IN THE SUPREME COURT OF THE STATE OF NEVADA

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

HELIX ELECTRIC OF NEVADA, LLC,

Appellant/Cross-Respondent,

v.

APCO CONSTRUCTION, INC., A NEVADA CORPORATION,

Respondent/Cross-Appellant.

COMBINED ANSWERING BRIEF ON APPEAL AND OPENING BRIEF ON CROSS-APPEAL

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NRAP 26.1 DISCLOSURE

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

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

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

3. John Randall Jefferies, Esq. and Chris Byrd, Esq. of Fennemore Craig, P.C. represent APCO in this Court.

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JURISDICTIONAL STATEMENT

APCO agrees that this Court has jurisdiction under NRAP 3A(b)(1) and (8).

ROUTING STATEMENT

APCO agrees with Helix that this case should be assigned to the Supreme Court because it raises a question of statewide importance as to whether contractors can still condition retention payments on completion of work.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did the district court properly determine that the Subcontract (Trial Exhibit 45) governed the contractual relationship between Helix and APCO considering Helix's admissions that APCO breached the Subcontract?

2. Did the district court rightfully find that because the preconditions to retainage in Section 3.8 of the Subcontract were not met, Helix was not entitled to receive any retention?

3. Was the district court's factual finding that the Subcontract was not terminated supported by substantial evidence, and as a result, Section 3.8's preconditions to retainage still governed Helix's right to retention?

4. Was the district court's factual determination that Helix intended Camco to take over APCO's obligations supported by substantial evidence such that APCO was no longer legally responsible for Helix's retention?

5. Did the district court properly hold that APCO is not liable for a deficiency judgment under NRS 108.239(12) because APCO is not contractually liable for the retainage?

6. Did the district court properly hold that APCO's offer of judgment was timely so as to support the district court's award of APCO's attorneys' fees and costs under NRCP 68?

STATEMENT OF ISSUES ON APCO'S CROSS-APPEAL

1. Did the district court err as a matter of law by not awarding APCO its reasonable attorneys' fees and costs under the mandatory attorneys' fees and costs provision in the Subcontract?

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 (the "Project"), which was owned by Gemstone Development West, Inc. ("Gemstone"). 84-JA006194, Finding of Fact ("FF") ¶¶ 1–2. Before Gemstone hired a general contractor, Gemstone selected Appellant/Cross-Respondent Helix Electric of Nevada, LLC ("Helix") to perform engineering and design services for Gemstone on the Project's electrical scope of work. 84-JA006201–6202, FF ¶¶ 39–40.

On or about September 6, 2007, Gemstone and Respondent/Cross-Appellant APCO Construction, Inc. ("APCO") entered into the Manhattan West General

Construction Contract for GMP (the "Contract"). *Id.*, FF ¶ 3. APCO started work that same month. *Id.*, FF ¶ 5.

B. <u>The Subcontract between APCO and Helix.</u>

At Gemstone's direction, APCO entered into a subcontract with Helix for the electrical installation (the "Subcontract") required on the Project, which included distribution of power, lighting, power for the units, and connections to equipment that required electricity. 84-JA006202, FF ¶¶ 41–42. Helix's work was based, in part, on the electrical drawings that it prepared under contract to Gemstone. *Id.*, FF ¶ 43.

Helix has admitted in many filings that it had a binding subcontract with APCO. For example, Helix admitted such in its lien documents, Complaint against APCO, and its Amended Complaint against APCO. 84-JA006204, FF ¶ 47. The President of Helix, Victor Fuchs, also confirmed in an affidavit attached to Helix's May 5, 2010 Motion for Summary Judgment Against Gemstone that:

> 4. On or around April 17, 2007, 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 Camco . . .

84-JA006204–6205, FF ¶ 48. Bob Johnson, Helix's Vice President of Special Projects, also admitted that Trial Exhibit 45 (i.e., the Subcontract) represented the governing subcontract between APCO and Helix:

> 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. Jeffries: 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.

84-JA006205–6206, FF ¶ 50.

C. APCO leaves the Project due to Gemstone's Non-Payment

APCO did not finish the Project as the general contractor. 84-JA006207, FF ¶ 59. After APCO submitted its May Pay Application in May 2008, Gemstone withheld an additional $226,360.88 in addition to the 10% retainage from APCO. *Id.*, FF ¶¶ 60–61. As a result, APCO provided Gemstone with a written notice of its intent to stop work pursuant to NRS 624.610 unless APCO was paid in full. 84-JA006207, FF ¶ 63. Notably, however, APCO did not request its retainage on the outstanding Project. 84-JA006208, FF ¶¶ 66–67. On July 18, 2008, APCO sent Gemstone a notice of intent to stop work for its failure to pay the May Pay Application pursuant to NRS 624.609(1)(b). 84-JA006208, FF ¶ 67. On July 28, 2008, APCO wrote another letter asserting that APCO was stopping work as of July 28, 2008 due to the non-payment and was terminating the contract pursuant to NRS 624.610(2). 84-JA006208–6209, FF ¶ 68.

Helix was aware that shortly after APCO's July 11, 2008 email, APCO began issuing stop work notices to Gemstone on the Project. 84-JA006209, FF ¶ 69. On July 29, 2008, APCO sent a letter to its subcontractors, including Helix:

> 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.

84-JA006209, FF ¶ 71.

On or about August 6, 2008, Gemstone notified APCO that it intended to withhold $1,770,444.28 from APCO's June Pay Application. 84-JA006210, FF ¶ 73. Accordingly, APCO submitted a notice of intent to stop work on August 11, 2008 to Gemstone stating that it would suspend work on the Project if payment was not made by August 21, 2008. 84-JA006210, FF ¶ 74. All subcontractors, including Helix, were copied on APCO's August 11, 2008 notice. 84-JA006211, FF ¶¶ 75. APCO later informed all subcontractors that it intended to terminate its Contract with Gemstone as of September 5, 2008. 84-JA006211, ¶ 76.

Gemstone responded by asserting that APCO was in breach of contract and would terminate for cause if the breaches were not cured by August 17, 2008. 84-JA006212, FF ¶ 78. In that same response, Gemstone confirmed that upon

termination "all Third-Party Agreements shall be assigned to Gemstone" and "APCO must execute and deliver all documents take such steps as Gemstone may require for the purpose of fully vesting in Gemstone the rights and benefits of such Third-Party Assignments." 84-JA006212, FF ¶ 79. The district court found that APCO was not in breach, though that is not at issue in Helix's appeal. 84-JA006213, FF ¶¶ 82–83.

On August 15, 2008, just prior to its purported August 17 termination deadline, Gemstone improperly contacted APCO's subcontractors and notified them that Gemstone was terminating APCO on August 18, 2008. 84-JA006213, ¶ 84. In that same communication, Gemstone also informed the subcontractors that it had another general contractor lined up, and "[i]f APCO does not cure all breaches, [Gemstone] will be providing extensive additional information on the transition to a new GC in 48 hours time." 84-JA006213, FF ¶ 85.

