terms and conditions of the Subcontract Agreement will remain in full force and effect."[158]
- The ratification agreement acknowledged that $264,395.00 of work remained

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[154] Testimony of Steve Parry (Camco) Day 5, p. 30.

[155] Exhibit 3096; Testimony of Nicholas Cox (CabineTec) Day 3, p. 34; Testimony of Mr. Thompson (CabineTec) Day 5, p. 60.

[156] Testimony of Nicholas Cox (CabineTec) Day 3, p. 35.

[157] Testimony of Nicholas Cox (CabineTec) Day 3, p. 36.

[158] Exhibit 183-1.

to be finished on Building 8 and $264,395.00 on Building 9.[159]

- "5. Ratification. Subcontractor and Camco agree that (a) the terms of the Subcontract Agreement (as amended by this Ratification and including all Amendments, Previously Approved Change Orders, and the Camco Schedule) will govern their relationship regarding the Project, (b) Camco will be the "Contractor" under the Subcontract Agreement, and (c) Subcontractor and Camco agree to perform and fulfill all of the executory terms, covenants, conditions and obligations required to be performed and fulfilled thereunder by Subcontractor and Camco, respectively."[160]

Accordingly, all retention and future payments to CabineTec, which were executory obligations, were Camco's responsibility.

148. After Gemstone could no longer pay Camco, CabineTec filed a complaint against APCO and Camco and alleged that it entered into a ratification agreement with Camco:

> 10. On or about August 26, 2008, pursuant to Gemstone's request CABINETEC entered into a Ratification and Amendment of Subcontract Agreement (the "Ratification") with CAMCO, whereby CAMCO agreed to the terms of the APCO Subcontract and to replace APCO as the "Contractor" under the APCO Contract. . .
> 14. CABINETEC entered into the Ratification with CAMCO, pursuant to Gemstone's request, wherein CAMCO agreed to pay CABINETEC for the services and materials on the Project.
> 15. Pursuant to, and in reliance upon, the aforementioned Subcontract, Ratification and representations, CABINETEC performed the work of providing services and materials (the "Work.")...[161]

So there is no basis for CabineTec to seek payment from APCO for its retention, which never became due under the retention payment schedule while APCO was the contractor. And APCO had no liability for the materials CabineTec provided to Camco and Gemstone after termination.

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[159] Exhibit 183-2.

[160] Exhibit 172-5.

[161] Exhibit 156 at ¶ 10-15.

149. The fact is, APCO paid (and even overpaid) CabineTec for materials delivered to the Project while APCO was contractor.[162]

150. CabineTec did not dispute this overpayment at trial.

151. CabineTec submitted two invoices while APCO was on the Project.[163]

152. Exhibit 148 is CabineTec's first invoice to Camco for $70,836.[164]

153. CabineTec's second invoice is for $72,540.[165]

154. The total amount due to CabineTec, less retention, was $129,038.40.[166]

155. But APCO actually paid CabineTec a total of $161,262 for these two invoices.[167]

156. As such, CabineTec was overpaid $32,223.60 by APCO on the Project.

157. CabineTec did not submit a pay application for August 2008.[168]

158. APCO is entitled to be paid this over payment.

L. <u>CabineTec Claims retention against APCO.</u>

159. When CabineTec originally filed suit CabineTec disclosed $19,547.00 in damages against APCO in its complaint:

> "50. As a result of the foregoing, and in accordance with the principles of equity and common law, CABINETEC is entitled to judgment in its favor, and against APCO in the amount of $19,547.00, together with interest thereon at the highest legal rate."[169]

160. And, CabineTec's initial and first supplemental disclosures only disclosed $30,110.95 in damages against APCO: "...National Wood seeks to recover those damages claimed by CabineTec in its complaint in intervention against APCO in the

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[162] Testimony of Mary Jo Allen (APCO) Day 3, pp. 131-132.

[163] Exhibits Nos. 148, 150, 151, and 320-321, Calculation of CabineTec overpayment; Testimony of Mary Jo Allen (APCO) Day 3, p. 130.

[164] Testimony of Mary Jo Allen (APCO) Day 3, p. 130.

[165] Testimony of Mary Jo Allen (APCO) Day 3, p. 131.

[166] Testimony of Mary Jo Allen (APCO) Day 3, p. 131.

[167] Testimony of Mary Jo Allen (APCO) Day 3, p. 131.

[168] Testimony of Mary Jo Allen (APCO) Day 3, p. 134.

[169] Exhibit 156-8.

amount of $30,110.95 and CAMCO in the amount of $1,125,374.94..."[170] The $30,110.95 represented $19,547 in alleged retention, and $10,563.95 in interest and fees.[171]

161. Those were the only two disclosures CabineTec made before the close of discovery, as was extended by the Court. Then on the eve of trial, CabineTec attempted to disclose and seek $1,154,680.40 in damages against APCO.[172]

162. Aside from the late disclosure there is no basis for that amount as it is undisputed that CabineTec was paid every dollar it billed APCO, less retention, notwithstanding the overpayment.[173]

M. <u>Helix's claim for $505,021 in retention.</u>

163. Helix's designated PMK and Project Manager, Andy Rivera, confirmed that Helix's only claim in this litigation against APCO was for the retention of $505,021.[174]

164. Helix's counsel admitted this limited claim in its opening statement.[175]

165. And then at trial, Mr. Rivera confirmed Helix was only seeking retention and not the unpaid invoices submitted to Camco:

> Q. Sir, could you pull out Exhibit 44. And I want to make sure my record's clear. Exhibit 44 that I marked is, in fact, the same summary that was found in Exhibit 535, page 252, that you and Mr. Zimbleman went over; is that—
>
> A. Correct.
>
> Q. Okay. And does Exhibit 44 represent the damages that you are seeking from APCO in this matter?
>
> A. Yes.

---

[170] Exhibit 157 (CabineTec's Initial Disclosure); Exhibit 158 (CabineTec's First Supplemental Disclosure), and Exhibit 159 (CabineTec's Second Supplemental Disclosure).

[171] Compare Exhibit 156, CabineTec's Complaint to Exhibit 157, CabineTec's Initial Disclosure.

[172] Exhibit 159-6.

[173] Exhibit 147 summarizing payments and releases.

[174] Exhibit 279, Testimony of Andy Rivera (Helix) Day 2, pp. 63-65; Helix's PMK Deposition at p. 52.

[175] Testimony, Day 1 at p. 10. ("...Helix remains to be unpaid $505,021, while APCO was the general contractor. This is to say amounts still owing from pay applications submitted to APCO, and yes, that is essentially our retention.").

Q. And do you recall if you were designated as the person most knowledgeable for one of the topics being the damages that Helix was seeking from APCO in these proceedings, correct?

A. Correct.

Q. And would you agree that as the PMK, you identified a figure of $505,021 as the amount that Helix in this lawsuit claims APCO owes it, correct?

A. Correct.

Q. And there are no other amounts that you identified in your PMK depo as being APCO's liability on this Project, correct?

A. Correct.

Q. Okay. And we are in agreement that the 505—that's your handwriting, where you wrote: Retention?

A. Yes.

Q. And would it be fair to conclude that that retention represents retention that had been accounted for and accrued while APCO was serving as the prime contract – prime contractor on the Project?

A. Yes.

Q. Prior to today has Helix ever billed APCO for that retention?

A. No. No. I'm sorry.

Q. Do you have any information to suggest that APCO ever received Helix's retention from Gemstone?

A. I would not know.

Q. Okay. You don't have any information to suggest that APCO has collected Helix's retention but not forwarded it on to Helix, correct?

A. Correct.

Q. Okay. And in light of your summary within Exhibit 44, would it be fair to conclude that all of the amounts that Helix billed to APCO were, in fact, paid but for retention?

A. Yes.[176]

166. Helix received direct payments from APCO through May 2008.[177]

167. After May 2008, Helix received payment for its APCO billings directly from NCS through joint checks to Helix and APCO, which APCO endorsed over to Helix.[178]

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[176] Testimony of Andy Rivera (Helix) Day 2, pp. 73-75.

[177] Testimony of Andy Rivera (Helix) Day 2, p. 61.

[178] Testimony of Andy Rivera (Helix) Day 2, pp. 61-64

168. Helix's first billing to Camco was on September 19, 2008.[179]

169. Mr. Rivera admitted Helix is only seeking $505,021 in retention from APCO, which Helix never billed Apco.[180]

N. Retention never became due to Helix or CabineTec.

170. As noted above, both the Helix Subcontract and the CabineTec Subcontract included an agreed upon retention payment schedule in Paragraph 3.8.

171. The evidence was undisputed, and even acknowledged by Helix and CabineTec, that the level of completion and other preconditions of the retention payment schedule were not met while APCO was the general contractor.

172. More specifically, Helix's Mr. Johnson admitted Helix did not meet the preconditions in Section 3.8 of the Subcontract to be entitled to retention:[181]

> Q. Well, let me ask it this way: Did Helix satisfy any of these preconditions found in paragraph 3.8 while APCO was the general contractor on the project?
> A. Not to my knowledge.[182]

173. CabineTec's Mr. Thompson admitted that the buildings had to be drywalled and painted before the cabinets were installed[183] and he had no documentation (daily reports, photographs, etc.) that would confirm that CabineTec ultimately installed cabinets in Phase 1 for APCO.[184]

174. It is undisputed that neither Helix nor CabineTec presented *any* testimony that they met the valid conditions precedent to payment to be entitled to retention.

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[179] Exhibit 508, p. 1; Testimony of Andy Rivera (Helix) Day 2 at p. 65.

[180] Testimony of Andy Rivera (Helix) Day 2, pp. 50 and 58. Exhibit 501, p. 393 is the spreadsheet Helix created of payments it applied for and received from APCO. Helix's Mr. Rivera admitted Helix was paid a total of $4,626,186.11 on the Project by and through APCO, which reflected payment for work billed (and retention) through August 31, 2008. Testimony of Andy Rivera (Helix) Day 2, pp. 58-59; Exhibits 46-47, Helix May and June billings; Exhibit 49-50; APCO Checks to Helix, Exhibit 58, Exhibit 59, Exhibit 60, Exhibit 61, Exhibit 66, Exhibit 75.

[181] Testimony of Bob Johnson (Helix) Day 2, pp. 36-37.

[182] Testimony of Bob Johnson (Helix) Day 2, p. 19.

[183] Testimony of Mr. Thompson (CabineTec) Day 5, p. 69.

[184] Testimony of Mr. Thompson (CabineTec) Day 5, p. 69.

175. *See Lucini-Parish Ins. v. Buck,*[185] (a party who seeks to recover on a contract has the burden of establishing any condition precedent to the respective contract).

176. Instead, the Court saw pictures[186] and videos[187] confirming that Helix's and CabineTec's work was not completed.

177. The Court also heard unrefuted testimony that APCO was never paid from Gemstone for Helix's or CabineTec's retention.[188]

178. The fact is APCO and its subcontractors never got to the point where they could request retention while APCO was the contractor.[189]

179. To that end, Helix's Mr. Johnson admitted that Helix did not present a claim to APCO for any additional compensation for disputed claims or changes while APCO was on the Project. [190]

180. Helix's Mr. Rivera admitted Helix *has never* billed APCO for retention, and that all amounts that Helix did bill APCO were paid, less retention.[191]

181. The fact that Helix did not bill retention confirms that Helix recognized that retention never became due from APCO under the retention payment schedule.

182. Both Helix and CabineTec rolled their retention account over to Camco and Gemstone in their post-APCO billings as it was truly a Project and Gemstone liability.[192]

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[185] 108 Nev. 617, 620, 836 P.2d 627, 629 (1992).

[186] Exhibit 32-38, 51-57, 108-114, 62-65, 67-74, 125-132, Pictures of Status of Project; Testimony of Brian Benson (APCO) Day 3, pp. 53-71.

[187] Exhibits 17-22, Videos of Project.

[188] Testimony of Mary Jo Allen (APCO) Day 3, p. 144; Testimony of Joe Pelan (APCO) Day 1, p. 26.

[189] Testimony of Joe Pelan (APCO) Day 1, pp. 60 and 82; Testimony of Bob Johnson (Helix) Day 2, pp. 36-37; Testimony of Joe Pelan (APCO) Day 3, p. 151.

[190] Testimony of Bob Johnson (Helix) Day 2, p. 31.

[191] Testimony of Andy Rivera (Helix) Day 2, p. 74; Exhibits 43, 50, 61 and 75.

[192] Exhibits 170-177, Helix billings to Camco and Exhibit 185, CabineTec's billings to Camco; Testimony of Mary Jo Allen (APCO) Day 3, pp. 129-130; Testimony of Andy Rivera (Helix) Day 2, p. 74.

183. APCO was never responsible for retention under the subcontract's retention payment schedule.

184. That is confirmed by Helix's and Camco's conduct at the Project level through their pay applications.[193]

O. Similarly, APCO never earned or received its retention.

185. Gemstone and/or its lender maintained the retention account.[194]

186. APCO's August 2008 pay application did not bill Gemstone for APCO's retention.[195]

187. In fact, APCO never billed Gemstone for retention[196] because APCO had not earned the retention and thus was not entitled to it.[197]

188. And APCO never billed or received the retention funds from Gemstone for any of the subcontractors.[198]

189. APCO never received CabineTec's or Helix's retention from Gemstone.[199]

190. Helix's Mr. Johnson admitted that Gemstone, not APCO, was holding its retention.[200]

191. And Helix admitted it had no information to suggest that APCO was ever paid Helix's retention.[201]

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[193] Compare Exhibit 58, Helix's August 2008 pay application to APCO, to reflecting $513,120.71 in retention to Exhibit 173, Helix's September 2008 payment application to Camco reflecting $553,404.81 in retention. See also, Exhibit 151 pgs. 1, 2 CabineTec's last pay application to APCO for $179,180 reflecting $17,918.00 in retention, to Exhibit 185, CabineTec's first payment application to Camco showing approved amount of $537,404.80 less $53,740.48 in retention. See also Exhibit 30 (Camco's August 2008 draw request confirming retention was being held for the entire project).

[194] Testimony of Joe Pelan (APCO) Day 1, p. 30.

[195] Exhibit 31; Testimony of Joe Pelan (APCO) Day 1, p. 45.

[196] Testimony of Joe Pelan (APCO) Day 1, p. 30.

[197] Testimony of Joe Pelan (APCO) Day 1, p. 83.

[198] Testimony of Mary Jo Allen (APCO) Day 3, p. 128.

[199] Testimony of Joe Pelan (APCO) Day 3, p. 150.

[200] Testimony of Bob Johnson (Helix) Day 2, p. 19.

[201] Testimony of Bob Johnson (Helix) Day 2, p. 20.

192. Neither Helix nor CabineTec ever billed APCO for any of the materials or work it performed after Camco signed its prime contract with Gemstone.[202]

193. And notably, neither Helix nor CabineTec billed APCO or submitted a claim letter for the retention they now claim.[203]

194. In fact, CabineTec actually billed Camco for the retention it incurred under APCO.[204]

P. Helix's also entered into a ratification agreement with Camco.

195. Helix's Project Manager, Mr. Rivera understood that Gemstone purported to terminate the Contract:

> Q. Wouldn't it be fair to say that based on communications, both written and verbal, that you received from APCO and/or Gemstone, you knew that Gemstone had purported to terminate APCO's prime contract?
>
> A. We knew they were having issues.
>
> Q. Okay. And those issues had culminated in APCO purporting to terminate the prime contract and/or Gemstone purporting to terminate the prime contract, correct?
>
> A. Correct.[205]

196. In fact, during the August 2008 timeframe, Helix was getting information directly from Gemstone.[206]

197. Mr. Rivera admitted Helix was copied on certain communications between APCO and Gemstone:

> Q. And wouldn't it be fair to say that you received copies of certain communications from APCO to the owner, Gemstone, whereby APCO indicated that we're having payment issues and we're giving notice of our intent to exercise statutory rights to suspend and/or terminate?

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[202] Testimony of Joe Pelan (APCO) Day 1, p. 97.

[203] Testimony of Joe Pelan (APCO) Day 1, p. 97; Testimony of Mary Jo Allen (APCO) Day 3, p. 128 (as to CabineTec); Testimony of Joe Pelan (APCO) Day 3, p. 150.

[204] Exhibit 3103 confirming CabineTec billed Camco for its retention. Testimony of Nicholas Cox (CabineTec) Day 3, p. 38-39.

[205] Testimony of Andy Rivera (Helix) Day 2, p. 75.

[206] Testimony of Andy Rivera (Helix) Day 2, p. 76.

A. Something to that effect, yes.[207]

. . . .

Q. Okay. But do you recall receiving APCO generated correspondence indicating to the owner, which was sent to subcontractors as well, that APCO was suspending and/or terminating its work, correct?

A. Correct.[208]

198. Mr. Rivera also admitted Helix was performing work under Gemstone's direction by August 26, 2008:

Q. And from and after about August 26, 2008, Helix was taking its direction from Gemstone and/or Camco, correct?

A. Gemstone.

Q. Okay. APCO was not directing, requesting any work on behalf of Helix after September 5, 2008, correct?

A. Correct.

Q. And based on your personal involvement with Gemstone and Camco, did you understand that, in fact, Camco was replacing APCO as the prime contractor?

A. At that time did not know exactly how that was—the agreement was going to be.

Q. Did you come to find out?

A. Yes.

Q. that was, in fact, the case?

A. Yes.[209]

199. Helix was directed to hook up power to the Camco trailer on August 26, 2008.[210]

200. Gemstone provided Helix with the Camco subcontract and Camco pay applications,[211] and directed Helix to start directing its payment applications to Camco.[212]

201. On August 26, 2008 Camco sent Helix a checklist for starting work.[213] Among the provisions included:

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[207] Testimony of Andy Rivera (Helix) Day 2, p. 76.

[208] Testimony of Andy Rivera (Helix) Day 2, p. 77.

[209] Testimony of Andy Rivera (Helix) Day 2, pp. 76-77. *See also* Testimony of Bob Johnson (Helix) Day 2, p. 25.

[210] Exhibit 171; Testimony of Bob Johnson (Helix) Day 2, p. 25.

[211] Exhibit 170.

[212] Testimony of Andy Rivera (Helix) Day 2, p. 66.

- "Retention Monies- Final retention monies will only be released to Camco Pacific from Owner when all Punch list Items, Contract Items, and Close-Out Documents have been fully completed and inspected by the owner. Any delay by a single Subcontractor in completing this will delay the entire project's final payment. PLEASE DO NOT DELAY IN COMPLETING YOUR PUNCHLIST ITEMS. Exhibit 170-3.
- "D. Final Payment." Subcontractor shall not be entitled to payment of the balance of the Contract Price, including, without limitation, the Retainage, until (1) the Contract Work has been completed to the satisfaction of Contractor, (2) Subcontractor has submitted to Contractor an invoice for the final payment accompanied by (i) a final complete list of all suppliers and subcontractors whose material or services have been utilized by subcontractor, (ii) all closeout documents including, warranties, guarantees, as-builts, drawings, operation and maintenance manuals and such other items required of Subcontractor have been provided and accepted by Owner, (iii) executed unconditional lien releases and waivers from Subcontractor and all of its mechanics, subcontractors, and suppliers for the Contract Work covered by all preceding progress payments, and (iv) executed unconditional lien releases and waivers upon final payment from all mechanics, subcontractors, and suppliers who have previously received final payment, and conditional lien releases and waiver upon final payment from Subcontractor and each mechanic, subcontractor or supplier from which an unconditional lien release and waiver upon final payment has not been submitted to Contractor, (3) Contractor has received the corresponding final payment from Owner, (4) Contractor has received evidence of Subcontractor's insurance required to be in place, (5) 45 days have elapsed after a Notice of Completion has been recorded or if a valid Notice of Completion is not recorded, upon Subcontractor's receipt of a written notice of acceptance of the Contract Work that shall be given by Contractor not later than 91 days after Contractor determines in good faith that the Contract Work has been performed completed and in acceptable manner and (6) all outstanding disputes related to the Project have been resolved, and any liens against the Project have been

[213] Exhibit 170.

removed.[214]

Having received these requirements, Helix continued on as the electrical subcontractor for Camco after APCO's termination.

202. Helix's Andy Rivera admitted Helix's technical scope of work remained the same under Camco:

> Q. Would it be fair to conclude the technical scope of work remained the same as you transitioned to work with Camco—
> A. Yeah.
> Q. –for Helix?
> A. Yes.[215]

203. During the transition of APCO to Camco, Helix had a meeting with Gemstone.[216]

204. The purpose of that meeting was to: "represent that work was still proceeding, nothing had changed with our contracts with the current APCO relationship, and that we were to take direction for construction from Camco, and they wanted to negotiate a contract."[217]

205. Helix never sent APCO a letter or requested that APCO clarify or provide any information to Helix on the status of its relationship to the Project.[218]

206. Camco presented Helix with a ratification agreement.[219]

207. It was Camco's intent and understanding that it was replacing APCO in the Helix-APCO subcontract.[220]

208. Helix had a copy of the ratification agreement by at least September 3, 2008.[221]

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[214] Exhibit 170-11, 170-12.
[215] Testimony of Andy Rivera (Helix) Day 2, p. 78.
[216] Testimony of Bob Johnson (Helix) Day 2, p. 22.
[217] Testimony of Bob Johnson (Helix) Day 2, pp. 22-23.
[218] Testimony of Bob Johnson (Helix) Day 2, p. 23.
[219] Testimony of Bob Johnson (Helix) Day 1, p. 124.
[220] Testimony of Steve Parry (Camco) Day 5, pp. 28, 29 and 60.
[221] Exhibit 172. Testimony of Bob Johnson (Helix) Day 2, p. 27.

209. Helix understood the purpose of the ratification agreement as follows: "...they [Camco] were stepping in as construction management for the project and that they were using that agreement in order to proceed with – hold us as the subcontractor going forward."[222]

210. Camco's understanding was the same, i.e. the Ratification agreement formed the basis of Camco's agreement in allowing Helix to proceed on the Project.[223]

211. Helix continued working on the Project after receiving the ratification agreement from Gemstone.[224]

212. Camco sent Helix the ratification agreement with a September 4, 2008 letter that included the following representations: "The conditional acceptance of this work is based on the execution of a standard Camco Pacific Ratification Agreement... We have provided you a copy of the Camco Pacific Ratification Agreement for your review and acceptance."

213. The Ratification Agreement contained the following additional terms:

- "B. Subcontractor and Camco desire to acknowledge, ratify and agree to the terms of the Subcontract Agreement, whereby Camco will replace APCO as the "Contractor" under the Subcontract Agreement but, subject to the terms of this Ratification, all other terms and conditions of the Subcontract Agreement will remain in full force and effect."
- "5. Ratification. Subcontractor and Camco agree that (a) the terms of the Subcontract Agreement (as amended by this Ratification and including all Amendments, Previously Approved Change Orders, and the Camco Schedule) will govern their relationship regarding the Project, (b) Camco will be the "Contractor" under the Subcontract Agreement, and (c) Subcontractor and Camco agree to perform and fulfill all of the executory

[222] Testimony of Bob Johnson (Helix) Day 1, p. 124.

[223] Exhibit 172. Testimony of Steve Parry (Camco) Day 5, p. 29.

[224] Testimony of Bob Johnson (Helix) Day 2, p. 28.

terms, covenants, conditions and obligations required to be performed and fulfilled thereunder by Subcontractor and Camco, respectively."[225]

214. Helix admitted it entered into a ratification agreement with Camco on September 4, 2008 to continue on and complete the APCO scope of work.[226]

215. Helix even added a document to the ratification entitled "Helix Electric's Exhibit to the Ratification and Amendment."[227]

216. The Helix Exhibit to the Ratification and Amendment contained language confirming that APCO was removed as the general contractor and that Helix submitted $994,025 in change orders to APCO prior to August 26, 2008, the date Camco was using for its ratification agreement.[228]

217. Helix included a total contract price of $5.55 million for the Project, which was its original contract price with APCO for Phase 1, and added $480,689 as approved change orders under APCO to the total contract price.[229]

218. The proposed Helix Amendment to the ratification agreement also included the following term: "All close out documents must be turned in before Camco Pacific can release final payment." [230]

219. And although Helix has not produced a signed copy of the ratification agreement, Helix has admitted entering into its ratification and amended subcontract agreement in its complaint as follows:

> 18. On or about September 4, 2008, Helix entered into the Ratification and Amendment of Subcontract Agreement ("CPCC Agreement") **with Camco who replaced APCO as the general contractor on the Project**, to continue the work for the Property ("CPCC Work").

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[225] Exhibit 172-5.

[226] Exhibit 77, Helix Complaint, ¶18.

[227] Exhibit 170; Testimony of Bob Johnson (Helix) Day 2, p. 42.

[228] Exhibit 170; Testimony of Bob Johnson (Helix) Day 2, pp. 42-43.

[229] Exhibit 170-54; Testimony of Bob Johnson (Helix) Day 2, p. 44; Exhibit 169-8.

[230] Exhibit 169-1.

> 19. **Helix furnished the CPCC Work for the benefit of and at the specific instance and request of CPCC and/or Owner.**
> 20. Pursuant to the CPCC Agreement, Helix was to be paid an amount in excess of Ten Thousand Dollars ($10,000.00) (hereinafter "CPCC Outstanding Balance") for the CPCC Work.
> 21. Helix furnished the CPCC Work and has otherwise performed its duties and obligations as required by the CPCC Agreement.
> 22. CPCC has breached the CPCC Agreement…
> CPCC breached its duty to act in good faith by performing the Ratification Agreement in a manner that was unfaithful to the purpose of the Ratification Agreement, thereby denying Helix's justified expectations…[231]

Helix's Mr. Johnson admitted that Exhibit 172, the Ratification Agreement, was the document that Helix referenced in its complaint (Exhibit 77) as the Ratification.[232]

220. Helix sought $834,476.45 against Camco.[233]

221. Helix also admitted it had a contract with Camco/Gemstone for $8.6 million in its lien documents.[234]

222. The scope of work that Helix and CabineTec undertook on the Project was the same as each had previously contracted with APCO for.[235]

223. Helix did not have any further communication with APCO after Camco took over the Project.[236]

224. That is because both knew that APCO was no longer involved and had no further liability.

225. In fact, both Helix and CabineTec rolled their retention over into the Camco billings.[237]

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[231] Exhibit 77.
[232] Testimony of Bob Johnson (Helix) at Day 2, p. 28.
[233] Testimony of Joe Pelan (APCO) Day 1 at p. 10.
[234] Exhibit 512; Testimony of Bob Johnson (Helix) at Day 2, p. 29.
[235] Exhibit 314 and Testimony of Bob Johnson (Helix) Day 2, p. 10.
[236] Testimony of Bob Johnson (Helix) Day 2, p. 14.

226. Helix's Andy Rivera specifically admitted that it rolled its $505,000 in retention billings over to Camco.[238]

227. After Helix and CabineTec went to work for Camco, neither sent APCO any further pay applications or billings for work they performed on the Project.[239]

228. And it's undisputed that Helix submitted its September 2008 pay application for $354,456.90 to Camco.[240]

229. That pay application tracked Helix's full retainage of $553,404.81 for the Project, not just work completed under Camco.[241]

230. Helix also submitted its October 2008 billing for $361,117.44,[242] its November 2008 pay application for $$159,475.68,[243] and its December 2008 billing for $224,805.30 to Camco. [244]

Q.Camco never completed the Project.

231. Camco never finished the Project[245] and was never paid retention by Gemstone.[246]

232. In its letter to the subcontractors dated December 22, 2008, Camco advised the subcontractors as follows:

> [I]t has come to Camco Construction, Inc.'s attention that funding for the completion of the Manhattan West project (the "Project") has been withdrawn. Camco recently received the

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[237] Compare Exhibit 58, Helix's last pay application to APCO to Exhibit 173, Helix's first payment application to Camco. *See also* Exhibit 176 and 177 showing Helix's retention rolled over. See also, Exhibit 150, CabineTec's last pay application to APCO, to Exhibit 185, CabineTec's first payment application to Camco showing CabineTec's retention rolled over. See also, Exhibit 30 (Camco's August 2008 draw request confirming retention was being held for the entire Project).

[238] Testimony of Andy Rivera (Helix) Day 2, p. 74.

[239] Testimony of Mary Jo Allen (APCO) Day 3, at pp. 127-128; Testimony of Andy Rivera (Helix) Day 2, p. 76.

[240] Exhibit 173-1.

[241] Exhibit 173-2

[242] Exhibit 176-2.

[243] Exhibit 177-4.

[244] Exhibit 178-4.

[245] Testimony of Steve Parry (Camco) Day 5, p. 36.

[246] Testimony of Steven Parry (Camco) Day 5, p. 36.

> following email from [Gemstone]...As a result, Gemstone does not have funds sufficient to pay out the October draw or other obligations...Based on the foregoing facts and circumstances, Camco has no other alternative but to immediately terminate all subcontracts on the Project, including the agreement with your company... you have acknowledged that Camco is not liable to you for payment unless and until Camco receives the corresponding payment from the Owner...Camco's contract with Gemstone is a cost plus agreement wherein the subcontracts and supplies were paid directly by Gemstone and/or its agent, Nevada Construction Services, based on the invoices and/or payment applications submitted through voucher control... Therefore, Camco has no contractual and/or statutory obligation to pay any claim that may be alleged by any of the subcontractors and/or suppliers on the Project... any claim for payment alleged against Camco will result in additional fees, costs ...Therefore, all claims for payment must be directed to and/or alleged against Gemstone and the Project.[247]

233. Camco's Parry was not able to tell if CabineTec billed Camco in August 2008, Exhibit 218 and Camco's first pay app to Gemstone.[248]

- Exhibit 220 is Camco's second pay application for the Project, through September 30, 2008.[249] That pay application accounted $6,004,763 in retention.[250] Camco's Parry admitted that Exhibit 220 does include billings from Helix to Camco that Camco was passing on to Gemstone.[251]
- Exhibit 221 is Camco's billing to Gemstone through October 31, 2008; reflecting a total retention of $6,928,767.84 in retention.
- Exhibit 163 is Camco's November 2008 billing, reflecting a total retention of $7,275,991.08.

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[247] Exhibit 40 and Exhibit 39.

[248] Exhibit 218; Testimony of Steven Parry (Camco) Day 5, p. 34.

[249] Exhibit 220; Testimony of Steven Parry (Camco) Day 5, p. 32.

[250] Exhibit 220; Testimony of Steven Parry (Camco) Day 5, p. 32.

[251] Exhibit 220; Testimony of Steven Parry (Camco) Day 5, p. 33.

234. Based on Camco's last billing,[252] Exhibit 163, Camco's best estimate of the work completed on Phase 1 was 86%.[253]

R. The litigation.

235. On September 9, 2008, APCO brought an action against Gemstone for breach of Contract and nonpayment.[254]

236. Gemstone counterclaimed alleging that APCO breached the Contract.[255]

237. On November 4, 2008, the Project lender confirmed that it was reviewing September's pay application, and confirmed that the subcontractors would be paid for the work performed for Camco.[256]

238. In December 2008 Gemstone suspended work on the Project and advised Camco and its various subcontractors that the lender was halting all financing for the Project.[257]

239. That led to the onslaught of liens and the related priority litigation.

240. On December 16, 2008, Camco officially terminated its prime contract with Gemstone:

> Pursuant to your notice to Camco on December 15, 2008, Gemstone (a) has lost its funding for the ManhattanWest project and (b) will be unable to meet its payment obligations pursuant to Article VI of
> the Engagement Agreement. Furthermore, Gemstone has failed to make payments to Camco pursuant to Article VI of the Engagement Agreement for October 2008, November 2008, and December 2008, and such failures are a material breach of the Engagement Agreement. As Gemstone has no means of curing such material breach in a timely manner, the Engagement Agreement is terminated for cause, effective

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[252] Testimony of Steve Parry (Camco), Day 5, p. 36.

[253] Exhibit 163; Testimony of Steven Parry (Camco), Day 5, p. 36.

[254] Exhibit 219.

[255] Exhibit 226.

[256] Exhibit 138.

[257] Exhibit 48; Exhibit 138.

> December 19, 2008. Pursuant to our discussions, we understand that you agree with the termination and the effective date of termination.
>
> ...
>
> Pursuant to our discussions and with Gemstone's consent, Camco will immediately send notices to all of the subcontractors to terminate their subcontract agreements. In Camco's termination notice, we will ask the subcontractors to submit their payment applications to Camco. Camco will review the payment applications and, if they appear proper, Camco will forward them to Gemstone for payment.[258]

In response, Camco terminated the subcontracts with its subcontractors on December 22, 2008.[259]

241. On May 26, 2010, Judge Delaney filed an Order Striking Defendant Gemstone Development West, Inc.'s Answer and Counterclaims, and Entering Default for failure to give reasonable attention to matters, failure to obtain new counsel, failure to appear at hearings.[260]

242. On June 6, 2013, APCO filed a motion for summary judgment against Gemstone. That Motion confirmed that APCO complied with all terms of the Agreement and that Gemstone materially breached the Agreement by, among other things: (1) failing to make payments due to APCO; (2) interfering with APCO's relationships with its subcontractors; (3) refusing to review, negotiate, or consider change order requests in good faith; (4) removing APCO from the Project without valid or appropriate grounds; and (5) otherwise breaching the terms of the Agreement.[261]

243. On June 13, the Court granted that motion.[262] The record does not reflect a final order or judgment.

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[258] Exhibit 165.

[259] Exhibit 166-2.

[260] Docket at May 26, 2010 Order Striking Defendant Gemstone Development West, Inc.'s Answer and Counterclaims, and Entering Default.

[261] Docket at June 6, 2013, Motion for Summary Judgment against Gemstone.

[262] Docket at Minutes from June 13, 2013.

244. APCO did not receive any funds associated with its work from June, July or August 2008 on the Project and never received its or any subcontractor's retention.

245. APCO did cooperate with Gemstone to see that all subcontractors, including Helix and CabineTec were paid all progress payments that were billed and due while APCO was in charge.

246. Despite APCO's efforts, Helix and CabineTec are seeking to hold APCO responsible for retention that never became due under the subcontract retention payment schedule and for work that both subcontractors provided to Camco and Gemstone knowing full well that APCO had no liability for any further payments.

247. The inequities are obvious.

248. Any of the foregoing findings of fact that would be more appropriately considered conclusions of law should be deemed so.

II. CONCLUSIONS OF LAW

1. Helix's Claims Against APCO Fail

249. All of Helix's claims for relief against APCO fail. Helix's First Amended Complaint asserts five claims for relief against APCO: (1) breach of contract, (2) breach of the covenant of good faith and fair dealing, (3) quantum meruit/unjust enrichment, (4) mechanic's lien foreclosure, and (5) violation of NRS 624.606 through 624.630 *et seq.* Helix has failed to meet its burden of proof on its claims and APCO is entitled to recover its attorneys fees and costs.

A. Breach of Contract

250. Helix's first claim for breach of contract fails because Helix failed to demonstrate two essential elements of its claim—that it met all preconditions under the Helix Subcontract or that APCO breached any contractual obligation.

251. In Nevada, there are four elements to a claim for breach of contract: "(1) formation of a valid contract, (2) performance or excuse of performance by the plaintiff, (3) material breach by the defendant, and (4) damages."[263]

252. Exhibit 45 is the Helix Subcontract, which represents the valid, final written agreement between APCO and Helix.

253. Helix's claim against APCO is for $505,021 in alleged retention.[264] As a condition precedent to payment for retention, the Helix Subcontract required Helix to properly comply with the retention payment schedule in Section 3.8.[265] Specifically, Section 3.8 required: (1) completion of the entire project, (2) owner acceptance, (3) final payment from owner to APCO, (4) final as-built drawings, and (5) releases.[266]

254. A party who seeks to recover on a contract has the burden of establishing any condition precedent to the respective contract.[267]

1. Retention payment schedules and related preconditions are valid.

255. Parties can agree to a schedule of payments.[268]

256. Parties can agree to conditions precedent to payment, including one that requires a general contractor to pay a subcontractor only after the general contractor has received payment from the owner.[269]

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[263] *Laguerre v. Nevada System of Higher Education,* 837 F.Supp.2d 1176, 1180 (D. Nev. 2011).

[264] Testimony of Andy Rivera (Helix) Day 2, pp. 73-75.

[265] Exhibit 45 at Section 3.8.

[266] Exhibit 45 at Section 3.8.

[267] *See Lucini-Parish Ins. v. Buck,* 108 Nev. 617, 620, 836 P.2d 627, 629 (1992)

[268] NRS 624.624(1)(a).

[269] *Padilla Construction Company of Nevada v. Big-D Construction Corp*, 386 P.3d 982 (Nev. 2016) (unpublished)("Because the parties' subcontract contained a payment schedule that required that Padilla be paid within ten days after IGT accepted Padilla's work and paid Big-D for that work and it is undisputed that IGT never accepted Padilla's work and never 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); see generally*, NRS 624.626.

257. Under Nevada precedent and legislative action, these provisions are valid conditions precedent to payment when not combined with a waiver of a mechanic's lien rights.[270]

258. NRS 624.624 was meant to ensure payment to subcontractors **after** the owner paid the general for the subcontractor's work.[271]

259. In the present action, the Helix Subcontract: (1) incorporated the Contract,[272] (2) confirmed that the subcontractors would be bound to Gemstone to the same extent APCO was,[273] and (3) contained a schedule of payments for both retention and change orders with preconditions before APCO had an obligation to pay the subcontractors.[274]

260. Only one of those preconditions involved Gemstone's payment of retention to APCO, which never occurred.

2. Retention payments never became due.

261. Pursuant to NRS 624.624(1)(a), payment was due to Helix in accordance with the retentention payment schedule or within 10 days after APCO received payment from Gemstone:

> **NRS 624.624 Payment of lower-tiered subcontractor; grounds and procedure for withholding amounts from payment; rights and duties after notice of withholding, notice of objection or notice of correction.**
>
> 1. Except as otherwise provided in this section, if a higher-tiered contractor enters into:
>
> (a) A written Contract with a lower-tiered subcontractor that includes a schedule for payments, the higher-tiered contractor shall pay the lower-tiered subcontractor:

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[270] Id.

[271] *Padilla Construction Company of Nevada v. Big-D Construction Corp*, 386 P.3d 982 (Nev. 2016) (unpublished).

[272] Exhibits 45 and 149, Helix and CabineTec Subcontracts at Sections 1.1.

[273] Exhibits 45 and 149, Helix and CabineTec Subcontracts at Sections 3.4.

[274] *Id.* at Section 3.8 and Article 4.

(1) On or before the date payment is due; or

(2) Within 10 days after the date the higher-tiered contractor receives payment for all or a portion of the work, materials or equipment described in a request for payment submitted by the lower-tiered subcontractor,

→ whichever is earlier.

262. Section 3.8 of the Helix Subcontract contained a retention payment schedule that was acknowledged and affirmed by Helix and APCO at trial. As such, Helix needed to show these five conditions precedent were satisfied before APCO had to pay retention. *See Lucini-Parish Ins. v. Buck,*[275] (a party who seeks to recover on a contract has the burden of establishing any condition precedent to the respective contract).

263. Helix admitted that it did not comply with the five conditions precedent to be entitled to its retention payments from APCO.[276]

264. Helix did not meet its burden of proof and APCO never received Helix's retention to trigger the 10 day period.

265. Helix did not even attempt to show: (1) completion of the entire Project, (2) final acceptance of the Project by Gemstone, (3) receipt of final payment from Gemstone to APCO, (4) delivery of all as-builts and close out document, and (5) delivery of all final waivers and releases.

266. Helix never sent APCO an invoice or billing for its retention.

267. Accordingly, Helix's retention payment never became due from APCO.

268. As a result, Helix's first claim for relief for breach of contract for failing to pay retention fails as a matter of law.

269. Lastly, there is no contractual obligation for APCO to pay Helix for the work it performed for Gemstone and/or Camco after APCO left the Project. Helix knowingly

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[275] 108 Nev. 617, 620, 836 P.2d 627, 629 (1992)

[276] See Testimony of Helix's Bob Johnson, Day 2 at pg. 19 ("Q. Well, let me ask it this way: Did Helix satisfy any of these preconditions found in paragraph 3.8 while APCO was the general contractor on the project? A. Not to my knowledge.")

replaced APCO with Camco under the Helix Subcontract on all executory obligations, including payment for future work and retention.

B. Breach of the Implied Covenant of Good Faith and Fair Dealing

270. Helix's second claim for relief for breach of the covenant of good faith and fair dealing also fails.

271. In Nevada, "[e]very contract imposes upon each party a duty of good faith and fair dealing in its performance and enforcement."[277] This implied covenant requires that parties "act in a manner that is faithful to the purpose of the contract and the justified expectations of the other party."[278]

272. A breach of the implied covenant of good faith and fair dealing occurs when the terms of a contract are complied with but one party to the contract deliberately contravenes the intention of the contract.[279]

273. To prevail on a theory of breach of the covenant of good faith and fair dealing, a plaintiff must establish: (1) plaintiff and defendants were parties to a contract, (2) defendants owed a duty of good faith to the plaintiff, (3) defendants breached that duty by performing in a manner that was unfaithful to the purpose of the contract, and (3) plaintiff's justified expectations were denied.[280]

274. The Nevada Supreme Court has held that good faith is a question of fact.[281]

275. Helix claims APCO breached its duty of good faith and fair dealing by "performing in a manner that was unfaithful to the purpose of the APCO Agreement."[282]

276. APCO acted in good faith with respect to Helix:

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[277] *A.C. Shaw Cont., Inc. v. Washoe Cnty.*, 105 Nev. 913, 914, 784 P.2d 9, 9 (Nev. 1989) (quoting NRS 104.1203).

[278] *Morris v. Bank of Am. Nev.*, 110 Nev. 1274, 1278 n.2, 886 P.2d 454, 457 n.2 (Nev. 1994) (internal quotations omitted).

[279] . See *Hilton Hotels v. Butch Lewis Prods.*, 107 Nev. 226, 232, 808 P.2d 919,923 (Nev. 1991).

[280] *Perry v. Jordan*, 111 Nev. 943, 948, 900 P.2d 335, 338 (Nev. 1995).

[281] *Consolidated Generator-Nevada, Inc. v. Commins Engine Co., Inc.*, 114 Nev.. 1304, 1312, 971 P.2d 1251, 1256 (Nev. 1998).

[282] Exhibit 231, Helix's amended complaint at ¶ 27.

a. APCO paid Helix all sums Helix billed APCO through August 2008 (when APCO left the Project),[283]

b. APCO signed joint checks so that its subcontractors, including Helix, would get paid, even though APCO was not getting paid,[284]

c. APCO pulled its general contractor permits so that Camco could get permits for the Project and APCO's subcontractors could continue on with the Project (less retention),[285] and

d. APCO also financed the related appeal to obtain priority for Helix and the other subcontractors once Gemstone shut the Project down.

277. Helix failed to present any evidence that APCO failed to act in good faith under the Helix Subcontract or these circumstances. While it is undisputed that APCO did not pay Helix the retention, there is no evidence that this non-payment was in bad faith.

278. As a result, Helix's second claim for breach of the implied covenant of good faith and fair dealing of the subcontract fails as a matter of law.

C. Unjust Enrichment/Quantum Meruit

279. Helix asserted breach of contract *and* unjust enrichment claims against APCO.[286]

280. APCO had a subcontract with Helix, **Exhibit 45.** Helix admitted the same in its complaints, at trial, and in its May 10, 2010 Motion for Partial Summary Judgment Against Gemstone (and corresponding errata), on file with this Court.

281. An action based upon a theory of unjust enrichment is not available when there is an express, written contract because no contract can be implied when there is an express contract.[287]

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[283] Exhibit 26; Exhibit 152; Testimony of Joe Pelan, Day 1 at pg. 67; Testimony of Mary Jo Allen (APCO), Day 3 pg. 127 (as to Helix) and Testimony of Mary Jo Allen (APCO), Day 3 at pg. 128; Testimony of Joe Pelan (APCO), Day 1 at pg. 46; Testimony of Joe Pelan (APCO), Day 1 at pg. 82.

[284] Exhibit 26. See also: Testimony of Joe Pelan (APCO), Day 1 at pg. 38; Testimony of Joe Pelan (APCO), Day 1 at pg. 41.

[285] Testimony of Joe Pelan (APCO), Day 1 at pg. 100.

[286] *See* Exhibit 45, Helix Subcontract, and Exhibit 149, CabineTec Subcontract.

[287] *Leasepartner's Corp. v. Robert L. Brooks Trust*, 113 Nev. 747, 942 P.2d 182 (1997).

282. Even if the Helix Subcontract did not preclude an unjust enrichment/quantum meruit theory of recovery (which it does), APCO was not unjustly enriched by Helix's work. The undisputed evidence confirms that APCO was not paid any amounts for Helix's work that it did not transmit to Helix, and APCO did not get to keep the property. Instead, APCO remains unpaid $1,400,036.75 from the failed Project. [288]

283. As such, APCO was not unjustly enriched by Helix's work.

D. Mechanic's Lien Foreclosure

284. Helix's fourth claim for relief was of a mechanic's lien foreclosure, which also fails.

285. APCO was not the owner of the Project.

286. The Project has already been foreclosed upon and the proceeds were awarded to the lender. The Nevada Supreme Court affirmed the decision of the trial court that the lender was entitled to keep the Project and related proceeds, and the subcontractors (and APCO) were left with nothing. Thus, Helix cannot foreclose upon the property.

287. APCO is not legally liable for any deficiency judgment because it is not the party responsible for any deficiency. [289]

E. Violation of NRS 624.606 through 624.630 et seq.

288. NRS 624.624 is designed to ensure that general contractors promptly pay subcontractors after the general contractor receives payment from the owner for the work performed by the subcontractor.

289. By its own terms, NRS 624.624 yields to a schedule of payments contained in subcontracts.

290. Here, it is undisputed that Exhibit 45, the Helix Subcontract is a written agreement between APCO and Helix and contained a retention payment schedule in Section 3.8.

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[288] Testimony of Mary Jo Allen (APCO), Day 3, p. 122.

[289] NRS 108.239(12); *Nev. Nat'l Bank v. Snyder*, 108 Nev. 151, 157, 826 P.2d 560, 563 (1992).

Accordingly, pursuant to NRS 624.624(1)(a) payment is due on the date specified in the subcontract.

291. The Helix Subcontract confirmed that Helix would get paid retention after it met the five conditions precedent in the retention payment schedule.

292. It is undisputed that Helix never met the five preconditions in the subcontract's payment schedule.[290] Accordingly, payment of retention to Helix never became due under NRS 624 and Helix's claim for a violation of NRS 624 fails.

293. Additionally, Helix never billed APCO for its retention and APCO never received Helix's retention from Gemstone.

2. CabineTec's claims against APCO all fail as well.

294. All of CabineTec's claims for relief against APCO fail. CabineTec's Complaint asserts the following claims for relief against APCO: (1) breach of contract, (2) breach of implied covenant of good faith and fair dealing, (3) unjust enrichment/ quantum meruit, (4) violation of NRS 624, (5) monies due and owing, and (6) account stated. CabineTec has failed to meet its burden of proof on its claims and APCO is entitled to recover its attorneys fees and costs.

A. Breach of Contract

295. CabineTec's first claim for breach of contract fails because CabineTec failed to demonstrate two essential elements of its claim—that it met all preconditions under the CabineTec Subcontract or that APCO breached any contractual obligation.

296. In Nevada, there are four elements to a claim for breach of contract: "(1) formation of a valid contract, (2) performance or excuse of performance by the plaintiff, (3) material breach by the defendant, and (4) damages."[291]

297. Exhibit 149 is the CabineTec Subcontract, which represents the valid, final written agreement between APCO and CabineTec.

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[290] Testimony of Bob Johnson (Helix) Day 2 at pg. 36 and 37

[291] *Laguerre v. Nevada System of Higher Education,* 837 F.Supp.2d 1176, 1180 (D. Nev. 2011).

298. Exhibit 156, CabineTec's Complaint (page 7, paragraph 50) confirms that CabineTec's principal claim against APCO is for $19,547.00 for retention.

299. As a condition precedent to payment for retention, the CabineTec Subcontract required CabineTec to properly comply with the retention payment schedule in Section 3.8.[292] Specifically, Section 3.8 required: (1) completion of the entire project, (2) owner acceptance, (3) final payment from owner to APCO, (4) final as-built drawings, and (5) releases.[293]

300. A party who seeks to recover on a contract has the burden of establishing any condition precedent to the respective contract.[294]

1. Retention payment schedules and related preconditions are valid.

301. Parties can agree to a schedule of payments.[295]

302. Parties can agree to conditions precedent to payment, including one that requires a general contractor to pay a subcontractor only after the general contractor has received payment from the owner.[296]

303. Under Nevada precedent and legislative action, these provisions are valid conditions precedent to payment when not combined with a waiver of a mechanic's lien rights.[297]

304. NRS 624.624 was meant to ensure payment to subcontractors **after** the owner paid the general for the subcontractor's work.[298]

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[292] Exhibit 149, CabineTec Subcontract at Section 3.8.

[293] Exhibit 149, CabineTec Subcontract at Section 3.8.

[294] *See Lucini-Parish Ins. v. Buck,* 108 Nev. 617, 620, 836 P.2d 627, 629 (1992).

[295] NRS 624.624(1)(a).

[296] *Padilla Construction Company of Nevada v. Big-D Construction Corp*, 386 P.3d 982 (Nev. 2016) (unpublished)("Because the parties' subcontract contained a payment schedule that required that Padilla be paid within ten days after IGT accepted Padilla's work and paid Big-D for that work and it is undisputed that IGT never accepted Padilla's work and never 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); see generally*, NRS 624.626.

[297] Id.

305. In the present action, the CabineTec Subcontract: (1) incorporated the Contract,[299] (2) confirmed that the subcontractors would be bound to Gemstone to the same extent APCO was,[300] and (3) contained a schedule of payments for both retention and change orders with preconditions before APCO had an obligation to pay the subcontractors.[301]

306. Only one of those preconditions involved Gemstone's payment of retention to APCO, which never occurred.

2. Retention payments never became due.

307. Pursuant to NRS 624.624(1)(a), payment was due to CabineTec in accordance with the retention payment scheduleor within 10 days after APCO received payment from Gemstone:

> **NRS 624.624 Payment of lower-tiered subcontractor; grounds and procedure for withholding amounts from payment; rights and duties after notice of withholding, notice of objection or notice of correction.**
>
> 1. Except as otherwise provided in this section, if a higher-tiered contractor enters into:
>
> > (a) A written Contract with a lower-tiered subcontractor that includes a schedule for payments, the higher-tiered contractor shall pay the lower-tiered subcontractor:
> >
> > (1) On or before the date payment is due; or
> >
> > (2) Within 10 days after the date the higher-tiered contractor receives payment for all or a portion of the work, materials or equipment described in a request for payment submitted by the lower-tiered subcontractor,
> >
> > → whichever is earlier.

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[298] *Padilla Construction Company of Nevada v. Big-D Construction Corp*, 386 P.3d 982 (Nev. 2016) (unpublished).

[299] Exhibits 45 and 149, Helix and CabineTec Subcontracts at Sections 1.1.

[300] Exhibits 45 and 149, Helix and CabineTec Subcontracts at Sections 3.4.

[301] *Id.* at Section 3.8 and Article 4.

308. Section 3.8 of the CabineTec Subcontract contained retention payment schedules that were acknowledged and affirmed by CabineTec and APCO at trial. As such, CabineTec needed to show these five conditions precedent were satisfied before APCO had to pay retention. *See Lucini-Parish Ins. v. Buck,*[302] (a party who seeks to recover on a contract has the burden of establishing any condition precedent to the respective contract).

309. CabineTec did not even attempt to show: (1) completion of the entire Project, (2) final acceptance of the Project by Gemstone, (3) receipt of final payment from Gemstone to APCO, (4) delivery of all as-builts and close out document, and (5) delivery of all final waivers and releases.

310. CabineTec did not meet its burden of proof and APCO never received CabineTec's retention to trigger the 10 day period.

311. Accodingly, CabineTec's retention payment never became due from APCO.

312. As a result, CabineTec's first claim for relief for breach of contract fails as a matter of law.

313. There is no contractual obligation for APCO to pay CabineTec for the work it performed for Gemstone and/or Camco after APCO left the Project. CabineTec knowingly replaced APCO with Camco under the CabineTec Subcontract on all executory obligations, including payment for future work and retention.

3. CabineTec's damages are limited to $30,110.95.

314. NRCP 16.1(a)(1)(c) requires that a plaintiff "**must**, *without awaiting a discovery request*, provide to other parties . . . [a] **a computation of any category of damages claimed by the disclosing** party, making available for inspection and copying under Rule 34 of the documents or other evidentiary matter... on which such computation is based, including materials bearing on the nature and extent of injuries suffered..."[303]

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[302] 108 Nev. 617, 620, 836 P.2d 627, 629 (1992)

[303] NRCP16.1(a)(1)(c)(emphasis added).

315. A plaintiff "is not excused from making its disclosures because it has not fully completed its investigation of the case."[304]

316. NRCP 16.1(a)(c) requires that parties voluntarily disclose "[a] computation of any category of damages claimed by the disclosing party" and documents to support the computation.[305]

317. Under NRCP 26(e)(1), a plaintiff must immediately supplement its initial damages computation if it "learns that in some material respect the information disclosed is incomplete or incorrect."[306] *See Keener v. United States*,[307] (finding a second disclosure so substantially different from the first that it could not qualify as a correction of an incomplete or inaccurate expert report).

318. CabineTec's complaint alleged $19,547.00 against APCO.[308]

319. CabineTec's initial, and first supplemental disclosures disclosed $30,110.95 in damages against APCO, which included interest and fees on the retention amount of $19,547.[309]

320. Those were the only disclosures that CabineTec made prior to the close of discovery, as extended by the Court.

321. CabineTec's damage claims against APCO are limited to $30,110.95.

322. National Wood's Second Supplemental Disclosure containing amended damages was filed on November 13, 2017, two weeks before a November 28 trial date. This supplement increases the damages from $30,110.95 to $1,154,680.40, a 3600% increase.

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[304] *Id.*

[305] NRCP 16.1(a)(1)(c).

[306] NRCP 26(e)(1).

[307] 181 F.R.D. 639, 640 (D. Mont. 1998)

[308] Exhibit 156-8.

[309] Exhibits 157 (CabineTec's initial disclosures); Exhibit 158 (CabineTec's First Supplemental Disclosure), and Exhibit 159 (CabineTec's second supplemental disclosure).

323. APCO has been prejudiced as a result of this late disclosure as APCO described in its motion in limine, and National Wood's error in not disclosing its damages pursuant to these rules was not harmless.

324. CabineTec/National Wood has no adequate justification for its repeated failure to comply with Rule 16.1(a)'s disclosure requirements.

325. CabineTec did not present any testimony confirming it met any of the conditions in Section 3.8. Instead, CabineTec's Mr. Thompson admitted that the buildings had to be drywalled and painted before the cabinets were installed[310] and he had no documentation (daily reports, photographs, etc.) that would confirm that CabineTec ultimately installed cabinets in Phase 1 for APCO.[311]

B. Breach of the Implied Covenant of Good Faith and Fair Dealing

326. CabineTec's second claim for relief for breach of the covenant of good faith and fair dealing also fails.

327. In Nevada, "[e]very contract imposes upon each party a duty of good faith and fair dealing in its performance and enforcement."[312] This implied covenant requires that parties "act in a manner that is faithful to the purpose of the contract and the justified expectations of the other party."[313]

328. A breach of the implied covenant of good faith and fair dealing occurs when the terms of a contract are complied with but one party to the contract deliberately contravenes the intention of the contract.[314]

329. To prevail on a theory of breach of the covenant of good faith and fair dealing, a plaintiff must establish: (1) plaintiff and defendants were parties to a contract, (2)

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[310] Testimony of Mr. Thompson (CabineTec) at Day 5 p. 69.

[311] Testimony of Mr. Thompson (CabineTec) at Day 5 p. 69.

[312] *A.C. Shaw Cont., Inc. v. Washoe Cnty.*, 105 Nev. 913, 914, 784 P.2d 9, 9 (Nev. 1989) (quoting NRS 104.1203).

[313] *Morris v. Bank of Am. Nev.*, 110 Nev. 1274, 1278 n.2, 886 P.2d 454, 457 n.2 (Nev. 1994) (internal quotations omitted).

[314] See *Hilton Hotels v. Butch Lewis Prods.*, 107 Nev. 226, 232, 808 P.2d 919,923 (Nev. 1991).

defendants owed a duty of good faith to the plaintiff, (3) defendants breached that duty by performing in a manner that was unfaithful to the purpose of the contract, and (4) plaintiff's justified expectations were denied.[315]

330. The Nevada Supreme Court has held that good faith is a question of fact.[316]

331. APCO acted in good faith with respect to CabineTec:

a. APCO paid CabineTec all sums CabineTec billed APCO through August 2008 (when APCO left the Project),[317]

b. APCO signed joint checks so that its subcontractors, including CabineTec, would get paid, even though APCO was not getting paid,[318]

c. APCO pulled its general contractor permits so that Camco could get permits for the Project and APCO's subcontractors could continue on with the Project (less retention),[319] and

d. APCO also financed the related appeal to obtain priority for CabineTec and the other subcontractors once Gemstone shut the Project down.

332. CabineTec failed to present any evidence that APCO failed to act in good faith under the CabineTec Subcontract. While it is undisputed that APCO did not pay CabineTec the retention, there is no evidence that this non-payment was in bad faith.

333. As a result, CabineTec's second claim for breach of the implied covenant of good faith and fair dealing of the subcontract fails as a matter of law.

C. Unjust Enrichment/Quantum Meruit

334. CabineTec asserted breach of contract *and* unjust enrichment/ quantum meruit claims against APCO.[320]

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[315] *Perry v. Jordan*, 111 Nev. 943, 948, 900 P.2d 335, 338 (Nev. 1995).

[316] *Consolidated Generator-Nevada, Inc. v. Commins Engine Co., Inc.*, 114 Nev.. 1304, 1312, 971 P.2d 1251, 1256 (Nev. 1998).

[317] Exhibit 26; Exhibit 152; Testimony of Joe Pelan, Day 1, pp. 46, 67 and 82; Testimony of Mary Jo Allen (APCO) Day 3, p. 128.

[318] Exhibit 26. See also: Trial Testimony of Joe Pelan (APCO) Day 1 at p. 38; Testimony of Joe Pelan (APCO) Day 1 at p. 41.

[319] Testimony of Joe Pelan (APCO) Day 1 at p. 100.

335. APCO had a subcontract with CabineTec, **Exhibit 149.**

336. An action based upon a theory of unjust enrichment is not available when there is an express, written contract because no contract can be implied when there is an express contract.[321]

337. Even if the CabineTec Subcontract did not preclude an unjust enrichment/quantum meruit theory of recovery (which it does), APCO was not unjustly enriched by CabineTec's work. The undisputed evidence confirms that APCO was not paid any amounts for CabineTec's work that it did not transmit to CabineTec, and APCO did not get to keep the property. Instead, APCO remains unpaid $1,400,036.75 from the failed Project.[322]

338. As such, APCO was not unjustly enriched by CabineTec's work.

D. Violation of NRS 624.606 through 624.630 et seq.

339. NRS 624.624 is designed to ensure that general contractors promptly pay subcontractors after the general contractor receives payment from the Owner for the work performed by the subcontractor.

340. By its own terms, NRS 624.624 yields to a schedule of payments contained in subcontracts.

341. Here, it is undisputed that Exhibit 149, the CabineTec Subcontract is a written agreement between APCO and CabineTec and contained a retention payment schedule in Section 3.8. Accordingly, pursuant to NRS 624.624(1)(a) payment is due on the date specified in the subcontract.

342. The CabineTec Subcontract confirmed that CabineTec would get paid retention after it met the five conditions precedent in the retention payment schedule.

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[320] *See* Exhibit 149, CabineTec Subcontract.

[321] *Leasepartner's Corp. v. Robert L. Brooks Trust*, 113 Nev. 747, 942 P.2d 182 (1997).

[322] Testimony of Mary Jo Allen (APCO), Day 3, p. 122.

343. It is undisputed that CabineTec never met the five preconditions in the subcontract's payment schedule. Accordingly, payment of retention to CabineTec never became due under NRS 624 and CabineTec's claim for a violation of NRS 624 fails.

344. Additionally, CabineTec never billed APCO for its retention and APCO never received CabineTec's retention from the Owner. CabineTec rolled its retention over to Camco as a Project liability, and actually billed its retention to Camco.

E. Monies Due and Owing

345. CabineTec has failed to prove that it is due monies from APCO.

346. "The word due always imports a fixed and settled obligation or liability."[323]

347. Exhibit 149 governed the relationship between the parties and it was subject to the retention payment schedule in Section 3.8.

348. Payment never became due under Section 3.8 for the reasons set forth above.

F. Account Stated

349. CabineTec's claim for account stated fails.

350. In Nevada, "[a]n account stated may be broadly defined as an agreement based upon prior transactions between the parties with respect to the items composing the account and the balance due, if any, in favor of one of the parties."[324]

351. "To effect an account stated, the outcome of the negotiations must be the recognition of a sum due from one of the parties to the other with a promise, express or implied, to pay that balance."[325]

352. "The genesis of an account stated is the agreement of the parties, express or implied."[326] APCO and CabineTec had an express written agreement that governed their relationship.

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[323] *Black's Law Dictionary,* Sixth Edition, 1990.

[324] *Old W. Enterprises, Inc. v. Reno Escrow Co.,* 86 Nev. 727, 729, 476 P.2d 1, 2 (1970).

[325] *Id.*

[326] *Id.*

353. APCO and CabineTec did not have any prior transactions with respect to the items composing any account.

354. No evidence was presented that APCO agreed that any sum was due. Instead, APCO disputed any payment obligation.

355. APCO and CabineTec have not agreed to any other payment provisions outside of Exhibit 149 and this claim fails.

3. Helix and CabineTec ratified their subcontracts with Camco.

356. "Ratification of a contract occurs when one approves, adopts, or confirms a contract previously executed by another…"[327]

357. Ratification may be express or implied by the conduct of the parties.[328] The party to be charged with ratification of such a contract must have acted voluntarily and with full knowledge of the facts.[329]

358. "A person ratifies an act by manifesting assent that the act affects the person's legal relations or conduct that justifies a reasonable assumption that the person so consents."[330]

359. "Any conduct which indicates assent by the purported principal to become a party to the transaction or which is justifiable only if there is ratification is sufficient, and even silence with full knowledge of the facts may operate as a ratification."[331]

360. "If a person makes a manifestation that the person has ratified another's act and the manifestation, as reasonably understood by a third party, induces the third party to make a detrimental change in position, the person may be estopped to deny the ratification."[332]

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[327] *Id.*

[328] 17A Am Jur 2d Contracts § 10.

[329] *Id.*

[330] 3 Am Jur 2d Agency § 169.

[331] *Id.*

[332] 3 Am Jur 2d Agency § 171.

361. "A valid ratification by the principal relieves the agent from any liability to the principal which would otherwise result from the fact that the agent acted in an unauthorized way or without authority."[333]

362. Helix legally admitted it ratified the Helix/APCO subcontract to the Court and to APCO in its complaint, thereby replacing Camco for APCO in all executory obligations under the Helix Subcontract, including payment for retention and future work.

363. CabineTec signed a ratification agreement with Camco.

364. After APCO left the Project, Helix and CabineTec took direction from Gemstone or Camco, not APCO.

365. Helix and CabineTec submitted billings to Camco including rolling over the retention they now seek from APCO, and each performed work under the ratified original scope of work.

366. None of the ongoing work was done for or on behalf of APCO and there is no legal authority that would make APCO liable for their ongoing work on the Project, or the Project retention.

367. Helix never billed APCO for retention because it never became due.[334]

368. Helix and CabineTec waived all claims against APCO by knowingly contracting to work on the Project for Camco/Gemstone and rolling their retention over to Camco and Gemstone.

369. When Helix and CabineTec ratified their subcontracts with Camco, they replaced APCO and released APCO from liability. See *Foley Co. v. Scottsdale Ins. Co.*,[335] ("The ratification, by subcontractor's liability insurer, of its general agent's allegedly unauthorized placement of coverage released the general agent from liability to the

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[333] 2A C.J.S. Agency § 85.

[334] CabineTec admittedly sent one billing for the full amount of CabineTec's delivered (but uninstalled) cabinets that incorrectly included retention. Retention clearly was not due under the retention payment schedule.

[335] 28 Kan. App. 2d 219, 15 P.3d 353 (2000)

insurer."); *Brooks v. January,*[336] (holding that because a dissident faction of a church congregation ratified their pastor's unauthorized sale of property, the pastor was relieved from liability to the church); *Southwest Title Ins. Co. v. Northland Bldg.,*[337] (holding that because the title insurance company ratified its agent's arguably unauthorized actions, the agent could not be held liable to the title insurance company); *Rakestraw v. Rodrigues,*[338] (holding that because a wife ratified forgery of her name on a deed of trust, the agent was relieved of liability to the principal).

370. CabineTec and Helix ratified their subcontracts with Camco and discharged APCO.

4. The Subcontracts were assigned to Gemstone.

371. The following factors are relevant in determining whether an assignment of a construction contract took place: which party was responsible for the administration of the project, which party ensured the design was correctly carried out, who paid the subcontractors and materialmen, which party answered questions from the owner, which parties were on the job site, which party had ongoing involvement with the project, and which party was corresponding with the owner.[339]

372. These factors weigh in APCO's favor. Each party's behavior is consistent with the assignment of the Helix and CabineTec Subcontracts to Gemstone:

- ***Gemstone***: Gemstone attempted to "terminate" the APCO/Gemstone prime contract and stopped giving direction and/or orders to APCO. Gemstone told the subcontractors to stop working for APCO and that their contracts would be assumed by Camco. Gemstone also ordered APCO off the site.
- ***Camco***: Camco started giving direction to the subcontractors and dictating their work. Camco sent subcontracts and/or Ratification agreements to both Helix and CabineTec. It engaged in negotiations of the respective subcontracts, and it received billings directly from Helix and CabineTec, including the rollover of their retention.

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[336] 116 Mich.App. 15, 321 N.W.2d 823 (1982)

[337] 542 S.W.2d 436 (Tex.App.1976), *rev'd in part on other grounds* 552 S.W.2d 425 (Tex.1977)

[338] 8 Cal.3d 67, 104 Cal.Rptr. 57, 500 P.2d 1401 (1972)

[339] *J. Christopher Stuhmer, Inc. v. Centaur Sculpture Galleries, Ltd., Inc.*, 110 Nev. 270, 274, 871 P.2d 327, 330 (1994)

- ***Helix***: Helix did not contact APCO after August 2008 and remained on-site working directly for Gemstone and Camco. It engaged in subcontract negotiations for the same scope of work as it had initially subcontracted for with APCO with Camco, and took direction and performed work under Camco's and Gemstone's direction. Helix submitted pay applications to Camco and even rolled its retention account over to Camco billings. Helix also represented that it signed a ratification Contract and subcontract with Camco in its complaint and its amended complaint.

- ***CabineTec***: CabineTec did not contact APCO after August 2008 and remained on-site working for Camco. It engaged in subcontract negotiations for the same scope of work as it had initially subcontracted for with APCO with Camco, and took direction and performed work under Camco's direction. CabineTec submitted pay applications to Camco including all retention. CabineTec also signed a ratification agreement with Camco.

- ***APCO***: APCO was off-site and did not dictate or control the subcontractors' work. It did not have any communication with Gemstone or the subcontractors after August 2008. It did not participate in construction related meetings, did not receive billings from subcontractors, or submit payment applications on behalf of subcontractors. In fact, Helix never invoiced APCO for its retention.

373. The Contract contained a subcontract assignment provision that assigned Gemstone APCO's subcontracts upon termination of the Contract.[340]

374. The Contract was incorporated into the subcontracts.[341]

375. Once APCO left the Project, the Helix and CabineTec Subcontracts were assigned to Gemstone per Gemstone's written notice to APCO.

376. Once Gemstone had those Subcontracts, it facilitated Camco's assumption of those subcontracts.[342]

377. After the subcontracts were assigned, Gemstone/Camco was responsible all executory obligations including payments for retention and future work.[343]

378. An assignment took place thereby making Gemstone/Camco the party responsible for payment to the subcontractors, not APCO.

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[340] Exhibit 2 at 10.4.

[341] *See* Sections 1.1 of Helix and CabineTec subcontracts. Helix's Mr. Johnson admitted it was Helix's practice to request and review an incorporated prime contract. Testimony of Bob Johnson (Helix) Day 2, p.16.

[342] *See* Exhibit 170/169 Helix's subcontract and Helix Amendment with Camco; and Exhibit 184, CabineTec's subcontract with Camco.

[343] *See* Exhibit 2, Section 10.4.

5. Helix and CabineTec waived any right to pursue APCO.

379. "Waiver requires the intentional relinquishment of a known right."[344]

380. "If intent is to be inferred from conduct, the conduct must clearly indicate the party's intention."[345]

381. "Thus, the waiver of a right may be inferred when a party engages in conduct so inconsistent with an intent to enforce the right as to induce a reasonable belief that the right has been relinquished."[346]

382. In this case, CabineTec's and Helix's intent was clear: they understood that APCO left the Project. They entered into ratification agreements with Camco and continued working for Camco and Gemstone on the Project without any further dealings with APCO.

383. Helix and CabineTec did not negotiate entirely new contracts and their subsequent billings to Camco depicted their retention that was being held by Gemstone, not APCO. They took orders and direction from Camco employees. They sent billings to Camco. They submitted change orders to Camco. They showed up to the Project at Camco's direction and Camco ultimately informed them the Project had shut down. By pursuing this course of action, it was clear that none of the parties believed APCO was the general contractor on the Project. This conduct is entirely inconsistent with any claim that APCO was the general contractor and was responsible for retention or other future payments. APCO paid Helix and CabineTec all amounts due while APCO was the general contractor.

6. The new subcontracts are novations.

384. "A novation consists of four elements: (1) there must be an existing valid contract; (2) all parties must agree to a new contract; (3) the new contract must extinguish the

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[344] *Nevada Yellow Cab Corp. v. Eighth Judicial Dist. Court ex rel. Cty. of Clark,* 123 Nev. 44, 49, 152 P.3d 737, 740 (2007) (internal citations omitted).

[345] *Id.*

[346] *Id.*

old contract; and (4) the new contract must be valid."[347] "If all four elements exist, a novation occurred.[348] "Additionally, the intent of all parties to cause a novation must be clear."[349]

385. "A 'novation' may be defined as a substitution of a new contract or obligation for an old one which is thereby extinguished."[350]

386. "All novations are substituted contracts, and the converse is also true that all substituted contracts are novations. An existing claim can be instantly discharged by the substitution of a new executory Contract in its place."[351]

387. "This substitution of a new obligation for an existing one, effects a novation, which thereby discharges the parties from all of their obligations under the former Contract inasmuch as such obligations are extinguished by the novation."[352]

388. "However, consent to novation may be implied from the circumstances of the transaction and by the subsequent conduct of the parties."[353]

389. "Whether a novation occurred is a question of fact if the evidence is such that reasonable persons can draw more than one conclusion."[354]

390. The conduct of the parties, as described above, confirm a novation.

391. The new agreements between Camco and Helix and Camco and CabineTec are novations. The substituted ratification agreements and subcontracts clearly replaced and extinguished APCO's obligations.

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[347] *United Fire Ins. Co. v. McClelland*, 105 Nev. 504, 508, 780 P.2d 193, 195–96 (1989) (internal citations omitted).

[348] *Id.*

[349] *United Fire Ins. Co. v. McClelland*, 105 Nev. 504, 508, 780 P.2d 193, 195–96 (1989) citing Pink v. Busch, 100 Nev. 684, 690, 691 P.2d 456, 460 (1984).

[350] 66 C.J.S. Novation § 1.

[351] *Lazovich & Lazovich, Inc. v. Harding,* 86 Nev. 434, 437, 470 P.2d 125, 127 (1970)

[352] *Williams v. Crusader Disc. Corp.,* 75 Nev. 67, 70, 334 P.2d 843, 845 (1959) citing 66 C.J.S. Novation § 1, p. 681; 39 Am.Jur. Novation § 2,254.

[353] *United Fire Ins. Co. v. McClelland*, 105 Nev. 504, 508, 780 P.2d 193, 195–96 (1989) citing *Sans Souci v. Div. of Fla. Land Sales,* 448 So.2d 1116, 1121 (Fla.Dist.Ct.App.1984).

[354] *Id.* (internal citations omitted).

392. Once the novation occurred, placing Camco as the completion contractor into privity with the subcontractors, APCO was wholly removed from contractual privity with either Helix or CabineTec as a matter of law.

393. APCO did not retain any obligations (including payment) following the novations of the APCO/ Helix and APCO/CabineTec subcontracts.

Any of the foregoing conclusions of law that would be more appropriately be considered findings of fact should be deemed so.

NOW, THEREFORE, IT IS HEREBY SO FOUND AND CONCLUDED; and same to be entered concurrently with the entry hereof:

A. That Helix and CabineTec take nothing by way of their complaints.

B. APCO, as the prevailing party, be entitled to attorney's fees per the Helix and CabineTec Subcontracts.

C. APCO is granted leave to apply for the same by way of an amendment to these Findings of Fact and Conclusions of Law and for judgment as to the same.

D. As the prevailing party, APCO may also apply for an award of costs.

ORDER

IT IS SO ORDERED this ____ day of March, 2018.

DISTRICT COURT JUDGE

Submitted by:

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DISTRICT COURT

CLARK COUNTY, NEVADA

APCO CONSTRUCTION, a Nevada corporation, Plaintiff, v. GEMSTONE DEVELOPMENT WEST, INC., A Nevada corporation, Defendant. AND ALL RELATED MATTERS	Case No.: A571228 Dept. No.: XIII *Consolidated with: A574391; A574792; A577623; A583289; A587168; A580889; A584730; A589195; A595552; A597089; A592826; A589677; A596924; A584960; A608717; A608718; and A590319* **APCO CONSTRUCTION, INC.'S POST-TRIAL BRIEF** **Date of Trial: January 17, 2018**

APCO Construction, Inc. ("APCO") hereby submits its post-trial brief, which incorporates the following proposed findings of fact and preliminary legal analysis.

I. STATEMENT OF FACTS

A. The Project

This action arises out of a construction project in Las Vegas, Nevada known as the Manhattan West Condominiums project in Clark County Nevada, (the "Project"). Gemstone Development West, Inc. ("Gemstone") was the owner and developer of the Project that contracted APCO to serve as the prime contractor. On or about September 6, 2007, Gemstone and APCO entered into the Manhattan West General Construction Contract for GMP (the "Contract")[1]. The Contract included Phase 1 and Phase 2 and consisted of nine buildings, with five of the nine buildings in Phase 1 (buildings 2, 3, 7, 8 and 9).[2] The Contract price for Phase 1 was $78,938,160.[3] APCO started work on the Project in September, 2007.[4]

B. The Contract

The following are several critical Contract provisions that relate to the current claims.

1. Completion

Section 2.10 of the Contract defines completion as follows:

> (a) The Work within or related to each Building shall be deemed completed upon the (i) completion of the Work in such Building and the Corresponding Common Area; (ii) issuance of the Certificate of Occupancy for such Building; (iii) completion of any corrections that are requested by Developer, set forth on a Developer Punch List; and (iv) delivery of the applicable Completion Documents (collectively, a "Building Completion"). The Project shall be deemed completed upon the

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[1] Exhibit 2. Gemstone and APCO also entered into a grading contract on April 17, 2017 but that contract is not the subject of this lawsuit. Exhibit 1.

[2] Testimony of Joe Pelan (APCO) Day 1, pp. 19 and 22; Exhibit 13, p.1. Joe Pelan is the General Manager of APCO Construction.

[3] Testimony of Joe Pelan (APCO), Day 1, p. 28.

[4] Testimony of Joe Pelan (APCO), Day 1, p. 28. APCO first started work under the grading contract. Exhibit 1.

Building Completion of each Building (collectively "Final Completion").[5]

Given the ultimate disputes between APCO and Gemstone, APCO did not meet this definition of completion.[6]

2. Progress Payments.

Section 5.05 outlined the progress payment process as follows:

> (a) On the first business day of each month, General Contractor and the Developer shall meet to review the Work that was completed during the previous month and the corresponding payment required for such Work.
>
> . . .
>
> (e) Upon receipt of an Application for Payment that is acceptable to Developer pursuant to Sections 5.05(a-d), Developer shall, within 12 calendar days, submit, to Developer's lender or such lender's authorized designee, the corresponding draw application for the undisputed amount to be paid pursuant to such Application for Payment (the "Draw Application"). Thereafter, Developer shall take such actions as are necessary for the payment if the amount owed to General Contractor pursuant to such Draw Application of the amount owed to the General Contractor pursuant to such Draw Application (the "Progress Payment"). In the event that a Draw Application is not submitted to Developer's lender or such lender's authorized designee within the above 12 calendar day period, Developer shall pay to General Contractor $5,000 for each day that the submission of the Draw Application is delayed after such 12 calendar day period.
>
> . . .
>
> (g) Upon receipt of the Progress Payment, General Contractor shall promptly pay each Third-Party Service Provider the amount represented by the portion of the Percentage of Work Completed that was completed by such Third-Party Service Provider during the period covered by the corresponding Progress Payment. General Contractor shall, by appropriate

[5] Exhibit 2, Section 2.10.

[6] Testimony of Joe Pelan (APCO), Day 1, p. 23.

> agreement with each Third-Party Service Provider, require each Third-Party Service Provider to make payment to sub-contractors in a similar manner.[7]

Per this provision, on the 20th of each month subcontractors submitted their billings to APCO for the current month (including a projection of what each intended to complete through the end of that month).[8] APCO would then provide all of these documents to Gemstone.[9] Gemstone would then walk the Project and determine the percentage each subcontractor had completed.[10] Gemstone would adjust each subcontractor's billings to match its estimate of the percentage complete.[11] Gemstone would give the revised billings back to APCO, and APCO would return them to each subcontractor to revise.[12] Once revised, the subcontractors would submit them to APCO, APCO would submit them to Gemstone, and Gemstone would submit them to its construction funds control company, Nevada Construction Services ("NCS") for further review and payment.[13] NCS would then send an inspector to verify the work was complete.[14] NCS would then request funds from the lender and pay the total amount directly to APCO.[15] APCO then paid the subcontractor the final amount received from Gemstone.[16] As discussed more fully below, this process continued until June 2008.[17]

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[7] Exhibit 2 at Section 5.05. The Contract defines APCO's subcontractors as a "Third Party Service Provider." Exhibit 2, Section 2.02(a).

[8] Testimony of Joe Pelan (APCO), Day 1, p. 24.

[9] Testimony of Joe Pelan (APCO), Day 1, p. 24.

[10] Testimony of Joe Pelan (APCO), Day 1, p. 24.

[11] Testimony of Joe Pelan (APCO), Day 1, p. 24.

[12] Testimony of Joe Pelan (APCO), Day 1, p. 24.

[13] Testimony of Joe Pelan (APCO), Day 1, p. 24; Exhibit 3, Nevada Construction Services Agreement.

[14] Testimony of Joe Pelan (APCO), Day 1, p. 25.

[15] Testimony of Joe Pelan (APCO), Day 1, p. 25, and 59.

[16] Testimony of Joe Pelan (APCO), Day 1, p. 25.

[17] Testimony of Joe Pelan (APCO), Day 1, p. 25.

3. Final Payment

Per the payment schedule in Section 5.06, Gemstone was required to make final payment when the following preconditions were met:

> (c) ...Prior to final payment, and as a condition precedent, General Contractor shall furnish Developer with the following (the "Completed Documents"):
>
> (i) All maintenance and operating manuals;
>
> (ii) Marked set of drawings and specifications reflecting "as-built" conditions, upon which General Contractor shall have transferred all changes in the location of concealed utilities...
>
> (iii) the documents set forth in Section 2.06(e)
>
> (iv) Any assignment and/or transfer of all guaranties and warranties from Third-Party Service Providers, vendors or suppliers and manufacturers;
>
> (v) A list of the names, address and phone numbers of all parties providing guarantees and warranties, and
>
> (vi) verification that all waivers that should be issued to Developer concurrent with Final payment. [18]

APCO admitted that none of these preconditions were met while APCO was on the Project.[19]

4. Retainage

Section 5.07 contained the Contract's retention (or retainage) payment schedule.[20] Retainage is a portion of a billing that is retained by Gemstone to ensure that the work is complete properly, that all material suppliers are paid and lien releases have been provided, and that all certificates of occupancy were issued.[21] APCO and the

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[18] Exhibit 2 at Section 5.06(c).

[19] Testimony of Joe Pelan (APCO), Day 1, p. 63.

[20] Exhibit 2 at Section 5.07.

[21] Testimony of Joe Pelan (APCO), Day 1, p. 25; Exhibit 2 at Section 5.07.

subcontractors tracked the 10% retention in their billings each month.[22] APCO never held or otherwise received any subcontractor's retention withheld by Gemstone and kept by the lender for the Project.[23]

Section 5.05(f) sets forth the preconditions for APCO to receive its retention:

> (f) Any remaining Standard Retainage, Monthly Retainage, and Milestone Retainage shall be released to General Contractor on the date that (i) Final Completion is attached and (ii) all outstanding disputes between Developer and General Contractor and Developer and any Third Party Service Providers have been resolved, and any liens against the Project related to such disputes have been removed.[24]

APCO admits that it never met any of the milestones or preconditions to be entitled to its retention from Gemstone.[25] Accordingly, APCO never billed and did not receive any retention from Gemstone.[26]

5. Termination for Convenience

Section 10.01 of the Contract is entitled "Termination by the Developer Without Cause."[27] In the construction industry, this is known as a "termination for convenience."[28] Gemstone never terminated the Contract for convenience.

6. Termination for Cause

Section 10.02 of the Contract is entitled "Termination by Developer With Cause" and states:

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[22] Testimony of Joe Pelan (APCO), Day 1, pp. 25-26.

[23] Testimony of Joe Pelan (APCO), Day 1, p. 26.

[24] Exhibit 2 at Section 5.07(f).

[25] Testimony of Joe Pelan (APCO), Day 1, pp. 1-4, 26.

[26] Testimony of Mary Jo Allen (APCO), Day 3, p. 127. Mary Jo Allen is a bookkeeper for APCO, and has been a bookkeeper for approximately 40 years. Testimony of Mary Jo Allen (APCO), Day 3, p. 121. She assisted in preparing the pay applications to Gemstone for the Project. Testimony of Mary Jo Allen (APCO), Day 3, p. 121.

[27] Exhibit 2 at Section 10.01.

[28] Testimony of Joe Pelan (APCO), Day 1, p. 27.

> (b) When any of the reasons set forth in Section 10.02(a) exist, Developer may without prejudice to any other rights or remedies available to Developer and after giving General Contractor seven days' written notice (in addition to the 48 hours notice for purposes of Section 10.02 (a)(vi)), terminate employment of General Contractor and may do the following:
>
> . . .
>
> (ii) Accept assignment of any Third-Party Agreements pursuant to Section 10.04. [29]

Although Gemstone purported to terminate the Contract for cause,[30] the undisputed evidence established that APCO was not in default.[31]

7. Assignment

The Contract contained an assignment provision confirming that upon the Contract's termination, APCO's subcontracts would be assigned to Gemstone. At that point, Gemstone would be responsible for any amounts that Gemstone had not already paid APCO for the subcontractors' work:

> 10.04 Assignment. Each Third-Party Agreement for a portion of the Work is hereby assigned by General Contractor to Developer provided that such assignment is effective only after termination of the Agreement by Developer for cause pursuant to Section 10.02 and only for those Third-Party Agreements which Developer accepts by notifying General Contractor and the applicable Third Party Service Provider in writing. General Contractor shall execute and deliver all such documents and take all such steps as Developer *may* require for the purpose of fully vesting in Developer the rights and benefits of General Contractor under such documents. Upon the acceptance by Developer of any Third-Party Agreement, subject to the other terms of this Article X; Developer shall pay to the corresponding Third-Party Service Provider any undisputed amounts owed for any Work completed by such Third Party Provider, prior to the underlying termination for which

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[29] Exhibit 2 at Section 10.02(b)(2).

[30] Testimony of Joe Pelan (APCO), Day 1, p. 27.

[31] Testimony of Joe Pelan (APCO), Day 1, p. 100.

> Developer has not yet paid General Contractor prior to such underlying termination.[32]

Despite its dispute with Gemstone, APCO could not have terminated its subcontracts or it would have been in breach of the Contract.[33] Notably, the Contract and this assignment clause were incorporated into the APCO subcontracts.[34] And before APCO left the Project, Gemstone and APCO ensured that all subcontractors were properly paid up through that last period.[35]

C. Subcontracts

1. Helix

Helix Electric of Nevada, LLC ("Helix") was originally selected and retained by Gemstone and performed work on the Project prior to APCO becoming the general contractor.[36] Specifically, Helix's Vice President, Bob Johnson,[37] admitted Helix participated in preparing engineering and design services for Gemstone on the Project's electrical scope of work.[38] So at Gemstone's direction, APCO entered into a subcontract with Helix for the electrical work (the "Helix Subcontract") required on the Project.[39] Helix's scope of work included "electrical installation for the project, which consists of

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[32] Exhibit 2, Section 10.04 (p. 36).

[33] Testimony of Joe Pelan (APCO), Day 1, p. 75.

[34] Exhibit 45 (Helix Subcontract) and Exhibit 149 (CabineTec Subcontract), Section 1.1.

[35] Exhibit 26; Exhibit 152; Testimony of Joe Pelan, Day 1, pp. 46, 67, and 82. Testimony of Mary Jo Allen (APCO), Day 3, pp. 127-128.

[36] Testimony of Joe Pelan (APCO), Day 1, p. 58.

[37] Bob Johnson is the Vice President of the major projects group at Helix. Testimony of Bob Johnson (Helix), Day 1, p. 106. Mr. Johnson has negotiated more than 50 subcontracts in his career, three to four of which have been with APCO. Testimony of Bob Johnson (Helix), Day 2, p. 17. Mr. Johnson was involved in the negotiation and execution of the final terms and conditions of Helix's subcontract with APCO for the Project. Testimony of Bob Johnson (Helix), Day 1, p. 107. Mr. Johnson admitted Andy Rivera received most of the project related correspondence and had the most information on Helix's damages claim. Testimony of Bob Johnson (Helix), at Day 2, p. 24.

[38] Testimony of Bob Johnson (Helix) Day 2, p. 6.

[39] Exhibit 45, Helix Subcontract; Testimony of Joe Pelan (APCO), Day 1, p. 58.

distribution of power, lighting, power for the units, connections to equipment that required electrical."[40] So Helix's work was based, in part, on the electrical drawings that Helix prepared under contract to Gemstone.[41]

The Helix subcontract included the following relevant provisions:

- Section 1.1: The subcontract incorporates the Contract including all exhibits and attachments, specifically including the Helix exhibit.
- Section 1.3: Helix was bound to APCO to the same extent and duration that APCO was bound to Gemstone.
- Section 3.4 outlined the agreed upon progress payment schedule as follows: Progress Payments
  - The progress payment to Subcontractor shall be one hundred percent (100%) of the value of Subcontract work completed (less 10% retention) during the preceding month as determined by the Owner, less such other amounts as Contractor shall determine as being property withheld as allowed under this Article or as provided elsewhere in this Subcontract. The estimates of Owner as to the amount of Work completed by Subcontractor shall be binding upon Contractor and Subcontractor and shall conclusively establish the amount of Work performed by Subcontractor. As a condition precedent to receiving partial payments from Contractor for Work performed, Subcontractor shall execute and deliver to Contractor, with its application for payment, a full and complete release (Forms attached) of *all* claims and causes of action Subcontractor may have against Contractor and Owner through) the 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. Upon the request of Contractor, Subcontractor shall provide an Unconditional Waiver of Release in form required by Contractor for any previous payment made to Subcontractor. Any payment to Subcontractor shall be conditioned upon receipt of the actual payments by Contractor from Owner. Subcontractor herein agrees to assume the same risk that the Owner *may* become

[40] Testimony of Bob Johnson (Helix) at Day 2, p. 10.

[41] Testimony of Bob Johnson (Helix) Day 2, p. 7.

insolvent that Contractor has assumed by entering Into the Prime Contract with the Owner.

- 3.5 Progress Payments
  - Progress payments will be made by Contractor to Subcontractor within 15 days after Contractor actually receives payment for Subcontractor's work from Owner.... The estimate of owner as to the amount of Work completed by Subcontractor be binding upon Contractor and Subcontractor and shall conclusively establish the amount of Work performed by Subcontractor...[42]

Of critical importance to the present action and claims, the Helix Subcontract contained the following agreed upon retention payment schedule:

- Section 3.8: Retainage

  The 10 percent withheld retention shall be payable to Subcontractor upon, and only upon the occurrence of all the following events, each of which is a condition precedent to Subcontractor's right to receive final payment hereunder and payment of such retention: (a) completion of the entire project as described in the Contract Documents; (b) the approval of final acceptance of the project Work by Owner, (c) Receipt of final payment by Contractor from Owner; (d) Delivery to Contractor from Subcontractor all as-built drawings for it's scope of work and other close out documents; (e) Delivery to Contractor from Subcontractor a Release and Waiver of Claims from all of Subcontractor's laborers, material and equipment suppliers, and subcontractors, providing labor, materials or services to the Project.43

As documented below, Helix admitted that these preconditions were not met while Apco was the contractor.[44]

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[42] Exhibit 45.

[43] Exhibit 45.

[44] Testimony of Bob Johnson, Day 2, pp. 36 and 37.

2. **Helix Clearly had a Subcontract with APCO.**

In its lien documents,[45] complaint against APCO,[46] and its amended complaint, Helix has unequivocally admitted that it had a binding subcontract with APCO.[47] In fact, Victor Fuchs, the President of Helix,[48] also confirmed the following in an affidavit attached to Helix's May 5, 2010 Motion for Summary Judgment Against Gemstone Development West (and corresponding errata) filed with this Court:

> 4. On or around April 17, 2007 [the date of Exhibit 45], APCO contracted with Helix to perform certain work on the Property.
>
> 5. Helix's relationship with APCO was governed by a subcontract, which provided the scope of Helix's work and method of billing and payments to Helix for work performed on the Property (the "Subcontract"). A true and correct copy of the Subcontract is attached hereto as Exhibit 1.
>
> 6. Helix also performed work and provided equipment and services directly for and to Gemstone, namely design engineering and temporary power.
>
> 7. Camco Pacific Construction Company, Inc. ("Camco") replaced APCO as the general contractor. Thereafter, Helix performed its Work for Gemstone and/or Camcmo…[49]

Exhibit 1 to the declaration was the first fifteen pages of Exhibit 45.[50]

And notwithstanding Helix's proposed interlineations to the subcontract, Helix's Mr. Johnson admitted he did not change the retention payment schedule in the subcontract:

> Q. Okay. Would you turn to page 4 [of Exhibit 45] And directing your attention to paragraph 3.8?
>
> A. Okay.

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[45] Exhibits 512 pp. 5-6, 7-9, 10-11.

[46] Exhibit 77.

[47] Exhibit 231.

[48] Testimony of Bob Johnson (Helix), Day 1, p. 108.

[49] Exhibit 314.

[50] Helix Electric's May 5, 2010 Motion for Partial Summary Judgment Against Gemstone Development West (and corresponding errata).

Q. Do you recognize that as the agreed-upon retention payment schedule in the subcontract?

A. I do.

Q. And in fairness to you and the record, you did propose a change to paragraph 3.8. Could you turn to page 16 of the exhibit, Exhibit 45? And directing your attention to paragraph 7, does this reflect your proposed change to the retention payment schedule in the original form of Exhibit 45?

A. In the original form, yes.

Q. Okay. And APCO accepted your added sentence that if the retention was reduced on the Project, the same would be passed on to the subcontractor, correct?

A. Correct.

Q. Through your change in paragraph 7, on page 16 of Exhibit 45, you did not otherwise modify the preconditions in the retention payment schedule of 3.8, did you?

A. We did not.[51]

Mr. Johnson, also admitted that Exhibit 45 represented the APCO agreement that Helix alleges APCO somehow breached:

Q. Okay, sitting here today, is it your contention that APCO breached a contract with Helix?

A. I would say they did in the respect that we haven't been paid.

Q. Okay. And which contract is it in your opinion that APCO breached?

A. For the Manhattan West project.

Q. Is there a document?

A. There is a document.

Q. Okay. And, sir, would you turn—if you could, grab Exhibit 45. You spent some time talking about this yesterday.

A. Okay.

The Court: Which item is it, counsel?

Mr. Jefferies: Exhibit 45.

Q. Is it your position that APCO breached this agreement?

A. My assumption would be they breached it, yes.

Q. Okay. But this is the document that represents the agreement between APCO and Helix for the project?

A. It is the agreement between APCO and Helix.[52]

[51] Testimony of Bob Johnson, Day 2, pp. 17-18.

IN THE SUPREME COURT OF THE STATE OF NEVADA

Supreme Court Case No. 77320
***Consolidated with* 80508**

HELIX ELECTRIC OF NEVADA, LLC,

Appellant,

v.

APCO CONSTRUCTION, INC., A NEVADA CORPORATION,

Respondent.

JOINT APPENDIX
VOLUME 83

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Docket 77320 Document 2020-38056

CHRONOLOGICAL APPENDIX OF EXHIBITS

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04-26-10	**CAMCO and Fidelity's Answer and CAMCO's Counterclaim**	**JA000031-JA000041**	**1**
07-02-10	**Order Striking Defendant Gemstone Development West, Inc.'s Answer and Counterclaim and Entering Default**	**JA000042-JA000043**	**1**
06-06-13	**APCO's Limited Motion to Lift Stay for Purposes of this Motion Only; (2) APCO's Motion for Summary Judgment Against Gemstone Only; and (3) Request for Order Shortening Time**	**JA000044-JA000054**	**1**
	Exhibit 1 – Affidavit of Randy Nickerl in Support of (I) APCO's Limited Motion to Lift Sta for Purposes of this Motion Only; (2) APCO's Motion for Judgment Against Gemstone Only	JA000055-JA000316	1/2/4/5/6
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	Exhibit 3 – Excerpt from David E. Parry's Deposition Transcript taken June 20, 2017	JA000473 JA00489	8
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	Exhibit 7 – Helix Electric of Nevada, LLC's First Set of Request for Admissions to Camco Pacific Construction	JA000523-JA000533	8
11-06-17	**Helix Electric of Nevada's Motion *in Limine* Nos. 1-4**	**JA000534-JA000542**	**8**
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11-06-17	**APCO Construction, Inc.'s Omnibus Motion *in Limine***	**JA000590 JA000614**	**9**
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	Exhibit 7 – Email from Mary Bacon dated October 16, 2017	JA000827-JA000831	12
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	Exhibit 9 – Email from Eric Zimbelman dated October 17, 2017	JA000838-JA000844	12
	Exhibit 10 – Special Master Report, Recommendation and District Court Order	JA00845-JA000848	12

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	Exhibit 11 – Plaintiff in Intervention, National Wood Products, Inc.'s Initial Disclosures Pursuant to NRCP 16.1	JA000849-JA000856	12
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11-14-17	**Camco Pacific Construction Company, Inc.'s Opposition to Lien Claimants' Motions in Limine Nos. 1-6**	**JA000898-JA000905**	**12**
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01-03-18	**Notice of Entry of Order Granting Peel Brimley Lien Claimants' Motion for Partial Summary Judgment Precluding Defenses Based on Pay-if-Paid Agreements**	**JA001187-JA001198**	**22**
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01-10-18	**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**	**JA001561-JA001573**	**27**
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	Exhibit 9 - Amended *nunc pro tunc* order regarding APCO Construction, Inc.'s Omnibus Motion *in Limine* No. 7	JA001648-JA001650	28
	Exhibit 10 - Order Granting in Part and Denying in part Helix Electric of Nevada, LLC's Motions *in Limine* 1-4 (Against APCO Construction)	JA001651-JA001653	28
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01-17-18	**Transcript Bench Trial (Day 1)**[1]	**JA001668-JA001802**	**29/30**
	Trial Exhibit 1 - Grading Agreement ***(Admitted)***	JA001803-JA001825	30
	Trial Exhibit 2 – APCO/Gemstone General Construction Agreement ***(Admitted)***	JA001826-JA001868	30
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[1] Filed January 31, 2018

Date	**Description**	**Bates Number**	**Volume(s)**
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	Trial Exhibit 5 - Letter from J. Barker to A. Edelstein re: APCO's Notice of Intent to Stop Work ***(Admitted)***	JA001975-JA001978	32
	Trial Exhibit 6 - Letter from J. Barker to A. Edelstein re: APCO's Notice of Intent to Stop Work ***(Admitted)***	JA001979-JA001980	32
	Trial Exhibit 10 - Letter from J. Barker to A. Edelstein Re: Notice of Intent to Stop Work (Second Notice) ***(Admitted)***	JA001981-JA001987	32
	Trial Exhibit 13 - Letter from A. Edelstein to Re. Nickerl Re: Termination for Cause (Gemstone) ***(Admitted)***	JA001988-JA002001	32
	Trial Exhibit 14 - Letter from W. Gochnour to Sean Thueson Re: [APCO's] Response to [Gemstone's] Termination for Cause ***(Admitted)***	JA002002-JA002010	33
	Trial Exhibit 15 - Letter from R. Nickerl to A. Edelstein Re: 48-Hour Notices ***(Admitted)***	JA002011-JA002013	33
	Trial Exhibit 16 - Email from J. Horning to A. Berman and J. Olivares re: Joint Checks ***(Admitted)***	JA002014	33
	Trial Exhibit 23 - APCO Subcontractor Notice of Stopping Work and Letter from J. Barker to A. Edelstein Re: Notice of Stopping Work and Notice of Intent to Terminate Contract ***(Admitted)***	JA002015-JA002016	33

Date	**Description**	**Bates Number**	**Volume(s)**
	Trial Exhibit 24 - Letter from R. Nickerl to Clark County re: Notification of APCO's withdrawal as General Contractor of Record ***(Admitted)***	JA002017-JA002023	33
	Trial Exhibit 26 - Email from J. Gisondo to Subcontractors re: June checks ***(Admitted)***	JA002024	34
	Trial Exhibit 27 - Letter from A. Edelstein to R. Nickerl re: June Progress Payment ***(Admitted)***	JA002025-JA002080	34
	Trial Exhibit 28 - Letter from J. Barker to A. Edelstein Re: Termination of Agreement for GMP ***(Admitted)***	JA002081	34
	Trial Exhibit 31 - Transmission of APCO's Pay Application No. 11 as Submitted to Owner ***(Admitted)***	JA002082-JA002120	34/35
	Trial Exhibit 45 - Subcontractor Agreement ***(Admitted)***	JA002121-JA002146	35
	Trial Exhibit 162 - Amended and Restated General Construction Agreement between Gemstone and CAMCO ***(Admitted)***	JA002147-JA002176	35/36
	Trial Exhibit 212 - Letter from Edelstein to R. Nickerl re: NRS 624 Notice ***(Admitted)***	JA002177-JA002181	36
	Trial Exhibit 215 - Email from C. Colligan to Subcontractors re: 48-hour Termination Notice ***(Admitted)***	JA002182-JA002185	36
	Trial Exhibit 216 - Email from C. Colligan re: Meeting with Subcontractors ***(Admitted)***	JA002186-JA002188	36
	Trial Exhibit 506 – Email and Contract Revisions ***(Admitted)***	JA002189 – JA002198	36

Date	**Description**	**Bates Number**	**Volume(s)**
01-18-18	**Stipulation and Order Regarding Trial Exhibit Admitted into Evidence**	**JA002199-JA002201**	**36**
	Exhibit 1 – Exhibit List APCO	JA002208-JA002221	36
	Exhibit 2 – Helix Trial Exhibits	JA002222-JA002223	36
	Exhibit 3 – Exhibit List Plaintiff in Intervention National Wood Products, Inc.	JA002224-JA002242	36/37
	APCO TRIAL EXHIBITS:		
	APCO Related Exhibits:		
	Trial Exhibit 7 - Letter from Scott Financial to APCO re: Loan Status	JA002243	37
	Trial Exhibit 8 - APCO Pay Application No. 10 as submitted to Owner	JA002244-JA002282	37/38
	Trial Exhibit 12 and 107 - Email from C. Colligan to Subcontractors re: Subcontractor Concerns	JA002283-JA002284	38
	Trial Exhibit 17 – Video (Construction Project)	JA002285	N/A
	Trial Exhibit 18 – Video (Construction Project)	JA002286	N/A
	Trial Exhibit 19 – Video (Construction Project)	JA002287	N/A
	Trial Exhibit 20 – Video (Construction Project)	JA002288	N/A
	Trial Exhibit 21 – Video (Construction Project)	JA002289	N/A
	Trial Exhibit 22 – Video (Construction Project)	JA002290	N/A

Date	Description	Bates Number	Volume(s)
	Trial Exhibit 29 - Email from J. Robbins to Subcontractors re: Billing Cut-Off for August Billing	JA002285	39
	Trial Exhibit 30 - Camco Pay Application No. 11 NCS-Owner Approved with NCS Draw Request	JA002286-JA002306	39
	Trial Exhibit 32 and 125 - Photo re: Building 8 & 9, Interior (Showing drywall still not completed and no electrical trim or fixture installed)	JA002307-JA002308	39
	Trial Exhibits 33 and 126 - Photo re: Building 8 & 9, Interior (Showing drywall still not completed)	JA002309-JA002310	39
	Exhibit 34 and 128 - Photo re: Building 8 & 9, Interior (Showing drywall still not completed)	JA002311-JA002312-	40
	Trial Exhibit 35 - Photo re: Building 8 & 9, Interior (Showing drywall still not completed and no electrical trim or fixtures installed)	JA002313-JA002314	40
	Exhibit 36 and 130 -Photo re: Building 8 & 9, Interior (Showing drywall still not completed and no electrical trim or fixtures installed)	JA002315-JA002316	40
	Trial Exhibits 37 and 131 -Photo re: Building 8 & 9, Interior (Showing drywall still not completed and no electrical trim or fixtures installed)	JA002317-JA002318	40
	Trial Exhibits 38 and 132 - Photo re: Building 8 & 9, Interior (Showing drywall still not completed and no electrical trim or fixtures installed)	JA002319-JA002320	41

Date	Description	Bates Number	Volume(s)
	Trial Exhibit 39 -Email from K. Costen to Subcontractors informing that Manhattan West Project no longer open	JA002321-JA002322	41
	Trial Exhibit 40- Letter from D. Parry to Subcontractors Re: Funding Withdrawn	JA002323 JA002326	41
	HELIX Related Exhibits:		41
	Trial Exhibit 46 - Helix Pay Application No. 16713-008R1 with Proof of Payment	JA002327-JA002345	41
	Trial Exhibit 47 - Helix Pay Application No. 16713-009R1 with Proof of Payment	JA002346-JA002356	41
	Trial Exhibit 48 - Email from R. Nickerl to B. Johnson Re: Work Suspension Directive	JA002357-JA002358	41
	Trial Exhibit 49 -Helix Pay Application No. 16713-010R2 with Proof of Payment	JA002359-JA002364	41/42
	Trial Exhibit 50 - Unconditional Waiver and Release re: Pay Application No. 8 with Copy of Payment	JA002365-JA002366	42
	Trial Exhibit 51 - Photo re: Building 8 & 9, South (No Exterior fixtures installed. Helix billed out at 90%)	JA002367-JA002368	42
	Trial Exhibit 52 -Photo re: Building 8 & 9, North (No Exterior fixtures installed. Helix billed out at 90%)	JA002369-JA002370	42
	Trial Exhibit 53 -Photo re: Building - 2 & 3, West (No Exterior fixtures installed. Helix billed out at 90%)	JA002371-JA002372	42

Date	Description	Bates Number	Volume(s)
	Trial Exhibit 54 - Photo re: Building - 2 & 3, East (No Exterior fixtures installed. Helix billed out at 90%)	JA002373-JA002374	42
	Trial Exhibit 55 - Photo re: Building 2 & 3, East (No Exterior fixtures installed. Helix billed out at 90%)	JA002375-JA002376	42
	Trial Exhibit 56 - Photo re: Building 8 & 9, North (No Exterior fixtures installed. Helix billed out at 90%)	JA002377-JA002378	42
	Trial Exhibit 57 - Photo re: Building 2 & 3, and 8 & 9, North (No Exterior fixtures installed. Helix billed out at 90%)	JA002379-JA002381	42
	Trial Exhibit 58 - Helix Pay Application No. 16713-011R1 submitted to Owner	JA002382-JA002391	42
	Trial Exhibit 59 - Helix Pay Application No. 16713-011R1 given to Camco with Proof of Payment	JA002392-JA002405	43
	Trial Exhibit 60 - Helix Retention Rolled to Camco	JA002406-JA002415	43
	Trial Exhibit 61 - Unconditional Waiver and Release re: all Invoices through June 30, 2008 with Proof of Payment	JA002413-JA002415	43
	Trial Exhibit 62 - Photo re: Building 8 & 9, South	JA002416-JA002417	43
	Trial Exhibit 63 - Photo re: Building 2 & 3, West	JA002418-JA002419	43
	Trial Exhibit 64 - Photo re: Building 2 & 3, West	JA002420-JA002421	43
	Trial Exhibit 65 - Photo re: Building 2 & 3, South	JA002422-JA002423	43

Date	Description	Bates Number	Volume(s)
	Trial Exhibit 66 - Letter of transmittal from Helix to APCO re: Helix Pay Application No. 16713-011R1	JA002424-JA002433	43
	Trial Exhibit 67 - Photo re: Building 8 & 9, West (No exterior fixtures installed. Helix billed out 90%)	JA002435-JA002436	43
	Trial Exhibit 68 -Photo re: Building 8 & 9, West (No exterior fixtures installed. Helix billed out 90%)	JA002437-JA002438	43
	Trial Exhibit 69 - Photo re: Building 2 & 3, East (No exterior fixtures installed. Helix billed out 90%)	JA002439-JA002440	43
	Trial Exhibit 70 - Photo re: Building 8 & 9, South (No exterior fixtures installed. Helix billed out 90%)	JA002441-JA002442	43
	Trial Exhibit 71 - Photo re: Building 8 & 9, West (No exterior fixtures installed. Helix billed out 90%)	JA002443-JA002444	43
	Trial Exhibit 72 - Photo re: Building 2 & 3, East (No exterior fixtures installed. Helix billed out 90%)	JA002445-JA002446	43
	Trial Exhibit 73 - Photo re: Building 8 & 9, West (No exterior fixtures installed. Helix billed out 90%)	JA002447-JA002448	43
	Trial Exhibit 74 - Photo re: Building 2 & 3, East (No exterior fixtures installed. Helix billed out 90%)	JA002448-JA002449	43

Date	Description	Bates Number	Volume(s)
	Trial Exhibit 75 - Unconditional Release re: Pay Application No. 16713-011R1 with Proof of Payment	JA002450-JA002456	43
	Exhibit 77 - Helix Statement of Facts Constituting Notice of Lien and Third-Party Complaint	JA002457-JA002494	43
	Zitting Brothers Related Exhibits:		
	Trial Exhibit 100 - Check No. 14392 payable to Zitting ($27,973.80); Progress Payment No. 7	JA002495-JA002497	44
	Trial Exhibit 101 - Email from R. Nickerl to R. Zitting re: Change Orders	JA002498-JA002500	44
	Trial Exhibit 102 -Email from L. Lynn to J. Griffith, et al. re: Change Order No. 00011 "pending"	JA002501-JA002503	44
	Trial Exhibit 103- Email from R. Zitting to R. Nickerl re: change orders adjusted to $30 per hour	JA002504-JA002505	44
	Trial Exhibit 104 - Email from R. Zitting to R. Nickerl re: change orders adjusted to $30 per hour with copies of change orders	JA002506-JA002526	44
	Trial Exhibit 105 - Ex. C to the Ratification – Zitting Quotes	JA002527-JA002528	44
	Trial Exhibit 106 - Unconditional Lien Release – Zitting ($27,973.80)	JA002529	44
	Trial Exhibit 108 - Photo of Video (Construction Project)	JA002530-JA002531	44
	Trial Exhibit 109 - Photo of Video (Construction Project)	JA002532-JA002533	44

Date	Description	Bates Number	Volume(s)
	Trial Exhibit 110 - Photo of Video (Construction Project)	JA002534-JA002535	44
	Trial Exhibit 111 - Photo of Video (Construction Project)	JA002536-JA002537	44
	Trial Exhibit 112 - Photo of Video (Construction Project)	JA002538-JA002539	44
	Trial Exhibit 113 -Photo of Video (Construction Project)	JA002550-JA002541	44
	Trial Exhibit 114 -Photo of Video (Construction Project)	JA002542-JA002543	44
	Trial Exhibit 115 - Progress Payment No. 9 Remitted to Zitting	JA002544-JA002545	44
	Trial Exhibit 116 - Ratification and Amendment of Subcontract Agreement between Buchele and Camco	JA002546-JA002550	44
	Trial Exhibit 117 - C to the Ratification	JA002551-JA002563	44
	Trial Exhibit 118 - Q&A from Gemstone to subcontracts	JA002564-JA002567	44
	Trial Exhibit 119 - Check No. 528388 payable to APCO ($33,847.55) – Progress Payment No. 8.1 and 8.2	JA002568-JA002571	44
	Trial Exhibit 120 - Tri-City Drywall Pay Application No. 7 to APCO as submitted to Owner. Show percentage complete for Zitting	JA002572-JA002575	44/45
	Trial Exhibit 127 - Photo of Video (Construction Project)	JA002576-JA002577	45/46
	Trial Exhibit 128 - Photo of Video (Construction Project)	JA002578-JA002579	46
	Trial Exhibit 129 - Photo of Video (Construction Project)	JA002580-JA002581	46

Date	Description	Bates Number	Volume(s)
	Trial Exhibit 138 - Memo from Scott Financial to Nevada State Contractors Board Re: Explanation of Project Payment Process	JA002582-JA002591	46
	Trial Exhibit 152 -Terms & Conditions modified by APCO, Invoices and Check Payment	JA002592-JA002598	46
	National Wood Products Related Exhibits:		
	Trial Exhibit 160 - Documents provided for settlement	JA002599-JA002612	46
	CAMCO Related Exhibits:		
	Trial Exhibit 163 - Camco Pay Application No. 12 to Gemstone	JA002613-JA002651	46/47
	Trial Exhibit 165 - Letter from D. Parry to A. Edelstein re: Gemstone losing funding for project	JA002652-JA002653	47
	Trial Exhibit 166 - Letter from D. Parry to G. Hall re: withdrawal of funding	JA002654 JA002656	47
	Helix Related Exhibits:		47
	Trial Exhibit 169 - Helix Exhibit to Standard Subcontract Agreement with Camco	JA 002665 JA002676	47/48
	Trial Exhibit 170 - Subcontract Agreement between Helix and Camco (unsigned)	JA002677-JA002713	48
	Trial Exhibit 171 - Work Order No. 100	JA002714-JA002718	48
	Trial Exhibit 172 - Letter from J. Griffith to Victor Fuchs Re: Gemstone's intention to continue retention of Helix w/copy of Ratification and Amendment of Subcontract Agreement	JA002719-JA002730	48

Date	**Description**	**Bates Number**	**Volume(s)**
	Trial Exhibit 173 - Helix Pay Application No. 16713-012 to Camco with proof of payment	JA002731-JA002745	48
	Trial Exhibit 174 - Helix Change Order Request No. 28	JA002746-JA002747	48
	Trial Exhibit 175 - Change Notice No. 41	JA002748-JA002751	48
	Trial Exhibit 176 - Helix Pay Application No. 16713-013 to Camco	JA002752-JA002771	48/49
	Trial Exhibit 177 - Helix Pay Application No. 16713-014 to Camco	JA002772-JA002782	49
	Trial Exhibit 178 - Camco's letter to Helix rejecting Pay Application No. 16713-015 with attached copy of Pay Application	JA002783 JA002797	49
	National Wood/Cabinetec Related Exhibits:		
	Trial Exhibit 184 - Ratification and Amendment of Subcontract Agreement between CabineTec and Camco (fully executed copy)	JA002798-JA002825	49
	General Related Exhibits:		
	Trial Exhibit 218 - Camco/Owner Pay Application No. 11 w/Backup	JA002826-JA003028	50/51/52
	Trial Exhibit 220 - Camco/Owner Pay Application No. 12 w/Backup	JA003029-JA003333	52/53/54/55
	Trial Exhibit 313 - Letter from A. Edelstein to R. Nickerl re: NRS 624 Notice	JA003334-JA003338	55
	Helix Trial Exhibits:		
	Trial Exhibit 501 - Payment Summary	JA003339 – JA003732	55/56/57 /58/59/60
	Trial Exhibit 508 – Helix Pay Application	JA003733-JA003813	60/61

Date	**Description**	**Bates Number**	**Volume(s)**
	Trial Exhibit 510 - Unsigned Subcontract	JA003814-JA003927	61/62
	Trial Exhibit 512 - Helix's Lien Notice	JA003928-JA004034	62/63
	Trial Exhibit 522 - Camco Billing	JA004035-JA005281	63/64/65/66/67/68/69/70/71/72/73/74/75/76/77
01-19-18	**Order Denying APCO Construction's Motion for Reconsideration of Order Granting Partial Summary Judgment Precluding Defenses Based on Pay-if-Paid Agreements**	**JA005282-JA005283**	**78**
01-18-18	**Transcript – Bench Trial (Day 2)**[2]	JA005284-JA005370	78
	Trial Exhibit 535 – Deposition Transcript of Andrew Rivera (Exhibit 99) ***(Admitted)***	JA005371-JA005623	78/79/80
01-19-18	**Transcript – Bench Trial (Day 3)**[3]	JA005624-JA005785	80
	Trial Exhibit 231 – Helix Electric's Amended Statement of Facts Constituting Notice of Lien and Third-Party Complaint ***(Admitted)***	JA005786-JA005801	80
	Trial Exhibit 314 - Declaration of Victor Fuchs in support of Helix's Motion for Partial Summary Judgment against Gemstone ***(Admitted)***	JA005802-JA005804	80

[2] Filed January 31, 201879

[3] Filed January 31, 2018

Date	Description	Bates Number	Volume(s)
	Trial Exhibit 320 – June-August Billings—not paid to APCO ***(Admitted)***	JA005805	80
	Trial Exhibit 321 – Overpayments to Cabinetec ***(Admitted)***	JA005806-	80
	Trial Exhibit 536 – Lien math calculations (handwritten) ***(Admitted)***	JA005807-JA005808	80
	Trial Exhibit 804 – Camco Correspondence ***(Admitted)***	JA005809-JA005816	80
	Trial Exhibit 3176 – APCO Notice of Lien ***(Admitted)***	JA005817-JA005819	81
01-24-18	**Transcript – Bench Trial (Day 5)[4]**	**JA005820-JA005952**	81
03-08-18	**Letter to Judge Denton submitting Helix Electric of Nevada, LLC's (Proposed) Findings of Fact and Conclusions of Law**	**JA005953-JA005985**	**81**
03-08-18	**Letter to Judge Denton submitting APCO Construction, Inc.'s Proposed Findings of Fact and Conclusions of Law**	**JA005986-JA006058**	**8/821**
03-08-18	**APCO Construction Inc.'s Post-Trial Brief**	**JA006059-JA006124**	**82/83**
03-23-18	**APCO Opposition to Helix Electric of Nevada, LLC's Findings of Fact and Conclusions of Law**	**JA006125-JA006172**	**83/84**
03-23-18	**Helix Electric of Nevada, LLC's Responses to APCO Construction's Post-Trial Brief**	**JA006173-JA006193**	**84**
04-25-18	**Findings of Fact and Conclusions of Law and Order as the Claims of Helix Electric and Cabinetec Against APCO**	**JA006194-JA006264**	**84/85**

[4] Filed January 31, 201883

Date	Description	Bates Number	Volume(s)
05-08-18	**APCO Construction, Inc.'s Motion for Attorneys' Fees and Costs Against Helix Electric of Nevada, LLC and Plaintiff in Intervention National Wood Products, Inc**.	**JA006265-JA006284**	**85**
	Exhibit 1 – Findings of Fact and Conclusions of Law as to the Claims of Helix Electric and Cabenetec Against APCO	JA006285-JA006356	85/86
	Exhibit 2 – National Wood Products, Inc.'s Notice of Motion and Motion to Intervene and Memorandum of Points and Authorities in Support Thereof	JA006357-JA006369	86
	Exhibit 3 – Plaintiff in Intervention, National Wood Products, Inc.'s Findings of Fact and Conclusions of Law (Proposed)	JA006370-JA006385	86/87
	Exhibit 4 – Plaintiff in Intervention, National Wood Productions, Inc.'s Findings of Fact and Conclusions of Law Re Camco	JA006386-JA006398	87
	Exhibit 5 – Offer of Judgment to Helix Electric of Nevada, LLC	JA006399-JA006402	87
	Exhibit 6 – Offer of Judgment to Plaintiff in Intervention National Wood Products, Inc.	JA006403-JA006406	87
	Exhibit 7 – Declaration of John Randall Jefferies, Esq. in Support of APCO Construction, Inc.'s Motion for Attorney's Fees and Costs	JA006407-JA006411	87
	Exhibit 7A – Billing Entries	JA006412-JA006442	87/88

Date	**Description**	**Bates Number**	**Volume(s)**
	Exhibit 7B – Time Recap	JA006443-JA006474	88
	Exhibit 8 – Declaration of Cody S. Mounteer, Esq. in Support of Motion for Attorney's Fees and Costs	JA006475-JA006478	88
	Exhibit 9 – APCO Construction, Inc.'s Memorandum of Costs and Disbursements [Against Helix Electric of Nevada, LLC, and Plaintiff in Intervention National Wood Products, LLC]	JA006479-JA006487	88
	Exhibit 10 – Depository Index	JA006488-JA006508	88/89
05-08-18	**Helix Electric of Nevada, LLC's Motion to Retax Costs Re: Defendant APCO Construction's Memorandum of Costs and Disbursements**	**JA006509-JA006521**	**89**
05-31-18	**Notice of Entry of Judgment [As to the Claims of Helix Electric of Nevada, LLC Against Camco Construction, Co., Inc.]**	**JA006522 JA006540**	**89**
06-01-18	**Notice of Entry of Judgment [As to the Claims of Helix Electric of Nevada, LLC and Plaintiff in Intervention National Wood Products, Inc.'s Against APCO Construction, Inc.]**	**JA006541 JA006550**	**90**
06-01-18	**Helix Electric of Nevada, LLC's Motion for Attorneys' Fees, Interest and Costs**	**JA006551-JA006563**	**90**
	Exhibit 1 – Findings of Fact and Conclusions of Law and Order as to the Claims of Helix Electric of Nevada, LLC Against Camco Pacific Construction, Inc.	JA006564-JA006574	90

Date	**Description**	**Bates Number**	**Volume(s)**
	Exhibit 2 – Memorandum of Costs and Disbursements (Helix Electric of Nevada, LLC)	JA006575-JA006580	90
	Exhibit 3 – Prime Interest Rate	JA006581-JA006601	90
	Exhibit 4 – Declaration of Eric B. Zimbelman in Support of Helix Electric of Nevada, LLC's Motion for Attorneys' Fees, Interest and Costs	JA006583-JA006588	90
	Exhibit 5 – Summary of Fees	JA006589-JA006614	90
06-15-18	**APCO Construction, Inc.'s Opposition to Helix Electric of Nevada, LLC and Plaintiff in Intervention National Wood Products, Inc.'s Motions to Retax Costs**	**JA006615-JA006637**	**90/9**1
	Exhibit 1-A Declaration of Mary Bacon in Support of APCO's Supplement to its Motion for Attorney's Fees	JA006635 JA006638	91
	Exhibit 1-B – Declaration of Cody Mounteer in Support of APCO's Supplement to its Motion for Attorney's Fees	JA006639-JA006916	91/92/93 94/95/96
06-15-18	**Helix Electric of Nevada, LLC's Opposition to APCO Construction's Motion for Attorneys' Fees and Costs**	**JA006917 – JA006942**	**96**
	Exhibit 1 – Notice of Entry of Staying the Case, Except for the Sale of the Property, Pending Resolution of the Petition before the Nevada Supreme Court	JA006943-JA006948	96

Date	Description	Bates Number	Volume(s)
	Exhibit 2 – Notice of Entry of Denying APCO Construction's Motion for Partial Summary Judgment Re: Lien Foreclosure Claims	JA006949-JA006954	96
	Exhibit 3 – Supreme Court filing notification Joint Petition for Writ of Mandamus filed	JA006955-JA006958	96
	Exhibit 4 – Order Denying *En Banc* Reconsideration	JA006959-JA006963	96
	Exhibit 5 – Notice of Entry of Order Granting Peel Brimley Lien Claimants' Motion for Partial Summary Judgment Precluding Defenses Based on Pay-if-Paid Agreements	JA006964-JA006978	96
	Exhibit 6A – Interstate Plumbing and Air Conditioning, LLC's Response to Special Master Questionnaire	JA006977-JA006980	96
	Exhibit 6B – Nevada Prefab Engineers, Inc.'s Response to Special Master Questionnaire	JA006981-JA006984	96
	Exhibit 6C – Zitting Brothers Construction, Inc.'s Response to Special Master Questionnaire	JA006985-JA006993	96/97
	Exhibit 6D – Noorda Sheet Metal's Notice of Compliance	JA006994 JA007001	97
	Exhibit 6 E – Unitah Investments, LLC's Special Master Questionnaire	JA007002-JA007005	97
	Exhibit 7A – Motion to Appoint Special Master	JA007006-JA007036	97
	Exhibit 7B – Letter from Floyd A. Hale dated August 2, 2016	JA007037-JA007060	97

Date	Description	Bates Number	Volume(s)
	Exhibit 7C – Special Master Report Regarding Remaining Parties to the Litigation, Special Master Recommendation and District Court Order Amended Case Agenda	JA007042-JA007046	97
	Exhibit 8 – Notice of Entry of Order Granting Plaintiff's Motion to Dismiss	JA007047 JA007053	97
	Exhibit 9 – Stipulation and Order for Dismissal with Prejudice	JA007054-JA007056	97
	Exhibit 10 – Stipulation and Order to Dismiss Third-Party Complaint of Interstate Plumbing & Air Conditioning, LLC Against APCO Construction, Inc. with Prejudice	JA007057-JA007059	97
	Exhibit 11 – Notice of Entry of Order Granting in Part and Denying in Part APCO Construction's Omnibus Motion *in Limine*	JA007060-JA007088	97
	Exhibit 12 – Notice of Entry of Order Granting in Part and Denying in Part Helix Electric of Nevada, LLC's Motion in Limine (against APCO Construction)	JA007070-JA007078	97
	Exhibit 13 – Notice of Entry of Order Denying APCO Constructions' Motion for Partial Summary Judgment Re: Lien Foreclosure Claims	JA007079-JA007084	97
	Exhibit 14 – Notice of Entry of Order Denying APCO Construction's Motion for Reconsideration of Order Granting Partial Summary	JA007085-JA007087	97

Date	Description	Bates Number	Volume(s)
	Judgment Precluding Defenses Based on Pay-if-Paid Agreements		
	Exhibit 15 – Notice of Association of Counsel	JA007088-JA007094	97
06-15-18	**Plaintiff in Intervention National Wood Products, Inc.'s Opposition to APCO Construction's Motion for Attorneys' Fees and Costs**	**JA007095-JA007120**	**97/98**
06-15-18	**Declaration of S. Judy Hirahara in support of National Woods's Opposition to APCO Construction's Motion for Attorneys' Fees and Costs**	**JA007121-JA007189**	**98**
06-18-18	**Plaintiff in Intervention National Wood Products, Inc.'s Joinder to Helix Electric of Nevada, LLC's Opposition to APCO Construction's Motion for Attorneys' Fees and Costs**	**JA007190-JA007192**	**99**
06-21-18	**Helix Electric of Nevada, LLC's Notice of Non-Opposition to its Motion for Attorney's Fees, Interest and Costs**	**JA007193-JA007197**	**99**
06-29-18	**APCO Construction, Inc.'s Reply in Support of its Motion for Attorney's Fees and Costs Against Helix Electric of Nevada, LLC and Plaintiff in Intervention National Wood Products, Inc.**	**JA007198-JA007220**	**99**
	Exhibit 1 – Invoice Summary by Matter Selection	JA007221-JA007222	99
	Exhibit 2 – Marquis Aurbach Coffing Invoice to APCO dated April 30, 2018	JA007223-JA007224	99

Date	Description	Bates Number	Volume(s)
06-29-18	Helix Electric of Nevada, LLC's Reply Re: Motion to Retax	JA007225-JA007237	100
07-02-18	Notice of Entry of Order Granting Helix Electric of Nevada, LLC's Motion for Attorneys' Fees, Interest and Costs	JA007238-JA007245	100
07-19-18	Plaintiff-in-Intervention National Wood Products, Inc.'s Surreply to APCO Construction's Reply to Plaintiff-in-Intervention National Wood Products, Inc.'s Opposition to Motion for Attorney's Fees and Costs	JA007246-JA007261	100
08-08-18	Court's Decision on Attorneys' Fees and Cost Motions	JA007262-JA007280	100
09-28-18	Notice of Entry of (1) Granting APCO Construction, Inc.'s Motion for Attorneys' Fees and Costs (2) Granting APCO Construction, Inc.'s Memorandum of Costs in Part (3) Granting Helix Electric of Nevada, LLC's Motion to Retax in Part and Denying in Part (4) Granting Plaintiff in Intervention National Wood Products, LLC's Motion to Retax in Part and Denying in Part and (5) Granting National Wood Products, Inc.'s Motion to File a Surreply	JA007281-JA007299	100
01-24-19	Transcript for All Pending Fee Motions on July 19, 2018	JA007300-JA007312	100/101
07-12-19	Order Dismissing Appeal (Case No. 76276)	JA007313-JA007315	101

Date	Description	Bates Number	Volume(s)
08-06-19	**Helix Electric of Nevada LLC's Motion to (I) Re-Open Statistically Closed Case, (II) Dismiss All Unresolved Claims and/or (III) In the Alternative for a Rule 54(B) Certification as to Helix and APCO**	**JA007316-JA007331**	**101**
	Exhibit 1 – Judgment [As to the Claims of Helix Electric of Nevada, LLC and Plaintiff in Intervention National Wood Products, Inc.'s Against APCO Construction, Inc.	JA007332-JA007335	101
	Exhibit 2 – ORDER: (1) Granting APCO Construction, Inc. Motion for Attorneys Fees and Costs (2) Granting APCO Construction, Inc.'s Memorandum of Costs in Part (3) Granting Helix Electric of Nevada LLC's Motion to Retax in Part and Denying in Part and all related matters (4) Granting Plaintiff in Intervention National Wood Products LLC's Motion to Retax in Part and Denying in Part -and-(5) Granting National Wood Products, Inc.'s Motion to File a Surreply	JA007336-JA007344	101
	Exhibit 3 - Notice of Appeal	JA007345-JA007394	101/102
	Exhibit 4 – Amended Notice of Appeal	JA007395-JA007400	102
	Exhibit 5A – 5F -Notices of Entry of Order as to the Claims of Cactus Rose Construction, Fast Glass, Inc., Heinaman Contract Glazing, Helix Electric of Nevada, LLC, SWPPP Compliance	JA007401-JA007517	102/103

Date	Description	Bates Number	Volume(s)
	Solutions, Inc., E&E Fire Protection		
	Exhibit 6 – Order Dismissing Appeal in Part (Case No. 76276)	JA007518-JA007519	103
	Exhibit 7 – Order to Show Cause	JA007520-JA007542	103
	Exhibit 8 -Order Dismissing Appeal (Case No. 76276)	JA007524-JA007527	103
	Exhibit 9 – Notice of Entry of Order to Consolidate this Action with Case Nos. A574391, A574792, A57623. A58389, A584730, A58716, A580889 and A589195	JA 007528-JA007541	103
	Exhibit 10 (Part One)	JA007537-JA007542	103
	Exhibit 10A – Docket 09A587168 (Accuracy Glass & Mirror v. APCO)	JA007543-JA007585	103
	Exhibit 10B -Docket 08A571228 (APCO v. Gemstone)	JA007586-JA008129	103/104/105/106/107/108/109
	Exhibit 10C – Notice of Entry of Order to Consolidate this Action with Cases Nos A57. 4391, A574792, A577623, A583289, A584730, A587168, A580889 and A589195	JA008130-JA008138	109
	Exhibit 10D – Notice of Entry of Joint Order Granting, in Part, Various Lien Claimants' Motions for Partial Summary Judgment Against Gemstone Development West	JA008139-JA008141	109
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	Exhibit 10H – Complaint re Foreclosure	JA008178-JA008214	109
	Exhibit 10I – First Amended Complaint re Foreclosure	JA008215-JA008230	109
	Exhibit 10J – APCO Construction's Answer to Accuracy Glass & Mirror Company's First Amended Complaint re Foreclosure	JA008231-JA008265	109/110
	Exhibit 10K –Answer to Accuracy Glass & Mirror Company, Inc.'s Complaint and Camco Pacific Construction, Inc.'s Counterclaim	JA008266-JA008285	110
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	Exhibit 10U – APCO Construction's Answer to WRG Design Inc.'s amended Statement of Facts Constituting Lien and Third-Party Complaint	JA008468-JA008483	111
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	Exhibit 10AA – Notice of Entry of Granting Heinaman Glazing's Motion for Attorneys's Fees, Interest and Costs	JA008552-JA008579	111/112
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	Exhibit 10DD - Bruin Painting Corporation's Amended Statement of Facts Constituting Notice of Lien and Third-Party Complaint	JA008589-JA00861	112
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	Exhibit 10HH – APCO Construction's Answer to HD Supply Waterworks' Amended Statement of Facts Constituting Lien and Third-Party Complaint	JA008643-JA008657	112
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	Exhibit 11 – Order to Consolidate this Action with Case Nos. A574391, A574792, A57623. A58389, A584730, A58716, A580889 and A589195	JA008747-JA008755	113
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08-16-19	**APCO's Opposition to Helix Electric of Nevada LLC's Motion to (I) Re-Open Statistically Closed Case, (II) Dismiss All Unresolved Claims and/or (III) In the Alternative for a Rule 54(B) Certification as to Helix and APCO**	**JA008811-JA008821**	**114**
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	Exhibit 7 – Answer to Cactus Rose's Statement of Facts Constituting Notice of Lien and Complaint and Camco Pacific Construction Company Inc.'s Counterclaim	JA008948-JA008965	117
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	Exhibit 11 – Findings of Fact and Conclusions of Law as to the Claims of Heinaman Contract Glazing	JA009011-JA009024	118
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	Exhibit [C] – Notice of Entry of Order Granting Helix Electric of Nevada's Rule 54(b) Certification	JA009148-JA009156	120
02-11-20	**Case Appeal Statement**	**JA009157-JA009163**	120
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	Exhibit 2 – National Wood Products, Inc.'s Notice of Motion and Motion to Intervene and Memorandum of Points and Authorities in Support Thereof	JA006357-JA006369	86
	Exhibit 3 – Plaintiff in Intervention, National Wood Products, Inc.'s Findings of Fact and Conclusions of Law (Proposed)	JA006370-JA006385	86/87
	Exhibit 4 – Plaintiff in Intervention, National Wood Productions, Inc.'s Findings of Fact and Conclusions of Law Re Camco	JA006386-JA006398	87
	Exhibit 5 – Offer of Judgment to Helix Electric of Nevada, LLC	JA006399-JA006402	87
	Exhibit 6 – Offer of Judgment to Plaintiff in Intervention National Wood Products, Inc.	JA006403-JA006406	87
	Exhibit 7 – Declaration of John Randall Jefferies, Esq. in Support of APCO Construction, Inc.'s Motion for Attorney's Fees and Costs	JA006407-JA006411	87
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	Exhibit 7B – Time Recap	JA006443-JA006474	88
	Exhibit 8 – Declaration of Cody S. Mounteer, Esq. in Support of Motion for Attorney's Fees and Costs	JA006475-JA006478	88
	Exhibit 9 – APCO Construction, Inc.'s Memorandum of Costs and Disbursements [Against Helix Electric of Nevada, LLC, and Plaintiff in Intervention National Wood Products, LLC]	JA006479-JA006487	88
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06-06-13	**APCO's Limited Motion to Lift Stay for Purposes of this Motion Only; (2) APCO's Motion for Summary Judgment Against Gemstone Only; and (3) Request for Order Shortening Time**	**JA000044-JA000054**	**1**
	Exhibit 1 – Affidavit of Randy Nickerl in Support of (I) APCO's Limited Motion to Lift Sta for Purposes of this Motion Only; (2) APCO's Motion for Judgment Against Gemstone Only	JA000055-JA000316	1/2/4/5/6
	Exhibit 2 – Findings of Fact and Conclusions of Law and Judgment in Favor of APCO Construction Against Gemstone Development West, Inc. Only	JA000317-JA000326	6
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11-06-17	**APCO Construction, Inc.'s Omnibus Motion *in Limine***	**JA000590 JA000614**	**9**
	Exhibit 1 – Second Amended Notice of taking NRCP Rule 30(b)(6) Deposition of Person Most Knowledgeable for Zitting Brothers Construction, Inc.	JA000615-JA000624	9
	Exhibit 2 – Zitting Brothers Construction, Inc.'s Motion for Partial Summary Judgment Against APCO Construction	JA000625-JA000646	9
	Exhibit 3 – Excerpts from Samuel Zitting's Deposition Transcript taken October 27, 2017	JA000647-JA000678	9/10
	Exhibit 4 – Statement of Facts Constituting Lien on Behalf of Buchele, Inc.	JA000679-JA000730	10
	Exhibit 5 – Subcontract Agreement dated April 17, 2007	JA000731-JA000808	10/11
	Exhibit 6 – Subcontract Agreement dated April 17, 2007	JA000809-JA000826	11/12
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	Exhibit 13 – Amended Notice of Taking NRCP Rule 30(b)(6) Deposition of Person Most Knowledgeable for Helix Electric of Nevada, LLC	JA000865-JA000873	12
	Exhibit 14 – Excerpts from Helix Electric of Nevada, LLC's 30(b)(6) Witness Deposition Transcript taken July 20, 2017	JA000874-JA000897	12
03-23-18	**APCO Opposition to Helix Electric of Nevada, LLC's Findings of Fact and Conclusions of Law**	**JA006125-JA006172**	**83/84**
08-16-19	**APCO's Opposition to Helix Electric of Nevada LLC's Motion to (I) Re-Open Statistically Closed Case, (II) Dismiss All Unresolved Claims and/or (III) In the Alternative for a Rule 54(B) Certification as to Helix and APCO**	**JA008811-JA008821**	**114**
	Exhibit 1 – Order to File Amended Docketing Statement	JA008822-JA008824	114
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	Exhibit 3 – Appellant/Cross-Respondent's Response to Order to Show Cause	JA008829-JA008892	114/115/116
	Exhibit 4 – Order Dismissing Appeal	JA008893-JA008896	116
	Exhibit 5 – Chart of Claims	JA008897-JA008924	116
	Exhibit 6 – Answer to Helix Electric's Statement of Facts Constituting Lien and Third-Party Complaint and Camco	JA008925-JA008947	116/117

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	Exhibit 8 – Answer to Heinaman Contract Glazing's Statement of Facts Constituting Lien and Third-Party Complaint and Camco Pacific Construction's Counterclaim	JA008966-JA008986	117/118
	Exhibit 9 – Findings of Fact and Conclusions of Law as to the Claims of Helix Electric of Nevada, LLC Against Camco Pacific Construction, Inc.	JA008987-JA008998	118
	Exhibit 10 – Findings of Fact and Conclusions of Law as to the Claims of Cactus Rose Construction Co., Inc.	JA008998-JA009010	118
	Exhibit 11 – Findings of Fact and Conclusions of Law as to the Claims of Heinaman Contract Glazing	JA009011-JA009024	118
	Exhibit 12 – Notice of Entry of Decision, Order and Judgment on Defendant Scott Financial Corporation's Motion for Summary Judgment as to Priority of Liens	JA009025-JA009038	118
	Exhibit 13 – Findings of Fact and Conclusions of Law as to the Claims of Helix Electric and Cabenetec Against APCO	JA009039-JA009110	118/119
	Exhibit 14 – Order Granting Motion to Deposit Bond Penal Sum with Court, Exoneration of Bond and Dismissal	JA009111-JA009113	119
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11-14-17	**APCO Construction, Inc.'s Opposition to Helix Electric of Nevada, LLC's Motions *in Limine* Nos. 1-4**	**JA000929-JA000940**	**13/14**
	Exhibit 1 – Excerpts from the Deposition Transcript of Mary Jo Allen taken July 18, 2017	JA000941-JA000966	14/15/16
	Exhibit 2 – Helix Electric's Manhattan West Billing/Payment Status through August 2008	JA000967-JA000969	16/17
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08-21-17	**APCO Construction's Opposition to Peel Brimley Lien Claimants' Partial Motion for Summary Judgment Precluding Defenses Based on Pay-if-Paid Agreements**	**JA000393-JA000409**	**6/7**
	Exhibit A – Excerpt from 30(b)(6) Witness for Helix Electric of Nevada, LLC taken July 20, 2017	JA000410-JA000412	7
03-08-18	**APCO Construction Inc.'s Post-Trial Brief**	**JA006059-JA006124**	**82/83**
11-15-17	**APCO Construction, Inc.'s Reply in Support of its Omnibus *Motion in Limine***	**JA001133 JA001148**	**21**

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06-29-18	**APCO Construction, Inc.'s Reply in Support of its Motion for Attorney's Fees and Costs Against Helix Electric of Nevada, LLC and Plaintiff in Intervention National Wood Products, Inc.**	**JA007198-JA007220**	**99**
	Exhibit 1 – Invoice Summary by Matter Selection	JA007221-JA007222	99
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04-26-10	**CAMCO and Fidelity's Answer and CAMCO's Counterclaim**	**JA000031-JA000041**	**1**
11-14-17	**Camco Pacific Construction Company, Inc.'s Opposition to Lien Claimants' Motions in Limine Nos. 1-6**	**JA000898-JA000905**	**12**
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	Exhibit C – E-mail from Alex Edelstein dated December 15, 2008 Re: Letter to Subs	JA000916-JA000917	13
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04-25-18	**Findings of Fact and Conclusions of Law and Order as the Claims of Helix Electric and Cabinetec Against APCO**	**JA006194-JA006264**	**84/85**
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06-01-18	**Helix Electric of Nevada, LLC's Motion for Attorneys' Fees, Interest and Costs**	**JA006551-JA006563**	**90**
	Exhibit 1 – Findings of Fact and Conclusions of Law and Order as to the Claims of Helix Electric of Nevada, LLC Against Camco Pacific Construction, Inc.	JA006564-JA006574	90
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	Exhibit 4 – Declaration of Eric B. Zimbelman in Support of Helix Electric of Nevada, LLC's Motion for Attorneys' Fees, Interest and Costs	JA006583-JA006588	90
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08-06-19	**Helix Electric of Nevada LLC's Motion to (I) Re-Open Statistically Closed Case, (II) Dismiss All Unresolved Claims and/or (III) In the Alternative for a Rule 54(B) Certification as to Helix and APCO**	**JA007316-JA007331**	**101**
	Exhibit 1 – Judgment [As to the Claims of Helix Electric of Nevada, LLC and Plaintiff in Intervention National Wood Products, Inc.'s Against APCO Construction, Inc.	JA007332-JA007335	101
	Exhibit 2 – ORDER: (1) Granting APCO Construction, Inc. Motion for Attorneys Fees and Costs (2) Granting APCO Construction, Inc.'s Memorandum of Costs in Part (3) Granting Helix Electric of Nevada LLC's Motion to Retax in Part and Denying in Part and all related matters (4) Granting Plaintiff in Intervention National Wood Products LLC's Motion to Retax in Part and Denying in Part -and-(5) Granting National Wood Products, Inc.'s Motion to File a Surreply	JA007336-JA007344	101
	Exhibit 3 - Notice of Appeal	JA007345-JA007394	101/102
	Exhibit 4 – Amended Notice of Appeal	JA007395-JA007400	102
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	Exhibit 7 – Order to Show Cause	JA007520-JA007542	103
	Exhibit 8 -Order Dismissing Appeal (Case No. 76276)	JA007524-JA007527	103
	Exhibit 9 – Notice of Entry of Order to Consolidate this Action with Case Nos. A574391, A574792, A57623. A58389, A584730, A58716, A580889 and A589195	JA 007528-JA007541	103
	Exhibit 10 (Part One)	JA007537-JA007542	103
	Exhibit 10A – Docket 09A587168 (Accuracy Glass & Mirror v. APCO)	JA007543-JA007585	103
	Exhibit 10B -Docket 08A571228 (APCO v. Gemstone)	JA007586-JA008129	103/104/105/106/107/108 109
	Exhibit 10C – Notice of Entry of Order to Consolidate this Action with Cases Nos A57. 4391, A574792, A577623, A583289, A584730, A587168, A580889 and A589195	JA008130-JA008138	109
	Exhibit 10D – Notice of Entry of Joint Order Granting, in Part, Various Lien Claimants' Motions for Partial Summary Judgment Against Gemstone Development West	JA008139-JA008141	109
	Exhibit 10 (Part Two)	JA008142-JA008149	109
	Exhibit 10E – 131 Nev. Advance Opinion 70	JA008150-JA008167	109
	Exhibit 10F – Special Master Report Regarding Remaining Parties to the Litigation and Discovery Status	JA008168-JA008170	109

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	Exhibit 10EG – Notice of Entry of Granting Plaintiff's Motion to Dismiss	JA008171-JA008177	109
	Exhibit 10H – Complaint re Foreclosure	JA008178-JA008214	109
	Exhibit 10I – First Amended Complaint re Foreclosure	JA008215-JA008230	109
	Exhibit 10J – APCO Construction's Answer to Accuracy Glass & Mirror Company's First Amended Complaint re Foreclosure	JA008231-JA008265	109/110
	Exhibit 10K –Answer to Accuracy Glass & Mirror Company, Inc.'s Complaint and Camco Pacific Construction, Inc.'s Counterclaim	JA008266-JA008285	110
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	Exhibit 10N – APCO Construction's Answer to Helix Electric's Amended Statement of Facts Constituting Lien and Third-Party Complaint	JA008307-JA008322	110
	Exhibit 10O – Answer to Helix Electric's Statement of Facts Constituting Lien and Third-Party Complaint and Camco Pacific Construction Company Inc.'s Counterclaim	JA008323-JA008338	110
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	Exhibit 10FF – Voluntary Dismissal of Fidelity and Deposit Company of Maryland Only from Bruin Painting Corporation's Amended Statement of Facts Constituting Notice of Lien and Third-Party Complaint Without Prejudice	JA008622-JA008624	112
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03-08-18	**Letter to Judge Denton submitting APCO Construction, Inc.'s Proposed Findings of Fact and Conclusions of Law**	**JA005986-JA006058**	**8/821**
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01-04-18	**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 provision on an Order Shortening Time**	**JA001199-JA001217**	**22**
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	Exhibit 10 – Order Granting Peel Brimley Lien Claimants' Motion for Partial Summary Judgment Precluding Defenses Based on Pay-if-Paid Agreements	JA001386-JA001392	26
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01-29-20	**Notice of Appeal**	**JA009132-JA009136**	**119/120**
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06-01-18	**Notice of Entry of Judgment [As to the Claims of Helix Electric of Nevada, LLC and Plaintiff in Intervention National Wood Products, Inc.'s Against APCO Construction, Inc.]**	**JA006541 JA006550**	**90**
09-28-18	**Notice of Entry of Order (1) Granting APCO Construction, Inc.'s Motion for Attorneys' Fees and Costs (2) Granting APCO Construction, Inc.'s Memorandum of Costs in Part (3) Granting Helix Electric of Nevada, LLC's Motion to Retax in Part and Denying in Part (4) Granting Plaintiff in Intervention National Wood Products, LLC's Motion to Retax in Part and Denying in Part and (5) Granting National Wood Products, Inc.'s Motion to File a Surreply**	**JA007281-JA007299**	**100**
12-29-17	**Notice of Entry of Order Granting in Part and Denying in Part APCO Construction's Omnibus Motion *in Limine***	**JA001178-JA001186**	**22**
07-02-18	**Notice of Entry of Order Granting Helix Electric of Nevada, LLC's Motion for Attorneys' Fees, Interest and Costs**	**JA007238-JA007245**	**100**
01-03-20	**Notice of Entry of Order Granting Helix Electric of Nevada, LLC's Motion for Rule 54(b) Certification**	**JA009124-JA009131**	**119**

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12-29-17	**Notice of Entry of Order Granting in Part and Denying in Part Helix Electric of Nevada, LLC's Motion *in Limine* 1-4**	**JA001170-JA001177**	**22**
12-29-17	**Notice of Entry of Order Granting Peel Brimley Lien Claimants' Motion *in Limine* 1-6**	**JA001161-JA001169**	**22**
01-19-18	**Order Denying APCO Construction's Motion for Reconsideration of Order Granting Partial Summary Judgment Precluding Defenses Based on Pay-if-Paid Agreements**	**JA005282-JA005283**	**78**
07-12-19	**Order Dismissing Appeal (Case No. 76276)**	**JA007332-JA007334**	**101**
07-02-10	**Order Striking Defendant Gemstone Development West, Inc.'s Answer and Counterclaim and Entering Default**	**JA000042-JA000043**	**1**
08-02-17	**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**	**JA000328-JA000342**	**6**
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	Exhibit 2 – Camco Pacific Construction Company, Inc.'s Responses to Helix Electric of Nevada, LLC's Interrogatories	JA000380-JA000392	6
11-06-17	**Peel Brimley Lien Claimants' Motion in Limine Nos. 1-6**	**JA000419-JA000428**	**7**
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	Exhibit 3 – Excerpt from David E. Parry's Deposition Transcript taken June 20, 2017	JA000473 JA00489	8
	Exhibit 4 – Cactus Rose Construction, Inc.'s First Set of Request for Admissions to Camco Pacific Construction	JA00490 JA000500	8
	Exhibit 5 – Fast Glass, Inc.'s First Set of Request for Admissions to Camco Pacific Construction	JA000501-JA000511	8
	Exhibit 6 – Heinaman Contract Glazing, Inc.'s First Set of Request for Admissions to Camco Pacific Construction	JA000512-JA000522	8
	Exhibit 7 – Helix Electric of Nevada, LLC's First Set of Request for Admissions to Camco Pacific Construction	JA000523-JA000533	8
09-28-17	**Peel Brimley Lien Claimants' Reply to Oppositions to Motion for Partial Summary Judgment Precluding Defenses Based on Pay-if-Paid Agreements**	**JA000413-JA00418**	**7**
01-09-18	**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**	**JA001552-JA001560**	**27**
06-18-18	**Plaintiff in Intervention National Wood Products, Inc.'s Joinder to Helix Electric of Nevada, LLC's Opposition**	**JA007190-JA007192**	**99**

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07-19-18	**Plaintiff-in-Intervention National Wood Products, Inc.'s Surreply to APCO Construction's Reply to Plaintiff-in-Intervention National Wood Products, Inc.'s Opposition to Motion for Attorney's Fees and Costs**	**JA007246-JA007261**	**100**
01-10-18	**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**	**JA001561-JA001573**	**27**
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	Trial Exhibit 104 - Email from R. Zitting to R. Nickerl re: change orders adjusted to $30 per hour with copies of change orders	JA002506-JA002526	44
	Trial Exhibit 105 - Ex. C to the Ratification – Zitting Quotes	JA002527-JA002528	44
	Trial Exhibit 106 - Unconditional Lien Release – Zitting ($27,973.80)	JA002529	44
	Trial Exhibit 108 - Photo of Video (Construction Project)	JA002530-JA002531	44
	Trial Exhibit 109 - Photo of Video (Construction Project)	JA002532-JA002533	44
	Trial Exhibit 110 - Photo of Video (Construction Project)	JA002534-JA002535	44
	Trial Exhibit 111 - Photo of Video (Construction Project)	JA002536-JA002537	44
	Trial Exhibit 112 - Photo of Video (Construction Project)	JA002538-JA002539	44
	Trial Exhibit 113 -Photo of Video (Construction Project)	JA002550-JA002541	44
	Trial Exhibit 114 -Photo of Video (Construction Project)	JA002542-JA002543	44
	Trial Exhibit 115 - Progress Payment No. 9 Remitted to Zitting	JA002544-JA002545	44
	Trial Exhibit 116 - Ratification and Amendment of Subcontract Agreement between Buchele and Camco	JA002546-JA002550	44
	Trial Exhibit 117 - C to the Ratification	JA002551-JA002563	44
	Trial Exhibit 118 - Q&A from Gemstone to subcontracts	JA002564-JA002567	44
	Trial Exhibit 119 - Check No. 528388 payable to APCO ($33,847.55) – Progress Payment No. 8.1 and 8.2	JA002568-JA002571	44

Date	Description	Bates Number	Volume(s)
	Trial Exhibit 120 - Tri-City Drywall Pay Application No. 7 to APCO as submitted to Owner. Show percentage complete for Zitting	JA002572-JA002575	44/45
	Trial Exhibit 127 - Photo of Video (Construction Project)	JA002576-JA002577	45/46
	Trial Exhibit 128 - Photo of Video (Construction Project)	JA002578-JA002579	46
	Trial Exhibit 129 - Photo of Video (Construction Project)	JA002580-JA002581	46
	Trial Exhibit 138 - Memo from Scott Financial to Nevada State Contractors Board Re: Explanation of Project Payment Process	JA002582-JA002591	46
	Trial Exhibit 152 -Terms & Conditions modified by APCO, Invoices and Check Payment	JA002592-JA002598	46
	National Wood Products Related Exhibits:		
	Trial Exhibit 160 - Documents provided for settlement	JA002599-JA002612	46
	CAMCO Related Exhibits:		
	Trial Exhibit 163 - Camco Pay Application No. 12 to Gemstone	JA002613-JA002651	46/47
	Trial Exhibit 165 - Letter from D. Parry to A. Edelstein re: Gemstone losing funding for project	JA002652-JA002653	47
	Trial Exhibit 166 - Letter from D. Parry to G. Hall re: withdrawal of funding	JA002654 JA002656	47
	Helix Related Exhibits:		47
	Trial Exhibit 169 - Helix Exhibit to Standard Subcontract Agreement with Camco	JA 002665 JA002676	47/48
	Trial Exhibit 170 - Subcontract Agreement between Helix and Camco (unsigned)	JA002677-JA002713	48

Date	Description	Bates Number	Volume(s)
	Trial Exhibit 171 - Work Order No. 100	JA002714-JA002718	48
	Trial Exhibit 172 - Letter from J. Griffith to Victor Fuchs Re: Gemstone's intention to continue retention of Helix w/copy of Ratification and Amendment of Subcontract Agreement	JA002719-JA002730	48
	Trial Exhibit 173 - Helix Pay Application No. 16713-012 to Camco with proof of payment	JA002731-JA002745	48
	Trial Exhibit 174 - Helix Change Order Request No. 28	JA002746-JA002747	48
	Trial Exhibit 175 - Change Notice No. 41	JA002748-JA002751	48
	Trial Exhibit 176 - Helix Pay Application No. 16713-013 to Camco	JA002752-JA002771	48/49
	Trial Exhibit 177 - Helix Pay Application No. 16713-014 to Camco	JA002772-JA002782	49
	Trial Exhibit 178 - Camco's letter to Helix rejecting Pay Application No. 16713-015 with attached copy of Pay Application	JA002783 JA002797	49
	National Wood/Cabinetec Related Exhibits:		
	Trial Exhibit 184 - Ratification and Amendment of Subcontract Agreement between CabineTec and Camco (fully executed copy)	JA002798-JA002825	49
	General Related Exhibits:		
	Trial Exhibit 218 - Camco/Owner Pay Application No. 11 w/Backup	JA002826-JA003028	50/51/52
	Trial Exhibit 220 - Camco/Owner Pay Application No. 12 w/Backup	JA003029-JA003333	52/53/54/55
	Trial Exhibit 313 - Letter from A. Edelstein to R. Nickerl re: NRS 624 Notice	JA003334-JA003338	55
	Helix Trial Exhibits:		

Date	**Description**	**Bates Number**	**Volume(s)**
	Trial Exhibit 501 - Payment Summary	JA003339 – JA003732	55/56/57/ 58/59/60
	Trial Exhibit 508 – Helix Pay Application	JA003733- JA003813	60/61
	Trial Exhibit 510 - Unsigned Subcontract	JA003814- JA003927	61/62
	Trial Exhibit 512 - Helix's Lien Notice	JA003928- JA004034	62/63
	Trial Exhibit 522 - Camco Billing	JA004035- JA005281	63/64/65/66/67/ 68/69/70 /71/72 /73/74/75/ 76/77
01-17-18	**Transcript Bench Trial (Day 1)**[5]	**JA001668- JA001802**	**29/30**
	Trial Exhibit 1 - Grading Agreement ***(Admitted)***	JA001803- JA001825	30
	Trial Exhibit 2 – APCO/Gemstone General Construction Agreement ***(Admitted)***	JA001826- JA001868	30
	Trial Exhibit 3 - Nevada Construction Services /Gemstone Cost Plus/GMP Contract Disbursement Agreement ***(Admitted)***	JA001869- JA001884	30
	Trial Exhibit 4 - APCO Pay Application No. 9 Submitted to Gemstone ***(Admitted)***	JA001885- JA001974	30/31/32
	Trial Exhibit 5 - Letter from J. Barker to A. Edelstein re: APCO's Notice of Intent to Stop Work ***(Admitted)***	JA001975- JA001978	32
	Trial Exhibit 6 - Letter from J. Barker to A. Edelstein re: APCO's Notice of Intent to Stop Work ***(Admitted)***	JA001979- JA001980	32
	Trial Exhibit 10 - Letter from J. Barker to A. Edelstein Re: Notice of Intent to Stop Work (Second Notice) ***(Admitted)***	JA001981- JA001987	32

[5] Filed January 31, 2018

Date	**Description**	**Bates Number**	**Volume(s)**
	Trial Exhibit 13 - Letter from A. Edelstein to Re. Nickerl Re: Termination for Cause (Gemstone) ***(Admitted)***	JA001988-JA002001	32
	Trial Exhibit 14 - Letter from W. Gochnour to Sean Thueson Re: [APCO's] Response to [Gemstone's] Termination for Cause ***(Admitted)***	JA002002-JA002010	33
	Trial Exhibit 15 - Letter from R. Nickerl to A. Edelstein Re: 48-Hour Notices ***(Admitted)***	JA002011-JA002013	33
	Trial Exhibit 16 - Email from J. Horning to A. Berman and J. Olivares re: Joint Checks ***(Admitted)***	JA002014	33
	Trial Exhibit 23 - APCO Subcontractor Notice of Stopping Work and Letter from J. Barker to A. Edelstein Re: Notice of Stopping Work and Notice of Intent to Terminate Contract ***(Admitted)***	JA002015-JA002016	33
	Trial Exhibit 24 - Letter from R. Nickerl to Clark County re: Notification of APCO's withdrawal as General Contractor of Record ***(Admitted)***	JA002017-JA002023	33
	Trial Exhibit 26 - Email from J. Gisondo to Subcontractors re: June checks ***(Admitted)***	JA002024	34
	Trial Exhibit 27 - Letter from A. Edelstein to R. Nickerl re: June Progress Payment ***(Admitted)***	JA002025-JA002080	34
	Trial Exhibit 28 - Letter from J. Barker to A. Edelstein Re: Termination of Agreement for GMP ***(Admitted)***	JA002081	34
	Trial Exhibit 31 - Transmission of APCO's Pay Application No. 11 as Submitted to Owner ***(Admitted)***	JA002082-JA002120	34/35
	Trial Exhibit 45 - Subcontractor Agreement ***(Admitted)***	JA002121-JA002146	35

Date	**Description**	**Bates Number**	**Volume(s)**
	Trial Exhibit 162 - Amended and Restated General Construction Agreement between Gemstone and CAMCO ***(Admitted)***	JA002147-JA002176	35/36
	Trial Exhibit 212 - Letter from Edelstein to R. Nickerl re: NRS 624 Notice ***(Admitted)***	JA002177-JA002181	36
	Trial Exhibit 215 - Email from C. Colligan to Subcontractors re: 48-hour Termination Notice ***(Admitted)***	JA002182-JA002185	36
	Trial Exhibit 216 - Email from C. Colligan re: Meeting with Subcontractors ***(Admitted)***	JA002186-JA002188	36
	Trial Exhibit 506 – Email and Contract Revisions ***(Admitted)***	JA002189 – JA002198	36
01-18-18	**Transcript – Bench Trial (Day 2)**[6]	JA005284-JA005370	78
	Trial Exhibit 535 – Deposition Transcript of Andrew Rivera (Exhibit 99) ***(Admitted)***	JA005371-JA005623	78/79/80
01-19-18	**Transcript – Bench Trial (Day 3)**[7]	JA005624-JA005785	80
	Trial Exhibit 231 – Helix Electric's Amended Statement of Facts Constituting Notice of Lien and Third-Party Complaint ***(Admitted)***	JA005786-JA005801	80
	Trial Exhibit 314 - Declaration of Victor Fuchs in support of Helix's Motion for Partial Summary Judgment against Gemstone ***(Admitted)***	JA005802-JA005804	80
	Trial Exhibit 320 – June-August Billings—not paid to APCO ***(Admitted)***	JA005805	80
	Trial Exhibit 321 – Overpayments to Cabinetec ***(Admitted)***	JA005806-	80

[6] Filed January 31, 201879
[7] Filed January 31, 2018

Date	**Description**	**Bates Number**	**Volume(s)**
	Trial Exhibit 536 – Lien math calculations (handwritten) ***(Admitted)***	JA005807-JA005808	80
	Trial Exhibit 804 – Camco Correspondence ***(Admitted)***	JA005809-JA005816	80
	Trial Exhibit 3176 – APCO Notice of Lien ***(Admitted)***	JA005817-JA005819	81
01-24-18	**Transcript – Bench Trial (Day 5)**[8]	**JA005820-JA005952**	81
01-24-19	**Transcript for All Pending Fee Motions on July 19, 2018**	**JA007300-JA007312**	**100/101**

[8] Filed January 31, 2018

So Helix's counsel's attempts to avoid the agreed upon retention schedule are unpersuasive and not supported by the evidence.

Notably, the Helix Subcontract did not contain a provision purporting to waive Helix's statutory lien rights.

3. CabineTec

Gemstone also selected CabineTec, Inc. ("CabineTec") to serve as APCO's cabinet subcontractor.[53] APCO entered into a subcontract with CabineTec on April 28, 2008 for the delivery and installation of cabinets on the Project (the "CabineTec Subcontract")[54]

CabineTec's Subcontract contained the same retention and progress payment schedules quoted above from the Helix Subcontract.[55] CabineTec's Nicholas Cox[56] admitted CabineTec did not change the retention payment schedule found in Section 3.8.[57]

CabineTec and APCO also signed an August 6, 2008 letter regarding Terms & Conditions.[58] That letter confirmed that CabineTec would be paid when "APCO receives payment from Gemstone per subcontract."[59]

The CabineTec Subcontract does not contain a waiver of CabineTec's right to place a mechanic's lien on the Project.

D. The Contract was terminated.

APCO did not finish the Project as the general contractor.[60] Despite APCO's performance, issues with Gemstone's payments started in May 2008 and Gemstone

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[52] Testimony of Bob Johnson (Helix), Day 2, p. 9.

[53] Testimony of Joe Pelan (APCO), Day 1, p. 89.

[54] Exhibit 149, CabineTec Subcontract.

[55] Exhibit 149.

[56] Mr. Cox was the president of CabineTec during the Project. Testimony of Nicholas Cox (CabineTec) Testimony Day 3, p. 13.

[57] Testimony of Nicholas Cox (CabineTec), Day 3, p. 29.

[58] Exhibit 152.

[59] Exhibit 152.

[60] Testimony of Brian Benson (APCO) at Day 3, p. 50; Testimony of Mary Jo Allen (APCO), Day 3, p. 122.

reduced the May Pay Application to exclude any money for APCO:[61] "Gemstone will withhold $226,360.88 from the May Progress Payment (the "Withheld Amount" in addition to the 10% retainage that was already being withheld. The Withheld Amount represents the APCO Construction Contractor's Fee line-item from the May Progress Payment."[62] As a result, Gemstone only paid the subcontractors for the May time period. Given the wrongful withholding, APCO provided Gemstone with written notice of its intent to stop work pursuant to NRS 624.610 if APCO was not paid in full.[63]

On or about July 18, 2008, APCO submitted its pay application for the month ending June 30, 2008, and requested $6,566,720.38 (the "June Application").[64] The cover page of the June Application, like all other pay applications, tracked the total value of the Contract, the total requested for that month, subcontractor billings and retention.[65] The June Application shows Gemstone was withholding $4,742,574.01 in retainage as of that date.[66]

On July 18, 2008, APCO sent Gemstone a notice of intent to stop work for its failure to pay the May Application as follows.

> Specifically, Gemstone has failed to pay $3,434,396.50 for Application for Payment No. 8, Owner Draw No. 7, which was submitted to Gemstone on June 20, 2008, and was due no later than July 11, 2008 pursuant to NRS 624.609(A). Accordingly, THIS LETTER SHALL SERVE AS APCO'S NOTICE OF INTENT TO STOP WORK PURSUANT TO NRS 624.609 THROUGH NRS 624.630, INCLUSIVE, UNLESS APCO IS PAID THE TOTAL AMOUNT OF $3,434,396.50 FOR ITS WORK ON THE PROJECT... Accordingly, pursuant to NRS 624.609(1)(b), payment was due to APCO within 21 days of its request for payment (again, no later than July 11, 2008). To date, no payment has been made...If APCO has not been paid

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[61] Testimony of Joe Pelan (APCO), Day 1, pp. 28 and 31.

[62] Exhibit 212-1.

[63] Exhibit 5.

[64] Exhibit 4.

[65] Testimony of Joe Pelan (APCO), Day 1, pp. 28 and 29; Exhibit 4.

[66] Exhibit 4; Testimony of Joe Pelan (APCO), Day 1, p. 30.

> for Application for Payment No. 8, Owner Construction Draw No. 7, in the amount of $3,434,396.50 by the close of business on Monday, July 28, 2008, APCO reserves the right to stop work on the Project anytime after that date. While APCO is willing to continue to work with Gemstone to get these issues resolved, APCO is not waiving its right to stop work any time after July 28, 2008, if APCO continues to work on the Project or otherwise attempts to resolve these issues with Gemstone.[67]

On July 28, 2008, APCO sent a letter confirming that APCO would stop working unless Gemstone made full payment to APCO for all past due amounts:

> As you area aware, on July 17, 2008, APCO provided Gemstone with written notice that unless APCO was paid the full amount of $3,434,396 by the close of business on Monday, July 28, 2008, that APCO would stop work on the Project. Gemstone failed to make full payment and has improperly withheld $203,724.29, despite having no good faith or proper statutory basis for withholding the payment. AS a result, APCO is stopping work on the Manhattan West Project effective immediately.
>
> In addition to stopping work on the project, APCO hereby asserts its rights to terminate the contract pursuant to NRS 624.610(2). THIS LETTER SHALL SERVICE AS APCO'S NOTICE OF INTENT TO TERMINATE THE MANHATTAN WEST GENERAL CONSTRUCTION CONTRACT FOR GMP PURSUANT TO NRS 624.606 THROUGH NRS 624.630, INCLUSIVE, PURSUANT TO THE TERMS OF THE NRS 624.610, THE CONTRACT SHALL BE TERMINATED AS OF AUGUST 14, 2008.[68]

Helix was aware that shortly after a July 11, 2008 email,[69] APCO began issuing stop work notices to Gemstone on the Project.[70] Gemstone ultimately paid APCO for May.[71]

In addition, on July 29, 2008, APCO sent the following letter to its subcontractors:

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[67] Exhibit 5.

[68] Exhibit 6.

[69] Exhibit 506, p. 1.

[70] Testimony of Bob Johnson (Helix), Day 1, p. 113.

[71] Testimony of Joe Pelan (APCO) Day 1, p. 31.

> As most of you are now aware, APCO Construction and GEMSTONE are embroiled in an unfortunate contractual dispute which has resulted in the issuance of a STOP WORK NOTICE to GEMSTONE. While it is APCO Construction's desire to amicably resolve these issues so work may resume, it must also protect its contractual and legal rights. This directive is to advise all subcontractors on this project that until further notice, all work on the Manhattan West project will remain suspended.
>
> THIS SUSPENSION IS NOT A TERMINATION OF THE GENERAL CONTRACT AT THIS TIME AND AS SUCH ALL SUBCONTRACTORS ARE STILL CONTRACTUALLY BOUND TO THE TERMS OF THEIR RESPECTIVE SUBCONTRACTS WITH APCO CONSTRUCTION. Additionally, the subcontractors are advised that, at the present time they are not obligated to perform any subcontract work on the project at the direction or insistence of Gemstone.
>
> We will keep all subcontractors advised on a timely basis if the status of the work suspension changes. Should you have any questions, feel free to call.[72]

On July 30, 2008, Scott Financial, the Project's lender, sent a letter to APCO confirming the loan for the Project was in good standing.[73]

On or about August 6, 2008, Gemstone provided APCO notice of its intent to withhold the sum of $1,770,444.28 from APCO for the June Application.[74] Accordingly, APCO sent Gemstone another notice of intent to stop work on August 11, 2008, noting that if APCO was not paid by August 21, 2008, APCO would suspend work on the Project:

> On July 18, 2008, APCO Construction submitted its Progress Payment for June 2008 pursuant to the terms of the General Construction Agreement for GMP, dated September 6, 2007 in the amount of $6,566,720.38. This number has since been adjusted on your submittal to the lender to reflect $5,409,029.42 currently due to APCO Construction. We understand this number reflects certain upward adjustments to change orders made after the Progress Payment was submitted

[72] Exhibit 48.

[73] Exhibit 7.

[74] Exhibit 313.

on July 18, 2008. Pursuant to NRS 624.609(1), this payment was due on or before August 8, 2008. By way of good faith agreement extended by APCO Construction to Peter Smith, this deadline was extended for three (3) days as a result of what were intended to be "good faith" efforts to fully resolve certain change order issues. While APCO Construction does not feel at this time that Gemstone participated in good faith, we will nevertheless honor our commitment to you to extend the deadline. Accordingly, and pursuant to the aforementioned statute and agreement, deadline for payment for the June Progress Payment was close of business Monday, August 11, 2008.

...

In review of your August 6, 2008 correspondence you have provided a "withholding breakdown" wherein you have given notice of your intent to withhold $1,770,444.28, allegedly pursuant to NRS 624.609(3) and Section 5.05(d) and 5.05(f)(vii) of the Agreement.

...

As such, the correct amount of the June Progress Payment should be $6,183,445.24. As of this date, Gemstone has failed and/or refused to pay the June Progress Payment.

THIS LETTER SHALL SERVE AS APCO'S NOTICE OF INTENT TO STOP WORK PURSUANT TO NRS 624.606 THROUGH NRS 624.630, INCLUSIVE, UNLESS APCO IS PAID THE TOTAL AMOUNT OF $6,183,445.24 FOR ITS WORK ON THE PROJECT.

IF APCO CONSTRUCTION HAS NOT BEEN PAID FOR PAYMENT NO. 9 OWNER CONSTRUCTION DRAW NO. 8, IN THE AMOUNT OF $6,183,445.24 BY CLOSE OF BUSINESS ON THURSDAY, AUGUST 21, 2008, APCO CONSTRUCTION RESERVES THE RIGHT TO STOP WORK ON THE PROJECT ANYTIME AFTER THAT DATE.

As we have previously demonstrated, APCO Construction will continue to work with Gemstone to resolve the various issues affecting this project, however, we will not waive our right to

> stop work anytime after August 21, 2008. We trust you will give this Notice appropriate attention.[75]

All subcontractors were copied on this notice.[76] APCO informed all subcontractors that it intended to terminate the Contract as of September 5, 2008.[77] Helix's Project Manager, Andy Rivera,[78] admitted that he received APCO's stop work notice and possible termination.[79]

After receipt of APCO's written notice, Gemstone sent a letter on Friday, August 15, 2008, claiming that APCO was in breach of contract and that Gemstone would terminate the Contract for cause if the alleged breaches were not cured by Sunday, August 17, 2008.[80] That letter divided APCO's alleged breaches into curable breaches and non-curable breaches[81] and also confirmed that upon termination: "(a) all Third-Party Agreements shall be assigned to Gemstone and (b) APCO must execute and deliver all documents and take such steps as Gemstone may require for the purpose of fully vesting in Gemstone the rights and benefits of such assigned Third-Party Agreements."[82]

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[75] Exhibit 10; Testimony of Joe Pelan (APCO) Day 1, pp. 30 and 32.

[76] Testimony of Joe Pelan (APCO), Day 1, p. 31; Exhibit 10.

[77] Exhibit 23; Testimony of Joe Pelan (APCO), Day 1, p. 74.

[78] Andy Rivera was Helix's Project Manager. Testimony of Andy River (Helix), Day 2, p. 48. As the Project Manager, he was in charge of labor, materials, subcontractors, labor reports, billings, change orders, submittals, requests for information, and most other documents on the Project. Mr. Rivera reported to Robert Johnson. Testimony of Andy Rivera (Helix), Day 2, p. 48. Andy Rivera prepared Helix's pay applications. Testimony of Bob Johnson (Helix), Day 2, p. 8. So while Robert Johnson signed the pay applications for Helix, Mr. Andy Rivera had the most personal knowledge of the financial aspects of the Project for Helix and was actually designated as Helix's PMK on Helix's claim. Testimony of Andy Rivera, Day 2, p. 73.

[79] Testimony of Bob Johnson (Helix), Day 1, p. 113.

[80] Exhibit 13; Testimony of Joe Pelan (APCO), Day 1, pp. 35-36.

[81] Exhibit 13 - 1-13.

[82] Exhibit 13, p. 14, Section C.3.

APCO's counsel responded to the letter the same day, August 15, 2008.[83] That letter refuted Gemstone's purported basis for termination for cause,[84] as there was no factual basis for any of the alleged defaults in Gemstone's letter:

> Gemstone's demand is factually incorrect as APCO is not in default of the agreement, and even if APCO was in default of the Agreement as alleged, the issues set forth by Gemstone would not support a termination of the contract...APCO has provided Gemstone with a 10 day Notice of Intent to Stop Work on the project due to Gemstone's failure to pay the June 2008 Application. Instead of making the payment that is due, Gemstone is seeking to terminate the contract on or before the date that APCO will stop work on the project...APCO has received a copy of the e-mail sent to APCO's subcontractors by Gemstone. The e-mail notes that Gemstone has a replacement General Contractor in place. Obviously, Gemstone's intent is to improperly declare APCO in default and then attempt to move forward with the project using APCO's subcontractors... Items (ii), (iii), (iv) and (v) were all complete months ago as part of the normal job process.[85]

There was no evidence presented at trial rebutting Mr. Pelan's testimony that APCO was not in default. And since the Court has stricken Gemstone's answer and counterclaim against APCO,[86] the Court must find that APCO was not in breach.

On or about August 15, 2008, prior to its purported termination, Gemstone improperly contacted APCO's subcontractors and notified them that Gemstone was terminating APCO as of Monday, August 18, 2008.[87] Gemstone confirmed it had already retained a replacement general contractor.[88] Gemstone advised the APCO subcontractors as follows:

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[83] Exhibit 14; Testimony of Joe Pelan (APCO), Day 1, p. 36.

[84] Exhibit 14; Testimony of Joe Pelan (APCO), Day 1, pp. 37 and 79.

[85] Exhibit 14; Testimony of Joe Pelan (APCO), Day 1, p. 100.

[86] Docket at May 26, 2010 Order Striking Defendant Gemstone Development West, Inc.'s Answer and Counterclaims, and Entering Default.

[87] Exhibit 215; Testimony of Joe Pelan (APCO), Day 1, pp. 34 and 35.

[88] Exhibit 215.

> In the event that APCO does not cure breaches to Gemstone's satisfaction during the cure period, Gemstone will proceed with a new general contractor. This GC has been selected and they are ready to go. We do not expect any delays or demobilizations in this event... If APCO does not cure all breaches, we will be providing extensive additional information on the transition to a new GC in 48 hours time.[89]

The replacement contractor turned out to be Camco.[90]

On August 18, 2008, APCO emailed Gemstone objecting to such direct communications with the subcontractors: "The APCO Construction GMP and Grading Contracts are still in effect and as such Gemstone shall not meet with our subcontractors. Please read the contract and other correspondence closely. If APCO didn't (and APCO did) cure the breach, Gemstone must issue a seven day notice of termination. You are disrupting my ability to perform the work."[91] That same day, APCO submitted its July 2008 pay application for $6,307,487.15.[92]

The next day on August 19, 2008, APCO sent Gemstone a letter noting Gemstone's breaches:

> [I]t was and is my clear position that any termination of our contract would be a breach of the agreement. Then today before I could end my letter I received a letter from your lawyer saying our contract was over.... As with the other changes, it is impossible to fully account for the delays and full impacts to our schedule at this stage. Consistent with the (2) two change orders that Alex signed after Pete initially rejected them for the HVAC deltas, I would propose that we hold the time issues for now... I also find it interesting that you have sent us letters to terminate the contract all within the time that we were allowed to provide you notice of our intent to suspend the work if the change orders on the June pay application were not paid. That was to elapse on Thursday and now your lawyer is proposing that we agree to a termination before that date. We

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[89] Exhibit 215-2.

[90] Exhibit 162, Camco/Gemstone Prime Contract.

[91] Exhibit 216-1.

[92] Exhibit 8.

> will not agree and intend to fully proceed with our contract obligations... Yesterday morning, Alex came in and asked me what we were still doing on site because there was nothing that we could do to satisfy Gemstone. That would be consistent with the email that was sent to all of our subcontractors on Friday advising that we were being removed from the project before we even had a chance to respond to the 48 hour notice... Craig also told me that Gemstone had previously selected Camco to complete the project.[93]

On August 19, 2008, Gemstone confirmed that joint checks to the Subcontractors and Apco would be written for the June 2008's pay application: "I'd like to have dual checks cut for this [June, 2008] pay application directly to the subs and the general. I believe this is different than what we have historically done on ManhattanWest, but similar to how we have paid some Manhattan Pay Apps in the past."[94] Gemstone confirmed that all future payments would essentially go directly from Nevada Construction Control to the subcontractors.[95]

Although it disagreed with Gemstone's conduct, APCO cooperated in this post termination process to ensure that all subcontractors were properly paid for work performed on APCO's watch:

> An APCO representative has to sign all of *the* subcontractor checks due to Gemstone's request to prepare the "joint checks". An APCO signer should be doing that by the end of today or tomorrow morning. At that time, NCS will contact all of the subcontractors to pick up their checks. Furthermore, today the APCO's July pay application was submitted to NCS. As mentioned in the meeting on Monday, August 25, 2008, enclosed is the contact information for Camco Pacific regarding pay applications... Please forward your July and August pay requests to Yvonne. Obviously, July was already

[93] Exhibit 15.

[94] Exhibit 16; Testimony of Joe Pelan (APCO), Day 1, p. 38.

[95] Testimony of Joe Pelan (APCO), Day 1, p. 38.

> submitted to NCS but we would like Camco to have record of the most current pay requests.[96]

None of the joint checks that NCS and Gemstone issued and that APCO properly endorsed included any funds for APCO.[97] And none of the joint checks accounted for any APCO or subcontractor retention because retention had not been earned under either the Contract or the various subcontracts.[98] As of the end of August, the Project was only about 74% complete.[99]

Ultimately, APCO was not paid for its share June Application even though the subcontractors received their money.[100]

On August 21, 2008, APCO sent a letter to its subcontractors informing them that APCO would stop work on the Project on August 21, 2008:

> Attached hereto is APCO Construction's Notice of Stopping Work and Notice of Intent to Terminate Contract for nonpayment. As of 5:00p.m., Thursday, August 21,.2008 all work in furtherance of the subcontracts you have with APCO CONSTRUCTION on the Manhattan West project is to stop until you are advised otherwise, in writing, by APCO CONSTRUCTION... If a prime contractor terminates an agreement pursuant to this section, all such lower tiered subcontractors may terminate their agreements with the prime contractor... Pursuant to statute, APCO CONSTRUCTION is only stopping work on this project. At this time it has not terminated its contract with Gemstone. As such, all subcontractors, until advised in writing by APCO CONSTRUCTION, remain under contract with APCO CONSTRUCTION.[101]

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[96] Exhibit 26. Testimony of Joe Pelan (APCO), Day 1, pp. 38 and 41.

[97] Testimony Day 1, p. 38.

[98] Testimony of Joe Pelan (APCO), Day 1, pp. 38-39.

[99] Exhibit 218-10; Testimony of Steven Parry (Camco), Day 5, pp. 31-32. Mr. Parry was Camco's project manager for the approximate four months that Camco worked on the Project. Testimony of Steven Parry (Camco), Day 5, p. 24.

[100] Testimony of Joe Pelan (APCO), Day 1, p. 33.

[101] Exhibit 23; Testimony of Joe Pelan (APCO), Day 1, p. 32.

On August 21, 2008 APCO also provided Gemstone with written notice of APCO's intent to terminate the Contract as of September 5, 2008.[102] APCO's last work on the Project was August 21, 2008.[103]

On August 22, 2008, APCO sent a letter to the Clark County Building Department advising that APCO was withdrawing as the general contractor for the Project.[104] APCO was required to cancel its current building permits so the Project permits could be issued and transferred to Camco.[105]

In an August 28, 2008 letter, Gemstone advised that APCO was terminated for cause as of August 24, 2008:

> Furthermore, pursuant to the ManhattanWest's August 15, 2008 notice regarding Termination of Phase 1 for Cause, and APCO's failure to cure the breaches set forth in the notice prior to August 17, 2008, the Contract terminated for cause on August 24, 2008. Consequently, pursuant to Section 10.02(c) of the Contract, APCO is not entitled to receive any further payments until the Work [as defined in the Contract] is finished. Later today, Gemstone will issue joint checks to the subcontractors pursuant to the June Progress Payment; however, payment will not include any fees or general conditions to APCO.[106]

APCO contested Gemstone's purported termination and APCO's evidence was uncontested on that issue that it was not in default.[107] APCO properly terminated the Contract for cause in accordance with NRS 624.610 and APCO's notice of termination since Gemstone did not pay the June Application, as of September 5, 2008.[108] Helix and

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[102] Exhibit 23.

[103] Testimony of Brian Benson (APCO), Day 3, p. 50; Testimony of Joe Pelan (APCO), Day 1, p. 40.

[104] Exhibit 24; Testimony of Joe Pelan (APCO), Day 1, p. 40.

[105] Testimony of Joe Pelan (APCO), Day 1, p. 100.

[106] Exhibit 27; Testimony of Joe Pelan (APCO), Day 1, p. 41.

[107] Testimony of Joe Pelan (APCO), Day 1, p. 42.

[108] Exhibit 28; Testimony of Joe Pelan (APCO), Day 1, pp. 73 and 80.

CabineTec both received a copy of the termination letter.[109] APCO considered its notice of termination to be effective as of September 5, 2008.[110] But Gemstone proceeded with the Project as if it had terminated the Contract with APCO.[111] APCO was physically asked to leave the Project as of the end of August, 2008.[112] And all subcontractors received notice from Gemstone that APCO was terminated on August 26, 2008 and would not be returning to the Project.[113]

E. Gemstone owed APCO $1.4 million when APCO left the Project.

Even though the subcontractors had received all amounts billed through August 2008, Gemstone owed APCO $1,400,036.75 for APCO's June, July, and August 2008 payment applications.[114] Gemstone also owed APCO $200,000 from various reimbursements.[115] APCO has never received payment in any form from any entity for these pay applications or the $200,000 in reimbursements.[116] The $1,400,036.75 does not

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[109] Exhibit 28; Testimony of Bob Johnson (Helix), Day 1, p. 113.

[110] Testimony of Joe Pelan (APCO), Day 1, pp. 42-43.

[111] Testimony of Joe Pelan (APCO), Day 1, pp. 100-101; Exhibit 29.

[112] Testimony of Joe Pelan (APCO) Day 3, p. 150.

[113] Exhibit 118.

[114] Exhibit 320/321, Summary of June, July and August 2008 payment applications to Gemstone that were not paid; Testimony of Joe Pelan (APCO) Day 1, p. 67; Testimony of Mary Jo Allen (APCO) Day 3, p. 144. Exhibit 4 is APCO's June Application. Testimony of Mary Jo Allen (APCO), Day 3, p. 124. APCO's share of the June Pay Application was $700,802.90, which was not paid. Testimony of Mary Jo Allen (APCO), Day 3, pp. 125-127. Exhibit 8 is APCO's July pay application. Testimony of Mary Jo Allen (APCO), Day 3, p. 125. APCO's share of the July 2008 pay application was $431,183.67, which was not paid. Testimony of Mary Jo Allen (APCO), Day 3, pp. 125-127. Exhibit 31 was APCO's August 2008 pay application and its final pay application. Accordingly, the August 2008 application shows everything that was done by APCO and its subcontractors through the end of August 2008. Testimony of Mary Jo Allen (APCO) Day 3, p. 135. APCO's share of the August 2008 pay application was $268,050.18, which was not paid. Testimony of Joe Pelan (APCO) Day 1, p. 46; Testimony of Mary Jo Allen (APCO), Day 3, pp. 126-127. In total, Gemstone owed APCO $1,400,036.75 for its last three pay applications. Testimony of Mary Jo Allen (APCO), Day 3, p. 122.

[115] Testimony of Mary Jo Allen (APCO), Day 3, p. 127.

[116] Testimony of Mary Jo Allen (APCO), Day 3, p. 127.

reflect any of the retention that Gemstone withheld from APCO on the Project because the retention never became due.[117]

Ultimately, Gemstone would not accept APCO's final August 2008 pay application.[118] So Camco submitted APCO's August 2008 billing so APCO's subcontractors would get paid.[119] Camco's August 2008 pay application tracked the full retention from the Project (including APCO's)[120] and APCO's full contract amount.[121] As of its last pay application, APCO believed it was 76% complete with the Project.[122]

Despite the amounts owed to APCO, the evidence was uncontested that the subcontractors received all of their billed amounts, less retention, up through August 2008.[123]

F. APCO did not terminate the Helix or CabineTec Subcontracts.

During this dispute, APCO did not terminate the Helix or CabineTec subcontracts,[124] but advised its subcontractors that they could suspend work on the Project in accordance with NRS Chapter 624.[125] If APCO wanted to terminate its subcontractors, it had to do so in writing.[126] Helix admitted it knew APCO was off the Project as of August 28, 2008[127] and that neither APCO nor Helix terminated the Helix Subcontract.[128]

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[117] Testimony of Mary Jo Allen (APCO), Day 3, p. 127.

[118] Testimony of Joe Pelan (APCO), Day 1, pp. 44-45. Exhibit 31.

[119] Exhibit 218; Testimony of Joe Pelan (APCO), Day 1, pp. 43-44.

[120] Testimony of Joe Pelan (APCO), Day 1, p. 44; Exhibit 218-2.

[121] Exhibit 218-10.

[122] Exhibit 31; Testimony of Joe Pelan (APCO) Day 1, p. 45.

[123] Testimony of Mary Jo Allen (APCO) Day 3, pp. 127-129 and 144; Testimony of Andy Rivera (Helix) Day 2, pp. 73 and 75; Testimony of Joe Pelan (APCO) Day 3, p. 150; Exhibit 26; Exhibit 152; Testimony of Joe Pelan (APCO) Day 1, pp. 26, 46, 67 and 82.

[124] Testimony of Joe Pelan (APCO), Day 1, p. 39.

[125] Exhibit 23.

[126] Testimony of Joe Pelan (APCO) Day 1, p. 71.

[127] Testimony of Andy Rivera (Helix) Day 2, p. 62.

[128] Testimony of Joe Pelan (APCO) Day 1 at p. 126; Testimony of Bob Johnson (Helix) Day 2, p. 33.

Additionally, Helix admitted it never issued a stop work notice to APCO pursuant to NRS 624 because it had no payment disputes with APCO.[129] In fact, per Gemstone's notice dated August 15, 2008, Gemstone gave APCO notice that it exercised its right under Contract Section 10.04 to accept an assignment of the APCO subcontracts.[130] Accordingly, any purported termination of a subcontract by APCO would have breached the Contract.[131]

During August 2008, subcontractors on the Project were getting information directly from Gemstone.[132] Helix and CabineTec both continued work on the Project for Gemstone and Camco, and submitted their August billings to Camco.[133]

G. Status of the Project when APCO was off the Project

Before APCO was asked to leave the Project on August 19 and 20, 2008, APCO documented the as-built conditions and confirmed that Helix and CabineTec were not anywhere close to completing their respective scopes of work.[134]

So the evidence was undisputed that at the time APCO left the Project, Gemstone did not owe APCO or the subcontractors their retention.

H. Camco became the Prime Contractor.

Camco and Gemstone had several meetings and Gemstone contracted with Camco to complete the Project on August 25, 2008.[135] In terms of the plans, specifications and technical scope of work, Camco's work was the same as APCO's.[136] In fact, Camco used

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[129] Testimony of Bob Johnson (Helix) Day 1, p. 127.

[130] Exhibit 13.

[131] Testimony of Joe Pelan (APCO) Day 1, p. 75.

[132] Testimony of Andy Rivera (Helix) Day 2, p. 76.

[133] Exhibit 29; Exhibit 173, Helix's first payment application to Camco; Exhibits 182/185, CabineTec's first payment application to Camco.

[134] Testimony of Brian Benson (APCO) Day 3, pp. 50-58, 63-64 and 97. Those videos are a correct and accurate representation and reproduction of the status of the Project on August 19 and August 20, 2008. Testimony of Brian Benson (APCO) Day 3, p. 52.

[135] Exhibit 162, Camco/Gemstone Prime Contract; Testimony of Steve Parry (Camco) Day 5, pp. 25-26.

[136] Exhibit 162; Testimony of Joe Pelan (APCO) Day 1, pp. 45 and 98; Testimony of Steve Parry (Camco) Day 5, p. 31.

the same schedule of values and cost coding that APCO had been using on the Project.[137] Camco obtained permits in its own name to complete the Project.[138]

Camco's Steve Parry confirmed that Exhibit E to the Camco contract represented the state of the Project when Camco took over.[139] Gemstone and Camco estimated the Project to be 74% complete for Phase 1.[140] Those estimates also confirmed that:

- The first floor drywall taping in building 8 was 70% complete.[141]
- The first floor drywall taping in building 9 was 65% complete.[142]

Among other things, the Camco contract required that Camco "shall engage the Third-Party Service Providers listed on Exhibit C (the "Existing Third-Party Service Providers)."[143] Helix and CabineTec are both listed as Existing Third-Party Service Providers on Exhibit C.[144] And Camco had worked with Helix before.[145] Camco's Steve Parry admitted that Camco was assuming the subcontracts that APCO had with Helix and CabineTec:

> [Exhibit 162 was on the elmo]
> Q. ..I've highlighted a sentence that says, "General contractor shall engage third-party service providers." Do you see that?
> A. Yes.
> Q. Okay. What did you understand that to mean?
> A. That we would use subcontractors on the site that had already been under contract to perform work on the project.
> Q. Okay. So you were assuming the Subcontracts that APCO had issued on the Project; is that right?
> A. Yes.
> Q. And, sir, if you would, turn to Exhibit C within the exhibit.

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[137] Testimony of Steve Parry (Camco) Day 5, pp. 30-31.