Gemstone informed APCO and the subcontractors that it would issue dual checks for APCO's June 2008 Pay Application and that all future payments would go directly from Nevada Construction Control to the subcontractors. 84-JA006215, FF ¶¶ 90–91. None of the joint checks Gemstone and Nevada Construction Control issued included any funds for APCO,[1] nor did they include any amounts for the

[1] Gemstone did not pay APCO for its June Pay Application even though the subcontractors received their money. 84-JA006216, FF ¶ 96.

subcontractors' retention because the retention had not been earned. 84-JA006215, FF ¶¶ 93–94.

On August 21, 2008, APCO sent a letter to its subcontractors informing them that APCO would stop work on August 21, 2008. 84-JA006216, FF ¶ 97. That same day, APCO provided Gemstone with a written notice of APCO's intent to terminate the Contract as of September 5, 2008. 84-JA006216, FF ¶ 98. Helix received a copy of APCO's letter as well. 84-JA006217, FF ¶ 105. The district court found that APCO "properly terminated the Contract for cause in accordance with 624.610 and APCO's notice of termination since Gemstone did not pay the June Application as of September 5, 2008." 84-JA006217, FF ¶ 104. 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. 84-JA006218, FF ¶ 108. This amount, of course, does not reflect any retention amounts because they never became due given that the Project was not completed, among other required conditions. 84-JA006218, FF ¶ 111; 84-JA006219, FF ¶ 116; 84-JA006220, FF ¶ 126. APCO never received any funds associated with its work from June, July, or August 2008. 84-JA006242, FF ¶ 244. Despite this, APCO did cooperate with Gemstone to see that all subcontractors, including Helix, were paid all progress payments that were billed and due while APCO was in charge. *Id.*, FF ¶ 245.

APCO never terminated its subcontract with Helix—a point which Helix admitted. 84-JA006219, FF ¶¶ 117–19. Rather, APCO only advised that Helix could suspend work on the Project under NRS Chapter 624.[2] 84-JA006219, FF ¶ 117.

D. Camco replaces APCO as the General Contractor

During August 2008, Gemstone was giving information directly to all subcontractors, including Helix. 84-JA006220, FF ¶ 123. Helix admitted that it was performing work under Gemstone's direction by August 26, 2008. 84-JA006232, FF ¶ 196 & 84-JA006233, FF ¶ 198. When Gemstone hired Camco Pacific Construction Company, Inc. ("Camco") to replace APCO as the general contractor, Gemstone provided Helix with the Camco Subcontract, Camco pay applications, and directed Helix to start sending its payment applications to Camco. 84-JA006233, FF ¶ 200 & 84-JA006235, FF ¶¶ 203–04.

Camco presented Helix with a ratification agreement. 84-JA006235, FF ¶ 206. It was Camco's intent and understanding that it was replacing APCO in the Subcontract.[3] 84-JA006235, FF ¶ 207. Similarly, Helix understood the purpose of

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[2] As the district court noted, because Gemstone gave APCO notice that it exercised its right under Section 10.04 of the Contract to accept an assignment of APCO's subcontracts, any purported termination of the Subcontract between APCO and Helix would have breached the Contract. 84-JA006220, ¶¶ 121–22.

[3] Helix admitted that its scope of work remained the same as Helix transitioned to working under Camco. 84-JA006235, FF ¶ 202.

the ratification was that "[Camco was] 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." 84-JA006236, FF ¶ 209; *see also* 84-JA006222, FF ¶ 136 (Camco admitting that it was assuming the subcontracts that APCO had with Helix and other subcontractors). Helix admitted it entered into a ratification agreement with Camco on September 4, 2008 to continue on and complete the APCO scope of work. 84-JA006237–6238, FF ¶¶ 214, 219.

Relevant to this appeal wherein Helix challenges only the retention, Helix rolled its $505,000.00 retention over into the Camco billings. 84-JA006238–6239, FF ¶¶ 225–26. To illustrate, when Helix submitted its September 2008 pay application to Camco, it tracked Helix's full retainage of $553,404.81 for the Project—which was for work completed under APCO and Camco. 84-JA006239, FF ¶¶ 228–29. Likewise, when Camco submitted its first pay application, it included the retainage account for APCO's work, showing that the parties knew that any subcontract retention amounts were maintained with Gemstone *after* APCO terminated. 84-JA006223, FF ¶ 143.

No Helix representative ever approached APCO with questions or concerns with proceeding with the work on the Project after APCO's termination. 84-JA006223, FF ¶ 140. Helix did not have any further communication with APCO after Camco took the Project over. 84-JA006238, FF ¶ 223. Nor did Helix send

APCO any billings for work Helix performed on the Project. 84-JA006239, FF ¶ 227. As the district court found, that was because Helix "knew that APCO was no longer involved and had no further liability." *Id.*, FF ¶ 224.

E. The Project is not completed

It is undisputed that the Project was never completed. 84-JA006239, FF ¶ 231; *see also* 84-JA006240, FF ¶ 234 (Camco's best estimate is that Phase 1 was 86% complete). Camco advised Helix and other subcontractors in December 22, 2008 that Gemstone "did not have the funds to pay out the October draw or other obligations." 84-JA006239–6240, FF ¶ 232. Camco terminated its contract with Gemstone on December 16, 2008. 84-JA006241, FF ¶ 240.

F. Helix's claims for retention against APCO

This appeal exclusively concerns Helix's claims for its retention against APCO. The Subcontract between APCO and Helix included an agreed-upon retention payment schedule governing the conditions to Helix receiving any retention payment:

> 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 [sic] scope of work and other close out documents;
>
> (e) Delivery to Contractor from Subcontractor a Release and Waiver of Claims from all Subcontractor's laborers, material and equipment suppliers, and subcontractors, providing labor, materials or services to the Project.

84-JA006203–6204, FF ¶ 45. Helix admitted that these preconditions were not met while APCO was the general contractor. 84-JA006204, FF ¶ 46; *accord* 84-JA006229, FF ¶¶ 171–72, 174. Most notably, when APCO left the Project in August 2008, the Project was only 74% complete. 84-JA006216, FF ¶ 95.

Despite the fact that the preconditions to any retainage were not met, Helix's only claim against APCO is for $505,021.00 in retention. 84-JA006227, FF ¶ 163. Helix also admitted that it never even billed APCO for its $505,021.00 in retention. 84-JA009228, FF ¶ 169; *accord* 84-JA006230, FF ¶¶ 179–80. Instead, as noted above, Helix rolled its retention account over to Camco and Gemstone in its post-APCO billings, suggesting that even Helix knew it was truly a Project and Gemstone liability—not an APCO liability. 84-JA006230, FF ¶ 182.

STATEMENT OF THE CASE

The district court started the bench trial on Helix's claims against APCO on January 17, 2018. 84-JA006194. After trial, the district court issued its Findings of Fact and Conclusions of Law as to the Claims of Helix Electric and Cabinetec[4] Against APCO, which detailed 247 paragraphs of factual findings and 127 paragraphs of conclusions of law in its 71-page order. 84-JA006194–85-JA006264. The district court found in favor of APCO on all of Helix's claims:

Breach of Contract. The district court concluded that Helix's claim for breach of contract against APCO failed because the preconditions to retainage in Section 3.8 of the Subcontract were indisputably not met. 84-JA006246, Conclusion of Law ("CL") ¶¶ 14–17.