[138] Testimony of Steve Parry (Camco) Day 5, p. 37.

[139] Testimony of Steve Parry (Camco) Day 5, p. 27.

[140] Exhibit 218, p. 10; Testimony of Steven Parry (Camco) Day 5, p. 31-32.

[141] Exhibit 160-3.

[142] Exhibit 160-3.

[143] Exhibit 162-2.

[144] Exhibit 162-23.

[145] Testimony of Steve Parry (Camco) Day 5, pp. 13-14.

> Those assumed contracts from APCO included CabineTec and Helix; correct?
> A. Yes.
> Q. And, sir, if you would, turn to Exhibit C within the exhibit. Those assumed subcontracts from APCO included CabineTec and Helix; correct?
> A. Yes.
> Q. [146]

After Camco became the general contractor, APCO was not responsible to pay subcontractors for work performed under Camco.[147] Camco never had any contact or involvement with APCO on the Project,[148] nor did APCO provide any direction or impose any scheduling requirements on subcontractors proceeding with their work.[149] APCO played no role in the pay application process or the actual field work on the Project from September-December 2008.[150] And no Helix or CabineTec representative ever approached APCO with questions or concerns about proceeding with work on the Project after APCO's termination.[151] So APCO did not receive any benefit from the work or materials that Helix or CabineTec performed or provided to the Project after August 21, 2008.[152]

Camco's first pay application was for the period through August 31, 2008.[153] That billing reflected Gemstone retainage account for APCO's work:

> Q. Now, I have highlighted the retainage line item of $5,337,982.74 [on Trial Exhibit 218]. Do you see that?
> A. Yes.
> Q. What did that figure represent?
> A. The retainage that was being withheld on the Project.

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[146] Testimony of Steve Parry (Camco) Day 5, p. 26.

[147] Testimony of Joe Pelan (APCO) Day 1, p. 99.

[148] Testimony of Steve Parry (Camco) Day 5, p. 27.

[149] Testimony of Joe Pelan (APCO) Day 1, p. 97; Testimony of Joe Pelan (APCO) Day 3, p. 150; Testimony of Steve Parry (Camco) Day 5, p. 27.

[150] Testimony of Joe Pelan (APCO) Day 1, p. 98.

[151] Testimony of Joe Pelan (APCO) Day 1, p. 98.

[152] Testimony of Joe Pelan (APCO) Day 3, pp. 149-150.

[153] Testimony of Steve Parry (Camco) Day 5, p. 29.

> Q. And who was the retainage being withheld by?
>
> A. Gemstone, the owner.
>
> . . .
>
> Q. Okay. So my point simply was what you're depicting here in the retainage is the accounting of the retainage that was withheld from APCO as you're going forward on the Project.
>
> A. That's correct.[154]

So all parties knew that the subcontract retention amounts were maintained with Gemstone after APCO was terminated.

I. Cabinetec's entered into a ratification agreement with Camco.

After APCO left the Project, CabineTec signed a ratification agreement with Camco whereby CabineTec agreed to complete its original scope of work for Camco.[155] CabineTec understood the ratification to mean that "you guys [APCO] were stepping out and Camco was stepping in."[156] CabineTec further clarified its understanding of the ratification agreement as follows:

> Q. Okay. Sir, but going forward from and after the point that CabineTec signed the ratification agreement with Camco, you knew and understood that Camco was going to be the "contractor", as that term was used in the original subcontract that CabinetTec had for the project, correct?
>
> A. So APCO was going away and Camco was coming on. That's what was happening.[157]

In addition, the signed ratification agreement contained the following terms:

- "B. Subcontractor and Camco desire to acknowledge, ratify and agree to the terms of the Subcontract Agreement, whereby Camco will replace APCO as the "Contractor" under the Subcontract Agreement but, subject to the terms of this Ratification, all other terms and conditions of the Subcontract Agreement will remain in full force and effect."[158]

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[154] Testimony of Steve Parry (Camco) Day 5, p. 30.

[155] Exhibit 3096; Testimony of Nicholas Cox (CabineTec) Day 3, p. 34; Testimony of Mr. Thompson (CabineTec) Day 5, p. 60.

[156] Testimony of Nicholas Cox (CabineTec) Day 3, p. 35.

[157] Testimony of Nicholas Cox (CabineTec) Day 3, p. 36.

[158] Exhibit 183-1.

- The ratification agreement acknowledged that $264,395.00 of work remained to be finished on Building 8 and $264,395.00 on Building 9.[159]
- "5. Ratification. Subcontractor and Camco agree that (a) the terms of the Subcontract Agreement (as amended by this Ratification and including all Amendments, Previously Approved Change Orders, and the Camco Schedule) will govern their relationship regarding the Project, (b) Camco will be the "Contractor" under the Subcontract Agreement, and (c) Subcontractor and Camco agree to perform and fulfill all of the executory terms, covenants, conditions and obligations required to be performed and fulfilled thereunder by Subcontractor and Camco, respectively."[160]

Accordingly, all retention and future payments to CabineTec, which were executory obligations, were Camco's responsibility.

After Gemstone could no longer pay Camco, CabineTec filed a complaint against APCO and Camco and alleged that it entered into a ratification agreement with Camco:

> 10. On or about August 26, 2008, pursuant to Gemstone's request CABINETEC entered into a Ratification and Amendment of Subcontract Agreement (the "Ratification") with CAMCO, whereby CAMCO agreed to the terms of the APCO Subcontract and to replace APCO as the "Contractor" under the APCO Contract. . .
> 14. CABINETEC entered into the Ratification with CAMCO, pursuant to Gemstone's request, wherein CAMCO agreed to pay CABINETEC for the services and materials on the Project.
> 15. Pursuant to, and in reliance upon, the aforementioned Subcontract, Ratification and representations, CABINETEC performed the work of providing services and materials (the "Work.")…[161]

So there is no basis for CabineTec to seek payment from APCO for its retention, which never became due under the retention payment schedule while APCO was the contractor. And APCO had no liability for the materials CabineTec provided to Camco and Gemstone after termination.

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[159] Exhibit 183-2.

[160] Exhibit 172-5.

[161] Exhibit 156 at ¶ 10-15.

The fact is, APCO paid (and even overpaid) CabineTec for materials delivered to the Project while APCO was contractor.[162] CabineTec did not dispute this overpayment at trial. CabineTec submitted two invoices while APCO was on the Project.[163] Exhibit 148 is CabineTec's first invoice to Camco for $70,836.[164] CabineTec's second invoice is for $72,540.[165] The total amount due to CabineTec, less retention, was $129,038.40.[166] But APCO actually paid CabineTec a total of $161,262 for these two invoices.[167] As such, CabineTec was overpaid $32,223.60 by APCO on the Project. CabineTec did not submit a pay application for August 2008.[168] APCO is entitled to be paid this over payment.

J. <u>CabineTec Claims retention against APCO.</u>

When CabineTec originally filed suit CabineTec disclosed $19,547.00 in damages against APCO in its complaint:

> "50. As a result of the foregoing, and in accordance with the principles of equity and common law, CABINETEC is entitled to judgment in its favor, and against APCO in the amount of $19,547.00, together with interest thereon at the highest legal rate."[169]

And, CabineTec's initial and first supplemental disclosures only disclosed $30,110.95 in damages against APCO: "...National Wood seeks to recover those damages claimed by CabineTec in its complaint in intervention against APCO in the amount of $30,110.95 and CAMCO in the amount of $1,125,374.94..."[170] The $30,110.95

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[162] Testimony of Mary Jo Allen (APCO) Day 3, pp. 131-132.

[163] Exhibits Nos. 148, 150, 151, and 320-321, Calculation of CabineTec overpayment; Testimony of Mary Jo Allen (APCO) Day 3, p. 130.

[164] Testimony of Mary Jo Allen (APCO) Day 3, p. 130.

[165] Testimony of Mary Jo Allen (APCO) Day 3, p. 131.

[166] Testimony of Mary Jo Allen (APCO) Day 3, p. 131.

[167] Testimony of Mary Jo Allen (APCO) Day 3, p. 131.

[168] Testimony of Mary Jo Allen (APCO) Day 3, p. 134.

[169] Exhibit 156-8.

[170] Exhibit 157, CabineTec's Initial Disclosure, Exhibit 158, CabineTec's First Supplemental Disclosure.

represented $19,547 in alleged retention, and $10,563.95 in interest and fees.[171] Those were the only two disclosures CabineTech made before the close of discovery, as was extended by the Court. Then on the eve of trial, CabineTec attempted to disclose and seek $1,154,680.40 in damages against APCO.[172] Aside from the late disclosure there is no basis for that amount as it is undisputed that CabineTec was paid every dollar it billed APCO, less retention, notwithstanding the overpayment.[173]

K. Helix's claim for $505,021 in retention.

Helix's designated PMK and Project Manager, Andy Rivera, confirmed that Helix's only claim in this litigation against APCO was for the retention of $505,021.[174] Helix's counsel admitted this limited claim in its opening statement.[175] And then at trial, Mr. Rivera confirmed Helix was only seeking retention and not the unpaid invoices submitted to Camco:

> Q. Sir, could you pull out Exhibit 44. And I want to make sure my record's clear. Exhibit 44 that I marked is, in fact, the same summary that was found in Exhibit 535, page 252, that you and Mr. Zimbleman went over; is that—
>
> A. Correct.
>
> Q. Okay. And does Exhibit 44 represent the damages that you are seeking from APCO in this matter?
>
> A. Yes.
>
> Q. And do you recall if you were designated as the person most knowledgeable for one of the topics being the damages that Helix was seeking from APCO in these proceedings, correct?
>
> A. Correct.
>
> Q. And would you agree that as the PMK, you identified a figure of $505,021 as the amount that Helix in this lawsuit

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[171] Compare Exhibit 156, CabineTec's Complaint to Exhibit 157, CabineTec's Initial Disclosure.

[172] Exhibit 159-6.

[173] Exhibit 147 summarizing payments and releases.

[174] Exhibit 279, Testimony of Andy Rivera (Helix) Day 2, pp. 63-65; Helix's PMK Deposition at p. 52.

[175] Testimony, Day 1 at p. 10. ("...Helix remains to be unpaid $505,021, while APCO was the general contractor. This is to say amounts still owing from pay applications submitted to APCO, and yes, that is essentially our retention.").

claims APCO owes it, correct?

A. Correct.

Q. And there are no other amounts that you identified in your PMK depo as being APCO's liability on this Project, correct?

A. Correct.

Q. Okay. And we are in agreement that the 505—that's your handwriting, where you wrote: Retention?

A. Yes.

Q. And would it be fair to conclude that that retention represents retention that had been accounted for and accrued while APCO was serving as the prime contract – prime contractor on the Project?

A. Yes.

Q. Prior to today has Helix ever billed APCO for that retention?

A. No. No. I'm sorry.

Q. Do you have any information to suggest that APCO ever received Helix's retention from Gemstone?

A. I would not know.

Q. Okay. You don't have any information to suggest that APCO has collected Helix's retention but not forwarded it on to Helix, correct?

A. Correct.

Q. Okay. And in light of your summary within Exhibit 44, would it be fair to conclude that all of the amounts that Helix billed to APCO were, in fact, paid but for retention?

A. Yes.[176]

Helix received direct payments from APCO through May 2008.[177] After May 2008, Helix received payment for its APCO billings directly from NCS through joint checks to Helix and APCO, which APCO endorsed over to Helix.[178] Helix's first billing to Camco was on September 19, 2008.[179] Mr. Rivera admitted Helix is only seeking $505,021 in retention from APCO, which Helix never billed Apco.[180]

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[176] Testimony of Andy Rivera (Helix) Day 2, pp. 73-75.

[177] Testimony of Andy Rivera (Helix) Day 2, p. 61.

[178] Testimony of Andy Rivera (Helix) Day 2, pp. 61-64

[179] Exhibit 508, p. 1; Testimony of Andy Rivera (Helix) Day 2 at p. 65.

[180] Testimony of Andy Rivera (Helix) Day 2, pp. 50 and 58. Exhibit 501, p. 393 is the spreadsheet Helix created of payments it applied for and received from APCO. Helix's Mr. Rivera admitted

L. **Retention never became due to Helix or CabineTec.**

As noted above, both the Helix Subcontract and the CabineTec Subcontract included an agreed upon retention payment schedule in Paragraph 3.8. The evidence was undisputed, and even acknowledged by Helix and CabineTec, that the level of completion and other preconditions of the retention payment schedule were not met while APCO was the general contractor. More specifically, Helix's Mr. Johnson admitted Helix did not meet the preconditions in Section 3.8 of the Subcontract to be entitled to retention:[181]

> Q. Well, let me ask it this way: Did Helix satisfy any of these preconditions found in paragraph 3.8 while APCO was the general contractor on the project?
> A. Not to my knowledge.[182]

CabineTec's Mr. Thompson admitted that the buildings had to be drywalled and painted before the cabinets were installed[183] and he had no documentation (daily reports, photographs, etc.) that would confirm that CabineTec ultimately installed cabinets in Phase 1 for APCO.[184]

It is undisputed that neither Helix nor CabineTec presented *any* testimony that they met the valid conditions precedent to payment to be entitled to retention. *See Lucini-Parish Ins. v. Buck,*[185] (a party who seeks to recover on a contract has the burden of establishing any condition precedent to the respective contract). Instead, the Court saw pictures[186] and

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Helix was paid a total of $4,626,186.11 on the Project by and through APCO, which reflected payment for work billed (and retention) through August 31, 2008. Testimony of Andy Rivera (Helix) Day 2, pp. 58-59; Exhibits 46-47, Helix May and June billings; Exhibit 49-50; APCO Checks to Helix, Exhibit 58, Exhibit 59, Exhibit 60, Exhibit 61, Exhibit 66, Exhibit 75.

[181] Testimony of Bob Johnson (Helix) Day 2, pp. 36-37.

[182] Testimony of Bob Johnson (Helix) Day 2, p. 19.

[183] Testimony of Mr. Thompson (CabineTec) Day 5, p. 69.

[184] Testimony of Mr. Thompson (CabineTec) Day 5, p. 69.

[185] 108 Nev. 617, 620, 836 P.2d 627, 629 (1992).

[186] Exhibit 32-38, 51-57, 108-114, 62-65, 67-74, 125-132, Pictures of Status of Project; Testimony of Brian Benson (APCO) Day 3, pp. 53-71.

videos[187] confirming that Helix's and CabineTec's work was not completed. The Court also heard unrefuted testimony that APCO was never paid from Gemstone for Helix's or CabineTec's retention.[188] The fact is APCO and its subcontractors never got to the point where they could request retention while APCO was the contractor.[189]

To that end, Helix's Mr. Johnson admitted that Helix did not present a claim to APCO for any additional compensation for disputed claims or changes while APCO was on the Project. [190] Helix's Mr. Rivera admitted Helix *has never* billed APCO for retention, and that all amounts that Helix did bill APCO were paid, less retention.[191] The fact that Helix did not bill retention confirms that Helix recognized that retention never became due from APCO under the retention payment schedule.

Both Helix and CabineTec rolled their retention account over to Camco and Gemstone in their post-APCO billings as it was truly a Project and Gemstone liability.[192] APCO was never responsible for retention under the subcontract's retention payment schedule. That is confirmed by Helix's and Camco's conduct at the Project level through their pay applications.[193]

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[187] Exhibits 17-22, Videos of Project.

[188] Testimony of Mary Jo Allen (APCO) Day 3, p. 144; Testimony of Joe Pelan (APCO) Day 1, p. 26.

[189] Testimony of Joe Pelan (APCO) Day 1, pp. 60 and 82; Testimony of Bob Johnson (Helix) Day 2, pp. 36-37; Testimony of Joe Pelan (APCO) Day 3, p. 151.

[190] Testimony of Bob Johnson (Helix) Day 2, p. 31.

[191] Testimony of Andy Rivera (Helix) Day 2, p. 74; Exhibits 43, 50, 61 and 75.

[192] Exhibits 170-177, Helix billings to Camco and Exhibit 185, CabineTec's billings to Camco; Testimony of Mary Jo Allen (APCO) Day 3, pp. 129-130; Testimony of Andy Rivera (Helix) Day 2, p. 74.

Compare Exhibit 58, Helix's last pay application to APCO to Exhibit 173, Helix's first payment application to Camco. *See also* Exhibit 176 and 177 showing Helix's retention rolled over. See also, Exhibit 150, CabineTec's last pay application to APCO, to Exhibit 185, CabineTec's first payment application to Camco showing CabineTec's retention rolled over. See also, Exhibit 30 (Camco's August 2008 draw request confirming retention was being held for the entire Project).

M. Similarly, APCO never earned or received its retention.

Gemstone and/or its lender maintained the retention account.[194] APCO's August 2008 pay application did not bill Gemstone for APCO's retention.[195] In fact, APCO never billed Gemstone for retention[196] because APCO had not earned the retention and thus was not entitled to it.[197] And APCO never billed or received the retention funds from Gemstone for any of the subcontractors.[198] APCO never received CabineTec's or Helix's retention from Gemstone.[199] Helix's Mr. Johnson admitted that Gemstone, not APCO, was holding its retention.[200] And Helix admitted it had no information to suggest that APCO was ever paid Helix's retention.[201]

Neither Helix nor CabineTec ever billed APCO for any of the materials or work it performed after Camco signed its prime contract with Gemstone.[202] And notably, neither Helix nor CabineTec billed APCO or submitted a claim letter for the retention they now claim.[203] In fact, CabineTec actually billed Camco for the retention it incurred under APCO.[204]

N. Helix's also entered into a ratification agreement with Camco.

Helix's Project Manager, Mr. Rivera understood that Gemstone purported to terminate the Contract:

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[194] Testimony of Joe Pelan (APCO) Day 1, p. 30.

[195] Exhibit 31; Testimony of Joe Pelan (APCO) Day 1, p. 45.

[196] Testimony of Joe Pelan (APCO) Day 1, p. 30.

[197] Testimony of Joe Pelan (APCO) Day 1, p. 83.

[198] Testimony of Mary Jo Allen (APCO) Day 3, p. 128.

[199] Testimony of Joe Pelan (APCO) Day 3, p. 150.

[200] Testimony of Bob Johnson (Helix) Day 2, p. 19.

[201] Testimony of Bob Johnson (Helix) Day 2, p. 20.

[202] Testimony of Joe Pelan (APCO) Day 1, p. 97.

[203] Testimony of Joe Pelan (APCO) Day 1, p. 97; Testimony of Mary Jo Allen (APCO) Day 3, p. 128 (as to CabineTec); Testimony of Joe Pelan (APCO) Day 3, p. 150.

[204] Exhibit 3103 confirming CabineTec billed Camco for its retention. Testimony of Nicholas Cox (CabineTec) Day 3, p. 38-39.

> Q. Wouldn't it be fair to say that based on communications, both written and verbal, that you received from APCO and/or Gemstone, you knew that Gemstone had purported to terminate APCO's prime contract?
>
> A. We knew they were having issues.
>
> Q. Okay. And those issues had culminated in APCO purporting to terminate the prime contract and/or Gemstone purporting to terminate the prime contract, correct?
>
> A. Correct.[205]

In fact, during the August 2008 timeframe, Helix was getting information directly from Gemstone.[206] Mr. Rivera admitted Helix was copied on certain communications between APCO and Gemstone:

> Q. And wouldn't it be fair to say that you received copies of certain communications from APCO to the owner, Gemstone, whereby APCO indicated that we're having payment issues and we're giving notice of our intent to exercise statutory rights to suspend and/or terminate?
>
> A. Something to that effect, yes.[207]
>
> . . . .
>
> Q. Okay. But do you recall receiving APCO generated correspondence indicating to the owner, which was sent to subcontractors as well, that APCO was suspending and/or terminating its work, correct?
>
> A. Correct.[208]

Mr. Rivera also admitted Helix was performing work under Gemstone's direction by August 26, 2008:

> Q. And from and after about August 26, 2008, Helix was taking its direction from Gemstone and/or Camco, correct?
>
> A. Gemstone.
>
> Q. Okay. APCO was not directing, requesting any work on behalf of Helix after September 5, 2008, correct?
>
> A. Correct.
>
> Q. And based on your personal involvement with

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[205] Testimony of Andy Rivera (Helix) Day 2, p. 75.

[206] Testimony of Andy Rivera (Helix) Day 2, p. 76.

[207] Testimony of Andy Rivera (Helix) Day 2, p. 76.

[208] Testimony of Andy Rivera (Helix) Day 2, p. 77.

Gemstone and Camco, did you understand that, in fact, Camco was replacing APCO as the prime contractor?

A. At that time did not know exactly how that was—the agreement was going to be.

Q. Did you come to find out?

A. Yes.

Q. that was, in fact, the case?

A. Yes.[209]

Helix was directed to hook up power to the Camco trailer on August 26, 2008.[210] Gemstone provided Helix with the Camco subcontract and Camco pay applications,[211] and directed Helix to start directing its payment applications to Camco.[212]

On August 26, 2008 Camco sent Helix a checklist for starting work.[213] Among the provisions included:

- "Retention Monies- Final retention monies will only be released to Camco Pacific from Owner when all Punch list Items, Contract Items, and Close-Out Documents have been fully completed and inspected by the owner. Any delay by a single Subcontractor in completing this will delay the entire project's final payment. PLEASE DO NOT DELAY IN COMPLETING YOUR PUNCHLIST ITEMS. Exhibit 170-3.
- "D. Final Payment." Subcontractor shall not be entitled to payment of the balance of the Contract Price, including, without limitation, the Retainage, until (1) the Contract Work has been completed to the satisfaction of Contractor, (2) Subcontractor has submitted to Contractor an invoice for the final payment accompanied by (i) a final complete list of all suppliers and subcontractors whose material or services have been utilized by subcontractor, (ii) all closeout documents including, warranties, guarantees, as-builts, drawings, operation and maintenance manuals and such other items required of Subcontractor have been provided and accepted by Owner, (iii) executed

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[209] Testimony of Andy Rivera (Helix) Day 2, pp. 76-77. *See also* Testimony of Bob Johnson (Helix) Day 2, p. 25.

[210] Exhibit 171; Testimony of Bob Johnson (Helix) Day 2, p. 25.

[211] Exhibit 170.

[212] Testimony of Andy Rivera (Helix) Day 2, p. 66.

[213] Exhibit 170.

> unconditional lien releases and waivers from Subcontractor and all of its mechanics, subcontractors, and suppliers for the Contract Work covered by all preceding progress payments, and (iv) executed unconditional lien releases and waivers upon final payment from all mechanics, subcontractors, and suppliers who have previously received final payment, and conditional lien releases and waiver upon final payment from Subcontractor and each mechanic, subcontractor or supplier from which an unconditional lien release and waiver upon final payment has not been submitted to Contractor, (3) Contractor has received the corresponding final payment from Owner, (4) Contractor has received evidence of Subcontractor's insurance required to be in place, (5) 45 days have elapsed after a Notice of Completion has been recorded or if a valid Notice of Completion is not recorded, upon Subcontractor's receipt of a written notice of acceptance of the Contract Work that shall be given by Contractor not later than 91 days after Contractor determines in good faith that the Contract Work has been performed completed and in acceptable manner and (6) all outstanding disputes related to the Project have been resolved, and any liens against the Project have been removed.[214]

Having received these requirements, Helix continued on as the electrical subcontractor for Camco after APCO's termination. Helix's Andy Rivera admitted Helix's technical scope of work remained the same under Camco:

> Q. Would it be fair to conclude the technical scope of work remained the same as you transitioned to work with Camco—
> A. Yeah.
> Q. –for Helix?
> A. Yes.[215]

During the transition of APCO to Camco, Helix had a meeting with Gemstone.[216] The purpose of that meeting was to: "represent that work was still proceeding, nothing had

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[214] Exhibit 170-11, 170-12.

[215] Testimony of Andy Rivera (Helix) Day 2, p. 78.

[216] Testimony of Bob Johnson (Helix) Day 2, p. 22.

changed with our contracts with the current APCO relationship, and that we were to take direction for construction from Camco, and they wanted to negotiate a contract."[217] Helix never sent APCO a letter or requested that APCO clarify or provide any information to Helix on the status of its relationship to the Project.[218]

Camco presented Helix with a ratification agreement.[219] It was Camco's intent and understanding that it was replacing APCO in the Helix-APCO subcontract.[220] Helix had a copy of the ratification agreement by at least September 3, 2008.[221] Helix understood the purpose of the ratification agreement as follows: "...they [Camco] were stepping in as construction management for the project and that they were using that agreement in order to proceed with – hold us as the subcontractor going forward."[222] Camco's understanding was the same, i.e. the Ratification agreement formed the basis of Camco's agreement in allowing Helix to proceed on the Project.[223] Helix continued working on the Project after receiving the ratification agreement from Gemstone.[224] Camco sent Helix the ratification agreement with a September 4, 2008 letter that included the following representations: "The conditional acceptance of this work is based on the execution of a standard Camco Pacific Ratification Agreement... We have provided you a copy of the Camco Pacific Ratification Agreement for your review and acceptance."

The Ratification Agreement contained the following additional terms:

- "B. Subcontractor and Camco desire to acknowledge, ratify and agree to the terms of the Subcontract Agreement, whereby Camco will replace APCO as the "Contractor" under the Subcontract Agreement but, subject to the terms

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[217] Testimony of Bob Johnson (Helix) Day 2, pp. 22-23.

[218] Testimony of Bob Johnson (Helix) Day 2, p. 23.

[219] Testimony of Bob Johnson (Helix) Day 1, p. 124.

[220] Testimony of Steve Parry (Camco) Day 5, pp. 28, 29 and 60.

[221] Exhibit 172. Testimony of Bob Johnson (Helix) Day 2, p. 27.

[222] Testimony of Bob Johnson (Helix) Day 1, p. 124.

[223] Exhibit 172. Testimony of Steve Parry (Camco) Day 5, p. 29.

[224] Testimony of Bob Johnson (Helix) Day 2, p. 28.

of this Ratification, all other terms and conditions of the Subcontract Agreement will remain in full force and effect."

- "5. Ratification. Subcontractor and Camco agree that (a) the terms of the Subcontract Agreement (as amended by this Ratification and including all Amendments, Previously Approved Change Orders, and the Camco Schedule) will govern their relationship regarding the Project, (b) Camco will be the "Contractor" under the Subcontract Agreement, and (c) Subcontractor and Camco agree to perform and fulfill all of the executory terms, covenants, conditions and obligations required to be performed and fulfilled thereunder by Subcontractor and Camco, respectively."[225]

Helix admitted it entered into a ratification agreement with Camco on September 4, 2008 to continue on and complete the APCO scope of work.[226] Helix even added a document to the ratification entitled "Helix Electric's Exhibit to the Ratification and Amendment."[227] The Helix Exhibit to the Ratification and Amendment contained language confirming that APCO was removed as the general contractor and that Helix submitted $994,025 in change orders to APCO prior to August 26, 2008, the date Camco was using for its ratification agreement.[228] Helix included a total contract price of $5.55 million for the Project, which was its original contract price with APCO for Phase 1, and added $480,689 as approved change orders under APCO to the total contract price.[229]

The proposed Helix Amendment to the ratification agreement also included the following term: "All close out documents must be turned in before Camco Pacific can release final payment." [230]

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[225] Exhibit 172-5.

[226] Exhibit 77, Helix Complaint, ¶18.

[227] Exhibit 170; Testimony of Bob Johnson (Helix) Day 2, p. 42.

[228] Exhibit 170; Testimony of Bob Johnson (Helix) Day 2, pp. 42-43.

[229] Exhibit 170-54; Testimony of Bob Johnson (Helix) Day 2, p. 44; Exhibit 169-8.

[230] Exhibit 169-1.

And although Helix has not produced a signed copy of the ratification agreement, Helix has admitted entering into its ratification and amended subcontract agreement in its complaint as follows:

> 18. On or about September 4, 2008, Helix entered into the Ratification and Amendment of Subcontract Agreement ("CPCC Agreement") **with Camco who replaced APCO as the general contractor on the Project**, to continue the work for the Property ("CPCC Work").
> 19. **Helix furnished the CPCC Work for the benefit of and at the specific instance and request of CPCC and/or Owner.**
> 20. Pursuant to the CPCC Agreement, Helix was to be paid an amount in excess of Ten Thousand Dollars ($10,000.00) (hereinafter "CPCC Outstanding Balance") for the CPCC Work.
> 21. Helix furnished the CPCC Work and has otherwise performed its duties and obligations as required by the CPCC Agreement.
> 22. CPCC has breached the CPCC Agreement...
> CPCC breached its duty to act in good faith by performing the Ratification Agreement in a manner that was unfaithful to the purpose of the Ratification Agreement, thereby denying Helix's justified expectations...[231]

Helix's Mr. Johnson admitted that Exhibit 172, the Ratification Agreement, was the document that Helix referenced in its complaint (Exhibit 77) as the Ratification.[232] Helix sought $834,476.45 against Camco.[233] Helix also admitted it had a contract with Camco/Gemstone for $8.6 million in its lien documents.[234]

The scope of work that Helix and CabineTec undertook on the Project was the same as each had previously contracted with APCO for.[235] Helix did not have any further communication with APCO after Camco took over the Project.[236] That is because both knew that APCO was no longer involved and had no further liability. In fact, both Helix

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[231] Exhibit 77.

[232] Testimony of Bob Johnson (Helix) at Day 2, p. 28.

[233] Testimony of Joe Pelan (APCO) Day 1 at p. 10.

[234] Exhibit 512; Testimony of Bob Johnson (Helix) at Day 2, p. 29.

[235] Exhibit 314 and Testimony of Bob Johnson (Helix) Day 2, p. 10.

[236] Testimony of Bob Johnson (Helix) Day 2, p. 14.

and CabineTec rolled their retention over into the Camco billings.[237] Helix's Andy Rivera specifically admitted that it rolled its $505,000 in retention billings over to Camco.[238] After Helix and CabineTec went to work for Camco, neither sent APCO any further pay applications or billings for work they performed on the Project.[239] And it's undisputed that Helix submitted its September 2008 pay application for $354,456.90 to Camco.[240] That pay application tracked Helix's full retainage of $553,404.81 for the Project, not just work completed under Camco.[241] Helix also submitted its October 2008 billing for $361,117.44,[242] its November 2008 pay application for $$159,475.68,[243] and its December 2008 billing for $224,805.30 to Camco. [244]

O. <u>Camco never completed the Project.</u>

Camco never finished the Project[245] and was never paid retention by Gemstone.[246] In its letter to the subcontractors dated December 22, 2008, Camco advised the subcontractors as follows:

> [I]t has come to Camco Construction, Inc.'s attention that funding for the completion of the Manhattan West project (the "Project") has been withdrawn. Camco recently received the following email from [Gemstone]…As a result, Gemstone does not have funds sufficient to pay out the October draw or other obligations…Based on the foregoing facts and circumstances,

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[237] Compare Exhibit 58, Helix's last pay application to APCO, Exhibit 173, Helix's first payment application to Camco. *See also* Exhibit 176 and 177 showing Helix's retention rolled over. See also, Exhibits 148/150, CabineTec's last pay application to APCO, to Exhibits 182/185, CabineTec's first payment application to Camco showing CabineTec's retention rolled over.

[238] Testimony of Andy Rivera (Helix) Day 2, p. 74.

[239] Testimony of Mary Jo Allen (APCO) Day 3, at pp. 127-128; Testimony of Andy Rivera (Helix) Day 2, p. 76.

[240] Exhibit 173-1.

[241] Exhibit 173-2

[242] Exhibit 176-2.

[243] Exhibit 177-4.

[244] Exhibit 178-4.

[245] Testimony of Steve Parry (Camco) Day 5, p. 36.

[246] Testimony of Steven Parry (Camco) Day 5, p. 36.

> Camco has no other alternative but to immediately terminate all subcontracts on the Project, including the agreement with your company... you have acknowledged that Camco is not liable to you for payment unless and until Camco receives the corresponding payment from the Owner...Camco's contract with Gemstone is a cost plus agreement wherein the subcontracts and supplies were paid directly by Gemstone and/or its agent, Nevada Construction Services, based on the invoices and/or payment applications submitted through voucher control... Therefore, Camco has no contractual and/or statutory obligation to pay any claim that may be alleged by any of the subcontractors and/or suppliers on the Project... any claim for payment alleged against Camco will result in additional fees, costs ...Therefore, all claims for payment must be directed to and/or alleged against Gemstone and the Project.[247]

Camco's Parry was not able to tell if CabineTec billed Camco in August 2008, Exhibit 218 and Camco's first pay app to Gemstone.[248]

- Exhibit 220 is Camco's second pay application for the Project, through September 30, 2008.[249] That pay application accounted $6,004,763 in retention.[250] Camco's Parry admitted that Exhibit 220 does include billings from Helix to Camco that Camco was passing on to Gemstone.[251]
- Exhibit 221 is Camco's billing to Gemstone through October 31, 2008; reflecting a total retention of $6,928,767.84 in retention.
- Exhibit 163 is Camco's November 2008 billing, reflecting a total retention of $7,275,991.08.

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[247] Exhibit 40 and Exhibit 39.

[248] Exhibit 218; Testimony of Steven Parry (Camco) Day 5, p. 34.

[249] Exhibit 220; Testimony of Steven Parry (Camco) Day 5, p. 32.

[250] Exhibit 220; Testimony of Steven Parry (Camco) Day 5, p. 32.

[251] Exhibit 220; Testimony of Steven Parry (Camco) Day 5, p. 33.

Based on Camco's last billing,[252] Exhibit 163, Camco's best estimate of the work completed on Phase 1 was 86%.[253]

P. The litigation.

On September 9, 2008, APCO brought an action against Gemstone for breach of Contract and nonpayment.[254] Gemstone counterclaimed alleging that APCO breached the Contract.[255]

On November 4, 2008, the Project lender confirmed that it was reviewing September's pay application, and confirmed that the subcontractors would be paid for the work performed for Camco.[256]

In December 2008 Gemstone suspended work on the Project and advised Camco and its various subcontractors that the lender was halting all financing for the Project.[257] That led to the onslaught of liens and the related priority litigation.

On December 16, 2008, Camco officially terminated its prime contract with Gemstone:

> Pursuant to your notice to Camco on December 15, 2008, Gemstone (a) has lost its funding for the ManhattanWest project and (b) will be unable to meet its payment obligations pursuant to Article VI of
> the Engagement Agreement. Furthermore, Gemstone has failed to make payments to Camco pursuant to Article VI of the Engagement Agreement for October 2008, November 2008, and December 2008, and such failures are a material breach of the Engagement Agreement. As Gemstone has no means of curing such material breach in a timely manner, the Engagement Agreement is terminated for cause, effective

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[252] Testimony of Steve Parry (Camco) Day 5, p. 36.

[253] Exhibit 163; Testimony of Steven Parry (Camco) Day 5, p. 36.

[254] Exhibit 219.

[255] Exhibit 226.

[256] Exhibit 138.

[257] Exhibit 48; Exhibit 138.

> December 19, 2008. Pursuant to our discussions, we understand that you agree with the termination and the effective date of termination.
>
> ...
>
> Pursuant to our discussions and with Gemstone's consent, Camco will immediately send notices to all of the subcontractors to terminate their subcontract agreements. In Camco's termination notice, we will ask the subcontractors to submit their payment applications to Camco. Camco will review the payment applications and, if they appear proper, Camco will forward them to Gemstone for payment.[258]

In response, Camco terminated the subcontracts with its subcontractors on December 22, 2008.[259]

On May 26, 2010, Judge Delaney filed an Order Striking Defendant Gemstone Development West, Inc.'s Answer and Counterclaims, and Entering Default for failure to give reasonable attention to matters, failure to obtain new counsel, failure to appear at hearings.[260]

On June 6, 2013, APCO filed a motion for summary judgment against Gemstone. That Motion confirmed that APCO complied with all terms of the Agreement and that Gemstone materially breached the Agreement by, among other things: (1) failing to make payments due to APCO; (2) interfering with APCO's relationships with its subcontractors; (3) refusing to review, negotiate, or consider change order requests in good faith; (4) removing APCO from the Project without valid or appropriate grounds; and (5) otherwise breaching the terms of the Agreement.[261] On June 13, the Court granted that motion.[262] The record does not reflect a final order or judgment.

APCO did not receive any funds associated with its work from June, July or August

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[258] Exhibit 165.

[259] Exhibit 166-2.

[260] Docket at May 26, 2010 Order Striking Defendant Gemstone Development West, Inc.'s Answer and Counterclaims, and Entering Default.

[261] Docket at June 6, 2013, Motion for Summary Judgment against Gemstone.

[262] Docket at Minutes from June 13, 2013.

2008 on the Project and never received its or any subcontractor's retention. APCO did cooperate with Gemstone to see that all subcontractors, including Helix and CabineTec were paid all progress payments that were billed and due while APCO was in charge. Despite APCO's efforts, Helix and CabineTec are seeking to hold APCO responsible for retention that never became due under the subcontract retention payment schedule and for work that both subcontractors provided to Camco and Gemstone knowing full well that APCO had no liability for any further payments. The inequities are obvious.

II. ISSUES OF LAW

A. Retention payment schedules and related preconditions are valid.

The Helix and CabineTec Subcontracts contain enforceable retention payment schedules that include owner payment and other preconditions.[263] Under Nevada precedent and legislative action, these provisions are valid conditions precedent to payment when not combined with a waiver of a mechanic's lien rights.

a. Padilla Construction v. Big-D Construction

In *Padilla Construction Company of Nevada v. Big-D Construction Corp*,[264] the Nevada Supreme Court and this Court analyzed and enforced valid payment schedules. In fact, these courts enforced similar conditions precedent to payment requiring the owner's payment to the general contractor before the general contractor is required to pay a subcontractor. That decision also confirmed that NRS 624.624 was meant to ensure payment to subcontractors **after** the owner paid the general for the subcontractor's work.[265]

In *Padilla Construction*, Big-D was hired as the general contractor for a construction project and subcontracted with Padilla to install a stucco system on the building. While the stucco was being installed, separation issues developed and the owner rejected Padilla's work. Padilla filed a complaint against Big-D for non-payment. After

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[263] Exhibit 45 and Exhibit 149 at Sections 3.4, 3.5 and 3.8.

[264] 386 P.3d 982 (Nev. 2016)(unpublished).

[265] *Padilla Construction Company of Nevada v. Big-D Construction Corp*, 386 P.3d 982 (Nev. 2016) (unpublished).

trial, this Court found that: (1) Padilla's signed subcontract bound it to the owner's decisions,[266] (2) NRS 624.624 was designed to ensure that general contractors pay subcontractors **after** the owner pays the general,[267] (3) NRS 624.624 yields to a schedule of payments,[268] (4) the subcontract confirmed that Padilla would get paid after the owner accepted and paid the prime contractor for the work,[269] and (5) the owner never accepted the work so Big-D's payment to Padilla never became due.[270] Then this Court awarded Big-D damages and attorney's fees.[271]

As explained below, the Nevada Supreme Court analyzed the pay-if-paid provision in the subcontract under a condition precedent analysis, not whether the language was void as against public policy. The Nevada Supreme Court affirmed this Court's decision finding:

> Because the parties' **subcontract contained a payment schedule** that required that Padilla be paid within ten days after IGT accepted Padilla's work **and paid Big-D for that work** and it is undisputed that IGT never accepted Padilla's work **and never paid Big-D for Padilla's work**, the district

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[266] *See Padilla v. Big D* Docket, Case No: A-10-609048-C, Findings of Fact and Conclusions of Law and Judgment at 19:15-18 ("9A. In the Subcontract 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.").

[267] *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.").

[268] *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."); *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.**").

[269] *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.").

[270] *Id.* at 23:2-3 ("Here, it is undisputed that IGT never accepted the Padilla work. Accordingly, payment to Padilla never became due.").

[271] *Padilla v. Big D* Docket, Case No: A-10-609048-C, Order Granting Attorney's Fees.

> court correctly found that payment never became due to Padilla under the subcontract or *NRS 624.624(1)(a).* [272]

So payment schedules that are triggered after owner payment are not unenforceable pay-if-paid provisions; they are valid conditions precedent to payment.

In the present action, the Helix and CabineTec Subcontracts: (1) incorporated the Contract,[273] (2) confirmed that the subcontractors would be bound to Gemstone to the same extent APCO was,[274] and (3) contained a schedule of payments for both retention and change orders with preconditions before APCO had an obligation to pay the subcontractors.[275] Only one of those preconditions involved Gemstone's payment of retention to APCO, which never occurred. It is undisputed that the preconditions to retention payments were never satisfied and that APCO did not receive the amounts the subcontractors currently seek from APCO. Accordingly, given the Nevada Supreme Court's analysis in *Padilla v. Big-D*, APCO's retention payments to the subcontractors never became due. Neither the subcontracts nor NRS 624.624 were intended to make the general contractor Gemstone's guarantor. From a policy standpoint, such a ruling would drive prime contractors out of business.

b. The Nevada Legislature has recognized owner payment preconditions.

Consistent with *Padilla v. Big D*, the Nevada Legislature has recognized that parties can agree to conditions precedent to payment, including one that requires a general contractor to pay a subcontractor only after the general contractor has received payment from the owner.[276] This is evident from the Legislature's recognition of such clauses in prompt payment statutes. But instead of finding them against public policy, the Legislature merely gave subcontractors a right to suspend operations:

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[272] 386 P.3d 982, 2016 Nev. Unpub. LEXIS 958 (emphasis added).

[273] Exhibits 45 and 149, Helix and CabineTec Subcontracts at Sections 1.1.

[274] Exhibits 45 and 149, Helix and CabineTec Subcontracts at Sections 3.4.

[275] *Id.* at Section 3.8 and Article 4.

> **NRS 624.626 Grounds and procedure for stopping work or terminating Contract; change orders; damages and other remedies; rights of lower-tiered subcontractors after work stoppage or termination of Contract; limitations on liability.**
>
> 1. If:
>
> ..
>
> (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 payment, **even if the higher-tiered contractor has not been paid and the Contract 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 Contract until payment is received if the lower-tiered subcontractor gives written notice to the higher-tiered contractor at least 10 days before stopping work.[277]

If the Legislature wanted to prohibit contracts with pay if paid language, it could have easily done so. It did not and gave the subcontractor the right to suspend work and ultimately terminate if necessary. The Legislature also recognized that parties can agree to a schedule of payments,[278] and the Nevada Supreme Court confirmed that payment schedules that include owner payment preconditions are valid in *Padilla Construction.*

B. <u>Retention payments never became due.</u>

NRS 624.624 is designed to ensure that general subcontractors promptly pay subcontractors after the general contractor receives payment from the owner for the subcontractor's work.[279] Pursuant to NRS 624.624(1)(a), the Helix and CabineTec

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[276] NRS 624.626.

[277] NRS 624.626 (1)(b) (emphasis added).

[278] NRS 624.624(1)(a).

[279] *Big D v. Padilla* Findings of Fact and Conclusions of Law, at 21:14-16 (emphasis added). ("NRS 624.624 is designed to ensure that general subcontractors promptly pay subcontractor after

subcontracts contain valid retention payment schedules, or payment is otherwise due 10 days after APCO received payment from Gemstone:

> **NRS 624.624 Payment of lower-tiered subcontractor; grounds and procedure for withholding amounts from payment; rights and duties after notice of withholding, notice of objection or notice of correction.**
>
> 1. Except as otherwise provided in this section, if a higher-tiered contractor enters into:
>
> (a) A written Contract with a lower-tiered subcontractor that includes a schedule for payments, the higher-tiered contractor shall pay the lower-tiered subcontractor:
>
> (1) On or before the date payment is due; or
>
> (2) Within 10 days after the date the higher-tiered contractor receives payment for all or a portion of the work, materials or equipment described in a request for payment submitted by the lower-tiered subcontractor,
>
> → whichever is earlier.

Section 3.8 of the Helix Subcontract and the CabineTec Subcontract contained retention payment schedules that were acknowledged and affirmed by all parties at trial. As such, Helix and CabineTec needed to show they complied with each of these five conditions precedent to payment before it would be entitled to retention. *See Lucini-Parish Ins. v. Buck,*[280] (a party who seeks to recover on a contract has the burden of establishing any condition precedent to the respective contract). They did not meet their burden of proof and APCO never received their retention to trigger the 10 day period

First, Helix never even sent APCO an invoice or billing for its final retention. Second, Helix and CabineTec did not even attempt to show: (1) completion of the entire

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the general contractor receives payment from the Owner associated with work performed by the subcontract.").

[280] 108 Nev. 617, 620, 836 P.2d 627, 629 (1992).

Project, (2) final acceptance of the Project by Gemstone, (3) receipt of final payment from Gemstone to APCO, (4) delivery of all as-builts and close out document, and (5) delivery of all final waivers and releases. Accordingly, Helix and CabineTec's retention payment never became due from Apco. And lastly, the evidence was clear that Apco did not receive any retention payment from Gemstone.

C. <u>The Subcontracts were assigned to Gemstone.</u>

The Contract contained a subcontract assignment provision.[281] That provision confirmed that upon termination of the Contract, APCO's subcontracts were assigned to Gemstone. Thereafter, Gemstone would be responsible for the payment of work completed by the subcontracts that was due to the subcontractors prior to the termination.[282] The Contract was incorporated into the subcontracts.[283].

On August 15, 2008, Gemstone sent APCO a letter confirming its intention to terminate the Contract, and accept the assignment of subcontracts.[284]On August 28, 2008, Gemstone sent another letter indicating the Contract was terminated as of August 24, 2008.[285]Accordingly, once APCO left the Project, the Helix and CabineTec Subcontracts were assigned to Gemstone. And once Gemstone had those Subcontracts, it facilitated Camco's assumption of those subcontracts.[286] Camco's Steve Parry admitted that Camco was assuming the subcontracts that APCO had with Helix and CabineTec:

> Q. Okay. So you were assuming the Subcontracts that APCO had issued on the Project; is that right?
>
> A. Yes.

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[281] Exhibit 2 at 10.4.

[282] Exhibit 2, Section 10.4.

[283] Sections 1.1 of Helix and CabineTec subcontracts. Helix's Mr. Johnson admitted it was Helix's practice to request and review an incorporated prime contract. Testimony of Bob Johnson (Helix) Day 2, p. 16.

[284] Exhibit 13-14.

[285] Exhibit 27.

[286] Exhibit 170/169 Helix's subcontract and Helix Amendment with Camco; and Exhibit 184, CabineTec's subcontract with Camco.

> Q. And, sir, if you would, turn to Exhibit C within the exhibit. Those assumed contracts from APCO included CabineTec and Helix; correct?
>
> A. Yes.[287]

In *J. Christopher Stuhmer, Inc. v. Centaur Sculpture Galleries, Ltd., Inc.*,[288] the Nevada Supreme Court considered whether an assignment of a construction contract took place and considered the following factors: which party was responsible for the administration of the project, which party ensured the design was correctly carried out, who paid the subcontractors and materialmen, which party answered questions from the owner, which parties were on the job site, which party had ongoing involvement with the project, and which party was corresponding with the owner.[289] These factors could not weigh more clearly in APCO's favor. Each party's behavior is consistent with the assignment of the subcontracts to Gemstone:

- ***Gemstone***: Gemstone attempted to "terminate" the APCO/Gemstone prime contract and stopped giving direction and/or orders to APCO. Gemstone told the subcontractors to stop working for APCO and that their contracts would be assumed by Camco. Gemstone also ordered APCO off the site.
- ***Camco***: Camco started giving direction to the subcontractors and dictating their work. Camco sent subcontracts and/or Ratification agreements to both Helix and CabineTec. It engaged in negotiations of the respective subcontracts, and it received billings directly from Helix and CabineTec, including the rollover of their retention.
- ***Helix***: Helix did not contact APCO after August 2008 and remained on-site working directly for Gemstone and Camco. It engaged in subcontract negotiations for the same scope of work as it had initially subcontracted for with APCO with Camco, and took direction and performed work under Camco's and Gemstone's direction. Helix submitted pay applications to Camco and even rolled its retention account over to Camco billings. Helix also represented that it signed a ratification Contract and subcontract with Camco in its complaint and its amended complaint.
- ***CabineTec***: CabineTec did not contact APCO after August 2008 and remained on-site working for Camco. It engaged in subcontract negotiations for the same scope of work as it had initially subcontracted for with APCO with Camco, and took direction and performed work under Camco's

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[287] Testimony of Steve Parry (Camco) Day 5, p. 26.

[288] 110 Nev. 270, 274, 871 P.2d 327, 330 (1994).

[289] *Id.*

direction. CabineTec submitted pay applications to Camco including all retention. CabineTec also signed a ratification agreement with Camco.

- ***APCO***: APCO was off-site and did not dictate or control the subcontractors' work. It did not have any communication with Gemstone or the subcontractors after August 2008. It did not participate in construction related meetings, did not receive billings from subcontractors, or submit payment applications on behalf of subcontractors. In fact, Helix never invoiced APCO for its retention.

As such, it is clear that an assignment took place thereby making Gemstone/Camco the party responsible for payment to the subcontractors, not APCO.

D. The Court should preclude evidence or argument of CabineTec's damages over $30,110.95.

CabineTec's complaint alleged $19,547.00 against APCO.[290] CabineTec's initial, and first supplemental disclosures disclosed $30,110.95 in damages against APCO, which included interest and fees on the $19,547.[291] Those were the only disclosures that CabineTec made prior to the close of discovery, as extended by the Court. As such, the Court should preclude any evidence or argument of CabineTec's alleged damages against APCO in excess of $30,110.95.

NRCP 16.1(a)(1)(c) requires that a plaintiff "**must**, *without awaiting a discovery request*, provide to other parties . . . [a] **a computation of any category of damages claimed by the disclosing** party, making available for inspection and copying under Rule 34 of the documents or other evidentiary matter... on which such computation is based, including materials bearing on the nature and extent of injuries suffered..."[292] Early disclosure of damages is mandatory. The rule is clear—a plaintiff "is not excused from making its disclosures because it has not fully completed its investigation of the case."[293]

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[290] Exhibit 156-8.

[291] Exhibits 157 (CabineTec's initial disclosures); Exhibit 158 (CabineTec's First Supplemental Disclosure), and Exhibit 159 (CabineTec's second supplemental disclosure).

[292] NRCP16.1(a)(1)(c)(emphasis added).

[293] *Id.*

NRCP 16.1(a)(c) requires that parties voluntarily disclose "[a] computation of any category of damages claimed by the disclosing party" and documents to support the computation.[294]

Under NRCP 26(e)(1), a plaintiff must immediately supplement its initial damages computation if it "learns that in some material respect the information disclosed is incomplete or incorrect."[295] *See Keener v. United States*,[296] (finding a second disclosure so substantially different from the first that it could not qualify as a correction of an incomplete or inaccurate expert report).

National Wood's Second Supplemental Disclosure containing amended damages was filed on November 13, 2017, two weeks before a November 28 trial date. This supplement increases the damages from $30,110.95 to $1,154,680.40, a 3600% increase. APCO has suffered huge prejudice as a result of this late disclosure as APCO described in its motion in limine, and National Wood's error in not disclosing its damages pursuant to these rules was certainly not harmless.

CabineTec has no adequate justification for its repeated failure to comply with Rule 16.1(a)'s disclosure requirements. APCO should not be forced to defend against undisclosed damages due to CabineTec's disregard of Nevada's disclosure rules. Per the Court's Order dated January 2, 2018, and the evidence presented at trial, the Court should exclude all evidence of CabineTec's damages above its prior disclosures.

E. Helix and CabineTec ratified their subcontracts with Camco.

"Ratification of a contract occurs when one approves, adopts, or confirms a contract previously executed by another..."[297] Ratification may be express or implied by the conduct of the parties.[298] The party to be charged with ratification of such a contract must

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[294] NRCP 16.1(a)(1)(c).

[295] NRCP 26(e)(1).

[296] 181 F.R.D. 639, 640 (D. Mont. 1998)

[297] *Id.*

[298] 17A Am Jur 2d Contracts § 10.

have acted voluntarily and with full knowledge of the facts.[299] "A person ratifies an act by manifesting assent that the act affects the person's legal relations or conduct that justifies a reasonable assumption that the person so consents."[300] "Any conduct which indicates assent by the purported principal to become a party to the transaction or which is justifiable only if there is ratification is sufficient, and even silence with full knowledge of the facts may operate as a ratification."[301] "If a person makes a manifestation that the person has ratified another's act and the manifestation, as reasonably understood by a third party, induces the third party to make a detrimental change in position, the person may be estopped to deny the ratification."[302] "A valid ratification by the principal relieves the agent from any liability to the principal which would otherwise result from the fact that the agent acted in an unauthorized way or without authority."[303]

In this case, CabineTec and Helix ratified their subcontracts with Camco. Helix legally admitted this fact to the Court and to APCO in its complaint. CabineTec signed a ratification agreement with Camco. After APCO left the Project, both took direction for their respective work from Camco. Each submitted billings to Camco including rolling over the retention they now seek from APCO, and each performed work under the ratified original scope of work. None of the ongoing work was done for or on behalf of APCO and there is no legal authority that would make APCO liable for their ongoing work on the Project, or the Project retention. Neither party continued to take direction or send invoices to APCO. And notably, Helix never billed APCO for retention because it never became due.[304] Helix and CabineTec waived all claims against APCO by knowingly contracting to

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[299] *Id.*

[300] 3 Am Jur 2d Agency § 169.

[301] *Id.*

[302] 3 Am Jur 2d Agency § 171.

[303] 2A C.J.S. Agency § 85.

[304] CabineTec admittedly sent one billing for the full amount of CabineTec's delivered (but uninstalled) cabinets that incorrectly included retention. Retention clearly was not due under the retention payment schedule.

work on the Project for Camco/Gemstone and rolling their retention over to Camco and Gemstone.

When Helix and CabineTec ratified their subcontracts with Camco, they effectively replaced APCO and released it from liability. See *Foley Co. v. Scottsdale Ins. Co.,*[305] ("The ratification, by subcontractor's liability insurer, of its general agent's allegedly unauthorized placement of coverage released the general agent from liability to the insurer."); *Brooks v. January,*[306] (holding that because a dissident faction of a church congregation ratified their pastor's unauthorized sale of property, the pastor was relieved from liability to the church); *Southwest Title Ins. Co. v. Northland Bldg.,*[307] (holding that because the title insurance company ratified its agent's arguably unauthorized actions, the agent could not be held liable to the title insurance company); *Rakestraw v. Rodrigues,*[308] (holding that because a wife ratified forgery of her name on a deed of trust, the agent was relieved of liability to the principal).

F. Helix's legally admitted that it entered into a subcontract with APCO and a ratification Contract with Camco.

"Judicial admissions are defined as deliberate, clear, unequivocal statements by a party about a concrete fact within that party's knowledge."[309] Concessions in pleadings are judicial admissions whereas oral testimony subject to traditional impeachment is construed as evidence.[310]

1. Helix had a subcontract with APCO.

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[305] 28 Kan. App. 2d 219, 15 P.3d 353 (2000).

[306] 116 Mich.App. 15, 321 N.W.2d 823 (1982).

[307] 542 S.W.2d 436 (Tex.App.1976), *rev'd in part on other grounds* 552 S.W.2d 425 (Tex.1977).

[308] 8 Cal.3d 67, 104 Cal.Rptr. 57, 500 P.2d 1401 (1972).

[309] *Reyburn Lawn & Landscape Designers, Inc. v. Plaster Dev. Co.,* 127 Nev. 331, 343, 255 P.3d 268, 276 (2011) citing *Smith v. Pavlovich,* 394 Ill.App.3d 458, 333 Ill.Dec. 446, 914 N.E.2d 1258, 1267 (2009).

[310] *See* Reyburn Lawn & Landscape Designers, Inc. v. Plaster Dev. Co., *supra.*

Helix admitted it had a valid written subcontract with APCO in its lien documents,[311] in its complaint against APCO,[312] and in its amended complaint against APCO.[313] Then, Victor Fuchs, the President of Helix, also confirmed that the first 15 pages of Trial Exhibit 45 was the written agreement that governed the APCO/Helix relationship.[314] Given these admissions and the conduct of the parties, it is clear that there was a subcontract between APCO and Helix.

2. Helix ratified its subcontract with Camco and replaced APCO.

Helix also admitted the following regarding its ratification Contract with Camco:

> 18. On or about September 4, 2008, Helix entered into the Ratification and Amendment of Subcontract Contract ("CPCC Contract") with Camco who replaced APCO as the general contractor on the Project, to continue the work for the Property ("CPCC Work").
>
> 19. Helix furnished the CPCC Work for the benefit of and at the specific instance and request of CPCC and/or Owner.
>
> 20. Pursuant to the CPCC Contract, Helix was to be paid an amount in excess of Ten Thousand Dollars ($10,000.00) (hereinafter "CPCC Outstanding Balance") for the CPCC Work.
>
> 21. Helix furnished the CPCC Work and has otherwise performed its duties and obligations as required by the CPCC Contract.
>
> 22. CPCC has breached the CPCC Contract...[315]

While Helix has not produced a signed version of the "Ratification and Amendment of Subcontract Contract" it entered into with Camco on September 4, 2008, it represented these facts to this Court and to APCO and proceeded accordingly. So Helix's intentions

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[311] Exhibits 512 and pages 5-6, 7-9, 10-11.

[312] Exhibit 77.

[313] Exhibit 231.

[314] Exhibit 314. This affidavit was attached to Helix's Motion for Summary Judgment Against Gemstone filed on May 10, 2010. The attachment referenced in the Fuchs affidavit is the first fifteen pages of Exhibit 45.

[315] Exhibit 77.

and actions were clear: it understood that it was entering into a ratification agreement, that it was replacing APCO as the general contractor with Camco, and that it was amending the APCO subcontract. Accordingly, the retention account was transferred to Camco and Gemstone, and Helix's work was for the benefit and direction of Camco. Helix's representations and intentions in entering into a ratification agreement with Camco were clear and now legally admitted.

G. Helix and CabineTec waived any right to pursue APCO.

"Waiver requires the intentional relinquishment of a known right."[316] "If intent is to be inferred from conduct, the conduct must clearly indicate the party's intention."[317] "Thus, the waiver of a right may be inferred when a party engages in conduct so inconsistent with an intent to enforce the right as to induce a reasonable belief that the right has been relinquished."[318]

In this case, CabineTec's and Helix's intent was clear: they understood that APCO left the Project. They entered into ratification agreements with Camco and continued working for Camco and Gemstone on the Project without any further dealings with APCO. They did not negotiate entirely new contracts – their contract amounts and retention rolled over from APCO to Camco. They took orders and direction from Camco employees. They sent billings to Camco. They submitted change orders to Camco. They showed up to the Project at Camco's direction and Camco ultimately informed them the Project had shut down. By pursuing this course of action, it was clear that none of the parties believed APCO was the general contractor on the Project. This conduct is entirely inconsistent with any claim that APCO was the general contractor and was responsible for retention or other future payments. APCO paid Helix and CabineTec all amounts due while APCO was the general contractor.

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[316] *Nevada Yellow Cab Corp. v. Eighth Judicial Dist. Court ex rel. Cty. of Clark,* 123 Nev. 44, 49, 152 P.3d 737, 740 (2007) (internal citations omitted).

[317] *Id.*

[318] *Id.*

H. The new subcontracts or ratification agreements are novations.

"A novation consists of four elements: (1) there must be an existing valid contract; (2) all parties must agree to a new contract; (3) the new contract must extinguish the old contract; and (4) the new contract must be valid."[319] "If all four elements exist, a novation occurred.[320] "Additionally, the intent of all parties to cause a novation must be clear."[321] "A 'novation' may be defined as a substitution of a new contract or obligation for an old one which is thereby extinguished."[322] "All novations are substituted contracts, and the converse is also true that all substituted contracts are novations. An existing claim can be instantly discharged by the substitution of a new executory Contract in its place."[323]

"This substitution of a new obligation for an existing one, effects a novation, which thereby discharges the parties from all of their obligations under the former Contract inasmuch as such obligations are extinguished by the novation."[324] "However, consent to novation may be implied from the circumstances of the transaction and by the subsequent conduct of the parties."[325] "Novation is a question of law only when the Contract and consent of the parties are unequivocal."[326] "Whether a novation occurred is a question of fact if the evidence is such that reasonable persons can draw more than one conclusion."[327]

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[319] *United Fire Ins. Co. v. McClelland*, 105 Nev. 504, 508, 780 P.2d 193, 195–96 (1989) (internal citations omitted).

[320] *Id.*

[321] *United Fire Ins. Co. v. McClelland*, 105 Nev. 504, 508, 780 P.2d 193, 195–96 (1989) citing Pink v. Busch, 100 Nev. 684, 690, 691 P.2d 456, 460 (1984).

[322] 66 C.J.S. Novation § 1.

[323] *Lazovich & Lazovich, Inc. v. Harding,* 86 Nev. 434, 437, 470 P.2d 125, 127 (1970).

[324] *Williams v. Crusader Disc. Corp.,* 75 Nev. 67, 70, 334 P.2d 843, 845 (1959) citing 66 C.J.S. Novation § 1, p. 681; 39 Am.Jur. Novation § 2,254.

[325] *United Fire Ins. Co. v. McClelland*, 105 Nev. 504, 508, 780 P.2d 193, 195–96 (1989) citing *Sans Souci v. Div. of Fla. Land Sales,* 448 So.2d 1116, 1121 (Fla.Dist.Ct.App.1984).

[326] *United Fire Ins. Co. v. McClelland*, 105 Nev. 504, 508, 780 P.2d 193, 195–96 (1989) *citing Downing v. Dial,* 426 N.E.2d 416, 419 (Ind.Ct.App.1981).

[327] *Id.* (internal citations omitted).

"Moreover, the party asserting novation has the burden of proving all the essentials of novation by clear and convincing evidence."[328]

The new subcontracts between Camco and Helix and Camco and CabineTec are novations. The substituted ratification agreements and subcontracts clearly replaced and extinguished the APCO subcontracts. The Camco subcontracts picked up where the subcontractors left off with APCO in terms of scope and payment. Once the novation occurred, placing Camco as the completion contractor into privity with the subcontractors, APCO was wholly removed from contractual privity with either Helix or CabineTec as a matter of law. It is clear that, "[c]onsent to novation may be implied from the circumstances of the transaction and by the subsequent conduct of the parties."[329] Accordingly, APCO did not retain any obligations (including payment) following the novations of the APCO/ Helix and APCO/CabineTec subcontracts.

I. CabineTec and Helix cannot pursue their unjust enrichment or quantum meruit claims.

CabineTec and Helix asserted breach of contract *and* unjust enrichment damages against APCO.[330] APCO had a subcontract with CabineTec and Helix. An action based upon a theory of unjust enrichment is not available when there is an express, written contract because no contract can be implied when there is an express contract.[331]

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[328] *Id.*

[329] *United Fire Ins. Co. v. McClelland*, 105 Nev. 504, 508, 780 P.2d 193, 195–96 (1989) citing *Sans Souci v. Div. of Fla. Land Sales,* 448 So.2d 1116, 1121 (Fla.Dist.Ct.App.1984).

[330] *See* Exhibit 45, Helix Subcontract, and Exhibit 149, CabineTec Subcontract.

[331] *Leasepartner's Corp. v. Robert L. Brooks Trust*, 113 Nev. 747, 942 P.2d 182 (1997).

DATED: March 8, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of SPENCER FANE LLP and that a copy of the foregoing **APCO CONSTRUCTION, INC.'S POST-TRIAL BRIEF** was served by electronic transmission through the E-Filing system pursuant to NEFCR 9, NRCP 5(b) and EDCR 7.26 or by mailing a copy to their last known address, first class mail, postage prepaid for non-registered users, on this 8th day of March, 2018, as follows:

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DISTRICT COURT

CLARK COUNTY, NEVADA

APCO CONSTRUCTION, a Nevada corporation, Plaintiff, v. GEMSTONE DEVELOPMENT WEST, INC., A Nevada corporation, Defendant. AND ALL RELATED MATTERS	Case No.: A571228 Dept. No.: XIII *Consolidated with:* *A574391; A574792; A577623; A583289; A587168; A580889; A584730; A589195; A595552; A597089; A592826; A589677; A596924; A584960; A608717; A608718; and A590319*

APCO'S OPPOSITION TO HELIX ELECTRIC OF NEVADA, LLC'S FINDINGS OF FACT AND CONCLUSIONS OF LAW

APCO Construction, Inc. ("APCO") submits its response to Helix Electric of Nevada, LLC's ("Helix") Proposed Findings of Fact and Conclusions of Law.

I. Helix's most critical proposed findings of fact are not supported by the weight of the evidence.

APCO disputes the following "findings of fact" which Helix proposed to this Court. The findings of fact which APCO disputes include the following 4-5, 8, 9, 12, 14, 15, 17, 21-24, 36-38, and 40. For ease of review, Helix's proposed finding precedes APCO's response to the same.

A. Helix's Proposed Finding of Fact No: 4. After APCO provided its form Subcontract Agreement ("the APCO Subcontract"). Helix modified, signed and on or about November 28, 2007 returned the same to APCO for its review, consideration and execution. **[Exhibit 45** - "the Helix-APCO Subcontract"]. Helix's proposed modifications were contained in an attachment called the Helix Electric Exhibit to the Standard Subcontract Agreement [between APCO and Helix (hereinafter, "the Helix Exhibit (APCO)"]. *[See* Ex. 45-016-023]. Helix also interlineated Section 1.1 of the Helix-APCO Subcontract to reflect that "the attached Helix Electric Exhibit is also part of this Subcontract Agreement." [Ex. 45, ~ 1.1]. Among the modifications proposed by Helix were:

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• Deleting "Pay-if-Paid" language, including a provision purporting to require Helix to assume the risk that the owner may become insolvent. *[See also* Trial Transcript Vol. 1 pp.116:2-117-18[1]]…

APCO's Response: The Helix Amendment did not delete the provisions that make payment from the owner a condition precedent to APCO's payment obligations, including the retention payment schedule preconditions in Section 3.8 of the Subcontract:

> The 10 percent withheld retention shall be payable to Subcontractor upon, and only upon the occurrence of all the following events, each of which is a condition precedent to Subcontractor's right to receive final payment hereunder and payment of such retention: (a) completion of the entire project as described in the Contract Documents; (b) the approval of final acceptance of the project Work by Owner, (c) Receipt of final payment by Contractor from Owner; (d) Delivery to Contractor from Subcontractor all as-built drawings for it's scope of work and other close out documents; (e) Delivery to Contractor from Subcontractor a Release and Waiver of Claims from all of Subcontractor's laborers, material and equipment suppliers, and subcontractors, providing labor, materials or services to the Project.[2]

And notwithstanding Helix's proposed interlineations to the subcontract, Helix's Mr. Johnson admitted he did not change the retention payment schedule in the subcontract:

> Q. Okay. Would you turn to page 4 [of Exhibit 45] And directing your attention to paragraph 3.8?
>
> A. Okay.
>
> Q. Do you recognize that as the agreed-upon retention payment schedule in the subcontract?
>
> A. I do.
>
> Q. And in fairness to you and the record, you did propose a change to paragraph 3.8. Could you turn to page 16 of the exhibit, Exhibit 45? And directing your attention to paragraph 7, does this reflect your proposed change to the retention payment schedule in the original form of Exhibit 45?
>
> A. In the original form, yes.

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[1] References to the Trial Transcript will hereafter be in the following format to represent the day/volume, page and line citation: "TR1-116:2-117-18." The identity of the witness will appear in a footnote. In this instance the witness is Robert Johnson.

[2] Exhibit 45-4.

> Q. Okay. And APCO accepted your added sentence that if the retention was reduced on the Project, the same would be passed on to the subcontractor, correct?
>
> A. Correct.
>
> Q. Through your change in paragraph 7, on page 16 of Exhibit 45, you did not otherwise modify the preconditions in the retention payment schedule of 3.8, did you?
>
> A. We did not.[3]

So the retention payment schedule was always in effect.

B. Helix's Proposed Finding of Fact No: 5. On or about April 8, 2008 (i.e., nearly 5 months after Helix submitted its proposed amendments to APCO), APCO signed and returned the Helix-APCO Subcontract with numerous changes to the proposed Helix Exhibit-APCO rejecting many of Helix's proposed revisions. Helix did not consent to APCO's proposed revisions to the Helix Exhibit (APCO).

APCO's Response: Helix did not provide any citation to the record for this statement, as such, it should not be given any weight. And Helix's Mr. Johnson received APCO's revisions to the Subcontract on July 11, 2008,[4] and continued to work on the Project knowing of APCO's revisions.[5]

More substantively, Helix's Mr. Johnson, also admitted that Exhibit 45 represented the APCO agreement that Helix alleges APCO somehow breached:

> Q. Okay, sitting here today, is it your contention that APCO breached a contract with Helix?
>
> A. I would say they did in the respect that we haven't been paid.
>
> Q. Okay. And which contract is it in your opinion that APCO breached?
>
> A. For the Manhattan West project.
>
> Q. Is there a document?
>
> A. There is a document.
>
> Q. Okay. And, sir, would you turn—if you could, grab Exhibit 45. You spent some time talking about this yesterday.

---

[3] Testimony of Bob Johnson (Helix) Day 2, pp. 17-18.
[4] Exhibit 506.
[5] Testimony of Bob Johnson (Helix) Day 2, p. 21.

A. Okay.

The Court: Which item is it, counsel?

Mr. Jefferies: Exhibit 45.

Q. Is it your position that APCO breached this agreement?

A. My assumption would be they breached it, yes.

Q. Okay. But this is the document that represents the agreement between APCO and Helix for the project?

A. It is the agreement between APCO and Helix.[6]

C. Helix's Proposed Finding of Fact No: 8. Johnson's undisputed testimony is that Helix did not agree to or accept APCO's July 11, 2008 revisions. [TR1-113:20- 114:8].[7] Accordingly, and in the absence of evidence to the contrary, the Court finds that Helix and APCO did not reach a meeting of the minds with respect to the Helix-APCO Subcontract.

APCO's Response: Helix's corporate representatives, counsel, and conduct throughout this litigation all confirm that Exhibit 45 represented the Subcontract with APCO. In its lien documents,[8] complaint against APCO,[9] and its amended complaint,[10] Helix has unequivocally admitted that it had a binding subcontract with APCO.[11] In fact, Victor Fuchs, the President of Helix,[12] also confirmed the following in an affidavit attached to Helix's May 5, 2010 Motion for Summary Judgment Against Gemstone Development West (and corresponding errata) filed with this Court:

> 4. On or around April 17, 2007 [the date of Exhibit 45], APCO contracted with Helix to perform certain work on the Property.
>
> 5. Helix's relationship with APCO was governed by a subcontract, which provided the scope of Helix's work and method of billing and payments to Helix for work

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[6] Testimony of Bob Johnson (Helix) Day 2, p. 9.
[7] Testimony of Robert Johnson.
[8] Exhibits 512 pp. 5-6, 7-9, 10-11.
[9] Exhibit 77.
[10] Exhibit 231.
[11] Exhibit 231.
[12] Testimony of Bob Johnson (Helix) Day 1, p. 108.

> performed on the Property (the "Subcontract"). A true and correct copy of the Subcontract is attached hereto as Exhibit 1.
>
> 6. Helix also performed work and provided equipment and services directly for and to Gemstone, namely design engineering and temporary power.
>
> 7. Camco Pacific Construction Company, Inc. ("Camco") replaced APCO as the general contractor. Thereafter, Helix performed its Work for Gemstone and/or Camco…[13]

Exhibit 1 to the declaration was the first fifteen pages of Exhibit 45.[14] And notwithstanding Helix's proposed interlineations to the subcontract, Helix's Mr. Johnson admitted he did not change the retention payment schedule in the subcontract:

> Q. Okay. Would you turn to page 4 [of Exhibit 45] And directing your attention to paragraph 3.8?
>
> A. Okay.
>
> Q. Do you recognize that as the agreed-upon retention payment schedule in the subcontract?
>
> A. I do.
>
> Q. And in fairness to you and the record, you did propose a change to paragraph 3.8. Could you turn to page 16 of the exhibit, Exhibit 45? And directing your attention to paragraph 7, does this reflect your proposed change to the retention payment schedule in the original form of Exhibit 45?
>
> A. In the original form, yes.
>
> Q. Okay. And APCO accepted your added sentence that if the retention was reduced on the Project, the same would be passed on to the subcontractor, correct?
>
> A. Correct.
>
> Q. Through your change in paragraph 7, on page 16 of Exhibit 45, you did not otherwise modify the preconditions in the retention payment schedule of 3.8, did you?

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[13] Exhibit 314.

[14] Helix Electric's May 5, 2010 Motion for Partial Summary Judgment Against Gemstone Development West (and corresponding errata).

A. We did not.[15]

Mr. Johnson, also admitted that Exhibit 45 represented the APCO agreement that Helix alleges APCO somehow breached:

> Q. Okay, sitting here today, is it your contention that APCO breached a contract with Helix?
>
> A. I would say they did in the respect that we haven't been paid.
>
> Q. Okay. And which contract is it in your opinion that APCO breached?
>
> A. For the Manhattan West project.
>
> Q. Is there a document?
>
> A. There is a document.
>
> Q. Okay. And, sir, would you turn—if you could, grab Exhibit 45. You spent some time talking about this yesterday.
>
> A. Okay.
>
> The Court: Which item is it, counsel?
>
> Mr. Jefferies: Exhibit 45.
>
> Q. Is it your position that APCO breached this agreement?
>
> A. My assumption would be they breached it, yes.
>
> Q. Okay. But this is the document that represents the agreement between APCO and Helix for the project?
>
> A. It is the agreement between APCO and Helix.[16]

So Helix's counsel's attempts to avoid the agreed upon retention schedule are unpersuasive and not supported by the evidence.

D. Helix's Proposed Finding of Fact No: 9. However, for the reasons discussed below, the Court concludes that Helix and APCO did reach an agreement with respect to material terms constituting a contract. The evidence is undisputed that Helix performed agreed-upon work on the Project for APCO, submitted multiple payment applications to APCO for an agreed-upon price, and (except for some payments made to Helix from a voucher control company after APCO left the Project), was paid directly by APCO throughout APCO's time on the Project. [See e.g., **Exhibit 501].**

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[15] Testimony of Bob Johnson (Helix) Day 2, pp. 17-18.
[16] Testimony of Bob Johnson (Helix) Day 2, p. 9.

IN THE SUPREME COURT OF THE STATE OF NEVADA

Supreme Court Case No. 77320
***Consolidated with* 80508**

HELIX ELECTRIC OF NEVADA, LLC,

Appellant,

v.

APCO CONSTRUCTION, INC., A NEVADA CORPORATION,

Respondent.

JOINT APPENDIX
VOLUME 84

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Docket 77320 Document 2020-38056

CHRONOLOGICAL APPENDIX OF EXHIBITS

Date	Description	Bates Number	Volume(s)
06-24-09	**Helix Electric's Statement of Facts Constituting Lien and Third-Party Complaint**	**JA000001-JA000015**	**1**
08-05-09	**APCO's Answer to Helix's Amended Statement of Facts Constituting Notice of Lien and Third-Party Complaint**	**JA000016 – JA000030**	**1**
04-26-10	**CAMCO and Fidelity's Answer and CAMCO's Counterclaim**	**JA000031-JA000041**	**1**
07-02-10	**Order Striking Defendant Gemstone Development West, Inc.'s Answer and Counterclaim and Entering Default**	**JA000042-JA000043**	**1**
06-06-13	**APCO's Limited Motion to Lift Stay for Purposes of this Motion Only; (2) APCO's Motion for Summary Judgment Against Gemstone Only; and (3) Request for Order Shortening Time**	**JA000044-JA000054**	**1**
	Exhibit 1 – Affidavit of Randy Nickerl in Support of (I) APCO's Limited Motion to Lift Sta for Purposes of this Motion Only; (2) APCO's Motion for Judgment Against Gemstone Only	JA000055-JA000316	1/2/4/5/6
	Exhibit 2 – Findings of Fact and Conclusions of Law and Judgment in Favor of APCO Construction Against Gemstone Development West, Inc. Only	JA000317-JA000326	6

Date	Description	Bates Number	Volume(s)
06-13-13	**Docket Entry and Minute Order Granting APCO's Motion for Summary Judgment Against Gemstone**	**JA000327**	**6**
08-02-17	**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**	**JA000328-JA000342**	**6**
	Exhibit 1 – APCO Construction's Answers to Helix Electric of Nevada, LLC's First Request for Interrogatories	JA000343-JA00379	6
	Exhibit 2 – Camco Pacific Construction Company, Inc.'s Responses to Helix Electric of Nevada, LLC's Interrogatories	JA000380-JA000392	6
08-21-17	**APCO Construction's Opposition to Peel Brimley Lien Claimants' Partial Motion for Summary Judgment Precluding Defenses Based on Pay-if-Paid Agreements**	**JA000393-JA000409**	**6/7**
	Exhibit A – Excerpt from 30(b)(6) Witness for Helix Electric of Nevada, LLC taken July 20, 2017	JA000410-JA000412	7
09-28-17	**Peel Brimley Lien Claimants' Reply to Oppositions to Motion for Partial Summary Judgment Precluding Defenses Based on Pay-if-Paid Agreements**	**JA000413-JA00418**	**7**
11-06-17	**Peel Brimley Lien Claimants' Motion in Limine Nos. 1-6**	**JA000419-JA000428**	**7**

Date	Description	Bates Number	Volume(s)
	Exhibit 1 – Notice of Entry of Order	JA000429 JA000435	7
	Exhibit 2 – Amended Notices of 30(b)(6) Deposition of Camco Pacific Construction Company, Inc. from Cactus Rose Construction, Inc., Fast Glass, Inc.'s, Heinaman Contract Glazing, Inc. and Helix Electric of Nevada, LLC's	JA000436-JA000472	7/8
	Exhibit 3 – Excerpt from David E. Parry's Deposition Transcript taken June 20, 2017	JA000473 JA00489	8
	Exhibit 4 – Cactus Rose Construction, Inc.'s First Set of Request for Admissions to Camco Pacific Construction	JA00490 JA000500	8
	Exhibit 5 – Fast Glass, Inc.'s First Set of Request for Admissions to Camco Pacific Construction	JA000501-JA000511	8
	Exhibit 6 – Heinaman Contract Glazing, Inc.'s First Set of Request for Admissions to Camco Pacific Construction	JA000512-JA000522	8
	Exhibit 7 – Helix Electric of Nevada, LLC's First Set of Request for Admissions to Camco Pacific Construction	JA000523-JA000533	8
11-06-17	**Helix Electric of Nevada's Motion *in Limine* Nos. 1-4**	**JA000534-JA000542**	**8**
	Exhibit 1 – Notice of Entry of Order	JA000543-JA000549	8
	Exhibit 2 – Helix Electric of Nevada, LLC's Amended Notice of 30(b)(6) Deposition of APCO Construction	JA000550 JA000558	8/9

Date	Description	Bates Number	Volume(s)
	Exhibit 3 - Excerpts from Brian Benson Deposition Transcript taken June 5, 2017	JA000559 JA000574	9
	Exhibit 4 – Excerpts from Mary Jo Allen's Deposition Transcript taken July 18, 2017	JA000575- JA000589	9
11-06-17	**APCO Construction, Inc.'s Omnibus Motion *in Limine***	**JA000590 JA000614**	**9**
	Exhibit 1 – Second Amended Notice of taking NRCP Rule 30(b)(6) Deposition of Person Most Knowledgeable for Zitting Brothers Construction, Inc.	JA000615- JA000624	9
	Exhibit 2 – Zitting Brothers Construction, Inc.'s Motion for Partial Summary Judgment Against APCO Construction	JA000625- JA000646	9
	Exhibit 3 – Excerpts from Samuel Zitting's Deposition Transcript taken October 27, 2017	JA000647- JA000678	9/10
	Exhibit 4 – Statement of Facts Constituting Lien on Behalf of Buchele, Inc.	JA000679- JA000730	10
	Exhibit 5 – Subcontract Agreement dated April 17, 2007	JA000731- JA000808	10/11
	Exhibit 6 – Subcontract Agreement dated April 17, 2007	JA000809- JA000826	11/12
	Exhibit 7 – Email from Mary Bacon dated October 16, 2017	JA000827- JA000831	12
	Exhibit 8 – Email from Mary Bacon dated October 17, 2017	JA000832- JA000837	12
	Exhibit 9 – Email from Eric Zimbelman dated October 17, 2017	JA000838- JA000844	12
	Exhibit 10 – Special Master Report, Recommendation and District Court Order	JA00845- JA000848	12

Date	Description	Bates Number	Volume(s)
	Exhibit 11 – Plaintiff in Intervention, National Wood Products, Inc.'s Initial Disclosures Pursuant to NRCP 16.1	JA000849-JA000856	12
	Exhibit 12 – Plaintiff in Intervention, National Wood Products, Inc.'s First Supplemental Disclosures Pursuant to NRCP 16.1	JA000857-JA000864	12
	Exhibit 13 – Amended Notice of Taking NRCP Rule 30(b)(6) Deposition of Person Most Knowledgeable for Helix Electric of Nevada, LLC	JA000865-JA000873	12
	Exhibit 14 – Excerpts from Helix Electric of Nevada, LLC's 30(b)(6) Witness Deposition Transcript taken July 20, 2017	JA000874-JA000897	12
11-14-17	**Camco Pacific Construction Company, Inc.'s Opposition to Lien Claimants' Motions in Limine Nos. 1-6**	**JA000898-JA000905**	**12**
	Exhibit A – Nevada Construction Services Cost Plus GMP Contract Disbursement Agreement	JA000906-JA000907	12
	Exhibit B – Scott Financial Corporation's April 28, 2009 letter to the Nevada State Contractor's Board	JA000908-JA000915	2/13
	Exhibit C – E-mail from Alex Edelstein dated December 15, 2008 Re: Letter to Subs	JA000916-JA000917	13
	Exhibit D – Camco Pacific's letter dated December 22, 2008	JA000918-JA000920	13
	Exhibit E – Order Approving Sale of Property	JA000921-JA000928	13

Date	Description	Bates Number	Volume(s)
11-14-17	**APCO Construction, Inc.'s Opposition to Helix Electric of Nevada, LLC's Motions *in Limine* Nos. 1-4**	**JA000929-JA000940**	**13/14**
	Exhibit 1 – Excerpts from the Deposition Transcript of Mary Jo Allen taken July 18, 2017	JA000941-JA000966	14/15/16
	Exhibit 2 – Helix Electric's Manhattan West Billing/Payment Status through August 2008	JA000967-JA000969	16/17
	Exhibit 3 – Excerpts from the Deposition Transcript of Andrew Rivera taken July 20, 2017	JA000970-JA000993	17/18/19
11-14-17	**Helix Electric of Nevada's Opposition to APCO Construction's Omnibus Motion *in Limine***	**JA000994-JA001008**	**20**
	Exhibit 1 – Excerpts from the Deposition Transcript of Brian Benson taken June 5, 2017	JA001009-JA001042	20
	Exhibit 2 - Excerpts from the Deposition Transcript of Brian Benson taken June 5, 2017	JA001043-JA001055	20
	Exhibit 3 – Special Master Order Requiring Completion of Questionnaire	JA001056-JA001059	20
	Exhibit 4 – Excerpts from the Deposition Transcript of the 30(b)(6) Witness for Helix Electric of Nevada taken July 20, 2017	JA001060-JA001064	20
	Exhibit 5 - Excerpts from the Deposition Transcript of David E. Parry taken June 20, 2017	JA001065 JA001132	20/21
11-15-17	**APCO Construction, Inc.'s Reply in Support of its Omnibus *Motion in Limine***	**JA001133 JA001148**	**21**

Date	Description	Bates Number	Volume(s)
	Exhibit 1 – Special Master Report Regarding Discovery Status	JA001149-JA001151	21
	Exhibit 2 – Notice of Taking NRCP Rule 30(b)(6) Deposition of the Person Most Knowledgeable for Zitting Brothers Construction, Inc.	JA001152-JA001160	21
12-29-17	**Notice of Entry of Order Granting Peel Brimley Lien Claimants' Motion *in Limine* 1-6**	**JA001161-JA001169**	**22**
12-29-17	**Notice of Entry of Order Granting in Part and Denying in Part Helix Electric of Nevada, LLC's Motion *in Limine* 1-4**	**JA001170-JA001177**	**22**
12-29-17	**Notice of Entry of Order Granting in Part and Denying in Part APCO Construction's Omnibus Motion *in Limine***	**JA001178-JA001186**	**22**
01-03-18	**Notice of Entry of Order Granting Peel Brimley Lien Claimants' Motion for Partial Summary Judgment Precluding Defenses Based on Pay-if-Paid Agreements**	**JA001187-JA001198**	**22**
01-04-18	**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 provision on an Order Shortening Time**	**JA001199-JA001217**	**22**
	Exhibit 1 – Subcontract Agreement (Helix Electric of Nevada, LLC)	JA001218-JA001245	22/23/24
	Exhibit 2 – Subcontract Agreement (Zitting Brothers)	JA001246-JA001263	24

Date	Description	Bates Number	Volume(s)
	Exhibit 3 – Subcontract Agreement (CabineTec)	JA001264-JA001281	24/25
	Exhibit 4 – Amended Notice of Lien	JA001282-JA001297	25
	Exhibit 5 - Amended NOL	JA001298-JA001309	25
	Exhibit 6 – Notice of Lien	JA001310-JA001313	25
	Exhibit 7 – Order Approving Sale of Property	JA001314-JA001376	25/26
	Exhibit 8 – Order Releasing Sale Proceeds from Court Controlled Escrow Account	JA001377-JA001380	26
	Exhibit 9 – Order Denying *En Banc* Reconsideration	JA001381-JA001385	26
	Exhibit 10 – Order Granting Peel Brimley Lien Claimants' Motion for Partial Summary Judgment Precluding Defenses Based on Pay-if-Paid Agreements	JA001386-JA001392	26
	Exhibit 11 – Notice of Entry of Findings of Fact and Conclusions of Law and Judgment	JA001393-JA001430	26
	Exhibit 12 – Order Big D Construction Corp.'s Motion for Attorney's Fees, Costs and Interest Pursuant to Judgment	JA001431-JA001435	26
	Exhibit 13 – Appellant's Opening Brief (Padilla v. Big D)	JA001436-JA001469	26
	Exhibit 14 – Respondent's Answering Brief	JA001470-JA001516	26/27
	Exhibit 15 – Appellant's Reply Brief (Padilla v. Big D)	JA001517-JA001551	27
01-09-18	**Peel Brimley Lien Claimants' Opposition to APCO Construction's Motion for Reconsideration of Order**	**JA001552-JA001560**	**27**

Date	Description	Bates Number	Volume(s)
	Granting Partial Summary Judgment Precluding Defenses Based on Pay-if-Paid Agreements		
01-10-18	**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**	**JA001561-JA001573**	**27**
01-12-18	**Joint Pre-Trial Memorandum [for APCO Construction, Inc., the Peel Brimley Lien Claimants and National Wood Products, LLC ONLY]**	**JA001574-JA001594**	**27/28**
	Exhibit 1 – Exhibit List APCO	JA001595-JA001614	28
	Exhibit 2 – Helix Trial Exhibits	JA001615-JA001616	28
	Exhibit 3 – Exhibit List Plaintiff in Intervention National Wood Products, Inc.	JA001617-JA001635	28
	Exhibit 4 – Cactus Rose Trial Exhibits	JA001636-JA001637	28
	Exhibit 5 – Heinaman Trial Exhibits	JA001638-JA001639	28
	Exhibit 6 – Fast Glass Trial Exhibits	JA001640-JA001641	28
	Exhibit 7 – SWPPP Trial Exhibits	JA001642-JA001643	28
	Exhibit 8 - Order Granting in Part and Denying in Part APCO Construction's Omnibus Motion *in Limine*	JA001644-JA001647	28

Date	Description	Bates Number	Volume(s)
	Exhibit 9 - Amended *nunc pro tunc* order regarding APCO Construction, Inc.'s Omnibus Motion *in Limine* No. 7	JA001648-JA001650	28
	Exhibit 10 - Order Granting in Part and Denying in part Helix Electric of Nevada, LLC's Motions *in Limine* 1-4 (Against APCO Construction)	JA001651-JA001653	28
	Exhibit 11 - order granting Peel Brimley Lien Claimants' Motion in Limine Nos.1-6 (against Camco Pacific Construction, Inc.)	JA001654-JA001657	28
	Exhibit 12 - Order Granting Plaintiff in Intervention, National Wood Products, Inc.'s Motion *in Limine*	JA001658-JA001660	28
	Exhibit 13 - Order Granting Peel Brimley Lien Claimants' Motion for Partial Summary Judgment Precluding Defenses Based on Pay-if-Paid Agreements	JA001661-JA00167	28/9/29
01-17-18	**Transcript Bench Trial (Day 1)**[1]	**JA001668-JA001802**	**29/30**
	Trial Exhibit 1 - Grading Agreement ***(Admitted)***	JA001803-JA001825	30
	Trial Exhibit 2 – APCO/Gemstone General Construction Agreement ***(Admitted)***	JA001826-JA001868	30
	Trial Exhibit 3 - Nevada Construction Services /Gemstone Cost Plus/GMP Contract Disbursement Agreement ***(Admitted)***	JA001869-JA001884	30

[1] Filed January 31, 2018

Date	**Description**	**Bates Number**	**Volume(s)**
	Trial Exhibit 4 - APCO Pay Application No. 9 Submitted to Gemstone ***(Admitted)***	JA001885-JA001974	30/31/32
	Trial Exhibit 5 - Letter from J. Barker to A. Edelstein re: APCO's Notice of Intent to Stop Work ***(Admitted)***	JA001975-JA001978	32
	Trial Exhibit 6 - Letter from J. Barker to A. Edelstein re: APCO's Notice of Intent to Stop Work ***(Admitted)***	JA001979-JA001980	32
	Trial Exhibit 10 - Letter from J. Barker to A. Edelstein Re: Notice of Intent to Stop Work (Second Notice) ***(Admitted)***	JA001981-JA001987	32
	Trial Exhibit 13 - Letter from A. Edelstein to Re. Nickerl Re: Termination for Cause (Gemstone) ***(Admitted)***	JA001988-JA002001	32
	Trial Exhibit 14 - Letter from W. Gochnour to Sean Thueson Re: [APCO's] Response to [Gemstone's] Termination for Cause ***(Admitted)***	JA002002-JA002010	33
	Trial Exhibit 15 - Letter from R. Nickerl to A. Edelstein Re: 48-Hour Notices ***(Admitted)***	JA002011-JA002013	33
	Trial Exhibit 16 - Email from J. Horning to A. Berman and J. Olivares re: Joint Checks ***(Admitted)***	JA002014	33
	Trial Exhibit 23 - APCO Subcontractor Notice of Stopping Work and Letter from J. Barker to A. Edelstein Re: Notice of Stopping Work and Notice of Intent to Terminate Contract ***(Admitted)***	JA002015-JA002016	33

Date	Description	Bates Number	Volume(s)
	Trial Exhibit 24 - Letter from R. Nickerl to Clark County re: Notification of APCO's withdrawal as General Contractor of Record ***(Admitted)***	JA002017-JA002023	33
	Trial Exhibit 26 - Email from J. Gisondo to Subcontractors re: June checks ***(Admitted)***	JA002024	34
	Trial Exhibit 27 - Letter from A. Edelstein to R. Nickerl re: June Progress Payment ***(Admitted)***	JA002025-JA002080	34
	Trial Exhibit 28 - Letter from J. Barker to A. Edelstein Re: Termination of Agreement for GMP ***(Admitted)***	JA002081	34
	Trial Exhibit 31 - Transmission of APCO's Pay Application No. 11 as Submitted to Owner ***(Admitted)***	JA002082-JA002120	34/35
	Trial Exhibit 45 - Subcontractor Agreement ***(Admitted)***	JA002121-JA002146	35
	Trial Exhibit 162 - Amended and Restated General Construction Agreement between Gemstone and CAMCO ***(Admitted)***	JA002147-JA002176	35/36
	Trial Exhibit 212 - Letter from Edelstein to R. Nickerl re: NRS 624 Notice ***(Admitted)***	JA002177-JA002181	36
	Trial Exhibit 215 - Email from C. Colligan to Subcontractors re: 48-hour Termination Notice ***(Admitted)***	JA002182-JA002185	36
	Trial Exhibit 216 - Email from C. Colligan re: Meeting with Subcontractors ***(Admitted)***	JA002186-JA002188	36
	Trial Exhibit 506 – Email and Contract Revisions ***(Admitted)***	JA002189 – JA002198	36

Date	Description	Bates Number	Volume(s)
01-18-18	**Stipulation and Order Regarding Trial Exhibit Admitted into Evidence**	**JA002199-JA002201**	**36**
	Exhibit 1 – Exhibit List APCO	JA002208-JA002221	36
	Exhibit 2 – Helix Trial Exhibits	JA002222-JA002223	36
	Exhibit 3 – Exhibit List Plaintiff in Intervention National Wood Products, Inc.	JA002224-JA002242	36/37
	APCO TRIAL EXHIBITS:		
	APCO Related Exhibits:		
	Trial Exhibit 7 - Letter from Scott Financial to APCO re: Loan Status	JA002243	37
	Trial Exhibit 8 - APCO Pay Application No. 10 as submitted to Owner	JA002244-JA002282	37/38
	Trial Exhibit 12 and 107 - Email from C. Colligan to Subcontractors re: Subcontractor Concerns	JA002283-JA002284	38
	Trial Exhibit 17 – Video (Construction Project)	JA002285	N/A
	Trial Exhibit 18 – Video (Construction Project)	JA002286	N/A
	Trial Exhibit 19 – Video (Construction Project)	JA002287	N/A
	Trial Exhibit 20 – Video (Construction Project)	JA002288	N/A
	Trial Exhibit 21 – Video (Construction Project)	JA002289	N/A
	Trial Exhibit 22 – Video (Construction Project)	JA002290	N/A