Breach of Implied Covenant of Good Faith and Fair Dealing. The district court held that Helix's claim for breach of the implied covenant of good faith and fair dealing similarly failed because "Helix failed to present any evidence that APCO failed to act in good faith under the Helix Subcontract or these circumstances." 85-JA006248, CL ¶ 26. In fact, although "it is undisputed that APCO did not pay Helix the retention," the court held that, "there was no evidence that this non-payment was in bad faith." *Id.*

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[4] Cabinetec is not a party to this appeal.

Unjust Enrichment. The district court found that Helix's unjust enrichment claim failed because the Subcontract governed the parties' remedies. 85-JA006248, CL ¶¶ 29–30. Even if it did not, "APCO was not unjustly enriched by Helix's work" because the "undisputed evidence confirms that PACO was not paid any amounts for Helix's work that it did not transmit to Helix." 85-JA006248, CL ¶ 31.

Mechanic's Lien Foreclosure. The district court rejected Helix's claim for a mechanic's lien foreclosure because the Project had already been foreclosed upon and APCO was left with nothing. 85-JA006249, CL ¶ 35. It similarly held that APCO is not legally liable for any deficiency judgment because it is not the party responsible for any deficiency. 85-JA006249, CL ¶ 36.

Violation of NRS 624.606 through 624.630 *et seq.* The district court concluded that because Helix never met the five preconditions to retainage in Section 3.8 of the Subcontract, retainage never became due under NRS Chapter 624. 85-JA006249, CL ¶ 40.

After the district court entered its Findings of Fact and Conclusions of Law, APCO filed its Motion for Attorneys' Fees and Costs seeking $239,550.03 in attorneys' fees and $33,423.31 in costs against Helix. 85-JA006265; 85-JA006271; 85-JA006279. APCO sought attorneys' fees under the Subcontract's attorneys' fees provision, NRS 108.237, and NRCP 68. 85-JA006265–6284.

The district court awarded *only* APCO's attorneys' fees incurred *after* APCO made an offer of judgment pursuant to NRCP 68—ignoring the controlling Subcontract's attorneys' provision in Section 18.5. 100-JA007281. Specifically, the court held:

> The Court finds that **although there are certainly viable bases supporting APCO's contention that contractual provisions in the respective subcontracts and equitable estoppel can support an award of attorneys' fees going back in time to a point long before making of the November 13, 2018 offers of judgment**, the Court determines, in the context of this complex case, involving multiple parties and claims and consolidation of cases and period party alignments and realignments and contractual reconfigurations, **that the *best* basis for attorney fee awards is NRCP 68**.

100-JA007275 (emphases added).

The district court also determined that "the fees sought by APCO are reasonable." 100-JA7277 (citing *Brunzell v. Golden Gate Nat. Bank*, 85 Nev. 345, 455 P.2d 31 (1969), which sets forth the "well known basic elements to be considered in determining the reasonable value of an attorney's services"). However, the court looked to the factors in reviewing an application for attorneys' fees pursuant to Rule 68 in *Beattie v. Thomas*, 99 Nev. 579, 668 P.2d 268 (1983), and then reduced APCO's post-offer attorneys' fees attributable to Helix from $130,933.73 to $85,000. 100-JA7277.

Helix appeals from the district court's Findings of Fact and Conclusions of Law dismissing its claims against APCO. 119-JA009132.

SUMMARY OF ARGUMENT IN RESPONSE TO HELIX'S OPENING BRIEF

1. The district court properly held that the Subcontract governs the parties' contractual relationship; the district court was not required to analyze Helix's claims under an unjust enrichment theory as Helix asserts in its Opening Brief. Helix admitted—in multiple filings—that the Subcontract governed its breach of contract claims against APCO. Aside from Helix's judicial admissions, substantial evidence exists to establish that the Subcontract constitutes the "essential terms" of APCO's and Helix's agreement.

2. The district court properly concluded that Helix's ability to obtain its retention is directly controlled by the preconditions to retention in Section 3.8 of the Subcontract, which Helix failed to satisfy. All of those conditions are enforceable and do not contradict Nevada law; in fact, Nevada law expressly permits parties to put conditions on retention payments just like Section 3.8 here. Helix's assertion that one of the preconditions is an unenforceable pay-if-paid clause fails under Nevada law. The Nevada legislature has provided multiple examples throughout Chapter 624 to demonstrate that pay-if-paid clauses *are* enforceable. Even if one of the preconditions is unenforceable as Helix argues, the Subcontract's severability clause still requires that the remaining preconditions be satisfied before Helix is

eligible for retention. Helix's additional argument that APCO somehow interfered with Helix's ability to comply with Section 3.8's preconditions also fails because, as the district court found, there is no evidence to show that APCO did so. Simply put, Section 3.8's requirement that any retention payment be conditioned on completion of the work is a standard precondition to retainage. Because the work was not finished, Helix was not owed any retention payments.

3. The fact that the Contract between Gemstone (the owner) and APCO was terminated does not affect the enforceability of Section 3.8. It *still* governs all of Helix's claims for retention.

4. The district court rightly found that Helix, at the direction of Gemstone, intended Camco to take over the obligations in the Subcontract—including any retention payment—from APCO. Helix waived its right to seek retention from APCO by specifically billing Camco for *all* of its retention amounts, novating the Subcontract with APCO, and agreeing to assign the Subcontract to Camco.

5. APCO is not liable for a deficiency judgment under NRS 108.239(12) because, as the district court held, APCO is not contractually liable for Helix's retention.

6. APCO's offer of judgment under NRCP 68 was timely as it occurred more than 10 days before January 17, 2018, so the district court properly awarded attorneys' fees to APCO under NRCP 68.

SUMMARY OF ARGUMENT FOR APCO'S CROSS-APPEAL

The district court erred when it declined to award APCO its attorneys' fees and costs against Helix pursuant to the mandatory attorneys' fees and cost provision in the Subcontract and instead only awarded a portion of APCO's attorneys' fees and costs under NRCP 68. Helix sued APCO for breach *of the Subcontract* and APCO prevailed, so APCO is entitled to *all* of its fees and costs incurred defending against Helix's claims. The fact that the Subcontract was later assigned to Camco does not change the result; equitable estoppel still requires that Helix pay APCO's attorneys' fees and costs pursuant to the Subcontract.