Date	Description	Bates Number	Volume(s)
	Trial Exhibit 29 - Email from J. Robbins to Subcontractors re: Billing Cut-Off for August Billing	JA002285	39
	Trial Exhibit 30 - Camco Pay Application No. 11 NCS-Owner Approved with NCS Draw Request	JA002286-JA002306	39
	Trial Exhibit 32 and 125 - Photo re: Building 8 & 9, Interior (Showing drywall still not completed and no electrical trim or fixture installed)	JA002307-JA002308	39
	Trial Exhibits 33 and 126 - Photo re: Building 8 & 9, Interior (Showing drywall still not completed)	JA002309-JA002310	39
	Exhibit 34 and 128 - Photo re: Building 8 & 9, Interior (Showing drywall still not completed)	JA002311-JA002312-	40
	Trial Exhibit 35 - Photo re: Building 8 & 9, Interior (Showing drywall still not completed and no electrical trim or fixtures installed)	JA002313-JA002314	40
	Exhibit 36 and 130 -Photo re: Building 8 & 9, Interior (Showing drywall still not completed and no electrical trim or fixtures installed)	JA002315-JA002316	40
	Trial Exhibits 37 and 131 -Photo re: Building 8 & 9, Interior (Showing drywall still not completed and no electrical trim or fixtures installed)	JA002317-JA002318	40
	Trial Exhibits 38 and 132 - Photo re: Building 8 & 9, Interior (Showing drywall still not completed and no electrical trim or fixtures installed)	JA002319-JA002320	41

Date	Description	Bates Number	Volume(s)
	Trial Exhibit 39 -Email from K. Costen to Subcontractors informing that Manhattan West Project no longer open	JA002321-JA002322	41
	Trial Exhibit 40- Letter from D. Parry to Subcontractors Re: Funding Withdrawn	JA002323 JA002326	41
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	Trial Exhibit 58 - Helix Pay Application No. 16713-011R1 submitted to Owner	JA002382-JA002391	42
	Trial Exhibit 59 - Helix Pay Application No. 16713-011R1 given to Camco with Proof of Payment	JA002392-JA002405	43
	Trial Exhibit 60 - Helix Retention Rolled to Camco	JA002406-JA002415	43
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	Trial Exhibit 105 - Ex. C to the Ratification – Zitting Quotes	JA002527-JA002528	44
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	Trial Exhibit 118 - Q&A from Gemstone to subcontracts	JA002564-JA002567	44
	Trial Exhibit 119 - Check No. 528388 payable to APCO ($33,847.55) – Progress Payment No. 8.1 and 8.2	JA002568-JA002571	44
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	Trial Exhibit 165 - Letter from D. Parry to A. Edelstein re: Gemstone losing funding for project	JA002652-JA002653	47
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	Trial Exhibit 169 - Helix Exhibit to Standard Subcontract Agreement with Camco	JA 002665 JA002676	47/48
	Trial Exhibit 170 - Subcontract Agreement between Helix and Camco (unsigned)	JA002677-JA002713	48
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	Trial Exhibit 172 - Letter from J. Griffith to Victor Fuchs Re: Gemstone's intention to continue retention of Helix w/copy of Ratification and Amendment of Subcontract Agreement	JA002719-JA002730	48

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	Trial Exhibit 173 - Helix Pay Application No. 16713-012 to Camco with proof of payment	JA002731-JA002745	48
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	Helix Trial Exhibits:		
	Trial Exhibit 501 - Payment Summary	JA003339 – JA003732	55/56/57 /58/59/60
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	Trial Exhibit 522 - Camco Billing	JA004035-JA005281	63/64/65/66/67/68/69/70/71/72/73/74/75/76/77
01-19-18	**Order Denying APCO Construction's Motion for Reconsideration of Order Granting Partial Summary Judgment Precluding Defenses Based on Pay-if-Paid Agreements**	**JA005282-JA005283**	**78**
01-18-18	**Transcript – Bench Trial (Day 2)[2]**	JA005284-JA005370	78
	Trial Exhibit 535 – Deposition Transcript of Andrew Rivera (Exhibit 99) ***(Admitted)***	JA005371-JA005623	78/79/80
01-19-18	**Transcript – Bench Trial (Day 3)[3]**	JA005624-JA005785	80
	Trial Exhibit 231 – Helix Electric's Amended Statement of Facts Constituting Notice of Lien and Third-Party Complaint ***(Admitted)***	JA005786-JA005801	80
	Trial Exhibit 314 - Declaration of Victor Fuchs in support of Helix's Motion for Partial Summary Judgment against Gemstone ***(Admitted)***	JA005802-JA005804	80

[2] Filed January 31, 201879
[3] Filed January 31, 2018

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	Trial Exhibit 320 – June-August Billings—not paid to APCO ***(Admitted)***	JA005805	80
	Trial Exhibit 321 – Overpayments to Cabinetec ***(Admitted)***	JA005806-	80
	Trial Exhibit 536 – Lien math calculations (handwritten) ***(Admitted)***	JA005807-JA005808	80
	Trial Exhibit 804 – Camco Correspondence ***(Admitted)***	JA005809-JA005816	80
	Trial Exhibit 3176 – APCO Notice of Lien ***(Admitted)***	JA005817-JA005819	81
01-24-18	**Transcript – Bench Trial (Day 5)[4]**	**JA005820-JA005952**	81
03-08-18	**Letter to Judge Denton submitting Helix Electric of Nevada, LLC's (Proposed) Findings of Fact and Conclusions of Law**	**JA005953-JA005985**	**81**
03-08-18	**Letter to Judge Denton submitting APCO Construction, Inc.'s Proposed Findings of Fact and Conclusions of Law**	**JA005986-JA006058**	**8/821**
03-08-18	**APCO Construction Inc.'s Post-Trial Brief**	**JA006059-JA006124**	**82/83**
03-23-18	**APCO Opposition to Helix Electric of Nevada, LLC's Findings of Fact and Conclusions of Law**	**JA006125-JA006172**	**83/84**
03-23-18	**Helix Electric of Nevada, LLC's Responses to APCO Construction's Post-Trial Brief**	**JA006173-JA006193**	**84**
04-25-18	**Findings of Fact and Conclusions of Law and Order as the Claims of Helix Electric and Cabinetec Against APCO**	**JA006194-JA006264**	**84/85**

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05-08-18	**APCO Construction, Inc.'s Motion for Attorneys' Fees and Costs Against Helix Electric of Nevada, LLC and Plaintiff in Intervention National Wood Products, Inc**.	**JA006265-JA006284**	**85**
	Exhibit 1 – Findings of Fact and Conclusions of Law as to the Claims of Helix Electric and Cabenetec Against APCO	JA006285-JA006356	85/86
	Exhibit 2 – National Wood Products, Inc.'s Notice of Motion and Motion to Intervene and Memorandum of Points and Authorities in Support Thereof	JA006357-JA006369	86
	Exhibit 3 – Plaintiff in Intervention, National Wood Products, Inc.'s Findings of Fact and Conclusions of Law (Proposed)	JA006370-JA006385	86/87
	Exhibit 4 – Plaintiff in Intervention, National Wood Productions, Inc.'s Findings of Fact and Conclusions of Law Re Camco	JA006386-JA006398	87
	Exhibit 5 – Offer of Judgment to Helix Electric of Nevada, LLC	JA006399-JA006402	87
	Exhibit 6 – Offer of Judgment to Plaintiff in Intervention National Wood Products, Inc.	JA006403-JA006406	87
	Exhibit 7 – Declaration of John Randall Jefferies, Esq. in Support of APCO Construction, Inc.'s Motion for Attorney's Fees and Costs	JA006407-JA006411	87
	Exhibit 7A – Billing Entries	JA006412-JA006442	87/88

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	Exhibit 7B – Time Recap	JA006443-JA006474	88
	Exhibit 8 – Declaration of Cody S. Mounteer, Esq. in Support of Motion for Attorney's Fees and Costs	JA006475-JA006478	88
	Exhibit 9 – APCO Construction, Inc.'s Memorandum of Costs and Disbursements [Against Helix Electric of Nevada, LLC, and Plaintiff in Intervention National Wood Products, LLC]	JA006479-JA006487	88
	Exhibit 10 – Depository Index	JA006488-JA006508	88/89
05-08-18	**Helix Electric of Nevada, LLC's Motion to Retax Costs Re: Defendant APCO Construction's Memorandum of Costs and Disbursements**	**JA006509-JA006521**	**89**
05-31-18	**Notice of Entry of Judgment [As to the Claims of Helix Electric of Nevada, LLC Against Camco Construction, Co., Inc.]**	**JA006522 JA006540**	**89**
06-01-18	**Notice of Entry of Judgment [As to the Claims of Helix Electric of Nevada, LLC and Plaintiff in Intervention National Wood Products, Inc.'s Against APCO Construction, Inc.]**	**JA006541 JA006550**	**90**
06-01-18	**Helix Electric of Nevada, LLC's Motion for Attorneys' Fees, Interest and Costs**	**JA006551-JA006563**	**90**
	Exhibit 1 – Findings of Fact and Conclusions of Law and Order as to the Claims of Helix Electric of Nevada, LLC Against Camco Pacific Construction, Inc.	JA006564-JA006574	90

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	Exhibit 2 – Memorandum of Costs and Disbursements (Helix Electric of Nevada, LLC)	JA006575-JA006580	90
	Exhibit 3 – Prime Interest Rate	JA006581-JA006601	90
	Exhibit 4 – Declaration of Eric B. Zimbelman in Support of Helix Electric of Nevada, LLC's Motion for Attorneys' Fees, Interest and Costs	JA006583-JA006588	90
	Exhibit 5 – Summary of Fees	JA006589-JA006614	90
06-15-18	**APCO Construction, Inc.'s Opposition to Helix Electric of Nevada, LLC and Plaintiff in Intervention National Wood Products, Inc.'s Motions to Retax Costs**	**JA006615-JA006637**	**90/9**1
	Exhibit 1-A Declaration of Mary Bacon in Support of APCO's Supplement to its Motion for Attorney's Fees	JA006635 JA006638	91
	Exhibit 1-B – Declaration of Cody Mounteer in Support of APCO's Supplement to its Motion for Attorney's Fees	JA006639-JA006916	91/92/93 94/95/96
06-15-18	**Helix Electric of Nevada, LLC's Opposition to APCO Construction's Motion for Attorneys' Fees and Costs**	**JA006917 – JA006942**	**96**
	Exhibit 1 – Notice of Entry of Staying the Case, Except for the Sale of the Property, Pending Resolution of the Petition before the Nevada Supreme Court	JA006943-JA006948	96

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	Exhibit 3 – Supreme Court filing notification Joint Petition for Writ of Mandamus filed	JA006955-JA006958	96
	Exhibit 4 – Order Denying *En Banc* Reconsideration	JA006959-JA006963	96
	Exhibit 5 – Notice of Entry of Order Granting Peel Brimley Lien Claimants' Motion for Partial Summary Judgment Precluding Defenses Based on Pay-if-Paid Agreements	JA006964-JA006978	96
	Exhibit 6A – Interstate Plumbing and Air Conditioning, LLC's Response to Special Master Questionnaire	JA006977-JA006980	96
	Exhibit 6B – Nevada Prefab Engineers, Inc.'s Response to Special Master Questionnaire	JA006981-JA006984	96
	Exhibit 6C – Zitting Brothers Construction, Inc.'s Response to Special Master Questionnaire	JA006985-JA006993	96/97
	Exhibit 6D – Noorda Sheet Metal's Notice of Compliance	JA006994 JA007001	97
	Exhibit 6 E – Unitah Investments, LLC's Special Master Questionnaire	JA007002-JA007005	97
	Exhibit 7A – Motion to Appoint Special Master	JA007006-JA007036	97
	Exhibit 7B – Letter from Floyd A. Hale dated August 2, 2016	JA007037-JA007060	97

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	Exhibit 7C – Special Master Report Regarding Remaining Parties to the Litigation, Special Master Recommendation and District Court Order Amended Case Agenda	JA007042-JA007046	97
	Exhibit 8 – Notice of Entry of Order Granting Plaintiff's Motion to Dismiss	JA007047 JA007053	97
	Exhibit 9 – Stipulation and Order for Dismissal with Prejudice	JA007054-JA007056	97
	Exhibit 10 – Stipulation and Order to Dismiss Third-Party Complaint of Interstate Plumbing & Air Conditioning, LLC Against APCO Construction, Inc. with Prejudice	JA007057-JA007059	97
	Exhibit 11 – Notice of Entry of Order Granting in Part and Denying in Part APCO Construction's Omnibus Motion *in Limine*	JA007060-JA007088	97
	Exhibit 12 – Notice of Entry of Order Granting in Part and Denying in Part Helix Electric of Nevada, LLC's Motion in Limine (against APCO Construction)	JA007070-JA007078	97
	Exhibit 13 – Notice of Entry of Order Denying APCO Constructions' Motion for Partial Summary Judgment Re: Lien Foreclosure Claims	JA007079-JA007084	97
	Exhibit 14 – Notice of Entry of Order Denying APCO Construction's Motion for Reconsideration of Order Granting Partial Summary	JA007085-JA007087	97

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	Judgment Precluding Defenses Based on Pay-if-Paid Agreements		
	Exhibit 15 – Notice of Association of Counsel	JA007088-JA007094	97
06-15-18	**Plaintiff in Intervention National Wood Products, Inc.'s Opposition to APCO Construction's Motion for Attorneys' Fees and Costs**	**JA007095-JA007120**	**97/98**
06-15-18	**Declaration of S. Judy Hirahara in support of National Woods's Opposition to APCO Construction's Motion for Attorneys' Fees and Costs**	**JA007121-JA007189**	**98**
06-18-18	**Plaintiff in Intervention National Wood Products, Inc.'s Joinder to Helix Electric of Nevada, LLC's Opposition to APCO Construction's Motion for Attorneys' Fees and Costs**	**JA007190-JA007192**	**99**
06-21-18	**Helix Electric of Nevada, LLC's Notice of Non-Opposition to its Motion for Attorney's Fees, Interest and Costs**	**JA007193-JA007197**	**99**
06-29-18	**APCO Construction, Inc.'s Reply in Support of its Motion for Attorney's Fees and Costs Against Helix Electric of Nevada, LLC and Plaintiff in Intervention National Wood Products, Inc.**	**JA007198-JA007220**	**99**
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	Exhibit 2 – Marquis Aurbach Coffing Invoice to APCO dated April 30, 2018	JA007223-JA007224	99

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06-29-18	Helix Electric of Nevada, LLC's Reply Re: Motion to Retax	JA007225-JA007237	100
07-02-18	Notice of Entry of Order Granting Helix Electric of Nevada, LLC's Motion for Attorneys' Fees, Interest and Costs	JA007238-JA007245	100
07-19-18	Plaintiff-in-Intervention National Wood Products, Inc.'s Surreply to APCO Construction's Reply to Plaintiff-in-Intervention National Wood Products, Inc.'s Opposition to Motion for Attorney's Fees and Costs	JA007246-JA007261	100
08-08-18	Court's Decision on Attorneys' Fees and Cost Motions	JA007262-JA007280	100
09-28-18	Notice of Entry of (1) Granting APCO Construction, Inc.'s Motion for Attorneys' Fees and Costs (2) Granting APCO Construction, Inc.'s Memorandum of Costs in Part (3) Granting Helix Electric of Nevada, LLC's Motion to Retax in Part and Denying in Part (4) Granting Plaintiff in Intervention National Wood Products, LLC's Motion to Retax in Part and Denying in Part and (5) Granting National Wood Products, Inc.'s Motion to File a Surreply	JA007281-JA007299	100
01-24-19	Transcript for All Pending Fee Motions on July 19, 2018	JA007300-JA007312	100/101
07-12-19	Order Dismissing Appeal (Case No. 76276)	JA007313-JA007315	101

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08-06-19	**Helix Electric of Nevada LLC's Motion to (I) Re-Open Statistically Closed Case, (II) Dismiss All Unresolved Claims and/or (III) In the Alternative for a Rule 54(B) Certification as to Helix and APCO**	**JA007316-JA007331**	**101**
	Exhibit 1 – Judgment [As to the Claims of Helix Electric of Nevada, LLC and Plaintiff in Intervention National Wood Products, Inc.'s Against APCO Construction, Inc.	JA007332-JA007335	101
	Exhibit 2 – ORDER: (1) Granting APCO Construction, Inc. Motion for Attorneys Fees and Costs (2) Granting APCO Construction, Inc.'s Memorandum of Costs in Part (3) Granting Helix Electric of Nevada LLC's Motion to Retax in Part and Denying in Part and all related matters (4) Granting Plaintiff in Intervention National Wood Products LLC's Motion to Retax in Part and Denying in Part -and-(5) Granting National Wood Products, Inc.'s Motion to File a Surreply	JA007336-JA007344	101
	Exhibit 3 - Notice of Appeal	JA007345-JA007394	101/102
	Exhibit 4 – Amended Notice of Appeal	JA007395-JA007400	102
	Exhibit 5A – 5F -Notices of Entry of Order as to the Claims of Cactus Rose Construction, Fast Glass, Inc., Heinaman Contract Glazing, Helix Electric of Nevada, LLC, SWPPP Compliance	JA007401-JA007517	102/103

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	Solutions, Inc., E&E Fire Protection		
	Exhibit 6 – Order Dismissing Appeal in Part (Case No. 76276)	JA007518-JA007519	103
	Exhibit 7 – Order to Show Cause	JA007520-JA007542	103
	Exhibit 8 -Order Dismissing Appeal (Case No. 76276)	JA007524-JA007527	103
	Exhibit 9 – Notice of Entry of Order to Consolidate this Action with Case Nos. A574391, A574792, A57623. A58389, A584730, A58716, A580889 and A589195	JA 007528-JA007541	103
	Exhibit 10 (Part One)	JA007537-JA007542	103
	Exhibit 10A – Docket 09A587168 (Accuracy Glass & Mirror v. APCO)	JA007543-JA007585	103
	Exhibit 10B -Docket 08A571228 (APCO v. Gemstone)	JA007586-JA008129	103/104/105/106/107/108/109
	Exhibit 10C – Notice of Entry of Order to Consolidate this Action with Cases Nos A57. 4391, A574792, A577623, A583289, A584730, A587168, A580889 and A589195	JA008130-JA008138	109
	Exhibit 10D – Notice of Entry of Joint Order Granting, in Part, Various Lien Claimants' Motions for Partial Summary Judgment Against Gemstone Development West	JA008139-JA008141	109
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	Exhibit 10E – 131 Nev. Advance Opinion 70	JA008150-JA008167	109
	Exhibit 10F – Special Master Report Regarding Remaining Parties to the Litigation and Discovery Status	JA008168-JA008170	109
	Exhibit 10EG – Notice of Entry of Granting Plaintiff's Motion to Dismiss	JA008171-JA008177	109
	Exhibit 10H – Complaint re Foreclosure	JA008178-JA008214	109
	Exhibit 10I – First Amended Complaint re Foreclosure	JA008215-JA008230	109
	Exhibit 10J – APCO Construction's Answer to Accuracy Glass & Mirror Company's First Amended Complaint re Foreclosure	JA008231-JA008265	109/110
	Exhibit 10K –Answer to Accuracy Glass & Mirror Company, Inc.'s Complaint and Camco Pacific Construction, Inc.'s Counterclaim	JA008266-JA008285	110
	Exhibit 10L – Accuracy Glass & Mirror Company, Inc.'s Answer to Camco Pacific Construction Company's Counterclaim	JA008286-JA008290	110
	Exhibit 10M – Helix Electric's Amended Statement of Facts Constituting Lien and Third-Party Complaint	JA008291-JA008306	110
	Exhibit 10N – APCO Construction's Answer to Helix Electric's Amended Statement of Facts Constituting Lien and Third-Party Complaint	JA008307-JA008322	110
	Exhibit 10O – Answer to Helix Electric's Statement of Facts	JA008323-JA008338	110

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	Constituting Lien and Third-Party Complaint and Camco Pacific Construction Company Inc.'s Counterclaim		
	Exhibit 10P – Notice of Entry of Helix Electric of Nevada, LLC's Motion for Attorney's Fees, Interest and Costs	JA008339 JA008347	110
	Exhibit 10Q – Notice of Entry of Judgment [As to the claims of Helix Electric of Nevada, LLC Against Camco Construction Co., Inc.]	JA008348-JA008367	110
	Exhibit 10R – Notice of Entry of Judgment [As to the Claims of Helix Electric of Nevada, LLC and Plaintiff in Intervention National Wood Products, Inc. Against APCO Construction, Inc.]	JA008368-JA008378	110
	Exhibit 10S – Findings of Fact and Conclusions of Law and Order as to the Claims of Helix Electric and Cabenetec Against APCO	JA008379-JA008450	110/111
	Exhibit 10T -WRG Design, Inc.'s Amended Statement of Facts Constituting Notice of Lien and Third-Party Complaint	JA008451-JA008486	111
	Exhibit 10U – APCO Construction's Answer to WRG Design Inc.'s amended Statement of Facts Constituting Lien and Third-Party Complaint	JA008468-JA008483	111
	Exhibit 10V -Answer to WRG Design, Inc.'s Statement of Facts Constituting Lien, Third-Party Complaint and Camco Pacific Construction, Inc's Counterclaim	JA008484-JA008504	111

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	Exhibit 10W – Notice of Entry of Stipulation and Order Dismissal	JA008505-JA008512	111
	Exhibit 10X – WRG Design, Inc.'s Answer to Camco Pacific Construction Company, Inc.'s Counterclaim	JA008513 JA008517	111
	Exhibit 10Y – Heinaman Contract Glazing's Amended Statement of Facts Constituting Lien and Third-Party Complaint	JA008518-JA008549	111
	Exhibit 10Z – Answer to Heinaman Contract Glazing's Statement of Facts Constituting Lien and Third-Party Complaint, and Camco Pacific Construction's Counterclaim	JA008531-JA008551	111
	Exhibit 10AA – Notice of Entry of Granting Heinaman Glazing's Motion for Attorneys's Fees, Interest and Costs	JA008552-JA008579	111/112
	Exhibit 10BB -Notice of Entry of Judgment [As to the Claims of Heinaman Contract Glazing Against Camco Construction Co., Inc.]	JA008561-JA008582	112
	Exhibit 10CC – Heinaman Contract Glazing's Answer to Camco Pacific Construction Company's Counterclaim	JA008583 JA008588	112
	Exhibit 10DD - Bruin Painting Corporation's Amended Statement of Facts Constituting Notice of Lien and Third-Party Complaint	JA008589-JA00861	112
	Exhibit 10EE – Answer to Bruin Painting Corporation's Amended Statement of Facts Constituting Notice of Lien and Third-Party	JA008602-JA008621	112

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	Complaint and Camco Pacific Construction, Inc.'s Counterclaim		
	Exhibit 10FF – Voluntary Dismissal of Fidelity and Deposit Company of Maryland Only from Bruin Painting Corporation's Amended Statement of Facts Constituting Notice of Lien and Third-Party Complaint Without Prejudice	JA008622-JA008624	112
	Exhibit 10GG – HD Supply Waterworks' Amended Statement of Facts Constituting Lien and Third-Party Complaint	JA008625-JA008642	112
	Exhibit 10HH – APCO Construction's Answer to HD Supply Waterworks' Amended Statement of Facts Constituting Lien and Third-Party Complaint	JA008643-JA008657	112
	Exhibit 10II – Amended Answer to HD Supply Waterworks' Amended Statement of Facts Constituting Lien and Third-Party Complaint	JA008658-JA008664	112
	Exhibit 10JJ -Defendants Answer to HD Supply Waterworks' Amended Statement of Facts Constituting Lien and Third-Party Complaint	JA008665-JA008681	112
	Exhibit 10KK – Stipulation and Order to Dismiss E & E Fire Protection, LLC Only Pursuant to the Terms State Below	JA008682-JA008685	112
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	Exhibit 10OO – Amended Notice of Appeal	JA008724-JA008729	113
	Exhibit 10PP – Notice of Cross Appeal	JA008730-JA008736	113
	Exhibit 10QQ – Motion to Suspend Briefing Pending Outcome of Order to Show Cause in Supreme Court Case No. 76276	JA008737-JA008746	113
	Exhibit 11 – Order to Consolidate this Action with Case Nos. A574391, A574792, A57623. A58389, A584730, A58716, A580889 and A589195	JA008747-JA008755	113
	Exhibit 12 – Stipulation and Order to Dismiss Third-Party Complaint of Interstate Plumbing & Air Conditioning, LLC Against APCO Construction, Inc. with Prejudice	JA00875-JA008758	113
	Exhibit 13 – Stipulation and Order with Prejudice	JA008759-JA008780	113
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08-16-19	**APCO's Opposition to Helix Electric of Nevada LLC's Motion to (I) Re-Open Statistically Closed Case, (II) Dismiss All Unresolved Claims and/or (III) In the Alternative for a Rule 54(B) Certification as to Helix and APCO**	**JA008811-JA008821**	**114**
	Exhibit 1 – Order to File Amended Docketing Statement	JA008822-JA008824	114
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	Exhibit 3 – Appellant/Cross-Respondent's Response to Order to Show Cause	JA008829-JA008892	114/115/116
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	Exhibit 6 – Answer to Helix Electric's Statement of Facts Constituting Lien and Third-Party Complaint and Camco Pacific Construction Company, Inc.'s Counterclaim	JA008925-JA008947	116/117
	Exhibit 7 – Answer to Cactus Rose's Statement of Facts Constituting Notice of Lien and Complaint and Camco Pacific Construction Company Inc.'s Counterclaim	JA008948-JA008965	117
	Exhibit 8 – Answer to Heinaman Contract Glazing's Statement of Facts Constituting Lien and Third-Party Complaint and Camco	JA008966-JA008986	117/118

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	Pacific Construction's Counterclaim		
	Exhibit 9 – Findings of Fact and Conclusions of Law as to the Claims of Helix Electric of Nevada, LLC Against Camco Pacific Construction, Inc.	JA008987-JA008998	118
	Exhibit 10 – Findings of Fact and Conclusions of Law as to the Claims of Cactus Rose Construction Co., Inc.	JA008998-JA009010	118
	Exhibit 11 – Findings of Fact and Conclusions of Law as to the Claims of Heinaman Contract Glazing	JA009011-JA009024	118
	Exhibit 12 – Notice of Entry of Decision, Order and Judgment on Defendant Scott Financial Corporation's Motion for Summary Judgment as to Priority of Liens	JA009025-JA009038	118
	Exhibit 13 – Findings of Fact and Conclusions of Law as to the Claims of Helix Electric and Cabenetec Against APCO	JA009039-JA009110	118/119
	Exhibit 14 – Order Granting Motion to Deposit Bond Penal Sum with Court, Exoneration of Bond and Dismissal	JA009111-JA009113	119
	Exhibit 15 – Order Approving Distribution of Fidelity and Deposit Company of Maryland's Bond	JA009114-JA009116	119
08-29-19	**Helix Electric of Nevada LLC's Reply to APCO's Opposition to Helix Electric of Nevada LLC's Motion to (I) Re-Open Statistically Closed Case, (II)**	**JA009117-JA009123**	**119**

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01-03-20	**Notice of Entry of Order Granting Helix Electric of Nevada, LLC's Motion for Rule 54(b) Certification**	**JA009124-JA009131**	**119**
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	Exhibit [C] – Notice of Entry of Order Granting Helix Electric of Nevada's Rule 54(b) Certification	JA009148-JA009156	120
02-11-20	**Case Appeal Statement**	**JA009157-JA009163**	120
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05-08-18	**APCO Construction, Inc.'s Motion for Attorneys' Fees and Costs Against Helix Electric of Nevada, LLC and Plaintiff in Intervention National Wood Products, Inc**.	**JA006265-JA006284**	**85**
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	Exhibit 2 – National Wood Products, Inc.'s Notice of Motion and Motion to Intervene and Memorandum of Points and Authorities in Support Thereof	JA006357-JA006369	86
	Exhibit 3 – Plaintiff in Intervention, National Wood Products, Inc.'s Findings of Fact and Conclusions of Law (Proposed)	JA006370-JA006385	86/87
	Exhibit 4 – Plaintiff in Intervention, National Wood Productions, Inc.'s Findings of Fact and Conclusions of Law Re Camco	JA006386-JA006398	87
	Exhibit 5 – Offer of Judgment to Helix Electric of Nevada, LLC	JA006399-JA006402	87
	Exhibit 6 – Offer of Judgment to Plaintiff in Intervention National Wood Products, Inc.	JA006403-JA006406	87
	Exhibit 7 – Declaration of John Randall Jefferies, Esq. in Support of APCO Construction, Inc.'s Motion for Attorney's Fees and Costs	JA006407-JA006411	87
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	Exhibit 7B – Time Recap	JA006443-JA006474	88
	Exhibit 8 – Declaration of Cody S. Mounteer, Esq. in Support of Motion for Attorney's Fees and Costs	JA006475-JA006478	88
	Exhibit 9 – APCO Construction, Inc.'s Memorandum of Costs and Disbursements [Against Helix Electric of Nevada, LLC, and Plaintiff in Intervention National Wood Products, LLC]	JA006479-JA006487	88
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06-06-13	**APCO's Limited Motion to Lift Stay for Purposes of this Motion Only; (2) APCO's Motion for Summary Judgment Against Gemstone Only; and (3) Request for Order Shortening Time**	**JA000044-JA000054**	**1**
	Exhibit 1 – Affidavit of Randy Nickerl in Support of (I) APCO's Limited Motion to Lift Sta for Purposes of this Motion Only; (2) APCO's Motion for Judgment Against Gemstone Only	JA000055-JA000316	1/2/4/5/6
	Exhibit 2 – Findings of Fact and Conclusions of Law and Judgment in Favor of APCO Construction Against Gemstone Development West, Inc. Only	JA000317-JA000326	6
02-11-20	**APCO's Notice of Cross Appeal**	**JA009164-JA010310**	120
	Exhibit 1 – Notice of Entry of Order (1) Granting APCO Construction, Inc.'s Motion for Attorney's Fees and Costs; (2) Granting APCO Construction, Inc.'s Memorandum of Costs in Part (3) Granting Helix Electric of Nevada, LLC's	JA009168-JA009182	114

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11-06-17	**APCO Construction, Inc.'s Omnibus Motion *in Limine***	**JA000590 JA000614**	**9**
	Exhibit 1 – Second Amended Notice of taking NRCP Rule 30(b)(6) Deposition of Person Most Knowledgeable for Zitting Brothers Construction, Inc.	JA000615-JA000624	9
	Exhibit 2 – Zitting Brothers Construction, Inc.'s Motion for Partial Summary Judgment Against APCO Construction	JA000625-JA000646	9
	Exhibit 3 – Excerpts from Samuel Zitting's Deposition Transcript taken October 27, 2017	JA000647-JA000678	9/10
	Exhibit 4 – Statement of Facts Constituting Lien on Behalf of Buchele, Inc.	JA000679-JA000730	10
	Exhibit 5 – Subcontract Agreement dated April 17, 2007	JA000731-JA000808	10/11
	Exhibit 6 – Subcontract Agreement dated April 17, 2007	JA000809-JA000826	11/12
	Exhibit 7 – Email from Mary Bacon dated October 16, 2017	JA000827-JA000831	12
	Exhibit 8 – Email from Mary Bacon dated October 17, 2017	JA000832-JA000837	12
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	Exhibit 12 – Plaintiff in Intervention, National Wood Products, Inc.'s First Supplemental Disclosures Pursuant to NRCP 16.1	JA000857-JA000864	12
	Exhibit 13 – Amended Notice of Taking NRCP Rule 30(b)(6) Deposition of Person Most Knowledgeable for Helix Electric of Nevada, LLC	JA000865-JA000873	12
	Exhibit 14 – Excerpts from Helix Electric of Nevada, LLC's 30(b)(6) Witness Deposition Transcript taken July 20, 2017	JA000874-JA000897	12
03-23-18	**APCO Opposition to Helix Electric of Nevada, LLC's Findings of Fact and Conclusions of Law**	**JA006125-JA006172**	**83/84**
08-16-19	**APCO's Opposition to Helix Electric of Nevada LLC's Motion to (I) Re-Open Statistically Closed Case, (II) Dismiss All Unresolved Claims and/or (III) In the Alternative for a Rule 54(B) Certification as to Helix and APCO**	**JA008811-JA008821**	**114**
	Exhibit 1 – Order to File Amended Docketing Statement	JA008822-JA008824	114
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	Exhibit 3 – Appellant/Cross-Respondent's Response to Order to Show Cause	JA008829-JA008892	114/115/116
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	Exhibit 5 – Chart of Claims	JA008897-JA008924	116
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	Exhibit 8 – Answer to Heinaman Contract Glazing's Statement of Facts Constituting Lien and Third-Party Complaint and Camco Pacific Construction's Counterclaim	JA008966-JA008986	117/118
	Exhibit 9 – Findings of Fact and Conclusions of Law as to the Claims of Helix Electric of Nevada, LLC Against Camco Pacific Construction, Inc.	JA008987-JA008998	118
	Exhibit 10 – Findings of Fact and Conclusions of Law as to the Claims of Cactus Rose Construction Co., Inc.	JA008998-JA009010	118
	Exhibit 11 – Findings of Fact and Conclusions of Law as to the Claims of Heinaman Contract Glazing	JA009011-JA009024	118
	Exhibit 12 – Notice of Entry of Decision, Order and Judgment on Defendant Scott Financial Corporation's Motion for Summary Judgment as to Priority of Liens	JA009025-JA009038	118
	Exhibit 13 – Findings of Fact and Conclusions of Law as to the Claims of Helix Electric and Cabenetec Against APCO	JA009039-JA009110	118/119
	Exhibit 14 – Order Granting Motion to Deposit Bond Penal Sum with Court, Exoneration of Bond and Dismissal	JA009111-JA009113	119
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06-15-18	**APCO Construction, Inc.'s Opposition to Helix Electric of Nevada, LLC and Plaintiff in Intervention National Wood Products, Inc.'s Motions to Retax Costs**	**JA006615-JA006637**	**90/9**1
	Exhibit 1-A Declaration of Mary Bacon in Support of APCO's Supplement to its Motion for Attorney's Fees	JA006635 JA006638	91
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11-14-17	**APCO Construction, Inc.'s Opposition to Helix Electric of Nevada, LLC's Motions *in Limine* Nos. 1-4**	**JA000929-JA000940**	**13/14**
	Exhibit 1 – Excerpts from the Deposition Transcript of Mary Jo Allen taken July 18, 2017	JA000941-JA000966	14/15/16
	Exhibit 2 – Helix Electric's Manhattan West Billing/Payment Status through August 2008	JA000967-JA000969	16/17
	Exhibit 3 – Excerpts from the Deposition Transcript of Andrew Rivera taken July 20, 2017	JA000970-JA000993	17/18/19
08-21-17	**APCO Construction's Opposition to Peel Brimley Lien Claimants' Partial Motion for Summary Judgment Precluding Defenses Based on Pay-if-Paid Agreements**	**JA000393-JA000409**	**6/7**
	Exhibit A – Excerpt from 30(b)(6) Witness for Helix Electric of Nevada, LLC taken July 20, 2017	JA000410-JA000412	7
03-08-18	**APCO Construction Inc.'s Post-Trial Brief**	**JA006059-JA006124**	**82/83**
11-15-17	**APCO Construction, Inc.'s Reply in Support of its Omnibus *Motion in Limine***	**JA001133 JA001148**	**21**

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06-29-18	**APCO Construction, Inc.'s Reply in Support of its Motion for Attorney's Fees and Costs Against Helix Electric of Nevada, LLC and Plaintiff in Intervention National Wood Products, Inc.**	**JA007198-JA007220**	**99**
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	Exhibit A – Nevada Construction Services Cost Plus GMP Contract Disbursement Agreement	JA000906-JA000907	12
	Exhibit B – Scott Financial Corporation's April 28, 2009 letter to the Nevada State Contractor's Board	JA000908-JA000915	2/13
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04-25-18	**Findings of Fact and Conclusions of Law and Order as the Claims of Helix Electric and Cabinetec Against APCO**	**JA006194-JA006264**	**84/85**
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	Exhibit 3 - Excerpts from Brian Benson Deposition Transcript taken June 5, 2017	JA000559 JA000574	9
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06-01-18	**Helix Electric of Nevada, LLC's Motion for Attorneys' Fees, Interest and Costs**	**JA006551-JA006563**	**90**
	Exhibit 1 – Findings of Fact and Conclusions of Law and Order as to the Claims of Helix Electric of Nevada, LLC Against Camco Pacific Construction, Inc.	JA006564-JA006574	90
	Exhibit 2 – Memorandum of Costs and Disbursements (Helix Electric of Nevada, LLC)	JA006575-JA006580	90
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	Exhibit 4 – Declaration of Eric B. Zimbelman in Support of Helix Electric of Nevada, LLC's Motion for Attorneys' Fees, Interest and Costs	JA006583-JA006588	90
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08-06-19	**Helix Electric of Nevada LLC's Motion to (I) Re-Open Statistically Closed Case, (II) Dismiss All Unresolved Claims and/or (III) In the Alternative for a Rule 54(B) Certification as to Helix and APCO**	**JA007316-JA007331**	**101**
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	Exhibit 2 – ORDER: (1) Granting APCO Construction, Inc. Motion for Attorneys Fees and Costs (2) Granting APCO Construction, Inc.'s Memorandum of Costs in Part (3) Granting Helix Electric of Nevada LLC's Motion to Retax in Part and Denying in Part and all related matters (4) Granting Plaintiff in Intervention National Wood Products LLC's Motion to Retax in Part and Denying in Part -and-(5) Granting National Wood Products, Inc.'s Motion to File a Surreply	JA007336-JA007344	101
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	Exhibit 10A – Docket 09A587168 (Accuracy Glass & Mirror v. APCO)	JA007543-JA007585	103
	Exhibit 10B -Docket 08A571228 (APCO v. Gemstone)	JA007586-JA008129	103/104/105/106/107/108 109
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	Exhibit 10D – Notice of Entry of Joint Order Granting, in Part, Various Lien Claimants' Motions for Partial Summary Judgment Against Gemstone Development West	JA008139-JA008141	109
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	Exhibit 10J – APCO Construction's Answer to Accuracy Glass & Mirror Company's First Amended Complaint re Foreclosure	JA008231-JA008265	109/110
	Exhibit 10K –Answer to Accuracy Glass & Mirror Company, Inc.'s Complaint and Camco Pacific Construction, Inc.'s Counterclaim	JA008266-JA008285	110
	Exhibit 10L – Accuracy Glass & Mirror Company, Inc.'s Answer to Camco Pacific Construction Company's Counterclaim	JA008286-JA008290	110
	Exhibit 10M – Helix Electric's Amended Statement of Facts Constituting Lien and Third-Party Complaint	JA008291-JA008306	110
	Exhibit 10N – APCO Construction's Answer to Helix Electric's Amended Statement of Facts Constituting Lien and Third-Party Complaint	JA008307-JA008322	110
	Exhibit 10O – Answer to Helix Electric's Statement of Facts Constituting Lien and Third-Party Complaint and Camco Pacific Construction Company Inc.'s Counterclaim	JA008323-JA008338	110
	Exhibit 10P – Notice of Entry of Helix Electric of Nevada, LLC's Motion for Attorney's Fees, Interest and Costs	JA008339 JA008347	110
	Exhibit 10Q – Notice of Entry of Judgment [As to the claims of Helix Electric of Nevada, LLC Against Camco Construction Co., Inc.]	JA008348-JA008367	110

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	Exhibit 10R – Notice of Entry of Judgment [As to the Claims of Helix Electric of Nevada, LLC and Plaintiff in Intervention National Wood Products, Inc. Against APCO Construction, Inc.]	JA008368-JA008378	110
	Exhibit 10S – Findings of Fact and Conclusions of Law and Order as to the Claims of Helix Electric and Cabenetec Against APCO	JA008379-JA008450	110/111
	Exhibit 10T -WRG Design, Inc.'s Amended Statement of Facts Constituting Notice of Lien and Third-Party Complaint	JA008451-JA008486	111
	Exhibit 10U – APCO Construction's Answer to WRG Design Inc.'s amended Statement of Facts Constituting Lien and Third-Party Complaint	JA008468-JA008483	111
	Exhibit 10V -Answer to WRG Design, Inc.'s Statement of Facts Constituting Lien, Third-Party Complaint and Camco Pacific Construction, Inc's Counterclaim	JA008484-JA008504	111
	Exhibit 10W – Notice of Entry of Stipulation and Order Dismissal	JA008505-JA008512	111
	Exhibit 10X – WRG Design, Inc.'s Answer to Camco Pacific Construction Company, Inc.'s Counterclaim	JA008513 JA008517	111
	Exhibit 10Y – Heinaman Contract Glazing's Amended Statement of Facts Constituting Lien and Third-Party Complaint	JA008518-JA008549	111
	Exhibit 10Z – Answer to Heinaman Contract Glazing's Statement of Facts Constituting Lien and Third-Party Complaint, and Camco Pacific Construction's Counterclaim	JA008531-JA008551	111

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	Exhibit 10CC – Heinaman Contract Glazing's Answer to Camco Pacific Construction Company's Counterclaim	JA008583 JA008588	112
	Exhibit 10DD - Bruin Painting Corporation's Amended Statement of Facts Constituting Notice of Lien and Third-Party Complaint	JA008589-JA00861	112
	Exhibit 10EE – Answer to Bruin Painting Corporation's Amended Statement of Facts Constituting Notice of Lien and Third-Party Complaint and Camco Pacific Construction, Inc.'s Counterclaim	JA008602-JA008621	112
	Exhibit 10FF – Voluntary Dismissal of Fidelity and Deposit Company of Maryland Only from Bruin Painting Corporation's Amended Statement of Facts Constituting Notice of Lien and Third-Party Complaint Without Prejudice	JA008622-JA008624	112
	Exhibit 10GG – HD Supply Waterworks' Amended Statement of Facts Constituting Lien and Third-Party Complaint	JA008625-JA008642	112
	Exhibit 10HH – APCO Construction's Answer to HD Supply Waterworks' Amended Statement of Facts Constituting Lien and Third-Party Complaint	JA008643-JA008657	112
	Exhibit 10II – Amended Answer to HD Supply Waterworks' Amended Statement of Facts Constituting Lien and Third-Party Complaint	JA008658-JA008664	112

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	Exhibit 10JJ -Defendants Answer to HD Supply Waterworks' Amended Statement of Facts Constituting Lien and Third-Party Complaint	JA008665-JA008681	112
	Exhibit 10KK – Stipulation and Order to Dismiss E & E Fire Protection, LLC Only Pursuant to the Terms State Below	JA008682-JA008685	112
	Exhibit 10LL – HD Supply Waterworks, LP's Voluntary Dismissal of Platte River Insurance Company Only Without Prejudice	JA008686-JA008693	112
	Exhibit 10MM – Scott Financial Corporation's Answer to HD Supply Waterworks' Amended Statement of Facts Constituting Lien and Third-Party Complaint	JA008694-JA008717	112/113
	Exhibit 10NN-Notice of Appeal	JA008718 JA008723	113
	Exhibit 10OO – Amended Notice of Appeal	JA008724-JA008729	113
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	Exhibit 10QQ – Motion to Suspend Briefing Pending Outcome of Order to Show Cause in Supreme Court Case No. 76276	JA008737-JA008746	113
	Exhibit 11 – Order to Consolidate this Action with Case Nos. A574391, A574792, A57623. A58389, A584730, A58716, A580889 and A589195	JA008747-JA008755	113
	Exhibit 12 – Stipulation and Order to Dismiss Third-Party Complaint of Interstate Plumbing & Air Conditioning, LLC Against APCO Construction, Inc. with Prejudice	JA00875-JA008758	113
	Exhibit 13 – Stipulation and Order with Prejudice	JA008759-JA008780	113

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	Exhibit 15 – Notice of Entry of Order Granting Motion for 54(b) Certification and for Stay Pending Appeal	JA008789-JA008798	113
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05-08-18	**Helix Electric of Nevada, LLC's Motion to Retax Costs Re: Defendant APCO Construction's Memorandum of Costs and Disbursements**	**JA006509-JA006521**	**89**
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	Exhibit 1 – Notice of Entry of Staying the Case, Except for the Sale of the Property, Pending Resolution of the Petition before the Nevada Supreme Court	JA006943-JA006948	96
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	Exhibit 3 – Supreme Court filing notification Joint Petition for Writ of Mandamus filed	JA006955-JA006958	96
	Exhibit 4 – Order Denying *En Banc* Reconsideration	JA006959-JA006963	96
	Exhibit 5 – Notice of Entry of Order Granting Peel Brimley Lien Claimants' Motion for Partial Summary Judgment	JA006964-JA006978	96

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	Exhibit 6C – Zitting Brothers Construction, Inc.'s Response to Special Master Questionnaire	JA006985-JA006993	96/97
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	Exhibit 6 E – Unitah Investments, LLC's Special Master Questionnaire	JA007002-JA007005	97
	Exhibit 7A – Motion to Appoint Special Master	JA007006-JA007036	97
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	Exhibit 9 – Stipulation and Order for Dismissal with Prejudice	JA007054-JA007056	97
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	Exhibit 14 – Notice of Entry of Order Denying APCO Construction's Motion for Reconsideration of Order Granting Partial Summary Judgment Precluding Defenses Based on Pay-if-Paid Agreements	JA007085-JA007087	97
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11-14-17	**Helix Electric of Nevada's Opposition to APCO Construction's Omnibus Motion *in Limine***	**JA000994-JA001008**	**20**
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	Exhibit 3 – Special Master Order Requiring Completion of Questionnaire	JA001056-JA001059	20
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08-29-19	**Helix Electric of Nevada LLC's Reply to APCO's Opposition to Helix Electric of Nevada LLC's Motion to (I) Re-**	**JA009117-JA009123**	**119**

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01-12-18	**Joint Pre-Trial Memorandum [for APCO Construction, Inc., the Peel Brimley Lien Claimants and National Wood Products, LLC ONLY]**	**JA001574-JA001594**	**27/28**
	Exhibit 1 – Exhibit List APCO	JA001595-JA001614	28
	Exhibit 2 – Helix Trial Exhibits	JA001615-JA001616	28
	Exhibit 3 – Exhibit List Plaintiff in Intervention National Wood Products, Inc.	JA001617-JA001635	28
	Exhibit 4 – Cactus Rose Trial Exhibits	JA001636-JA001637	28
	Exhibit 5 – Heinaman Trial Exhibits	JA001638-JA001639	28
	Exhibit 6 – Fast Glass Trial Exhibits	JA001640-JA001641	28
	Exhibit 7 – SWPPP Trial Exhibits	JA001642-JA001643	28
	Exhibit 8 - Order Granting in Part and Denying in Part APCO Construction's Omnibus Motion *in Limine*	JA001644-JA001647	28

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	Exhibit 9 - Amended *nunc pro tunc* order regarding APCO Construction, Inc.'s Omnibus Motion *in Limine* No. 7	JA001648-JA001650	28
	Exhibit 10 - Order Granting in Part and Denying in part Helix Electric of Nevada, LLC's Motions *in Limine* 1-4 (Against APCO Construction)	JA001651-JA001653	28
	Exhibit 11 - order granting Peel Brimley Lien Claimants' Motion in Limine Nos.1-6 (against Camco Pacific Construction, Inc.)	JA001654-JA001657	28
	Exhibit 12 - Order Granting Plaintiff in Intervention, National Wood Products, Inc.'s Motion *in Limine*	JA001658-JA001660	28
	Exhibit 13 - Order Granting Peel Brimley Lien Claimants' Motion for Partial Summary Judgment Precluding Defenses Based on Pay-if-Paid Agreements	JA001661-JA00167	28/9/29
03-08-18	**Letter to Judge Denton submitting APCO Construction, Inc.'s Proposed Findings of Fact and Conclusions of Law**	**JA005986-JA006058**	**8/821**
03-08-18	**Letter to Judge Denton submitting Helix Electric of Nevada, LLC's (Proposed) Findings of Fact and Conclusions of Law**	**JA005953-JA005985**	**81**
01-04-18	**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 provision on an Order Shortening Time**	**JA001199-JA001217**	**22**
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	Exhibit 9 – Order Denying *En Banc* Reconsideration	JA001381-JA001385	26
	Exhibit 10 – Order Granting Peel Brimley Lien Claimants' Motion for Partial Summary Judgment Precluding Defenses Based on Pay-if-Paid Agreements	JA001386-JA001392	26
	Exhibit 11 – Notice of Entry of Findings of Fact and Conclusions of Law and Judgment	JA001393-JA001430	26
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01-29-20	**Notice of Appeal**	**JA009132-JA009136**	**119/120**
	Exhibit A – Notice of Entry of Judgment [As to the Claims of Helix Electric of Nevada, LLC and Plaintiff in Intervention	JA009137-JA009166	120

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05-31-18	**Notice of Entry of Judgment [As to the Claims of Helix Electric of Nevada, LLC Against Camco Construction, Co., Inc.]**	**JA006522 JA006540**	**89**
06-01-18	**Notice of Entry of Judgment [As to the Claims of Helix Electric of Nevada, LLC and Plaintiff in Intervention National Wood Products, Inc.'s Against APCO Construction, Inc.]**	**JA006541 JA006550**	**90**
09-28-18	**Notice of Entry of Order (1) Granting APCO Construction, Inc.'s Motion for Attorneys' Fees and Costs (2) Granting APCO Construction, Inc.'s Memorandum of Costs in Part (3) Granting Helix Electric of Nevada, LLC's Motion to Retax in Part and Denying in Part (4) Granting Plaintiff in Intervention National Wood Products, LLC's Motion to Retax in Part and Denying in Part and (5) Granting National Wood Products, Inc.'s Motion to File a Surreply**	**JA007281-JA007299**	**100**
12-29-17	**Notice of Entry of Order Granting in Part and Denying in Part APCO Construction's Omnibus Motion *in Limine***	**JA001178-JA001186**	**22**
07-02-18	**Notice of Entry of Order Granting Helix Electric of Nevada, LLC's Motion for Attorneys' Fees, Interest and Costs**	**JA007238-JA007245**	**100**
01-03-20	**Notice of Entry of Order Granting Helix Electric of Nevada, LLC's Motion for Rule 54(b) Certification**	**JA009124-JA009131**	**119**

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01-19-18	**Order Denying APCO Construction's Motion for Reconsideration of Order Granting Partial Summary Judgment Precluding Defenses Based on Pay-if-Paid Agreements**	**JA005282-JA005283**	**78**
07-12-19	**Order Dismissing Appeal (Case No. 76276)**	**JA007332-JA007334**	**101**
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08-02-17	**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**	**JA000328-JA000342**	**6**
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	Exhibit 2 – Camco Pacific Construction Company, Inc.'s Responses to Helix Electric of Nevada, LLC's Interrogatories	JA000380-JA000392	6
11-06-17	**Peel Brimley Lien Claimants' Motion in Limine Nos. 1-6**	**JA000419-JA000428**	**7**
	Exhibit 1 – Notice of Entry of Order	JA000429	7

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	Exhibit 2 – Amended Notices of 30(b)(6) Deposition of Camco Pacific Construction Company, Inc. from Cactus Rose Construction, Inc., Fast Glass, Inc.'s, Heinaman Contract Glazing, Inc. and Helix Electric of Nevada, LLC's	JA000436-JA000472	7/8
	Exhibit 3 – Excerpt from David E. Parry's Deposition Transcript taken June 20, 2017	JA000473 JA00489	8
	Exhibit 4 – Cactus Rose Construction, Inc.'s First Set of Request for Admissions to Camco Pacific Construction	JA00490 JA000500	8
	Exhibit 5 – Fast Glass, Inc.'s First Set of Request for Admissions to Camco Pacific Construction	JA000501-JA000511	8
	Exhibit 6 – Heinaman Contract Glazing, Inc.'s First Set of Request for Admissions to Camco Pacific Construction	JA000512-JA000522	8
	Exhibit 7 – Helix Electric of Nevada, LLC's First Set of Request for Admissions to Camco Pacific Construction	JA000523-JA000533	8
09-28-17	**Peel Brimley Lien Claimants' Reply to Oppositions to Motion for Partial Summary Judgment Precluding Defenses Based on Pay-if-Paid Agreements**	**JA000413-JA00418**	**7**
01-09-18	**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**	**JA001552-JA001560**	**27**
06-18-18	**Plaintiff in Intervention National Wood Products, Inc.'s Joinder to Helix Electric of Nevada, LLC's Opposition**	**JA007190-JA007192**	**99**

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07-19-18	**Plaintiff-in-Intervention National Wood Products, Inc.'s Surreply to APCO Construction's Reply to Plaintiff-in-Intervention National Wood Products, Inc.'s Opposition to Motion for Attorney's Fees and Costs**	**JA007246-JA007261**	**100**
01-10-18	**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**	**JA001561-JA001573**	**27**
01-18-18	**Stipulation and Order Regarding Trial Exhibit Admitted into Evidence**	**JA002199-JA002201**	**36**
	Exhibit 1 – Exhibit List APCO	JA002208-JA002221	36
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	APCO TRIAL EXHIBITS:		
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	Trial Exhibit 19 – Video (Construction Project)	JA002287	N/A
	Trial Exhibit 20 – Video (Construction Project)	JA002288	N/A
	Trial Exhibit 21 – Video (Construction Project)	JA002289	N/A
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	Trial Exhibit 29 - Email from J. Robbins to Subcontractors re: Billing Cut-Off for August Billing	JA002285	39
	Trial Exhibit 30 - Camco Pay Application No. 11 NCS-Owner Approved with NCS Draw Request	JA002286-JA002306	39
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	Exhibit 34 and 128 - Photo re: Building 8 & 9, Interior (Showing drywall still not completed)	JA002311-JA002312-	40
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	Trial Exhibit 40- Letter from D. Parry to Subcontractors Re: Funding Withdrawn	JA002323 JA002326	41
	HELIX Related Exhibits:		41
	Trial Exhibit 46 - Helix Pay Application No. 16713-008R1 with Proof of Payment	JA002327-JA002345	41
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	Trial Exhibit 54 - Photo re: Building - 2 & 3, East (No Exterior fixtures installed. Helix billed out at 90%)	JA002373-JA002374	42
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	Trial Exhibit 56 - Photo re: Building 8 & 9, North (No Exterior fixtures installed. Helix billed out at 90%)	JA002377-JA002378	42
	Trial Exhibit 57 - Photo re: Building 2 & 3, and 8 & 9, North (No Exterior fixtures installed. Helix billed out at 90%)	JA002379-JA002381	42
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	Trial Exhibit 60 - Helix Retention Rolled to Camco	JA002406-JA002415	43
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	Zitting Brothers Related Exhibits:		
	Trial Exhibit 100 - Check No. 14392 payable to Zitting ($27,973.80); Progress Payment No. 7	JA002495-JA002497	44
	Trial Exhibit 101 - Email from R. Nickerl to R. Zitting re: Change Orders	JA002498-JA002500	44
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	Trial Exhibit 105 - Ex. C to the Ratification – Zitting Quotes	JA002527-JA002528	44
	Trial Exhibit 106 - Unconditional Lien Release – Zitting ($27,973.80)	JA002529	44
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	Trial Exhibit 118 - Q&A from Gemstone to subcontracts	JA002564-JA002567	44
	Trial Exhibit 119 - Check No. 528388 payable to APCO ($33,847.55) – Progress Payment No. 8.1 and 8.2	JA002568-JA002571	44

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	Trial Exhibit 120 - Tri-City Drywall Pay Application No. 7 to APCO as submitted to Owner. Show percentage complete for Zitting	JA002572-JA002575	44/45
	Trial Exhibit 127 - Photo of Video (Construction Project)	JA002576-JA002577	45/46
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	Trial Exhibit 138 - Memo from Scott Financial to Nevada State Contractors Board Re: Explanation of Project Payment Process	JA002582-JA002591	46
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	National Wood Products Related Exhibits:		
	Trial Exhibit 160 - Documents provided for settlement	JA002599-JA002612	46
	CAMCO Related Exhibits:		
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	Trial Exhibit 165 - Letter from D. Parry to A. Edelstein re: Gemstone losing funding for project	JA002652-JA002653	47
	Trial Exhibit 166 - Letter from D. Parry to G. Hall re: withdrawal of funding	JA002654 JA002656	47
	Helix Related Exhibits:		47
	Trial Exhibit 169 - Helix Exhibit to Standard Subcontract Agreement with Camco	JA 002665 JA002676	47/48
	Trial Exhibit 170 - Subcontract Agreement between Helix and Camco (unsigned)	JA002677-JA002713	48

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	Trial Exhibit 171 - Work Order No. 100	JA002714-JA002718	48
	Trial Exhibit 172 - Letter from J. Griffith to Victor Fuchs Re: Gemstone's intention to continue retention of Helix w/copy of Ratification and Amendment of Subcontract Agreement	JA002719-JA002730	48
	Trial Exhibit 173 - Helix Pay Application No. 16713-012 to Camco with proof of payment	JA002731-JA002745	48
	Trial Exhibit 174 - Helix Change Order Request No. 28	JA002746-JA002747	48
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	Trial Exhibit 176 - Helix Pay Application No. 16713-013 to Camco	JA002752-JA002771	48/49
	Trial Exhibit 177 - Helix Pay Application No. 16713-014 to Camco	JA002772-JA002782	49
	Trial Exhibit 178 - Camco's letter to Helix rejecting Pay Application No. 16713-015 with attached copy of Pay Application	JA002783 JA002797	49
	National Wood/Cabinetec Related Exhibits:		
	Trial Exhibit 184 - Ratification and Amendment of Subcontract Agreement between CabineTec and Camco (fully executed copy)	JA002798-JA002825	49
	General Related Exhibits:		
	Trial Exhibit 218 - Camco/Owner Pay Application No. 11 w/Backup	JA002826-JA003028	50/51/52
	Trial Exhibit 220 - Camco/Owner Pay Application No. 12 w/Backup	JA003029-JA003333	52/53/54/55
	Trial Exhibit 313 - Letter from A. Edelstein to R. Nickerl re: NRS 624 Notice	JA003334-JA003338	55
	Helix Trial Exhibits:		

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	Trial Exhibit 501 - Payment Summary	JA003339 – JA003732	55/56/57/ 58/59/60
	Trial Exhibit 508 – Helix Pay Application	JA003733- JA003813	60/61
	Trial Exhibit 510 - Unsigned Subcontract	JA003814- JA003927	61/62
	Trial Exhibit 512 - Helix's Lien Notice	JA003928- JA004034	62/63
	Trial Exhibit 522 - Camco Billing	JA004035- JA005281	63/64/65/66/67/ 68/69/70 /71/72 /73/74/75/ 76/77
01-17-18	**Transcript Bench Trial (Day 1)**[5]	**JA001668- JA001802**	**29/30**
	Trial Exhibit 1 - Grading Agreement ***(Admitted)***	JA001803- JA001825	30
	Trial Exhibit 2 – APCO/Gemstone General Construction Agreement ***(Admitted)***	JA001826- JA001868	30
	Trial Exhibit 3 - Nevada Construction Services /Gemstone Cost Plus/GMP Contract Disbursement Agreement ***(Admitted)***	JA001869- JA001884	30
	Trial Exhibit 4 - APCO Pay Application No. 9 Submitted to Gemstone ***(Admitted)***	JA001885- JA001974	30/31/32
	Trial Exhibit 5 - Letter from J. Barker to A. Edelstein re: APCO's Notice of Intent to Stop Work ***(Admitted)***	JA001975- JA001978	32
	Trial Exhibit 6 - Letter from J. Barker to A. Edelstein re: APCO's Notice of Intent to Stop Work ***(Admitted)***	JA001979- JA001980	32
	Trial Exhibit 10 - Letter from J. Barker to A. Edelstein Re: Notice of Intent to Stop Work (Second Notice) ***(Admitted)***	JA001981- JA001987	32

[5] Filed January 31, 2018

Date	Description	Bates Number	Volume(s)
	Trial Exhibit 13 - Letter from A. Edelstein to Re. Nickerl Re: Termination for Cause (Gemstone) ***(Admitted)***	JA001988-JA002001	32
	Trial Exhibit 14 - Letter from W. Gochnour to Sean Thueson Re: [APCO's] Response to [Gemstone's] Termination for Cause ***(Admitted)***	JA002002-JA002010	33
	Trial Exhibit 15 - Letter from R. Nickerl to A. Edelstein Re: 48-Hour Notices ***(Admitted)***	JA002011-JA002013	33
	Trial Exhibit 16 - Email from J. Horning to A. Berman and J. Olivares re: Joint Checks ***(Admitted)***	JA002014	33
	Trial Exhibit 23 - APCO Subcontractor Notice of Stopping Work and Letter from J. Barker to A. Edelstein Re: Notice of Stopping Work and Notice of Intent to Terminate Contract ***(Admitted)***	JA002015-JA002016	33
	Trial Exhibit 24 - Letter from R. Nickerl to Clark County re: Notification of APCO's withdrawal as General Contractor of Record ***(Admitted)***	JA002017-JA002023	33
	Trial Exhibit 26 - Email from J. Gisondo to Subcontractors re: June checks ***(Admitted)***	JA002024	34
	Trial Exhibit 27 - Letter from A. Edelstein to R. Nickerl re: June Progress Payment ***(Admitted)***	JA002025-JA002080	34
	Trial Exhibit 28 - Letter from J. Barker to A. Edelstein Re: Termination of Agreement for GMP ***(Admitted)***	JA002081	34
	Trial Exhibit 31 - Transmission of APCO's Pay Application No. 11 as Submitted to Owner ***(Admitted)***	JA002082-JA002120	34/35
	Trial Exhibit 45 - Subcontractor Agreement ***(Admitted)***	JA002121-JA002146	35

Date	**Description**	**Bates Number**	**Volume(s)**
	Trial Exhibit 162 - Amended and Restated General Construction Agreement between Gemstone and CAMCO ***(Admitted)***	JA002147-JA002176	35/36
	Trial Exhibit 212 - Letter from Edelstein to R. Nickerl re: NRS 624 Notice ***(Admitted)***	JA002177-JA002181	36
	Trial Exhibit 215 - Email from C. Colligan to Subcontractors re: 48-hour Termination Notice ***(Admitted)***	JA002182-JA002185	36
	Trial Exhibit 216 - Email from C. Colligan re: Meeting with Subcontractors ***(Admitted)***	JA002186-JA002188	36
	Trial Exhibit 506 – Email and Contract Revisions ***(Admitted)***	JA002189 – JA002198	36
01-18-18	**Transcript – Bench Trial (Day 2)**[6]	JA005284-JA005370	78
	Trial Exhibit 535 – Deposition Transcript of Andrew Rivera (Exhibit 99) ***(Admitted)***	JA005371-JA005623	78/79/80
01-19-18	**Transcript – Bench Trial (Day 3)**[7]	JA005624-JA005785	80
	Trial Exhibit 231 – Helix Electric's Amended Statement of Facts Constituting Notice of Lien and Third-Party Complaint ***(Admitted)***	JA005786-JA005801	80
	Trial Exhibit 314 - Declaration of Victor Fuchs in support of Helix's Motion for Partial Summary Judgment against Gemstone ***(Admitted)***	JA005802-JA005804	80
	Trial Exhibit 320 – June-August Billings—not paid to APCO ***(Admitted)***	JA005805	80
	Trial Exhibit 321 – Overpayments to Cabinetec ***(Admitted)***	JA005806-	80

[6] Filed January 31, 201879
[7] Filed January 31, 2018

Date	Description	Bates Number	Volume(s)
	Trial Exhibit 536 – Lien math calculations (handwritten) ***(Admitted)***	JA005807-JA005808	80
	Trial Exhibit 804 – Camco Correspondence ***(Admitted)***	JA005809-JA005816	80
	Trial Exhibit 3176 – APCO Notice of Lien ***(Admitted)***	JA005817-JA005819	81
01-24-18	**Transcript – Bench Trial (Day 5)[8]**	**JA005820-JA005952**	81
01-24-19	**Transcript for All Pending Fee Motions on July 19, 2018**	**JA007300-JA007312**	**100/101**

[8] Filed January 31, 2018

APCO's Response: If Exhibit 45 was not the subcontract between APCO and Helix, Helix has failed to provide the material terms of the supposed agreement, as confirmed by its lack of proper citation to the record. Further, Helix only cites to Exhibit 501 for its statement. If anything, Exhibit 501 contains the payment records between Helix and APCO[17]—it does not confirm any other material terms of the alleged agreement between Helix and APCO.

E. Helix's Proposed Finding of Fact No: 12. APCO and Helix agree that the remaining sum of $505,021.00 not paid to Helix for work performed while APCO was the general contractor is monies withheld from Helix as "retention."…

APCO's Response: It is undisputed that APCO never held or otherwise received any subcontractor's retention withheld by Gemstone and kept by the lender for the Project.[18] It is also undisputed that complying with the preconditions (submitting close out documents, as-builts, etc.) is part of the work that needed to be performed in order to earn the retention.

F. Helix's Proposed Finding of Fact No: 14. APCO ceased work on the Project in or about the end of August 2008. APCO and Gemstone each claim to have terminated the other. Among other events leading up to APCO's stopping work on the Project are the following:

. . .

• On September 5, 2008, APCO wrote to Gemstone confirming that, pursuant to its August 21, 2008 notice (Ex. 23) it "has terminated the [APCO-Gemstone Agreement] in accordance with NRS 624.610." [Exhibit 28]. Although the notice contains the notation "Cc: All Subcontractors" APCO was unable to demonstrate that it actually provided a copy of this notice to Helix.

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[17] *See* Exhibit 501.
[18] Testimony of Joe Pelan (APCO) Day 1, p. 26.

APCO's Response: Helix's Andy Rivera confirmed that he received copies of communications between APCO and Gemstone regarding their payment dispute.[19] Helix's proposed Finding of Fact No. 20 confirmed the same to this Court: "Just as APCO was advising its subcontractors of its notices of intent to stop work and terminate its agreement with Gemstone (see e.g. Exs. 26, 48), Gemstone notified the subcontractors that it disputed APCO's claims.[20]

G. Helix's Proposed Finding of Fact No: 17. By way of APCO's final certified payment application **[Exhibit 31],** which it submitted on October 3, 2008 (i.e., more than a month after stopping work and terminating the APCO-Gemstone Agreement) APCO showed similar figures. Specifically, on the Contractor's Application for Payment document [Ex. 31-002], APCO showed "total completed & stored to date" of $62,101,623.10 and a current payment due of $5,276,181.54. While these figures are lower than the subtotal of work performed, and the amounts owed as represented by the APCO Notice of Lien, APCO's Joe Pelan testified that APCO was owed for changed work that Gemstone had not approved and allowed to be billed. *[See* TR1-65:7-9]. APCO's Mary Joe Allen contradicted APCO's Joe Pelan by testifying that APCO was owed only approximately $1.4 million when it stopped work on the Project. [TR3-122:10-12]. However, it is clear that Ms. Allen's calculations only selected line items earned by APCO and did not include any amounts owed to subcontractors that had otherwise been included in APCO's pay applications. In any event, the Court finds that APCO billed for and included in its Notice of Lien amounts earned by (but not paid to) subcontractors, including their retention.

APCO's Response: The $1,400,036.75 Ms. Allen calculated does not reflect any of the retention that Gemstone withheld from APCO on the Project because the retention never became due.[21] The $1,400,036.75 also does not include any

[19] Testimony of Andy Rivera (APCO) Day 2, p.76.
[20] Helix's Proposed Finding of Fact No: 20.
[21] Testimony of Mary Jo Allen (APCO) Day 3, p. 127.

amounts to subcontractors because APCO ensured subcontractors had received all amounts billed through August 2008 before it left the Project.[22]

H. Helix's Proposed Finding of Fact No: 21. After APCO stopped work, Helix had a meeting with Gemstone's principal, Alex Edelstein, and a Camco representative in which Gemstone represented to Helix that "work was still proceeding, nothing had changed with our contracts with the current APCO relationship, and that we were to take direction for construction from Camco, and they wanted to negotiate a contract." [TR2-22:10-23:3[23]]. Despite repeatedly requesting to know what happened to APCO, Helix "never got a clear signal. So you stop asking after a while because you get different messages from everybody. Our people had even asked in the field what's going on, and people didn't know. So it was just confusion." [TR2-23:8-14].[24]

APCO's Response: Helix cites Bob Johnson's testimony for the proposition that Helix was somehow confused about the status of the Project. But Mr. Johnson admitted that Andy Rivera was more knowledgeable about the Project. And Andy Rivera understood that Gemstone purported to terminate the APCO Contract, that Helix was getting information directly from Gemstone, that Helix was being copied on APCO/Gemstone emails, and was getting direction directly from Gemstone:

> Q. Wouldn't it be fair to say that based on communications, both written and verbal, that you received from APCO and/or Gemstone, you knew that Gemstone had purported to terminate APCO's prime contract?
>
> A. We knew they were having issues.
>
> Q. Okay. And those issues had culminated in APCO purporting to terminate the prime contract and/or Gemstone purporting to terminate the prime contract, correct?
>
> A. Correct.[25]

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[22] Exhibit 26; Exhibit 152; Testimony of Joe Pelan (APCO) Day 1, pp. 46, 67, and 82. Testimony of Mary Jo Allen (APCO) Day 3, pp. 127-128.
[23] Testimony of Robert Johnson on cross-examination by APCO's counsel.
[24] Testimony of Robert Johnson on cross-examination by APCO's counsel.
[25] Testimony of Andy Rivera (Helix) Day 2, p. 75.

In fact, during the August 2008 timeframe, Helix was getting information directly from Gemstone.[26] And Mr. Rivera admitted Helix was copied on certain communications between APCO and Gemstone:

> Q. And wouldn't it be fair to say that you received copies of certain communications from APCO to the owner, Gemstone, whereby APCO indicated that we're having payment issues and we're giving notice of our intent to exercise statutory rights to suspend and/or terminate?
>
> A. Something to that effect, yes.[27]
>
> . . . .
>
> Q. Okay. But do you recall receiving APCO generated correspondence indicating to the owner, which was sent to subcontractors as well, that APCO was suspending and/or terminating its work, correct?
>
> A. Correct.[28]

Mr. Rivera also admitted Helix was performing work under Gemstone's direction by August 26, 2008:

> Q. And from and after about August 26, 2008, Helix was taking its direction from Gemstone and/or Camco, correct?
>
> A. Gemstone.
>
> Q. Okay. APCO was not directing, requesting any work on behalf of Helix after September 5, 2008, correct?
>
> A. Correct.
>
> Q. And based on your personal involvement with Gemstone and Camco, did you understand that, in fact, Camco was replacing APCO as the prime contractor?
>
> A. At that time did not know exactly how that was—the agreement was going to be.
>
> Q. Did you come to find out?
>
> A. Yes.
>
> Q. that was, in fact, the case?
>
> A. Yes.[29]

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[26] Testimony of Andy Rivera (Helix) Day 2, p. 76.
[27] Testimony of Andy Rivera (Helix) Day 2, p. 76.
[28] Testimony of Andy Rivera (Helix) Day 2, p. 77.
[29] Testimony of Andy Rivera (Helix) Day 2, pp. 76-77. *See also* Testimony of Bob Johnson (Helix) Day 2, p. 25.

Helix was directed to hook up power to the Camco trailer on August 26, 2008.[30] During the transition of APCO to Camco, Helix had a meeting with Gemstone.[31]And the purpose of that meeting was to: "represent that work was still proceeding, nothing had changed with our contracts with the current APCO relationship, and that we were to take direction for construction from Camco, and they wanted to negotiate a contract."[32] Lastly, on August 26, 2008, Gemstone sent a "question and answer" letter to the Project's subcontractors.[33] That letter contained the following questions and answers:

> Q. APCO is refusing to pay me, saying that you haven't paid them. What's up with that?
>
> A. The most recent pay application submitted by APCO is Pay Application [NUMBER]. IT's processing and is nearly complete, and money will be wired to NCS, most likely, within 1 week. [At that point we will instruct NCS to pay the subcontractors portions of the draw by joint check.]. We have paid APCO 100% of all legitimate pay applications they have made of us.
>
> Q. How do I get paid going forward?
>
> A. Please plan on submitting your next pay application by the 25th of August. You can send it to CAMCO c/o Jennifer Griffith in the construction trailer. Gemstone and CAMCO will collaborate on the analysis and signoff of subcontractor pay applications, and we hope to fund that pay application by the 15th of September.
>
> …
>
> Q. APCO owes me (money/retention). What do I do about that?
>
> A. Please contact APCO directly. They owe us a great deal in damages, and we do not expect to pay them any additional money after the current pay application is processed.[34]

So Helix was always aware of the status of the Project.

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[30] Exhibit 171; Testimony of Bob Johnson (Helix) Day 2, p. 25.
[31] Testimony of Bob Johnson (Helix) Day 2, p. 22.
[32] Testimony of Bob Johnson (Helix) Day 2, pp. 22-23.
[33] Trial Exhibit 118.
[34] Trial Exhibit 118.

I. Helix's Proposed Finding of Fact No: 22. Helix's Robert Johnson testified that, from Helix's perspective, "until APCO does something contractually to inform me our relationship is different, it's not changed." [TR2-23:17-19]. As noted, APCO never gave Helix written notice of termination of the Helix-APCOSubcontract. [TR1: 126:1-4[35]] It also never advised Helix that by way of an incorporation clause in the APCO Subcontract the termination of the APCO-Gemstone Agreement somehow served to terminate the APCO Subcontract by implication. [TR1:126:12-22].[36] Indeed, as discussed above, APCO had rejected Helix's attempt to modify the APCO Subcontract by including language in the Helix Exhibit (APCO) that would have granted Helix the same rights of termination that APCO possessed in the APCO-Gemstone Agreement. *[See* Ex. 506-004; TR1 121: 17-122:6].[37]

APCO's Response: Helix understood exactly what was going on. It received Gemstone's notice of termination, received direction and work directly from Gemstone, was copied on communications between APCO and Gemstone, and even had private meetings directly with Gemstone. *See* APCO's Response to Helix's Proposed Finding of Fact No. 21. Helix even admitted that it negotiated to complete the same technical scope of work under Camco:

> Q. Would it be fair to conclude the technical scope of work remained the same as you transitioned to work with Camco—
> A. Yeah.
> Q. –for Helix?
> A. Yes.[38]

So Helix clearly understood APCO was being replaced.

J. Helix's Proposed Finding of Fact No: 23. Mr. Johnson also testified that, unlike APCO, Helix did not believe it had a legal right to stop work on the Project after APCO did so. [TR1:128:12-16]. In fact, Helix worried that if it had stopped work it

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[35] Testimony of Robert Johnson.
[36] Testimony of Robert Johnson.
[37] Testimony of Robert Johnson.
[38] Testimony of Andy Rivera (Helix) Day 2, p. 78.

"would have been at full risk of [APCO] pursuing us for abandoning the contract." [TR1: 128:15-16]. APCO did not dispute this point.

APCO Response: APCO had paid all amounts due to Helix before APCO left the Project.[39] The statutes invoked by APCO gave Helix the right to suspend and terminate if they desired. [40] And Exhibit 23, APCO's letter to Helix, specifically advised Helix of its right to suspend work.[41] Helix never elected to do so and simply entered into the ratification agreement with Camco and replaced APCO. And after APCO terminated the prime contract, there was no work to perform other than under a new contract with Camco, as Helix has admitted in its President's own affidavit:

> 6. Helix also performed work and provided equipment and services directly for and to Gemstone, namely design engineering and temporary power.
>
> 7. Camco Pacific Construction Company, Inc. ("Camco") replaced APCO as the general contractor. Thereafter, Helix performed its Work for Gemstone and/or Camco…[42]

K. Helix's Proposed Finding of Fact No: 24. Section 10.04 of the APCO-Gemstone Agreement provides in part:

> Each Third-Party Agreement for a portion of the Work is hereby assigned by [APCO] to [Gemstone] provided that such assignment is effective only after termination of the Agreement by [Gemstone] for cause pursuant to Section 10.02 and only for those Third-Party Agreements which developer accepts by notifying [APCO] and the applicable Third-Party Provider in writing.

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[39] Exhibit 26; Exhibit 152; Testimony of Joe Pelan, Day 1, pp. 46, 67, and 82. Testimony of Mary Jo Allen (APCO) Day 3, pp. 127-128.
[40] Exhibit 23; NRS 624.610(7).
[41] Exhibit 23.
[42] Exhibit 314.

There was no evidence presented at trial that Gemstone ever notified APCO, Helix or any other subcontractor of its acceptance of an assignment of the relevant subcontracts. [See e.g., TR2-36:12-16].[43]

APCO's Response: Helix's citation to TR2-36:12-16 does not support this proposition. Instead, it only confirms that Bob Johnson doesn't remember seeing anything in writing confirming:

> Q: To your knowledge, did the developer accept the assignment by notifying general contractor and the applicable third-party service provider in writing? Did Gemstone notify you in writing that it was accepting assignment of APCO's contract?
> A: I have never seen anything in writing.[44]

This citation ignores the weight of the evidence. First, Helix received Exhibit 172, a letter from Gemstone to Helix confirming its intention to have Helix continue performing work under Camco.[45] Next, Helix received Gemstone's notice of termination of APCO, received direction and work directly from Gemstone, was copied on communications between APCO and Gemstone, and even had private meetings directly with Gemstone. *See* APCO's Response to Helix's Proposed Finding of Fact No. 21. Lastly, Gemstone did invoke the assignment in written communication. See Exhibit 13 (confirming that upon a termination of the Contract "(a) all Third-Party Agreements shall be assigned to Gemstone and (b) APCO must execute and deliver all documents and take such steps as Gemstone may require for the purpose of fully vesting in Gemstone the rights and benefits of such assigned Third-Party Agreements.").[46]

L. Helix's Proposed Finding of Fact No: 36. Based on Helix's undisputed testimony and the lack of signed agreements, the Court finds that Helix did not sign or enter into either the Camco Subcontract or the Camco Ratification. Although Camco

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[43] Testimony of Robert Johnson.
[44] Testimony of Bob Johnson (Helix) Day 2, p. 36.
[45] Exhibit 172.
[46] Exhibit 13, p. 14, Section C.3.

presented each of these forms to Helix, the testimony is undisputed that Helix did not execute either. [See **Exhibit 510-006-042; Exhibit 172-003-011; TR1-123:1-124:25].**[47] As it did with the APCO Subcontract, Helix prepared a Helix Electric Exhibit ("the Helix Exhibit (Camco)") to the Camco Subcontract with multiple proposed revisions to which Camco never agreed [See **Exhibit 510-043-045;** TR1-125:2-10[48]].[49]

APCO's Response: The cited evidence does not support this proposition and ignores conclusive evidence and Helix's own admissions: Helix admitted it entered into a ratification agreement with Camco on September 4, 2008 to continue on and complete the APCO scope of work.[50] Helix even added a document to the ratification entitled "Helix Electric's Exhibit to the Ratification and Amendment."[51]

- The Helix Exhibit to the Ratification and Amendment contained language confirming that APCO was removed as the general contractor and that Helix submitted $994,025 in change orders to APCO prior to August 26, 2008, the date Camco was using for its ratification agreement.[52]
- Helix included a total contract price of $5.55 million for the Project, which was its original contract price with APCO for Phase 1, and added $480,689 as approved change orders under APCO to the total contract price.[53]
- And although Helix has not produced a signed copy of the ratification agreement, Helix has admitted entering into its ratification and amended subcontract agreement in its complaint as follows:

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[47] Testimony of Robert Johnson.
[48] Testimony of Robert Johnson.
[49] APCO argues that by way of its initial pleading in this action Helix admitted to entering into the Cameo Ratification. However, (i) Helix moved to amend its pleading during opening statement to correct this mis-statement [see TRI :9: 19-25]; (ii) Helix provided credible and undisputed testimony is the pleading is incorrect and that it did not in fact sign or agree to the document which (iii) outweighs any pleading admission. A trial is a search for the truth and the evidence at trial supports the truth that Helix did not enter into the Camco Ratification.
[50] Exhibit 77, Helix Complaint, ¶18.
[51] Exhibit 170; Testimony of Bob Johnson (Helix) Day 2, p. 42.
[52] Exhibit 170; Testimony of Bob Johnson (Helix) Day 2, pp. 42-43.

> 18. On or about September 4, 2008, Helix entered into the Ratification and Amendment of Subcontract Agreement ("CPCC Agreement") **with Camco who replaced APCO as the general contractor on the Project**, to continue the work for the Property ("CPCC Work").
> 19. **Helix furnished the CPCC Work for the benefit of and at the specific instance and request of CPCC and/or Owner.**
> 20. Pursuant to the CPCC Agreement, Helix was to be paid an amount in excess of Ten Thousand Dollars ($10,000.00) (hereinafter "CPCC Outstanding Balance") for the CPCC Work.
> 21. Helix furnished the CPCC Work and has otherwise performed its duties and obligations as required by the CPCC Agreement.
> 22. CPCC has breached the CPCC Agreement…
> CPCC breached its duty to act in good faith by performing the Ratification Agreement in a manner that was unfaithful to the purpose of the Ratification Agreement, thereby denying Helix's justified expectations…[54]

- Helix's Mr. Johnson admitted that Exhibit 172, the Ratification Agreement, was the document that Helix referenced in its complaint (Exhibit 77) as the Ratification.[55]
- Helix also admitted it had a contract with Camco/Gemstone for $8.6 million in its lien documents.[56] So the referenced documents clearly reflect the replacement agreement between Helix and Camco.

M. Helix's Proposed Finding of Fact No: 37. Among other things, by way of the Helix Exhibit (Camco), Helix noted in Item 1 that **["p]rior to the removal of APCO as the contractor** and the issuance of this Ratification and Amendment of Subcontract Agreement, Helix Electric and APCO were in the process of completing negotiations of the [Helix Exhibit (APCO)] .... " Helix attempted to incorporate into the Helix Exhibit (Camco) the last version of the Helix Exhibit (APCO) that was acceptable to Helix.

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[53] Exhibit 170-54; Testimony of Bob Johnson (Helix) Day 2, p. 44; Exhibit 169-8.
[54] Exhibit 77.
[55] Testimony of Bob Johnson (Helix) Day 2, p. 28.
[56] Exhibit 512; Testimony of Bob Johnson (Helix) Day 2, p. 29.

[See Ex. 510-043]. Helix felt it had to do so "because we're still under contract with APCO." [TR125:11-25].38[57]

APCO's Response: The bolded language confirms that Helix had full knowledge that APCO was removed from the Project and could have invoked its statutory right to terminate the subcontract.[58]

N. Helix's Proposed Finding of Fact No: 38. **As it was instructed to do**, and while it continued to negotiate with Camco with respect to the Camco Subcontract, the Camco Ratification Agreement and the Helix Exhibit (Camco), Camco continued to perform the work it had agreed to perform on the Project until Gemstone suspended work on December 15, 2008. **As it was also instructed to do**, Helix submitted payment applications to Camco using the same forms and same procedures as it had employed while APCO was still on the Project. [See e.g., Ex. 508-067-074]. Camco in turn submitted its pay applications to Gemstone in the same way, and using the same forms, as APCO had used. *[See e.g.,* Ex. 522-001-011].

APCO's Response: Helix failed to cite at whose direction it was performing work or specific tasks. APCO was not giving Helix any direction after August 2008.[59] So Helix was clearly taking direction from Camco and Gemstone.

O. Helix's Proposed Finding of Fact No: 40. The Court finds that Helix and Camco did not enter into the Camco Subcontract or the Camco Ratification. However, the Court finds that Helix and Camco entered into a contractor/subcontractor relationship and agreement whereby they agreed on the material terms of a contract- i.e., the work to be performed, the price for the work and Camco's obligation to pay. The Court finds that Camco breached its obligation to pay Helix the sum of $834,476.45.

APCO's Response: Helix and Camco entered into a ratification agreement.[60] And

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[57] Testimony of Robert Johnson (emphasis added).
[58] NRS 624.6210(7).
[59] Testimony of Joe Pelan (APCO) Day 1, p. 97; Testimony of Joe Pelan (APCO) Day 3, p. 150; Testimony of Steve Parry (Camco) Day 5, p. 27.

they agreed on the material terms of the agreement[61] including price[62] and scope [63] to complete the Project under Camco.

II. Many of Helix's "Conclusions of Law" are not supported by Nevada Law.

APCO disputes the following "conclusions of law" that Helix proposed to this Court: 2-6, 8-10, 13-22, 27, 29, 30, 32, 34 and 36. For ease of review, Helix's proposed finding precedes APCO's response to the same.

A. Helix's Proposed Conclusions of Law No: 2. Because there was no meeting of the minds with respect to materials terms of the APCO Subcontract, the Court concludes that this document does not constitute the parties' agreement.

APCO's Response: *See* APCO's Response to Helix's Proposed Finding of Fact No: 8 (confirming the numerous times Helix has admitted its contract with APCO was Exhibit 45).

B. Helix's Proposed Conclusions of Law No: 3. However, the Court concludes that APCO and Helix entered into a contract for an agreed-upon sum for the work performed by Helix, that Helix performed that work and that in breach of that contract, APCO has not paid Helix in full. APCO owes Helix the principal sum of $505,021.00 for monies earned and not paid to Helix while APCO was on site as the general contractor.[64]

APCO's Response: *See* APCO's Response to Helix's Proposed Finding of Fact No: 8 and Proposed Conclusion of Law No. 2. Exhibit 45 is the agreement between

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[60] Exhibit 172.

[61] *Medina v. Medina*, No. 67008, 2016 WL 1298974, at *1 (Nev. App. Mar. 31, 2016) (internal citations omitted) ("Unless the parties agree to all material terms, preliminary negotiations cannot constitute a binding contract. However, a contract is formed 'when the parties have agreed to the material terms, even though the contract's exact language is not finalized until later.'")

[62] Exhibit 172.

[63] Testimony of Andy Rivera (Helix) Day 2, p. 78.

[64] Helix's claim that APCO is also liable for sums earned by Helix after APCO left the site and while Cameo was on site as the general contractor is discussed infra.

Helix and APCO. Helix cannot pick and choose which provisions it wants to govern its relationship with APCO.

Pursuant to NRS 624.624(1)(a), there are two events that would trigger when retention is due to Helix: (1) compliance with the retention payment schedule, or (2) within 10 days after APCO received the retention from Gemstone. Neither event occurred here.

Section 3.8 of the Helix Subcontract contained a retention payment schedule that was acknowledged and affirmed by Helix and APCO at trial. As such, Helix needed to show these five conditions precedent were satisfied before APCO had to pay retention. *See Lucini-Parish Ins. v. Buck,*[65] (a party who seeks to recover on a contract has the burden of establishing any condition precedent to the respective contract). Helix admitted that it did not comply with the five conditions precedent to be entitled to its retention payments from APCO.[66] So Helix did not meet its burden of proof. Also, APCO never received Helix's retention to trigger the statutory 10 day period. Helix never sent APCO an invoice or billing for its retention, thereby confirming its intention and understanding that it never earned retention while APCO was the contractor.[67] And Helix has no information to suggest APCO received Helix's retention[68] because that never occurred.[69] Accordingly, Helix 's retention payment never became due from APCO. [70]

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[65] 108 Nev. 617, 620, 836 P.2d 627, 629 (1992)

[66] *See* Testimony of Helix's Bob Johnson, Day 2, p. 19 ("Q. Well, let me ask it this way: Did Helix satisfy any of these preconditions found in paragraph 3.8 while APCO was the general contractor on the project? A. Not to my knowledge.).

[67] Testimony of Andy Rivera (Helix) Day 2, pp. 73-75.

[68] Testimony of Andy Rivera (Helix) Day 2, pp. 73-75.

[69] Testimony of Joe Pelan (APCO) Day 3, p. 150.

[70] *See also Titus v. Gunn*, 69 N.J.L. 410, 55 A. 735 (1903) (the delivery of a release of liens is a condition precedent to the contractor's right to recover unless there are no liens to waive); *Kilianek v. Kim*, 192 Ill. App. 3d 139, 139 Ill. Dec. 213, 548 N.E.2d 598 (1st Dist. 1989) (architect's certificate was condition precedent for payment). *D. I. Corbett Elec., Inc. v. Venture Const. Co.,* 140 Ga. App. 586, 231 S.E.2d 536 (1976); (under subcontract which provided that final payment was to be made by contractor within 30 days after subcontractor's completion of work, written acceptance by architect and owner and full payment therefore by owner, acceptance and payment were conditions precedent to final payment to subcontractor).

C. Helix's Proposed Conclusions of Law No: 4. Alternatively, the Court concludes that there is an implied contract between Helix and APCO and that Helix is entitled quantum meruit damages for recovery of the full and reasonable value of the work its performed. See *Certified Fire Prot. Inc. v. Precision Constr.,* 128 Nev. 371, 379, 283 P.3d 250, 257 (2012) ("quantum meruit's first application is in actions based upon contracts implied-in-fact."). A contract implied-in-fact must be "manifested by conduct." *Id.* at 380 citing *Smith v. Recrion Corp.,* 91 Nev. 666, 668, 541 P.2d 663, 664 (1975); *Hay v. Hay*, 100 Nev. 196, 198, 678 P.2d 672, 674 (1984). It "is a true contract that arises from the tacit agreement of the parties." *Id.* To find a contract implied-in-fact, the fact-finder must conclude that the parties intended to contract and promises were exchanged, the general obligations for which must be sufficiently clear. *Id.* Here, APCO and Helix clearly intended to enter into a contract whereby Helix would perform work for APCO and APCO would pay Helix for its work.

APCO's Response: *See* APCO's Response to Helix's Proposed Finding of Fact No. 8 and Proposed Conclusion of Law No 2. Helix admitted Exhibit 45 was the subcontract that governed the APCO/ Helix relationship. And Helix has not shown that APCO received any benefit from the $505,021 in retention that Helix rolled over in its billings to Camco.[71] APCO never received that retention payment from Gemstone. The retention was always held by Gemstone and/or its lender.[72]

D. Helix's Proposed Conclusions of Law No: 5. Where an implied-in-fact contract exists "quantum meruit ensures the laborer receives the reasonable value, usually market price, for his services." *Precision Constr.,* 128 Nev. at 3 80 citing Restatement (Third) of Restitution and Unjust Enrichment *§* 31 cmt. e (20 11), *Sack v. Tomlin,* 110 Nev. 204,208, 871 P.2d 298,302 (1994) ("The doctrine of quantum meruit generally applies to an action ... involving work and labor performed which is founded on a[n]

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[71] Exhibit 60.
[72] Testimony of Joe Pelan (APCO) Day 1, p. 30.

oral promise [or other circumstances] on the part of the defendant to pay the plaintiff as much as the plaintiff reasonably deserves for his labor in the absence of an agreed upon amount."). **Here, the only and undisputed testimony was that the monies Helix billed for its work were a reasonable value for the work performed**. Moreover, APCO's submission of such amounts to Gemstone as part of its own pay application estops APCO from disputing the reasonable value of Helix's work. Because Helix has been paid all but $505,021.00 of the value its established for the work it performed while APCO was on site as the general contractor, APCO owes Helix no less than that amount.[73]

APCO's Response: APCO paid Helix for all amounts Helix actually billed to APCO, and Helix's Andy Rivera admitted it never billed APCO for its retention and APCO never received Helix's retention:

> Q. Sir, could you pull out Exhibit 44. And I want to make sure my record's clear. Exhibit 44 that I marked is, in fact, the same summary that was found in Exhibit 535, page 252, that you and Mr. Zimbleman went over; is that—
>
> A. Correct.
>
> Q. Okay. And does Exhibit 44 represent the damages that you are seeking from APCO in this matter?
>
> A. Yes.
>
> Q. And do you recall if you were designated as the person most knowledgeable for one of the topics being the damages that Helix was seeking from APCO in these proceedings, correct?
>
> A. Correct.
>
> Q. And would you agree that as the PMK, you identified a figure of $505,021 as the amount that Helix in this lawsuit claims APCO owes it, correct?
>
> A. Correct.
>
> Q. And there are no other amounts that you identified in your PMK depo as being APCO's liability on this Project, correct?
>
> A. Correct.
>
> Q. Okay. And we are in agreement that the 505—that's your handwriting, where you wrote: Retention?

[73] Emphasis added.

A. Yes.

Q. And would it be fair to conclude that that retention represents retention that had been accounted for and accrued while APCO was serving as the prime contract – prime contractor on the Project?

A. Yes.

Q. Prior to today has Helix ever billed APCO for that retention?

A. No. No. I'm sorry.

Q. Do you have any information to suggest that APCO ever received Helix's retention from Gemstone?

A. I would not know.

Q. Okay. You don't have any information to suggest that APCO has collected Helix's retention but not forwarded it on to Helix, correct?

A. Correct.

Q. Okay. And in light of your summary within Exhibit 44, would it be fair to conclude that all of the amounts that Helix billed to APCO were, in fact, paid but for retention?

A. Yes.[74]

So under Helix's unjust enrichment/quantum meruit theory, it is not entitled to any further payment from APCO as APCO has not retained any benefit received from Helix.

E. Helix's Proposed Conclusions of Law No: 6. Alternatively, and even if (as APCO contends despite of the lack of a fully executed agreement) Helix and APCO entered into the APCO Subcontract and that document is therefore controlling, the court concludes that APCO is nonetheless in breach of that agreement for failure to pay Helix in full as required by that document for the work Helix performed while APCO was on site as the general contractor.

APCO's Response: *See* APCO's Response to Helix's Proposed Conclusion of Law No: 3. The retention never became due while APCO was contractor and Helix never billed APCO for its retention. So there was never an existing payment obligation that APCO breached.

[74] Testimony of Andy Rivera (Helix) Day 2, pp. 73-75.

F. Helix's Proposed Conclusions of Law No: 8. Section 3.8 of the Helix-APCO Subcontract provides in part:

> The 10 percent withheld retention shall be payable to Subcontractor upon, and only upon the occurance of all of the following events, each of which is a condition precedent to Subcontractor's right to receive final payment hereunder and payment of such retention: (a) Completion of the entire project described in the Contract Documents; (b) The approval and final acceptance of the project Work by Owner; (c) Receipt of final payment by Contractor from Owner; (d) Delivery to Contractor from Subcontractor all as-built drawings from its scope of work and other close-out documents; (e) Delivery to Contractor from Subcontractor a Release and Waiver of Claims from all of Subcontractor's laborers, material and equipment suppliers, and subcontractors ...