ARGUMENT IN RESPONSE TO HELIX'S OPENING BRIEF

I. THE SUBCONTRACT GOVERNS THE PARTIES' CONTRACTUAL RELATIONSHIP.

Helix first argues that the district court erred in enforcing the Subcontract because, according to Helix, the district court's finding that the parties agreed to the Subcontract was clearly erroneous. Opening Brief ("OB") at 30. According to Helix, the Subcontract does not control the parties' relationship because Helix and APCO "never reached a meeting of the minds." *Id.* at 31. Helix argues that because there was no enforceable written contract, the district court "should have analyzed Helix's entitlement to payment for the earned and unpaid retention as an oral contract, quasi-contract and/or quantum meruit rendering any application of Section 3.8 moot." *Id.* at 32. Helix's quantum meruit arguments have no merit because

Helix itself admitted in *multiple filings* to the district court (including its Proposed Findings of Fact) that there was a *binding contract* between Helix and APCO. In any event, the Subcontract memorializes the essential terms of the parties' agreement—including the pivotal Section 3.8 that governs Helix's claims for retention.

A. Helix's own Proposed Findings of Fact requested that the district court find that there was a contract between Helix and APCO.

Helix's first argument that this Court should completely disregard the Subcontract and instead "analyze[] Helix's entitlement to payment for the earned and unpaid retention as an oral contract, quasi-contract and/or quantum meruit" is disingenuous. In Helix's own Proposed Findings of Fact submitted to the district court, Helix explicitly proposed that the district court find that "**Helix and APCO *did* reach an agreement with respect to material terms constituting a contract**." 81-JA005960 (emphasis added).

Helix also proposed that the district court enforce specific terms of the Subcontract. For example, Helix requested that the Court find that APCO never provided a written notice of termination, which Helix argued the Subcontract required. 81-JA005967. Helix further requested that the district court enforce Section 10.04 of the Subcontract, regarding the conditions for an assignment to be effective, so that Helix could argue that Gemstone never notified Helix of any

assignment and therefore the assignment from APCO to Camco is ineffective. 81-JA005967–5968.

Helix *now* claims that this Court should disregard Helix's own Proposed Findings of Fact affirming that there was a contract and should *now* instead analyze Helix's claims under a quantum meruit theory. This Court should not countenance Helix's about-face argument. *See New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) ("[W]here a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him."). That is because judicial estoppel "prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase." *Id.* (quoting *Pegram v. Herdrich*, 530 U.S. 211, 227, n.8 (2000)).[5]

Judicial estoppel has unique application to a situation as here wherein Helix actually prevailed in arguing that there was a contract between the parties. If this

[5] The five elements of judicial estoppel readily apply here: (1) the same party has taken two positions (Helix's positions that there was a contract versus there was no contract); (2) the positions were taken in judicial or quasi-judicial administrative proceedings (both occurred in judicial proceedings); (3) the party was successful in asserting the first position (the district court accepted Helix's contract position as true); (4) the two positions are totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud, or mistake (Helix has never made that argument). *See Marcuse v. Del Webb Communities, Inc.*, 123 Nev. 278, 287, 163 P.3d 462, 468–69 (2007).

Court were to accept Helix's now-inconsistent position that there is no enforceable contract between the parties, it would "create the perception that either the first or the second court was misled." *Id.* at 750 (quoting *Edwards v. Aetna Life Ins. Co.*, 690 F.2d 595, 599 (6th Cir. 1982)); *see also Scarano v. Central R. Co. of N.J.*, 203 F.2d 510, 513 (3d Cir. 1953) (judicial estoppel forbids use of "intentional self-contradiction . . . as a means of obtaining unfair advantage"). The Court should reject Helix's attempt to claim error when the district court accepted Helix's proffered finding that there was a contract with APCO, which is exactly what Helix requested.

B. The district court relied on Helix's admissions in *multiple filings*—including an affidavit from Helix's President—that there was a binding subcontract between Helix and APCO.

Helix's argument that there was "no contract" and the district court should have used a quantum meruit theory fails for another significant reason. The district court expressly relied on Helix's *multiple filings* (i.e., its lien documents, Complaint against APCO, and Amended Complaint against APCO), which unequivocally admitted that there was a *binding subcontract* between Helix and APCO. *See* 84-JA6204, FF ¶ 47. The district court was able to rely on Helix's admissions to conclude that there was a contract between the parties. *See Valerio v. Andrew Youngquist Constr.*, 103 Cal. App. 4th 1264, 1272, 127 Cal. Rptr. 2d 436, 441 (2002), as modified (Dec. 3, 2002) ("An admission in a pleading is conclusive on

the pleader."); *accord Manning v. Bowman*, 26 Nev. 451, 69 P. 995, 995 (1902) (holding that after a party has admitted a fact in a pleading, "such admissions are conclusive upon the parties litigant and upon the court, and no contradictory evidence can properly be received"). Judicial estoppel also applies here given that it applies when "[a] party . . . has stated an oath in a prior proceeding, as in a pleading, that a given fact is true," that party "may not be allowed to deny the same fact in a subsequent action." *Matter of Frei Irrevocable Tr. Dated October 29, 1996*, 133 Nev. 50, 56, 390 P.3d 646, 652 (2017).

The district court also relied on testimony from Victor Fuchs, the President of Helix. Mr. Fuchs confirmed the existence of a contract in a sworn affidavit attached to Helix's May 5, 2010 Motion for Summary Judgment against Gemstone (and corresponding errata):

> 4. On or around April 17, 2007, 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]

[6] As the district court noted (FF ¶ 48), Exhibit 1 contains the first fifteen pages of Trial Exhibit 45.

84-JA6204, FF ¶ 48 (emphases added). The district court's findings are supported by substantial evidence, namely Helix's testimonial admission. *See Christensen v. Ransom*, 844 P.2d 1349, 1358 (Idaho App. 1992) (holding that there was sufficient evidence to support the district court's finding that a party admitted the existence of a contract).

Moreover, the district court also considered testimony from Bob Johnson, Helix's vice-president of major projects group, which was the group that oversaw the work for the Manhattan West Project. 29-JA001773. Mr. Johnson testified that Trial Exhibit 45 was the contract that Helix alleges APCO 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.
>
> The Court: Which item is it, counsel?
>
> Mr. Jeffries: 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**.

84-JA006205–6206 (emphasis added). The district court further independently considered testimony from Joe Pelan, APCO's general manager, who testified that Trial Exhibit 45 *is* the Subcontract between APCO and Helix. 29-JA001728. Given the foregoing testimony from Helix and APCO, the district could—and did—determine that Trial Exhibit 45 was the enforceable agreement between the parties. Substantial evidence supports the district court's factual finding.

C. In any event, substantial evidence shows that the Subcontract constitutes the "essential terms" of the parties' agreement.

May v. Anderson, 121 Nev. 668, 119 P.3d 1254 (2005), which Helix cites, holds that a "contract can be formed . . . **when the parties have agreed to the material terms**, even though the contract's exact language is not finalized until later." (emphasis added) (citing *Higbee v. Sentry Ins. Co.*, 253 F.3d 994, 998 (7th Cir. 2001)); *see also Certified Fire Prot. Inc. v. Precision Constr.*, 128 Nev. 371, 378, 283 P.3d 250, 255 (2012) ("A meeting of the minds . . . exists when the parties have agreed upon the contract's essential terms.").