APCO argues that because Helix it did not comply with these conditions it has no right to receive its retention. The Court rejects this argument because (i) Section 3.8 otherwise assumes that the Project would be completed such that Helix's compliance with Section 3.8 would not otherwise be impossible and futile, (ii) enforcement of Section 3.8 as demanded by APCO would impermissibly avoid APCO's payment obligations under NRS 624 and attempt to waive or impair lien rights, and (iii) there was a termination event that triggers APCO's payment obligations pursuant to Section 9 .4, which overrides the provisions of Section 3 .8.

APCO's Response: Complying with Section 3.8 was not impossible when APCO left the Project. This is obvious since Helix continued on the Project with Camco. And, enforcement of Section 3.8 does not waive Helix's lien rights. Helix vigorously pursued its lien rights.[75] Lastly, no party presented evidence that there was a termination for convenience under Section 9.4 of the Subcontract. And even Helix's Mr. Johnson admitted that Section 9.4 of the Subcontract *only* applies to a termination for convenience:

> Q And then directing your attention to the next page -- excuse me. Well, now I'm missing a page.
> Can you go to page 9 [of Exhibit 45]?
> A. Okay.

[75] Exhibits 76 (Helix's Amended Lien) and 77 (Helix's Statement of Facts Constituting Lien).

Q Does that have Article 9?
A It does.
Q Terminations for convenience?
A Yes.
Q Okay. Would you take a minute and review, just to yourself, Articles 9.4 and 9.5?
A [Mr. Johnson complies.]
Okay.
Q Would you agree with me, sir, that Articles 9.4 and 9.5 contemplate an owner's termination of the prime contract for the owner's convenience?
A It appears to be that.
Q And Helix never submitted a claim invoking these provisions of the subcontract, did it?
A. Not to my knowledge.[76]

So even Helix's Mr. Johnson admitted that Article 9.4 was never intended to apply in this situation.

G. Helix's Proposed Conclusions of Law No: 9. When one party abandons contract, the other party need not "engage in futile gestures to preserve contractual rights." *Mayfield v. Koroghli,* 124 Nev. 343, 349, 184 P.3d 362, 366 (2008). Furthermore, it is futile for a party to make a demand "if the other party has repudiated the contract or otherwise indicated [he] refuses to perform." *Id.* Here, it was impossible and would have been futile for Helix to comply with the provisions of Section 3.8. For example, the "entire project" was never completed through no fault of Helix, nor was there any "approval and final acceptance of the project Owner" as Section 3.8 otherwise plainly anticipated. Of course, "receipt of final payment by Contractor from Owner" is a Pay-if-Paid clause that is void and unenforceable.

APCO's Response: Helix did not present any evidence that APCO abandoned the APCO/Gemstone prime contract. Instead, APCO presented evidence of a statutory notice of nonpayment to the Owner and ultimately an assignment, ratification, and novation between Helix and Camco.[77] Exhibit 45, the Helix/APCO subcontract,

[76] Testimony of Bob Johnson (Helix) Day 2, pp. 20-21.
[77] *See* APCO's Proposed Findings of Fact and Conclusions of Law at 371-379 (regarding the assignment), 384-393 (confirming the novation) and 195-222 (confirming the ratification).

contained a valid retention payment schedule, and payment to Helix never became due under that schedule because: (1) Helix did not bill APCO for its retention, and (2) APCO never received Helix's retention. See *Padilla Construction Company of Nevada v. Big-D Construction Corp*, 386 P.3d 982 (Nev. 2016) (unpublished)("Because the parties' subcontract contained a payment schedule that required that Padilla be paid within ten days after IGT accepted Padilla's work and paid Big-D for that work and it is undisputed that IGT never accepted Padilla's work and never 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); see generally*, NRS 624.626. As Helix continued working with Gemstone and Camco and rolled its retention over to its Camco billings, compliance with Article 3.8 was not only possible but obviously contemplated by Helix. APCO paid Helix all amounts Helix billed APCO while APCO was the contractor. After Helix continued, APCO lost all control. The events of which Helix complains took place months after Camco replaced APCO.

Lastly, complying with these conditions would not have been futile. In *Am. Cont'l Life Ins. Co. v. Ranier Const. Co.,*[78] the contractor made the same argument that complying with a condition precedent to payment (obtaining a final certificate of payment from the architect) would have been futile. The court reject contractor's argument and confirmed that contractor was not excused from obtaining "the contractually-imposed duty of acquiring a certificate". The court held:

> Without it, we have no way of knowing if the architect was satisfied that the list of items to be completed between the time of issuance of the certificate of substantial compliance and the application for final payment had been completed and that the contract was, thus, fully performed. At the trial, in fact, the architect testified that after he issued the certificate of substantial completion, the building was not complete, and items on the "punch" list remained unfinished.

[78] 125 Ariz. 53, 56, 607 P.2d 372, 375 (1980).

The appellate court went on to agree with the owner, finding, "the final certificate for payment is not 'procedural chaff.'" Instead, the court found "[the certificate] is a major substantive right, which "serves a vital interest, in that it induces the contractor to render a performance that conforms in fact to plans and specifications, spurs him to stay with the job and, upon completion, furnishes the main incentive to make conforming corrections." The appellate court reversed the decision of the trial court and directed a verdict in the owner's favor because of contractor's non-compliance with the condition precedent of obtaining a final certificate of payment. *See also Dixie Roof Decks, Inc. v. Borggren/Dickson Const., Inc.,* 195 Ga. App. 881, 881, 395 S.E.2d 19, 19 (1990) The trial court did not err in granting directed verdict in favor of defendant general contractor on grounds that subcontractor had failed to deliver the roof warranty to general contractor as expressly required as a condition precedent to payment by the construction contract); *Titus v. Gunn*, 69 N.J.L. 410, 55 A. 735 (1903) (the delivery of a release of liens is a condition precedent to the contractor's right to recover unless there are no liens to waive); *Kilianek v. Kim*, 192 Ill. App. 3d 139, 139 Ill. Dec. 213, 548 N.E.2d 598 (1st Dist. 1989) (architect's certificate was condition precedent for payment). *D. I. Corbett Elec., Inc. v. Venture Const. Co.,* 140 Ga. App. 586, 231 S.E.2d 536 (1976); (under subcontract which provided that final payment was to be made by contractor within 30 days after subcontractor's completion of work, written acceptance by architect and owner and full payment therefore by owner, acceptance and payment were conditions precedent to final payment to subcontractor). So the law clearly suggests the enforceability of these preconditions.

H. Helix's Proposed Conclusions of Law No: 10. To the extent Section 3.8 serves to avoid APCO's obligation to promptly pay Helix for its work on the Project (as it is obligated to do pursuant to NRS 624.624), it is a "condition stipulation or provision" that is against public policy, void and unenforceable pursuant to NRS 624.628(3)

because it "(a) Requires a lower-tiered subcontractor to waive any rights provided in NRS 624.624 to 624.630, inclusive, or which limits those rights; [or] (b) Relieves a higher-tiered contractor of any obligation or liability imposed pursuant to NRS 624.624 to 624.630, inclusive."[79]

APCO's Response: *See* APCO's Response to Conclusion of Law No. 11. The preconditions in Section 3.8 are not against public policy. First, the legislature has already agreed that contracts between prime contractors and subcontractors can contain payment schedules and there are not against public policy.[80] And the Nevada Supreme Court has already recognized that prime contractors and subcontractors can agree to conditions precedent to payment. See *Padilla Construction Company of Nevada v. Big-D Construction Corp*, 386 P.3d 982 (Nev. 2016)(enforcing the owner acceptance and owner payment preconditions). Lastly, it is undisputed that the Subcontract did not waive Helix's right to place a mechanic's lien on the Project, so Helix had multiple avenues to collect payment on the Project.

I. Helix's Proposed Conclusion of Law No: 11. Similarly, if Section 3.8 prevents Helix from being paid in full it violates the Nevada Mechanic's Lien Statute and is void and unenforceable because it impermissibly "require[s] a lien claimant to waive rights provided by law to lien claimants or to limit the rights provided to lien claimants" (NRS 1 08.2453(2). See also, NRS 1 08.2457(1) and (2)) and is a"term of a contract that attempts to waive or impair the lien rights of a contractor, subcontractor or supplier" (NRS 108.2457(1).

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[79] NRS 624.628(3) provides: 3. A condition, stipulation or provision in an agreement which:
(a) Requires a lower-tiered subcontractor to waive any rights provided in NRS 624.624 to 624.630, inclusive, or which limits those rights; (b) Relieves a higher-tiered contractor of any obligation or liability imposed pursuant to NRS 624.624 to 624.630, inclusive; or (c) Requires a lower-tiered subcontractor to waive, release or extinguish a claim or right for damages or an extension of time that the lower-tiered subcontractor may otherwise possess or acquire as a result of delay, acceleration, disruption or an impact event that is unreasonable under the circumstances, that was not within the contemplation of the parties at the time the agreement was entered into, or for which the lower-tiered subcontractor is not responsible, - is against public policy and is void and unenforceable.

[80] *See* NRS 624.624.

APCO Response: There is nothing in the Helix Subcontract that waives lien rights. Helix fully prosecuted its lien rights.[81] And it is undisputed that APCO financed the prosecution of Helix's lien rights throughout a costly appeal.[82]

J. Helix's Proposed Conclusion of Law No: 12. More fundamentally, the termination of the APCO-Gemstone Agreement triggered Section 9.4 of the Helix-APCO Subcontract, overrides Section 3.8 and requires APCO to pay Helix in full. Section 9.4 provides:

> Effect of Owner's Termination of Contractor. If there has been a termination of the Contractor's contract with the Owner, the Subcontractor ***shall be paid*** the amount due from the Owner to the Contractor for the Subcontractor's completed work ... after payment by the Owner to the Contractor. [Ex. 45, ~9.4, emphasis added].

APCO's Response: And even Helix's Mr. Johnson admitted that Section 9.4 of the Subcontract *only* applies to termination for convenience, which obviously did not occur here:

> Q And then directing your attention to the next page -- excuse me. Well, now I'm missing a page.
> Can you go to page 9 [of Exhibit 45]?
> A. Okay.
> Q Does that have Article 9?
> A It does.
> Q Terminations for convenience?
> A Yes.
> Q Okay. Would you take a minute and review, just to yourself, Articles 9.4 and 9.5?
> A [Mr. Johnson complies.]
> Okay.
> Q Would you agree with me, sir, that Articles 9.4 and 9.5 contemplate an owner's termination of the prime contract for the owner's convenience?
> A It appears to be that.
> Q And Helix never submitted a claim invoking these provisions of the subcontract, did it?

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[81] Exhibit 76 and 77.

[82] *See* Exhibit 13, Declaration of Mary Jo Allen of APCO's January 2018 Motion for Reconsideration of Court's Order Granting Zitting Brothers Construction, Inc.'s Partial Motion for Summary Judgment.

A. Not to my knowledge.[83]

So even Helix's Mr. Johnson admitted that Article 9.4 was never intended to apply in this situation. Nothing in Article 9 obligates APCO to pay if Gemstone has not paid APCO and APCO exercises its right to terminate. That would be contrary to the expressed and agreed upon payment precondition that Gemstone pay APCO first. That requirement shows up in multiple places in Article 3 of the Helix Subcontract.

K. Helix's Proposed Conclusions of Law No: 13. Irrespective of who terminated first (i.e., APCO or Gemstone), there was clearly "a termination of the Contractor's contract with the Owner" and the plain language of Section 9.4 requires APCO to then pay Helix in full for its completed work "after payment by the Owner." Because that final clause ("after payment by the Owner") is a Pay-if-Paid clause it is void as against public policy, unenforceable and must therefore be ignored. The Court therefore concludes that once the APCO-Gemstone Agreement was terminated (i.e., no later than September 5, 2008), APCO became obligated to pay Helix in full, including its retention.

APCO's Response: There is no legal support for this position. Helix admittedly continued on the Project with Camco knowing that its retention rolled over (in its billings) to Camco,[84] and any post-APCO events cannot trigger APCO's liability. And Helix admitted that: (1) Section 9.4 only applies to a termination for convenience, and (2) Helix never submitted anything to APCO alleging a termination for convenience or submitted a request for payment under that section.[85] Lastly, the Court has not heard any testimony from any party alleging that there was a termination for convenience.

And the owner payment precondition is not void as against public policy. Nev. Rev. Stat. 624.628(3) does not support a conclusion that pay-if-paid provisions are illegal. Instead, it confirms that a term which "[r]equires a lower-

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[83] Testimony of Bob Johnson (Helix) Day 2 at pp. 20-21.
[84] Exhibit 60.

tiered subcontractor to waive, release or extinguish a claim or right for damages or an extension of time that the lower-tiered subcontractor may otherwise possess or acquire as a result of delay, acceleration, disruption or an impact event that is unreasonable under the circumstances, that was not within the contemplation of the parties at the time the agreement was entered into, or for which the lower-tiered subcontractor is not responsible is against public policy and is void and unenforceable."[86]

In fact, the Nevada Legislature has recognized that parties can agree to conditions precedent to payment (including a condition precedent that only requires a general contractor to pay a subcontractor after the general contractor has received payment for the subcontractor's work from the owner) in its prompt payment statutes:

> **NRS 624.626 Grounds and procedure for stopping work or terminating agreement; change orders; damages and other remedies; rights of lower-tiered subcontractors after work stoppage or termination of agreement; limitations on liability.**
>
> 1. If:
>
> ..
>
> (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 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.[87]

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[85] Testimony of Bob Johnson (Helix) Day 2 at pp.20-21.
[86] NRS 624.628(3).
[87] NRS 624.626 (1)(b) (emphasis added).

If the Legislature wanted to prohibit contracts with pay if paid language, it could have easily done so. It did not and gave the subcontractor the right to suspend work and ultimately terminate if necessary. The Legislature also recognized that parties can agree to a schedule of payments,[88] and the Nevada Supreme Court confirmed that payment schedules that include owner payment preconditions are valid.[89]

L. Helix's Proposed Conclusions of Law No: 14. The first sentence of Subsection 9.4 ("Effect of Owner's Termination of Contractor") does not affect the Court's analysis, particularly where APCO and Gemstone both claimed to have terminated the other. First, Subsection 18.6 provides that "all sections and headings are descriptive only and not controlling." Second, the header of Section 9 as a whole is "Termination for Convenience," the text of Section 9 identifies only APCO as having the right of termination for convenience[90] and no other provision grants Helix a right of termination for convenience. As such, the Court may ignore the descriptive heading of Subsection 9.4 and apply the text of the subsection because there "has been a termination of the Contractor's Contract with Owner."

APCO's Response: To so find would ignore the admitted intent of the parties and the industry accepted terminology.[91] Helix's Mr. Johnson has already admitted this provision does not apply and was never invoked by Helix.[92]

M. Helix's Proposed Conclusions of Law No: 15. Moreover, even if Section 9.4 is intended to apply only when the owner has terminated APCO and the Court were to assume that APCO's termination of the owner takes precedence over the owner's termination of APCO, APCO admits that it never exercised its right to terminate Helix

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[88] NRS 624.624(1)(a).

[89] *Padilla Construction Company of Nevada v. Big-D Construction Corp*, 386 P.3d 982 (Nev. 2016)(unpublished).

[90] *See. e.g.,* Subsection 9.1 ("The Contractor [i.e., APCO] shall have the right to terminate for convenience, at any time, with or without cause, Subcontractor's performance of all or part of the Subcontract or Subcontract Work ... ").

[91] Testimony of Bob Johnson (Helix) Day 2, pp.20-21; Testimony of Joe Pelan (APCO) Day 1 at 27.

for convenience. As such, the provisions of (i) Subsection 9.3 ("Subcontractor's Obligations" - describing the procedures Helix would be required to follow) and (ii) Subsection 9.5 ("Compensation" - describing the compensation to which Helix would be entitled) in the event of an APCO termination for convenience are inapplicable. Because the agreement is otherwise silent as to Helix's rights when APCO terminates its contact with the owner but fails to terminate its contract with Helix, it is appropriate for the Court to "invoke quantum meruit as a gap-filler to supply absent terms" and "ensure the laborer receives the reasonable value ... for his services." *Certified Fire Prot. Inc. v. Precision Constr.,* 128 Nev. 371, 380, 283 P.3d 250, 257 (2012). See also discussion *infra* at Conclusion of Law ¶ 20.

APCO's Response: Helix's speculative and contrived arguments confirm that Article 9 was never intended to apply to this situation. It would be inappropriate for the Court to "fill the gaps" of Exhibit 45. Helix cannot claim the benefits of Section 9.4 and not comply with Section 9.3 (subcontractor's obligations).[93] And Helix admitted there was not a termination for convenience,[94] and as such, Helix's counsel elicited testimony from APCO's Joe Pelan that Helix did not need to comply with the requirements of Section 9.3:

> Q Now, under Section 9.3 defines subcontractor's obligations upon receipt of the written notice of termination, correct?
> A Yes.
> Q Now, given that APCO never sent Helix and Helix never received written notice of termination that provision, you will agree with me, has no application to this analysis, correct?
> A Yes.[95]

Counsel's attempt to misuse Article 9, despite the admission of his own witnesses, should not be sanctioned by the Court.

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[92] Testimony of Bob Johnson (Helix) Day 2, pp. 20-21.
[93] *See* Exhibit 45.
[94] Testimony of Bob Johnson (Helix) Day 2, pp. 20-21.
[95] Cross-examination of Joe Pelan (APCO) Day 1 at 82.

N. Helix's Proposed Conclusions of Law No: 16. Even if the Court were to (i) ignore the termination of the APCO-Gemstone Agreement and (ii) otherwise enforce Subsection 3.8 of the Helix-APCO Agreement (as APCO urges) so as to preclude Helix from receiving its retention until, among other things, "completion of the entire project," APCO's decision to stop work on the Project and subsequently seek to enforce this provision constitutes a breach of the duty of good faith and fair dealing that is implied in every contract in Nevada. *See Hilton Hotels Corp. v. Butch Lewis Prods., Inc.,* 107 Nev. 226, 234, 808 P.2d 919, 923-24 (1991).

APCO's Response: APCO's decision to invoke its statutory rights to stop work on the Project due to non-payment does not discharge Helix's responsibilities under Section 3.8. Helix elected to enter into an agreement/subcontract, ratification and novation with Camco and carry over its retention to the billings it submitted to Camco, as explained in Sections C, E and F of APCO's Post-Trial Brief. Helix entered into all of these agreements at its own risk. APCO has ensured payment to Helix through August 2008 when APCO left[96] and financed the lien litigation which fought to obtain priority for Helix and the other subcontractors. How can APCO have acted in bad faith when it has paid every invoice received from Helix regarding the Project? Helix knows full well retention never became due from APCO, which is why Helix never billed APCO for retention or Helix's subsequent work for Camco.

O. Helix's Proposed Conclusions of Law No: 17. When one party performs a contract in a manner that is unfaithful to the purpose of the contract and the justified expectations of the other party are thus denied, damages may be awarded against the party who does not act in good faith. *Butch Lewis Prods.,* 107 Nev. at 234. Here, by (i) terminating its relationship with Gemstone and (ii) failing to terminate APCO for

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[96] Exhibit 26; Exhibit 152; Testimony of Joe Pelan, Day 1, pp. 46, 67, and 82. Testimony of Mary Jo Allen (APCO), Day 3, pp. 127-128.

convenience pursuant to Subsection 9.2[97] (and thereby establishing a procedure and contractual basis for Helix to recover the value of its work performed to that point), APCO effectively deprived Helix of a contractual means of recovery. APCO also exposed Helix to the risk that the project would not be completed while compelling Helix to "remain under contract" [see Ex. 23] and continuing working to its ultimate detriment.

APCO's Response: APCO cannot be found to have acted in bad faith for exercising its statutory right to stop work for non-payment. This is especially true when APCO went out of its way to cooperate in the process of onboarding a new general contractor and ensured payment to APCO's subcontractors through August 2008.[98] And none of the joint checks that NCS and Gemstone issued and that APCO properly endorsed included any funds for APCO.[99] APCO also canceled its current building permits so the Project permits could be issued and transferred to Camco.[100] And nobody forced Helix to continue on the Project. Helix never exercised its statutory right to suspend and/or terminate the Helix/APCO Subcontract. [101] Instead, it knowingly waived and released APCO by contracting with Camco and Gemstone and rolling its retention over to Camco's billings.[102] If anyone has acted in bad faith it is Helix in trying to now recover amounts from APCO that it never billed knowing the retention never became due and knowing that APCO could not be liable for Helix's subsequent work for Camco.

P. Helix's Proposed Conclusions of Law No: 19. Like the provisions of Section 3.8 of the Helix-APCO Subcontract, compliance with these provisions of the APCO-Gemstone Agreement also would not have been possible once APCO and/or Gemstone

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[97] Indeed, as noted above, APCO informed Helix that it was "STILL CONTRACTUALLY BOUND" [*see* Ex. 48] and "remain[s] under contract" [*see* Ex. 23] to APCO. [*See* supra, Finding of Fact~ 19].
[98] Exhibit 26. Testimony of Joe Pelan (APCO) Day 1, pp. 38 and 41.
[99] Testimony Day 1, p. 38.
[100] Testimony of Joe Pelan (APCO) Day 1, p. 100.
[101] Exhibit 23.
[102] Exhibit 60.

terminated the APCO-Gemstone Agreement. APCO nonetheless sought recovery and obtained a summary judgment of all sums earned, including retention. APCO is therefore estopped to deny Helix a recovery on grounds that APCO does not apply to itself.

APCO's Response: Compliance with Article 3.8 was not possible but was contemplated by Helix as it proceeded with the APCO scope with Gemstone and/or Camco. The claimed roadblock occurred months after APCO left the project and Helix continued working. And the basis for APCO's prior motion for summary judgment was that Gemstone breached by failing to properly pay APCO.

Q. Helix's Proposed Conclusions of Law No: 20. Finally, even if Helix were not entitled to payment from APCO for work Helix performed while APCO was on site as the general contractor for any of the foregoing reasons as urged by APCO, the Court concludes in the alternative that APCO has been unjustly enriched to the extent of the monies Helix earned but was not paid during that time.

APCO's Response: Helix does not have any support for the fact that APCO was allegedly "unjustly enriched." The undisputed evidence confirms that APCO was not paid any amounts for Helix's work that it did not transmit to Helix, and APCO did not get to keep the property or any Helix money. Instead, APCO remains unpaid $1,400,036.75 from the failed Project despite its exceptional efforts to ensure all subcontracts were fully paid for all amounts billed. [103]

R. Helix's Proposed Conclusions of Law No: 21. A claim for unjust enrichment arises when a "plaintiff confers a benefit on the defendant, the defendant appreciates such benefit, and there is 'acceptance and retention by the defendant of such benefit under circumstances such that it would be inequitable for him to retain the benefit without payment of the value thereof.'" *Certified Fire Prot.,* 128 Nev. at 381, 283 P.3d 250, 257 (2012) *citing Unionamerica Mtg. v. McDonald,* 97 Nev. 210, 212, 626 P.2d 1272, 1273 (1981). Here, APCO benefitted from Helix's work and the monies it

otherwise earned by (i) submitting the same as part of its own pay applications, (ii) including in its Notice of Lien all amounts earned by (but not paid to) subcontractors, including their retention.

APCO's Response: First, an action based upon a theory of unjust enrichment is not available when there is an express, written contract because no contract can be implied in that situation.[104] So Helix cannot proceed with any unjust enrichment claims since it has admitted a contract with APCO. The evidence also confirms APCO received no benefit that was not conveyed to Helix. In *Nev. Nat'l Bank v. Snyder,*[105] the owner of a project optioned a piece of land to develop. He engaged engineers to begin developing the land. The next year, the owner received a loan from a bank, and purchased the land. The owner did not pay the engineers, and the engineers recorded mechanic's liens against the property. The owner declared bankruptcy and owed the engineers money for work done for the project. The bank foreclosed upon the property and kept the proceeds. The architect and engineer argued that the bank was unjustly enriched because the work they performed increased the value of the property. The Nevada Supreme Court found that "[w]hile there was a benefit conferred on the Bank, it does not rise to unjust enrichment."[106]

The record here does not show how APCO retained some unjust enrichment or benefit. And since Helix's disclosed damages only sought retentions, there is no dispute that APCO did not receive Helix's retention from Gemstone.[107]

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[103] Testimony of Mary Jo Allen (APCO) Day 3, p. 122.
[104] *Leasepartner's Corp. v. Robert L. Brooks Trust*, 113 Nev. 747, 942 P.2d 182 (1997).
[105] 108 Nev. 151, 157, 826 P.2d 560, 563 (1992).
[106] *Id.* at 157.
[107] Testimony of Joe Pelan (APCO) Day 3, p. 150.

S. Helix's Proposed Conclusions of Law No: 22. For all of the foregoing reasons, and in the alternative, Helix is entitled to an award of $505,021 for monies earned and not paid to Helix while APCO was on site as the general contractor.[108]

APCO's Response: *See* APCO's Response to Helix's Proposed Conclusion of Law No. 10. To so hold would undermine the parties agreed to and statutorily authorized retention payment schedule under NRS 624.624. [109]

T. Helix's Proposed Conclusions of Law No: 27. As between Helix and Camco specifically, and even if Pay-if-Paid was a viable legal defense (which it is not), Helix and Camco did not reach a meeting of the minds on either the Camco Subcontract or the Camco Ratification through which Camco asserts Pay-if-Paid. As there is no other factual basis for a Pay-if-Paid agreement as between Helix and Camco, the Court rejects any such defense for Camco as against Helix.

APCO's Response: Helix admitted it entered into a ratification agreement with Camco on September 4, 2008 to continue on and complete the APCO scope of work.[110] Helix even added a document to the ratification entitled "Helix Electric's Exhibit to the Ratification and Amendment."[111] The Helix Exhibit to the Ratification and Amendment contained language confirming that APCO was removed as the general contractor.[112] And Helix included a total contract price of $5.55 million for the Project, which was its original contract price with APCO for Phase 1, and added $480,689 as approved change orders under APCO to the total contract price.[113] The proposed Helix Amendment to the ratification agreement also included the following term: "All close out documents must be turned in before

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[108] As noted, Helix's claim that APCO is also liable for sums earned by Helix after APCO left the site and while Cameo was on site as the general contractor is discussed infra.
[109] See *Padilla Construction Company of Nevada v. Big-D Construction Corp*, 386 P.3d 982 (Nev. 2016).
[110] Exhibit 77, Helix Complaint, ¶18.
[111] Exhibit 170; Testimony of Bob Johnson (Helix) Day 2, p. 42.
[112] Exhibit 170; Testimony of Bob Johnson (Helix) Day 2, pp. 42-43.
[113] Exhibit 170-54; Testimony of Bob Johnson (Helix) Day 2, p. 44; Exhibit 169-8.

Camco Pacific can release final payment."[114] So Helix knew it had rolled its retention over to Camco.

And although Helix has not produced a signed copy of the ratification agreement, Helix has admitted entering into its ratification and amended subcontract agreement in its complaint as follows:

> 18. On or about September 4, 2008, Helix entered into the Ratification and Amendment of Subcontract Agreement ("CPCC Agreement") **with Camco who replaced APCO as the general contractor on the Project**, to continue the work for the Property ("CPCC Work").
> 19. **Helix furnished the CPCC Work for the benefit of and at the specific instance and request of CPCC and/or Owner.**
> 20. Pursuant to the CPCC Agreement, Helix was to be paid an amount in excess of Ten Thousand Dollars ($10,000.00) (hereinafter "CPCC Outstanding Balance") for the CPCC Work.
> 21. Helix furnished the CPCC Work and has otherwise performed its duties and obligations as required by the CPCC Agreement.
> 22. CPCC has breached the CPCC Agreement…
> CPCC breached its duty to act in good faith by performing the Ratification Agreement in a manner that was unfaithful to the purpose of the Ratification Agreement, thereby denying Helix's justified expectations…[115]

Helix's Mr. Johnson admitted that Exhibit 172, the Ratification Agreement, was the document that Helix referenced in its complaint (Exhibit 77) as the Ratification.[116] Helix sought $834,476.45 against Camco.[117] Helix also admitted it had a contract with Camco/Gemstone for $8.6 million in its lien documents.[118]

Lastly, Helix has not advanced a single legal theory or any legal support to

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[114] Exhibit 169-1.
[115] Exhibit 77.
[116] Testimony of Bob Johnson (Helix) Day 2, p. 28.
[117] Testimony of Joe Pelan (APCO) Day 1, p. 10.
[118] Exhibit 512; Testimony of Bob Johnson (Helix) Day 2, p. 29.

impose joint and several liability on APCO for work Helix performed under Camco.

U. Helix's Proposed Conclusions of Law No: 29. First, as discussed above, APCO never terminated its subcontract with Helix and instead repeatedly informed Helix that it was "STILL CONTRACTUALLY BOUND" [see Ex. 48] and "remain[s] under contract" [see Ex. 23] to APCO. That Helix subsequently contracted (expressly or impliedly) with Camco to continue the work Helix was contractually bound to APCO to perform is of no consequence to APCO's liability to Helix for the full amount of Helix's unpaid work. As Helix testified, and APCO did not dispute, Helix reasonably concluded that it was still under contract with APCO and exposed to a claim of abandonment of contract if it failed to continue working (unless and until APCO terminated Helix or otherwise directed it to stop working, which it never did).

APCO's Response: There is no legal or factual basis for such a speculative ruling. *See* APCO's Response to Helix's Proposed Finding of Fact No. 21 (confirming Andy Rivera understood the status the Gemstone purported to terminate the APCO Contract, that Helix was getting information directly from Gemstone, that Helix was being copied on APCO/Gemstone emails, and was getting direction directly from Gemstone). And Helix elected to continue to work on the Project after APCO left. APCO's letters confirmed Helix's statutory right to suspend work given APCO's suspension and claims of nonpayment.

V. Helix's Proposed Conclusions of Law No: 30. First, APCO hired Helix to perform work at a specific price and/or for a reasonable value for the duration of the Project and never terminated that relationship. To the contrary, APCO repeatedly informed Helix and other subcontractors that they were "still contractually bound to" and "remain under contract with" APCO. [See Ex. 23, 48]. APCO's letters confirmed Helix's statutory right to suspend work given APCO's suspension and claims of non-payment.

APCO's Response: APCO did not have to terminate Helix. Helix's subcontract with APCO was assigned,[119] ratified,[120] and novated.[121]

W. Helix's Proposed Conclusions of Law No: 32. APCO has not established a novation by clear and convincing evidence. First, there is no evidence that "all parties" (i.e., Helix, APCO and Camco) agreed to a new contract because APCO is not a party to any agreement (express or implied between Helix and Camco. Second, APCO cannot prove that the Helix-Camco Subcontract "extinguished" the Helix-APCO Subcontract. To establish this element, the party claiming novation must show that the creditor clearly intended to release the original obligor. See *Pink v. Busch,* 100 Nev. 684 (1984) ("the intent to cause a novation must be clear" and the evidence must show a "clear understanding that a complete novation is proposed.").

APCO's Response: "However, consent to novation may be implied from the circumstances of the transaction and by the subsequent conduct of the parties."[122] The conduct of the parties, as described below, confirm a novation:

- ***Gemstone***: Gemstone attempted to "terminate" the APCO/Gemstone prime contract and stopped giving direction and/or orders to APCO. Gemstone told the subcontractors to stop working for APCO and that their contracts would be assumed by Camco. Gemstone also ordered APCO off the site.
- ***Camco***: Camco started giving direction to the subcontractors and dictating their work. Camco sent subcontracts and/or Ratification agreements to both Helix and CabineTec. It engaged in negotiations of the respective subcontracts, and it received billings directly from Helix and CabineTec, including the rollover of their retention.
- ***Helix***: Helix did not contact APCO after August 2008 and remained on-site working directly for Gemstone and Camco. It engaged in subcontract negotiations for the same scope of work as it had initially subcontracted for with APCO with Camco, and took direction and performed work under Camco's and Gemstone's direction. Helix submitted pay applications to Camco and even rolled its retention account over to Camco billings. Helix also represented that it signed a ratification Contract and subcontract with Camco in its complaint and its amended complaint.

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[119] *See* APCO's Proposed Findings of Fact and Conclusions of Law at 371-378.
[120] *See* APCO's Proposed Findings of Fact and Conclusions of Law at 195-222.
[121] *See* APCO's Proposed Findings of Fact and Conclusions of Law at 384-393.
[122] *United Fire Ins. Co. v. McClelland*, 105 Nev. 504, 508, 780 P.2d 193, 195–96 (1989) citing *Sans Souci v. Div. of Fla. Land Sales,* 448 So.2d 1116, 1121 (Fla.Dist.Ct.App.1984).

- ***CabineTec***: CabineTec did not contact APCO after August 2008 and remained on-site working for Camco. It engaged in subcontract negotiations for the same scope of work as it had initially subcontracted for with APCO with Camco, and took direction and performed work under Camco's direction. CabineTec submitted pay applications to Camco including all retention. CabineTec also signed a ratification agreement with Camco.

- ***APCO***: APCO was off-site and did not dictate or control the subcontractors' work. It did not have any communication with Gemstone or the subcontractors after August 2008. It did not participate in construction related meetings, did not receive billings from subcontractors, or submit payment applications on behalf of subcontractors. In fact, Helix never invoiced APCO for its retention.

The new agreements between Camco and Helix and Camco and CabineTec are novations. The substituted ratification agreements and subcontracts clearly replaced and extinguished APCO's obligations. Once the novation occurred, placing Camco as the completion contractor into privity with the subcontractors, APCO was wholly removed from contractual privity with Helix as a matter of law. APCO did not retain any obligations (including payment) following the novations of the APCO/ Helix and subcontracts.

Next, *Pink v. Busch* [123] is clearly distinguishable. Essentially, the Nevada Supreme Court found that nothing about the addition of new personal guarantees undermined the existence of the prior personal guarantees, and confirmed: "Finding an inferred novation where the creditor was simply aware of the execution of new guarantees by third parties and did not accept any payments under the personal guarantees is tantamount to forcing new debtors on the creditor…and is also clearly erroneous." This case is distinguishable because the conduct of the parties did not clearly evidence a novation. Here, the expressed intent and related conduct replacing APCO clearly amounts to a novation. See APCO's Response to Helix's Proposed Conclusion of Law No. 32.

X. Helix's Proposed Conclusions of Law No: 33. In *Pink,* the plaintiff sold a business to certain parties with a guaranty of performance. Thereafter, the buyers sold to new

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[123] 100 Nev. 684, 690–91, 691 P.2d 456, 461 (1984).

buyers, who provided a new guaranty of performance. When the new buyers defaulted, Pink sued the original and new buyers and all of the guarantors. The original guarantors claimed that the contract had been novated, but the Nevada Supreme Court ruled that even the plaintiffs acceptance of the new guarantees (as found by the trial court) did not serve to release the original guarantors. 100 Nev. at 690-691. Instead, this merely provided additional security for the Plaintiff. In fact, "the failure of the creditor to cancel the original note [served] to negate one of the essential elements of a novation - that the parties agreed to extinguish the original debt or obligation." Id. at 690.

APCO's Response: *See* APCO's Response to Helix's Proposed Conclusion of Law No: 32, distinguishing *Pink*.

Y. Helix's Proposed Conclusions of Law No: 34. Similarly here, Helix's agreement to work for Camco was a reasonable means of seeking additional security for payment of the work it had agreed to perform for APCO, but it does not relieve APCO of its continuing obligation to pay Helix for that work. Like the plaintiff in *Pink,* Helix also did not terminate its agreement with APCO or ever agree to stop looking to APCO for payment.

APCO's Response: Helix has failed to cite any law to confirm that a general contractor like APCO can be liable to a subcontractor like Helix for work the subcontractor does under the direction of another general contractor. *See* APCO's Response to Helix's Proposed Conclusion of Law No: 32, distinguishing *Pink*.

Z. Helix's Proposed Conclusions of Law No: 36. Accordingly, the Court concludes that, in addition to the $505,012.00 awarded to Helix against APCO for unpaid work while APCO was on site serving as the general contractor, Helix is entitled to an additional award against APCO for $834,476.45 for Helix's unpaid work after APCO left the Project.

APCO's Response: Again, Helix has not advanced a single legal theory to hold APCO jointly and severally liable for work Helix performed under Camco or the retention that never became due while APCO was the prime contractor.

DATED: March 23, 2018.

SPENCER FANE LLP

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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of SPENCER FANE LLP and that a copy of the foregoing **APCO CONSTRUCTION, INC.'S OPPOSITION TO HELIX ELECTRIC OF NEVADA, LLC'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW** 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 23rd day of March, 2018, as follows:

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DISTRICT COURT

CLARK COUNTY, NEVADA

APCO CONSTRUCTION, a Nevada corporation,

Plaintiff,

vs

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

Defendants.

AND ALL RELATED MATTERS.

CASE NO.: A571228

DEPT. NO.: XIII

Consolidated with:
A571792, A574391, A577623, A580889, A583289, A584730, and A587168

HELIX ELECTRIC OF NEVADA, LLC'S RESPONSE TO APCO CONSTRUCTION'S POST-TRIAL BRIEF

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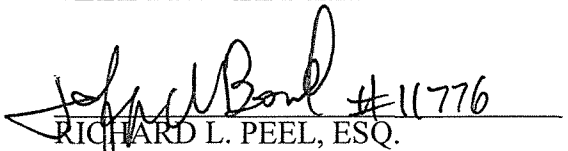
Case Number: 08A571228

HELIX ELECTRIC OF NEVADA, LLC'S RESPONSE TO APCO CONSTRUCTION'S POST-TRIAL BRIEF

COMES NOW HELIX ELECTRIC OF NEVADA, LLC ("Helix") and does hereby submit the following Response to the Post-Trial Brief and Proposed Findings of Fact and Conclusions of Law submitted by APCO Construction("APCO").

DATED this 23rd day of March 2017.

PEEL BRIMLEY LLP



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HELIX'S RESPONSE TO APCO'S POST-TRIAL BRIEF

I. INTRODUCTION/SUMMARY OF RESPONSE.

APCO's Post-Trial Brief ("APCO Brief") and Proposed Findings of Fact and Conclusions of Law ("APCO FFCL") predictably attempt to absolve APCO of liability to Helix by, among other things, (i) relying on an inapplicable and unenforceable set of preconditions to payment, (ii) asserting that Gemstone took (or that Helix assented to or ratified) an assignment of APCO's obligations to Helix and (iii) re-arguing Pay-if-Paid and other legal questions this Court has already resolved in Helix's favor. Although Helix's Proposed Findings of Fact and Conclusions of Law ("Helix FFCL") have already anticipated most of APCO's arguments, Helix submits the following in response to APCO's primary positions.

II. SECTION 3.8 DOES NOT APPLY

APCO contends in its brief (see APCO Brief, p. 34) and its Proposed FFCL (see APCO FFCL pp. 49-53) that Helix's claim to payment of the $505,021.00 is invalid because Helix failed

to meet certain "preconditions" to payment of Helix's retention found in Section 3.8 of Helix-APCO Subcontract. As discussed in detail in Helix's Proposed Findings of Fact (Helix FF") and Conclusions of Law ("Helix CL"), APCO is incorrect on multiple grounds.

A. Helix's Retention Was Earned.

As an initial but important matter, APCO is simply wrong to assert that Helix's "retention had not been earned." [See APCO Brief p. 22]. To the contrary, retention is monies earned by a contractor but withheld from progress payments (usually 5-10%)[1] until the conclusion of the project in case the contractor abandons the project, fails to complete its work or there is otherwise some kind of dispute relating to the contractor's work. [*See e.g.*, TR2-38:2-22; Helix FF ¶ 12].[2] Retention is not a bonus or additional payment but rather an "escrow account" of temporarily withheld portion of the monies otherwise earned by the contractor for its work in place. [*See e.g.*, TR2-38:8-13; TR2-39:1-3[3]; Helix FF ¶ 12]. By way of its progress payment applications on the forms required by APCO, Helix showed a gross billing, 10% retention and a "net amount due this period." [*See e.g.* Ex. 501-006]. As such, while the release of Helix's retention may have been deferred pending potential workmanship disputes that never materialized, such monies were always earned by and due to Helix.

B. There Was No Meeting Of The Minds On The Helix-APCO Subcontract.

As explained in detail in, without limitation, Sections 4-8 of the Helix FF, Helix and APCO never reached a meeting of the minds with respect to the Helix-APCO Subcontract. Among other things, Helix demonstrated at trial that its acceptance of the Helix-APCO Subcontract was conditioned upon APCO's assent to multiple revisions as contained in the Helix Electric Exhibit to the Standard Subcontract Agreement [between APCO and Helix (hereinafter, "the Helix Exhibit (APCO)"]. [*See e.g.*, Ex. 45-016-023; Helix FF ¶4].

APCO rejected many of Helix's proposed revisions and the parties were still exchanging proposed versions of the Helix Exhibit (APCO) as late as July 11, 2008, shortly before APCO stopped work on the Project. [See Exhibit 506; Helix FF ¶¶6-7]. Helix's Bob Johnson provided

[1] By way of amendments to NRS 624 that took effect after the events of this Project (and therefore not applicable to this Project), retention from a lower-tiered subcontractor is now limited to 5%. NRS 624.624(2)(a)(1).
[2] Testimony of Andy Rivera.
[3] Testimony of Andy Rivera.

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undisputed testimony that Helix did not agree to or accept APCO's July 11, 2008 revisions. [TR1-113:20 – 114:8; Helix FF ¶8]. Helix and APCO therefore did not reach a meeting of the minds with respect to the Helix-APCO Subcontract. Accordingly, Helix's entitlement to payment for the earned and unpaid retention should be analyzed as oral contract [*see e.g.*, Helix FF 9, Helix CL 3], quasi-contract and/or quantum meruit [see e.g., Helix CL ¶¶ 4-5] rendering APCO's analysis of Section 3.8 moot.

C. Section 3.8 Does Not Bar Helix's Claims.

Even if the Court concludes that the Helix-APCO Subcontract was adopted in whole or in part such that APCO's contentions relating to Section 3.8 must be considered, the Court should nonetheless reject APCO's position. As more fully discussed in the Helix FFCL:

- Section 3.8 assumes that the Project would be completed such that Helix's compliance with Section 3.8 would not otherwise be impossible and futile, [*see* Helix CL ¶¶ 8-9];
- Enforcement of Section 3.8 as demanded by APCO would impermissibly avoid APCO's payment obligations under NRS Chapter 624 and attempt to waive or impair lien rights secured by NRS Chapter 108. [*see* Helix CL ¶¶ 10-11]. Specifically, but without limitation, the "conditions precedent" of Section 3.8 contain (and are inextricably intertwined with) a Pay-if-Paid agreement that this Court has already rejected on summary judgment; and
- There was a termination event that triggers APCO's payment obligations pursuant to Section 9.4, which negates the provisions of Section 3.8 [*see* Helix CL ¶¶ 12-15].

Without restating the Helix CL (and/or Helix's prior briefing on summary judgment), Helix respectfully requests that the Court consider the following.

1. Compliance with Section 3.8 would be futile.

When one party abandons contract, the other party need not "engage in futile gestures to preserve contractual rights." *Mayfield v. Koroghli*, 124 Nev. 343, 349, 184 P.3d 362, 366 (2008). Furthermore, it is futile for a party to make a demand "if the other party has repudiated the contract or otherwise indicated [he] refuses to perform." *Id.* Here, APCO repudiated or indicated its intention not to perform when it stopped work and later terminated its contractual relationship

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with the owner. It was also otherwise impossible and would have been futile for Helix to comply with the provisions of Section 3.8. For example, the "entire project" was never completed through no fault of Helix, nor was there any "approval and final acceptance of the project Owner" as Section 3.8 otherwise plainly anticipated.

Of course, "receipt of final payment by Contractor from Owner" ***is*** a Pay-if-Paid clause that is void and unenforceable and barred by Nevada law and this Court's partial summary judgment. In addition, because the APCO-Gemstone Agreement contains similar conditions precedent to APCO's receipt of its retention [*see e.g.*, Ex. 2, ¶ 5.07(f)[4]], the conditions precedent to APCO's receipt of payment are inextricably intertwined with the conditions precedent to Helix's receipt of retention under Section 3.8 such that they are virtually indistinguishable. In other words, the other conditions to payment under Section 3.8 are also impermissible Pay-if-Paid agreements.

APCO nonetheless attempts to rejuvenate its Pay-if-Paid defense by relying - as it did in its Motion for Reconsideration of this Court's summary judgment Order - on *Padilla Construction Company of Nevada v. Big-D Construction Corp.*, 386 P.3d 982 (Nev. 2016, unpublished). [*See* APCO Brief pp 47-51]. APCO now suggests that *Padilla* allows APCO to deny retention to Helix because Section 3.8 contains conditions precedent to such payment, even though (as noted above) one of the conditions precedent is payment from the Owner to APCO (i.e., Pay-if-Paid) and the others are themselves conditions precedent to the Owner's obligation of payment to APCO. For all of the reasons discussed above and below, nothing in *Padilla* changes the analysis of Section 3.8.

Importantly, and as this Court has previously noted [*see e.g.*, TR5-125:10-126:2], the plaintiff in Padilla provided defective work, which breached the subcontract before any payment was owed and which was therefore never accepted. That condition precedent (acceptance of the work) was at least theoretically possible (i.e., if Padilla had performed properly) and was not

[4] Pursuant to Section 5.07(f), APCO is entitled to its retention "on the date that (i) Final Completion is attained and (ii) all outstanding disputes between Developer and General Contractor and any Third-Party Service Providers have been resolved, and any liens against the Project related to such disputes have been resolved."

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solely dependent on the acts or omissions of higher-tiered parties, such as the conditions precedent to Section 3.8. Here, there is no evidence of any defective or non-confirming work, or any act or omission, by Helix that created a failure of any condition precedent and all of the conditions precedent in Section 3.8 failed because the owner stopped the project. Even if defective or non-conforming work were at issue here (which it is not), 624.624(3) required APCO – "on or before the date the payment is due" - to issue a written notice of withholding giving a "reasonably detailed explanation of the condition or reason for the withholding."[5] This is did not do.

In addition, it is plainly apparent from the face of this unpublished decision[6] that the Supreme Court did not consider the applicability of *Bullock* and its prohibition on pay-if-paid, presumably because neither party raised the issue. *See Nye Cty. v. Washoe Med. Ctr.*, 108 Nev. 490, 493, 835 P.2d 780, 782 (1992) (Generally, an issue which is not raised in the district court is waived on appeal). There is also no indication from the Supreme Court decision in *Padilla* that Pay-if-Paid was brought to the attention of the District Court or the Supreme Court.

Finally, as has been repeatedly argued, NRS 624.624(1) does not allow a Pay-if-Paid agreement simply because it is written into the "schedule of payments." Stated differently, a "schedule of payments" that makes payment due within 15 days after the general contractor receives payment from the Owner (like the APCO Subcontract does – *see* Ex. 45, ¶ 3.5) is nothing more than a prohibited Pay-if-Paid agreement. Similarly, conditioning APCO's obligation to pay Helix its retention upon "receipt of final payment by Contractor from Owner"

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[5] NRS 624.624(3) provides in part:

> If, pursuant to subparagraph (2) or (3) of paragraph (a) of subsection 2 or paragraph (b) of subsection 2, a higher-tiered contractor intends to withhold any amount from a payment to be made to a lower-tiered subcontractor, the higher-tiered contractor must give, on or before the date the payment is due, a written notice to the lower-tiered subcontractor of any amount that will be withheld and give a copy of such notice to all reputed higher-tiered contractors and the owner.

[6] To the extent the Court wishes to consider intervening case decisions, the court should consider *Cashman Equipment Company v. West Edna Associates, Ltd.*, 380 P.3d 844 (2016), 132 Nev. Adv. Op. 69 (2016). Cashman is a 2016 published decision that relied on and reaffirmed Bullock. Cashman rejected the argument that a lower-tiered subcontractor's unconditional lien release waived its right to lien when in fact it never received payment , holding: "the waiver is void. Just as we refused to enforce the pay-if-paid provision in [Bullock] we likewise refuse to enforce Cashman's release." 380 P.3d at 849. In other words, Bullock remains good law and this Court's Order was proper and should not be reconsidered.

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(and other conditions that are inextricably intertwined with the Owner's obligation to make that final payment to APCO) is also contrary to APCO's obligation of prompt payment under NRS 624.624(1).

2. Enforcement of Section 3.8 impermissibly defeats statutory rights.

To the extent Section 3.8 serves to avoid APCO's obligation to promptly pay Helix for its work on the Project (as it is obligated to do pursuant to NRS 624.624), it is a "condition stipulation or provision" that is against public policy, void and unenforceable pursuant to NRS 624.628(3) because it "(a) Requires a lower-tiered subcontractor to waive any rights provided in NRS 624.624 to 624.630, inclusive, or which limits those rights; [or] (b) Relieves a higher-tiered contractor of any obligation or liability imposed pursuant to NRS 624.624 to 624.630, inclusive."[7]

Similarly, if Section 3.8 prevents Helix from being paid in full it violates the Nevada Mechanic's Lien Statute and is void and unenforceable because it impermissibly "require[s] a lien claimant to waive rights provided by law to lien claimants or to limit the rights provided to lien claimants" (NRS 108.2453(2). See also, NRS 108.2457(1) and (2))[8] and is a "term of a contract

[7] NRS 624.628(3) provides:

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

(a) Requires a lower-tiered subcontractor to waive any rights provided in NRS 624.624 to 624.630, inclusive, or which limits those rights;

(b) Relieves a higher-tiered contractor of any obligation or liability imposed pursuant to NRS 624.624 to 624.630, inclusive; or

(c) Requires a lower-tiered subcontractor to waive, release or extinguish a claim or right for damages or an extension of time that the lower-tiered subcontractor may otherwise possess or acquire as a result of delay, acceleration, disruption or an impact event that is unreasonable under the circumstances, that was not within the contemplation of the parties at the time the agreement was entered into, or for which the lower-tiered subcontractor is not responsible,

➥ is against public policy and is void and unenforceable.

[8] NRS 108.2453(2) provides:

2. A condition, stipulation or provision in a contract or other agreement for the improvement of property or for the construction, alteration or repair of a work of improvement in this State that attempts to do any of the following is contrary to public policy and is void and unenforceable:

(a) Require a lien claimant to waive rights provided by law to lien claimants or to limit the rights provided to lien claimants, other than as expressly provided in NRS 108.221 to 108.246, inclusive;

(b) Relieve a person of an obligation or liability imposed by the provisions of NRS 108.221 to 108.246, inclusive;

(c) Make the contract or other agreement subject to the laws of a state other than this State;

(d) Require any litigation, arbitration or other process for dispute resolution on disputes arising out of the contract or other agreement to occur in a state other than this State; or

(e) Require a prime contractor or subcontractor to waive, release or extinguish a claim or right that the prime contractor or subcontractor may otherwise possess or acquire for delay, acceleration, disruption or impact damages or an extension of time for delays incurred, for any delay, acceleration, disruption or impact event which was

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that attempts to waive or impair the lien rights of a contractor, subcontractor or supplier" (NRS 108.2457(1).[9]

3. Section 3.8 does not apply because there was a "termination of the Contractor's contract with the Owner."

As more fully discussed at Helix FF ¶¶ 12-15, there was a plainly a "termination of the Contractor's contract with the Owner" as provided for in Section 9.4.[10] In that event, Section 9.4 requires APCO to then pay Helix in full for its completed work "after payment by the Owner." However, because that final clause ("after payment by the Owner") is itself a Pay-if-Paid clause it is void as against public policy, unenforceable and must therefore be ignored. Accordingly, APCO became obligated to pay Helix in full, including its retention.

4. Good faith and fair dealing precludes application of Section 3.8.

Even if the Court were to (i) ignore the termination of the APCO-Gemstone Agreement and (ii) otherwise enforce Subsection 3.8 of the Helix-APCO Agreement (as APCO urges), it will have countenanced APCO's breach of the duty of good faith and fair dealing that is implied in every contract in Nevada. *See Hilton Hotels Corp. v. Butch Lewis Prods., Inc.*, 107 Nev. 226, 234, 808 P.2d 919, 923–24 (1991) (when one party performs a contract in a manner that is unfaithful to the purpose of the contract and the justified expectations of the other party are thus denied, damages may be awarded against the party who does not act in good faith).

Here, APCO failed to terminate Helix for convenience pursuant to Section 9.2,[11] yet nonetheless apparently contends (for reasons it has never explained other than Pay-if-Paid) that

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unreasonable under the circumstances, not within the contemplation of the parties at the time the contract was entered into, or for which the prime contractor or subcontractor is not responsible.

[9] NRS 108.2457(1) provides:

1. Any term of a contract that attempts to waive or impair the lien rights of a contractor, subcontractor or supplier is void. An owner, contractor or subcontractor by any term of a contract, or otherwise, may not obtain the waiver of, or impair the lien rights of, a contractor, subcontractor or supplier, except as provided in this section. Any written consent given by a lien claimant that waives or limits any lien rights is unenforceable unless the lien claimant:

(a) Executes and delivers a waiver and release that is signed by the lien claimant or the lien claimant's authorized agent in the form set forth in this section; and

(b) In the case of a conditional waiver and release, receives payment of the amount identified in the conditional waiver and release.

[10] Section 9.4 provides: "If there has been a termination of the Contractor's contract with the Owner, the Subcontractor shall be paid the amount due from the Owner to the Contractor for the Subcontractor's completed work … after payment by the Owner to the Contractor.

[11] Section 9.2 requires APCO to "provide Subcontractor with written notice of [a Section 9.1 termination for convenience] two calendar days in advance of the effective date of the termination." [See Ex. 45, ¶¶ 9.1, 9.2].

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Helix is not entitled to full compensation pursuant to Section 9.4, until, among other things, "completion of the entire project." Specifically, but without limitation, by (i) terminating its relationship with Gemstone and (ii) failing to terminate APCO for convenience pursuant to Subsection 9.2 (and thereby creating a procedure and contractual basis for Helix to recover the value of its work performed to that point), APCO effectively deprived Helix of a contractual means of recovery that was otherwise provided for by the agreement. APCO also exposed Helix to the risk that the project would not be completed while compelling Helix to "remain under contract" [see Ex. 23] and continuing working to its ultimate detriment. [12] There is no better example than this of failing to perform a contract "in a manner that is unfaithful to the purpose of the contract and [denying] the justified expectations of the other party." See *Butch Lewis Prods*, 107 Nev. at 234.

In addition, and while APCO contends that Helix is barred from recovering its retention pursuant to Subsection 3.8, it hypocritically sought and obtained a summary judgment against Gemstone for ***all*** monies it earned, including retention, despite the fact that its agreement with Gemstone contains similar language. Specifically, but without limitation, the APCO-Gemstone Agreement:

- requires APCO to "complete the work" and "use its best efforts to complete the Project" [Ex. 2, ¶2.01(a)];
- conditions APCO's entitlement to final payment until, among other things, APCO "has fully performed the contract" [Ex. 2, ¶5.06(a)(i)], and "a final Certificate of Payment has been issued by the architect" [Ex. 2, ¶5.06(a)(iv)]; and
- conditions payment of retention to APCO on (i) attainment of final completion, (ii) resolution of "all outstanding disputes," and (iii) removal of all liens. [Ex. 2, ¶5.07(f)].

Simply stated, APCO is engaging in rank hypocrisy. While it simultaneously asks this Court to deem the APCO-Gemstone Contract incorporated by reference into the Helix-APCO

[12] APCO not only (by its own admission) failed or refused to terminate the Helix-Apco Subcontract [*see e.g.*, Helix FF ¶15, TR1-80:13-25], it repeatedly affirmed the Helix-APCO Subcontract by advising Helix that it was "STILL CONTRACTUALLY BOUND" [*see* Ex. 48] and "remain[s] under contract" [*see* Ex. 23] to APCO. [See *also* Helix FF ¶¶ 18-19].

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Subcontract, it demands that this Court enforce Section 3.8 of the Helix-APCO Subcontract while ignoring the near identical language of (without limitation) Section 5.07(f) of the APCO-Gemstone Contract. In summary, APCO's decision to stop work on the Project and (by APCO's theory) leave Helix without a contractual remedy for recovery of its monies earned is a breach of good faith and fair dealing.

5. Enforcement of Section 3.8 would unjustly enrich APCO.

Similarly, APCO's hypocritical juxtaposition of Section 3.8 of the Helix-APCO Subcontract and Section 5.07(f) of the APCO-Gemstone Contract also allows it to be unjustly enriched by the work Helix performed and the monies it earned while denying Helix its share of the same.

A claim for unjust enrichment arises when a "plaintiff confers a benefit on the defendant, the defendant appreciates such benefit, and there is 'acceptance and retention by the defendant of such benefit under circumstances such that it would be inequitable for him to retain the benefit without payment of the value thereof.'" *Certified Fire Prot.*, 128 Nev. at 381, 283 P.3d 250, 257 (2012) *citing Unionamerica Mtg. v. McDonald*, 97 Nev. 210, 212, 626 P.2d 1272, 1273 (1981). Here, APCO benefitted from Helix's work and the monies it otherwise earned by, among other things, (i) submitting the same as part of its own pay applications and (ii) including in its Notice of Lien all amounts earned by (but not paid to) Helix and other subcontractors, including retention.

Notwithstanding the self-serving testimony of APCO's own witness, APCO incorrectly asserts that it "did not receive any benefit from the work or materials that Helix or CabineTec performed or provided to the Project after August 21, 2008." [*See* APCO Brief, p. 28]. To the contrary, by continuing the work Helix was contractually obligated to perform (because APCO never terminated Helix), Helix did it's best to ensure that APCO would be entitled to all of its monies owed, including retention. [See also Helix FF 18-19]. APCO rewarded Helix's faithful compliance to its contractual obligations by putting a proverbial knife in Helix's back.

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III. THE HELIX-APCO SUBCONTRACT WAS NEVER "ASSIGNED" TO GEMSTONE.

Apparently in an effort to deflect the Court's attention from APCO's failure to (i) pay Helix in full or (ii) terminate the Helix-APCO Subcontract (thereby leaving Helix in factual and legal limbo), APCO argues that it could not have terminated the subcontracts because "Gemstone gave APCO notice that it exercised its right under Contract Section 10.04 to accept an assignment of the APCO subcontracts. [*See* APCO Brief p. 26 citing Exhibit 13]. This contention is factually and legally incorrect.

A. The APCO-Gemstone Agreement Was Terminated.

First, APCO asserted to this Court ***and*** obtained summary judgment on the grounds that APCO complied with (and Gemstone materially breached) the terms of the APCO-Gemstone Agreement and, therefore, (ii) Gemstone owes APCO $20,782,659.95. [Joint Pre-Trial Memorandum ¶17]. If this is true, Gemstone's attempt to terminate APCO was always baseless and Gemstone's brief statement of intent to seek assignment of "all Third-Party Agreements" [*see* Ex. 13-014] in a fourteen-page letter is without any legal effect.

In addition, APCO claims that, irrespective of Gemstone's purported termination, APCO statutorily terminated the APCO-Gemstone Agreement as of September 5, 2008. [*See e.g.*, Exhibit 28; Helix FF ¶14]. That being the case, APCO cannot claim, as it did in its brief, that "any purported termination of a subcontract by APCO would have breached the [APCO-Gemstone Agreement]" [*see* APCO Brief p. 26]. The APCO-Gemstone Agreement was terminated - by one party or the other - no later than September 5, 2008 and it is therefore legally impossible for APCO to have breached the agreement by thereafter terminating the Helix-APCO Agreement.[13]

B. Gemstone Did Not Accept Assignment.

Even if APCO were somehow justified in not notifying Helix of Gemstone's purported, but ineffective, termination, there was no evidence presented at trial that Gemstone ever notified Helix (or any other subcontractor) of its acceptance of an assignment of the relevant

[13] As noted, APCO admits it did not terminate the Helix-APCO Subcontract, either before or after September 5, 2008. [See e.g., Helix FF ¶18, TR1-70:15-19].

subcontracts. [*See e.g.*, TR2-36:12-16].[14] Section 10.04 of the APCO-Gemstone Agreement provides in part:

> Each Third-Party Agreement for a portion of the Work is hereby assigned by [APCO] to [Gemstone] ***provided that such assignment is effective*** only after termination of the Agreement by [Gemstone] for cause pursuant to Section 10.02 and ***only for those Third-Party Agreements which developer accepts by notifying*** [APCO] and ***the applicable Third-Party Provider in writing***.

[See Ex. 2-036, ¶10.04]. Simply stated, even if Gemstone had intended to accept an assignment (which it did not – *see infra*) it did not do so in accordance with the APCO-Gemstone Agreement.

In fact, the evidence squarely demonstrates that Gemstone did not intend or attempt to take assignment of the subcontracts. Instead, Gemstone hired a replacement general contractor, Camco, who entered into (or attempted to enter into) formal subcontracts with some of the APCO subcontractors and hired others in different ways. In an apparent attempt to confuse the Court, APCO even claims, incorrectly, that "***Gemstone*** provided Helix with the Camco subcontract" [APCO Brief p. 38] yet only two sentences later correctly states that "***Camco*** sent Helix a checklist for starting work," citing to Exhibit 170, which enclosed the Camco Subcontract. [APCO Brief p. 38]. Stated differently, Exhibit 170 proves that Camco, not Gemstone, "provided Helix with the Camco subcontract."

C. Gemstone Did Not "Facilitate" Assumption by Camco

APCO's contention that Gemstone "facilitated Camco's assumption" of the Helix-APCO Subcontract [*see* APCO Brief p. 52] is as irrelevant as it is inaccurate. First, the mere fact that Camco's witness *believed* Camco made such an assumption [see APCO Brief 52][15] does not demonstrate that it was *in fact* assigned to or assumed by Camco or that Helix consented to the same,[16] for which there is simply no evidence. More fundamentally, Section 10.04 of the APCO-Gemstone Agreement (pursuant to which APCO claims an assignment was made) permits only *Gemstone* (i.e., not Camco) to take assignment of the subcontracts. Stated differently, even if

[14] Testimony of Robert Johnson.

[15] APCO incorrectly identifies Camco's witness as "Steve Parry." In fact, his name is Dave Parry.

[16] APCO's reliance on *J. Christopher Stuhmer, Inc. v. Centaur Sculpture Galleries, Ltd., Inc.*, 110 Nev. 270, 871 P.2d 327 (1994) is misplaced. There the Nevada Supreme Court rejected the argument that a Nevada plaintiff had assigned its contract to an California affiliate (and therefore had no standing to sue) because of the "absolute lack of evidence that a legal assignment took place." 110 Nev. at 275.

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Gemstone wanted to "facilitate Camco's assumption" of the Helix-APCO Subcontract, the APCO-Gemstone Agreement provides no basis for doing so. As such, any assignment to Camco would be predicated upon Gemstone ***first*** taking an assignment, which it did not do.[17]

Finally, the lack of any assignment to Gemstone is best exemplified by the fact that Gemstone did not, as required for an assignment to occur pursuant to Section 10.04, "pay to [Helix] any undisputed amounts owed for any Work completed by [Helix] prior to the underlying termination for which [Gemstone] had not yet paid [APCO]." [*See* Ex. 2-036, ¶10.04]. Had this occurred, of course, Helix would not be pursuing a claim against APCO for the $505,021.00 "owed for any Work completed [by Helix] … prior to the underlying termination."[18] Helix is here because it did not get paid.

IV. There Was No Novation, Waiver or Ratification

APCO asks this Court, in several different interconnected theories, to conclude that it has been relieved of its obligations to its subcontractor, Helix, with respect to any work performed by Helix after APCO ceased working on the Project. Each of these theories requires APCO to prove that there has been a novation, which APCO cannot do.

A. There Was No Novation.

APCO agrees that a novation exists only when (1) there is an existing valid contract; (2) all parties agree to a new contract; (3) the new contract extinguishes the old contract; and (4) the new contract is valid. [*See* APCO Brief p. 60 citing *United Fire Ins. Co. v. McClelland*, 105 Nev. 504, 509 (1989)]. APCO tellingly ignores the requirement that these conditions be proved with clear and convincing evidence and that APCO carries this heavy burden of proof. [*See Id.*; Helix CL ¶ 31]. In any event, APCO cannot prove the elements of novation under ***any*** burden of proof.

First, there is no evidence that "all parties" (i.e., Helix, APCO and Camco) agreed to a new contract because APCO is not a party to any agreement (express or implied between Helix

[17] In other words, the only way Gemstone could "facilitate" an assumption by Camco is for Gemstone to first take assignment of the subcontracts and then assign those same subcontracts to Camco. That plainly did not happen here.

[18] In an obvious effort to mislead the Court, APCO inaccurately states that "Helix admitted it never issued a stop work notice to APCO pursuant to NRS 624 *because it had no payment disputes with APCO*." [See APCO Brief, p. 26, *italics* added]. In fact, Helix's Bob Johnson testified that Helix "didn't feel like we had a legal right because I had no direction through their contract to stop work" and that if Helix had stopped work it "would have been at full risk of [APCO] pursuing us for abandoning the contract." [TR1:128:12-16].

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and Camco. [*See also* Helix CL ¶¶32-33]. Second, APCO cannot prove that any agreement it may have made with Camco "extinguished" the Helix-APCO Subcontract. [19] To establish this element, the party claiming novation must show that the creditor clearly intended to release the original obligor. See *Pink v. Busch*, 100 Nev. 684 (1984) ("the intent to cause a novation must be clear" and the evidence must show a "clear understanding that a complete novation is proposed.").

In *Pink*, the plaintiff sold a business to certain parties with a guaranty of performance. Thereafter, the buyers sold to new buyers, who provided a new guaranty of performance. When the new buyers defaulted, Pink sued the original and new buyers and all of the guarantors. The original guarantors claimed that the contract had been novated, but the Nevada Supreme Court ruled that even the plaintiff's acceptance of the new guarantees (as found by the trial court) did not serve to release the original guarantors. 100 Nev. at 690-691. Instead, this merely provided additional security for the Plaintiff. In fact, "the failure of the creditor to cancel the original note [served] to negate one of the essential elements of a novation – that the parties agreed to extinguish the original debt or obligation." *Id.* at 690

Similarly here, Helix's agreement to work for Camco was a reasonable means of seeking an additional means of payment of the work it had agreed to perform for APCO,[20] but it does not relieve APCO of its continuing obligation to pay Helix for that work. Like the plaintiff in *Pink*, Helix also did not terminate its agreement with APCO or ever agree to stop looking to APCO for payment.

Finally, even where a party might appear to have given consent to a novation (which Helix did not do), if it has not been given full details regarding the transaction, the apparent consent may not be effective. *See United Fire*, 105 Nev. at 509 (apparent acquiescence "did not constitute consent when plaintiff knew nothing" of certain key facts). Here, because Helix was never provided with the Camco-Gemstone Agreement, Helix was not informed that Camco was

[19] Helix also never entered into the Camco Subcontract or the Camco Ratification. *See* discussion *infra*.

[20] Much like a landlord whose tenant has breached and abandoned the premises may seek to re-let the premises and thereby mitigate its losses.

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not acting in the nature of a true general contractor.[21] Helix was also not informed that payments would not pass through Camco even though (i) the Camco Subcontract (which Helix received and reviewed, even if it was never agreed to) provides otherwise and (ii) Camco in fact required Helix to submit pay applications to Camco that Camco in turn submitted to Gemstone exactly as described in the Camco Subcontract. Given these conditions, any consent to novation that might be implied to Helix is excused by its ignorance of the true facts.

B. There Was No Ratification.

APCO also argues that "CabineTec and Helix ratified their subcontracts with Camco." While Helix cannot speak for CabineTec (who apparently did sign a Ratification Agreement and the Camco Subcontract), Helix signed no such agreements. APCO's only "evidence" that Helix entered into the Camco Ratification is an unfortunate error in its initial pleading, which Helix has disavowed and for which Helix requested amendment at the time of trial. [*See* TR1:9:19-25].

Helix provided credible and undisputed testimony that the pleading is incorrect and that it did not in fact sign or agree to the document [*see* Exhibit 510-006-042; Exhibit 172-003-011; TR1-123:1-124:25[22]; Helix FF 36]. A trial is a search for the truth and the evidence at trial supports the truth that Helix did not enter into the Camco Ratification.[23]

Helix also did not enter into the Camco Subcontract. Instead, as it did with the APCO Subcontract, Helix prepared a Helix Electric Exhibit ("the Helix Exhibit (Camco)") to the Camco Subcontract with multiple proposed revisions to which Camco never agreed. [*See* Exhibit 510-043-045; TR1-125:2-10[24]; Helix FF 36-37].

In any event, Helix's purported entry into the Camco Ratification and Camco Subcontract (for which, again, there is no evidence) would not alone establish a novation, which is the only means which by APCO can escape liability to Helix for the work it performed pursuant to its

[21] For example, instead of being incentivized to earn a profit for completing the Project (like a true general contractor), Camco was, by its own admission, a project supervisor hired to rent its license to Gemstone for a fee of $100,000 per month whether the Project was moving forward or not – and whether the subcontractors were being paid or not. [See e.g., Helix FF 26-28].

[22] Testimony of Robert Johnson.

[23] APCO unfairly and maliciously impugns Helix's integrity by suggesting the lack of a signed Camco Ratification is simply because "Helix has not produced a signed copy." [*See* APCO Brief p. 41]. Of course, APCO had the same opportunity to seek and produce such a document in discovery (in which, among others, Camco was a participant). The signed document was "not produced" (by any party) because it does not exist.

[24] Testimony of Robert Johnson.

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agreement with APCO to (at least attempt to) perform its scope of work on the Project. See *McClelland*, 105 Nev. at 509 (requiring proof of ***all four*** elements of novation).

C. Helix Did Not Waive It Rights Against APCO

Similarly, APCO argues (wrongly) that Helix and CabinteTec waived all claims against APCO by knowingly contracting to work on the Project for Camco/Gemstone and rolling their retention over to Camco and Gemstone. Waiver is usually defined as "the voluntary and intentional relinquishment of a known right" and may be either express or implied. *Udevco, Inc. v. Wagner*, 100 Nev. 185, 189, 678 P.2d 679, 682 (1984) citing 5 Williston On Contracts § 678 (3d ed. 1961). Waiver can be implied from conduct such as making payments for or accepting performance which does not meet contract requirements; waiver can also be expressed verbally or in writing. 17 Am.Jur.2d Contracts §§ 393, 396 (1964). Express waiver, when supported by reliance thereon, excuses nonperformance of the waived condition. *Udevco* citing 5 Williston On Contracts § 679 (3d ed. 1961); 17 Am.Jur.2d Contracts § 392 (1964); Restatement (Second) of Contracts § 84(1) (1981). In *Udevco*, the Nevada Supreme Court allowed a subcontractor to receive payment for extra work that was necessary, properly performed and accepted in spite of a a contract provision requiring written change orders for such extra work when the developer orally requested such modifications. 100 Nev. at 189.

Here, there is no evidence whatsoever that Helix waived its right to seek payment from APCO. To the contrary, Helix has consistently maintained that, as APCO had repeatedly instructed, it remained "under contract" with APCO. [*See* e.g., *see* Ex. 48; Ex. 23; Helix FF ¶¶ 18-19]. APCO did nothing (such as providing a simple notice of termination) to change that belief. [*See e.g.,* Helix FF ¶18, TR1-70:15-19]. [25] Indeed, as part of its review and proposed revision to the Camco Ratification, Helix attempted to incorporate into the Helix Exhibit (Camco) the last version of the Helix Exhibit (APCO) that was acceptable to Helix. [See Ex. 510-043]. Helix felt it had to do so "because we're still under contract with APCO." [TR125:11-25].[26].

APCO's argument that Helix (and other subcontractors) "rolled their retention account over to Camco and Gemstone" [see APCO Brief p. 35] presupposes that Helix and the other

[25] Testimony of Joe Pelan.
[26] Testimony of Robert Johnson.

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subcontractors had any say in the matter, which they of course did not. Rather than voluntarily relinquish known rights, the undisputed evidence is that APCO's decision to stop work created mass confusion for Helix and other subcontractors. Further, and despite repeatedly requesting to know what happened to APCO, Helix "never got a clear signal. So you stop asking after a while because you get different messages from everybody. Our people had even asked in the field what's going on, and people didn't know. So it was just confusion." [TR2-23:8-14].[27] Having put Helix and its other subcontractors in such uncertain circumstances, APCO's assertion that the subcontractors waived claims against APCO by continuing the work they were contracted to perform is rich with irony indeed.

V. Helix Is Entitled To Relief Pursuant to NRS 108.

Citing *Nev. Nat'l Bank v. Snyder*, 108 Nev. 151, 157, 826 P.2d 56 (1992) abrogated on other grounds by *Exec. Mgmt., Ltd. v. Ticor Title Ins. Co.*, 118 Nev. 46, 38 P.3d 872 (2002), APCO argues that it "is not legally liable for any deficiency judgment because it is not the party responsible for any deficiency." [See APCO FFCL 287]. In *Snyder*, the Court ruled that the bank whose priority over a contractor/lien claimant was established was not personally liable for the deficiency created for the lien claimant because it was not a party to the underlying contract. 108 Nev. at 157.

A. APCO Is A "Party Responsible."

Unlike the defendant in *Snyder*, APCO certainly was a party to an agreement (whether express or implied) giving rise to Helix's claims. In this regard it is hardly "unjust" to hold APCO personally liable under NRS Chapter 108 (like it is contractually or as a matter of quasi-contract/unjust enrichment) for the monies owed to Helix on account of Helix's work as a subcontractor to APCO. This conclusion is codified at NRS 108.239(12), which provides:

> Each party whose claim is not satisfied in the manner provided in this section is entitled to personal judgment for the residue against the party legally liable for it if that person has been personally summoned or has appeared in the action.

NRS 108.239(12). Plainly APCO has been personally summoned, has appeared and is a party

[27] Testimony of Robert Johnson on cross-examination by APCO's counsel.

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legally liable for the monies earned by but not paid to Helix. [28]

B. Helix Is Entitled To A Lien And All Lien Rights.

In addition, and as argued in response to APCOs Motion for Summary Judgment on Lien Claimants' NRS Ch 108 Claim for Foreclosure of Mechanic's Lien, which this Court denied, the mere loss of priority does not "wipe out" Helix's lien claim. As the Nevada Supreme Court has repeatedly held, "whether work is entitled to a lien pursuant to NRS 108.22184 and whether it is entitled to priority over other encumbrances pursuant to NRS 108.225 ***are two entirely separate issues.***" *Byrd Underground*, 332 P.3d at 277 citing *J.E. Dunn* 127 Nev. at 81(emphasis added).

NRS 108.22132 defines a lien as "the ***statutory rights and*** security interest in … property or any improvements thereon provided to a lien claimant by NRS 108.221 to 108.246, inclusive." (Emphasis added). Helix possesses and asserts statutory rights and security interests by virtue of its notice of lien (the validity and perfection of which APCO did not dispute at trial). Even where, as here, the adverse Priority Decision disposes of the *res* in which the lien claimants have a security interest, Helix retains its ***statutory rights*** as provided to them by NRS 108.221 to 108.246, inclusive.

One of those statutory rights is the right to adjudication as a "prevailing lien claimant." As defined in NRS 108.22156, a prevailing lien claimant is "a lien claimant to whom an amount is found due by a trier of fact on a notice of lien." The amount due is determined by NRS 108.237, which provides that:

> 1. ***The court shall award*** to a prevailing lien claimant, whether on its lien or on a surety bond, ***the lienable amount found due to the lien claimant*** by the court and the cost of preparing and recording the notice of lien, including, without limitation, attorney's fees, if any, and interest. ***The court shall also award*** to the prevailing lien claimant, whether on its lien or on a surety bond, ***the costs of the proceedings***, including, without limitation, ***reasonable attorney's fees,*** the costs for representation of the lien claimant in the proceedings, ***and any other amounts as the court may find to be justly due and owing to the lien claimant***.

NRS 108.237(1) (emphasis added). Accordingly, Helix is entitled to prove up and be awarded (against APCO ***and*** Camco) its lienable amounts, costs of the proceedings and

[28] See also NRS 108.238 ("The provisions of NRS 108.221 to 108.246, inclusive, must not be construed to impair or affect the right of a lien claimant to whom any debt may be due for work, materials or equipment furnished to maintain a civil action to recover that debt against the person liable therefor …").

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reasonable attorney's fees. Nothing in the Priority Decision alters these rights

VI. APCO's Failure to Pay Violated NRS Chapter 624

Recycling old arguments, and notwithstanding substantial prior briefing and this Court's Order granting partial summary judgment to Helix and other subcontractors precluding APCO's reliance on any Pay-if-Paid agreement, APCO contends that Helix's claims pursuant to NRS Chapter 624 must be dismissed. Specifically, APCO contends that NRS 624.624 permits it to deny payment of retention to Helix because Section 3.8 contains a payment schedule that requires certain conditions to be met, including APCO's receipt of payment from Gemstone.[29] APCO's contention must be rejected.

Generally, but without limitation, the Court previously concluded that, pursuant to NRS 624.624 and *Lehrer McGovern Bovis, Inc. v. Bullock Insulation, Inc.*, 124 Nev. 1102, 1117-18, 197 P.3d 1032, 1042 (Nev. 2008), higher-tiered contractors, such as APCO and Camco are required to pay their lower-tiered subcontractors within the time periods set forth in NRS 624.624(1) and may not fail to make such payment based on so-called "pay-if-paid" agreements ("Pay-if-Paid") that are against public policy, void and unenforceable except under very limited circumstances that do not exist in this case. Accordingly, the Court ruled that APCO and Camco may not assert or rely on any defense to their payment obligations, if any, to the party subcontractors that is based on a pay-if-paid agreement.

Despite the Court's ruling, APCO nonetheless argues that "payment of retention to Helix never became due under NRS 624" because "Helix never met the five preconditions in the subcontract's payment schedule." [*See* APCO FFCL 202]. One of those "preconditions is, of course, "receipt of final payment by [APCO] from Owner." [*See* Exhibit 45-004, ¶ 3.8(c)]. On such grounds alone, Section 3.8 is void and unenforceable. *See also*, discussion *supra*.

In addition, and as noted above, ***any*** condition stipulation or provision in an agreement that requires a lower-tiered subcontractor to waive any rights provided in NRS 624.624 to 624.630, inclusive, or which limits those rights, or that relieves a higher-tiered contractor of any

[29] While APCO focuses this argument on Section 3.8, its arguments under NRS 624 are identically applicable (or more accurately, inapplicable) to any payment owing under the Helix-APCO Subcontract. As noted in previous briefing and argument, the "schedule of payments" for progress payments is "within 15 days after [APCO] actually receives payment for [Helix's] work from Owner."

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obligation or liability imposed pursuant to NRS 624.624 to 624.630, inclusive, is "void and unenforceable." NRS 624.628(3). As also noted above, if any portion of Section 3.8 prevents Helix from being paid in full it violates the Nevada Mechanic's Lien Statute and is void and unenforceable because it impermissibly "require[s] a lien claimant to waive rights provided by law to lien claimants or to limit the rights provided to lien claimants" (NRS 108.2453(2). *See also*, NRS 108.2457(1) and (2)) and is a "term of a contract that attempts to waive or impair the lien rights of a contractor, subcontractor or supplier" (NRS 108.2457(1).

The public policy of Nevada "favors securing payment for labor and material contractors." *Bullock*, 124 Nev. at 1117-18. Simply stated, APCO had an obligation to pay Helix for the monies it earned on the Project and cannot hide behind a Pay-if-Paid clause or any condition, stipulation or provision that interferes with Helix's right to receive, and APCO's obligation to make, prompt payment to Helix. Helix has waited more than nine years. Enough is enough.

CONCLUSION

Based on the foregoing and the evidence adduced at trial, the Court should adopt, in substantially similar form, Helix's Proposed Findings of Fact and Conclusions of Law.

DATED this 23nd day of March 2017.

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#11776

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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of PEEL BRIMLEY LLP and that on this 23rd day of March 2018, I caused the above and foregoing document entitled **HELIX ELECTRIC OF NEVADA, LLC'S RESPONSE TO APCO CONSTRUCTION'S POST-TRIAL BRIEF** to be served 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 to the party(ies) and/or attorney(s) listed below; and/or
- ☒ to registered parties via Wiznet, the Court's electronic filing system;
- ☐ pursuant to EDCR 7.26, to be sent **via facsimile;**
- ☐ to be hand-delivered; and/or
- ☐ other _____

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DISTRICT COURT

CLARK COUNTY, NEVADA

APCO CONSTRUCTION, a Nevada corporation, Plaintiff, v. GEMSTONE DEVELOPMENT WEST, INC., A Nevada corporation, Defendant.	Case No.: 08A571228 Dept. No.: XIII *Consolidated with:* *A574391; A574792; A577623; A583289; A587168; A580889; A584730; A589195; A595552; A597089; A592826; A589677; A596924; A584960; A608717; A608718; and A590319*
AND ALL RELATED MATTERS	

FINDINGS OF FACT AND CONCLUSIONS OF LAW AS TO THE CLAIMS OF HELIX ELECTRIC AND CABENETEC AGAINST APCO

This matter having come on for a non-jury trial on January 17-19, 23, 24, and February 6, 2018, APCO Construction, Inc., appearing through Spencer Fane, LLP and Marquis & Aurbach; Camco Construction, Inc., through Grant Morris Dodds; National Wood Products, LLC through Cadden Fuller and Richard L. Tobler, Ltd.; United Subcontractors, Inc. through Fabian Vancott; and Helix Electric of Nevada, LLC, SWPP Compliance Solution, Cactus Rose Construction, Inc., Fast Glass, Inc., Heinaman Contract Glazing all through Peel Brimley; and, the Court having heard the testimony of witnesses, having reviewed the evidence provided by the parties, having heard the arguments of counsel, and having read and considered the briefs of counsel and good cause appearing; the Court hereby makes the following:

I. FINDINGS OF FACT

A. The Project

1. This action arises out of a construction project in Las Vegas, Nevada known as the Manhattan West Condominiums project in Clark County Nevada, (the "Project").

2. Gemstone Development West, Inc. ("Gemstone") was the owner and developer of the Project that contracted APCO to serve as the prime contractor.

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MARK R. DENTON
DISTRICT JUDGE
DEPARTMENT THIRTEEN
LAS VEGAS, NV 89155

3. On or about September 6, 2007, Gemstone and APCO entered into the Manhattan West General Construction Contract for GMP (the "Contract")[1].

4. The Contract included Phase 1 and Phase 2 and consisted of nine buildings, with five of the nine buildings in Phase 1 (buildings 2, 3, 7, 8 and 9).[2]

5. The Contract price for Phase 1 was $78,938,160.00.[3] APCO started work on the Project in September, 2007.[4]

B. The Contract

6. The following are several critical Contract provisions that relate to the current claims.

1. Completion

7. Section 2.10 of the Contract defines completion as follows:

> (a) The Work within or related to each Building shall be deemed completed upon the (i) completion of the Work in such Building and the Corresponding Common Area; (ii) issuance of the Certificate of Occupancy for such Building; (iii) completion of any corrections that are requested by Developer, set forth on a Developer Punch List; and (iv) delivery of the applicable Completion Documents (collectively, a "Building Completion"). The Project shall be deemed completed upon the Building Completion of each Building (collectively "Final Completion").[5]

8. Given the ultimate disputes between APCO and Gemstone, APCO did not meet this definition of completion.[6]

. . . . .

---

[1] Exhibit 2. Gemstone and APCO also entered into a grading contract on April 17, 2007 but that contract is not the subject of this lawsuit. Exhibit 1.

[2] Testimony of Joe Pelan (APCO) Day 1, pp. 19 and 22; Exhibit 13, p.1. Joe Pelan is the General Manager of APCO Construction.

[3] Testimony of Joe Pelan (APCO), Day 1, p. 28.

[4] Testimony of Joe Pelan (APCO), Day 1, p. 28. APCO first started work under the grading contract. Exhibit 1.

[5] Exhibit 2, Section 2.10.

[6] Testimony of Joe Pelan (APCO), Day 1, p. 23.

2. **Progress Payments.**

9. Section 5.05 outlined the progress payment process as follows:

> (a) On the first business day of each month, General Contractor and the Developer shall meet to review the Work that was completed during the previous month and the corresponding payment required for such Work.
>
> . . .
>
> (e) Upon receipt of an Application for Payment that is acceptable to Developer pursuant to Sections 5.05(a-d), Developer shall, within 12 calendar days, submit, to Developer's lender or such lender's authorized designee, the corresponding draw application for the undisputed amount to be paid pursuant to such Application for Payment (the "Draw Application"). Thereafter, Developer shall take such actions as are necessary for the payment of the amount owed to General Contractor pursuant to such Draw Application of the amount owed to the General Contractor pursuant to such Draw Application (the "Progress Payment"). In the event that a Draw Application is not submitted to Developer's lender or such lender's authorized designee within the above 12 calendar day period, Developer shall pay to General Contractor $5,000 for each day that the submission of the Draw Application is delayed after such 12 calendar day period.
>
> . . .
>
> (g) Upon receipt of the Progress Payment, General Contractor shall promptly pay each Third-Party Service Provider the amount represented by the portion of the Percentage of Work Completed that was completed by such Third-Party Service Provider during the period covered by the corresponding Progress Payment. General Contractor shall, by appropriate agreement with each Third-Party Service Provider, require each Third-Party Service Provider to make payment to sub-contractors in a similar manner.[7]

---

[7] Exhibit 2 at Section 5.05. The Contract defines APCO's subcontractors as a "Third Party Service Provider." Exhibit 2, Section 2.02(a).

10. Per this provision, on the 20th of each month subcontractors submitted their billings to APCO for the current month (including a projection of what each intended to complete through the end of that month).[8]

11. APCO would then provide all of these documents to Gemstone.[9]

12. Gemstone would then walk the Project and determine the percentage each subcontractor had completed.[10]

13. Gemstone would adjust each subcontractor's billings to match its estimate of the percentage complete.[11]

14. Gemstone would give the revised billings back to APCO, and APCO would return them to each subcontractor to revise.[12]

15. Once revised, the subcontractors would submit them to APCO, APCO would submit them to Gemstone, and Gemstone would submit them to its construction funds control company, Nevada Construction Services ("NCS") for further review and payment.[13]

16. NCS would then send an inspector to verify the work was complete.[14]

17. NCS would then request funds from the lender and pay the total amount directly to APCO.[15]

18. APCO then paid the subcontractor the final amount received from Gemstone.[16]

19. As discussed more fully below, this process continued until June 2008.[17]

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[8] Testimony of Joe Pelan (APCO), Day 1, p. 24.

[9] Testimony of Joe Pelan (APCO), Day 1, p. 24.

[10] Testimony of Joe Pelan (APCO), Day 1, p. 24.

[11] Testimony of Joe Pelan (APCO), Day 1, p. 24.

[12] Testimony of Joe Pelan (APCO), Day 1, p. 24.

[13] Testimony of Joe Pelan (APCO), Day 1, p. 24; Exhibit 3, Nevada Construction Services Agreement.

[14] Testimony of Joe Pelan (APCO), Day 1, p. 25.

[15] Testimony of Joe Pelan (APCO), Day 1, p. 25, and 59.

[16] Testimony of Joe Pelan (APCO), Day 1, p. 25.

[17] Testimony of Joe Pelan (APCO), Day 1, p. 25.

3. Final Payment

20. Per the payment schedule in Section 5.06, Gemstone was required to make final payment when the following preconditions were met:

> (c) ...Prior to final payment, and as a condition precedent, General Contractor shall furnish Developer with the following (the "Completed Documents"):
>
> (i) All maintenance and operating manuals;
>
> (ii) Marked set of drawings and specifications reflecting "as-built" conditions, upon which General Contractor shall have transferred all changes in the location of concealed utilities...
>
> (iii) the documents set forth in Section 2.06(e)
>
> (iv) Any assignment and/or transfer of all guaranties and warranties from Third-Party Service Providers, vendors or suppliers and manufacturers;
>
> (v) A list of the names, address and phone numbers of all parties providing guarantees and warranties, and
>
> (vi) verification that all waivers that should be issued to Developer concurrent with Final payment. [18]

21. APCO admitted that none of these preconditions were met while APCO was on the Project.[19]

4. Retainage

22. Section 5.07 contained the Contract's retention (or retainage) payment schedule.[20]

23. Retainage is essentially an "escrow account" representing a temporarily withheld portion of a billing that is retained by Gemstone to ensure that the work is completed

---

[18] Exhibit 2 at Section 5.06(c).

[19] Testimony of Joe Pelan (APCO), Day 1, p. 63.

[20] Exhibit 2 at Section 5.07.

properly, that all material suppliers are paid and lien releases have been provided, and that all certificates of occupancy were issued.[21]

24. APCO and the subcontractors tracked the 10% retention in their billings each month.[22]

25. APCO never held or otherwise received any subcontractor's retention withheld by Gemstone and kept by the lender for the Project.[23]

26. Section 5.07(f) sets forth the preconditions for APCO to receive its retention:

> (f) Any remaining Standard Retainage, Monthly Retainage, and Milestone Retainage shall be released to General Contractor on the date that (i) Final Completion is attained and (ii) all outstanding disputes between Developer and General Contractor and Developer and any Third Party Service Providers have been resolved, and any liens against the Project related to such disputes have been removed.[24]

27. APCO admits that it never met any of the milestones or preconditions to be entitled to its retention from Gemstone.[25]

28. Accordingly, APCO never billed and did not receive any retention from Gemstone.[26]

5. Termination for Convenience

29. Section 10.01 of the Contract is entitled **"Termination by the Developer Without Cause."**[27]

---

[21] Testimony of Joe Pelan (APCO), Day 1, p. 25; Exhibit 2 at Section 5.07; Helix's Post-Trial Brief, p. 3, ll. 10-11.

[22] Testimony of Joe Pelan (APCO), Day 1, pp. 25-26.

[23] Testimony of Joe Pelan (APCO), Day 1, p. 26.

[24] Exhibit 2 at Section 5.07(f).

[25] Testimony of Joe Pelan (APCO), Day 1, pp. 1-4, 26.

[26] Testimony of Mary Jo Allen (APCO), Day 3, p. 127. Mary Jo Allen is a bookkeeper for APCO, and has been a bookkeeper for approximately 40 years. Testimony of Mary Jo Allen (APCO), Day 3, p. 121. She assisted in preparing the pay applications to Gemstone for the Project. Testimony of Mary Jo Allen (APCO), Day 3, p. 121.

30. In the construction industry, this is known as a "termination for convenience."[28]

31. Gemstone never terminated the Contract for convenience.

6. Termination for Cause

32. Section 10.02 of the Contract is entitled **"Termination by Developer With Cause" and states:**

> . . .
>
> (b) When any of the reasons set forth in Section 10.02(a) exist, Developer may without prejudice to any other rights or remedies available to Developer and after giving General Contractor seven days' written notice (in addition to the 48 hours notice for purposes of Section 10.02 (a)(vi)), terminate employment of General Contractor and may do the following:
>
> . . .
>
> (ii) Accept assignment of any Third-Party Agreements pursuant to Section 10.04. [29]

33. Although Gemstone purported to terminate the Contract for cause,[30] the undisputed evidence established that APCO was not in default.[31]

7. Assignment

34. The Contract contained an assignment provision confirming that upon the Contract's termination, APCO's subcontracts would be assigned to Gemstone.

35. At that point, Gemstone would be responsible for any amounts that Gemstone had not already paid APCO for the subcontractors' work:

> **10.04 Assignment.** Each Third-Party Agreement for a portion of the Work is hereby assigned by General Contractor to Developer provided that such assignment is effective only after termination of the Agreement by Developer for cause pursuant to Section

---

[27] Exhibit 2 at Section 10.01.

[28] Testimony of Joe Pelan (APCO), Day 1, p. 27.

[29] Exhibit 2 at Section 10.02(b)(2).

[30] Testimony of Joe Pelan (APCO), Day 1, p. 27.

[31] Testimony of Joe Pelan (APCO), Day 1, p. 100.

> 10.02 and only for those Third-Party Agreements which Developer accepts by notifying General Contractor and the applicable Third Party Service Provider in writing. General Contractor shall execute and deliver all such documents and take all such steps as Developer may require for the purpose of fully vesting in Developer the rights and benefits of General Contractor under such documents. Upon the acceptance by Developer of any Third-Party Agreement, subject to the other terms of this Article X, Developer shall pay to the corresponding Third-Party Service Provider any undisputed amounts owed for any Work completed by such Third Party Provider, prior to the underlying termination for which Developer had not yet paid General Contractor prior to such underlying termination.[32]

36. Despite its dispute with Gemstone, APCO could not have terminated its subcontracts or it would have been in breach of the Contract.[33]

37. Notably, the Contract and this assignment clause were incorporated into the APCO subcontracts.[34]

38. And before APCO left the Project, Gemstone and APCO ensured that all subcontractors were properly paid up through that last period.[35]

C. <u>Subcontracts</u>

1. Helix

39. Helix Electric of Nevada, LLC ("Helix") was originally selected and retained by Gemstone and performed work on the Project prior to APCO becoming the general contractor.[36]

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[32] Exhibit 2, Section 10.04 (p. 36).

[33] Testimony of Joe Pelan (APCO), Day 1, p. 75.

[34] Exhibit 45 (Helix Subcontract) and Exhibit 149 (CabineTec Subcontract), Section 1.1.

[35] Exhibit 26; Exhibit 152; Testimony of Joe Pelan, Day 1, pp. 46, 67, and 82. Testimony of Mary Jo Allen (APCO), Day 3, pp. 127-128.

[36] Testimony of Joe Pelan (APCO), Day 1, p. 58.