Here, substantial evidence exists that Helix and APCO did agree to the material terms governing their contractual relationship. Certainly, Helix did not submit any evidence demonstrating that there were material terms *not* agreed to. In

fact, as the district court noted (84-JA006205, FF ¶ 49), the sole contract term that Helix argues should not apply to its claims against APCO—Section 3.8's preconditions to Helix receiving its retainage—was agreed to by both parties. *See* 35-JA002121–2146 (Trial Exhibit 45); 36-JA002189–2198 (Trial Exhibit 506). In fact, the district court cited the testimony of Mr. Johnson, who admitted that Helix did not change Section 3.8's 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.

84-JA006205, FF ¶ 49. Simply put, the parties clearly agreed to the material terms in Section 3.8 as stated in Trial Exhibit 45. As a result, Helix's claims that there is no enforceable agreement and that its claims must be considered under a quantum meruit theory fail.

II. THE CONDITIONS PRECEDENT OF SECTION 3.8 CONTROL.

The district court held that Helix failed to satisfy ***all*** of the preconditions to the retention payment in Section 3.8 of the Subcontract, 84-JA006246, CL ¶ 14, which provides in relevant part:

> 3.8 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 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 a Release and Waiver of Claims from all Subcontractor's laborers, material and equipment suppliers, and subcontractors providing labor, materials or services to the Project, (Forms attached).

35-JA002124 (emphases added). Given that Helix failed to introduce any evidence that these conditions to its retention were satisfied, the district court concluded that Helix's breach of contract claim for such retention failed as a matter of law. 84-JA006243–6246, CL ¶¶ 3, 6–7, 13–14, 16–17.

Helix makes a variety of unmeritorious challenges to convince this Court that the express preconditions to retention in Section 3.8 should not be enforced here. All of Helix's arguments either (1) ignore other controlling provisions of the Subcontract, or (2) rely on misinterpretations of Nevada law.

A. Helix's argument that Section 3.8 of the Subcontract is unenforceable if any one of the preconditions is unenforceable ignores the severability clause in Section 18.3.

Helix argues, "Because *all* of the conditions in Section 3.8 must be complied with before APCO is obligated to pay Helix its retention, Section 3.8 must be disregarded *in toto* if any one of those conditions is void and unenforceable." OB at 36. Helix makes this argument because it later asserts that because Section 3.8(c) is an unenforceable pay-if-paid clause (it is not as discussed *infra*), so *all* of Section 3.8 must be "disregarded." *Id.*

The severability clause in Section 18.3 of the Subcontract[7] readily belies Helix's argument that all of Section 3.8 must be disregarded if merely one condition is allegedly void. Section 18.3 provides:

> To the best knowledge and belief of the parties, the Subcontract contains no provision that is contrary to Federal or State law, ruling or regulation. However, if any provision of this Subcontract shall conflict with any such law, ruling or regulation, then such provision shall continue in effect to the extent permissible. **The illegality of any provisions, *or parts thereof*, shall not affect the enforceability of any other provisions of this Subcontract**.

35-JA002134–2135 (emphases added). Consequently, even if one of the conditions in Section 3.8 is void or enforceable (none of them are), Section 18.3 requires that the *remaining* conditions in Section 3.8 still be enforced. *See Scovill v. WSYX/ABC*, 425 F.3d 1012, 1016–17 (6th Cir. 2005) (finding that an arbitration clause was enforceable after removing unenforceable provisions from the clause because the contract contained a severability clause and removing the offending provisions did not "taint" the remainder of the contract).

B. Section 3.8's pay-if-paid clause is an enforceable precondition to APCO paying Helix's retention.

Helix's main argument on appeal is that the district court erred in applying the preconditions to retention in Section 3.8 of the Subcontract to bar Helix's breach of

[7] Like Section 3.8, both parties agreed to Section 18.3 in the Subcontract. In fact, neither party made any changes to Section 18.3 whatsoever. 35-JA002134.

contract claim for retention because *one* of those preconditions, namely the condition that APCO receive final payment from Gemstone, is an unenforceable "pay-if-paid" clause.[8] Under Nevada law, however, "pay-if-paid" clauses are enforceable so long as they do not impair a subcontractor's lien rights. Section 3.8's condition that APCO receive final payment from Gemstone does not impair Helix's lien rights whatsoever.

Lehrer McGovern Bovis, Inc. v. Bullock Insulation, Inc., 124 Nev. 1102, 1117, 197 P.3d 1032, 1042 & n. 50 (2008) concluded that pay-if-paid clauses could be enforceable under limited circumstances after the enactment of NRS 624.624–626. Helix contends that Section 3.8's requirement that APCO receive final payment from Gemstone prior to paying Helix its retention effectively waives Helix's lien rights pursuant to NRS 624.624(1). OB at 37–38. Not so.

Under NRS 624.624(1)(a), if there is a schedule of payments in the parties' written agreement, then the higher-tiered contractor shall pay the lower-tiered contractor either (1) on or before the date payment is due, *or* (2) within 10 days after the higher-tiered contractor receives payment for the work—whichever is earlier. If there is not a schedule of payments, then the higher-tiered contractor shall pay the lower-tiered contractor either (1) within 30 days after the date the lower-tiered

---

[8] Helix's argument carries little weight because, as noted above, even if one of the preconditions is unenforceable, the Subcontract's severability clause requires that the remaining conditions still be enforced.

subcontractor submits a request for payment, *or* (2) within 10 days after the higher-tiered contractor receives payment for the work—whichever is earlier. Helix's argument that NRS 624.624(1) prohibits Section 3.8's condition requiring final payment from Gemstone to APCO prior to paying retention is inaccurate for several reasons.

1. NRS 624.624(1) does not apply to Helix's demand for retention.

Contrary to Helix's argument, NRS 624.624(1) does not *require* a higher-tiered contractor to pay a lower-tiered contractor its retention payment prior to the parties' specified timeframe for doing so in their contractual agreement. Although NRS 624.624(1) envisions *prompt* payment generally, holding that it requires paying retention prior to the specified time frame the parties agreed to flies in the face of the subsection that follows it, NRS 624.624**(2)**. There, the Nevada Legislature expressly permitted a higher-tiered contractor to withhold retention payments pursuant to the terms of the parties' agreement:

> 2. If a higher-tiered contractor has complied with subsection 3, **the higher-tiered contractor may**:
>
> (a) **Withhold from any payment owed to the lower-tiered subcontractor**:
>
> (1) **A retention amount** that the higher-tiered contractor is authorized to withhold pursuant to the agreement, but the retention

> amount withheld must not exceed 5 percent[9] of the payment that is required pursuant to subsection 1.

NRS 624.624(2)(a)(1) (emphases added). It would make no sense to hold that NRS 624.624(1) itself *requires* paying retention—without any conditions whatsoever—when NRS 624.624(2) expressly permits such conditions.

2. NRS 624.624(1) does not prohibit pay-if-paid clauses.

Helix is correct is asserting that NRS 624.624(1) requires "payment to be made promptly." OB at 37. However, requiring that payment be made *promptly* does not mean that a pay-if-paid condition is therefore unenforceable. Nothing in the text of NRS 624.624(1) says anything about pay-if-paid clauses. In fact, NRS 624.624(1) does not mention anything about other obvious preconditions to issuing required by the agreement (e.g., itemized invoices and proof of payment for purchased and stored materials). Requiring *prompt* payment does not mean that there can be *no preconditions* on any payment whatsoever.

3. The Legislature has expressly permitted pay-if-paid clauses.

This is especially true given NRS 624.624(1)'s counterpart, NRS 624.626(1)(b), expressly envisions pay-if-paid clauses in construction contracts:

> 1. If:

---

[9] During the time frame governing this Subcontract, the operative retention amount was 10%. The legislature reduced the approved retention percentage to 5% in 2016. *See* Laws 2015, c. 450, § 5, eff. Jan. 1, 2016.

. . . .

> (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.

NRS 624.626(1)(b) (emphases added).

As NRS 624.626(1)(b) makes clear, there is a specific remedy if a higher-tiered contractor has not paid the lower-tiered subcontractor pursuant to a pay-if-paid clause—the lower-tiered subcontractor "may stop work."[10] It makes no sense for NRS 624.626(1)(b) to provide a specific remedy to a lower-tiered subcontractor in light of a pay-if-paid clause if, according to Helix, pay-if-paid clauses are *per se* void under NRS 624.624(1). This Court must interpret NRS 624.624(1) *and* NRS

[10] Notably, in that circumstance, the subcontractor cannot terminate the contract. *See* NRS 624.626(2) ("If a lower-tiered subcontractor stops work pursuant to paragraph (a), (c) or (d) of subsection 1, the lower-tiered subcontractor may terminate the agreement with the higher-tiered contractor by giving written notice of the termination to the higher-tiered contractor after stopping work but at least 15 days before the termination of the agreement.").

624.626(1)(b) together. *Cable v. State ex rel. its Employers Ins. Co. of Nevada*, 122 Nev. 120, 125, 127 P.3d 528, 531 (2006) (presuming "that the Legislature, when enacting statutes, is aware of other similar statutes"); *Warren v. Wilson*, 46 Nev. 272, 210 P. 204, 206 (1922) (statutes on the same subject "must be read together" and must be harmonized).

Moreover, any holding that "pay if paid" clauses are unenforceable as a matter of public policy makes no sense considering that "pay if paid" clauses are expressly authorized in the public contract setting. NRS 338.550 provides:

> 1. Each contractor shall disburse money paid to the contractor pursuant to this chapter, including any interest which the contractor receives, to his or her subcontractors and suppliers within 10 days ***after the contractor receives the money***, in direct proportion to the subcontractors' and suppliers' basis in the progress bill or retainage bill and any accrued interest thereon.
>
> 2. A contractor shall make payments to his or her subcontractor or supplier in an amount equal to that subcontractor's or supplier's basis in the payments paid by the public body to the contractor for the supplies, material and equipment identified in the contract between the contractor and the public body, or between the subcontractor or supplier and the contractor, within 10 days ***after the contractor has received a progress payment or retainage payment from the public body*** for those supplies, materials and equipment.

NRS 338.550(1) (emphases added). Certainly it makes no sense to expressly authorize pay-if-paid clauses in public contracts, but not private.

4. *Zitting* overlooks key portions of the Act.

Helix's pay-if-paid argument relies heavily on *APCO Construction, Inc. v. Zitting Brothers Construction, Inc.*, 473 P.3d 1021 (Nev. 2020). *Zitting* held that provisions in the subcontract between APCO and Zitting "condition payment on the general contractor receiving payment first" (i.e., a pay-if-paid clause), and therefore "require the respondent subcontractor to forgo its right to prompt payment under NRS 624.624 when payment would otherwise be due." *Id.* at 1024. As a result, the Court held that such provisions are void under NRS 624.628(3). *Id.*

Respectfully, in light of the foregoing statutory interpretation arguments set forth *supra*, *Zitting* was wrongly decided. APCO has filed a Petition for Rehearing En Banc, and this Court recently ordered briefing on APCO's Petition.[11]

C. The remaining conditions in Section 3.8 are enforceable as a matter of law.

Helix next argues that because none of the conditions in Section 3.8 (other than Section 3.8(d)'s waiver and release condition) are memorialized in NRS 624.624, all of those conditions are therefore void. OB at 41–42. Effectively, Helix asserts that NRS 624.624 is *so* broad that it does not allow *any* conditions whatsoever

[11] APCO requests that this Court take judicial notice of the Order Directing Answer to Petition for En Banc Reconsideration, Case No. 75197, filed Jan. 21, 2021.

on retention payments unless that condition is memorialized in NRS 624.624. Helix's argument is not sustainable for several reasons.

First and foremost, even if this Court holds that pay-if-paid clauses are unenforceable, they are only unenforceable "if they require subcontractors to waive or limit rights provided under NRS 624.624–.630, relieve general contractors of their obligations or liabilities under NRS 624.624–.630, or require subcontractors to waive their rights to damages, as further outlined in NRS 624.628(3)." *Zitting*, 473 P.3d at 1024. The conditions in Section 3.8 (i.e., "Completion of the entire project," "approval and final acceptance of the project Work by Owner," and "Delivery to Contractor from Subcontract a Release and Waiver of Claims") do not implicate any of the three restrictions above.[12]

By way of example, requiring that the project be completed before issuing a retention payment does not force a contractor to waive its rights or relieve a general contractor from its obligations. Requiring project competition is the entire point of retention—it is money that has been earned but has been held back until the project

[12] In fact, even the *Zitting* court cited its earlier opinion in *Padilla Constr. Co. of Nev. v. Big-D Constr. Corp.*, Docket Nos. 67397 & 68683, 2016 WL 6837851 (Order of Affirmance, Nov. 18, 2016) for the proposition that "payment never became due to the subcontractor under the subcontract or NRS 624.624(1)(a) because the owner never accepted the subcontractor's work for defectiveness and never paid the contractor for the subcontractor's work." Further, a higher-tiered contractor can withhold payment conditioned on the lower-tiered subcontractor providing lien releases, so long as the high-tiered contractor provides notice. NRS 624.624(2)(b) & (3).

is completed. *See* 3 Philip L. Bruner & Patrick J. O'Connor Jr., Bruner & O'Connor on Construction Law § 8:18 (2016 ed.) ("A common contract approach to reducing a contractee's risk that its contractor will fail to fully perform its contractual obligations is to withhold a percentage of the sums due until the work is substantially complete. This percentage is known as 'retainage.' Typical retainage amounts are 5 to 10% of the contract price.").

Helix, however, argues that because NRS 624.624 does not "expressly" authorize a retention payment to be withheld until completion of the project, conditioning retention on such implicitly violates NRS 624.624. OB at 41–42. To the contrary, NRS 624.624(2)(a)(1) *does* "authorize" a higher-tiered contractor to withhold a retention amount "pursuant to the agreement." NRS 624.624(3)(b) similarly allows a higher-tiered contractor to withhold *any* payment under terms of the parties' agreement, so long as it provides notice to the lower-tiered subcontractor regarding the reason and contractual authority to withhold payment.