40. Specifically, Helix's Vice President, Bob Johnson,[37] admitted Helix participated in preparing engineering and design services for Gemstone on the Project's electrical scope of work.[38]

41. So at Gemstone's direction, APCO entered into a subcontract with Helix for the electrical work (the "Helix Subcontract") required on the Project.[39]

42. Helix's scope of work included "electrical installation for the project, which consists of distribution of power, lighting, power for the units, connections to equipment that required electrical."[40]

43. So Helix's work was based, in part, on the electrical drawings that Helix prepared under contract to Gemstone.[41]

44. The Helix subcontract included the following relevant provisions:

- o Section 1.1: The subcontract incorporates the Contract including all exhibits and attachments, specifically including the Helix exhibit.
- o Section 1.3: Helix was bound to APCO to the same extent and duration that APCO was bound to Gemstone.
- o Section 3.4 outlined the agreed upon progress payment schedule as follows: Progress Payments
  - The progress payment to Subcontractor shall be one hundred percent (100%) of the value of Subcontract work completed (less 10% retention) during the preceding month as determined by the Owner, less such other amounts as Contractor shall determine as being properly withheld as allowed under this Article or as provided

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[37] Bob Johnson is the Vice President of the major projects group at Helix. Testimony of Bob Johnson (Helix), Day 1, p. 106. Mr. Johnson has negotiated more than 50 subcontracts in his career, three to four of which have been with APCO. Testimony of Bob Johnson (Helix), Day 2, p. 17. Mr. Johnson was involved in the negotiation and execution of the final terms and conditions of Helix's subcontract with APCO for the Project. Testimony of Bob Johnson (Helix), Day 1, p. 107. Mr. Johnson admitted Andy Rivera received most of the project related correspondence and had the most information on Helix's damages claim. Testimony of Bob Johnson (Helix), at Day 2, p. 24.

[38] Testimony of Bob Johnson (Helix) Day 2, p. 6.

[39] Exhibit 45, Helix Subcontract; Testimony of Joe Pelan (APCO), Day 1, p. 58.

[40] Testimony of Bob Johnson (Helix) at Day 2, p. 10.

[41] Testimony of Bob Johnson (Helix) Day 2, p. 7.

elsewhere in this Subcontract. The estimates of Owner as to the amount of Work completed by Subcontractor shall be binding upon Contractor and Subcontractor and shall conclusively establish the amount of Work performed by Subcontractor. As a condition precedent to receiving partial payments from Contractor for Work performed, Subcontractor shall execute and deliver to Contractor, with its application for payment, a full and complete release (Forms attached) of all claims and causes of action Subcontractor may have against Contractor and Owner through the 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. Upon the request of Contractor, Subcontractor shall provide an Unconditional Waiver of Release in form required by Contractor for any previous payment made to Subcontractor. Any payment to Subcontractor shall be conditioned upon receipt of the actual payments by Contractor from Owner. Subcontractor herein agrees to assume the same risk that the Owner may become insolvent that Contractor has assumed by entering Into the Prime Contract with the Owner.

- 3.5 Progress Payments
  - Progress payments will be made by Contractor to Subcontractor within 15 days after Contractor actually receives payment for Subcontractor's work from Owner.... The estimate of owner as to the amount of Work completed by Subcontractor be binding upon Contractor and Subcontractor and shall conclusively establish the amount of Work performed by Subcontractor...[42]

45. Of critical importance to the present action and claims, the Helix Subcontract contained the following agreed upon retention payment schedule:

- Section 3.8: Retainage

  The 10 percent withheld retention shall be payable to Subcontractor upon, and only upon the occurrence of all the following events, each of which is a condition precedent to Subcontractor's right to receive final payment hereunder and payment of such retention: (a) Completion of the

[42] Exhibit 45.

> entire project as described in the Contract Documents; (b) The approval of final acceptance of the project Work by Owner, (c) Receipt of final payment by Contractor from Owner; (d) Delivery to Contractor from Subcontractor all as-built drawings for it's (*sic*) scope of work and other close out documents; (e) Delivery to Contractor from Subcontractor a Release and Waiver of Claims from all of Subcontractor's laborers, material and equipment suppliers, and subcontractors, providing labor, materials or services to the Project.[43]

46. As documented below, Helix admitted that these preconditions were not met while Apco was the contractor.[44]

47. In its lien documents,[45] Complaint against APCO,[46] and its Amended Complaint, Helix has unequivocally admitted that it had a binding subcontract with APCO.[47]

48. In fact, Victor Fuchs, the President of Helix,[48] also confirmed the following in an affidavit attached to Helix's May 5, 2010 Motion for Summary Judgment Against Gemstone Development West (and corresponding errata) filed with this Court:

> 4. On or around April 17, 2007 [the date of Exhibit 45], APCO contracted with Helix to perform certain work on the Property.
>
> 5. Helix's relationship with APCO was governed by a subcontract, which provided the scope of Helix's work and method of billing and payments to Helix for work performed on the Property (the "Subcontract"). A true and correct copy of the Subcontract is attached hereto as Exhibit 1.
>
> 6. Helix also performed work and provided equipment and services directly for and to Gemstone, namely design engineering and temporary power.

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[43] Exhibit 45.

[44] Testimony of Bob Johnson, Day 2, pp. 36 and 37.

[45] Exhibits 512 pp. 5-6, 7-9, 10-11.

[46] Exhibit 77.

[47] Exhibit 231.

[48] Testimony of Bob Johnson (Helix), Day 1, p. 108.

7. Camco Pacific Construction Company, Inc. ("Camco") replaced APCO as the general contractor. Thereafter, Helix performed its Work for Gemstone and/or Camco...[49]

Exhibit 1 to the declaration was the first fifteen pages of Exhibit 45.[50]

49. And notwithstanding Helix's proposed interlineations to the subcontract, Helix's Mr. Johnson admitted he did not change the retention payment schedule in the subcontract:

> Q. Okay. Would you turn to page 4 [of Exhibit 45] And directing your attention to paragraph 3.8?
>
> A. Okay.
>
> Q. Do you recognize that as the agreed-upon retention payment schedule in the subcontract?
>
> A. I do.
>
> Q. And in fairness to you and the record, you did propose a change to paragraph 3.8. Could you turn to page 16 of the exhibit, Exhibit 45? And directing your attention to paragraph 7, does this reflect your proposed change to the retention payment schedule in the original form of Exhibit 45?
>
> A. In the original form, yes.
>
> Q. Okay. And APCO accepted your added sentence that if the retention was reduced on the Project, the same would be passed on to the subcontractor, correct?
>
> A. Correct.
>
> Q. Through your change in paragraph 7, on page 16 of Exhibit 45, you did not otherwise modify the preconditions in the retention payment schedule of 3.8, did you?
>
> A. We did not.[51]

50. Mr. Johnson, also admitted that Exhibit 45 represented the APCO agreement that Helix alleges APCO somehow breached:

> Q. Okay, sitting here today, is it your contention that APCO breached a contract with Helix?
>
> A. I would say they did in the respect that we haven't been paid.
>
> Q. Okay. And which contract is it in your opinion that APCO breached?

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[49] Exhibit 314.

[50] Helix Electric's May 5, 2010 Motion for Partial Summary Judgment Against Gemstone Development West (and corresponding errata).

[51] Testimony of Bob Johnson, Day 2, pp. 17-18.

A. For the Manhattan West project.

Q. Is there a document?

A. There is a document.

Q. Okay. And, sir, would you turn—if you could, grab Exhibit 45. You spent some time talking about this yesterday.

A. Okay.

The Court: Which item is it, counsel?

Mr. Jefferies: Exhibit 45.

Q. Is it your position that APCO breached this agreement?

A. My assumption would be they breached it, yes.

Q. Okay. But this is the document that represents the agreement between APCO and Helix for the project?

A. It is the agreement between APCO and Helix.[52]

51. Notably, the Helix Subcontract did not contain a provision purporting to waive Helix's statutory lien rights.

2. CabineTec

52. Gemstone also selected CabineTec, Inc. ("CabineTec") to serve as APCO's cabinet subcontractor.[53] Plaintiff in Intervention National Wood Products, Inc. ("National Wood") is a judgment creditor of CabineTec which has assigned all of its right, title, and interest in the project to National Wood. Such parties are collectively referred to herein as "CabineTec."

53. APCO entered into a subcontract with CabineTec on April 28, 2008 for the delivery and installation of cabinets on the Project (the "CabineTec Subcontract")[54]

54. CabineTec's Subcontract contained the same retention and progress payment schedules quoted above from the Helix Subcontract.[55]

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[52] Testimony of Bob Johnson (Helix), Day 2, p. 9.

[53] Testimony of Joe Pelan (APCO), Day 1, p. 89.

[54] Exhibit 149, CabineTec Subcontract.

[55] Exhibit 149.

55. CabineTec's Nicholas Cox[56] admitted CabineTec did not change the retention payment schedule found in Section 3.8.[57]

56. CabineTec and APCO also signed an August 6, 2008 letter regarding Terms & Conditions.[58]

57. That letter confirmed that CabineTec would be paid when "APCO receives payment from Gemstone per subcontract."[59]

58. The CabineTec Subcontract does not contain a waiver of CabineTec's right to place a mechanic's lien on the Project.

D. The Contract was terminated.

59. APCO did not finish the Project as the general contractor.[60]

60. Despite APCO's performance, issues with Gemstone's payments started in May 2008 and Gemstone reduced the May Pay Application to exclude any money for APCO.[61]

61. ". . .Gemstone will withhold $226,360.88 from the May Progress Payment (the "Withheld Amount") in addition to the 10% retainage that was already being withheld. The Withheld Amount represents the APCO Construction Contractor's Fee line-item from the May Progress Payment."[62]

62. As a result, Gemstone only paid the subcontractors for the May time period.

63. Given the wrongful withholding, APCO provided Gemstone with written notice of its intent to stop work pursuant to NRS 624.610 if APCO was not paid in full.[63]

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[56] Mr. Cox was the president of CabineTec during the Project. Testimony of Nicholas Cox (CabineTec) Testimony Day 3, p. 13.

[57] Testimony of Nicholas Cox (CabineTec), Day 3, p. 29.

[58] Exhibit 152.

[59] Exhibit 152.

[60] Testimony of Brian Benson (APCO) at Day 3, p. 50; Testimony of Mary Jo Allen (APCO), Day 3, p. 122.

[61] Testimony of Joe Pelan (APCO), Day 1, pp. 28 and 31.

[62] Exhibit 212-1.

[63] Exhibit 5.

64. On or about July 18, 2008, APCO submitted its pay application for the month ending June 30, 2008, and requested $6,566,720.38 (the "June Application").[64]

65. The cover page of the June Application, like all other pay applications, tracked the total value of the Contract, the total requested for that month, subcontractor billings and retention.[65]

66. The June Application shows Gemstone was withholding $4,742,574.01 in retainage as of that date.[66]

67. On July 18, 2008, APCO sent Gemstone a notice of intent to stop work for its failure to pay the May Application as follows.

> Specifically, Gemstone has failed to pay $3,434,396.50 for Application for Payment No. 8, Owner Draw No. 7, which was submitted to Gemstone on June 20, 2008, and was due no later than July 11, 2008 pursuant to NRS 624.609(A). Accordingly, THIS LETTER SHALL SERVE AS APCO'S NOTICE OF INTENT TO STOP WORK PURSUANT TO NRS 624.609 THROUGH NRS 624.630, INCLUSIVE, UNLESS APCO IS PAID THE TOTAL AMOUNT OF $3,434,396.50 FOR ITS WORK ON THE PROJECT... Accordingly, pursuant to NRS 624.609(1)(b), payment was due to APCO within 21 days of its request for payment (again, no later than July 11, 2008). To date, no payment has been made...If APCO has not been paid for Application for Payment No. 8, Owner Construction Draw No. 7, in the amount of $3,434,396.50 by the close of business on Monday, July 28, 2008, APCO reserves the right to stop work on the Project anytime after that date. While APCO is willing to continue to work with Gemstone to get these issues resolved, APCO is not waiving its right to stop work any time after July 28, 2008, if APCO continues to work on the Project or otherwise attempts to resolve these issues with Gemstone.[67]

68. On July 28, 2008, APCO sent a letter confirming that APCO would stop working unless Gemstone made full payment to APCO for all past due amounts:

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[64] Exhibit 4.

[65] Testimony of Joe Pelan (APCO), Day 1, pp. 28 and 29; Exhibit 4.

[66] Exhibit 4; Testimony of Joe Pelan (APCO), Day 1, p. 30.

[67] Exhibit 5.

> As you area aware, on July 17, 2008, APCO provided Gemstone with written notice that unless APCO was paid the full amount of $3,434,396 by the close of business on Monday, July 28, 2008, that APCO would stop work on the Project. Gemstone failed to make full payment and has improperly withheld $203,724.29, despite having no good faith or proper statutory basis for withholding the payment. AS a result, APCO is stopping work on the Manhattan West Project effective immediately.
> In addition to stopping work on the project, APCO hereby asserts its rights to terminate the contract pursuant to NRS 624.610(2). THIS LETTER SHALL SERVICE AS APCO'S NOTICE OF INTENT TO TERMINATE THE MANHATTAN WEST GENERAL CONSTRUCTION CONTRACT FOR GMP PURSUANT TO NRS 624.606 THROUGH NRS 624.630, INCLUSIVE, PURSUANT TO THE TERMS OF THE NRS 624.610, THE CONTRACT SHALL BE TERMINATED AS OF AUGUST 14, 2008.[68]

69. Helix was aware that shortly after a July 11, 2008 email,[69] APCO began issuing stop work notices to Gemstone on the Project.[70]

70. Gemstone ultimately paid APCO for May.[71]

71. In addition, on July 29, 2008, APCO sent the following letter to its subcontractors:

> As most of you are now aware, APCO Construction and GEMSTONE are embroiled in an unfortunate contractual dispute which has resulted in the issuance of a STOP WORK NOTICE to GEMSTONE. While it is APCO Construction's desire to amicably resolve these issues so work may resume, it must also protect its contractual and legal rights. This directive is to advise all subcontractors on this project that until further notice, all work on the Manhattan West project will remain suspended.
> THIS SUSPENSION IS NOT A TERMINATION OF THE GENERAL CONTRACT AT THIS TIME AND AS SUCH ALL SUBCONTRACTORS ARE STILL CONTRACTUALLY BOUND TO THE TERMS OF THEIR RESPECTIVE SUBCONTRACTS WITH APCO CONSTRUCTION.

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[68] Exhibit 6.

[69] Exhibit 506, p. 1.

[70] Testimony of Bob Johnson (Helix), Day 1, p. 113.

[71] Testimony of Joe Pelan (APCO) Day 1, p. 31.

> Additionally, the subcontractors are advised that, at the present time they are not obligated to perform any subcontract work on the project at the direction or insistence of Gemstone. We will keep all subcontractors advised on a timely basis if the status of the work suspension changes. Should you have any questions, feel free to call.[72]

72. On July 30, 2008, Scott Financial, the Project's lender, sent a letter to APCO confirming the loan for the Project was in good standing.[73]

73. On or about August 6, 2008, Gemstone provided APCO notice of its intent to withhold the sum of $1,770,444.28 from APCO for the June Application.[74]

74. Accordingly, APCO sent Gemstone another notice of intent to stop work on August 11, 2008, noting that if APCO was not paid by August 21, 2008, APCO would suspend work on the Project:

> On July 18, 2008, APCO Construction submitted its Progress Payment for June 2008 pursuant to the terms of the General Construction Agreement for GMP, dated September 6, 2007 in the amount of $6,566,720.38. This number has since been adjusted on your submittal to the lender to reflect $5,409,029.42 currently due to APCO Construction. We understand this number reflects certain upward adjustments to change orders made after the Progress Payment was submitted on July 18, 2008. Pursuant to NRS 624.609(1), this payment was due on or before August 8, 2008. By way of good faith agreement extended by APCO Construction to Peter Smith, this deadline was extended for three (3) days as a result of what were intended to be "good faith" efforts to fully resolve certain change order issues. While APCO Construction does not feel at this time that Gemstone participated in good faith, we will nevertheless honor our commitment to you to extend the deadline. Accordingly, and pursuant to the aforementioned statute and agreement, deadline for payment for the June Progress Payment was close of business Monday, August 11, 2008.
>
> ...

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[72] Exhibit 48.

[73] Exhibit 7.

[74] Exhibit 313.

> In review of your August 6, 2008 correspondence you have provided a "withholding breakdown" wherein you have given notice of your intent to withhold $1,770,444.28, allegedly pursuant to NRS 624.609(3) and Section 5.05(d) and 5.05(f)(vii) of the Agreement.
>
> ...
>
> **As such, the correct amount of the June Progress Payment should be $6,183,445.24.** As of this date, Gemstone has failed and/or refused to pay the June Progress Payment.
>
> THIS LETTER SHALL SERVE AS APCO'S NOTICE OF INTENT TO STOP WORK PURSUANT TO NRS 624.606 THROUGH NRS 624.630, INCLUSIVE, UNLESS APCO IS PAID THE TOTAL AMOUNT OF $6,183,445.24 FOR ITS WORK ON THE PROJECT.
>
> IF APCO CONSTRUCTION HAS NOT BEEN PAID FOR PAYMENT NO. 9 OWNER CONSTRUCTION DRAW NO. 8, IN THE AMOUNT OF $6,183,445.24 BY CLOSE OF BUSINESS ON THURSDAY, AUGUST 21, 2008, APCO CONSTRUCTION RESERVES THE RIGHT TO STOP WORK ON THE PROJECT ANYTIME AFTER THAT DATE.
>
> As we have previously demonstrated, APCO Construction will continue to work with Gemstone to resolve the various issues affecting this project, however, we will not waive our right to stop work anytime after August 21, 2008. We trust you will give this Notice appropriate attention.[75]

75. All subcontractors were copied on this notice.[76]

76. APCO informed all subcontractors that it intended to terminate the Contract as of September 5, 2008.[77]

77. Helix's Project Manager, Andy Rivera,[78] admitted that he received APCO's stop work notice and possible termination.[79]

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[75] Exhibit 10; Testimony of Joe Pelan (APCO) Day 1, pp. 30 and 32.

[76] Testimony of Joe Pelan (APCO), Day 1, p. 31; Exhibit 10.

[77] Exhibit 23; Testimony of Joe Pelan (APCO), Day 1, p. 74.

[78] Andy Rivera was Helix's Project Manager. Testimony of Andy River (Helix), Day 2, p. 48. As the Project Manager, he was in charge of labor, materials,

78. After receipt of APCO's written notice, Gemstone sent a letter on Friday, August 15, 2008, claiming that APCO was in breach of contract and that Gemstone would terminate the Contract for cause if the alleged breaches were not cured by Sunday, August 17, 2008.[80]

79. That letter divided APCO's alleged breaches into curable breaches and non-curable breaches[81] and also confirmed that upon termination: "(a) all Third-Party Agreements shall be assigned to Gemstone and (b) APCO must execute and deliver all documents and take such steps as Gemstone may require for the purpose of fully vesting in Gemstone the rights and benefits of such assigned Third-Party Agreements."[82]

80. APCO's counsel responded to the letter the same day, August 15, 2008.[83]

81. That letter refuted Gemstone's purported basis for termination for cause,[84] as there was no factual basis for any of the alleged defaults in Gemstone's letter:

> Gemstone's demand is factually incorrect as APCO is not in default of the agreement, and even if APCO was in default of the Agreement as alleged, the issues set forth by Gemstone would not support a termination of the contract...APCO has provided Gemstone with a 10 day Notice of Intent to Stop Work on the project due to Gemstone's failure to pay the June 2008 Application. Instead of making the payment that is due, Gemstone is seeking to terminate the contract on or before the date that APCO will stop work on the project...APCO has

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subcontractors, labor reports, billings, change orders, submittals, requests for information, and most other documents on the Project. Mr. Rivera reported to Robert Johnson. Testimony of Andy Rivera (Helix), Day 2, p. 48. Andy Rivera prepared Helix's pay applications. Testimony of Bob Johnson (Helix), Day 2, p. 8. So while Robert Johnson signed the pay applications for Helix, Mr. Andy Rivera had the most personal knowledge of the financial aspects of the Project for Helix and was actually designated as Helix's PMK on Helix's claim. Testimony of Andy Rivera, Day 2, p. 73.

[79] Testimony of Bob Johnson (Helix), Day 1, p. 113.

[80] Exhibit 13; Testimony of Joe Pelan (APCO), Day 1, pp. 35-36.

[81] Exhibit 13 - 1-13.

[82] Exhibit 13, p. 14, Section C.3.

[83] Exhibit 14; Testimony of Joe Pelan (APCO), Day 1, p. 36.

[84] Exhibit 14; Testimony of Joe Pelan (APCO), Day 1, pp. 37 and 79.

> received a copy of the e-mail sent to APCO's subcontractors by Gemstone. The e-mail notes that Gemstone has a replacement General Contractor in place. Obviously, Gemstone's intent is to improperly declare APCO in default and then attempt to move forward with the project using APCO's subcontractors... Items (ii), (iii), (iv) and (v) were all complete months ago as part of the normal job process.[85]

82. There was no evidence presented at trial rebutting Mr. Pelan's testimony that APCO was not in default.

83. And since the Court has stricken Gemstone's answer and counterclaim against APCO,[86] the Court must find that APCO was not in breach.

84. On or about August 15, 2008, prior to its purported termination, Gemstone improperly contacted APCO's subcontractors and notified them that Gemstone was terminating APCO as of Monday, August 18, 2008.[87]

85. Gemstone confirmed it had already retained a replacement general contractor.[88] Gemstone advised the APCO subcontractors as follows:

> In the event that APCO does not cure breaches to Gemstone's satisfaction during the cure period, Gemstone will proceed with a new general contractor. This GC has been selected and they are ready to go. We do not expect any delays or demobilizations in this event... If APCO does not cure all breaches, we will be providing extensive additional information on the transition to a new GC in 48 hours time.[89]

86. The replacement contractor turned out to be Camco.[90]

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[85] Exhibit 14; Testimony of Joe Pelan (APCO), Day 1, p. 100.

[86] Docket at May 26, 2010 Order Striking Defendant Gemstone Development West, Inc.'s Answer and Counterclaims, and Entering Default.

[87] Exhibit 215; Testimony of Joe Pelan (APCO), Day 1, pp. 34 and 35.

[88] Exhibit 215.

[89] Exhibit 215-2.

[90] Exhibit 162, Camco/Gemstone Prime Contract.

87. On August 18, 2008, APCO emailed Gemstone objecting to such direct communications with the subcontractors: "The APCO Construction GMP and Grading Contracts are still in effect and as such Gemstone shall not meet with our subcontractors. Please read the contract and other correspondence closely. If APCO didn't (and APCO did) cure the breach, Gemstone must issue a seven day notice of termination. You are disrupting my ability to perform the work."[91]

88. That same day, APCO submitted its July 2008 pay application for $6,307,487.15.[92]

89. The next day on August 19, 2008, APCO sent Gemstone a letter noting Gemstone's breaches:

> [I]t was and is my clear position that any termination of our contract would be a breach of the agreement. Then today before I could send my letter I received a letter from your lawyer saying our contract was over.... As with the other changes, it is impossible to fully account for the delays and full impacts to our schedule at this stage. Consistent with the (2) two change orders that Alex signed after Pete initially rejected them for the HVAC deltas, I would propose that we hold the time issues for now... I also find it interesting that you have sent us letters to terminate the contract all within the time that we were allowed to provide you notice of our intent to suspend the work if the change orders on the June pay application were not paid. That was to elapse on Thursday and now your lawyer is proposing that we agree to a termination before that date. We will not agree and intend to fully proceed with our contract obligations... Yesterday morning, Alex came in and asked me what we were still doing on site because there was nothing that we could do to satisfy Gemstone. That would be consistent with the email that was sent to all of our subcontractors on Friday advising that we were being removed from the project before we even had a chance to respond to the 48 hour notice... Craig also told me that Gemstone had previously selected Camco to complete the project.[93]

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[91] Exhibit 216-1.

[92] Exhibit 8.

[93] Exhibit 15.

90. On August 19, 2008, Gemstone confirmed that joint checks to the Subcontractors and Apco would be written for the June 2008's pay application: "I'd like to have dual checks cut for this [June, 2008] pay application directly to the subs and the general. I believe this is different than what we have historically done on ManhattanWest, but similar to how we have paid some Manhattan Pay Apps in the past."[94]

91. Gemstone confirmed that all future payments would essentially go directly from Nevada Construction Control to the subcontractors.[95]

92. Although it disagreed with Gemstone's conduct, APCO cooperated in this post termination process to ensure that all subcontractors were properly paid for work performed on APCO's watch:

> An APCO representative has to sign all of the subcontractor checks due to Gemstone's request to prepare the "joint checks". An APCO signer should be doing that by the end of today or tomorrow morning. At that time, NCS will contact all of the subcontractors to pick up their checks. Furthermore, today the APCO's July pay application was submitted to NCS. As mentioned in the meeting on Monday, August 25, 2008, enclosed is the contact information for Camco Pacific regarding pay applications... Please forward your July and August pay requests to Yvonne. Obviously, July was already submitted to NCS but we would like Camco to have record of the most current pay requests.[96]

93. None of the joint checks that NCS and Gemstone issued and that APCO properly endorsed included any funds for APCO.[97]

94. And none of the joint checks accounted for any APCO or subcontractor retention because retention had not been earned under either the Contract or the various subcontracts.[98]

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[94] Exhibit 16; Testimony of Joe Pelan (APCO), Day 1, p. 38.

[95] Testimony of Joe Pelan (APCO), Day 1, p. 38.

[96] Exhibit 26. Testimony of Joe Pelan (APCO), Day 1, pp. 38 and 41.

[97] Testimony Day 1, p. 38.

[98] Testimony of Joe Pelan (APCO), Day 1, pp. 38-39.

95. As of the end of August, the Project was only about 74% complete.[99]

96. Ultimately, APCO was not paid for its share of June Application even though the subcontractors received their money.[100]

97. On August 21, 2008, APCO sent a letter to its subcontractors informing them that APCO would stop work on the Project on August 21, 2008:

> Attached hereto is APCO Construction's Notice of Stopping Work and Notice of Intent to Terminate Contract for nonpayment. As of 5:00p.m., Thursday, August 21,.2008 all work in furtherance of the subcontracts you have with APCO CONSTRUCTION on the Manhattan West project is to stop until you are advised otherwise, in writing, by APCO CONSTRUCTION... If a prime contractor terminates an agreement pursuant to this section, all such lower tiered subcontractors may terminate their agreements with the prime contractor... Pursuant to statute, APCO CONSTRUCTION is only stopping work on this project. At this time it has not terminated its contract with Gemstone. As such, all subcontractors, until advised in writing by APCO CONSTRUCTION, remain under contract with APCO CONSTRUCTION.[101]

98. On August 21, 2008 APCO also provided Gemstone with written notice of APCO's intent to terminate the Contract as of September 5, 2008.[102]

99. APCO's last work on the Project was August 21, 2008.[103]

100. On August 22, 2008, APCO sent a letter to the Clark County Building Department advising that APCO was withdrawing as the general contractor for the Project.[104]

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[99] Exhibit 218-10; Testimony of Steven Parry (Camco), Day 5, pp. 31-32. Mr. Parry was Camco's project manager for the approximate four months that Camco worked on the Project. Testimony of Steven Parry (Camco), Day 5, p. 24.

[100] Testimony of Joe Pelan (APCO), Day 1, p. 33.

[101] Exhibit 23; Testimony of Joe Pelan (APCO), Day 1, p. 32.

[102] Exhibit 23.

[103] Testimony of Brian Benson (APCO), Day 3, p. 50; Testimony of Joe Pelan (APCO), Day 1, p. 40.

[104] Exhibit 24; Testimony of Joe Pelan (APCO), Day 1, p. 40.

101. APCO was required to cancel its current building permits so the Project permits could be issued and transferred to Camco.[105]

102. In an August 28, 2008 letter, Gemstone advised that APCO was terminated for cause as of August 24, 2008:

> Furthermore, pursuant to the ManhattanWest's August 15, 2008 notice regarding Termination of Phase 1 for Cause, and APCO's failure to cure the breaches set forth in the notice prior to August 17, 2008, the Contract terminated for cause on August 24, 2008. Consequently, pursuant to Section 10.02(c) of the Contract, APCO is not entitled to receive any further payments until the Work [as defined in the Contract] is finished. Later today, Gemstone will issue joint checks to the subcontractors pursuant to the June Progress Payment; however, payment will not include any fees or general conditions to APCO.[106]

103. APCO contested Gemstone's purported termination and APCO's evidence was uncontested on that issue that it was not in default.[107]

104. APCO properly terminated the Contract for cause in accordance with NRS 624.610 and APCO's notice of termination since Gemstone did not pay the June Application, as of September 5, 2008.[108]

105. Helix and CabineTec both received a copy of the termination letter.[109] APCO considered its notice of termination to be effective as of September 5, 2008.[110]

106. But Gemstone proceeded with the Project as if it had terminated the Contract with APCO.[111] APCO was physically asked to leave the Project as of the end of August, 2008.[112]

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[105] Testimony of Joe Pelan (APCO), Day 1, p. 100.
[106] Exhibit 27; Testimony of Joe Pelan (APCO), Day 1, p. 41.
[107] Testimony of Joe Pelan (APCO), Day 1, p. 42.
[108] Exhibit 28; Testimony of Joe Pelan (APCO), Day 1, pp. 73 and 80.
[109] Exhibit 28; Testimony of Bob Johnson (Helix), Day 1, p. 113.
[110] Testimony of Joe Pelan (APCO), Day 1, pp. 42-43.
[111] Testimony of Joe Pelan (APCO), Day 1, pp. 100-101; Exhibit 29.

107. And all subcontractors received notice from Gemstone that APCO was terminated on August 26, 2008 and would not be returning to the Project.[113]

E. Gemstone owed APCO $1.4 million when APCO left the Project.

108. Even though the subcontractors had received all amounts billed through August 2008, Gemstone owed APCO $1,400,036.75 for APCO's June, July, and August 2008 payment applications.[114]

109. Gemstone also owed APCO $200,000.00 from various reimbursements.[115]

110. APCO has never received payment in any form from any entity for these pay applications or the $200,000.00 in reimbursements.[116]

111. The $1,400,036.75 does not reflect any of the retention that Gemstone withheld from APCO on the Project because the retention never became due.[117]

112. Ultimately, Gemstone would not accept APCO's final August 2008 pay application.[118]

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[112] Testimony of Joe Pelan (APCO) Day 3, p. 150.

[113] Exhibit 118.

[114] Exhibit 320/321, Summary of June, July and August 2008 payment applications to Gemstone that were not paid; Testimony of Joe Pelan (APCO) Day 1, p. 67; Testimony of Mary Jo Allen (APCO) Day 3, p. 144. Exhibit 4 is APCO's June Application. Testimony of Mary Jo Allen (APCO), Day 3, p. 124. APCO's share of the June Pay Application was $700,802.90, which was not paid. Testimony of Mary Jo Allen (APCO), Day 3, pp. 125-127. Exhibit 8 is APCO's July pay application. Testimony of Mary Jo Allen (APCO), Day 3, p. 125. APCO's share of the July 2008 pay application was $431,183.67, which was not paid. Testimony of Mary Jo Allen (APCO), Day 3, pp. 125-127. Exhibit 31 was APCO's August 2008 pay application and its final pay application. Accordingly, the August 2008 application shows everything that was done by APCO and its subcontractors through the end of August 2008. Testimony of Mary Jo Allen (APCO) Day 3, p. 135. APCO's share of the August 2008 pay application was $268,050.18, which was not paid. Testimony of Joe Pelan (APCO) Day 1, p. 46; Testimony of Mary Jo Allen (APCO), Day 3, pp. 126-127. In total, Gemstone owed APCO $1,400,036.75 for its last three pay applications. Testimony of Mary Jo Allen (APCO), Day 3, p. 122.

[115] Testimony of Mary Jo Allen (APCO), Day 3, p. 127.

[116] Testimony of Mary Jo Allen (APCO), Day 3, p. 127.

[117] Testimony of Mary Jo Allen (APCO), Day 3, p. 127.

[118] Testimony of Joe Pelan (APCO), Day 1, pp. 44-45. Exhibit 31.

113. So Camco submitted APCO's August 2008 billing so APCO's subcontractors would get paid.[119]

114. Camco's August 2008 pay application tracked the full retention from the Project (including APCO's)[120] and APCO's full contract amount.[121]

115. As of its last pay application, APCO believed it was 76% complete with the Project.[122]

116. Despite the amounts owed to APCO, the evidence was uncontested that the subcontractors received all of their billed amounts, less retention, up through August 2008.[123]

F. APCO did not terminate the Helix or CabineTec Subcontracts.

117. During this dispute, APCO did not terminate the Helix or CabineTec subcontracts,[124] but advised its subcontractors that they could suspend work on the Project in accordance with NRS Chapter 624.[125]

118. If APCO wanted to terminate its subcontractors, it had to do so in writing.[126]

119. Helix admitted it knew APCO was off the Project as of August 28, 2008[127] and that neither APCO nor Helix terminated the Helix Subcontract.[128]

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[119] Exhibit 218; Testimony of Joe Pelan (APCO), Day 1, pp. 43-44.

[120] Testimony of Joe Pelan (APCO), Day 1, p. 44; Exhibit 218-2.

[121] Exhibit 218-10.

[122] Exhibit 31; Testimony of Joe Pelan (APCO) Day 1, p. 45.

[123] Testimony of Mary Jo Allen (APCO) Day 3, pp. 127-129 and 144; Testimony of Andy Rivera (Helix) Day 2, pp. 73 and 75; Testimony of Joe Pelan (APCO) Day 3, p. 150; Exhibit 26; Exhibit 152; Testimony of Joe Pelan (APCO) Day 1, pp. 26, 46, 67 and 82.

[124] Testimony of Joe Pelan (APCO), Day 1, p. 39.

[125] Exhibit 23.

[126] Testimony of Joe Pelan (APCO) Day 1, p. 71.

[127] Testimony of Andy Rivera (Helix) Day 2, p. 62.

[128] Testimony of Joe Pelan (APCO) Day 1 at p. 126; Testimony of Bob Johnson (Helix) Day 2, p. 33.

120. Additionally, Helix admitted it never issued a stop work notice to APCO pursuant to NRS 624 because it had no payment disputes with APCO.[129]

121. In fact, per Gemstone's notice dated August 15, 2008, Gemstone gave APCO notice that it exercised its right under Contract Section 10.04 to accept an assignment of the APCO subcontracts.[130]

122. Accordingly, any purported termination of a subcontract by APCO would have breached the Contract.[131]

123. During August 2008, subcontractors on the Project were getting information directly from Gemstone.[132]

124. Helix and CabineTec both continued work on the Project for Gemstone and Camco, and submitted their August billings to Camco.[133]

G. Status of the Project when APCO was off the Project

125. Before APCO was asked to leave the Project on August 19 and 20, 2008, APCO documented the as-built conditions and confirmed that Helix and CabineTec were not anywhere close to completing their respective scopes of work.[134]

126. So the evidence was undisputed that at the time APCO left the Project, Gemstone did not owe APCO or the subcontractors their retention.

. . . . .

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[129] Testimony of Bob Johnson (Helix) Day 1, p. 127.

[130] Exhibit 13.

[131] Testimony of Joe Pelan (APCO) Day 1, p. 75.

[132] Testimony of Andy Rivera (Helix) Day 2, p. 76.

[133] Exhibit 29; Exhibit 173, Helix's first payment application to Camco; Exhibits 182/185, CabineTec's first payment application to Camco.

[134] Testimony of Brian Benson (APCO) Day 3, pp. 50-58, 63-64 and 97. Those videos are a correct and accurate representation and reproduction of the status of the Project on August 19 and August 20, 2008. Testimony of Brian Benson (APCO) Day 3, p. 52.

H. Camco became the Prime Contractor.

127. Camco and Gemstone had several meetings and Gemstone contracted with Camco to complete the Project on August 25, 2008.[135]

128. In terms of the plans, specifications and technical scope of work, Camco's work was the same as APCO's.[136]

129. In fact, Camco used the same schedule of values and cost coding that APCO had been using on the Project.[137]

130. Camco obtained permits in its own name to complete the Project.[138]

131. Camco's Steve Parry confirmed that Exhibit E to the Camco contract represented the state of the Project when Camco took over.[139]

132. Gemstone and Camco estimated the Project to be 74% complete for Phase 1.[140] Those estimates also confirmed that:

- The first floor drywall taping in building 8 was 70% complete.[141]
- The first floor drywall taping in building 9 was 65% complete.[142]

133. Among other things, the Camco contract required that Camco "shall engage the Third-Party Service Providers listed on Exhibit C (the "Existing Third-Party Service Providers)."[143]

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[135] Exhibit 162, Camco/Gemstone Prime Contract; Testimony of Steve Parry (Camco) Day 5, pp. 25-26.

[136] Exhibit 162; Testimony of Joe Pelan (APCO) Day 1, pp. 45 and 98; Testimony of Steve Parry (Camco) Day 5, p. 31.

[137] Testimony of Steve Parry (Camco) Day 5, pp. 30-31.

[138] Testimony of Steve Parry (Camco) Day 5, p. 37.

[139] Testimony of Steve Parry (Camco) Day 5, p. 27.

[140] Exhibit 218, p. 10; Testimony of Steven Parry (Camco) Day 5, p. 31-32.

[141] Exhibit 160-3.

[142] Exhibit 160-3.

[143] Exhibit 162-2.

134. Helix and CabineTec are both listed as Existing Third-Party Service Providers on Exhibit C.[144]

135. And Camco had worked with Helix before.[145]

136. Camco's Steve Parry admitted that Camco was assuming the subcontracts that APCO had with Helix and CabineTec:

> [Exhibit 162 was on the elmo]
> Q. ..I've highlighted a sentence that says, "General contractor shall engage third-party service providers." Do you see that?
> A. Yes.
> Q. Okay. What did you understand that to mean?
> A. That we would use subcontractors on the site that had already been under contract to perform work on the project.
> Q. Okay. So you were assuming the Subcontracts that APCO had issued on the Project; is that right?
> A. Yes.
> Q. And, sir, if you would, turn to Exhibit C within the exhibit. Those assumed contracts from APCO included CabineTec and Helix; correct?
> A. Yes.
> Q. And, sir, if you would, turn to Exhibit C within the exhibit. Those assumed subcontracts from APCO included CabineTec and Helix; correct?
> A. Yes.[146]

137. After Camco became the general contractor, it was responsible to pay subcontractors for work performed under it.[147]

138. Camco never had any contact or involvement with APCO on the Project,[148] nor did APCO provide any direction or impose any scheduling requirements on subcontractors proceeding with their work.[149]

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[144] Exhibit 162-23.

[145] Testimony of Steve Parry (Camco) Day 5, pp. 13-14.

[146] Testimony of Steve Parry (Camco) Day 5, p. 26.

[147] Testimony of Joe Pelan (APCO) Day 1, p. 99.

[148] Testimony of Steve Parry (Camco) Day 5, p. 27.

[149] Testimony of Joe Pelan (APCO) Day 1, p. 97; Testimony of Joe Pelan (APCO) Day 3, p. 150; Testimony of Steve Parry (Camco) Day 5, p. 27.

139. APCO played no role in the pay application process or the actual field work on the Project from September-December 2008.[150]

140. And no Helix nor CabineTec representative ever approached APCO with questions or concerns about proceeding with work on the Project after APCO's termination.[151]

141. So APCO did not receive any benefit from the work or materials that Helix or CabineTec performed or provided to the Project after August 21, 2008.[152]

142. Camco's first pay application was for the period through August 31, 2008.[153]

143. That billing reflected Gemstone retainage account for APCO's work:

> Q. Now, I have highlighted the retainage line item of $5,337,982.74 [on Exhibit 218]. Do you see that?
>
> A. Yes.
>
> Q. What did that figure represent?
>
> A. The retainage that was being withheld on the Project.
>
> Q. And who was the retainage being withheld by?
>
> A. Gemstone, the owner.
>
> . . .
>
> Q. Okay. So my point simply was what you're depicting here in the retainage is the accounting of the retainage that was withheld from APCO as you're going forward on the Project.
>
> A. That's correct.[154]

So all parties knew that the subcontract retention amounts were maintained with Gemstone after APCO was terminated.

I. CabineTec entered into a ratification agreement with Camco.

144. After APCO left the Project, CabineTec signed a ratification agreement with Camco whereby CabineTec agreed to complete its original scope of work for Camco.[155]

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[150] Testimony of Joe Pelan (APCO) Day 1, p. 98.

[151] Testimony of Joe Pelan (APCO) Day 1, p. 98.

[152] Testimony of Joe Pelan (APCO) Day 3, pp. 149-150.

[153] Testimony of Steve Parry (Camco) Day 5, p. 29.

[154] Testimony of Steve Parry (Camco) Day 5, p. 30.

145. CabineTec understood the ratification to mean that "you guys [APCO] were stepping out and Camco was stepping in."[156]

146. CabineTec further clarified its understanding of the ratification agreement as follows:

> Q. Okay. Sir, but going forward from and after the point that CabineTec signed the ratification agreement with Camco, you knew and understood that Camco was going to be the "contractor", as that term was used in the original subcontract that CabinetTec had for the project, correct?
> A. So APCO was going away and Camco was coming on. That's what was happening.[157]

147. In addition, the signed ratification agreement contained the following terms:

- "B. Subcontractor and Camco desire to acknowledge, ratify and agree to the terms of the Subcontract Agreement, whereby Camco will replace APCO as the "Contractor" under the Subcontract Agreement but, subject to the terms of this Ratification, all other terms and conditions of the Subcontract Agreement will remain in full force and effect."[158]
- The ratification agreement acknowledged that $264,395.00 of work remained to be finished on Building 8 and $264,395.00 on Building 9.[159]
- "5. Ratification. Subcontractor and Camco agree that (a) the terms of the Subcontract Agreement (as amended by this Ratification and including all Amendments, Previously Approved Change Orders, and the Camco Schedule) will govern their relationship regarding the Project, (b) Camco will be the "Contractor" under the Subcontract Agreement, and (c) Subcontractor and Camco agree to perform and fulfill all of the executory terms, covenants, conditions and obligations required to be performed and fulfilled thereunder by Subcontractor and Camco, respectively."160

Accordingly, all retention and future payments to CabineTec, which were executory obligations, were Camco's responsibility.

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[155] Exhibit 3096; Testimony of Nicholas Cox (CabineTec) Day 3, p. 34; Testimony of Mr. Thompson (CabineTec) Day 5, p. 60.

[156] Testimony of Nicholas Cox (CabineTec) Day 3, p. 35.

[157] Testimony of Nicholas Cox (CabineTec) Day 3, p. 36.

[158] Exhibit 183-1.

[159] Exhibit 183-2.

148. After Gemstone could no longer pay Camco, CabineTec filed a complaint against APCO and Camco and alleged that it entered into a ratification agreement with Camco:

> 10. On or about August 26, 2008, pursuant to Gemstone's request CABINETEC entered into a Ratification and Amendment of Subcontract Agreement (the "Ratification") with CAMCO, whereby CAMCO agreed to the terms of the APCO Subcontract and to replace APCO as the "Contractor" under the APCO Contract. . .
> 14. CABINETEC entered into the Ratification with CAMCO, pursuant to Gemstone's request, wherein CAMCO agreed to pay CABINETEC for the services and materials on the Project.
> 15. Pursuant to, and in reliance upon, the aforementioned Subcontract, Ratification and representations, CABINETEC performed the work of providing services and materials (the "Work.")...[161]

APCO had no liability for the materials CabineTec provided to Camco and Gemstone after termination.

149. The fact is, APCO paid (and even overpaid) CabineTec for materials delivered to the Project while APCO was contractor.[162]

150. CabineTec did not dispute this overpayment at trial.

151. CabineTec submitted two invoices while APCO was on the Project.[163]

152. Exhibit 148 is CabineTec's first invoice to Camco for $70,836.00.[164]

153. CabineTec's second invoice is for $72,540.00.[165]

154. The total amount due to CabineTec, less retention, was $129,038.40.[166]

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[160] Exhibit 172-5.

[161] Exhibit 156 at ¶ 10-15.

[162] Testimony of Mary Jo Allen (APCO) Day 3, pp. 131-132.

[163] Exhibits Nos. 148, 150, 151, and 320-321, Calculation of CabineTec overpayment; Testimony of Mary Jo Allen (APCO) Day 3, p. 130.

[164] Testimony of Mary Jo Allen (APCO) Day 3, p. 130.

[165] Testimony of Mary Jo Allen (APCO) Day 3, p. 131.

[166] Testimony of Mary Jo Allen (APCO) Day 3, p. 131.

155. But APCO actually paid CabineTec a total of $161,262.00 for these two invoices.[167]

156. As such, CabineTec was overpaid $32,223.60 by APCO on the Project.

157. CabineTec did not submit a pay application for August 2008.[168]

158. APCO is entitled to credit for this over payment.

J. CabineTec Claims retention against APCO.

159. When CabineTec originally filed suit CabineTec disclosed $19,547.00 in damages against APCO in its complaint:

> "50. As a result of the foregoing, and in accordance with the principles of equity and common law, CABINETEC is entitled to judgment in its favor, and against APCO in the amount of $19,547.00, together with interest thereon at the highest legal rate."[169]

160. And, CabineTec's initial and first supplemental disclosures only disclosed $30,110.95 in damages against APCO: "...National Wood seeks to recover those damages claimed by CabineTec in its complaint in intervention against APCO in the amount of $30,110.95 and CAMCO in the amount of $1,125,374.94..."[170] The $30,110.95 represented $19,547.00 in alleged retention, and $10,563.95 in interest and fees.[171]

161. Those were the only two disclosures CabineTec made before the close of discovery, as was extended by the Court. Then on the eve of trial, CabineTec attempted to disclose and seek $1,154,680.40 in damages against APCO.[172]

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[167] Testimony of Mary Jo Allen (APCO) Day 3, p. 131.

[168] Testimony of Mary Jo Allen (APCO) Day 3, p. 134.

[169] Exhibit 156-8.

[170] Exhibit 157 (CabineTec's Initial Disclosure); Exhibit 158 (CabineTec's First Supplemental Disclosure), and Exhibit 159 (CabineTec's Second Supplemental Disclosure).

[171] Compare Exhibit 156, CabineTec's Complaint to Exhibit 157, CabineTec's Initial Disclosure.

[172] Exhibit 159-6.

162. Aside from the late disclosure there is no basis for that amount as it is undisputed that CabineTec was paid every dollar it billed APCO, less retention, notwithstanding the overpayment.[173]

K. Helix's claim for $505,021.00 in retention.

163. Helix's designated PMK and Project Manager, Andy Rivera, confirmed that Helix's only claim in this litigation against APCO was for the retention of $505,021.00.[174]

164. Helix's counsel admitted this limited claim in its opening statement.[175]

165. And then at trial, Mr. Rivera confirmed Helix was only seeking retention and not the unpaid invoices submitted to Camco:

> Q. Sir, could you pull out Exhibit 44. And I want to make sure my record's clear. Exhibit 44 that I marked is, in fact, the same summary that was found in Exhibit 535, page 252, that you and Mr. Zimbleman went over; is that—
>
> A. Correct.
>
> Q. Okay. And does Exhibit 44 represent the damages that you are seeking from APCO in this matter?
>
> A. Yes.
>
> Q. And do you recall if you were designated as the person most knowledgeable for one of the topics being the damages that Helix was seeking from APCO in these proceedings, correct?
>
> A. Correct.
>
> Q. And would you agree that as the PMK, you identified a figure of $505,021 as the amount that Helix in this lawsuit claims APCO owes it, correct?
>
> A. Correct.
>
> Q. And there are no other amounts that you identified in your PMK depo as being APCO's liability on this Project, correct?
>
> A. Correct.
>
> Q. Okay. And we are in agreement that the 505—that's your handwriting, where you wrote: Retention?
>
> A. Yes.

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[173] Exhibit 147 summarizing payments and releases.

[174] Exhibit 279, Testimony of Andy Rivera (Helix) Day 2, pp. 63-65; Helix's PMK Deposition at p. 52.

[175] Testimony, Day 1 at p. 10. ("...Helix remains to be unpaid $505,021, while APCO was the general contractor. This is to say amounts still owing from pay applications submitted to APCO, and yes, that is essentially our retention.").

Q. And would it be fair to conclude that that retention represents retention that had been accounted for and accrued while APCO was serving as the prime contract – prime contractor on the Project?

A. Yes.

Q. Prior to today has Helix ever billed APCO for that retention?

A. No. No. I'm sorry.

Q. Do you have any information to suggest that APCO ever received Helix's retention from Gemstone?

A. I would not know.

Q. Okay. You don't have any information to suggest that APCO has collected Helix's retention but not forwarded it on to Helix, correct?

A. Correct.

Q. Okay. And in light of your summary within Exhibit 44, would it be fair to conclude that all of the amounts that Helix billed to APCO were, in fact, paid but for retention?

A. Yes.[176]

166. Helix received direct payments from APCO through May 2008.[177]

167. After May 2008, Helix received payment for its APCO billings directly from NCS through joint checks to Helix and APCO, which APCO endorsed over to Helix.[178]

168. Helix's first billing to Camco was on September 19, 2008.[179]

169. Mr. Rivera admitted Helix is only seeking $505,021.00 in retention from APCO, which Helix never billed APCO.[180]

. . . . .

. . . . .

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[176] Testimony of Andy Rivera (Helix) Day 2, pp. 73-75.

[177] Testimony of Andy Rivera (Helix) Day 2, p. 61.

[178] Testimony of Andy Rivera (Helix) Day 2, pp. 61-64

[179] Exhibit 508, p. 1; Testimony of Andy Rivera (Helix) Day 2 at p. 65.

[180] Testimony of Andy Rivera (Helix) Day 2, pp. 50 and 58. Exhibit 501, p. 393 is the spreadsheet Helix created of payments it applied for and received from APCO. Helix's Mr. Rivera admitted Helix was paid a total of $4,626,186.11 on the Project by and through APCO, which reflected payment for work billed (and retention) through August 31, 2008. Testimony of Andy Rivera (Helix) Day 2, pp. 58-59; Exhibits 46-47,

L. **Retention never became due to Helix or CabineTec from APCO.**

170. As noted above, both the Helix Subcontract and the CabineTec Subcontract included an agreed upon retention payment schedule in Paragraph 3.8.

171. The evidence was undisputed, and even acknowledged by Helix and CabineTec, that the level of completion and other preconditions of the retention payment schedule were not met while APCO was the general contractor.

172. More specifically, Helix's Mr. Johnson admitted Helix did not meet the preconditions in Section 3.8 of the Subcontract to be entitled to retention:[181]

> Q. Well, let me ask it this way: Did Helix satisfy any of these preconditions found in paragraph 3.8 while APCO was the general contractor on the project?
> A. Not to my knowledge.[182]

173. CabineTec's Mr. Thompson admitted that the buildings had to be drywalled and painted before the cabinets were installed[183] and he had no documentation (daily reports, photographs, etc.) that would confirm that CabineTec ultimately installed cabinets in Phase 1 for APCO.[184]

174. It is undisputed that neither Helix nor CabineTec presented *any* testimony that they met the valid conditions precedent to payment to be entitled to retention.

175. *See Lucini-Parish Ins. v. Buck,*[185] (a party who seeks to recover on a contract has the burden of establishing any condition precedent to the respective contract).

176. Instead, the Court saw pictures[186] and videos[187] confirming that Helix's and CabineTec's work was not completed.

Helix May and June billings; Exhibit 49-50; APCO Checks to Helix, Exhibit 58, Exhibit 59, Exhibit 60, Exhibit 61, Exhibit 66, Exhibit 75.

[181] Testimony of Bob Johnson (Helix) Day 2, pp. 36-37.

[182] Testimony of Bob Johnson (Helix) Day 2, p. 19.

[183] Testimony of Mr. Thompson (CabineTec) Day 5, p. 69.

[184] Testimony of Mr. Thompson (CabineTec) Day 5, p. 69.

[185] 108 Nev. 617, 620, 836 P.2d 627, 629 (1992).

177. The Court also heard unrefuted testimony that APCO was never paid from Gemstone for Helix's or CabineTec's retention.[188]

178. The fact is APCO and its subcontractors never got to the point where they could request retention while APCO was the contractor.[189]

179. To that end, Helix's Mr. Johnson admitted that Helix did not present a claim to APCO for any additional compensation for disputed claims or changes while APCO was on the Project. [190]

180. Helix's Mr. Rivera admitted Helix *has never* billed APCO for retention, and that all amounts that Helix did bill APCO were paid, less retention.[191]

181. The fact that Helix did not bill retention confirms that Helix recognized that retention never became due from APCO under the retention payment schedule which governed the same.

182. Both Helix and CabineTec rolled their retention account over to Camco and Gemstone in their post-APCO billings as it was truly a Project and Gemstone liability.[192]

183. APCO's responsibility for retention under the subcontract's retention payment schedule was governed by the same.

184. That is confirmed by Helix's and Camco's conduct at the Project level through their pay applications.[193]

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[186] Exhibit 32-38, 51-57, 108-114, 62-65, 67-74, 125-132, Pictures of Status of Project; Testimony of Brian Benson (APCO) Day 3, pp. 53-71.

[187] Exhibits 17-22, Videos of Project.

[188] Testimony of Mary Jo Allen (APCO) Day 3, p. 144; Testimony of Joe Pelan (APCO) Day 1, p. 26.

[189] Testimony of Joe Pelan (APCO) Day 1, pp. 60 and 82; Testimony of Bob Johnson (Helix) Day 2, pp. 36-37; Testimony of Joe Pelan (APCO) Day 3, p. 151.

[190] Testimony of Bob Johnson (Helix) Day 2, p. 31.

[191] Testimony of Andy Rivera (Helix) Day 2, p. 74; Exhibits 43, 50, 61 and 75.

[192] Exhibits 170-177, Helix billings to Camco and Exhibit 185, CabineTec's billings to Camco; Testimony of Mary Jo Allen (APCO) Day 3, pp. 129-130; Testimony of Andy Rivera (Helix) Day 2, p. 74.

M. **Similarly, APCO never earned or received its retention.**

185. Gemstone and/or its lender maintained the retention account.[194]

186. APCO's August 2008 pay application did not bill Gemstone for APCO's retention.[195]

187. In fact, APCO never billed Gemstone for retention[196] because APCO had not earned the retention and thus was not entitled to it.[197]

188. And APCO never billed or received the retention funds from Gemstone for any of the subcontractors.[198]

189. APCO never received CabineTec's or Helix's retention from Gemstone.[199]

190. Helix's Mr. Johnson admitted that Gemstone, not APCO, was holding its retention.[200]

191. And Helix admitted it had no information to suggest that APCO was ever paid Helix's retention.[201]

192. Neither Helix nor CabineTec ever billed APCO for any of the materials or work it performed after Camco signed its prime contract with Gemstone.[202]

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[193] Compare Exhibit 58, Helix's August 2008 pay application to APCO, to reflecting $513,120.71 in retention to Exhibit 173, Helix's September 2008 payment application to Camco reflecting $553,404.81 in retention. See also, Exhibit 151 pgs. 1, 2 CabineTec's last pay application to APCO for $179,180.00 reflecting $17,918.00 in retention, to Exhibit–185, CabineTec's first payment application to Camco showing approved amount of $537,404.80 less $53,740.48 in retention. See also Exhibit 30 (Camco's August 2008 draw request confirming retention was being held for the entire project).

[194] Testimony of Joe Pelan (APCO) Day 1, p. 30.

[195] Exhibit 31; Testimony of Joe Pelan (APCO) Day 1, p. 45.

[196] Testimony of Joe Pelan (APCO) Day 1, p. 30.

[197] Testimony of Joe Pelan (APCO) Day 1, p. 83.

[198] Testimony of Mary Jo Allen (APCO) Day 3, p. 128.

[199] Testimony of Joe Pelan (APCO) Day 3, p. 150.

[200] Testimony of Bob Johnson (Helix) Day 2, p. 19.

[201] Testimony of Bob Johnson (Helix) Day 2, p. 20.

[202] Testimony of Joe Pelan (APCO) Day 1, p. 97.

193. And notably, neither Helix nor CabineTec billed APCO nor submitted a claim letter for the retention they now claim.[203]

194. In fact, CabineTec actually billed Camco for the retention it incurred under APCO.[204]

N. Helix also entered into a ratification agreement with Camco.

195. Helix's Project Manager, Mr. Rivera understood that Gemstone purported to terminate the Contract:

> Q. Wouldn't it be fair to say that based on communications, both written and verbal, that you received from APCO and/or Gemstone, you knew that Gemstone had purported to terminate APCO's prime contract?
> A. We knew they were having issues.
> Q. Okay. And those issues had culminated in APCO purporting to terminate the prime contract and/or Gemstone purporting to terminate the prime contract, correct?
> A. Correct.205

196. In fact, during the August 2008 timeframe, Helix was getting information directly from Gemstone.[206]

197. Mr. Rivera admitted Helix was copied on certain communications between APCO and Gemstone:

> Q. And wouldn't it be fair to say that you received copies of certain communications from APCO to the owner, Gemstone, whereby APCO indicated that we're having payment issues and we're giving notice of our intent to exercise statutory rights to suspend and/or terminate?
> A. Something to that effect, yes.[207]

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[203] Testimony of Joe Pelan (APCO) Day 1, p. 97; Testimony of Mary Jo Allen (APCO) Day 3, p. 128 (as to CabineTec); Testimony of Joe Pelan (APCO) Day 3, p. 150.

[204] Exhibit 3103 confirming CabineTec billed Camco for its retention. Testimony of Nicholas Cox (CabineTec) Day 3, p. 38-39.

[205] Testimony of Andy Rivera (Helix) Day 2, p. 75.

[206] Testimony of Andy Rivera (Helix) Day 2, p. 76.

[207] Testimony of Andy Rivera (Helix) Day 2, p. 76.

. . . .

Q. Okay. But do you recall receiving APCO generated correspondence indicating to the owner, which was sent to subcontractors as well, that APCO was suspending and/or terminating its work, correct?

A. Correct.[208]

198. Mr. Rivera also admitted Helix was performing work under Gemstone's direction by August 26, 2008:

Q. And from and after about August 26, 2008, Helix was taking its direction from Gemstone and/or Camco, correct?

A. Gemstone.

Q. Okay. APCO was not directing, requesting any work on behalf of Helix after September 5, 2008, correct?

A. Correct.

Q. And based on your personal involvement with Gemstone and Camco, did you understand that, in fact, Camco was replacing APCO as the prime contractor?

A. At that time did not know exactly how that was—the agreement was going to be.

Q. Did you come to find out?

A. Yes.

Q. that was, in fact, the case?

A. Yes.[209]

199. Helix was directed to hook up power to the Camco trailer on August 26, 2008.[210]

200. Gemstone provided Helix with the Camco subcontract and Camco pay applications,[211] and directed Helix to start directing its payment applications to Camco.[212]

201. On August 26, 2008 Camco sent Helix a checklist for starting work.[213] Among the provisions included:

- **RETENTION MONIES** Final retention monies will only be released to Camco Pacific from Owner when all Punch list

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[208] Testimony of Andy Rivera (Helix) Day 2, p. 77.

[209] Testimony of Andy Rivera (Helix) Day 2, pp. 76-77. *See also* Testimony of Bob Johnson (Helix) Day 2, p. 25.

[210] Exhibit 171; Testimony of Bob Johnson (Helix) Day 2, p. 25.

[211] Exhibit 170.

[212] Testimony of Andy Rivera (Helix) Day 2, p. 66.

[213] Exhibit 170.

Items, Contract Items, and Close-Out Documents have been fully completed and inspected by the owner. Any delay by a single Subcontractor in completing this will delay the entire project's final payment. PLEASE DO NOT DELAY IN COMPLETING YOUR PUNCHLIST ITEMS. Exhibit 170-3.

. . .

- D. **Final Payment**. Subcontractor shall not be entitled to payment of the balance of the Contract Price, including, without limitation, the Retainage, until (1) the Contract Work has been completed to the satisfaction of Contractor, (2) Subcontractor has submitted to Contractor an invoice for the final payment accompanied by (i) a final complete list of all suppliers and subcontractors whose materials or services have been utilized by Subcontractor, (ii) all closeout documents including, warranties, guarantees, as-builts, drawings, operating and maintenance manuals and such other items required of Subcontractor have been provided and such have been accepted by Owner, (iii) executed unconditional lien releases and waivers from Subcontractor and all of its mechanics, subcontractors, and suppliers for the Contract Work covered by all preceding progress payments, and (iv) executed unconditional lien releases and waivers upon final payment from all mechanics, subcontractors, and suppliers who have previously received final payment, and conditional lien releases and waivers upon final payment from Subcontractor and each mechanic, subcontractor, and supplier from which an unconditional lien release and waiver upon final payment has not been submitted to Contractor, (3) Contractor has received the corresponding final payment from Owner, (4) Contractor has received evidence of Subcontractor's insurance required to be in place, (5) 45 days have elapsed after a Notice of Completion has been recorded or if a valid Notice of Completion is not recorded, upon Subcontractor's receipt of a written notice of acceptance of the Contract Work that shall be given by Contractor not later than 91 days after Contractor determines in good faith that the Contract Work has been performed completed and in acceptable manner and (6) all outstanding disputes related to the Project have been resolved, and any liens against the Project have been removed.[214]

[214] Exhibit 170-11, 170-12.

Having received these requirements, Helix continued on as the electrical subcontractor for Camco after APCO's termination.

202. Helix's Andy Rivera admitted Helix's technical scope of work remained the same under Camco:

> Q. Would it be fair to conclude the technical scope of work remained the same as you transitioned to work with Camco—
>
> A. Yeah.
>
> Q. –for Helix?
>
> A. Yes.[215]

203. During the transition of APCO to Camco, Helix had a meeting with Gemstone.[216]

204. The purpose of that meeting was to: "represent that work was still proceeding, nothing had changed with our contracts with the current APCO relationship, and that we were to take direction for construction from Camco, and they wanted to negotiate a contract."[217]

205. Helix never sent APCO a letter or requested that APCO clarify or provide any information to Helix on the status of its relationship to the Project.[218]

206. Camco presented Helix with a ratification agreement.[219]

207. It was Camco's intent and understanding that it was replacing APCO in the Helix-APCO subcontract.[220]

208. Helix had a copy of the ratification agreement by at least September 3, 2008.[221]

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[215] Testimony of Andy Rivera (Helix) Day 2, p. 78.

[216] Testimony of Bob Johnson (Helix) Day 2, p. 22.

[217] Testimony of Bob Johnson (Helix) Day 2, pp. 22-23.

[218] Testimony of Bob Johnson (Helix) Day 2, p. 23.

[219] Testimony of Bob Johnson (Helix) Day 1, p. 124.

[220] Testimony of Steve Parry (Camco) Day 5, pp. 28, 29 and 60.

[221] Exhibit 172. Testimony of Bob Johnson (Helix) Day 2, p. 27.

209. Helix understood the purpose of the ratification agreement as follows: "...they [Camco] were stepping in as construction management for the project and that they were using that agreement in order to proceed with – hold us as the subcontractor going forward."[222]

210. Camco's understanding was the same, i.e. the ratification agreement formed the basis of Camco's agreement in allowing Helix to proceed on the Project.[223]

211. Helix continued working on the Project after receiving the ratification agreement from Gemstone.[224]

212. Camco sent Helix the ratification agreement with a September 4, 2008 letter that included the following representations: "The conditional acceptance of this work is based on the execution of a standard Camco Pacific Ratification Agreement... We have provided you a copy of the Camco Pacific Ratification Agreement for your review and acceptance."

213. The Ratification Agreement contained the following additional terms:

- "B. Subcontractor and Camco desire to acknowledge, ratify and agree to the terms of the Subcontract Agreement, whereby Camco will replace APCO as the "Contractor" under the Subcontract Agreement but, subject to the terms of this Ratification, all other terms and conditions of the Subcontract Agreement will remain in full force and effect."
- "5. Ratification. Subcontractor and Camco agree that (a) the terms of the Subcontract Agreement (as amended by this Ratification and including all Amendments, Previously Approved Change Orders, and the Camco Schedule) will govern their relationship regarding the Project, (b) Camco will be the "Contractor" under the Subcontract Agreement, and (c) Subcontractor and Camco agree to perform and fulfill all of the executory terms, covenants, conditions and obligations required to be performed and fulfilled thereunder by Subcontractor and Camco, respectively."[225]

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[222] Testimony of Bob Johnson (Helix) Day 1, p. 124.

[223] Exhibit 172. Testimony of Steve Parry (Camco) Day 5, p. 29.

[224] Testimony of Bob Johnson (Helix) Day 2, p. 28.

[225] Exhibit 172-5.

214. Helix admitted it entered into a ratification agreement with Camco on September 4, 2008 to continue on and complete the APCO scope of work.[226]

215. Helix even added a document to the ratification entitled "Helix Electric's Exhibit to the Ratification and Amendment."[227]

216. The Helix Exhibit to the Ratification and Amendment contained language confirming that APCO was removed as the general contractor and that Helix submitted $994,025.00 in change orders to APCO prior to August 26, 2008, the date Camco was using for its ratification agreement.[228]

217. Helix included a total contract price of $5.55 million for the Project, which was its original contract price with APCO for Phase 1, and added $480,689.00 as approved change orders under APCO to the total contract price.[229]

218. The proposed Helix Amendment to the ratification agreement also included the following term: "All close out documents must be turned in before Camco Pacific can release final payment." [230]

219. And although Helix has not produced a signed copy of the ratification agreement, Helix has admitted entering into its ratification and amended subcontract agreement in its complaint as follows:

> 18. On or about September 4, 2008, Helix entered into the Ratification and Amendment of Subcontract Agreement ("CPCC Agreement") with Camco who replaced APCO as the general contractor on the Project, to continue the work for the Property ("CPCC Work").
> 19. Helix furnished the CPCC Work for the benefit of and at the specific instance and request of CPCC and/or Owner.

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[226] Exhibit 77, Helix Complaint, ¶18.

[227] Exhibit 170; Testimony of Bob Johnson (Helix) Day 2, p. 42.

[228] Exhibit 170; Testimony of Bob Johnson (Helix) Day 2, pp. 42-43.

[229] Exhibit 170-54; Testimony of Bob Johnson (Helix) Day 2, p. 44; Exhibit 169-8.

[230] Exhibit 169-1.

> 20. Pursuant to the CPCC Agreement, Helix was to be paid an amount in excess of Ten Thousand Dollars ($10,000.00) (hereinafter "CPCC Outstanding Balance") for the CPCC Work.
> 21. Helix furnished the CPCC Work and has otherwise performed its duties and obligations as required by the CPCC Agreement.
> 22. CPCC has breached the CPCC Agreement…
> CPCC breached its duty to act in good faith by performing the Ratification Agreement in a manner that was unfaithful to the purpose of the Ratification Agreement, thereby denying Helix's justified expectations…[231]

Helix's Mr. Johnson admitted that Exhibit 172, the Ratification Agreement, was the document that Helix referenced in its complaint (Exhibit 77) as the Ratification.[232]

220. Helix sought $834,476.45 against Camco.[233]

221. Helix also admitted it had a contract with Camco/Gemstone for $8.6 million in its lien documents.[234]

222. The scope of work that Helix and CabineTec undertook on the Project was the same as each had previously contracted with APCO for.[235]

223. Helix did not have any further communication with APCO after Camco took over the Project.[236]

224. That is because both knew that APCO was no longer involved and had no further liability.

225. In fact, both Helix and CabineTec rolled their retention over into the Camco billings.[237]

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[231] Exhibit 77.

[232] Testimony of Bob Johnson (Helix) at Day 2, p. 28.

[233] Testimony of Joe Pelan (APCO) Day 1 at p. 10.

[234] Exhibit 512; Testimony of Bob Johnson (Helix) at Day 2, p. 29.

[235] Exhibit 314 and Testimony of Bob Johnson (Helix) Day 2, p. 10.

[236] Testimony of Bob Johnson (Helix) Day 2, p. 14.

[237] Compare Exhibit 58, Helix's last pay application to APCO to Exhibit 173, Helix's first payment application to Camco. *See also* Exhibit 176 and 177 showing Helix's retention rolled over. See also, Exhibit 150, CabineTec's last pay application to APCO, to Exhibit 185, CabineTec's first payment application to Camco showing

226. Helix's Andy Rivera specifically admitted that it rolled its $505,000.00 in retention billings over to Camco.[238]

227. After Helix and CabineTec went to work for Camco, neither sent APCO any further pay applications or billings for work they performed on the Project.[239]

228. And it is undisputed that Helix submitted its September 2008 pay application for $354,456.90 to Camco.[240]

229. That pay application tracked Helix's full retainage of $553,404.81 for the Project, not just work completed under Camco.[241]

230. Helix also submitted its October 2008 billing for $361,117.44,[242] its November 2008 pay application for $159,475.68,[243] and its December 2008 billing for $224,805.30 to Camco. [244]

O. <u>Camco never completed the Project.</u>

231. Camco never finished the Project[245] and was never paid retention by Gemstone.[246]

232. In its letter to the subcontractors dated December 22, 2008, Camco advised the subcontractors as follows:

> [I]t has come to Camco Construction, Inc.'s attention that funding for the completion of the Manhattan West project (the

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CabineTec's retention rolled over. See also, Exhibit 30 (Camco's August 2008 draw request confirming retention was being held for the entire Project).

[238] Testimony of Andy Rivera (Helix) Day 2, p. 74.

[239] Testimony of Mary Jo Allen (APCO) Day 3, at pp. 127-128; Testimony of Andy Rivera (Helix) Day 2, p. 76.

[240] Exhibit 173-1.

[241] Exhibit 173-2

[242] Exhibit 176-2.

[243] Exhibit 177-4.

[244] Exhibit 178-4.

[245] Testimony of Steve Parry (Camco) Day 5, p. 36.

[246] Testimony of Steven Parry (Camco) Day 5, p. 36.

"Project") has been withdrawn. Camco recently received the following email from [Gemstone]...As a result, Gemstone does not have funds sufficient to pay out the October draw or other obligations...Based on the foregoing facts and circumstances, Camco has no other alternative but to immediately terminate all subcontracts on the Project, including the agreement with your company... you have acknowledged that Camco is not liable to you for payment unless and until Camco receives the corresponding payment from the Owner...Camco's contract with Gemstone is a cost plus agreement wherein the subcontracts and supplies were paid directly by Gemstone and/or its agent, Nevada Construction Services, based on the invoices and/or payment applications submitted through voucher control... Therefore, Camco has no contractual and/or statutory obligation to pay any claim that may be alleged by any of the subcontractors and/or suppliers on the Project... any claim for payment alleged against Camco will result in additional fees, costs ...Therefore, all claims for payment must be directed to and/or alleged against Gemstone and the Project.[247]

233. Camco's Parry was not able to tell if CabineTec billed Camco in August 2008, Exhibit 218 and Camco's first pay app to Gemstone.[248]

- Exhibit 220 is Camco's second pay application for the Project, through September 30, 2008.[249] That pay application accounted $6,004,763.00 in retention.[250] Camco's Parry admitted that Exhibit 220 does include billings from Helix to Camco that Camco was passing on to Gemstone.[251]
- Exhibit 221 is Camco's billing to Gemstone through October 31, 2008; reflecting a total retention of $6,928,767.84 in retention.
- Exhibit 163 is Camco's November 2008 billing, reflecting a total retention of $7,275,991.08.

234. Based on Camco's last billing,[252] Exhibit 163, Camco's best estimate of the work completed on Phase 1 was 86%.[253]

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[247] Exhibit 40 and Exhibit 39.

[248] Exhibit 218; Testimony of Steven Parry (Camco) Day 5, p. 34.

[249] Exhibit 220; Testimony of Steven Parry (Camco) Day 5, p. 32.

[250] Exhibit 220; Testimony of Steven Parry (Camco) Day 5, p. 32.

[251] Exhibit 220; Testimony of Steven Parry (Camco) Day 5, p. 33.

[252] Testimony of Steve Parry (Camco), Day 5, p. 36.

[253] Exhibit 163; Testimony of Steven Parry (Camco), Day 5, p. 36.

P. **The litigation.**

235. On September 9, 2008, APCO brought an action against Gemstone for breach of Contract and nonpayment.[254]

236. Gemstone counterclaimed alleging that APCO breached the Contract.[255]

237. On November 4, 2008, the Project lender confirmed that it was reviewing September's pay application, and confirmed that the subcontractors would be paid for the work performed for Camco.[256]

238. In December 2008 Gemstone suspended work on the Project and advised Camco and its various subcontractors that the lender was halting all financing for the Project.[257]

239. That led to the onslaught of liens and the related priority litigation.

240. On December 16, 2008, Camco officially terminated its prime contract with Gemstone:

> Pursuant to your notice to Camco on December 15, 2008, Gemstone (a) has lost its funding for the ManhattanWest project and (b) will be unable to meet its payment obligations pursuant to Article VI of the Engagement Agreement. Furthermore, Gemstone has failed to make payments to Camco pursuant to Article VI of the Engagement Agreement for October 2008, November 2008, and December 2008, and such failures are a material breach of the Engagement Agreement. As Gemstone has no means of curing such material breach in a timely manner, the Engagement Agreement is terminated for cause, effective December 19, 2008. Pursuant to our discussions, we understand that you agree with the termination and the effective date of termination.
>
> ...
>
> Pursuant to our discussions and with Gemstone's consent, Camco will immediately send notices to all of the subcontractors to terminate their subcontract agreements. In Camco's termination notice, we will ask the subcontractors to submit their payment applications to Camco. Camco will review the payment

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[254] Exhibit 219.

[255] Exhibit 226.

[256] Exhibit 138.

[257] Exhibit 48; Exhibit 138.

applications and, if they appear proper, Camco will forward them to Gemstone for payment.[258]

In response, Camco terminated the subcontracts with its subcontractors on December 22, 2008.[259]

241. On May 26, 2010, Judge Kathleen Delaney filed an Order Striking Defendant Gemstone Development West, Inc.'s Answer and Counterclaims, and Entering Default for failure to give reasonable attention to matters, failure to obtain new counsel, failure to appear at hearings.[260]

242. On June 6, 2013, APCO filed a motion for summary judgment against Gemstone. That Motion confirmed that APCO complied with all terms of the Agreement and that Gemstone materially breached the Agreement by, among other things: (1) failing to make payments due to APCO; (2) interfering with APCO's relationships with its subcontractors; (3) refusing to review, negotiate, or consider change order requests in good faith; (4) removing APCO from the Project without valid or appropriate grounds; and (5) otherwise breaching the terms of the Agreement.[261]

243. On June 13, 2013, the Court (Judge Susan Scann) granted that motion.[262] The record does not reflect an order or judgment.

244. APCO did not receive any funds associated with its work from June, July or August 2008 on the Project and never received its or any subcontractor's retention.

245. APCO did cooperate with Gemstone to see that all subcontractors, including Helix and CabineTec were paid all progress payments that were billed and due while APCO was in charge.

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[258] Exhibit 165.

[259] Exhibit 166-2.

[260] Docket at May 26, 2010 Order Striking Defendant Gemstone Development West, Inc.'s Answer and Counterclaims, and Entering Default.

[261] Docket at June 6, 2013, Motion for Summary Judgment against Gemstone.

[262] Docket at Minutes from June 13, 2013.

246. Despite APCO's efforts, Helix and CabineTec are seeking to hold APCO responsible for retention.

247. Any of the foregoing findings of fact that would be more appropriately considered conclusions of law should be deemed so.

FROM the foregoing Findings of Fact, the Court makes the following

II. CONCLUSIONS OF LAW

Helix's Claims Against APCO

A. Breach of Contract

1. In Nevada, there are four elements to a claim for breach of contract: "(1) formation of a valid contract, (2) performance or excuse of performance by the plaintiff, (3) material breach by the defendant, and (4) damages."[263]

2. Exhibit 45 is the Helix Subcontract, which represents the valid, final written agreement between APCO and Helix.

3. Helix's claim against APCO is for $505,021.00 in alleged retention.[264] As a condition precedent to payment for retention, the Helix Subcontract required Helix to properly comply with the retention payment schedule in Section 3.8.[265] Specifically, Section 3.8 required: (1) completion of the entire project, (2) owner acceptance, (3) final payment from owner to APCO, (4) final as-built drawings, and (5) releases.[266]

4. A party who seeks to recover on a contract has the burden of establishing any condition precedent to the respective contract.[267]

5. Parties can agree to a schedule of payments.[268]

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[263] *Laguerre v. Nevada System of Higher Education,* 837 F.Supp.2d 1176, 1180 (D. Nev. 2011).

[264] Testimony of Andy Rivera (Helix) Day 2, pp. 73-75.

[265] Exhibit 45 at Section 3.8.

[266] Exhibit 45 at Section 3.8.

[267] *See Lucini-Parish Ins. v. Buck,* 108 Nev. 617, 620, 836 P.2d 627, 629 (1992).

6. Parties can agree to proper conditions precedent to payment.[269]

7. Under Nevada precedent and legislative action, acceptance provisions are valid conditions precedent to payment when not combined with a waiver of a mechanic's lien rights.[270]

8. NRS 624.624 was meant, *inter alia*, to ensure payment to subcontractors after the owner paid the general for the subcontractor's work.[271]

9. In the present action, the Helix Subcontract: (1) incorporated the Contract,[272] (2) confirmed that the subcontractors would be bound to Gemstone to the same extent APCO was,[273] and (3) contained a schedule of payments for both retention and change orders with preconditions before APCO had an obligation to pay the subcontractors.[274]

10. Only one of those preconditions involved Gemstone's payment of retention to APCO. The others concerned the right to receive payment, not the fact of payment.

11. Pursuant to NRS 624.624(1)(a), payment was due to Helix in accordance with the retention payment schedule or within 10 days after APCO received payment from Gemstone:

> **NRS 624.624 Payment of lower-tiered subcontractor; grounds and procedure for withholding amounts from**

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[268] NRS 624.624(1)(a).

[269] *Padilla Construction Company of Nevada v. Big-D Construction Corp*, 386 P.3d 982 (Nev. 2016) (unpublished)("Because the parties' subcontract contained a payment schedule that required that Padilla be paid within ten days after IGT accepted Padilla's work and paid Big-D for that work and it is undisputed that IGT never accepted Padilla's work . . . the district court correctly found that payment never became due to Padilla under the subcontract or *NRS 624.624(1)(a); see generally*, NRS 624.626.

[270] Id.

[271] *Padilla Construction Company of Nevada v. Big-D Construction Corp*, 386 P.3d 982 (Nev. 2016) (unpublished).

[272] Exhibits 45 and 149, Helix and CabineTec Subcontracts at Sections 1.1.

[273] Exhibits 45 and 149, Helix and CabineTec Subcontracts at Sections 3.4.

[274] *Id.* at Section 3.8 and Article 4.

payment; rights and duties after notice of withholding, notice of objection or notice of correction.

1. Except as otherwise provided in this section, if a higher-tiered contractor enters into:

(a) A written Contract with a lower-tiered subcontractor that includes a schedule for payments, the higher-tiered contractor shall pay the lower-tiered subcontractor:

(1) On or before the date payment is due; or

(2) Within 10 days after the date the higher-tiered contractor receives payment for all or a portion of the work, materials or equipment described in a request for payment submitted by the lower-tiered subcontractor,

→ whichever is earlier.

12. These provisions place a time obligation on a higher-tiered contract to make payment, but they do not restrict the right of the lower-tiered contractor to receive payment if the higher-tiered contractor has not been paid. Section 3.8 of the Helix Subcontract contained a retention payment schedule that was acknowledged and affirmed by Helix and APCO at trial. As such, Helix needed to show that applicable and enforceable conditions precedent were satisfied before APCO had to pay retention. *See Lucini-Parish Ins. v. Buck,*[275] (a party who seeks to recover on a contract has the burden of establishing any condition precedent to the respective contract).

13. Helix admitted that it did not comply with the applicable and enforceable conditions precedent to be entitled to its retention payments from APCO.[276]

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[275] 108 Nev. 617, 620, 836 P.2d 627, 629 (1992).

[276] See Testimony of Helix's Bob Johnson, Day 2 at pg. 19 ("Q. Well, let me ask it this way: Did Helix satisfy any of these preconditions found in paragraph 3.8 while APCO was the general contractor on the project? A. Not to my knowledge.")

14. Helix did not show: (1) completion of the entire Project, (2) final acceptance of the Project by Gemstone, (3) receipt of final payment from Gemstone to APCO, (4) delivery of all as-builts and close out document, and (5) delivery of all final waivers and releases.

15. Helix never sent APCO an invoice or billing for its retention.

16. Accordingly, Helix's retention payment was not due from APCO at the time APCO was removed from the project.

17. As a result, Helix's first claim for relief for breach of contract for failing to pay retention fails as a matter of law.

18. Lastly, there is no contractual obligation for APCO to pay Helix for the work it performed for Gemstone and/or Camco after APCO left the Project. Helix knowingly replaced APCO with Camco under the Helix Subcontract on all executory obligations, including payment for future work and retention.

B. Breach of the Implied Covenant of Good Faith and Fair Dealing

19. Helix's second claim for relief for breach of the covenant of good faith and fair dealing also fails.

20. In Nevada, "[e]very contract imposes upon each party a duty of good faith and fair dealing in its performance and enforcement."[277] This implied covenant requires that parties "act in a manner that is faithful to the purpose of the contract and the justified expectations of the other party."[278]

21. A breach of the implied covenant of good faith and fair dealing occurs when the terms of a contract are complied with but one party to the contract deliberately contravenes the intention of the contract.[279]

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[277] *A.C. Shaw Cont., Inc. v. Washoe Cnty.*, 105 Nev. 913, 914, 784 P.2d 9, 9 (Nev. 1989) (quoting NRS 104.1203).

[278] *Morris v. Bank of Am. Nev.*, 110 Nev. 1274, 1278 n.2, 886 P.2d 454, 457 n.2 (Nev. 1994) (internal quotations omitted).

[279] See *Hilton Hotels v. Butch Lewis Prods.*, 107 Nev. 226, 232, 808 P.2d 919,923 (Nev. 1991).

22. To prevail on a theory of breach of the covenant of good faith and fair dealing, a plaintiff must establish: (1) plaintiff and defendants were parties to a contract, (2) defendants owed a duty of good faith to the plaintiff, (3) defendants breached that duty by performing in a manner that was unfaithful to the purpose of the contract, and (4) plaintiff's justified expectations were denied.[280]

23. The Nevada Supreme Court has held that good faith is a question of fact.[281]

24. Helix claims APCO breached its duty of good faith and fair dealing by "performing in a manner that was unfaithful to the purpose of the APCO Agreement."[282]

25. APCO acted in good faith with respect to Helix:

a. APCO paid Helix all sums Helix billed APCO through August 2008 (when APCO left the Project),[283]

b. APCO signed joint checks so that its subcontractors, including Helix, would get paid, even though APCO was not getting paid,[284]

c. APCO pulled its general contractor permits so that Camco could get permits for the Project and APCO's subcontractors could continue on with the Project (less retention),[285] and

d. APCO also financed the related appeal to obtain priority for Helix and the other subcontractors once Gemstone shut the Project down.

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[280] *Perry v. Jordan*, 111 Nev. 943, 948, 900 P.2d 335, 338 (Nev. 1995).

[281] *Consolidated Generator-Nevada, Inc. v. Commins Engine Co., Inc.*, 114 Nev.. 1304, 1312, 971 P.2d 1251, 1256 (Nev. 1998).

[282] Exhibit 231, Helix's amended complaint at ¶ 27.

[283] Exhibit 26; Exhibit 152; Testimony of Joe Pelan, Day 1 at pg. 67; Testimony of Mary Jo Allen (APCO), Day 3 pg. 127 (as to Helix) and Testimony of Mary Jo Allen (APCO), Day 3 at pg. 128; Testimony of Joe Pelan (APCO), Day 1 at pg. 46; Testimony of Joe Pelan (APCO), Day 1 at pg. 82.

[284] Exhibit 26. See also: Testimony of Joe Pelan (APCO), Day 1 at pg. 38; Testimony of Joe Pelan (APCO), Day 1 at pg. 41.

[285] Testimony of Joe Pelan (APCO), Day 1 at pg. 100.

IN THE SUPREME COURT OF THE STATE OF NEVADA

Supreme Court Case No. 77320
***Consolidated with* 80508**

HELIX ELECTRIC OF NEVADA, LLC,

Appellant,

v.

APCO CONSTRUCTION, INC., A NEVADA CORPORATION,

Respondent.