In any event, Helix's argument—that every condition must be memorialized in a Nevada statute to be enforceable—would eviscerate even the simplest and most logical of conditions, such as requiring that a contractor provide receipts or invoices to list and verify the work performed. Under Helix's logic, because conditions like those do not appear in NRS 624.624, they would be void as against public policy.

Surely no one can reasonably dispute that requiring a subcontractor to itemize its work performed as a condition to payment does not violate Nevada law.

D. APCO did not deprive Helix of the opportunity to satisfy Section 3.8.

1. There is no evidence that APCO breached the covenant of good faith and fair dealing.

Helix claims that this Court should not enforce Section 3.8's conditions to retention because APCO breached the covenant of good faith and fair dealing by stopping work on the Project and failing to terminate Helix for convenience under Section 9.2. According to Helix, had APCO done so, Helix allegedly could have a contractual basis to recover the value of its work performed to that point, which supposedly would include its retention. OB at 43–46. The district court held that APCO acted in good faith, 84-JA006247, CL ¶ 25(a)–(d), and further held that Helix "failed to present any evidence that APCO failed to act in good faith under the Helix Subcontract or these circumstances," 85-JA006248, CL ¶ 26.

As an initial matter, Helix fails to show that the district court's decision is unsupported by substantial evidence. *See Consol. Generator-Nevada, Inc. v. Cummins Engine Co., Inc.*, 114 Nev. 1304, 1312, 971 P.2d 1251, 1256 (1998) ("good faith is a question of fact"); *Perry v. Jordan*, 111 Nev. 943, 947, 900 P.2d 335, 338 (1995) (reviewing breach of implied covenant of good faith and fair dealing claim for substantial evidence). The district court concluded that Helix failed to present

any evidence that APCO did not pay the retention amounts in bad faith. 85-JA006248, CL ¶ 26. Helix does not cite to any evidence in its Opening Brief to demonstrate that APCO had *not* paid the retention amounts in bad faith.[13] As a result, this Court can affirm the district court's opinion on Helix's good faith and fair dealing claim.

Despite failing to submit any evidence of APCO's bad faith in not paying the retention amounts, Helix now argues that APCO's failure to terminate Helix *for convenience* under Section 9.2 amounts to a breach of the covenant of good faith and fair dealing and that this breach somehow excuses Helix's noncompliance with Section 3.8. OB at 45. According to Helix, had APCO terminated Helix under Section 9.2, Helix would have been able to "stop work, terminate its subcontracts, and submit a written termination claim." *Id.* However, Helix fails to show that even if APCO had terminated Helix for convenience, Helix would have been able to recover its retention—which is Helix's entire basis for its breach of contract claim

[13] Effectively, Helix is trying to use the implied covenant of good faith and fair dealing to renegotiate the Subcontract in a way that would allow Helix to recover its retainage before the preconditions to retention in Section 3.8 were met. The implied covenant of good faith and fair dealing cannot be wielded to rewrite the parties' agreement. *See Winshall v. Viacom Int'l, Inc.*, 76 A.3d 808, 816 (Del. 2013), as corrected (Oct. 8, 2013) ("[T]he implied covenant is not a license to rewrite contractual language just because the plaintiff failed to negotiate for protections that, in hindsight, would have made the contract a better deal.").

against APCO. In fact, the Subcontract expressly says that if APCO terminates Helix for convenience, the *only* amounts Helix can recover are:

> A. The direct cost of the work performed by [Helix] prior to termination.
>
> B. Overhead, general, and administrative expenses (including those for any sub-subcontracts) in an amount equal to 5% of direct costs.
>
> C. 5% percent [sic] profit of the total of the amounts allowed in paragraphs (A) and (B) above. If, however, it appears that the Subcontractor would have sustained a loss on the entire Subcontract had it been completed, no profit shall be compensated by the Contractor, and the amounts paid for the termination shall not be compensated for.

35-JA002130 (quoting Subcontract § 9.5). Consequently, even if APCO had terminated Helix for convenience, Helix has no evidence that it would have had any opportunity to recover its retention, which is the only claim at issue here.

Finally, any breach of the implied covenant of good faith and fair dealing entails performance that is contrary to the "**justified expectations** of the other [contracting] party"—not an after-the-fact, lawyer-constructed argument as to what the opposing party allegedly should have done. *Perry*, 111 Nev. at 948, 900 P.2d at 338 (emphasis added). Helix has set forth no evidence that either APCO or Helix had a justified expectation that APCO should terminate Helix for convenience if the Subcontract was assigned to another general contractor or if APCO exercised its statutory right to stop work and terminate its contract with Gemstone.

2. Helix's compliance with Section 3.8 was not futile.

Helix contends that it did not need to comply with Section 3.8 because doing so would have been futile given that APCO allegedly abandoned or repudiated the Subcontract. OB at 46–47. However, Helix did not present any evidence that APCO abandoned or repudiated the Subcontract, which is a necessary perquisite to Helix's futility argument under *Mayfield v. Koroghli*, 124 Nev. 343, 349, 184 P.3d 362, 366 (2008). *See* OB at 46. The district court concluded that APCO terminated the Contract (not the Subcontract) given Gemstone's non-payment pursuant to APCO's statutory remedy in NRS 624.610. 84-JA006217, FF ¶ 104. The district court also concluded that Helix admitted that there was an assignment and ratification of the Subcontract between Helix and the subsequent general contractor, Camco. *E.g.*, 84-JA006237–6238, FF ¶¶ 214, 219.

Helix also contends more broadly that because the Project was never completed, complying with Section 3.8's preconditions to any retention payment was futile. Not so. Many courts have upheld a project-completion condition before a contractor is entitled to retention. *E.g., Pittsburg Unified Sch. Dist. v. S.J. Amoroso Constr. Co., Inc.*, 232 Cal. App. 4th 808, 824, 181 Cal. Rptr. 3d 694, 706–07 (2014) ("Unlike a progress payment or payment for extra or change order work, a contractor has no claim to retention funds until the project is completed."); *F & W Welding Serv., Inc. v. ADL Contracting Corp.*, 217 Conn. 507, 518, 587 A.2d 92, 98 (1991)

(upholding completed performance conditions in the parties' contract as a prerequisite to the town's obligation to pay retainage).

III. THE CONDITIONS TO RETAINAGE IN SECTION 3.8 CONTROL—EVEN IF THE APCO/GEMSTONE CONTRACT WAS TERMINATED.

Helix argues that Section 3.8 does not control because once the APCO-Gemstone Contract was terminated, the district court erred in not applying Section 9.4 of the Subcontract, which provides:

> If there has been a termination of the [APCO-Gemstone Contract], [Helix] shall be paid the amount due from [Gemstone] to [APCO] for [Helix's] completed work, as provided in the Contract Documents, after payment by [Gemstone] to [APCO].

35-JA002129. According to Helix, Section 9.4 applies to allegedly require APCO to pay Helix's retention before APCO left the Project, even though Helix had not met the conditions for retainage in Section 3.8. OB at 48–50. There are several problems with Helix's argument.