JOINT APPENDIX
VOLUME 85

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Docket 77320 Document 2020-38056

CHRONOLOGICAL APPENDIX OF EXHIBITS

Date	Description	Bates Number	Volume(s)
06-24-09	**Helix Electric's Statement of Facts Constituting Lien and Third-Party Complaint**	**JA000001-JA000015**	**1**
08-05-09	**APCO's Answer to Helix's Amended Statement of Facts Constituting Notice of Lien and Third-Party Complaint**	**JA000016 – JA000030**	**1**
04-26-10	**CAMCO and Fidelity's Answer and CAMCO's Counterclaim**	**JA000031-JA000041**	**1**
07-02-10	**Order Striking Defendant Gemstone Development West, Inc.'s Answer and Counterclaim and Entering Default**	**JA000042-JA000043**	**1**
06-06-13	**APCO's Limited Motion to Lift Stay for Purposes of this Motion Only; (2) APCO's Motion for Summary Judgment Against Gemstone Only; and (3) Request for Order Shortening Time**	**JA000044-JA000054**	**1**
	Exhibit 1 – Affidavit of Randy Nickerl in Support of (I) APCO's Limited Motion to Lift Sta for Purposes of this Motion Only; (2) APCO's Motion for Judgment Against Gemstone Only	JA000055-JA000316	1/2/4/5/6
	Exhibit 2 – Findings of Fact and Conclusions of Law and Judgment in Favor of APCO Construction Against Gemstone Development West, Inc. Only	JA000317-JA000326	6

Date	Description	Bates Number	Volume(s)
06-13-13	**Docket Entry and Minute Order Granting APCO's Motion for Summary Judgment Against Gemstone**	**JA000327**	**6**
08-02-17	**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**	**JA000328-JA000342**	**6**
	Exhibit 1 – APCO Construction's Answers to Helix Electric of Nevada, LLC's First Request for Interrogatories	JA000343-JA00379	6
	Exhibit 2 – Camco Pacific Construction Company, Inc.'s Responses to Helix Electric of Nevada, LLC's Interrogatories	JA000380-JA000392	6
08-21-17	**APCO Construction's Opposition to Peel Brimley Lien Claimants' Partial Motion for Summary Judgment Precluding Defenses Based on Pay-if-Paid Agreements**	**JA000393-JA000409**	**6/7**
	Exhibit A – Excerpt from 30(b)(6) Witness for Helix Electric of Nevada, LLC taken July 20, 2017	JA000410-JA000412	7
09-28-17	**Peel Brimley Lien Claimants' Reply to Oppositions to Motion for Partial Summary Judgment Precluding Defenses Based on Pay-if-Paid Agreements**	**JA000413-JA00418**	**7**
11-06-17	**Peel Brimley Lien Claimants' Motion in Limine Nos. 1-6**	**JA000419-JA000428**	**7**

Date	Description	Bates Number	Volume(s)
	Exhibit 1 – Notice of Entry of Order	JA000429 JA000435	7
	Exhibit 2 – Amended Notices of 30(b)(6) Deposition of Camco Pacific Construction Company, Inc. from Cactus Rose Construction, Inc., Fast Glass, Inc.'s, Heinaman Contract Glazing, Inc. and Helix Electric of Nevada, LLC's	JA000436-JA000472	7/8
	Exhibit 3 – Excerpt from David E. Parry's Deposition Transcript taken June 20, 2017	JA000473 JA00489	8
	Exhibit 4 – Cactus Rose Construction, Inc.'s First Set of Request for Admissions to Camco Pacific Construction	JA00490 JA000500	8
	Exhibit 5 – Fast Glass, Inc.'s First Set of Request for Admissions to Camco Pacific Construction	JA000501-JA000511	8
	Exhibit 6 – Heinaman Contract Glazing, Inc.'s First Set of Request for Admissions to Camco Pacific Construction	JA000512-JA000522	8
	Exhibit 7 – Helix Electric of Nevada, LLC's First Set of Request for Admissions to Camco Pacific Construction	JA000523-JA000533	8
11-06-17	**Helix Electric of Nevada's Motion *in Limine* Nos. 1-4**	**JA000534-JA000542**	**8**
	Exhibit 1 – Notice of Entry of Order	JA000543-JA000549	8
	Exhibit 2 – Helix Electric of Nevada, LLC's Amended Notice of 30(b)(6) Deposition of APCO Construction	JA000550 JA000558	8/9

Date	Description	Bates Number	Volume(s)
	Exhibit 3 - Excerpts from Brian Benson Deposition Transcript taken June 5, 2017	JA000559 JA000574	9
	Exhibit 4 – Excerpts from Mary Jo Allen's Deposition Transcript taken July 18, 2017	JA000575- JA000589	9
11-06-17	**APCO Construction, Inc.'s Omnibus Motion *in Limine***	**JA000590 JA000614**	**9**
	Exhibit 1 – Second Amended Notice of taking NRCP Rule 30(b)(6) Deposition of Person Most Knowledgeable for Zitting Brothers Construction, Inc.	JA000615- JA000624	9
	Exhibit 2 – Zitting Brothers Construction, Inc.'s Motion for Partial Summary Judgment Against APCO Construction	JA000625- JA000646	9
	Exhibit 3 – Excerpts from Samuel Zitting's Deposition Transcript taken October 27, 2017	JA000647- JA000678	9/10
	Exhibit 4 – Statement of Facts Constituting Lien on Behalf of Buchele, Inc.	JA000679- JA000730	10
	Exhibit 5 – Subcontract Agreement dated April 17, 2007	JA000731- JA000808	10/11
	Exhibit 6 – Subcontract Agreement dated April 17, 2007	JA000809- JA000826	11/12
	Exhibit 7 – Email from Mary Bacon dated October 16, 2017	JA000827- JA000831	12
	Exhibit 8 – Email from Mary Bacon dated October 17, 2017	JA000832- JA000837	12
	Exhibit 9 – Email from Eric Zimbelman dated October 17, 2017	JA000838- JA000844	12
	Exhibit 10 – Special Master Report, Recommendation and District Court Order	JA00845- JA000848	12

Date	Description	Bates Number	Volume(s)
	Exhibit 11 – Plaintiff in Intervention, National Wood Products, Inc.'s Initial Disclosures Pursuant to NRCP 16.1	JA000849-JA000856	12
	Exhibit 12 – Plaintiff in Intervention, National Wood Products, Inc.'s First Supplemental Disclosures Pursuant to NRCP 16.1	JA000857-JA000864	12
	Exhibit 13 – Amended Notice of Taking NRCP Rule 30(b)(6) Deposition of Person Most Knowledgeable for Helix Electric of Nevada, LLC	JA000865-JA000873	12
	Exhibit 14 – Excerpts from Helix Electric of Nevada, LLC's 30(b)(6) Witness Deposition Transcript taken July 20, 2017	JA000874-JA000897	12
11-14-17	**Camco Pacific Construction Company, Inc.'s Opposition to Lien Claimants' Motions in Limine Nos. 1-6**	**JA000898-JA000905**	**12**
	Exhibit A – Nevada Construction Services Cost Plus GMP Contract Disbursement Agreement	JA000906-JA000907	12
	Exhibit B – Scott Financial Corporation's April 28, 2009 letter to the Nevada State Contractor's Board	JA000908-JA000915	2/13
	Exhibit C – E-mail from Alex Edelstein dated December 15, 2008 Re: Letter to Subs	JA000916-JA000917	13
	Exhibit D – Camco Pacific's letter dated December 22, 2008	JA000918-JA000920	13
	Exhibit E – Order Approving Sale of Property	JA000921-JA000928	13

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11-14-17	**APCO Construction, Inc.'s Opposition to Helix Electric of Nevada, LLC's Motions *in Limine* Nos. 1-4**	**JA000929-JA000940**	**13/14**
	Exhibit 1 – Excerpts from the Deposition Transcript of Mary Jo Allen taken July 18, 2017	JA000941-JA000966	14/15/16
	Exhibit 2 – Helix Electric's Manhattan West Billing/Payment Status through August 2008	JA000967-JA000969	16/17
	Exhibit 3 – Excerpts from the Deposition Transcript of Andrew Rivera taken July 20, 2017	JA000970-JA000993	17/18/19
11-14-17	**Helix Electric of Nevada's Opposition to APCO Construction's Omnibus Motion *in Limine***	**JA000994-JA001008**	**20**
	Exhibit 1 – Excerpts from the Deposition Transcript of Brian Benson taken June 5, 2017	JA001009-JA001042	20
	Exhibit 2 - Excerpts from the Deposition Transcript of Brian Benson taken June 5, 2017	JA001043-JA001055	20
	Exhibit 3 – Special Master Order Requiring Completion of Questionnaire	JA001056-JA001059	20
	Exhibit 4 – Excerpts from the Deposition Transcript of the 30(b)(6) Witness for Helix Electric of Nevada taken July 20, 2017	JA001060-JA001064	20
	Exhibit 5 - Excerpts from the Deposition Transcript of David E. Parry taken June 20, 2017	JA001065 JA001132	20/21
11-15-17	**APCO Construction, Inc.'s Reply in Support of its Omnibus *Motion in Limine***	**JA001133 JA001148**	**21**

Date	Description	Bates Number	Volume(s)
	Exhibit 1 – Special Master Report Regarding Discovery Status	JA001149-JA001151	21
	Exhibit 2 – Notice of Taking NRCP Rule 30(b)(6) Deposition of the Person Most Knowledgeable for Zitting Brothers Construction, Inc.	JA001152-JA001160	21
12-29-17	**Notice of Entry of Order Granting Peel Brimley Lien Claimants' Motion *in Limine* 1-6**	**JA001161-JA001169**	**22**
12-29-17	**Notice of Entry of Order Granting in Part and Denying in Part Helix Electric of Nevada, LLC's Motion *in Limine* 1-4**	**JA001170-JA001177**	**22**
12-29-17	**Notice of Entry of Order Granting in Part and Denying in Part APCO Construction's Omnibus Motion *in Limine***	**JA001178-JA001186**	**22**
01-03-18	**Notice of Entry of Order Granting Peel Brimley Lien Claimants' Motion for Partial Summary Judgment Precluding Defenses Based on Pay-if-Paid Agreements**	**JA001187-JA001198**	**22**
01-04-18	**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 provision on an Order Shortening Time**	**JA001199-JA001217**	**22**
	Exhibit 1 – Subcontract Agreement (Helix Electric of Nevada, LLC)	JA001218-JA001245	22/23/24
	Exhibit 2 – Subcontract Agreement (Zitting Brothers)	JA001246-JA001263	24

Date	Description	Bates Number	Volume(s)
	Exhibit 3 – Subcontract Agreement (CabineTec)	JA001264-JA001281	24/25
	Exhibit 4 – Amended Notice of Lien	JA001282-JA001297	25
	Exhibit 5 - Amended NOL	JA001298-JA001309	25
	Exhibit 6 – Notice of Lien	JA001310-JA001313	25
	Exhibit 7 – Order Approving Sale of Property	JA001314-JA001376	25/26
	Exhibit 8 – Order Releasing Sale Proceeds from Court Controlled Escrow Account	JA001377-JA001380	26
	Exhibit 9 – Order Denying *En Banc* Reconsideration	JA001381-JA001385	26
	Exhibit 10 – Order Granting Peel Brimley Lien Claimants' Motion for Partial Summary Judgment Precluding Defenses Based on Pay-if-Paid Agreements	JA001386-JA001392	26
	Exhibit 11 – Notice of Entry of Findings of Fact and Conclusions of Law and Judgment	JA001393-JA001430	26
	Exhibit 12 – Order Big D Construction Corp.'s Motion for Attorney's Fees, Costs and Interest Pursuant to Judgment	JA001431-JA001435	26
	Exhibit 13 – Appellant's Opening Brief (Padilla v. Big D)	JA001436-JA001469	26
	Exhibit 14 – Respondent's Answering Brief	JA001470-JA001516	26/27
	Exhibit 15 – Appellant's Reply Brief (Padilla v. Big D)	JA001517-JA001551	27
01-09-18	**Peel Brimley Lien Claimants' Opposition to APCO Construction's Motion for Reconsideration of Order**	**JA001552-JA001560**	**27**

Date	Description	Bates Number	Volume(s)
	Granting Partial Summary Judgment Precluding Defenses Based on Pay-if-Paid Agreements		
01-10-18	**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**	**JA001561-JA001573**	**27**
01-12-18	**Joint Pre-Trial Memorandum [for APCO Construction, Inc., the Peel Brimley Lien Claimants and National Wood Products, LLC ONLY]**	**JA001574-JA001594**	**27/28**
	Exhibit 1 – Exhibit List APCO	JA001595-JA001614	28
	Exhibit 2 – Helix Trial Exhibits	JA001615-JA001616	28
	Exhibit 3 – Exhibit List Plaintiff in Intervention National Wood Products, Inc.	JA001617-JA001635	28
	Exhibit 4 – Cactus Rose Trial Exhibits	JA001636-JA001637	28
	Exhibit 5 – Heinaman Trial Exhibits	JA001638-JA001639	28
	Exhibit 6 – Fast Glass Trial Exhibits	JA001640-JA001641	28
	Exhibit 7 – SWPPP Trial Exhibits	JA001642-JA001643	28
	Exhibit 8 - Order Granting in Part and Denying in Part APCO Construction's Omnibus Motion *in Limine*	JA001644-JA001647	28

Date	Description	Bates Number	Volume(s)
	Exhibit 9 - Amended *nunc pro tunc* order regarding APCO Construction, Inc.'s Omnibus Motion *in Limine* No. 7	JA001648-JA001650	28
	Exhibit 10 - Order Granting in Part and Denying in part Helix Electric of Nevada, LLC's Motions *in Limine* 1-4 (Against APCO Construction)	JA001651-JA001653	28
	Exhibit 11 - order granting Peel Brimley Lien Claimants' Motion in Limine Nos.1-6 (against Camco Pacific Construction, Inc.)	JA001654-JA001657	28
	Exhibit 12 - Order Granting Plaintiff in Intervention, National Wood Products, Inc.'s Motion *in Limine*	JA001658-JA001660	28
	Exhibit 13 - Order Granting Peel Brimley Lien Claimants' Motion for Partial Summary Judgment Precluding Defenses Based on Pay-if-Paid Agreements	JA001661-JA00167	28/9/29
01-17-18	**Transcript Bench Trial (Day 1)**[1]	**JA001668-JA001802**	**29/30**
	Trial Exhibit 1 - Grading Agreement ***(Admitted)***	JA001803-JA001825	30
	Trial Exhibit 2 – APCO/Gemstone General Construction Agreement ***(Admitted)***	JA001826-JA001868	30
	Trial Exhibit 3 - Nevada Construction Services /Gemstone Cost Plus/GMP Contract Disbursement Agreement ***(Admitted)***	JA001869-JA001884	30

[1] Filed January 31, 2018

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	Trial Exhibit 4 - APCO Pay Application No. 9 Submitted to Gemstone ***(Admitted)***	JA001885-JA001974	30/31/32
	Trial Exhibit 5 - Letter from J. Barker to A. Edelstein re: APCO's Notice of Intent to Stop Work ***(Admitted)***	JA001975-JA001978	32
	Trial Exhibit 6 - Letter from J. Barker to A. Edelstein re: APCO's Notice of Intent to Stop Work ***(Admitted)***	JA001979-JA001980	32
	Trial Exhibit 10 - Letter from J. Barker to A. Edelstein Re: Notice of Intent to Stop Work (Second Notice) ***(Admitted)***	JA001981-JA001987	32
	Trial Exhibit 13 - Letter from A. Edelstein to Re. Nickerl Re: Termination for Cause (Gemstone) ***(Admitted)***	JA001988-JA002001	32
	Trial Exhibit 14 - Letter from W. Gochnour to Sean Thueson Re: [APCO's] Response to [Gemstone's] Termination for Cause ***(Admitted)***	JA002002-JA002010	33
	Trial Exhibit 15 - Letter from R. Nickerl to A. Edelstein Re: 48-Hour Notices ***(Admitted)***	JA002011-JA002013	33
	Trial Exhibit 16 - Email from J. Horning to A. Berman and J. Olivares re: Joint Checks ***(Admitted)***	JA002014	33
	Trial Exhibit 23 - APCO Subcontractor Notice of Stopping Work and Letter from J. Barker to A. Edelstein Re: Notice of Stopping Work and Notice of Intent to Terminate Contract ***(Admitted)***	JA002015-JA002016	33

Date	Description	Bates Number	Volume(s)
	Trial Exhibit 24 - Letter from R. Nickerl to Clark County re: Notification of APCO's withdrawal as General Contractor of Record ***(Admitted)***	JA002017-JA002023	33
	Trial Exhibit 26 - Email from J. Gisondo to Subcontractors re: June checks ***(Admitted)***	JA002024	34
	Trial Exhibit 27 - Letter from A. Edelstein to R. Nickerl re: June Progress Payment ***(Admitted)***	JA002025-JA002080	34
	Trial Exhibit 28 - Letter from J. Barker to A. Edelstein Re: Termination of Agreement for GMP ***(Admitted)***	JA002081	34
	Trial Exhibit 31 - Transmission of APCO's Pay Application No. 11 as Submitted to Owner ***(Admitted)***	JA002082-JA002120	34/35
	Trial Exhibit 45 - Subcontractor Agreement ***(Admitted)***	JA002121-JA002146	35
	Trial Exhibit 162 - Amended and Restated General Construction Agreement between Gemstone and CAMCO ***(Admitted)***	JA002147-JA002176	35/36
	Trial Exhibit 212 - Letter from Edelstein to R. Nickerl re: NRS 624 Notice ***(Admitted)***	JA002177-JA002181	36
	Trial Exhibit 215 - Email from C. Colligan to Subcontractors re: 48-hour Termination Notice ***(Admitted)***	JA002182-JA002185	36
	Trial Exhibit 216 - Email from C. Colligan re: Meeting with Subcontractors ***(Admitted)***	JA002186-JA002188	36
	Trial Exhibit 506 – Email and Contract Revisions ***(Admitted)***	JA002189 – JA002198	36

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01-18-18	**Stipulation and Order Regarding Trial Exhibit Admitted into Evidence**	**JA002199-JA002201**	**36**
	Exhibit 1 – Exhibit List APCO	JA002208-JA002221	36
	Exhibit 2 – Helix Trial Exhibits	JA002222-JA002223	36
	Exhibit 3 – Exhibit List Plaintiff in Intervention National Wood Products, Inc.	JA002224-JA002242	36/37
	APCO TRIAL EXHIBITS:		
	APCO Related Exhibits:		
	Trial Exhibit 7 - Letter from Scott Financial to APCO re: Loan Status	JA002243	37
	Trial Exhibit 8 - APCO Pay Application No. 10 as submitted to Owner	JA002244-JA002282	37/38
	Trial Exhibit 12 and 107 - Email from C. Colligan to Subcontractors re: Subcontractor Concerns	JA002283-JA002284	38
	Trial Exhibit 17 – Video (Construction Project)	JA002285	N/A
	Trial Exhibit 18 – Video (Construction Project)	JA002286	N/A
	Trial Exhibit 19 – Video (Construction Project)	JA002287	N/A
	Trial Exhibit 20 – Video (Construction Project)	JA002288	N/A
	Trial Exhibit 21 – Video (Construction Project)	JA002289	N/A
	Trial Exhibit 22 – Video (Construction Project)	JA002290	N/A

Date	Description	Bates Number	Volume(s)
	Trial Exhibit 29 - Email from J. Robbins to Subcontractors re: Billing Cut-Off for August Billing	JA002285	39
	Trial Exhibit 30 - Camco Pay Application No. 11 NCS-Owner Approved with NCS Draw Request	JA002286-JA002306	39
	Trial Exhibit 32 and 125 - Photo re: Building 8 & 9, Interior (Showing drywall still not completed and no electrical trim or fixture installed)	JA002307-JA002308	39
	Trial Exhibits 33 and 126 - Photo re: Building 8 & 9, Interior (Showing drywall still not completed)	JA002309-JA002310	39
	Exhibit 34 and 128 - Photo re: Building 8 & 9, Interior (Showing drywall still not completed)	JA002311-JA002312-	40
	Trial Exhibit 35 - Photo re: Building 8 & 9, Interior (Showing drywall still not completed and no electrical trim or fixtures installed)	JA002313-JA002314	40
	Exhibit 36 and 130 -Photo re: Building 8 & 9, Interior (Showing drywall still not completed and no electrical trim or fixtures installed)	JA002315-JA002316	40
	Trial Exhibits 37 and 131 -Photo re: Building 8 & 9, Interior (Showing drywall still not completed and no electrical trim or fixtures installed)	JA002317-JA002318	40
	Trial Exhibits 38 and 132 - Photo re: Building 8 & 9, Interior (Showing drywall still not completed and no electrical trim or fixtures installed)	JA002319-JA002320	41

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	Trial Exhibit 39 -Email from K. Costen to Subcontractors informing that Manhattan West Project no longer open	JA002321-JA002322	41
	Trial Exhibit 40- Letter from D. Parry to Subcontractors Re: Funding Withdrawn	JA002323 JA002326	41
	HELIX Related Exhibits:		41
	Trial Exhibit 46 - Helix Pay Application No. 16713-008R1 with Proof of Payment	JA002327-JA002345	41
	Trial Exhibit 47 - Helix Pay Application No. 16713-009R1 with Proof of Payment	JA002346-JA002356	41
	Trial Exhibit 48 - Email from R. Nickerl to B. Johnson Re: Work Suspension Directive	JA002357-JA002358	41
	Trial Exhibit 49 -Helix Pay Application No. 16713-010R2 with Proof of Payment	JA002359-JA002364	41/42
	Trial Exhibit 50 - Unconditional Waiver and Release re: Pay Application No. 8 with Copy of Payment	JA002365-JA002366	42
	Trial Exhibit 51 - Photo re: Building 8 & 9, South (No Exterior fixtures installed. Helix billed out at 90%)	JA002367-JA002368	42
	Trial Exhibit 52 -Photo re: Building 8 & 9, North (No Exterior fixtures installed. Helix billed out at 90%)	JA002369-JA002370	42
	Trial Exhibit 53 -Photo re: Building - 2 & 3, West (No Exterior fixtures installed. Helix billed out at 90%)	JA002371-JA002372	42

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	Trial Exhibit 54 - Photo re: Building - 2 & 3, East (No Exterior fixtures installed. Helix billed out at 90%)	JA002373-JA002374	42
	Trial Exhibit 55 - Photo re: Building 2 & 3, East (No Exterior fixtures installed. Helix billed out at 90%)	JA002375-JA002376	42
	Trial Exhibit 56 - Photo re: Building 8 & 9, North (No Exterior fixtures installed. Helix billed out at 90%)	JA002377-JA002378	42
	Trial Exhibit 57 - Photo re: Building 2 & 3, and 8 & 9, North (No Exterior fixtures installed. Helix billed out at 90%)	JA002379-JA002381	42
	Trial Exhibit 58 - Helix Pay Application No. 16713-011R1 submitted to Owner	JA002382-JA002391	42
	Trial Exhibit 59 - Helix Pay Application No. 16713-011R1 given to Camco with Proof of Payment	JA002392-JA002405	43
	Trial Exhibit 60 - Helix Retention Rolled to Camco	JA002406-JA002415	43
	Trial Exhibit 61 - Unconditional Waiver and Release re: all Invoices through June 30, 2008 with Proof of Payment	JA002413-JA002415	43
	Trial Exhibit 62 - Photo re: Building 8 & 9, South	JA002416-JA002417	43
	Trial Exhibit 63 - Photo re: Building 2 & 3, West	JA002418-JA002419	43
	Trial Exhibit 64 - Photo re: Building 2 & 3, West	JA002420-JA002421	43
	Trial Exhibit 65 - Photo re: Building 2 & 3, South	JA002422-JA002423	43

Date	Description	Bates Number	Volume(s)
	Trial Exhibit 66 - Letter of transmittal from Helix to APCO re: Helix Pay Application No. 16713-011R1	JA002424-JA002433	43
	Trial Exhibit 67 - Photo re: Building 8 & 9, West (No exterior fixtures installed. Helix billed out 90%)	JA002435-JA002436	43
	Trial Exhibit 68 -Photo re: Building 8 & 9, West (No exterior fixtures installed. Helix billed out 90%)	JA002437-JA002438	43
	Trial Exhibit 69 - Photo re: Building 2 & 3, East (No exterior fixtures installed. Helix billed out 90%)	JA002439-JA002440	43
	Trial Exhibit 70 - Photo re: Building 8 & 9, South (No exterior fixtures installed. Helix billed out 90%)	JA002441-JA002442	43
	Trial Exhibit 71 - Photo re: Building 8 & 9, West (No exterior fixtures installed. Helix billed out 90%)	JA002443-JA002444	43
	Trial Exhibit 72 - Photo re: Building 2 & 3, East (No exterior fixtures installed. Helix billed out 90%)	JA002445-JA002446	43
	Trial Exhibit 73 - Photo re: Building 8 & 9, West (No exterior fixtures installed. Helix billed out 90%)	JA002447-JA002448	43
	Trial Exhibit 74 - Photo re: Building 2 & 3, East (No exterior fixtures installed. Helix billed out 90%)	JA002448-JA002449	43

Date	Description	Bates Number	Volume(s)
	Trial Exhibit 75 - Unconditional Release re: Pay Application No. 16713-011R1 with Proof of Payment	JA002450-JA002456	43
	Exhibit 77 - Helix Statement of Facts Constituting Notice of Lien and Third-Party Complaint	JA002457-JA002494	43
	Zitting Brothers Related Exhibits:		
	Trial Exhibit 100 - Check No. 14392 payable to Zitting ($27,973.80); Progress Payment No. 7	JA002495-JA002497	44
	Trial Exhibit 101 - Email from R. Nickerl to R. Zitting re: Change Orders	JA002498-JA002500	44
	Trial Exhibit 102 -Email from L. Lynn to J. Griffith, et al. re: Change Order No. 00011 "pending"	JA002501-JA002503	44
	Trial Exhibit 103- Email from R. Zitting to R. Nickerl re: change orders adjusted to $30 per hour	JA002504-JA002505	44
	Trial Exhibit 104 - Email from R. Zitting to R. Nickerl re: change orders adjusted to $30 per hour with copies of change orders	JA002506-JA002526	44
	Trial Exhibit 105 - Ex. C to the Ratification – Zitting Quotes	JA002527-JA002528	44
	Trial Exhibit 106 - Unconditional Lien Release – Zitting ($27,973.80)	JA002529	44
	Trial Exhibit 108 - Photo of Video (Construction Project)	JA002530-JA002531	44
	Trial Exhibit 109 - Photo of Video (Construction Project)	JA002532-JA002533	44

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	Trial Exhibit 110 - Photo of Video (Construction Project)	JA002534-JA002535	44
	Trial Exhibit 111 - Photo of Video (Construction Project)	JA002536-JA002537	44
	Trial Exhibit 112 - Photo of Video (Construction Project)	JA002538-JA002539	44
	Trial Exhibit 113 -Photo of Video (Construction Project)	JA002550-JA002541	44
	Trial Exhibit 114 -Photo of Video (Construction Project)	JA002542-JA002543	44
	Trial Exhibit 115 - Progress Payment No. 9 Remitted to Zitting	JA002544-JA002545	44
	Trial Exhibit 116 - Ratification and Amendment of Subcontract Agreement between Buchele and Camco	JA002546-JA002550	44
	Trial Exhibit 117 - C to the Ratification	JA002551-JA002563	44
	Trial Exhibit 118 - Q&A from Gemstone to subcontracts	JA002564-JA002567	44
	Trial Exhibit 119 - Check No. 528388 payable to APCO ($33,847.55) – Progress Payment No. 8.1 and 8.2	JA002568-JA002571	44
	Trial Exhibit 120 - Tri-City Drywall Pay Application No. 7 to APCO as submitted to Owner. Show percentage complete for Zitting	JA002572-JA002575	44/45
	Trial Exhibit 127 - Photo of Video (Construction Project)	JA002576-JA002577	45/46
	Trial Exhibit 128 - Photo of Video (Construction Project)	JA002578-JA002579	46
	Trial Exhibit 129 - Photo of Video (Construction Project)	JA002580-JA002581	46

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	Trial Exhibit 138 - Memo from Scott Financial to Nevada State Contractors Board Re: Explanation of Project Payment Process	JA002582-JA002591	46
	Trial Exhibit 152 -Terms & Conditions modified by APCO, Invoices and Check Payment	JA002592-JA002598	46
	National Wood Products Related Exhibits:		
	Trial Exhibit 160 - Documents provided for settlement	JA002599-JA002612	46
	CAMCO Related Exhibits:		
	Trial Exhibit 163 - Camco Pay Application No. 12 to Gemstone	JA002613-JA002651	46/47
	Trial Exhibit 165 - Letter from D. Parry to A. Edelstein re: Gemstone losing funding for project	JA002652-JA002653	47
	Trial Exhibit 166 - Letter from D. Parry to G. Hall re: withdrawal of funding	JA002654 JA002656	47
	Helix Related Exhibits:		47
	Trial Exhibit 169 - Helix Exhibit to Standard Subcontract Agreement with Camco	JA 002665 JA002676	47/48
	Trial Exhibit 170 - Subcontract Agreement between Helix and Camco (unsigned)	JA002677-JA002713	48
	Trial Exhibit 171 - Work Order No. 100	JA002714-JA002718	48
	Trial Exhibit 172 - Letter from J. Griffith to Victor Fuchs Re: Gemstone's intention to continue retention of Helix w/copy of Ratification and Amendment of Subcontract Agreement	JA002719-JA002730	48

Date	Description	Bates Number	Volume(s)
	Trial Exhibit 173 - Helix Pay Application No. 16713-012 to Camco with proof of payment	JA002731-JA002745	48
	Trial Exhibit 174 - Helix Change Order Request No. 28	JA002746-JA002747	48
	Trial Exhibit 175 - Change Notice No. 41	JA002748-JA002751	48
	Trial Exhibit 176 - Helix Pay Application No. 16713-013 to Camco	JA002752-JA002771	48/49
	Trial Exhibit 177 - Helix Pay Application No. 16713-014 to Camco	JA002772-JA002782	49
	Trial Exhibit 178 - Camco's letter to Helix rejecting Pay Application No. 16713-015 with attached copy of Pay Application	JA002783 JA002797	49
	National Wood/Cabinetec Related Exhibits:		
	Trial Exhibit 184 - Ratification and Amendment of Subcontract Agreement between CabineTec and Camco (fully executed copy)	JA002798-JA002825	49
	General Related Exhibits:		
	Trial Exhibit 218 - Camco/Owner Pay Application No. 11 w/Backup	JA002826-JA003028	50/51/52
	Trial Exhibit 220 - Camco/Owner Pay Application No. 12 w/Backup	JA003029-JA003333	52/53/54/55
	Trial Exhibit 313 - Letter from A. Edelstein to R. Nickerl re: NRS 624 Notice	JA003334-JA003338	55
	Helix Trial Exhibits:		
	Trial Exhibit 501 - Payment Summary	JA003339 – JA003732	55/56/57 /58/59/60
	Trial Exhibit 508 – Helix Pay Application	JA003733-JA003813	60/61

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	Trial Exhibit 510 - Unsigned Subcontract	JA003814-JA003927	61/62
	Trial Exhibit 512 - Helix's Lien Notice	JA003928-JA004034	62/63
	Trial Exhibit 522 - Camco Billing	JA004035-JA005281	63/64/65/66/67/68/69/70/71/72/73/74/75/76/77
01-19-18	**Order Denying APCO Construction's Motion for Reconsideration of Order Granting Partial Summary Judgment Precluding Defenses Based on Pay-if-Paid Agreements**	**JA005282-JA005283**	**78**
01-18-18	**Transcript – Bench Trial (Day 2)[2]**	JA005284-JA005370	78
	Trial Exhibit 535 – Deposition Transcript of Andrew Rivera (Exhibit 99) ***(Admitted)***	JA005371-JA005623	78/79/80
01-19-18	**Transcript – Bench Trial (Day 3)[3]**	JA005624-JA005785	80
	Trial Exhibit 231 – Helix Electric's Amended Statement of Facts Constituting Notice of Lien and Third-Party Complaint ***(Admitted)***	JA005786-JA005801	80
	Trial Exhibit 314 - Declaration of Victor Fuchs in support of Helix's Motion for Partial Summary Judgment against Gemstone ***(Admitted)***	JA005802-JA005804	80

[2] Filed January 31, 201879
[3] Filed January 31, 2018

Date	Description	Bates Number	Volume(s)
	Trial Exhibit 320 – June-August Billings—not paid to APCO ***(Admitted)***	JA005805	80
	Trial Exhibit 321 – Overpayments to Cabinetec ***(Admitted)***	JA005806-	80
	Trial Exhibit 536 – Lien math calculations (handwritten) ***(Admitted)***	JA005807-JA005808	80
	Trial Exhibit 804 – Camco Correspondence ***(Admitted)***	JA005809-JA005816	80
	Trial Exhibit 3176 – APCO Notice of Lien ***(Admitted)***	JA005817-JA005819	81
01-24-18	**Transcript – Bench Trial (Day 5)[4]**	**JA005820-JA005952**	81
03-08-18	**Letter to Judge Denton submitting Helix Electric of Nevada, LLC's (Proposed) Findings of Fact and Conclusions of Law**	**JA005953-JA005985**	**81**
03-08-18	**Letter to Judge Denton submitting APCO Construction, Inc.'s Proposed Findings of Fact and Conclusions of Law**	**JA005986-JA006058**	**8/821**
03-08-18	**APCO Construction Inc.'s Post-Trial Brief**	**JA006059-JA006124**	**82/83**
03-23-18	**APCO Opposition to Helix Electric of Nevada, LLC's Findings of Fact and Conclusions of Law**	**JA006125-JA006172**	**83/84**
03-23-18	**Helix Electric of Nevada, LLC's Responses to APCO Construction's Post-Trial Brief**	**JA006173-JA006193**	**84**
04-25-18	**Findings of Fact and Conclusions of Law and Order as the Claims of Helix Electric and Cabinetec Against APCO**	**JA006194-JA006264**	**84/85**

[4] Filed January 31, 201883

Date	Description	Bates Number	Volume(s)
05-08-18	**APCO Construction, Inc.'s Motion for Attorneys' Fees and Costs Against Helix Electric of Nevada, LLC and Plaintiff in Intervention National Wood Products, Inc**.	**JA006265-JA006284**	**85**
	Exhibit 1 – Findings of Fact and Conclusions of Law as to the Claims of Helix Electric and Cabenetec Against APCO	JA006285-JA006356	85/86
	Exhibit 2 – National Wood Products, Inc.'s Notice of Motion and Motion to Intervene and Memorandum of Points and Authorities in Support Thereof	JA006357-JA006369	86
	Exhibit 3 – Plaintiff in Intervention, National Wood Products, Inc.'s Findings of Fact and Conclusions of Law (Proposed)	JA006370-JA006385	86/87
	Exhibit 4 – Plaintiff in Intervention, National Wood Productions, Inc.'s Findings of Fact and Conclusions of Law Re Camco	JA006386-JA006398	87
	Exhibit 5 – Offer of Judgment to Helix Electric of Nevada, LLC	JA006399-JA006402	87
	Exhibit 6 – Offer of Judgment to Plaintiff in Intervention National Wood Products, Inc.	JA006403-JA006406	87
	Exhibit 7 – Declaration of John Randall Jefferies, Esq. in Support of APCO Construction, Inc.'s Motion for Attorney's Fees and Costs	JA006407-JA006411	87
	Exhibit 7A – Billing Entries	JA006412-JA006442	87/88

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	Exhibit 7B – Time Recap	JA006443-JA006474	88
	Exhibit 8 – Declaration of Cody S. Mounteer, Esq. in Support of Motion for Attorney's Fees and Costs	JA006475-JA006478	88
	Exhibit 9 – APCO Construction, Inc.'s Memorandum of Costs and Disbursements [Against Helix Electric of Nevada, LLC, and Plaintiff in Intervention National Wood Products, LLC]	JA006479-JA006487	88
	Exhibit 10 – Depository Index	JA006488-JA006508	88/89
05-08-18	**Helix Electric of Nevada, LLC's Motion to Retax Costs Re: Defendant APCO Construction's Memorandum of Costs and Disbursements**	**JA006509-JA006521**	**89**
05-31-18	**Notice of Entry of Judgment [As to the Claims of Helix Electric of Nevada, LLC Against Camco Construction, Co., Inc.]**	**JA006522 JA006540**	**89**
06-01-18	**Notice of Entry of Judgment [As to the Claims of Helix Electric of Nevada, LLC and Plaintiff in Intervention National Wood Products, Inc.'s Against APCO Construction, Inc.]**	**JA006541 JA006550**	**90**
06-01-18	**Helix Electric of Nevada, LLC's Motion for Attorneys' Fees, Interest and Costs**	**JA006551-JA006563**	**90**
	Exhibit 1 – Findings of Fact and Conclusions of Law and Order as to the Claims of Helix Electric of Nevada, LLC Against Camco Pacific Construction, Inc.	JA006564-JA006574	90

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	Exhibit 2 – Memorandum of Costs and Disbursements (Helix Electric of Nevada, LLC)	JA006575-JA006580	90
	Exhibit 3 – Prime Interest Rate	JA006581-JA006601	90
	Exhibit 4 – Declaration of Eric B. Zimbelman in Support of Helix Electric of Nevada, LLC's Motion for Attorneys' Fees, Interest and Costs	JA006583-JA006588	90
	Exhibit 5 – Summary of Fees	JA006589-JA006614	90
06-15-18	**APCO Construction, Inc.'s Opposition to Helix Electric of Nevada, LLC and Plaintiff in Intervention National Wood Products, Inc.'s Motions to Retax Costs**	**JA006615-JA006637**	**90/9**1
	Exhibit 1-A Declaration of Mary Bacon in Support of APCO's Supplement to its Motion for Attorney's Fees	JA006635 JA006638	91
	Exhibit 1-B – Declaration of Cody Mounteer in Support of APCO's Supplement to its Motion for Attorney's Fees	JA006639-JA006916	91/92/93 94/95/96
06-15-18	**Helix Electric of Nevada, LLC's Opposition to APCO Construction's Motion for Attorneys' Fees and Costs**	**JA006917 – JA006942**	**96**
	Exhibit 1 – Notice of Entry of Staying the Case, Except for the Sale of the Property, Pending Resolution of the Petition before the Nevada Supreme Court	JA006943-JA006948	96

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	Exhibit 2 – Notice of Entry of Denying APCO Construction's Motion for Partial Summary Judgment Re: Lien Foreclosure Claims	JA006949-JA006954	96
	Exhibit 3 – Supreme Court filing notification Joint Petition for Writ of Mandamus filed	JA006955-JA006958	96
	Exhibit 4 – Order Denying *En Banc* Reconsideration	JA006959-JA006963	96
	Exhibit 5 – Notice of Entry of Order Granting Peel Brimley Lien Claimants' Motion for Partial Summary Judgment Precluding Defenses Based on Pay-if-Paid Agreements	JA006964-JA006978	96
	Exhibit 6A – Interstate Plumbing and Air Conditioning, LLC's Response to Special Master Questionnaire	JA006977-JA006980	96
	Exhibit 6B – Nevada Prefab Engineers, Inc.'s Response to Special Master Questionnaire	JA006981-JA006984	96
	Exhibit 6C – Zitting Brothers Construction, Inc.'s Response to Special Master Questionnaire	JA006985-JA006993	96/97
	Exhibit 6D – Noorda Sheet Metal's Notice of Compliance	JA006994 JA007001	97
	Exhibit 6 E – Unitah Investments, LLC's Special Master Questionnaire	JA007002-JA007005	97
	Exhibit 7A – Motion to Appoint Special Master	JA007006-JA007036	97
	Exhibit 7B – Letter from Floyd A. Hale dated August 2, 2016	JA007037-JA007060	97

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	Exhibit 7C – Special Master Report Regarding Remaining Parties to the Litigation, Special Master Recommendation and District Court Order Amended Case Agenda	JA007042-JA007046	97
	Exhibit 8 – Notice of Entry of Order Granting Plaintiff's Motion to Dismiss	JA007047 JA007053	97
	Exhibit 9 – Stipulation and Order for Dismissal with Prejudice	JA007054-JA007056	97
	Exhibit 10 – Stipulation and Order to Dismiss Third-Party Complaint of Interstate Plumbing & Air Conditioning, LLC Against APCO Construction, Inc. with Prejudice	JA007057-JA007059	97
	Exhibit 11 – Notice of Entry of Order Granting in Part and Denying in Part APCO Construction's Omnibus Motion *in Limine*	JA007060-JA007088	97
	Exhibit 12 – Notice of Entry of Order Granting in Part and Denying in Part Helix Electric of Nevada, LLC's Motion in Limine (against APCO Construction)	JA007070-JA007078	97
	Exhibit 13 – Notice of Entry of Order Denying APCO Constructions' Motion for Partial Summary Judgment Re: Lien Foreclosure Claims	JA007079-JA007084	97
	Exhibit 14 – Notice of Entry of Order Denying APCO Construction's Motion for Reconsideration of Order Granting Partial Summary	JA007085-JA007087	97

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	Judgment Precluding Defenses Based on Pay-if-Paid Agreements		
	Exhibit 15 – Notice of Association of Counsel	JA007088-JA007094	97
06-15-18	**Plaintiff in Intervention National Wood Products, Inc.'s Opposition to APCO Construction's Motion for Attorneys' Fees and Costs**	**JA007095-JA007120**	**97/98**
06-15-18	**Declaration of S. Judy Hirahara in support of National Woods's Opposition to APCO Construction's Motion for Attorneys' Fees and Costs**	**JA007121-JA007189**	**98**
06-18-18	**Plaintiff in Intervention National Wood Products, Inc.'s Joinder to Helix Electric of Nevada, LLC's Opposition to APCO Construction's Motion for Attorneys' Fees and Costs**	**JA007190-JA007192**	**99**
06-21-18	**Helix Electric of Nevada, LLC's Notice of Non-Opposition to its Motion for Attorney's Fees, Interest and Costs**	**JA007193-JA007197**	**99**
06-29-18	**APCO Construction, Inc.'s Reply in Support of its Motion for Attorney's Fees and Costs Against Helix Electric of Nevada, LLC and Plaintiff in Intervention National Wood Products, Inc.**	**JA007198-JA007220**	**99**
	Exhibit 1 – Invoice Summary by Matter Selection	JA007221-JA007222	99
	Exhibit 2 – Marquis Aurbach Coffing Invoice to APCO dated April 30, 2018	JA007223-JA007224	99

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06-29-18	Helix Electric of Nevada, LLC's Reply Re: Motion to Retax	JA007225-JA007237	100
07-02-18	Notice of Entry of Order Granting Helix Electric of Nevada, LLC's Motion for Attorneys' Fees, Interest and Costs	JA007238-JA007245	100
07-19-18	Plaintiff-in-Intervention National Wood Products, Inc.'s Surreply to APCO Construction's Reply to Plaintiff-in-Intervention National Wood Products, Inc.'s Opposition to Motion for Attorney's Fees and Costs	JA007246-JA007261	100
08-08-18	Court's Decision on Attorneys' Fees and Cost Motions	JA007262-JA007280	100
09-28-18	Notice of Entry of (1) Granting APCO Construction, Inc.'s Motion for Attorneys' Fees and Costs (2) Granting APCO Construction, Inc.'s Memorandum of Costs in Part (3) Granting Helix Electric of Nevada, LLC's Motion to Retax in Part and Denying in Part (4) Granting Plaintiff in Intervention National Wood Products, LLC's Motion to Retax in Part and Denying in Part and (5) Granting National Wood Products, Inc.'s Motion to File a Surreply	JA007281-JA007299	100
01-24-19	Transcript for All Pending Fee Motions on July 19, 2018	JA007300-JA007312	100/101
07-12-19	Order Dismissing Appeal (Case No. 76276)	JA007313-JA007315	101

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08-06-19	**Helix Electric of Nevada LLC's Motion to (I) Re-Open Statistically Closed Case, (II) Dismiss All Unresolved Claims and/or (III) In the Alternative for a Rule 54(B) Certification as to Helix and APCO**	**JA007316-JA007331**	**101**
	Exhibit 1 – Judgment [As to the Claims of Helix Electric of Nevada, LLC and Plaintiff in Intervention National Wood Products, Inc.'s Against APCO Construction, Inc.	JA007332-JA007335	101
	Exhibit 2 – ORDER: (1) Granting APCO Construction, Inc. Motion for Attorneys Fees and Costs (2) Granting APCO Construction, Inc.'s Memorandum of Costs in Part (3) Granting Helix Electric of Nevada LLC's Motion to Retax in Part and Denying in Part and all related matters (4) Granting Plaintiff in Intervention National Wood Products LLC's Motion to Retax in Part and Denying in Part -and-(5) Granting National Wood Products, Inc.'s Motion to File a Surreply	JA007336-JA007344	101
	Exhibit 3 - Notice of Appeal	JA007345-JA007394	101/102
	Exhibit 4 – Amended Notice of Appeal	JA007395-JA007400	102
	Exhibit 5A – 5F -Notices of Entry of Order as to the Claims of Cactus Rose Construction, Fast Glass, Inc., Heinaman Contract Glazing, Helix Electric of Nevada, LLC, SWPPP Compliance	JA007401-JA007517	102/103

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	Solutions, Inc., E&E Fire Protection		
	Exhibit 6 – Order Dismissing Appeal in Part (Case No. 76276)	JA007518-JA007519	103
	Exhibit 7 – Order to Show Cause	JA007520-JA007542	103
	Exhibit 8 -Order Dismissing Appeal (Case No. 76276)	JA007524-JA007527	103
	Exhibit 9 – Notice of Entry of Order to Consolidate this Action with Case Nos. A574391, A574792, A57623. A58389, A584730, A58716, A580889 and A589195	JA 007528-JA007541	103
	Exhibit 10 (Part One)	JA007537-JA007542	103
	Exhibit 10A – Docket 09A587168 (Accuracy Glass & Mirror v. APCO)	JA007543-JA007585	103
	Exhibit 10B -Docket 08A571228 (APCO v. Gemstone)	JA007586-JA008129	103/104/105/106/107/108/109
	Exhibit 10C – Notice of Entry of Order to Consolidate this Action with Cases Nos A57. 4391, A574792, A577623, A583289, A584730, A587168, A580889 and A589195	JA008130-JA008138	109
	Exhibit 10D – Notice of Entry of Joint Order Granting, in Part, Various Lien Claimants' Motions for Partial Summary Judgment Against Gemstone Development West	JA008139-JA008141	109
	Exhibit 10 (Part Two)	JA008142-JA008149	109

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	Exhibit 10E – 131 Nev. Advance Opinion 70	JA008150-JA008167	109
	Exhibit 10F – Special Master Report Regarding Remaining Parties to the Litigation and Discovery Status	JA008168-JA008170	109
	Exhibit 10EG – Notice of Entry of Granting Plaintiff's Motion to Dismiss	JA008171-JA008177	109
	Exhibit 10H – Complaint re Foreclosure	JA008178-JA008214	109
	Exhibit 10I – First Amended Complaint re Foreclosure	JA008215-JA008230	109
	Exhibit 10J – APCO Construction's Answer to Accuracy Glass & Mirror Company's First Amended Complaint re Foreclosure	JA008231-JA008265	109/110
	Exhibit 10K –Answer to Accuracy Glass & Mirror Company, Inc.'s Complaint and Camco Pacific Construction, Inc.'s Counterclaim	JA008266-JA008285	110
	Exhibit 10L – Accuracy Glass & Mirror Company, Inc.'s Answer to Camco Pacific Construction Company's Counterclaim	JA008286-JA008290	110
	Exhibit 10M – Helix Electric's Amended Statement of Facts Constituting Lien and Third-Party Complaint	JA008291-JA008306	110
	Exhibit 10N – APCO Construction's Answer to Helix Electric's Amended Statement of Facts Constituting Lien and Third-Party Complaint	JA008307-JA008322	110
	Exhibit 10O – Answer to Helix Electric's Statement of Facts	JA008323-JA008338	110

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	Constituting Lien and Third-Party Complaint and Camco Pacific Construction Company Inc.'s Counterclaim		
	Exhibit 10P – Notice of Entry of Helix Electric of Nevada, LLC's Motion for Attorney's Fees, Interest and Costs	JA008339 JA008347	110
	Exhibit 10Q – Notice of Entry of Judgment [As to the claims of Helix Electric of Nevada, LLC Against Camco Construction Co., Inc.]	JA008348-JA008367	110
	Exhibit 10R – Notice of Entry of Judgment [As to the Claims of Helix Electric of Nevada, LLC and Plaintiff in Intervention National Wood Products, Inc. Against APCO Construction, Inc.]	JA008368-JA008378	110
	Exhibit 10S – Findings of Fact and Conclusions of Law and Order as to the Claims of Helix Electric and Cabenetec Against APCO	JA008379-JA008450	110/111
	Exhibit 10T -WRG Design, Inc.'s Amended Statement of Facts Constituting Notice of Lien and Third-Party Complaint	JA008451-JA008486	111
	Exhibit 10U – APCO Construction's Answer to WRG Design Inc.'s amended Statement of Facts Constituting Lien and Third-Party Complaint	JA008468-JA008483	111
	Exhibit 10V -Answer to WRG Design, Inc.'s Statement of Facts Constituting Lien, Third-Party Complaint and Camco Pacific Construction, Inc's Counterclaim	JA008484-JA008504	111

Date	Description	Bates Number	Volume(s)
	Exhibit 10W – Notice of Entry of Stipulation and Order Dismissal	JA008505-JA008512	111
	Exhibit 10X – WRG Design, Inc.'s Answer to Camco Pacific Construction Company, Inc.'s Counterclaim	JA008513 JA008517	111
	Exhibit 10Y – Heinaman Contract Glazing's Amended Statement of Facts Constituting Lien and Third-Party Complaint	JA008518-JA008549	111
	Exhibit 10Z – Answer to Heinaman Contract Glazing's Statement of Facts Constituting Lien and Third-Party Complaint, and Camco Pacific Construction's Counterclaim	JA008531-JA008551	111
	Exhibit 10AA – Notice of Entry of Granting Heinaman Glazing's Motion for Attorneys's Fees, Interest and Costs	JA008552-JA008579	111/112
	Exhibit 10BB -Notice of Entry of Judgment [As to the Claims of Heinaman Contract Glazing Against Camco Construction Co., Inc.]	JA008561-JA008582	112
	Exhibit 10CC – Heinaman Contract Glazing's Answer to Camco Pacific Construction Company's Counterclaim	JA008583 JA008588	112
	Exhibit 10DD - Bruin Painting Corporation's Amended Statement of Facts Constituting Notice of Lien and Third-Party Complaint	JA008589-JA00861	112
	Exhibit 10EE – Answer to Bruin Painting Corporation's Amended Statement of Facts Constituting Notice of Lien and Third-Party	JA008602-JA008621	112

Date	Description	Bates Number	Volume(s)
	Complaint and Camco Pacific Construction, Inc.'s Counterclaim		
	Exhibit 10FF – Voluntary Dismissal of Fidelity and Deposit Company of Maryland Only from Bruin Painting Corporation's Amended Statement of Facts Constituting Notice of Lien and Third-Party Complaint Without Prejudice	JA008622-JA008624	112
	Exhibit 10GG – HD Supply Waterworks' Amended Statement of Facts Constituting Lien and Third-Party Complaint	JA008625-JA008642	112
	Exhibit 10HH – APCO Construction's Answer to HD Supply Waterworks' Amended Statement of Facts Constituting Lien and Third-Party Complaint	JA008643-JA008657	112
	Exhibit 10II – Amended Answer to HD Supply Waterworks' Amended Statement of Facts Constituting Lien and Third-Party Complaint	JA008658-JA008664	112
	Exhibit 10JJ -Defendants Answer to HD Supply Waterworks' Amended Statement of Facts Constituting Lien and Third-Party Complaint	JA008665-JA008681	112
	Exhibit 10KK – Stipulation and Order to Dismiss E & E Fire Protection, LLC Only Pursuant to the Terms State Below	JA008682-JA008685	112
	Exhibit 10LL – HD Supply Waterworks, LP's Voluntary Dismissal of Platte River Insurance Company Only Without Prejudice	JA008686-JA008693	112

Date	Description	Bates Number	Volume(s)
	Exhibit 10MM – Scott Financial Corporation's Answer to HD Supply Waterworks' Amended Statement of Facts Constituting Lien and Third-Party Complaint	JA008694-JA008717	112/113
	Exhibit 10NN-Notice of Appeal	JA008718 JA008723	113
	Exhibit 10OO – Amended Notice of Appeal	JA008724-JA008729	113
	Exhibit 10PP – Notice of Cross Appeal	JA008730-JA008736	113
	Exhibit 10QQ – Motion to Suspend Briefing Pending Outcome of Order to Show Cause in Supreme Court Case No. 76276	JA008737-JA008746	113
	Exhibit 11 – Order to Consolidate this Action with Case Nos. A574391, A574792, A57623. A58389, A584730, A58716, A580889 and A589195	JA008747-JA008755	113
	Exhibit 12 – Stipulation and Order to Dismiss Third-Party Complaint of Interstate Plumbing & Air Conditioning, LLC Against APCO Construction, Inc. with Prejudice	JA00875-JA008758	113
	Exhibit 13 – Stipulation and Order with Prejudice	JA008759-JA008780	113
	Exhibit 14 – Docket/United Subcontractors, Inc. dba Skyline Insulation's Motion to Enforce Settlement Agreement and Enter Judgment	JA008762-JA008788	113
	Exhibit 15 – Notice of Entry of Order Granting Motion for 54(b) Certification and for Stay Pending Appeal	JA008789-JA008798	113

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	Exhibit 16 – Notice of Appeal	JA008799-JA008810	113
08-16-19	**APCO's Opposition to Helix Electric of Nevada LLC's Motion to (I) Re-Open Statistically Closed Case, (II) Dismiss All Unresolved Claims and/or (III) In the Alternative for a Rule 54(B) Certification as to Helix and APCO**	**JA008811-JA008821**	**114**
	Exhibit 1 – Order to File Amended Docketing Statement	JA008822-JA008824	114
	Exhibit 2 – Order to Show Cause	JA008825-JA008828	114
	Exhibit 3 – Appellant/Cross-Respondent's Response to Order to Show Cause	JA008829-JA008892	114/115/116
	Exhibit 4 – Order Dismissing Appeal	JA008893-JA008896	116
	Exhibit 5 – Chart of Claims	JA008897-JA008924	116
	Exhibit 6 – Answer to Helix Electric's Statement of Facts Constituting Lien and Third-Party Complaint and Camco Pacific Construction Company, Inc.'s Counterclaim	JA008925-JA008947	116/117
	Exhibit 7 – Answer to Cactus Rose's Statement of Facts Constituting Notice of Lien and Complaint and Camco Pacific Construction Company Inc.'s Counterclaim	JA008948-JA008965	117
	Exhibit 8 – Answer to Heinaman Contract Glazing's Statement of Facts Constituting Lien and Third-Party Complaint and Camco	JA008966-JA008986	117/118

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	Pacific Construction's Counterclaim		
	Exhibit 9 – Findings of Fact and Conclusions of Law as to the Claims of Helix Electric of Nevada, LLC Against Camco Pacific Construction, Inc.	JA008987-JA008998	118
	Exhibit 10 – Findings of Fact and Conclusions of Law as to the Claims of Cactus Rose Construction Co., Inc.	JA008998-JA009010	118
	Exhibit 11 – Findings of Fact and Conclusions of Law as to the Claims of Heinaman Contract Glazing	JA009011-JA009024	118
	Exhibit 12 – Notice of Entry of Decision, Order and Judgment on Defendant Scott Financial Corporation's Motion for Summary Judgment as to Priority of Liens	JA009025-JA009038	118
	Exhibit 13 – Findings of Fact and Conclusions of Law as to the Claims of Helix Electric and Cabenetec Against APCO	JA009039-JA009110	118/119
	Exhibit 14 – Order Granting Motion to Deposit Bond Penal Sum with Court, Exoneration of Bond and Dismissal	JA009111-JA009113	119
	Exhibit 15 – Order Approving Distribution of Fidelity and Deposit Company of Maryland's Bond	JA009114-JA009116	119
08-29-19	**Helix Electric of Nevada LLC's Reply to APCO's Opposition to Helix Electric of Nevada LLC's Motion to (I) Re-Open Statistically Closed Case, (II)**	**JA009117-JA009123**	**119**

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	Dismiss All Unresolved Claims and/or (III) In The Alternative for a Rule 54(B) Certification as to Helix and APCO		
01-03-20	**Notice of Entry of Order Granting Helix Electric of Nevada, LLC's Motion for Rule 54(b) Certification**	**JA009124-JA009131**	**119**
01-29-20	**Notice of Appeal**	**JA009132-JA009136**	**119/120**
	Exhibit A – Notice of Entry of Judgment [As to the Claims of Helix Electric of Nevada, LLC and Plaintiff in Intervention National Wood Products, Inc.'s Against APCO Construction, Inc.]	JA009137-JA009166	120
	Exhibit [C] – Notice of Entry of Order Granting Helix Electric of Nevada's Rule 54(b) Certification	JA009148-JA009156	120
02-11-20	**Case Appeal Statement**	**JA009157-JA009163**	120
02-11-20	**APCO's Notice of Cross Appeal**	**JA009164-JA010310**	120
	Exhibit 1 – Notice of Entry of Order (1) Granting APCO Construction, Inc.'s Motion for Attorney's Fees and Costs; (2) Granting APCO Construction, Inc.'s Memorandum of Costs in Part (3) Granting Helix Electric of Nevada, LLC's Motion to Retax in Party (4) Granting Plaintiff-in-Intervention National Wood Productions, LLC's Motion to Retax in Part and Denying in Part and (5) Granting National Wood Products, Inc.'s Motion to File a Surreply	JA009168-JA009182	120

Date	**Description**	**Bates Number**	**Volume(s)**
	Exhibit 2 – Notice of Entry of Order Granting Helix Electric of Nevada's Motion for Rule 54(b) Certification	JA009183-JA00991	120

ALPHABETICAL APPENDIX OF EXHIBITS

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08-05-09	**APCO's Answer to Helix's Amended Statement of Facts Constituting Notice of Lien and Third-Party Complaint**	**JA000016 – JA000030**	**1**
05-08-18	**APCO Construction, Inc.'s Motion for Attorneys' Fees and Costs Against Helix Electric of Nevada, LLC and Plaintiff in Intervention National Wood Products, Inc**.	**JA006265-JA006284**	**85**
	Exhibit 1 – Findings of Fact and Conclusions of Law as to the Claims of Helix Electric and Cabenetec Against APCO	JA006285-JA006356	85/86
	Exhibit 2 – National Wood Products, Inc.'s Notice of Motion and Motion to Intervene and Memorandum of Points and Authorities in Support Thereof	JA006357-JA006369	86
	Exhibit 3 – Plaintiff in Intervention, National Wood Products, Inc.'s Findings of Fact and Conclusions of Law (Proposed)	JA006370-JA006385	86/87
	Exhibit 4 – Plaintiff in Intervention, National Wood Productions, Inc.'s Findings of Fact and Conclusions of Law Re Camco	JA006386-JA006398	87
	Exhibit 5 – Offer of Judgment to Helix Electric of Nevada, LLC	JA006399-JA006402	87
	Exhibit 6 – Offer of Judgment to Plaintiff in Intervention National Wood Products, Inc.	JA006403-JA006406	87
	Exhibit 7 – Declaration of John Randall Jefferies, Esq. in Support of APCO Construction, Inc.'s Motion for Attorney's Fees and Costs	JA006407-JA006411	87
	Exhibit 7A – Billing Entries	JA006412-	87/88

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		JA006442	
	Exhibit 7B – Time Recap	JA006443-JA006474	88
	Exhibit 8 – Declaration of Cody S. Mounteer, Esq. in Support of Motion for Attorney's Fees and Costs	JA006475-JA006478	88
	Exhibit 9 – APCO Construction, Inc.'s Memorandum of Costs and Disbursements [Against Helix Electric of Nevada, LLC, and Plaintiff in Intervention National Wood Products, LLC]	JA006479-JA006487	88
	Exhibit 10 – Depository Index	JA006488-JA006508	88/89
06-06-13	**APCO's Limited Motion to Lift Stay for Purposes of this Motion Only; (2) APCO's Motion for Summary Judgment Against Gemstone Only; and (3) Request for Order Shortening Time**	**JA000044-JA000054**	**1**
	Exhibit 1 – Affidavit of Randy Nickerl in Support of (I) APCO's Limited Motion to Lift Sta for Purposes of this Motion Only; (2) APCO's Motion for Judgment Against Gemstone Only	JA000055-JA000316	1/2/4/5/6
	Exhibit 2 – Findings of Fact and Conclusions of Law and Judgment in Favor of APCO Construction Against Gemstone Development West, Inc. Only	JA000317-JA000326	6
02-11-20	**APCO's Notice of Cross Appeal**	**JA009164-JA010310**	120
	Exhibit 1 – Notice of Entry of Order (1) Granting APCO Construction, Inc.'s Motion for Attorney's Fees and Costs; (2) Granting APCO Construction, Inc.'s Memorandum of Costs in Part (3) Granting Helix Electric of Nevada, LLC's	JA009168-JA009182	114

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	Motion to Retax in Party (4) Granting Plaintiff-in-Intervention National Wood Productions, LLC's Motion to Retax in Part and Denying in Part and (5) Granting National Wood Products, Inc.'s Motion to File a Surreply		
	Exhibit 2 – Notice of Entry of Order Granting Helix Electric of Nevada's Motion for Rule 54(b) Certification	JA009183-JA00991	120
11-06-17	**APCO Construction, Inc.'s Omnibus Motion *in Limine***	**JA000590 JA000614**	**9**
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	Exhibit 14 – Excerpts from Helix Electric of Nevada, LLC's 30(b)(6) Witness Deposition Transcript taken July 20, 2017	JA000874-JA000897	12
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03-08-18	**Letter to Judge Denton submitting APCO Construction, Inc.'s Proposed Findings of Fact and Conclusions of Law**	**JA005986-JA006058**	**8/821**
03-08-18	**Letter to Judge Denton submitting Helix Electric of Nevada, LLC's (Proposed) Findings of Fact and Conclusions of Law**	**JA005953-JA005985**	**81**
01-04-18	**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 provision on an Order Shortening Time**	**JA001199-JA001217**	**22**
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	Exhibit [C] – Notice of Entry of Order Granting Helix Electric of Nevada's Rule 54(b) Certification	JA009148-JA009156	120
05-31-18	**Notice of Entry of Judgment [As to the Claims of Helix Electric of Nevada, LLC Against Camco Construction, Co., Inc.]**	**JA006522 JA006540**	**89**
06-01-18	**Notice of Entry of Judgment [As to the Claims of Helix Electric of Nevada, LLC and Plaintiff in Intervention National Wood Products, Inc.'s Against APCO Construction, Inc.]**	**JA006541 JA006550**	**90**
09-28-18	**Notice of Entry of Order (1) Granting APCO Construction, Inc.'s Motion for Attorneys' Fees and Costs (2) Granting APCO Construction, Inc.'s Memorandum of Costs in Part (3) Granting Helix Electric of Nevada, LLC's Motion to Retax in Part and Denying in Part (4) Granting Plaintiff in Intervention National Wood Products, LLC's Motion to Retax in Part and Denying in Part and (5) Granting National Wood Products, Inc.'s Motion to File a Surreply**	**JA007281-JA007299**	**100**
12-29-17	**Notice of Entry of Order Granting in Part and Denying in Part APCO Construction's Omnibus Motion *in Limine***	**JA001178-JA001186**	**22**
07-02-18	**Notice of Entry of Order Granting Helix Electric of Nevada, LLC's Motion for Attorneys' Fees, Interest and Costs**	**JA007238-JA007245**	**100**
01-03-20	**Notice of Entry of Order Granting Helix Electric of Nevada, LLC's Motion for Rule 54(b) Certification**	**JA009124-JA009131**	**119**

Date	Description	Bates Number	Volume(s)
01-03-18	**Notice of Entry of Order Granting Peel Brimley Lien Claimants' Motion for Partial Summary Judgment Precluding Defenses Based on Pay-if-Paid Agreements**	**JA001187-JA001198**	**22**
12-29-17	**Notice of Entry of Order Granting in Part and Denying in Part Helix Electric of Nevada, LLC's Motion *in Limine* 1-4**	**JA001170-JA001177**	**22**
12-29-17	**Notice of Entry of Order Granting Peel Brimley Lien Claimants' Motion *in Limine* 1-6**	**JA001161-JA001169**	**22**
01-19-18	**Order Denying APCO Construction's Motion for Reconsideration of Order Granting Partial Summary Judgment Precluding Defenses Based on Pay-if-Paid Agreements**	**JA005282-JA005283**	**78**
07-12-19	**Order Dismissing Appeal (Case No. 76276)**	**JA007332-JA007334**	**101**
07-02-10	**Order Striking Defendant Gemstone Development West, Inc.'s Answer and Counterclaim and Entering Default**	**JA000042-JA000043**	**1**
08-02-17	**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**	**JA000328-JA000342**	**6**
	Exhibit 1 – APCO Construction's Answers to Helix Electric of Nevada, LLC's First Request for Interrogatories	JA000343-JA00379	6
	Exhibit 2 – Camco Pacific Construction Company, Inc.'s Responses to Helix Electric of Nevada, LLC's Interrogatories	JA000380-JA000392	6
11-06-17	**Peel Brimley Lien Claimants' Motion in Limine Nos. 1-6**	**JA000419-JA000428**	**7**
	Exhibit 1 – Notice of Entry of Order	JA000429	7

Date	Description	Bates Number	Volume(s)
		JA000435	
	Exhibit 2 – Amended Notices of 30(b)(6) Deposition of Camco Pacific Construction Company, Inc. from Cactus Rose Construction, Inc., Fast Glass, Inc.'s, Heinaman Contract Glazing, Inc. and Helix Electric of Nevada, LLC's	JA000436-JA000472	7/8
	Exhibit 3 – Excerpt from David E. Parry's Deposition Transcript taken June 20, 2017	JA000473 JA00489	8
	Exhibit 4 – Cactus Rose Construction, Inc.'s First Set of Request for Admissions to Camco Pacific Construction	JA00490 JA000500	8
	Exhibit 5 – Fast Glass, Inc.'s First Set of Request for Admissions to Camco Pacific Construction	JA000501-JA000511	8
	Exhibit 6 – Heinaman Contract Glazing, Inc.'s First Set of Request for Admissions to Camco Pacific Construction	JA000512-JA000522	8
	Exhibit 7 – Helix Electric of Nevada, LLC's First Set of Request for Admissions to Camco Pacific Construction	JA000523-JA000533	8
09-28-17	**Peel Brimley Lien Claimants' Reply to Oppositions to Motion for Partial Summary Judgment Precluding Defenses Based on Pay-if-Paid Agreements**	**JA000413-JA00418**	**7**
01-09-18	**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**	**JA001552-JA001560**	**27**
06-18-18	**Plaintiff in Intervention National Wood Products, Inc.'s Joinder to Helix Electric of Nevada, LLC's Opposition**	**JA007190-JA007192**	**99**

Date	Description	Bates Number	Volume(s)
	to APCO Construction's Motion for Attorneys' Fees and Costs		
06-15-18	**Plaintiff in Intervention National Wood Products, Inc.'s Opposition to APCO Construction's Motion for Attorneys' Fees and Costs**	**JA007095-JA007120**	**97/98**
07-19-18	**Plaintiff-in-Intervention National Wood Products, Inc.'s Surreply to APCO Construction's Reply to Plaintiff-in-Intervention National Wood Products, Inc.'s Opposition to Motion for Attorney's Fees and Costs**	**JA007246-JA007261**	**100**
01-10-18	**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**	**JA001561-JA001573**	**27**
01-18-18	**Stipulation and Order Regarding Trial Exhibit Admitted into Evidence**	**JA002199-JA002201**	**36**
	Exhibit 1 – Exhibit List APCO	JA002208-JA002221	36
	Exhibit 2 – Helix Trial Exhibits	JA002222-JA002223	36
	Exhibit 3 – Exhibit List Plaintiff in Intervention National Wood Products, Inc.	JA002224-JA002242	36/37
	APCO TRIAL EXHIBITS:		
	APCO Related Exhibits:		
	Trial Exhibit 7 - Letter from Scott Financial to APCO re: Loan Status	JA002243	37
	Trial Exhibit 8 - APCO Pay Application No. 10 as submitted to Owner	JA002244-JA002282	37/38
	Trial Exhibit 12 and 107 - Email from C. Colligan to Subcontractors re: Subcontractor Concerns	JA002283-JA002284	38

Date	Description	Bates Number	Volume(s)
	Trial Exhibit 17 – Video (Construction Project)	JA002285	N/A
	Trial Exhibit 18 – Video (Construction Project)	JA002286	N/A
	Trial Exhibit 19 – Video (Construction Project)	JA002287	N/A
	Trial Exhibit 20 – Video (Construction Project)	JA002288	N/A
	Trial Exhibit 21 – Video (Construction Project)	JA002289	N/A
	Trial Exhibit 22 – Video (Construction Project)	JA002290	N/A
	Trial Exhibit 29 - Email from J. Robbins to Subcontractors re: Billing Cut-Off for August Billing	JA002285	39
	Trial Exhibit 30 - Camco Pay Application No. 11 NCS-Owner Approved with NCS Draw Request	JA002286-JA002306	39
	Trial Exhibit 32 and 125 - Photo re: Building 8 & 9, Interior (Showing drywall still not completed and no electrical trim or fixture installed)	JA002307-JA002308	39
	Trial Exhibits 33 and 126 - Photo re: Building 8 & 9, Interior (Showing drywall still not completed)	JA002309-JA002310	39
	Exhibit 34 and 128 - Photo re: Building 8 & 9, Interior (Showing drywall still not completed)	JA002311-JA002312-	40
	Trial Exhibit 35 - Photo re: Building 8 & 9, Interior (Showing drywall still not completed and no electrical trim or fixtures installed)	JA002313-JA002314	40
	Exhibit 36 and 130 -Photo re: Building 8 & 9, Interior (Showing drywall still not completed and no electrical trim or fixtures installed)	JA002315-JA002316	40

Date	Description	Bates Number	Volume(s)
	Trial Exhibits 37 and 131 -Photo re: Building 8 & 9, Interior (Showing drywall still not completed and no electrical trim or fixtures installed)	JA002317-JA002318	40
	Trial Exhibits 38 and 132 - Photo re: Building 8 & 9, Interior (Showing drywall still not completed and no electrical trim or fixtures installed)	JA002319-JA002320	41
	Trial Exhibit 39 -Email from K. Costen to Subcontractors informing that Manhattan West Project no longer open	JA002321-JA002322	41
	Trial Exhibit 40- Letter from D. Parry to Subcontractors Re: Funding Withdrawn	JA002323 JA002326	41
	HELIX Related Exhibits:		41
	Trial Exhibit 46 - Helix Pay Application No. 16713-008R1 with Proof of Payment	JA002327-JA002345	41
	Trial Exhibit 47 - Helix Pay Application No. 16713-009R1 with Proof of Payment	JA002346-JA002356	41
	Trial Exhibit 48 - Email from R. Nickerl to B. Johnson Re: Work Suspension Directive	JA002357-JA002358	41
	Trial Exhibit 49 -Helix Pay Application No. 16713-010R2 with Proof of Payment	JA002359-JA002364	41/42
	Trial Exhibit 50 - Unconditional Waiver and Release re: Pay Application No. 8 with Copy of Payment	JA002365-JA002366	42
	Trial Exhibit 51 - Photo re: Building 8 & 9, South (No Exterior fixtures installed. Helix billed out at 90%)	JA002367-JA002368	42
	Trial Exhibit 52 -Photo re: Building 8 & 9, North (No Exterior fixtures installed. Helix billed out at 90%)	JA002369-JA002370	42
	Trial Exhibit 53 -Photo re: Building - 2 & 3, West (No Exterior fixtures installed. Helix billed out at 90%)	JA002371-JA002372	42

Date	Description	Bates Number	Volume(s)
	Trial Exhibit 54 - Photo re: Building - 2 & 3, East (No Exterior fixtures installed. Helix billed out at 90%)	JA002373-JA002374	42
	Trial Exhibit 55 - Photo re: Building 2 & 3, East (No Exterior fixtures installed. Helix billed out at 90%)	JA002375-JA002376	42
	Trial Exhibit 56 - Photo re: Building 8 & 9, North (No Exterior fixtures installed. Helix billed out at 90%)	JA002377-JA002378	42
	Trial Exhibit 57 - Photo re: Building 2 & 3, and 8 & 9, North (No Exterior fixtures installed. Helix billed out at 90%)	JA002379-JA002381	42
	Trial Exhibit 58 - Helix Pay Application No. 16713-011R1 submitted to Owner	JA002382-JA002391	42
	Trial Exhibit 59 - Helix Pay Application No. 16713-011R1 given to Camco with Proof of Payment	JA002392-JA002405	43
	Trial Exhibit 60 - Helix Retention Rolled to Camco	JA002406-JA002415	43
	Trial Exhibit 61 - Unconditional Waiver and Release re: all Invoices through June 30, 2008 with Proof of Payment	JA002413-JA002415	43
	Trial Exhibit 62 - Photo re: Building 8 & 9, South	JA002416-JA002417	43
	Trial Exhibit 63 - Photo re: Building 2 & 3, West	JA002418-JA002419	43
	Trial Exhibit 64 - Photo re: Building 2 & 3, West	JA002420-JA002421	43
	Trial Exhibit 65 - Photo re: Building 2 & 3, South	JA002422-JA002423	43
	Trial Exhibit 66 - Letter of transmittal from Helix to APCO re: Helix Pay Application No. 16713-011R1	JA002424-JA002433	43
	Trial Exhibit 67 - Photo re: Building 8 & 9, West (No exterior fixtures installed. Helix billed out 90%)	JA002435-JA002436	43

Date	Description	Bates Number	Volume(s)
	Trial Exhibit 68 -Photo re: Building 8 & 9, West (No exterior fixtures installed. Helix billed out 90%)	JA002437-JA002438	43
	Trial Exhibit 69 - Photo re: Building 2 & 3, East (No exterior fixtures installed. Helix billed out 90%)	JA002439-JA002440	43
	Trial Exhibit 70 - Photo re: Building 8 & 9, South (No exterior fixtures installed. Helix billed out 90%)	JA002441-JA002442	43
	Trial Exhibit 71 - Photo re: Building 8 & 9, West (No exterior fixtures installed. Helix billed out 90%)	JA002443-JA002444	43
	Trial Exhibit 72 - Photo re: Building 2 & 3, East (No exterior fixtures installed. Helix billed out 90%)	JA002445-JA002446	43
	Trial Exhibit 73 - Photo re: Building 8 & 9, West (No exterior fixtures installed. Helix billed out 90%)	JA002447-JA002448	43
	Trial Exhibit 74 - Photo re: Building 2 & 3, East (No exterior fixtures installed. Helix billed out 90%)	JA002448-JA002449	43
	Trial Exhibit 75 - Unconditional Release re: Pay Application No. 16713-011R1 with Proof of Payment	JA002450-JA002456	43
	Exhibit 77 - Helix Statement of Facts Constituting Notice of Lien and Third-Party Complaint	JA002457-JA002494	43
	Zitting Brothers Related Exhibits:		
	Trial Exhibit 100 - Check No. 14392 payable to Zitting ($27,973.80); Progress Payment No. 7	JA002495-JA002497	44
	Trial Exhibit 101 - Email from R. Nickerl to R. Zitting re: Change Orders	JA002498-JA002500	44
	Trial Exhibit 102 -Email from L. Lynn to J. Griffith, et al. re: Change Order No. 00011 “pending”	JA002501-JA002503	44

Date	Description	Bates Number	Volume(s)
	Trial Exhibit 103- Email from R. Zitting to R. Nickerl re: change orders adjusted to $30 per hour	JA002504-JA002505	44
	Trial Exhibit 104 - Email from R. Zitting to R. Nickerl re: change orders adjusted to $30 per hour with copies of change orders	JA002506-JA002526	44
	Trial Exhibit 105 - Ex. C to the Ratification – Zitting Quotes	JA002527-JA002528	44
	Trial Exhibit 106 - Unconditional Lien Release – Zitting ($27,973.80)	JA002529	44
	Trial Exhibit 108 - Photo of Video (Construction Project)	JA002530-JA002531	44
	Trial Exhibit 109 - Photo of Video (Construction Project)	JA002532-JA002533	44
	Trial Exhibit 110 - Photo of Video (Construction Project)	JA002534-JA002535	44
	Trial Exhibit 111 - Photo of Video (Construction Project)	JA002536-JA002537	44
	Trial Exhibit 112 - Photo of Video (Construction Project)	JA002538-JA002539	44
	Trial Exhibit 113 -Photo of Video (Construction Project)	JA002550-JA002541	44
	Trial Exhibit 114 -Photo of Video (Construction Project)	JA002542-JA002543	44
	Trial Exhibit 115 - Progress Payment No. 9 Remitted to Zitting	JA002544-JA002545	44
	Trial Exhibit 116 - Ratification and Amendment of Subcontract Agreement between Buchele and Camco	JA002546-JA002550	44
	Trial Exhibit 117 - C to the Ratification	JA002551-JA002563	44
	Trial Exhibit 118 - Q&A from Gemstone to subcontracts	JA002564-JA002567	44
	Trial Exhibit 119 - Check No. 528388 payable to APCO ($33,847.55) – Progress Payment No. 8.1 and 8.2	JA002568-JA002571	44

Date	Description	Bates Number	Volume(s)
	Trial Exhibit 120 - Tri-City Drywall Pay Application No. 7 to APCO as submitted to Owner. Show percentage complete for Zitting	JA002572-JA002575	44/45
	Trial Exhibit 127 - Photo of Video (Construction Project)	JA002576-JA002577	45/46
	Trial Exhibit 128 - Photo of Video (Construction Project)	JA002578-JA002579	46
	Trial Exhibit 129 - Photo of Video (Construction Project)	JA002580-JA002581	46
	Trial Exhibit 138 - Memo from Scott Financial to Nevada State Contractors Board Re: Explanation of Project Payment Process	JA002582-JA002591	46
	Trial Exhibit 152 -Terms & Conditions modified by APCO, Invoices and Check Payment	JA002592-JA002598	46
	National Wood Products Related Exhibits:		
	Trial Exhibit 160 - Documents provided for settlement	JA002599-JA002612	46
	CAMCO Related Exhibits:		
	Trial Exhibit 163 - Camco Pay Application No. 12 to Gemstone	JA002613-JA002651	46/47
	Trial Exhibit 165 - Letter from D. Parry to A. Edelstein re: Gemstone losing funding for project	JA002652-JA002653	47
	Trial Exhibit 166 - Letter from D. Parry to G. Hall re: withdrawal of funding	JA002654 JA002656	47
	Helix Related Exhibits:		47
	Trial Exhibit 169 - Helix Exhibit to Standard Subcontract Agreement with Camco	JA 002665 JA002676	47/48
	Trial Exhibit 170 - Subcontract Agreement between Helix and Camco (unsigned)	JA002677-JA002713	48

Date	Description	Bates Number	Volume(s)
	Trial Exhibit 171 - Work Order No. 100	JA002714-JA002718	48
	Trial Exhibit 172 - Letter from J. Griffith to Victor Fuchs Re: Gemstone's intention to continue retention of Helix w/copy of Ratification and Amendment of Subcontract Agreement	JA002719-JA002730	48
	Trial Exhibit 173 - Helix Pay Application No. 16713-012 to Camco with proof of payment	JA002731-JA002745	48
	Trial Exhibit 174 - Helix Change Order Request No. 28	JA002746-JA002747	48
	Trial Exhibit 175 - Change Notice No. 41	JA002748-JA002751	48
	Trial Exhibit 176 - Helix Pay Application No. 16713-013 to Camco	JA002752-JA002771	48/49
	Trial Exhibit 177 - Helix Pay Application No. 16713-014 to Camco	JA002772-JA002782	49
	Trial Exhibit 178 - Camco's letter to Helix rejecting Pay Application No. 16713-015 with attached copy of Pay Application	JA002783 JA002797	49
	National Wood/Cabinetec Related Exhibits:		
	Trial Exhibit 184 - Ratification and Amendment of Subcontract Agreement between CabineTec and Camco (fully executed copy)	JA002798-JA002825	49
	General Related Exhibits:		
	Trial Exhibit 218 - Camco/Owner Pay Application No. 11 w/Backup	JA002826-JA003028	50/51/52
	Trial Exhibit 220 - Camco/Owner Pay Application No. 12 w/Backup	JA003029-JA003333	52/53/54/55
	Trial Exhibit 313 - Letter from A. Edelstein to R. Nickerl re: NRS 624 Notice	JA003334-JA003338	55
	Helix Trial Exhibits:		

Date	Description	Bates Number	Volume(s)
	Trial Exhibit 501 - Payment Summary	JA003339 – JA003732	55/56/57/ 58/59/60
	Trial Exhibit 508 – Helix Pay Application	JA003733- JA003813	60/61
	Trial Exhibit 510 - Unsigned Subcontract	JA003814- JA003927	61/62
	Trial Exhibit 512 - Helix's Lien Notice	JA003928- JA004034	62/63
	Trial Exhibit 522 - Camco Billing	JA004035- JA005281	63/64/65/66/67/ 68/69/70 /71/72 /73/74/75/ 76/77
01-17-18	**Transcript Bench Trial (Day 1)**[5]	**JA001668- JA001802**	**29/30**
	Trial Exhibit 1 - Grading Agreement ***(Admitted)***	JA001803- JA001825	30
	Trial Exhibit 2 – APCO/Gemstone General Construction Agreement ***(Admitted)***	JA001826- JA001868	30
	Trial Exhibit 3 - Nevada Construction Services /Gemstone Cost Plus/GMP Contract Disbursement Agreement ***(Admitted)***	JA001869- JA001884	30
	Trial Exhibit 4 - APCO Pay Application No. 9 Submitted to Gemstone ***(Admitted)***	JA001885- JA001974	30/31/32
	Trial Exhibit 5 - Letter from J. Barker to A. Edelstein re: APCO's Notice of Intent to Stop Work ***(Admitted)***	JA001975- JA001978	32
	Trial Exhibit 6 - Letter from J. Barker to A. Edelstein re: APCO's Notice of Intent to Stop Work ***(Admitted)***	JA001979- JA001980	32
	Trial Exhibit 10 - Letter from J. Barker to A. Edelstein Re: Notice of Intent to Stop Work (Second Notice) ***(Admitted)***	JA001981- JA001987	32

[5] Filed January 31, 2018

Date	Description	Bates Number	Volume(s)
	Trial Exhibit 13 - Letter from A. Edelstein to Re. Nickerl Re: Termination for Cause (Gemstone) ***(Admitted)***	JA001988-JA002001	32
	Trial Exhibit 14 - Letter from W. Gochnour to Sean Thueson Re: [APCO's] Response to [Gemstone's] Termination for Cause ***(Admitted)***	JA002002-JA002010	33
	Trial Exhibit 15 - Letter from R. Nickerl to A. Edelstein Re: 48-Hour Notices ***(Admitted)***	JA002011-JA002013	33
	Trial Exhibit 16 - Email from J. Horning to A. Berman and J. Olivares re: Joint Checks ***(Admitted)***	JA002014	33
	Trial Exhibit 23 - APCO Subcontractor Notice of Stopping Work and Letter from J. Barker to A. Edelstein Re: Notice of Stopping Work and Notice of Intent to Terminate Contract ***(Admitted)***	JA002015-JA002016	33
	Trial Exhibit 24 - Letter from R. Nickerl to Clark County re: Notification of APCO's withdrawal as General Contractor of Record ***(Admitted)***	JA002017-JA002023	33
	Trial Exhibit 26 - Email from J. Gisondo to Subcontractors re: June checks ***(Admitted)***	JA002024	34
	Trial Exhibit 27 - Letter from A. Edelstein to R. Nickerl re: June Progress Payment ***(Admitted)***	JA002025-JA002080	34
	Trial Exhibit 28 - Letter from J. Barker to A. Edelstein Re: Termination of Agreement for GMP ***(Admitted)***	JA002081	34
	Trial Exhibit 31 - Transmission of APCO's Pay Application No. 11 as Submitted to Owner ***(Admitted)***	JA002082-JA002120	34/35
	Trial Exhibit 45 - Subcontractor Agreement ***(Admitted)***	JA002121-JA002146	35

Date	**Description**	**Bates Number**	**Volume(s)**
	Trial Exhibit 162 - Amended and Restated General Construction Agreement between Gemstone and CAMCO ***(Admitted)***	JA002147-JA002176	35/36
	Trial Exhibit 212 - Letter from Edelstein to R. Nickerl re: NRS 624 Notice ***(Admitted)***	JA002177-JA002181	36
	Trial Exhibit 215 - Email from C. Colligan to Subcontractors re: 48-hour Termination Notice ***(Admitted)***	JA002182-JA002185	36
	Trial Exhibit 216 - Email from C. Colligan re: Meeting with Subcontractors ***(Admitted)***	JA002186-JA002188	36
	Trial Exhibit 506 – Email and Contract Revisions ***(Admitted)***	JA002189 – JA002198	36
01-18-18	**Transcript – Bench Trial (Day 2)**[6]	JA005284-JA005370	78
	Trial Exhibit 535 – Deposition Transcript of Andrew Rivera (Exhibit 99) ***(Admitted)***	JA005371-JA005623	78/79/80
01-19-18	**Transcript – Bench Trial (Day 3)**[7]	JA005624-JA005785	80
	Trial Exhibit 231 – Helix Electric's Amended Statement of Facts Constituting Notice of Lien and Third-Party Complaint ***(Admitted)***	JA005786-JA005801	80
	Trial Exhibit 314 - Declaration of Victor Fuchs in support of Helix's Motion for Partial Summary Judgment against Gemstone ***(Admitted)***	JA005802-JA005804	80
	Trial Exhibit 320 – June-August Billings—not paid to APCO ***(Admitted)***	JA005805	80
	Trial Exhibit 321 – Overpayments to Cabinetec ***(Admitted)***	JA005806-	80

[6] Filed January 31, 201879
[7] Filed January 31, 2018

Date	Description	Bates Number	Volume(s)
	Trial Exhibit 536 – Lien math calculations (handwritten) ***(Admitted)***	JA005807-JA005808	80
	Trial Exhibit 804 – Camco Correspondence ***(Admitted)***	JA005809-JA005816	80
	Trial Exhibit 3176 – APCO Notice of Lien ***(Admitted)***	JA005817-JA005819	81
01-24-18	**Transcript – Bench Trial (Day 5)[8]**	**JA005820-JA005952**	81
01-24-19	**Transcript for All Pending Fee Motions on July 19, 2018**	**JA007300-JA007312**	**100/101**

[8] Filed January 31, 2018

26. Helix failed to present any evidence that APCO failed to act in good faith under the Helix Subcontract or these circumstances. While it is undisputed that APCO did not pay Helix the retention, there is no evidence that this non-payment was in bad faith.

27. As a result, Helix's second claim for breach of the implied covenant of good faith and fair dealing of the subcontract fails as a matter of law.

C. **Unjust Enrichment/*Quantum Meruit***

28. Helix asserted breach of contract *and* unjust enrichment claims against APCO.[286]

29. APCO had a subcontract with Helix, Exhibit 45. Helix admitted the same in its complaints, at trial, and in its May 10, 2010 Motion for Partial Summary Judgment Against Gemstone (and corresponding errata), on file with this Court.

30. An action based upon a theory of unjust enrichment is not available when there is an express, written contract because no contract can be implied when there is an express contract.[287] However, frustration of an express contract's purpose can make unjust enrichment an available remedy. *See e.g. Restatement, Contracts 2d*, §377.

31. Even if the Helix Subcontract did not preclude an unjust enrichment/*quantum meruit* theory of recovery (which it does), APCO was not unjustly enriched by Helix's work. The undisputed evidence confirms that APCO was not paid any amounts for Helix's work that it did not transmit to Helix, and APCO did not get to keep the property. Instead, APCO remains unpaid $1,400,036.75 from the failed Project. [288]

32. As such, APCO was not unjustly enriched by Helix's work.

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[286] *See* Exhibit 45, Helix Subcontract, and Exhibit 149, CabineTec Subcontract.

[287] *Leasepartner's Corp. v. Robert L. Brooks Trust*, 113 Nev. 747, 942 P.2d 182 (1997).

[288] Testimony of Mary Jo Allen (APCO), Day 3, p. 122.

D. **Mechanic's Lien Foreclosure**

33. Helix's fourth claim for relief was of a mechanic's lien foreclosure, which also fails.

34. APCO was not the owner of the Project.

35. The Project has already been foreclosed upon and the proceeds were awarded to the lender. The Nevada Supreme Court affirmed the decision of the trial court that the lender was entitled to keep the Project and related proceeds, and the subcontractors (and APCO) were left with nothing. Thus, Helix cannot foreclose upon the property.

36. APCO is not legally liable for any deficiency judgment because it is not the party responsible for any deficiency. [289]

E. **Violation of NRS 624.606 through 624.630 *et seq.***

37. NRS 624.624 is designed to ensure that general contractors promptly pay subcontractors after the general contractor receives payment from the owner for the work performed by the subcontractor.

38. Here, it is undisputed that Exhibit 45, the Helix Subcontract is a written agreement between APCO and Helix and contained a retention payment schedule in Section 3.8. Accordingly, pursuant to NRS 624.624(1)(a) payment is due on the date specified in the subcontract.

39. The Helix Subcontract confirmed that Helix would get paid retention after it met the five conditions precedent in the retention payment schedule.

40. It is undisputed that Helix never met the five preconditions in the subcontract's payment schedule.[290] Accordingly, payment of retention to Helix never became due under NRS 624 and Helix's claim for a violation of NRS 624 fails.

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[289] NRS 108.239(12); *Nev. Nat'l Bank v. Snyder,* 108 Nev. 151, 157, 826 P.2d 560, 563 (1992).

[290] Testimony of Bob Johnson (Helix) Day 2 at pg. 36 and 37

41. Additionally, Helix never billed APCO for its retention and APCO never received Helix's retention from Gemstone.

CabineTec's claims against APCO

A. Breach of Contract

42. In Nevada, there are four elements to a claim for breach of contract: "(1) formation of a valid contract, (2) performance or excuse of performance by the plaintiff, (3) material breach by the defendant, and (4) damages."[291]

43. Exhibit 149 is the CabineTec Subcontract, which represents the valid, final written agreement between APCO and CabineTec.

44. Exhibit 156, CabineTec's Complaint (page 7, paragraph 50) confirms that CabineTec's principal claim against APCO is for $19,547.00 for retention.

45. As a condition precedent to payment for retention, the CabineTec Subcontract required CabineTec to properly comply with the retention payment schedule in Section 3.8.[292] Specifically, Section 3.8 required: (1) completion of the entire project, (2) owner acceptance, (3) final payment from owner to APCO, (4) final as-built drawings, and (5) releases.[293]

46. A party who seeks to recover on a contract has the burden of establishing any condition precedent to the respective contract.[294]

47. Parties can agree to a schedule of payments.[295]

48. Parties can agree to proper conditions precedent to payment.[296]

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[291] *Laguerre v. Nevada System of Higher Education,* 837 F.Supp.2d 1176, 1180 (D. Nev. 2011).

[292] Exhibit 149, CabineTec Subcontract at Section 3.8.

[293] Exhibit 149, CabineTec Subcontract at Section 3.8.

[294] *See Lucini-Parish Ins. v. Buck,* 108 Nev. 617, 620, 836 P.2d 627, 629 (1992).

[295] NRS 624.624(1)(a).

[296] *Padilla Construction Company of Nevada v. Big-D Construction Corp*, 386 P.3d 982 (Nev. 2016) (unpublished)("Because the parties' subcontract contained a payment schedule that required that Padilla be paid within ten days after IGT accepted Padilla's work and paid Big-D for that work and it is undisputed that IGT never accepted Padilla's work the district court correctly found that payment never became

49. Under Nevada precedent and legislative action, acceptance provisions are valid conditions precedent to payment when not combined with a waiver of a mechanic's lien rights.[297]

50. NRS 624.624 was meant, *inter alia,* to ensure payment to subcontractors after the owner paid the general for the subcontractor's work.[298]

51. In the present action, the CabineTec Subcontract: (1) incorporated the Contract,[299] (2) confirmed that the subcontractors would be bound to Gemstone to the same extent APCO was,[300] and (3) contained a schedule of payments for both retention and change orders with preconditions before APCO had an obligation to pay the subcontractors.[301]

52. Only one of those preconditions involved Gemstone's payment of retention to APCO, which never occurred. The others concerned the right to receive payment, not the fact of payment.

53. Pursuant to NRS 624.624(1)(a), payment was due to CabineTec in accordance with the retention payment schedule or within 10 days after APCO received payment from Gemstone:

> **NRS 624.624 Payment of lower-tiered subcontractor; grounds and procedure for withholding amounts from payment; rights and duties after notice of withholding, notice of objection or notice of correction.**
>
> 1. Except as otherwise provided in this section, if a higher-tiered contractor enters into:

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due to Padilla under the subcontract or *NRS 624.624(1)(a); see generally*, NRS 624.626.

[297] *Id.*

[298] *Padilla Construction Company of Nevada v. Big-D Construction Corp*, 386 P.3d 982 (Nev. 2016) (unpublished).

[299] Exhibits 45 and 149, Helix and CabineTec Subcontracts at Sections 1.1.

[300] Exhibits 45 and 149, Helix and CabineTec Subcontracts at Sections 3.4.

[301] *Id.* at Section 3.8 and Article 4.

> (a) A written Contract with a lower-tiered subcontractor that includes a schedule for payments, the higher-tiered contractor shall pay the lower-tiered subcontractor:
>
> (1) On or before the date payment is due; or
>
> (2) Within 10 days after the date the higher-tiered contractor receives payment for all or a portion of the work, materials or equipment described in a request for payment submitted by the lower-tiered subcontractor,
>
> → whichever is earlier.

These provisions place a time obligation on a higher-tiered contractor to make payment but they do not restrict the right of a lower-tiered contractor to receive payment if the higher-tiered contractor has not been paid.

54. Section 3.8 of the CabineTec Subcontract contained retention payment schedules that were acknowledged and affirmed by CabineTec and APCO at trial. As such, CabineTec needed to show that applicable and enforceable conditions precedent were satisfied before APCO had to pay retention. *See Lucini-Parish Ins. v. Buck,*[302] (a party who seeks to recover on a contract has the burden of establishing any condition precedent to the respective contract).

55. CabineTec did not even attempt to show: (1) completion of the entire Project, (2) final acceptance of the Project by Gemstone, (3) receipt of final payment from Gemstone to APCO, (4) delivery of all as-builts and close out document, and (5) delivery of all final waivers and releases.

56. CabineTec did not meet its burden of proof and APCO never received CabineTec's retention to trigger the 10 day period.

57. Accodingly, CabineTec's retention payment never became due from APCO.

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[302] 108 Nev. 617, 620, 836 P.2d 627, 629 (1992)

58. As a result, CabineTec's first claim for relief for breach of contract fails as a matter of law.

59. There is no contractual obligation for APCO to pay CabineTec for the work it performed for Gemstone and/or Camco after APCO left the Project. CabineTec knowingly replaced APCO with Camco under the CabineTec Subcontract on all executory obligations, including payment for future work and retention.

60. NRCP 16.1(a)(1)(c) requires that a plaintiff "**must,** *without awaiting a discovery request*, provide to other parties . . . [a] **a computation of any category of damages claimed by the disclosing** party, making available for inspection and copying under Rule 34 of the documents or other evidentiary matter... on which such computation is based, including materials bearing on the nature and extent of injuries suffered..."[303]

61. A plaintiff "is not excused from making its disclosures because it has not fully completed its investigation of the case."[304]

62. NRCP 16.1(a)(c) requires that parties voluntarily disclose "[a] computation of any category of damages claimed by the disclosing party" and documents to support the computation.[305]

63. Under NRCP 26(e)(1), a plaintiff must immediately supplement its initial damages computation if it "learns that in some material respect the information disclosed is incomplete or incorrect."[306] *See Keener v. United States*,[307] (finding a second disclosure so substantially different from the first that it could not qualify as a correction of an incomplete or inaccurate expert report).

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[303] NRCP16.1(a)(1)(c)(emphasis added).

[304] *Id.*

[305] NRCP 16.1(a)(1)(c).

[306] NRCP 26(e)(1).

[307] 181 F.R.D. 639, 640 (D. Mont. 1998)

64. CabineTec's complaint alleged $19,547.00 against APCO.[308]

65. CabineTec's initial, and first supplemental disclosures disclosed $30,110.95 in damages against APCO, which included interest and fees on the retention amount of $19,547.00.[309]

66. Those were the only disclosures that CabineTec made prior to the close of discovery, as extended by the Court.

67. CabineTec's damage claims against APCO are limited to $30,110.95.

68. National Wood's Second Supplemental Disclosure containing amended damages was filed on November 13, 2017, two weeks before a November 28 trial date. This supplement increases the damages from $30,110.95 to $1,154,680.40, a 3600% increase.

69. APCO has been prejudiced as a result of this late disclosure as APCO described in its motion in limine, and National Wood's error in not disclosing its damages pursuant to these rules was not harmless.

70. CabineTec/National Wood has no adequate justification for its repeated failure to comply with Rule 16.1(a)'s disclosure requirements.

71. CabineTec did not present any testimony confirming it met any of the conditions in Section 3.8. Instead, CabineTec's Mr. Thompson admitted that the buildings had to be drywalled and painted before the cabinets were installed[310] and he had no documentation (daily reports, photographs, etc.) that would confirm that CabineTec ultimately installed cabinets in Phase 1 for APCO.[311]

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[308] Exhibit 156-8.

[309] Exhibits 157 (CabineTec's initial disclosures); Exhibit 158 (CabineTec's First Supplemental Disclosure), and Exhibit 159 (CabineTec's second supplemental disclosure).

[310] Testimony of Mr. Thompson (CabineTec) at Day 5 p. 69.

[311] Testimony of Mr. Thompson (CabineTec) at Day 5 p. 69.

B. **Breach of the Implied Covenant of Good Faith and Fair Dealing**

72. In Nevada, "[e]very contract imposes upon each party a duty of good faith and fair dealing in its performance and enforcement."[312] This implied covenant requires that parties "act in a manner that is faithful to the purpose of the contract and the justified expectations of the other party."[313]

73. A breach of the implied covenant of good faith and fair dealing occurs when the terms of a contract are complied with but one party to the contract deliberately contravenes the intention of the contract.[314]

74. To prevail on a theory of breach of the covenant of good faith and fair dealing, a plaintiff must establish: (1) plaintiff and defendants were parties to a contract, (2) defendants owed a duty of good faith to the plaintiff, (3) defendants breached that duty by performing in a manner that was unfaithful to the purpose of the contract, and (4) plaintiff's justified expectations were denied.[315]

75. The Nevada Supreme Court has held that good faith is a question of fact.[316]

76. APCO acted in good faith with respect to CabineTec:

a. APCO paid CabineTec all sums CabineTec billed APCO through August 2008 (when APCO left the Project),[317]

b. APCO signed joint checks so that its subcontractors, including CabineTec, would get paid, even though APCO was not getting paid,[318]

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[312] *A.C. Shaw Cont., Inc. v. Washoe Cnty.*, 105 Nev. 913, 914, 784 P.2d 9, 9 (Nev. 1989) (quoting NRS 104.1203).

[313] *Morris v. Bank of Am. Nev.*, 110 Nev. 1274, 1278 n.2, 886 P.2d 454, 457 n.2 (Nev. 1994) (internal quotations omitted).

[314] See *Hilton Hotels v. Butch Lewis Prods.*, 107 Nev. 226, 232, 808 P.2d 919,923 (Nev. 1991).

[315] *Perry v. Jordan*, 111 Nev. 943, 948, 900 P.2d 335, 338 (Nev. 1995).

[316] *Consolidated Generator-Nevada, Inc. v. Commins Engine Co., Inc.*, 114 Nev.. 1304, 1312, 971 P.2d 1251, 1256 (Nev. 1998).

[317] Exhibit 26; Exhibit 152; Testimony of Joe Pelan, Day 1, pp. 46, 67 and 82; Testimony of Mary Jo Allen (APCO) Day 3, p. 128.

c. APCO pulled its general contractor permits so that Camco could get permits for the Project and APCO's subcontractors could continue on with the Project (less retention),[319] and

d. APCO also financed the related appeal to obtain priority for CabineTec and the other subcontractors once Gemstone shut the Project down.

77. CabineTec failed to present any evidence that APCO failed to act in good faith under the CabineTec Subcontract. While it is undisputed that APCO did not pay CabineTec the retention, there is no evidence that this non-payment was in bad faith.

78. As a result, CabineTec's second claim for breach of the implied covenant of good faith and fair dealing of the subcontract fails as a matter of law.

C. Unjust Enrichment/*Quantum Meruit*

79. CabineTec asserted breach of contract *and* unjust enrichment/ *quantum meruit* claims against APCO.[320]

80. APCO had a subcontract with CabineTec, **Exhibit 149.**

81. An action based upon a theory of unjust enrichment is not available when there is an express, written contract because no contract can be implied when there is an express contract.[321] However, frustration of an express contract's purpose can make unjust enrichment an available remedy. *See e.g. Restatement, Contracts 2d*, §377.

82. Even if the CabineTec Subcontract did not preclude an unjust enrichment/*quantum meruit* theory of recovery (which it does), APCO was not unjustly enriched by CabineTec's work. The undisputed evidence confirms that APCO was not paid any

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[318] Exhibit 26. See also: Trial Testimony of Joe Pelan (APCO) Day 1 at p. 38; Testimony of Joe Pelan (APCO) Day 1 at p. 41.

[319] Testimony of Joe Pelan (APCO) Day 1 at p. 100.

[320] *See* Exhibit 149, CabineTec Subcontract.

[321] *Leasepartner's Corp. v. Robert L. Brooks Trust*, 113 Nev. 747, 942 P.2d 182 (1997).

amounts for CabineTec's work that it did not transmit to CabineTec, and APCO did not get to keep the property. Instead, APCO remains unpaid $1,400,036.75 from the failed Project.[322]

83. As such, APCO was not unjustly enriched by CabineTec's work.

D. Violation of NRS 624.606 through 624.630 et seq.

84. NRS 624.624 is designed to ensure that general contractors promptly pay subcontractors after the general contractor receives payment from the Owner for the work performed by the subcontractor.

85. Here, it is undisputed that Exhibit 149, the CabineTec Subcontract is a written agreement between APCO and CabineTec and contained a retention payment schedule in Section 3.8. Accordingly, pursuant to NRS 624.624(1)(a) payment is due on the date specified in the subcontract.

86. The CabineTec Subcontract confirmed that CabineTec would get paid retention after it met the five conditions precedent in the retention payment schedule.

87. It is undisputed that CabineTec never met the five preconditions in the subcontract's payment schedule. Accordingly, payment of retention to CabineTec never became due under NRS 624 and CabineTec's claim for a violation of NRS 624 fails.

88. Additionally, CabineTec never billed APCO for its retention and APCO never received CabineTec's retention from the Owner. CabineTec rolled its retention over to Camco as a Project liability, and actually billed its retention to Camco.

E. Monies Due and Owing

89. CabineTec has failed to prove that it is due monies from APCO.

90. "The word due always imports a fixed and settled obligation or liability."[323]

91. Exhibit 149 governed the relationship between the parties and it was subject to the retention payment schedule in Section 3.8.

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[322] Testimony of Mary Jo Allen (APCO), Day 3, p. 122.

[323] *Black's Law Dictionary,* Sixth Edition, 1990.

92. Payment never became due under Section 3.8 for the reasons set forth above.

F. Account Stated

93. CabineTec's claim for account stated fails.

94. In Nevada, "[a]n account stated may be broadly defined as an agreement based upon prior transactions between the parties with respect to the items composing the account and the balance due, if any, in favor of one of the parties."[324]

95. "To effect an account stated, the outcome of the negotiations must be the recognition of a sum due from one of the parties to the other with a promise, express or implied, to pay that balance."[325]

96. "The genesis of an account stated is the agreement of the parties, express or implied."[326] APCO and CabineTec had an express written agreement that governed their relationship.

97. APCO and CabineTec did not have any prior transactions with respect to the items composing any account.

98. No evidence was presented that APCO agreed that any sum was due. Instead, APCO disputed any payment obligation.

99. APCO and CabineTec have not agreed to any other payment provisions outside of Exhibit 149 and this claim fails.

Helix and CabineTec ratified their subcontracts with Camco.

100. "Ratification of a contract occurs when one approves, adopts, or confirms a contract previously executed by another…"[327]

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[324] *Old W. Enterprises, Inc. v. Reno Escrow Co.*, 86 Nev. 727, 729, 476 P.2d 1, 2 (1970).

[325] *Id.*

[326] *Id.*

[327] *Id.*

101. Ratification may be express or implied by the conduct of the parties.[328] The party to be charged with ratification of such a contract must have acted voluntarily and with full knowledge of the facts.[329]

102. "A person ratifies an act by manifesting assent that the act affects the person's legal relations or conduct that justifies a reasonable assumption that the person so consents."[330]

103. "Any conduct which indicates assent by the purported principal to become a party to the transaction or which is justifiable only if there is ratification is sufficient, and even silence with full knowledge of the facts may operate as a ratification."[331]

104. "If a person makes a manifestation that the person has ratified another's act and the manifestation, as reasonably understood by a third party, induces the third party to make a detrimental change in position, the person may be estopped to deny the ratification."[332]

105. "A valid ratification by the principal relieves the agent from any liability to the principal which would otherwise result from the fact that the agent acted in an unauthorized way or without authority."[333]

106. Helix legally admitted it ratified the Helix/APCO subcontract to the Court and to APCO in its complaint, thereby replacing Camco for APCO in all executory obligations under the Helix Subcontract, including payment for retention and future work.

107. CabineTec signed a ratification agreement with Camco.

108. After APCO left the Project, Helix and CabineTec took direction from Gemstone or Camco, not APCO.

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[328] 17A Am Jur 2d Contracts § 10.

[329] *Id.*

[330] 3 Am Jur 2d Agency § 169.

[331] *Id.*

[332] 3 Am Jur 2d Agency § 171.

[333] 2A C.J.S. Agency § 85.

109. Helix and CabineTec submitted billings to Camco including rolling over the retention they now seek from APCO, and each performed work under the ratified original scope of work.

110. None of the ongoing work was done for or on behalf of APCO and there is no legal authority that would make APCO liable for their ongoing work on the Project, or the Project retention.

111. Helix never billed APCO for retention because it never became due.[334]

112. Helix and CabineTec waived all claims against APCO by knowingly contracting to work on the Project for Camco/Gemstone and rolling their retention over to Camco and Gemstone.

113. When Helix and CabineTec ratified their subcontracts with Camco, they replaced APCO. See *Foley Co. v. Scottsdale Ins. Co.*,[335] ("The ratification, by subcontractor's liability insurer, of its general agent's allegedly unauthorized placement of coverage released the general agent from liability to the insurer."); *Brooks v. January*,[336] (holding that because a dissident faction of a church congregation ratified their pastor's unauthorized sale of property, the pastor was relieved from liability to the church); *Southwest Title Ins. Co. v. Northland Bldg.*,[337] (holding that because the title insurance company ratified its agent's arguably unauthorized actions, the agent could not be held liable to the title insurance company); *Rakestraw v. Rodrigues*,[338] (holding that because a wife ratified forgery of her name on a deed of trust, the agent was relieved of liability to the principal).

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[334] CabineTec admittedly sent one billing for the full amount of CabineTec's delivered (but uninstalled) cabinets that incorrectly included retention. Retention clearly was not due under the retention payment schedule.

[335] 28 Kan. App. 2d 219, 15 P.3d 353 (2000)

[336] 116 Mich.App. 15, 321 N.W.2d 823 (1982)

[337] 542 S.W.2d 436 (Tex.App.1976), *rev'd in part on other grounds* 552 S.W.2d 425 (Tex.1977)

[338] 8 Cal.3d 67, 104 Cal.Rptr. 57, 500 P.2d 1401 (1972)

114. CabineTec and Helix ratified their subcontracts with Camco and discharged APCO.

The Subcontracts were assigned to Gemstone.

115. The following factors are relevant in determining whether an assignment of a construction contract took place: which party was responsible for the administration of the project, which party ensured the design was correctly carried out, who paid the subcontractors and materialmen, which party answered questions from the owner, which parties were on the job site, which party had ongoing involvement with the project, and which party was corresponding with the owner.[339]

116. These factors weigh in APCO's favor. Each party's behavior is consistent with the assignment of the Helix and CabineTec Subcontracts to Gemstone:

- ***Gemstone***: Gemstone attempted to "terminate" the APCO/Gemstone prime contract and stopped giving direction and/or orders to APCO. Gemstone told the subcontractors to stop working for APCO and that their contracts would be assumed by Camco. Gemstone also ordered APCO off the site.
- ***Camco***: Camco started giving direction to the subcontractors and dictating their work. Camco sent subcontracts and/or Ratification agreements to both Helix and CabineTec. It engaged in negotiations of the respective subcontracts, and it received billings directly from Helix and CabineTec, including the rollover of their retention.
- ***Helix***: Helix did not contact APCO after August 2008 and remained on-site working directly for Gemstone and Camco. It engaged in subcontract negotiations for the same scope of work as it had initially subcontracted for with APCO with Camco, and took direction and performed work under Camco's and Gemstone's direction. Helix submitted pay applications to Camco and even rolled its retention account over to Camco billings. Helix also represented that it signed a ratification Contract and subcontract with Camco in its complaint and its amended complaint.
- ***CabineTec***: CabineTec did not contact APCO after August 2008 and remained on-site working for Camco. It engaged in subcontract negotiations for the same scope of work as it had initially subcontracted for with APCO with Camco, and took direction and performed work under Camco's direction. CabineTec

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[339] *J. Christopher Stuhmer, Inc. v. Centaur Sculpture Galleries, Ltd., Inc.*, 110 Nev. 270, 274, 871 P.2d 327, 330 (1994)

submitted pay applications to Camco including all retention. CabineTec also signed a ratification agreement with Camco.

- ***APCO***: APCO was off-site and did not dictate or control the subcontractors' work. It did not have any communication with Gemstone or the subcontractors after August 2008. It did not participate in construction related meetings, did not receive billings from subcontractors, or submit payment applications on behalf of subcontractors. In fact, Helix never invoiced APCO for its retention.

117. The Contract contained a subcontract assignment provision that assigned Gemstone APCO's subcontracts upon termination of the Contract.[340]

118. The Contract was incorporated into the subcontracts.[341]

119. Once APCO left the Project, the Helix and CabineTec Subcontracts were assigned to Gemstone per Gemstone's written notice to APCO.

120. Once Gemstone had those Subcontracts, it facilitated Camco's assumption of those subcontracts.[342]

121. After the subcontracts were assigned, Gemstone/Camco were responsible for all executory obligations including payments for retention and future work.[343]

122. An assignment took place thereby making Gemstone/Camco the party responsible for payment to the subcontractors.

Helix and CabineTec waived any right to pursue APCO.

123. "Waiver requires the intentional relinquishment of a known right."[344]

124. "If intent is to be inferred from conduct, the conduct must clearly indicate the party's intention."[345]

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[340] Exhibit 2 at 10.4.

[341] *See* Sections 1.1 of Helix and CabineTec subcontracts. Helix's Mr. Johnson admitted it was Helix's practice to request and review an incorporated prime contract. Testimony of Bob Johnson (Helix) Day 2, p.16.

[342] *See* Exhibit 170/169 Helix's subcontract and Helix Amendment with Camco; and Exhibit 184, CabineTec's subcontract with Camco.

[343] *See* Exhibit 2, Section 10.4.

[344] *Nevada Yellow Cab Corp. v. Eighth Judicial Dist. Court ex rel. Cty. of Clark,* 123 Nev. 44, 49, 152 P.3d 737, 740 (2007) (internal citations omitted).

125. "Thus, the waiver of a right may be inferred when a party engages in conduct so inconsistent with an intent to enforce the right as to induce a reasonable belief that the right has been relinquished."[346]

126. In this case, CabineTec's and Helix's intent was clear: they understood that APCO left the Project. They entered into ratification agreements with Camco and continued working for Camco and Gemstone on the Project without any further dealings with APCO.

127. Helix and CabineTec did not negotiate entirely new contracts and their subsequent billings to Camco depicted their retention that was being held by Gemstone, not APCO. They took orders and direction from Camco employees. They sent billings to Camco. They submitted change orders to Camco. They showed up to the Project at Camco's direction and Camco ultimately informed them the Project had shut down. By pursuing this course of action, it was clear that none of the parties believed APCO was the general contractor on the Project. This conduct is entirely inconsistent with any claim that APCO was the general contractor and was responsible for retention or other future payments. APCO paid Helix and CabineTec all amounts due while APCO was the general contractor.

Any of the foregoing conclusions of law that would more appropriately be considered to be findings of fact shall be so deemed.

ORDER

NOW, THEREFORE, the Court hereby directs entry of the foregoing Findings of Fact and Conclusions of Law; and

IT IS FURTHER ORDERED that, based upon the foregoing Findings of Fact and Conclusions of Law, and those made regarding the other parties and claims involved in the

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[345] *Id.*

[346] *Id.*

consolidated cases, the Court shall issue a separate Judgment or Judgments reflective of the same at the appropriate time subject to further order of the Court.

DATED this 24th day of April, 2018.

DISTRICT COURT JUDGE

CERTIFICATE

I hereby certify that on or about the date filed, this document was Electronically Served to the Counsel on Record on the Clark County E-File Electronic Service List.

LORRAINE TASHIRO
Judicial Executive Assistant
Dept. No. XIII

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DISTRICT COURT

CLARK COUNTY, NEVADA

APCO CONSTRUCTION, a Nevada corporation, Plaintiff, v. GEMSTONE DEVELOPMENT WEST, INC., A Nevada corporation, Defendant. AND ALL RELATED MATTERS	Case No.: A571228 Dept. No.: XIII *Consolidated with:* *A574391; A574792; A577623; A583289; A587168; A580889; A584730; A589195; A595552; A597089; A592826; A589677; A596924; A584960; A608717; A608718; and A590319* **APCO CONSTRUCTION, INC.'S MOTION FOR ATTORNEY'S FEES AND COSTS AGAINST HELIX ELECTRIC OF NEVADA, LLC AND PLAINTIFF IN INTERVENTION NATIONAL WOOD PRODUCTS, INC.**

Pursuant to this Court's April 26, 2018 Findings of Fact and Conclusions of Law as to the Claims of Helix Electric and CabineTec Against APCO ("FFCL"), APCO is the prevailing party in this litigation. As a result, APCO is entitled to its attorneys fees and costs pursuant to its subcontracts with Helix Electric of Nevada, LLC ("Helix") and CabineTec, Inc. ("CabineTec"). Further, the Court has discretion to award APCO fees and costs under two additional bases: (1) NRS 108.237 since a mechanic's lien against APCO was not upheld and (2) NRCP 68 since Helix and CabineTec failed to beat offers of judgment. APCO submits this motion in support of an award for: $239,550.03 in attorney's fees against Helix; $208,259.25 in attorneys fees against National Wood; $33,423.31 in costs as against Helix and $22,180.36 in costs against National Wood.

NOTICE OF MOTION

You and each of you, will please take notice that **APCO CONSTRUCTION, INC.'S MOTION FOR ATTORNEY'S FEES AND COSTS AGAINST HELIX ELECTRIC OF NEVADA, LLC AND PLAINTIFF IN INTERVENTION NATIONAL WOOD PRODUCTS, INC.** will come on regularly for hearing on the 11 day of JUNE, 2018, at the hour of 9:00A.m. or as soon thereafter as counsel may be heard, in Department XIII in the above-referenced court.

DATED this 8th day of May, 2018.

SPENCER FANE LLP

By: _____

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION AND STATEMENT OF FACTS

This action arises out of a construction project in Las Vegas, Nevada known as the Manhattan West Condominiums Project ("the Project or the "Property") owned by Gemstone Development West, Inc. ("Gemstone"). As detailed in the FFCL,[1] APCO was the original general contractor on the Project.[2] APCO entered into a subcontract with Helix for electrical work on April 8, 2008,[3] and entered into a subcontract with CabineTec on April 28, 2008 for the delivery and installation of cabinets on the Project.[4] Both subcontracts provide for an award of attorneys fees to the prevailing party in the event litigation was initiated:

> 18.5 In the event either party employs an attorney to institute a lawsuit or to demand arbitration for any cause arising out of the Subcontract Work, or any of the Contract Documents, the prevailing party shall be entitled to all costs, attorney's fees and other reasonable expenses incurred therein.[5]

Helix initiated litigation against APCO on April 14, 2009.[6] CabineTec initiated litigation against APCO on February 6, 2009.[7] National Wood Products, Inc. intervened in the litigation on April 12, 2012,[8] and was assigned CabineTec's claim.[9] That assignment confirmed:

> Cabinetec hereby confirms that it has assigned the Manhattan West Claims, including all claims that have been brought or could have been brought in the APCO Lawsuit to National Wood. Any amounts recovered by National Wood on the Manhattan West Claims, net of all attorney's fees and costs,

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[1] The FFCL are incorporated into this Motion by this reference.
[2] **Exhibit 1**, FFCL.
[3] Trial Exhibit 45, Helix Subcontract.
[4] Trial Exhibit 149, CabineTec Subcontract.
[5] Trial Exhibit 45, Helix Subcontract at Section 18.5; Trial Exhibit 149 CabineTec Subcontract at Section 18.5.
[6] Trial Exhibit 77, Helix Complaint against APCO.
[7] Trial Exhibit 156, CabineTec's Complaint against APCO.
[8] **Exhibit 2,** National Wood's Motion to Intervene.
[9] Trial Exhibit 3177, CabineTec Assignment to National Wood.

shall be credited to the Judgment in favor of National Wood against CabineTec.[10]

In fact, in the Court's April 26, 2018 Findings of Fact and Conclusions of Law Re: Camco, the Court found, "Cabinetec assigned all of its rights, title and interest in the Manhattan West Claims to National Wood on or about January 22, 2018."[11] From that point on, National Wood stepped in CabineTec's shoes for all purposes of CabineTec's claim against APCO.[12] After more than 9 years of litigation, APCO is the prevailing party and is entitled to an award of fees and costs.[13]

APCO seeks $447,809.28 in attorney's fees and $55,603.57 in costs, as detailed below. As set forth below, the amount of attorney's fees requested is reasonable under the *Brunzell* analysis.

II. ARGUMENT

A. The subcontracts provide an award of attorney's fees to the prevailing party.

"Where a contract provision purports to allow attorney's fees in an action arising out of the terms of the instrument, conventional rules of construction apply."[14] "Thus, every word must be given effect if at all possible, and a court should avoid an interpretation that makes a contract provision meaningless."[15]

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[10] Trial Exhibit 3177.

[11] **Exhibit 3,** Plaintiff in Intervention, National Wood Products, Inc.'s Findings of Fact and Conclusions of Law Re: Camco at 2.

[12] *3685 San Fernando Lenders, LLC v. Compass USA SPE, LLC (In re USA Commer. Mortg. Co.)*, 802 F Supp. 2d 1147, 1162-1163 (D. Nev. 2011), *citing Enright v. Mintz,* 116 Misc.2d 1084, 457 N.Y.S.2d 180, 181 (N.Y.Civ.Ct.1982).

[13] See FFCL; Section 18.5 of Helix and CabineTec Subcontracts.

[14] *Robert Dillon Framing, Inc. v. Canyon Villas Apartment Corp.*, No. 55897, 2013 WL 3984885, at *4 (Nev. Apr. 17, 2013)(internal quotations omitted) citing *Dobron v. Bunch,* 125 Nev. 460, 464, 215 P.3d 35, 37–38 (2009) (quoting *Campbell v. Nocilla*, 101 Nev. 9, 12, 692 P.2d 491, 493 (1985)).

[15] *Id. citing Musser v. Bank of America*. 114 Nev. 945, 949, 964 P.2d 51, 54 (1998) (alteration in original) (quoting *Royal Indem. Co. v. Special Serv.*, 82 Nev. 148, 150, 413 P.2d 500, 502 (1966)).

As quoted above, Section 18.5 of the Helix and CabineTec Subcontracts requires an award of attorney's fees to APCO as the prevailing party.[16] "When there are multiple parties and an award of attorney fees is entered against only one of the parties, the trial court, to the extent practical, should apportion the fees so that only those fees incurred with regard to that party are awarded."[17]

"A corollary to the rule is that the services for which reasonable fees may be awarded include those rendered in connection with all claims, even if recovery of attorney fees is not authorized for such claims, if they arise out of the same transaction and are so interrelated that their prosecution or defense entails proof or denial of essentially the same facts."[18] "Therefore, when the causes of action involved in the suit are dependent upon the same set of facts or circumstances and thus are 'interwined to the point of being inseparable,' the party suing for attorney's fees may recover the entire amount covering all claims."[19] *See also Jarvis v. Rocanville Corp.,*[20] (upholding a trial court's decision to award fees when the fees were supported by sufficient evidence and were "inextricably intertwined"); *Tony Gullo Motors I, L.P. v. Chapa,*[21] ("Requests for standard disclosures, proof of background facts, depositions of the primary actors, discovery motions and hearings, *voir dire* of the jury, and a host of other services may be necessary whether a claim is filed alone or with others. To the extent such services would have been incurred on a recoverable claim alone, they are not disallowed simply because they do double

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[16] Trial Exhibit 45, Helix Subcontract at Section 18.5; Exhibit 149 CabineTec Subcontract at Section 18.5.

[17] *Newport Pac. Capital Co. v. Waste*, 878 P.2d 136, 140 (Colo. App. 1994).

[18] *Flint & Assocs. v. Intercontinental Pipe & Steel, Inc.,* 739 S.W.2d 622, 624–25 (Tex. App. 1987), *writ denied* (June 29, 1988) (internal citations omitted).

[19] *Tony Gullo Motors I, L.P. v. Chapa,* 212 S.W.3d 299, 311 (Tex. 2006) citing *Gill Sav. Ass'n v. Chair King, Inc.,* 783 S.W.2d 674, 680 (Tex.App.-Houston [14th Dist.] 1989), *modified,* 797 S.W.2d 31 (Tex.1990) (remanded to the trial court for reexamination of attorney's fee award).

[20] 298 S.W.3d 305, 320 (Tex. App. 2009)

[21] 212 S.W.3d 299, 313 (Tex. 2006)

service."). The law also acknowledges that attorneys can estimate the segregation of their time per activity.[22]

According to the FFCL, APCO defeated all of Helix and CabineTec's claims.[23] After segregating fees where appropriate and splitting the time in trial, $239,550.03 of attorney's fees has been allocated to Helix and $208,259.25 has been allocated to CabineTec/National Wood, representing a total fee award of $447,809.28. [24] The specific allocations are set forth in **Exhibits 7A and 7B.**[25]

B. National Wood is responsible for APCO's attorneys fees defending against its pursuit of CabineTec's claim.

CabineTec assigned its claim to National Wood.[26] The District Court for the District of Nevada confirmed that "[i]t is hornbook law that an assignee steps into the shoes of the assignor."[27] "As a basic premise of assignment law, with assignment of rights comes

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[22] *See, e.g., Tony Gullo Motors I, L.P. v. Chapa, 212 S.W.3d 299, 314 (Tex. 2006)* ("Here, Chapa's attorneys did not have to keep separate time records when they drafted the fraud, contract, or DTPA paragraphs of her petition; an opinion would have sufficed stating that, for example, 95 percent of their drafting time would have been necessary even if there had been no fraud claim."); *Stewart Title Guar. Co. v. Aiello,* 941 S.W.2d 68, 73 (Tex.1997) (noting that claimant's attorney "testified that approximately twenty-percent of his time and fifteen-percent of his paralegal's time concerned issues predating the agreed judgment"); *Med. Specialist Group, P.A. v. Radiology Assocs., L.L.P.,* 171 S.W.3d 727, 738 (Tex.App.-Corpus Christi 2005, pet. denied) ("In his affidavit, Radiology Associates' counsel... testified that his fees for the defense of the case totaled $460,087.00, and approximately forty percent of these fees were directly related to Saratoga's antitrust claims."); *Flagship Hotel,* 117 S.W.3d at 566 n. 7 ("Flagship argues that the segregation standard is difficult to meet. We disagree and note that segregated attorney's fees can be established with evidence of unsegregated attorney's fees and a rough percent of the amount attributable to the breach of contract claim.").

[23] **Exhibit 1**, FFCL.

[24] See **Exhibit 7,** Declaration of Randy Jefferies, Esq.

[25] If fees were incurred for a specific subcontractor, APCO's attorneys allocated those fees directly to that subcontractor. If fees were incurred in the general defense of the case (since the facts are so intertwined), fees were allocated between the remaining subcontractors.

[26] Trail Exhibit 3177, CabineTec assignment of claims to National Wood.

[27] *3685 San Fernando Lenders, LLC v. Compass USA SPE, LLC (In re USA Commer. Mortg. Co.),* 802 F Supp. 2d 1147, 1162-1163 (D. Nev. 2011) *citing Enright v. Mintz,* 116 Misc.2d 1084, 457 N.Y.S.2d 180, 181 (N.Y.Civ.Ct.1982).

assignment of duties."[28] Essentially, "the assignee stands in the shoes of the assignor, subject to all the equities and defenses which existed against it in the hands of the assignor."[29] "As Chief Judge Posner wrote, 'the common law puts the assignee in the assignor's shoes, whatever the shoe size.'"[30] *See also Childs Real Estate Co., Inc. v. Shelburne Realty Co.,*[31] (holding an assignee with notice of claims or equities against his assignor ordinarily obtains no rights greater than those possessed by the assignor, but simply stands in the shoes of the latter, subject to all equities which may be asserted against the assignor).

And any attempt by National Wood to try and claim APCO is not entitled to fees would be disingenuous. In its proposed findings of fact and conclusions of law to this court, National Wood represented that National Wood would be entitled to attorney's fees as the prevailing party: "Pursuant to the Contracts, specifically Section 18.5 of the APCO Contract, National Wood is entitled to all costs, attorney's fees and any other reasonable expenses incurred."[32] Relatedly, National Wood was actually awarded fees pursuant to Section 18.5 pursuant to the Court's April 26, 2018 Findings of Fact and Conclusions of Law RE Camco:[33] "Pursuant to the ratified Contracts with CAMCO, specifically Section 18.5 thereof, National Wood is entitled to all costs, attorney's fees, and any other reasonable expenses incurred."

Accordingly, an assignment of CabineTec's claims came with the burden of CabineTec's duties. Since attorney's fees were authorized under the CabineTec subcontract, as an assignee and intervenor, National Wood is liable for all fees attributable to APCO's defense against CabineTec's claims.

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[28] *Mept St. Matthews, Inc. v. Baltimore Masonry, Inc.*, 2014 WL 12551200 (D.C.Super.), 27.
[29] *Corbin on Contracts*, § 51.1 (Volume 9, Revised Edition, 2011).
[30] *Mept St. Matthews, Inc. v. Baltimore Masonry, Inc.*, 2014 WL 12551200 (D.C.Super.) *citing Olvera v. Blitt & Gaines, P.C.*, 431 F.3d 285, 289 (7th Cir. 2005).
[31] 143 P.2d 697, 699 (Cal. 1943)
[32] **Exhibit 3,** National Wood's Proposed Findings of Fact and Conclusions of Law at 12
[33] **Exhibit 4,** at 10.

III. THE COURT MAY AWARD FEES PURSUANT TO NRS § 108.237 SINCE HELIX'S LIEN CLAIM WAS NOT UPHELD.

Pursuant to NRS 108.237(3), " [i]f the lien claim is not upheld, the court may award costs and reasonable attorney's fees to the owner or other person defending against the lien claim if the court finds that the notice of lien was pursued by the lien claimant without a reasonable basis in law or fact."[34]

In this case, the Helix elected to pursue foreclosure of a mechanic's lien against both Gemstone and APCO.[35] APCO was not the owner of the Project.[36] The Project was already foreclosed upon and the proceeds were awarded to the lender.[37] And the Nevada Supreme Court affirmed the decision of the trial court that the lender was entitled to keep the Project and related proceeds, and the subcontractors (and APCO) were left with nothing.[38] Thus, Helix could not legally foreclose upon the property.[39] As recognized by the court, APCO is not legally liable for any deficiency judgment because it is not the party responsible for any deficiency.[40] So in addition to an award of fees under the Helix Subcontract, APCO is also entitled to fees under NRS 108.237(3) against Helix since it had no reasonable basis in law or fact to continue to pursue a lien claim against APCO.

IV. LASTLY, THE COURT HAS DISCRETION TO AWARD APCO FEES SINCE BOTH SUBCONTRACTORS FAILED TO ACCEPT APCO'S OFFERS OF JUDGMENT.

NRCP 68 provides that at "any time more than 10 days before trial, any party may serve an offer in writing to allow judgment to be taken in accordance with its terms and conditions."[41] "If the offer is not accepted within 10 days after service, it shall be

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[34] NRS 108.237(3)
[35] Trial Exhibit 45, Helix Complaint.
[36] **Exhibit 1,** FFCL at Conclusion of Law at 34.
[37] *Id.* at 35.
[38] *Id.* at 35.
[39] *Id.*
[40] *Id.* at 36; NRS 108.239(12); *Nev. Nat'l Bank v. Snyder,* 108 Nev. 151, 157, 826 P.2d 560, 563 (1992).
[41] NRCP 68(a).

considered rejected by the offeree and deemed withdrawn by the offeror."[42] And "[i]f the offeree rejects an offer and fails to obtain a more favorable judgment, (1) the offeree cannot recover any costs or attorney's fees and shall not recover interest for the period after the service of the offer and before the judgment; and (2) the offeree shall pay the offeror's post-offer costs, applicable interest on the judgment from the time of the offer to the time of entry of the judgment and reasonable attorney's fees, if any be allowed, actually incurred by the offeror from the time of the offer."[43]

The purpose of NRCP 68 is to promote and encourage settlement and save time and money for the court system, the parties, and the taxpayers.[44] It rewards a party who makes a reasonable offer to settle a lawsuit and punishes the party who refuses to accept such an offer.[45] The operation of the offer of judgment law encourages litigants who receive offers of judgment to settle lawsuits by forcing the offeree to make a "difficult choice" and "balance the uncertainty of receiving a more favorable judgment against the risk of receiving a less favorable judgment and being forced to pay the offeror's costs and attorney's fees."[46]

On November 13, 2018, APCO made an offer of judgment to Helix for $25,000 and an offer of judgment to National Wood for $35,000.[47] Neither party accepted APCO's offer. Since November 23, 2018, APCO has incurred $113,622.77 of attorney's fees against Helix[48] and $90,993.77 in attorney's fees against National Wood.[49]

A. APCO incurred $447,809.78 in attorney's fees in connection with defending against Helix and CabineTec's claims, which is reasonable under the *Brunzell* factors.

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[42] NRCP 68(e).
[43] NRCP 68(f).
[44] *Muije v. A N. Las Vegas Cab Co.*, 106 Nev. 664, 667, 799 P.2d 559, 561 (1990).
[45] *Dillard Dep't Stores, Inc. v. Beckwith*, 115 Nev. 372, 382, 989 P.2d 882, 888 (1999).
[46] *Bergmann v. Boyce*, 109 Nev. 670, 678, 856 P.2d 560, 565 (1993).
[47] **Exhibit 5,** Offer of Judgment to Helix; **Exhibit 6**, Offer of Judgment to National Wood.
[48] $11,132.42 represents fees incurred by Marquis & Aurbach and $102,490.35 represents fees incurred by Spencer Fane. *See* Exhibits 7 and 8.
[49] $9,190.42 represents fees incurred by Marquis & Aubach and $81,803.35 represents fees incurred by Spencer Fane. *See* Exhibits 7 and 8.

Section 18.5 allows APCO, as the prevailing party, to recover all attorney's fees incurred in connection with litigation of the claims arising out of the contract.[50] As noted, APCO's fees total $447,809.28 which is a reasonable amount.

The *Brunzell* factors govern the evaluation of whether the attorney's fees are reasonable:

> (1) the qualities of the advocate: [their] ability, [their] training, education, experience, professional standing and skill; (2) the character of the work to be done: its difficulty, its intricacy, its importance, time and skill required, the responsibility imposed and the prominence and character of the parties where they affect the importance of the litigation; (3) the work actually performed by the lawyer: the skill, time and attention given to the work; (4) the result: whether the attorney was successful and what benefits were derived.[51]

Although courts consider each factor, no one factor predominates the consideration nor "be given undue weight."[52]

1. The first *Brunzell* factor favors the amount of the requested attorney's fees.

As to the first factor, the qualities of the advocate, experienced attorneys from Spencer Fane and Marquis Aurbach Coffing represented APCO in this litigation. John Randall Jefferies and Mary Bacon at Spencer Fane, and Jack Juan, Micah Echols, and Cody Mounteer at Marquis Aurbach Coffing performed the bulk of the work to obtain the favorable results for APCO.[53]

Mr. Jefferies is a partner at Spencer Fane, and has been practicing law in Nevada since 1988.[54] He received his J.D. from the University of Utah in 1987, where he was Order of the Coif.[55] He has an "AV" rating from Martindale Hubbell.[56] In addition, he

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[50] Trial Exhibit 45, Helix Subcontract at Section 18.5; Trial Exhibit 149, CabineTec Subcontract at Section 18.5.
[51] *Brunzell v. Golden Gate Nat. Bank*, 85 Nev. 345, 349, 455 P.2d 31, 33 (1969).
[52] *Id.*
[53] **Exhibit 7**, Declaration of John Randall Jefferies in Support of APCO's Motion for Attorneys Fees.
[54] *Id.*
[55] *Id.*

was named to *Arizona's Top Lawyers®*, in the construction litigation category in the AZ Business Magazine in 2014, *Southwest Super Lawyers®* in the construction litigation category from 2009-2016, *Best Lawyers in America®* for construction law in 2008, *Best Lawyers in America®* for construction litigation from 2009-2016, *Best Lawyers in America®* for commercial litigation, construction law, litigation-construction from 2005-2017 and *Best Lawyers in America®* "Lawyer of the Year" in construction law in 2018.[57] His billed rate to APCO is $400 per hour.[58]

Ms. Bacon is an associate at Spencer Fane, and has been practicing law in Nevada since 2013.[59] She received her J.D. from University of Southern California, was recently named as one of the "Best Up and Coming Attorneys" by *Nevada Business Magazine,* and was recognized as a *Mountain State Super Lawyer.*[60] Her billing rate is $285 per hour.[61]

Jack C. Juan, Esq. is a shareholder at Marquis Aurbach Coffing.[62] As an experienced litigator, Mr. Juan has an excellent reputation in this community for competency in civil litigation and quality legal work over 20 years.[63] Mr. Juan's skills have been recognized as an AV Preeminent attorney, one of Nevada's *Legal Elite*, and a *Mountain States Super Lawyer.* [64] His billed rate was $300 per hour.[65]

Mr. Echols is a director at Marquis Aurbach Coffing.[66] As the chair of the firm's Appellate Department, he focuses his practice on civil appeals, including state and federal

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[56] *Id.*
[57] *Id.*
[58] *Id.*
[59] *Id.*
[60] *Id.*
[61] *Id.*
[62] **Exhibit 8,** Declaration of Cody Mounteer, Esq.
[63] *Id.*
[64] *Id.*
[65] *Id.*
[66] **Exhibit 8,** Declaration of Cody Mounteer, Esq.

appeals, writ petitions and petitions for judicial review of agency decisions.[67] Mr. Echols has participated in the briefing or argument for over 200 appellate matters.[68] He has argued cases in both the Nevada Supreme Court and the Ninth Circuit.[69] Mr. Echols holds an AV Preeminent rating from Martindale-Hubbell and is also recognized by Super Lawyers for his appellate practice.[70] His billed rate was $300 per hour.[71]

Cody S. Mounteer, Esq. is a director at Marquis Aurbach Coffing.[72] As an experienced litigator, Mr. Mounteer has an excellent reputation in this community for competency in civil litigation and quality legal work.[73] Mr. Mounteer's skills have been recognized as one of Nevada's Legal Elite in 2013, 2014, 2015, 2016 and 2018 by the Nevada Business Magazine, and a Mountain States Super Lawyer for 2017 and 2018.[74] His billed rate was $285-$300 per hour.[75]

Counsel for APCO undeniably and unequivocally have the professional standing and skill justifying the reasonable rate and amount of attorneys' fees sought by APCO in this case.

2. The second *Brunzell* factor favors the amount of the requested attorney's fees.

The second factor, the character of the work, more than supports the requested amount of attorney's fees. Early in this case, this Court deemed this case complex,[76] as it involved "complex issues, multiple parties, difficult legal questions, or unusual proof

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[67] *Id.*

[68] *Id.*

[69] *Id.*

[70] *Id.*

[71] *Id.*

[72] *Id.*

[73] **Exhibit 8,** Declaration of Cody Mounteer, Esq.

[74] *Id.*

[75] *Id.*

[76] This Court's Order Setting Rule 16 conference, designating the Case as Complex Pursuant to NRCP 16.1(f), and Continuing the Hearing on Defendant Scott Financial Corporation's Motion to Dismiss Co-Defendants Vista Financial Services, L.L.C. and Tharaldson Motels II, Inc.'s Counterclaim, entered on November 10, 2009, as "NRCP 16.1(f) Order."

problems..."[77] The parties ultimately disclosed tens of thousands of pages of documents and prepared briefing on numerous motions.[78] The case also involved a writ petition before the Nevada Supreme Court, resulting in a published decision.[79] At its height, this case involved almost 100 parties,[80] and included the defense of numerable subcontractor claims against APCO.[81] Even APCO's defense of Helix and CabineTec's claims was complex, as both had separate and complex factual histories, which proceeded through trial.[82]

Therefore, the character of the work supports the reasonableness of the rates charged and the attorney's fees sought to be recovered by APCO.

3. The third *Brunzell* factor favors the amount of the requested attorney's fees.

The third factor, the work actually performed, justifies the requested award. APCO's attorneys spent over 9 years defending against Helix and CabineTec's claims.[83] The hourly rate for the attorneys was between $285 and $400 per hour.[84] Spencer Fane and Marquis & Aurbach billed hundreds hours in the defense of claims against APCO.[85] The hourly billing rate for attorneys in the Las Vegas legal market of the caliber and with the reputation of APCO's counsel are at or in excess of those billed by APCO's counsel in this matter.[86]

The attorneys working on this file only took those actions that were necessary to ensure that APCO obtained a favorable result.[87] Discrete tasks on this file were assigned to an attorney or paralegal based on the experience level needed to achieve the desired

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[77] Nev. R. Civ. P. 16.1(f).
[78] See Docket and **Exhibit 10,** Litigation Services Index.
[79] See generally *In re Manhattan W: Mech.'s Lien Litig.*, 131 Nev. Adv. Op. 70, 359 P.3d 125 (2015).
[80] See Docket.
[81] See Docket.
[82] **Exhibit 1**, FFCL.
[83] **Exhibit 7,** Declaration of John Randall Jefferies in Support of APCO's Motion for Attorney's Fees.
[84] *Id.*
[85] Id.
[86] *Id.*
[87] *Id.*

result.[88] This resulted in a lowering of the fees expended on behalf of APCO, as attorneys with higher billing rates were not employed to conduct tasks that could have been accomplished by an attorney or employee with a lower hourly rate.[89]

4. The fourth *Brunzell* factor favors the amount of the requested attorney's fees.

The fourth Brunzell factor is the result of the litigation. The fourth factor clearly favors APCO. APCO was successful in defeating Helix and CabineTec's multiple claims through trial.[90]

As set forth above, the rate and amount of the attorney's fees sought by APCO is reasonable and justified based upon application of the *Brunzell* factors. Therefore, this Court should award the requested amount of $447,809.78 of attorney's fees.

B. The requested $55,603.57 in costs and other reasonable expenses is recoverable under the subcontracts.

Section 18.5 provides for an award of costs and "other reasonable expenses" to the prevailing party in the event litigation was initiated.[91]

Here, APCO has documented its recoverable costs incurred in the attached memorandum of costs.[92] These costs relate to court costs, filing fees, photocopying, postage, research, court reporter fees, messenger services, process servers, travel and other reasonable expenses.[93] APCO's costs were reasonable and necessary to its efforts to defend against Helix and CabineTec's claims.[94] Additionally, the costs are not estimates,

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[88] *Id.*
[89] *Id.*
[90] See FFCL.
[91] Trial Exhibit 45, Helix Subcontract at Section 18.5; Trial Exhibit 149, CabineTec Subcontract at Section 18.5.
[92] **Exhibit 9**, Memorandum of Costs and see *Docket* for any errata filed to the Memorandum of Costs.
[93] **Exhibit 9,** Memorandum of Costs see *Docket* for any errata filed to the Memorandum of Costs. *See also Thon v. Thompson*, 29 Cal. App. 4th 1546, 35 Cal. Rptr. 2d 346 (1994) (defendants were entitled to award for travel expenses of their out-of-county attorneys in attending proceedings in county of jurisdiction).
[94] **Exhibit 7**, Declaration of John Randall Jefferies.

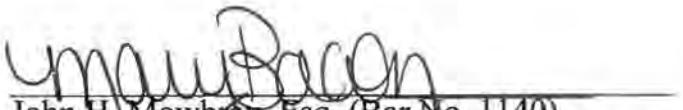
but the costs that were actually incurred by APCO.[95] Therefore, APCO requests an award of costs in the amount of $55,603.57 and other reasonable expenses.[96]

V. CONCLUSION

Based on the foregoing reasons, APCO requests a judgment of $272,973.34 for fees and costs against Helix and $230,439.61 for fees and costs against National Wood, with simple interest accruing daily from the date judgment is entered until the judgment amount owed to APCO is completely paid.

Dated this 8th day of May, 2018

SPENCER FANE LLP



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[95] **Exhibit 7**, Declaration of John Randall Jefferies.
[96] **Exhibit 9**, Memorandum of Costs.

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of Spencer Fane LLP and that a copy of the foregoing **APCO CONSTRUCTION, INC.'S MOTION FOR ATTORNEY'S FEES AND COSTS AGAINST HELIX ELECTRIC OF NEVADA, LLC AND PLAINTIFF IN INTERVENTION NATIONAL WOOD PRODUCTS, INC.** was served by electronic transmission through the E-Filing system pursuant to NEFCR 9, NRCP 5(b) and EDCR 7.26 or by mailing a copy to their last known address, first class mail, postage prepaid for non-registered users, on this 8th day of May, 2018, as follows:

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Intervenor Plaintiff: Cactus Rose Construction Inc
Eric B. Zimbelman (ezimbelman@peelbrimley.com)
Intervenor Plaintiff: Interstate Plumbing & Air Conditioning Inc
Jonathan S. Dabbieri (dabbieri@sullivanhill.com)
Intervenor: National Wood Products, Inc.'s
Dana Y Kim (dkim@caddenfuller.com)
Richard L Tobler (rltltdck@hotmail.com)
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S. Judy Hirahara (jhirahara@caddenfuller.com)
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Jennifer Saurer (Saurer@sullivanhill.com)
Jonathan Dabbieri (dabbieri@sullivanhill.com)
Plaintiff: Apco Construction
Rosie Wesp (rwesp@maclaw.com)
Third Party Plaintiff: E & E Fire Protection LLC
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/s/ Adam Miller

an employee of Spencer Fane LLP

EXHIBIT 1

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DISTRICT COURT

CLARK COUNTY, NEVADA

APCO CONSTRUCTION, a Nevada corporation, Plaintiff, v. GEMSTONE DEVELOPMENT WEST, INC., A Nevada corporation, Defendant.	Case No.: 08A571228 Dept. No.: XIII *Consolidated with:* *A574391; A574792; A577623; A583289; A587168; A580889; A584730; A589195; A595552; A597089; A592826; A589677; A596924; A584960; A608717; A608718; and A590319*
AND ALL RELATED MATTERS	

FINDINGS OF FACT AND CONCLUSIONS OF LAW AS TO THE CLAIMS OF HELIX ELECTRIC AND CABENETEC AGAINST APCO

This matter having come on for a non-jury trial on January 17-19, 23, 24, and February 6, 2018, APCO Construction, Inc., appearing through Spencer Fane, LLP and Marquis & Aurbach; Camco Construction, Inc., through Grant Morris Dodds; National Wood Products, LLC through Cadden Fuller and Richard L. Tobler, Ltd.; United Subcontractors, Inc. through Fabian Vancott; and Helix Electric of Nevada, LLC, SWPP Compliance Solution, Cactus Rose Construction, Inc., Fast Glass, Inc., Heinaman Contract Glazing all through Peel Brimley; and, the Court having heard the testimony of witnesses, having reviewed the evidence provided by the parties, having heard the arguments of counsel, and having read and considered the briefs of counsel and good cause appearing; the Court hereby makes the following:

I. FINDINGS OF FACT

A. The Project

1. This action arises out of a construction project in Las Vegas, Nevada known as the Manhattan West Condominiums project in Clark County Nevada, (the "Project").

2. Gemstone Development West, Inc. ("Gemstone") was the owner and developer of the Project that contracted APCO to serve as the prime contractor.

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3. On or about September 6, 2007, Gemstone and APCO entered into the Manhattan West General Construction Contract for GMP (the "Contract")[1].

4. The Contract included Phase 1 and Phase 2 and consisted of nine buildings, with five of the nine buildings in Phase 1 (buildings 2, 3, 7, 8 and 9).[2]

5. The Contract price for Phase 1 was $78,938,160.00.[3] APCO started work on the Project in September, 2007.[4]

B. The Contract

6. The following are several critical Contract provisions that relate to the current claims.

1. Completion

7. Section 2.10 of the Contract defines completion as follows:

> (a) The Work within or related to each Building shall be deemed completed upon the (i) completion of the Work in such Building and the Corresponding Common Area; (ii) issuance of the Certificate of Occupancy for such Building; (iii) completion of any corrections that are requested by Developer, set forth on a Developer Punch List; and (iv) delivery of the applicable Completion Documents (collectively, a "Building Completion"). The Project shall be deemed completed upon the Building Completion of each Building (collectively "Final Completion").[5]

8. Given the ultimate disputes between APCO and Gemstone, APCO did not meet this definition of completion.[6]

. . . . .

---

[1] Exhibit 2. Gemstone and APCO also entered into a grading contract on April 17, 2007 but that contract is not the subject of this lawsuit. Exhibit 1.

[2] Testimony of Joe Pelan (APCO) Day 1, pp. 19 and 22; Exhibit 13, p.1. Joe Pelan is the General Manager of APCO Construction.

[3] Testimony of Joe Pelan (APCO), Day 1, p. 28.

[4] Testimony of Joe Pelan (APCO), Day 1, p. 28. APCO first started work under the grading contract. Exhibit 1.

[5] Exhibit 2, Section 2.10.

[6] Testimony of Joe Pelan (APCO), Day 1, p. 23.

2. **Progress Payments.**

9. Section 5.05 outlined the progress payment process as follows:

> (a) On the first business day of each month, General Contractor and the Developer shall meet to review the Work that was completed during the previous month and the corresponding payment required for such Work.
>
> . . .
>
> (e) Upon receipt of an Application for Payment that is acceptable to Developer pursuant to Sections 5.05(a-d), Developer shall, within 12 calendar days, submit, to Developer's lender or such lender's authorized designee, the corresponding draw application for the undisputed amount to be paid pursuant to such Application for Payment (the "Draw Application"). Thereafter, Developer shall take such actions as are necessary for the payment of the amount owed to General Contractor pursuant to such Draw Application of the amount owed to the General Contractor pursuant to such Draw Application (the "Progress Payment"). In the event that a Draw Application is not submitted to Developer's lender or such lender's authorized designee within the above 12 calendar day period, Developer shall pay to General Contractor $5,000 for each day that the submission of the Draw Application is delayed after such 12 calendar day period.
>
> . . .
>
> (g) Upon receipt of the Progress Payment, General Contractor shall promptly pay each Third-Party Service Provider the amount represented by the portion of the Percentage of Work Completed that was completed by such Third-Party Service Provider during the period covered by the corresponding Progress Payment. General Contractor shall, by appropriate agreement with each Third-Party Service Provider, require each Third-Party Service Provider to make payment to sub-contractors in a similar manner.[7]

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[7] Exhibit 2 at Section 5.05. The Contract defines APCO's subcontractors as a "Third Party Service Provider." Exhibit 2, Section 2.02(a).

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10. Per this provision, on the 20th of each month subcontractors submitted their billings to APCO for the current month (including a projection of what each intended to complete through the end of that month).[8]

11. APCO would then provide all of these documents to Gemstone.[9]

12. Gemstone would then walk the Project and determine the percentage each subcontractor had completed.[10]

13. Gemstone would adjust each subcontractor's billings to match its estimate of the percentage complete.[11]

14. Gemstone would give the revised billings back to APCO, and APCO would return them to each subcontractor to revise.[12]

15. Once revised, the subcontractors would submit them to APCO, APCO would submit them to Gemstone, and Gemstone would submit them to its construction funds control company, Nevada Construction Services ("NCS") for further review and payment.[13]

16. NCS would then send an inspector to verify the work was complete.[14]

17. NCS would then request funds from the lender and pay the total amount directly to APCO.[15]

18. APCO then paid the subcontractor the final amount received from Gemstone.[16]

19. As discussed more fully below, this process continued until June 2008.[17]

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[8] Testimony of Joe Pelan (APCO), Day 1, p. 24.
[9] Testimony of Joe Pelan (APCO), Day 1, p. 24.
[10] Testimony of Joe Pelan (APCO), Day 1, p. 24.
[11] Testimony of Joe Pelan (APCO), Day 1, p. 24.
[12] Testimony of Joe Pelan (APCO), Day 1, p. 24.
[13] Testimony of Joe Pelan (APCO), Day 1, p. 24; Exhibit 3, Nevada Construction Services Agreement.
[14] Testimony of Joe Pelan (APCO), Day 1, p. 25.
[15] Testimony of Joe Pelan (APCO), Day 1, p. 25, and 59.
[16] Testimony of Joe Pelan (APCO), Day 1, p. 25.
[17] Testimony of Joe Pelan (APCO), Day 1, p. 25.

3. Final Payment

20. Per the payment schedule in Section 5.06, Gemstone was required to make final payment when the following preconditions were met:

> (c) ...Prior to final payment, and as a condition precedent, General Contractor shall furnish Developer with the following (the "Completed Documents"):
>
> (i) All maintenance and operating manuals;
>
> (ii) Marked set of drawings and specifications reflecting "as-built" conditions, upon which General Contractor shall have transferred all changes in the location of concealed utilities...
>
> (iii) the documents set forth in Section 2.06(e)
>
> (iv) Any assignment and/or transfer of all guaranties and warranties from Third-Party Service Providers, vendors or suppliers and manufacturers;
>
> (v) A list of the names, address and phone numbers of all parties providing guarantees and warranties, and
>
> (vi) verification that all waivers that should be issued to Developer concurrent with Final payment. [18]

21. APCO admitted that none of these preconditions were met while APCO was on the Project.[19]

4. Retainage

22. Section 5.07 contained the Contract's retention (or retainage) payment schedule.[20]

23. Retainage is essentially an "escrow account" representing a temporarily withheld portion of a billing that is retained by Gemstone to ensure that the work is completed

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[18] Exhibit 2 at Section 5.06(c).

[19] Testimony of Joe Pelan (APCO), Day 1, p. 63.

[20] Exhibit 2 at Section 5.07.

properly, that all material suppliers are paid and lien releases have been provided, and that all certificates of occupancy were issued.[21]

24. APCO and the subcontractors tracked the 10% retention in their billings each month.[22]

25. APCO never held or otherwise received any subcontractor's retention withheld by Gemstone and kept by the lender for the Project.[23]

26. Section 5.07(f) sets forth the preconditions for APCO to receive its retention:

> (f) Any remaining Standard Retainage, Monthly Retainage, and Milestone Retainage shall be released to General Contractor on the date that (i) Final Completion is attained and (ii) all outstanding disputes between Developer and General Contractor and Developer and any Third Party Service Providers have been resolved, and any liens against the Project related to such disputes have been removed.[24]

27. APCO admits that it never met any of the milestones or preconditions to be entitled to its retention from Gemstone.[25]

28. Accordingly, APCO never billed and did not receive any retention from Gemstone.[26]

5. Termination for Convenience

29. Section 10.01 of the Contract is entitled **"Termination by the Developer Without Cause."**[27]

---

[21] Testimony of Joe Pelan (APCO), Day 1, p. 25; Exhibit 2 at Section 5.07; Helix's Post-Trial Brief, p. 3, ll. 10-11.

[22] Testimony of Joe Pelan (APCO), Day 1, pp. 25-26.

[23] Testimony of Joe Pelan (APCO), Day 1, p. 26.

[24] Exhibit 2 at Section 5.07(f).

[25] Testimony of Joe Pelan (APCO), Day 1, pp. 1-4, 26.

[26] Testimony of Mary Jo Allen (APCO), Day 3, p. 127. Mary Jo Allen is a bookkeeper for APCO, and has been a bookkeeper for approximately 40 years. Testimony of Mary Jo Allen (APCO), Day 3, p. 121. She assisted in preparing the pay applications to Gemstone for the Project. Testimony of Mary Jo Allen (APCO), Day 3, p. 121.

30. In the construction industry, this is known as a "termination for convenience."[28]

31. Gemstone never terminated the Contract for convenience.

6. **Termination for Cause**

32. Section 10.02 of the Contract is entitled **"Termination by Developer With Cause" and states:**

> . . .
>
> (b) When any of the reasons set forth in Section 10.02(a) exist, Developer may without prejudice to any other rights or remedies available to Developer and after giving General Contractor seven days' written notice (in addition to the 48 hours notice for purposes of Section 10.02 (a)(vi)), terminate employment of General Contractor and may do the following:
>
> . . .
>
> (ii) Accept assignment of any Third-Party Agreements pursuant to Section 10.04. [29]

33. Although Gemstone purported to terminate the Contract for cause,[30] the undisputed evidence established that APCO was not in default.[31]

7. **Assignment**

34. The Contract contained an assignment provision confirming that upon the Contract's termination, APCO's subcontracts would be assigned to Gemstone.

35. At that point, Gemstone would be responsible for any amounts that Gemstone had not already paid APCO for the subcontractors' work:

> **10.04 Assignment.** Each Third-Party Agreement for a portion of the Work is hereby assigned by General Contractor to Developer provided that such assignment is effective only after termination of the Agreement by Developer for cause pursuant to Section

---

[27] Exhibit 2 at Section 10.01.

[28] Testimony of Joe Pelan (APCO), Day 1, p. 27.

[29] Exhibit 2 at Section 10.02(b)(2).

[30] Testimony of Joe Pelan (APCO), Day 1, p. 27.

[31] Testimony of Joe Pelan (APCO), Day 1, p. 100.

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> 10.02 and only for those Third-Party Agreements which Developer accepts by notifying General Contractor and the applicable Third Party Service Provider in writing. General Contractor shall execute and deliver all such documents and take all such steps as Developer may require for the purpose of fully vesting in Developer the rights and benefits of General Contractor under such documents. Upon the acceptance by Developer of any Third-Party Agreement, subject to the other terms of this Article X, Developer shall pay to the corresponding Third-Party Service Provider any undisputed amounts owed for any Work completed by such Third Party Provider, prior to the underlying termination for which Developer had not yet paid General Contractor prior to such underlying termination.[32]

36. Despite its dispute with Gemstone, APCO could not have terminated its subcontracts or it would have been in breach of the Contract.[33]

37. Notably, the Contract and this assignment clause were incorporated into the APCO subcontracts.[34]

38. And before APCO left the Project, Gemstone and APCO ensured that all subcontractors were properly paid up through that last period.[35]

C. <u>Subcontracts</u>

1. Helix

39. Helix Electric of Nevada, LLC ("Helix") was originally selected and retained by Gemstone and performed work on the Project prior to APCO becoming the general contractor.[36]

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[32] Exhibit 2, Section 10.04 (p. 36).

[33] Testimony of Joe Pelan (APCO), Day 1, p. 75.

[34] Exhibit 45 (Helix Subcontract) and Exhibit 149 (CabineTec Subcontract), Section 1.1.

[35] Exhibit 26; Exhibit 152; Testimony of Joe Pelan, Day 1, pp. 46, 67, and 82. Testimony of Mary Jo Allen (APCO), Day 3, pp. 127-128.

[36] Testimony of Joe Pelan (APCO), Day 1, p. 58.

40. Specifically, Helix's Vice President, Bob Johnson,[37] admitted Helix participated in preparing engineering and design services for Gemstone on the Project's electrical scope of work.[38]

41. So at Gemstone's direction, APCO entered into a subcontract with Helix for the electrical work (the "Helix Subcontract") required on the Project.[39]

42. Helix's scope of work included "electrical installation for the project, which consists of distribution of power, lighting, power for the units, connections to equipment that required electrical."[40]

43. So Helix's work was based, in part, on the electrical drawings that Helix prepared under contract to Gemstone.[41]

44. The Helix subcontract included the following relevant provisions:

- Section 1.1: The subcontract incorporates the Contract including all exhibits and attachments, specifically including the Helix exhibit.
- Section 1.3: Helix was bound to APCO to the same extent and duration that APCO was bound to Gemstone.
- Section 3.4 outlined the agreed upon progress payment schedule as follows: Progress Payments
  - The progress payment to Subcontractor shall be one hundred percent (100%) of the value of Subcontract work completed (less 10% retention) during the preceding month as determined by the Owner, less such other amounts as Contractor shall determine as being properly withheld as allowed under this Article or as provided

---

[37] Bob Johnson is the Vice President of the major projects group at Helix. Testimony of Bob Johnson (Helix), Day 1, p. 106. Mr. Johnson has negotiated more than 50 subcontracts in his career, three to four of which have been with APCO. Testimony of Bob Johnson (Helix), Day 2, p. 17. Mr. Johnson was involved in the negotiation and execution of the final terms and conditions of Helix's subcontract with APCO for the Project. Testimony of Bob Johnson (Helix), Day 1, p. 107. Mr. Johnson admitted Andy Rivera received most of the project related correspondence and had the most information on Helix's damages claim. Testimony of Bob Johnson (Helix), at Day 2, p. 24.

[38] Testimony of Bob Johnson (Helix) Day 2, p. 6.

[39] Exhibit 45, Helix Subcontract; Testimony of Joe Pelan (APCO), Day 1, p. 58.

[40] Testimony of Bob Johnson (Helix) at Day 2, p. 10.

[41] Testimony of Bob Johnson (Helix) Day 2, p. 7.

elsewhere in this Subcontract. The estimates of Owner as to the amount of Work completed by Subcontractor shall be binding upon Contractor and Subcontractor and shall conclusively establish the amount of Work performed by Subcontractor. As a condition precedent to receiving partial payments from Contractor for Work performed, Subcontractor shall execute and deliver to Contractor, with its application for payment, a full and complete release (Forms attached) of all claims and causes of action Subcontractor may have against Contractor and Owner through the 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. Upon the request of Contractor, Subcontractor shall provide an Unconditional Waiver of Release in form required by Contractor for any previous payment made to Subcontractor. Any payment to Subcontractor shall be conditioned upon receipt of the actual payments by Contractor from Owner. Subcontractor herein agrees to assume the same risk that the Owner may become insolvent that Contractor has assumed by entering Into the Prime Contract with the Owner.

- 3.5 Progress Payments
  - Progress payments will be made by Contractor to Subcontractor within 15 days after Contractor actually receives payment for Subcontractor's work from Owner.... The estimate of owner as to the amount of Work completed by Subcontractor be binding upon Contractor and Subcontractor and shall conclusively establish the amount of Work performed by Subcontractor...[42]

45. Of critical importance to the present action and claims, the Helix Subcontract contained the following agreed upon retention payment schedule:

- Section 3.8: Retainage

  The 10 percent withheld retention shall be payable to Subcontractor upon, and only upon the occurrence of all the following events, each of which is a condition precedent to Subcontractor's right to receive final payment hereunder and payment of such retention: (a) Completion of the

[42] Exhibit 45.

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> entire project as described in the Contract Documents; (b) The approval of final acceptance of the project Work by Owner, (c) Receipt of final payment by Contractor from Owner; (d) Delivery to Contractor from Subcontractor all as-built drawings for it's (*sic*) scope of work and other close out documents; (e) Delivery to Contractor from Subcontractor a Release and Waiver of Claims from all of Subcontractor's laborers, material and equipment suppliers, and subcontractors, providing labor, materials or services to the Project.[43]

46. As documented below, Helix admitted that these preconditions were not met while Apco was the contractor.[44]

47. In its lien documents,[45] Complaint against APCO,[46] and its Amended Complaint, Helix has unequivocally admitted that it had a binding subcontract with APCO.[47]

48. In fact, Victor Fuchs, the President of Helix,[48] also confirmed the following in an affidavit attached to Helix's May 5, 2010 Motion for Summary Judgment Against Gemstone Development West (and corresponding errata) filed with this Court:

> 4. On or around April 17, 2007 [the date of Exhibit 45], APCO contracted with Helix to perform certain work on the Property.
>
> 5. Helix's relationship with APCO was governed by a subcontract, which provided the scope of Helix's work and method of billing and payments to Helix for work performed on the Property (the "Subcontract"). A true and correct copy of the Subcontract is attached hereto as Exhibit 1.
>
> 6. Helix also performed work and provided equipment and services directly for and to Gemstone, namely design engineering and temporary power.

---

[43] Exhibit 45.

[44] Testimony of Bob Johnson, Day 2, pp. 36 and 37.

[45] Exhibits 512 pp. 5-6, 7-9, 10-11.

[46] Exhibit 77.

[47] Exhibit 231.

[48] Testimony of Bob Johnson (Helix), Day 1, p. 108.

> 7. Camco Pacific Construction Company, Inc. ("Camco") replaced APCO as the general contractor. Thereafter, Helix performed its Work for Gemstone and/or Camco...[49]

Exhibit 1 to the declaration was the first fifteen pages of Exhibit 45.[50]

49. And notwithstanding Helix's proposed interlineations to the subcontract, Helix's Mr. Johnson admitted he did not change the retention payment schedule in the subcontract:

> Q. Okay. Would you turn to page 4 [of Exhibit 45] And directing your attention to paragraph 3.8?
>
> A. Okay.
>
> Q. Do you recognize that as the agreed-upon retention payment schedule in the subcontract?
>
> A. I do.
>
> Q. And in fairness to you and the record, you did propose a change to paragraph 3.8. Could you turn to page 16 of the exhibit, Exhibit 45? And directing your attention to paragraph 7, does this reflect your proposed change to the retention payment schedule in the original form of Exhibit 45?
>
> A. In the original form, yes.
>
> Q. Okay. And APCO accepted your added sentence that if the retention was reduced on the Project, the same would be passed on to the subcontractor, correct?
>
> A. Correct.
>
> Q. Through your change in paragraph 7, on page 16 of Exhibit 45, you did not otherwise modify the preconditions in the retention payment schedule of 3.8, did you?
>
> A. We did not.[51]

50. Mr. Johnson, also admitted that Exhibit 45 represented the APCO agreement that Helix alleges APCO somehow breached:

> Q. Okay, sitting here today, is it your contention that APCO breached a contract with Helix?
>
> A. I would say they did in the respect that we haven't been paid.
>
> Q. Okay. And which contract is it in your opinion that APCO breached?

---

[49] Exhibit 314.

[50] Helix Electric's May 5, 2010 Motion for Partial Summary Judgment Against Gemstone Development West (and corresponding errata).

[51] Testimony of Bob Johnson, Day 2, pp. 17-18.

A. For the Manhattan West project.

Q. Is there a document?

A. There is a document.

Q. Okay. And, sir, would you turn—if you could, grab Exhibit 45. You spent some time talking about this yesterday.

A. Okay.

The Court: Which item is it, counsel?

Mr. Jefferies: Exhibit 45.

Q. Is it your position that APCO breached this agreement?

A. My assumption would be they breached it, yes.

Q. Okay. But this is the document that represents the agreement between APCO and Helix for the project?

A. It is the agreement between APCO and Helix.[52]

51. Notably, the Helix Subcontract did not contain a provision purporting to waive Helix's statutory lien rights.

2. **CabineTec**

52. Gemstone also selected CabineTec, Inc. ("CabineTec") to serve as APCO's cabinet subcontractor.[53] Plaintiff in Intervention National Wood Products, Inc. ("National Wood") is a judgment creditor of CabineTec which has assigned all of its right, title, and interest in the project to National Wood. Such parties are collectively referred to herein as "CabineTec."

53. APCO entered into a subcontract with CabineTec on April 28, 2008 for the delivery and installation of cabinets on the Project (the "CabineTec Subcontract")[54]

54. CabineTec's Subcontract contained the same retention and progress payment schedules quoted above from the Helix Subcontract.[55]

---

[52] Testimony of Bob Johnson (Helix), Day 2, p. 9.

[53] Testimony of Joe Pelan (APCO), Day 1, p. 89.

[54] Exhibit 149, CabineTec Subcontract.

[55] Exhibit 149.

55. CabineTec's Nicholas Cox[56] admitted CabineTec did not change the retention payment schedule found in Section 3.8.[57]

56. CabineTec and APCO also signed an August 6, 2008 letter regarding Terms & Conditions.[58]

57. That letter confirmed that CabineTec would be paid when "APCO receives payment from Gemstone per subcontract."[59]

58. The CabineTec Subcontract does not contain a waiver of CabineTec's right to place a mechanic's lien on the Project.

D. The Contract was terminated.

59. APCO did not finish the Project as the general contractor.[60]

60. Despite APCO's performance, issues with Gemstone's payments started in May 2008 and Gemstone reduced the May Pay Application to exclude any money for APCO.[61]

61. ". . .Gemstone will withhold $226,360.88 from the May Progress Payment (the "Withheld Amount") in addition to the 10% retainage that was already being withheld. The Withheld Amount represents the APCO Construction Contractor's Fee line-item from the May Progress Payment."[62]

62. As a result, Gemstone only paid the subcontractors for the May time period.

63. Given the wrongful withholding, APCO provided Gemstone with written notice of its intent to stop work pursuant to NRS 624.610 if APCO was not paid in full.[63]

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[56] Mr. Cox was the president of CabineTec during the Project. Testimony of Nicholas Cox (CabineTec) Testimony Day 3, p. 13.

[57] Testimony of Nicholas Cox (CabineTec), Day 3, p. 29.

[58] Exhibit 152.

[59] Exhibit 152.

[60] Testimony of Brian Benson (APCO) at Day 3, p. 50; Testimony of Mary Jo Allen (APCO), Day 3, p. 122.

[61] Testimony of Joe Pelan (APCO), Day 1, pp. 28 and 31.

[62] Exhibit 212-1.

[63] Exhibit 5.

64. On or about July 18, 2008, APCO submitted its pay application for the month ending June 30, 2008, and requested $6,566,720.38 (the "June Application").[64]

65. The cover page of the June Application, like all other pay applications, tracked the total value of the Contract, the total requested for that month, subcontractor billings and retention.[65]

66. The June Application shows Gemstone was withholding $4,742,574.01 in retainage as of that date.[66]

67. On July 18, 2008, APCO sent Gemstone a notice of intent to stop work for its failure to pay the May Application as follows.

> Specifically, Gemstone has failed to pay $3,434,396.50 for Application for Payment No. 8, Owner Draw No. 7, which was submitted to Gemstone on June 20, 2008, and was due no later than July 11, 2008 pursuant to NRS 624.609(A). Accordingly, THIS LETTER SHALL SERVE AS APCO'S NOTICE OF INTENT TO STOP WORK PURSUANT TO NRS 624.609 THROUGH NRS 624.630, INCLUSIVE, UNLESS APCO IS PAID THE TOTAL AMOUNT OF $3,434,396.50 FOR ITS WORK ON THE PROJECT... Accordingly, pursuant to NRS 624.609(1)(b), payment was due to APCO within 21 days of its request for payment (again, no later than July 11, 2008). To date, no payment has been made...If APCO has not been paid for Application for Payment No. 8, Owner Construction Draw No. 7, in the amount of $3,434,396.50 by the close of business on Monday, July 28, 2008, APCO reserves the right to stop work on the Project anytime after that date. While APCO is willing to continue to work with Gemstone to get these issues resolved, APCO is not waiving its right to stop work any time after July 28, 2008, if APCO continues to work on the Project or otherwise attempts to resolve these issues with Gemstone.[67]

68. On July 28, 2008, APCO sent a letter confirming that APCO would stop working unless Gemstone made full payment to APCO for all past due amounts:

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[64] Exhibit 4.

[65] Testimony of Joe Pelan (APCO), Day 1, pp. 28 and 29; Exhibit 4.

[66] Exhibit 4; Testimony of Joe Pelan (APCO), Day 1, p. 30.

[67] Exhibit 5.

> As you area aware, on July 17, 2008, APCO provided Gemstone with written notice that unless APCO was paid the full amount of $3,434,396 by the close of business on Monday, July 28, 2008, that APCO would stop work on the Project. Gemstone failed to make full payment and has improperly withheld $203,724.29, despite having no good faith or proper statutory basis for withholding the payment. AS a result, APCO is stopping work on the Manhattan West Project effective immediately.
> In addition to stopping work on the project, APCO hereby asserts its rights to terminate the contract pursuant to NRS 624.610(2). THIS LETTER SHALL SERVICE AS APCO'S NOTICE OF INTENT TO TERMINATE THE MANHATTAN WEST GENERAL CONSTRUCTION CONTRACT FOR GMP PURSUANT TO NRS 624.606 THROUGH NRS 624.630, INCLUSIVE, PURSUANT TO THE TERMS OF THE NRS 624.610, THE CONTRACT SHALL BE TERMINATED AS OF AUGUST 14, 2008.[68]

69. Helix was aware that shortly after a July 11, 2008 email,[69] APCO began issuing stop work notices to Gemstone on the Project.[70]

70. Gemstone ultimately paid APCO for May.[71]

71. In addition, on July 29, 2008, APCO sent the following letter to its subcontractors:

> As most of you are now aware, APCO Construction and GEMSTONE are embroiled in an unfortunate contractual dispute which has resulted in the issuance of a STOP WORK NOTICE to GEMSTONE. While it is APCO Construction's desire to amicably resolve these issues so work may resume, it must also protect its contractual and legal rights. This directive is to advise all subcontractors on this project that until further notice, all work on the Manhattan West project will remain suspended.
> THIS SUSPENSION IS NOT A TERMINATION OF THE GENERAL CONTRACT AT THIS TIME AND AS SUCH ALL SUBCONTRACTORS ARE STILL CONTRACTUALLY BOUND TO THE TERMS OF THEIR RESPECTIVE SUBCONTRACTS WITH APCO CONSTRUCTION.

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[68] Exhibit 6.

[69] Exhibit 506, p. 1.

[70] Testimony of Bob Johnson (Helix), Day 1, p. 113.

[71] Testimony of Joe Pelan (APCO) Day 1, p. 31.

> Additionally, the subcontractors are advised that, at the present time they are not obligated to perform any subcontract work on the project at the direction or insistence of Gemstone. We will keep all subcontractors advised on a timely basis if the status of the work suspension changes. Should you have any questions, feel free to call.[72]

72. On July 30, 2008, Scott Financial, the Project's lender, sent a letter to APCO confirming the loan for the Project was in good standing.[73]

73. On or about August 6, 2008, Gemstone provided APCO notice of its intent to withhold the sum of $1,770,444.28 from APCO for the June Application.[74]

74. Accordingly, APCO sent Gemstone another notice of intent to stop work on August 11, 2008, noting that if APCO was not paid by August 21, 2008, APCO would suspend work on the Project:

> On July 18, 2008, APCO Construction submitted its Progress Payment for June 2008 pursuant to the terms of the General Construction Agreement for GMP, dated September 6, 2007 in the amount of $6,566,720.38. This number has since been adjusted on your submittal to the lender to reflect $5,409,029.42 currently due to APCO Construction. We understand this number reflects certain upward adjustments to change orders made after the Progress Payment was submitted on July 18, 2008. Pursuant to NRS 624.609(1), this payment was due on or before August 8, 2008. By way of good faith agreement extended by APCO Construction to Peter Smith, this deadline was extended for three (3) days as a result of what were intended to be "good faith" efforts to fully resolve certain change order issues. While APCO Construction does not feel at this time that Gemstone participated in good faith, we will nevertheless honor our commitment to you to extend the deadline. Accordingly, and pursuant to the aforementioned statute and agreement, deadline for payment for the June Progress Payment was close of business Monday, August 11, 2008.
>
> ...

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[72] Exhibit 48.

[73] Exhibit 7.

[74] Exhibit 313.

> In review of your August 6, 2008 correspondence you have provided a "withholding breakdown" wherein you have given notice of your intent to withhold $1,770,444.28, allegedly pursuant to NRS 624.609(3) and Section 5.05(d) and 5.05(f)(vii) of the Agreement.
>
> ...
>
> **As such, the correct amount of the June Progress Payment should be $6,183,445.24.** As of this date, Gemstone has failed and/or refused to pay the June Progress Payment.
>
> THIS LETTER SHALL SERVE AS APCO'S NOTICE OF INTENT TO STOP WORK PURSUANT TO NRS 624.606 THROUGH NRS 624.630, INCLUSIVE, UNLESS APCO IS PAID THE TOTAL AMOUNT OF $6,183,445.24 FOR ITS WORK ON THE PROJECT.
>
> IF APCO CONSTRUCTION HAS NOT BEEN PAID FOR PAYMENT NO. 9 OWNER CONSTRUCTION DRAW NO. 8, IN THE AMOUNT OF $6,183,445.24 BY CLOSE OF BUSINESS ON THURSDAY, AUGUST 21, 2008, APCO CONSTRUCTION RESERVES THE RIGHT TO STOP WORK ON THE PROJECT ANYTIME AFTER THAT DATE.
>
> As we have previously demonstrated, APCO Construction will continue to work with Gemstone to resolve the various issues affecting this project, however, we will not waive our right to stop work anytime after August 21, 2008. We trust you will give this Notice appropriate attention.[75]

75. All subcontractors were copied on this notice.[76]

76. APCO informed all subcontractors that it intended to terminate the Contract as of September 5, 2008.[77]

77. Helix's Project Manager, Andy Rivera,[78] admitted that he received APCO's stop work notice and possible termination.[79]

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[75] Exhibit 10; Testimony of Joe Pelan (APCO) Day 1, pp. 30 and 32.

[76] Testimony of Joe Pelan (APCO), Day 1, p. 31; Exhibit 10.

[77] Exhibit 23; Testimony of Joe Pelan (APCO), Day 1, p. 74.

[78] Andy Rivera was Helix's Project Manager. Testimony of Andy River (Helix), Day 2, p. 48. As the Project Manager, he was in charge of labor, materials,

78. After receipt of APCO's written notice, Gemstone sent a letter on Friday, August 15, 2008, claiming that APCO was in breach of contract and that Gemstone would terminate the Contract for cause if the alleged breaches were not cured by Sunday, August 17, 2008.[80]

79. That letter divided APCO's alleged breaches into curable breaches and non-curable breaches[81] and also confirmed that upon termination: "(a) all Third-Party Agreements shall be assigned to Gemstone and (b) APCO must execute and deliver all documents and take such steps as Gemstone may require for the purpose of fully vesting in Gemstone the rights and benefits of such assigned Third-Party Agreements."[82]

80. APCO's counsel responded to the letter the same day, August 15, 2008.[83]

81. That letter refuted Gemstone's purported basis for termination for cause,[84] as there was no factual basis for any of the alleged defaults in Gemstone's letter:

> Gemstone's demand is factually incorrect as APCO is not in default of the agreement, and even if APCO was in default of the Agreement as alleged, the issues set forth by Gemstone would not support a termination of the contract...APCO has provided Gemstone with a 10 day Notice of Intent to Stop Work on the project due to Gemstone's failure to pay the June 2008 Application. Instead of making the payment that is due, Gemstone is seeking to terminate the contract on or before the date that APCO will stop work on the project...APCO has

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subcontractors, labor reports, billings, change orders, submittals, requests for information, and most other documents on the Project. Mr. Rivera reported to Robert Johnson. Testimony of Andy Rivera (Helix), Day 2, p. 48. Andy Rivera prepared Helix's pay applications. Testimony of Bob Johnson (Helix), Day 2, p. 8. So while Robert Johnson signed the pay applications for Helix, Mr. Andy Rivera had the most personal knowledge of the financial aspects of the Project for Helix and was actually designated as Helix's PMK on Helix's claim. Testimony of Andy Rivera, Day 2, p. 73.

[79] Testimony of Bob Johnson (Helix), Day 1, p. 113.

[80] Exhibit 13; Testimony of Joe Pelan (APCO), Day 1, pp. 35-36.

[81] Exhibit 13 - 1-13.

[82] Exhibit 13, p. 14, Section C.3.

[83] Exhibit 14; Testimony of Joe Pelan (APCO), Day 1, p. 36.

[84] Exhibit 14; Testimony of Joe Pelan (APCO), Day 1, pp. 37 and 79.

> received a copy of the e-mail sent to APCO's subcontractors by Gemstone. The e-mail notes that Gemstone has a replacement General Contractor in place. Obviously, Gemstone's intent is to improperly declare APCO in default and then attempt to move forward with the project using APCO's subcontractors... Items (ii), (iii), (iv) and (v) were all complete months ago as part of the normal job process.[85]

82. There was no evidence presented at trial rebutting Mr. Pelan's testimony that APCO was not in default.

83. And since the Court has stricken Gemstone's answer and counterclaim against APCO,[86] the Court must find that APCO was not in breach.

84. On or about August 15, 2008, prior to its purported termination, Gemstone improperly contacted APCO's subcontractors and notified them that Gemstone was terminating APCO as of Monday, August 18, 2008.[87]

85. Gemstone confirmed it had already retained a replacement general contractor.[88] Gemstone advised the APCO subcontractors as follows:

> In the event that APCO does not cure breaches to Gemstone's satisfaction during the cure period, Gemstone will proceed with a new general contractor. This GC has been selected and they are ready to go. We do not expect any delays or demobilizations in this event... If APCO does not cure all breaches, we will be providing extensive additional information on the transition to a new GC in 48 hours time.[89]

86. The replacement contractor turned out to be Camco.[90]

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[85] Exhibit 14; Testimony of Joe Pelan (APCO), Day 1, p. 100.

[86] Docket at May 26, 2010 Order Striking Defendant Gemstone Development West, Inc.'s Answer and Counterclaims, and Entering Default.

[87] Exhibit 215; Testimony of Joe Pelan (APCO), Day 1, pp. 34 and 35.

[88] Exhibit 215.

[89] Exhibit 215-2.

[90] Exhibit 162, Camco/Gemstone Prime Contract.

87. On August 18, 2008, APCO emailed Gemstone objecting to such direct communications with the subcontractors: "The APCO Construction GMP and Grading Contracts are still in effect and as such Gemstone shall not meet with our subcontractors. Please read the contract and other correspondence closely. If APCO didn't (and APCO did) cure the breach, Gemstone must issue a seven day notice of termination. You are disrupting my ability to perform the work."[91]

88. That same day, APCO submitted its July 2008 pay application for $6,307,487.15.[92]

89. The next day on August 19, 2008, APCO sent Gemstone a letter noting Gemstone's breaches:

> [I]t was and is my clear position that any termination of our contract would be a breach of the agreement. Then today before I could send my letter I received a letter from your lawyer saying our contract was over.... As with the other changes, it is impossible to fully account for the delays and full impacts to our schedule at this stage. Consistent with the (2) two change orders that Alex signed after Pete initially rejected them for the HVAC deltas, I would propose that we hold the time issues for now... I also find it interesting that you have sent us letters to terminate the contract all within the time that we were allowed to provide you notice of our intent to suspend the work if the change orders on the June pay application were not paid. That was to elapse on Thursday and now your lawyer is proposing that we agree to a termination before that date. We will not agree and intend to fully proceed with our contract obligations... Yesterday morning, Alex came in and asked me what we were still doing on site because there was nothing that we could do to satisfy Gemstone. That would be consistent with the email that was sent to all of our subcontractors on Friday advising that we were being removed from the project before we even had a chance to respond to the 48 hour notice... Craig also told me that Gemstone had previously selected Camco to complete the project.[93]

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[91] Exhibit 216-1.

[92] Exhibit 8.

[93] Exhibit 15.

90. On August 19, 2008, Gemstone confirmed that joint checks to the Subcontractors and Apco would be written for the June 2008's pay application: "I'd like to have dual checks cut for this [June, 2008] pay application directly to the subs and the general. I believe this is different than what we have historically done on ManhattanWest, but similar to how we have paid some Manhattan Pay Apps in the past."[94]

91. Gemstone confirmed that all future payments would essentially go directly from Nevada Construction Control to the subcontractors.[95]

92. Although it disagreed with Gemstone's conduct, APCO cooperated in this post termination process to ensure that all subcontractors were properly paid for work performed on APCO's watch:

> An APCO representative has to sign all of the subcontractor checks due to Gemstone's request to prepare the "joint checks". An APCO signer should be doing that by the end of today or tomorrow morning. At that time, NCS will contact all of the subcontractors to pick up their checks. Furthermore, today the APCO's July pay application was submitted to NCS. As mentioned in the meeting on Monday, August 25, 2008, enclosed is the contact information for Camco Pacific regarding pay applications... Please forward your July and August pay requests to Yvonne. Obviously, July was already submitted to NCS but we would like Camco to have record of the most current pay requests.[96]

93. None of the joint checks that NCS and Gemstone issued and that APCO properly endorsed included any funds for APCO.[97]

94. And none of the joint checks accounted for any APCO or subcontractor retention because retention had not been earned under either the Contract or the various subcontracts.[98]

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[94] Exhibit 16; Testimony of Joe Pelan (APCO), Day 1, p. 38.

[95] Testimony of Joe Pelan (APCO), Day 1, p. 38.

[96] Exhibit 26. Testimony of Joe Pelan (APCO), Day 1, pp. 38 and 41.

[97] Testimony Day 1, p. 38.

[98] Testimony of Joe Pelan (APCO), Day 1, pp. 38-39.

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95. As of the end of August, the Project was only about 74% complete.[99]

96. Ultimately, APCO was not paid for its share of June Application even though the subcontractors received their money.[100]

97. On August 21, 2008, APCO sent a letter to its subcontractors informing them that APCO would stop work on the Project on August 21, 2008:

> Attached hereto is APCO Construction's Notice of Stopping Work and Notice of Intent to Terminate Contract for nonpayment. As of 5:00p.m., Thursday, August 21,.2008 all work in furtherance of the subcontracts you have with APCO CONSTRUCTION on the Manhattan West project is to stop until you are advised otherwise, in writing, by APCO CONSTRUCTION... If a prime contractor terminates an agreement pursuant to this section, all such lower tiered subcontractors may terminate their agreements with the prime contractor... Pursuant to statute, APCO CONSTRUCTION is only stopping work on this project. At this time it has not terminated its contract with Gemstone. As such, all subcontractors, until advised in writing by APCO CONSTRUCTION, remain under contract with APCO CONSTRUCTION.[101]

98. On August 21, 2008 APCO also provided Gemstone with written notice of APCO's intent to terminate the Contract as of September 5, 2008.[102]

99. APCO's last work on the Project was August 21, 2008.[103]

100. On August 22, 2008, APCO sent a letter to the Clark County Building Department advising that APCO was withdrawing as the general contractor for the Project.[104]

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[99] Exhibit 218-10; Testimony of Steven Parry (Camco), Day 5, pp. 31-32. Mr. Parry was Camco's project manager for the approximate four months that Camco worked on the Project. Testimony of Steven Parry (Camco), Day 5, p. 24.

[100] Testimony of Joe Pelan (APCO), Day 1, p. 33.

[101] Exhibit 23; Testimony of Joe Pelan (APCO), Day 1, p. 32.

[102] Exhibit 23.

[103] Testimony of Brian Benson (APCO), Day 3, p. 50; Testimony of Joe Pelan (APCO), Day 1, p. 40.

[104] Exhibit 24; Testimony of Joe Pelan (APCO), Day 1, p. 40.

101. APCO was required to cancel its current building permits so the Project permits could be issued and transferred to Camco.[105]

102. In an August 28, 2008 letter, Gemstone advised that APCO was terminated for cause as of August 24, 2008:

> Furthermore, pursuant to the ManhattanWest's August 15, 2008 notice regarding Termination of Phase 1 for Cause, and APCO's failure to cure the breaches set forth in the notice prior to August 17, 2008, the Contract terminated for cause on August 24, 2008. Consequently, pursuant to Section 10.02(c) of the Contract, APCO is not entitled to receive any further payments until the Work [as defined in the Contract] is finished. Later today, Gemstone will issue joint checks to the subcontractors pursuant to the June Progress Payment; however, payment will not include any fees or general conditions to APCO.[106]

103. APCO contested Gemstone's purported termination and APCO's evidence was uncontested on that issue that it was not in default.[107]

104. APCO properly terminated the Contract for cause in accordance with NRS 624.610 and APCO's notice of termination since Gemstone did not pay the June Application, as of September 5, 2008.[108]

105. Helix and CabineTec both received a copy of the termination letter.[109] APCO considered its notice of termination to be effective as of September 5, 2008.[110]

106. But Gemstone proceeded with the Project as if it had terminated the Contract with APCO.[111] APCO was physically asked to leave the Project as of the end of August, 2008.[112]

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[105] Testimony of Joe Pelan (APCO), Day 1, p. 100.

[106] Exhibit 27; Testimony of Joe Pelan (APCO), Day 1, p. 41.

[107] Testimony of Joe Pelan (APCO), Day 1, p. 42.

[108] Exhibit 28; Testimony of Joe Pelan (APCO), Day 1, pp. 73 and 80.

[109] Exhibit 28; Testimony of Bob Johnson (Helix), Day 1, p. 113.

[110] Testimony of Joe Pelan (APCO), Day 1, pp. 42-43.

[111] Testimony of Joe Pelan (APCO), Day 1, pp. 100-101; Exhibit 29.

107. And all subcontractors received notice from Gemstone that APCO was terminated on August 26, 2008 and would not be returning to the Project.[113]

E. Gemstone owed APCO $1.4 million when APCO left the Project.

108. Even though the subcontractors had received all amounts billed through August 2008, Gemstone owed APCO $1,400,036.75 for APCO's June, July, and August 2008 payment applications.[114]

109. Gemstone also owed APCO $200,000.00 from various reimbursements.[115]

110. APCO has never received payment in any form from any entity for these pay applications or the $200,000.00 in reimbursements.[116]

111. The $1,400,036.75 does not reflect any of the retention that Gemstone withheld from APCO on the Project because the retention never became due.[117]

112. Ultimately, Gemstone would not accept APCO's final August 2008 pay application.[118]

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[112] Testimony of Joe Pelan (APCO) Day 3, p. 150.

[113] Exhibit 118.

[114] Exhibit 320/321, Summary of June, July and August 2008 payment applications to Gemstone that were not paid; Testimony of Joe Pelan (APCO) Day 1, p. 67; Testimony of Mary Jo Allen (APCO) Day 3, p. 144. Exhibit 4 is APCO's June Application. Testimony of Mary Jo Allen (APCO), Day 3, p. 124. APCO's share of the June Pay Application was $700,802.90, which was not paid. Testimony of Mary Jo Allen (APCO), Day 3, pp. 125-127. Exhibit 8 is APCO's July pay application. Testimony of Mary Jo Allen (APCO), Day 3, p. 125. APCO's share of the July 2008 pay application was $431,183.67, which was not paid. Testimony of Mary Jo Allen (APCO), Day 3, pp. 125-127. Exhibit 31 was APCO's August 2008 pay application and its final pay application. Accordingly, the August 2008 application shows everything that was done by APCO and its subcontractors through the end of August 2008. Testimony of Mary Jo Allen (APCO) Day 3, p. 135. APCO's share of the August 2008 pay application was $268,050.18, which was not paid. Testimony of Joe Pelan (APCO) Day 1, p. 46; Testimony of Mary Jo Allen (APCO), Day 3, pp. 126-127. In total, Gemstone owed APCO $1,400,036.75 for its last three pay applications. Testimony of Mary Jo Allen (APCO), Day 3, p. 122.

[115] Testimony of Mary Jo Allen (APCO), Day 3, p. 127.

[116] Testimony of Mary Jo Allen (APCO), Day 3, p. 127.

[117] Testimony of Mary Jo Allen (APCO), Day 3, p. 127.

[118] Testimony of Joe Pelan (APCO), Day 1, pp. 44-45. Exhibit 31.

113. So Camco submitted APCO's August 2008 billing so APCO's subcontractors would get paid.[119]

114. Camco's August 2008 pay application tracked the full retention from the Project (including APCO's)[120] and APCO's full contract amount.[121]

115. As of its last pay application, APCO believed it was 76% complete with the Project.[122]

116. Despite the amounts owed to APCO, the evidence was uncontested that the subcontractors received all of their billed amounts, less retention, up through August 2008.[123]

F. APCO did not terminate the Helix or CabineTec Subcontracts.

117. During this dispute, APCO did not terminate the Helix or CabineTec subcontracts,[124] but advised its subcontractors that they could suspend work on the Project in accordance with NRS Chapter 624.[125]

118. If APCO wanted to terminate its subcontractors, it had to do so in writing.[126]

119. Helix admitted it knew APCO was off the Project as of August 28, 2008[127] and that neither APCO nor Helix terminated the Helix Subcontract.[128]

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[119] Exhibit 218; Testimony of Joe Pelan (APCO), Day 1, pp. 43-44.

[120] Testimony of Joe Pelan (APCO), Day 1, p. 44; Exhibit 218-2.

[121] Exhibit 218-10.

[122] Exhibit 31; Testimony of Joe Pelan (APCO) Day 1, p. 45.

[123] Testimony of Mary Jo Allen (APCO) Day 3, pp. 127-129 and 144; Testimony of Andy Rivera (Helix) Day 2, pp. 73 and 75; Testimony of Joe Pelan (APCO) Day 3, p. 150; Exhibit 26; Exhibit 152; Testimony of Joe Pelan (APCO) Day 1, pp. 26, 46, 67 and 82.

[124] Testimony of Joe Pelan (APCO), Day 1, p. 39.

[125] Exhibit 23.

[126] Testimony of Joe Pelan (APCO) Day 1, p. 71.

[127] Testimony of Andy Rivera (Helix) Day 2, p. 62.

[128] Testimony of Joe Pelan (APCO) Day 1 at p. 126; Testimony of Bob Johnson (Helix) Day 2, p. 33.

120. Additionally, Helix admitted it never issued a stop work notice to APCO pursuant to NRS 624 because it had no payment disputes with APCO.[129]

121. In fact, per Gemstone's notice dated August 15, 2008, Gemstone gave APCO notice that it exercised its right under Contract Section 10.04 to accept an assignment of the APCO subcontracts.[130]

122. Accordingly, any purported termination of a subcontract by APCO would have breached the Contract.[131]

123. During August 2008, subcontractors on the Project were getting information directly from Gemstone.[132]

124. Helix and CabineTec both continued work on the Project for Gemstone and Camco, and submitted their August billings to Camco.[133]

G. Status of the Project when APCO was off the Project

125. Before APCO was asked to leave the Project on August 19 and 20, 2008, APCO documented the as-built conditions and confirmed that Helix and CabineTec were not anywhere close to completing their respective scopes of work.[134]

126. So the evidence was undisputed that at the time APCO left the Project, Gemstone did not owe APCO or the subcontractors their retention.

. . . . .

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[129] Testimony of Bob Johnson (Helix) Day 1, p. 127.

[130] Exhibit 13.

[131] Testimony of Joe Pelan (APCO) Day 1, p. 75.

[132] Testimony of Andy Rivera (Helix) Day 2, p. 76.

[133] Exhibit 29; Exhibit 173, Helix's first payment application to Camco; Exhibits 182/185, CabineTec's first payment application to Camco.

[134] Testimony of Brian Benson (APCO) Day 3, pp. 50-58, 63-64 and 97. Those videos are a correct and accurate representation and reproduction of the status of the Project on August 19 and August 20, 2008. Testimony of Brian Benson (APCO) Day 3, p. 52.

H. **Camco became the Prime Contractor.**

127. Camco and Gemstone had several meetings and Gemstone contracted with Camco to complete the Project on August 25, 2008.[135]

128. In terms of the plans, specifications and technical scope of work, Camco's work was the same as APCO's.[136]

129. In fact, Camco used the same schedule of values and cost coding that APCO had been using on the Project.[137]

130. Camco obtained permits in its own name to complete the Project.[138]

131. Camco's Steve Parry confirmed that Exhibit E to the Camco contract represented the state of the Project when Camco took over.[139]

132. Gemstone and Camco estimated the Project to be 74% complete for Phase 1.[140] Those estimates also confirmed that:

- The first floor drywall taping in building 8 was 70% complete.[141]
- The first floor drywall taping in building 9 was 65% complete.[142]

133. Among other things, the Camco contract required that Camco "shall engage the Third-Party Service Providers listed on Exhibit C (the "Existing Third-Party Service Providers)."[143]

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[135] Exhibit 162, Camco/Gemstone Prime Contract; Testimony of Steve Parry (Camco) Day 5, pp. 25-26.

[136] Exhibit 162; Testimony of Joe Pelan (APCO) Day 1, pp. 45 and 98; Testimony of Steve Parry (Camco) Day 5, p. 31.

[137] Testimony of Steve Parry (Camco) Day 5, pp. 30-31.

[138] Testimony of Steve Parry (Camco) Day 5, p. 37.

[139] Testimony of Steve Parry (Camco) Day 5, p. 27.

[140] Exhibit 218, p. 10; Testimony of Steven Parry (Camco) Day 5, p. 31-32.

[141] Exhibit 160-3.

[142] Exhibit 160-3.

[143] Exhibit 162-2.

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134. Helix and CabineTec are both listed as Existing Third-Party Service Providers on Exhibit C.[144]

135. And Camco had worked with Helix before.[145]

136. Camco's Steve Parry admitted that Camco was assuming the subcontracts that APCO had with Helix and CabineTec:

> [Exhibit 162 was on the elmo]
> Q. ..I've highlighted a sentence that says, "General contractor shall engage third-party service providers." Do you see that?
> A. Yes.
> Q. Okay. What did you understand that to mean?
> A. That we would use subcontractors on the site that had already been under contract to perform work on the project.
> Q. Okay. So you were assuming the Subcontracts that APCO had issued on the Project; is that right?
> A. Yes.
> Q. And, sir, if you would, turn to Exhibit C within the exhibit. Those assumed contracts from APCO included CabineTec and Helix; correct?
> A. Yes.
> Q. And, sir, if you would, turn to Exhibit C within the exhibit. Those assumed subcontracts from APCO included CabineTec and Helix; correct?
> A. Yes. [146]

137. After Camco became the general contractor, it was responsible to pay subcontractors for work performed under it.[147]

138. Camco never had any contact or involvement with APCO on the Project,[148] nor did APCO provide any direction or impose any scheduling requirements on subcontractors proceeding with their work.[149]

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[144] Exhibit 162-23.

[145] Testimony of Steve Parry (Camco) Day 5, pp. 13-14.

[146] Testimony of Steve Parry (Camco) Day 5, p. 26.

[147] Testimony of Joe Pelan (APCO) Day 1, p. 99.

[148] Testimony of Steve Parry (Camco) Day 5, p. 27.

[149] Testimony of Joe Pelan (APCO) Day 1, p. 97; Testimony of Joe Pelan (APCO) Day 3, p. 150; Testimony of Steve Parry (Camco) Day 5, p. 27.

139. APCO played no role in the pay application process or the actual field work on the Project from September-December 2008.[150]

140. And no Helix nor CabineTec representative ever approached APCO with questions or concerns about proceeding with work on the Project after APCO's termination.[151]

141. So APCO did not receive any benefit from the work or materials that Helix or CabineTec performed or provided to the Project after August 21, 2008.[152]

142. Camco's first pay application was for the period through August 31, 2008.[153]

143. That billing reflected Gemstone retainage account for APCO's work:

> Q. Now, I have highlighted the retainage line item of $5,337,982.74 [on Exhibit 218]. Do you see that?
>
> A. Yes.
>
> Q. What did that figure represent?
>
> A. The retainage that was being withheld on the Project.
>
> Q. And who was the retainage being withheld by?
>
> A. Gemstone, the owner.
>
> . . .
>
> Q. Okay. So my point simply was what you're depicting here in the retainage is the accounting of the retainage that was withheld from APCO as you're going forward on the Project.
>
> A. That's correct.[154]

So all parties knew that the subcontract retention amounts were maintained with Gemstone after APCO was terminated.

I. <u>CabineTec entered into a ratification agreement with Camco.</u>

144. After APCO left the Project, CabineTec signed a ratification agreement with Camco whereby CabineTec agreed to complete its original scope of work for Camco.[155]

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[150] Testimony of Joe Pelan (APCO) Day 1, p. 98.

[151] Testimony of Joe Pelan (APCO) Day 1, p. 98.

[152] Testimony of Joe Pelan (APCO) Day 3, pp. 149-150.

[153] Testimony of Steve Parry (Camco) Day 5, p. 29.

[154] Testimony of Steve Parry (Camco) Day 5, p. 30.