First and foremost, Helix's Mr. Johnson admitted that Section 9.4 of the Subcontract *only* applies to a termination for convenience, which did not occur here:

> 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.

78-JA005304. Instead, APCO terminated the Contract under its statutory rights under NRS 624.610 given Gemstone's repeated nonpayment—not a termination for

convenience whatsoever. 84-JA006217, FF ¶ 104. Mr. Johnson also admitted that Helix never submitted anything to APCO alleging a termination for convenience or submitted a request for payment under that section:

> Q. And Helix never submitted a claim invoking these provisions of the subcontract, did it?
>
> A. Not to my knowledge.

78-JA005304.

Second, even if Section 9.4 applied (it does not), Helix argues—without any support—that Section 3.8 somehow does *not* apply. Presumably Helix asserts that its retention constitutes an "amount due" under Section 9.4. *See* 35-JA002129 ("9.4 If there has been a termination of the [APCO-Gemstone Contract], [Helix] shall be paid the *amount due* from [Gemstone] to [APCO] for [Helix's] completed work, as provided in the Contract Documents, after payment by [Gemstone] to [APCO]." (emphasis added)). However, Nevada law instructs that the entire Subcontract—including both Sections 9.4 and 3.8—must be read "as a whole." *Rd. & Highway Builders v. N. Nev. Rebar*, 128 Nev. 384, 390, 284 P.3d 377, 380 (2012). In doing so, it is clear that the retention does not become due until the specific conditions in Section 3.8 have been satisfied—which all parties agree did not occur. This is true even if the Subcontract was terminated for convenience under Section 9.4. Put simply, **under Section 3.8, retention was not due, so any termination is irrelevant.** If Section 9.4 meant that it negated Section 3.8's conditions, it would

have needed to explicitly say so. *See id.* (requiring that the interpretation of contracts "avoid[] negating any contract provision"). Absent any indication that Section 9.4 eradicates Section 3.8's specific conditions to Helix receiving its retention, Section 3.8 governs any right to retention.

Helix also engages in a similar argument under NRS 624.610(6), arguing that because that section allows the prime contractor to recover the cost of "all" work, labor, etc. after an owner-contractor contract is terminated, Helix should therefore be able to recover its retention. OB at 49–50. Helix, however, waived this argument by never submitting it to the district court. *Dolores v. State, Employment Sec. Div.*, 134 Nev. 258, 261, 416 P.3d 259, 262 (2018) ("Issues not argued below are deemed to have been waived and will not be considered on appeal.").

Even if Helix had not waived this argument, its reliance on NRS 624.610(6) is misplaced. Chiefly, Helix assumes that because NRS 624.610(6) gives APCO (not Helix) the ability to recover the cost of "all" work, labor. etc., Helix is therefore similarly entitled to recover the same from APCO. NRS 624.610(6), however, exclusively applies to a prime contractor's ability to recover amounts from the owner—not a subcontractor's ability to recover amounts from a contractor. The plain language of NRS 624.610(6) simply does not apply to a prime contractor-subcontractor relationship in any way.

Moreover, Helix assumes—again, without any support—that APCO's ability to recover the cost of "all" work, labor, etc. necessarily under NRS 624.610(6) includes retention payments.[14] Yet there is no indication in the statutory text or the legislative history to show that recovering the costs of "all" work, labor, etc. inevitably includes retention. If the legislature intended to include retention, it would have said so explicitly just as it did in NRS 624.609(2). *See Poole v. Nevada Auto Dealership Investments, LLC,* 135 Nev. 280, 285, 449 P.3d 479, 483–484 (Nev. App. 2019) (following the statutory interpretive canon *expressio unius est exclusio alterius*, "the expression of one thing is the exclusion of another," to reason that where the legislature uses a material variation in terms, there is an intended variation in the meaning). Because the legislature did not expressly include "retention" in NRS 624.610(6), as it had in NRS 624.609(2), Helix has no authority to claim that it is entitled to its retention under NRS 624.610(6).

IV. HELIX INTENDED CAMCO TO TAKE OVER APCO'S OBLIGATIONS UNDER THE SUBCONTRACT.

As the foregoing makes clear, Helix's breach of contract claim against APCO fails because Helix did not satisfy the conditions in Section 3.8 of the Subcontract in order to be entitled to its retention. Despite this contractual bar to recovery, Helix

[14] Helix's reliance on NRS 624.610(6) also overlooks the fact that this statute refers to "earned" costs. Helix did not *earn* its retention under the preconditions to retainage in Section 3.8 of the Subcontract.

takes issue with the district court's *additional* conclusion foreclosing Helix's breach of contract claim that Helix "knowingly replaced APCO with Camco under the [Subcontract] on all executory obligations, including payments for future work and retention." OB at 50 (citing 84-JA006246, CL ¶ 18).

According to Helix, it (1) "never waived its right to seek payment from APCO," and (2) "never replaced APCO with Camco for purposes of the Helix-APCO Subcontract" or "released APCO of its obligations to Helix pursuant to the Helix-APCO Subcontract." *Id.* at 51–53. Helix also asserts that the Subcontract was never assigned to Camco. The record readily belies Helix's arguments.

A. Helix waived its right to seek its retention from APCO.

"Waiver occurs where a party knows of an existing right and either actually intends to relinquish the right or exhibits conduct so inconsistent with an intent to enforce the right as to induce a reasonable belief that the right has been relinquished." *Hudson v. Horseshoe Club Operating Co.*, 112 Nev. 446, 457, 916 P.2d 786, 792 (1996). As Helix admits, a waiver can be express or implied and can occur through words or conduct. *Id.*

Here, the evidence demonstrates that Helix's words and conduct waived its right to seek payment from APCO by doing the following:

- Admitting that Helix entered into a ratification agreement with Camco on September 4, 2008 to continue on and complete the APCO scope of work, which included Helix Electric's Exhibit to the Ratification and

Amendment containing language confirming that APCO was removed as the general contractor, 84-JA006237–6238, FF ¶¶ 214, 219;

- **billing Camco for *all* of its retention amounts**—including the retention amounts incurred during Helix's tenure working under APCO, 84-JA006238–6239, FF ¶¶ 225–29;
- invoicing for and accepting progress payments directly from Camco, 84-JA006239, FF ¶¶ 228–29; and
- not having any communication with APCO and not sending any billings for work to APCO after the ratification with Camco, 84-JA006238, FF ¶¶ 223, 227.

This evidence supports the district court's factual conclusion that Helix waived its right to seek any retention payment from APCO.

B. Helix admitted that it novated the Subcontract.

As a threshold matter, APCO did not need to prove a novation occurred because a novation is not exclusively necessary for the district court's conclusion that "Helix knowingly replaced APCO with Camco under the [Subcontract] on all executory obligations, including payments for future work and retention." 84-JA006246, CL ¶ 18. The district court's conclusion can be supported by Helix's waiver (discussed *supra*) and Helix's acceptance of Gemstone's assignment of the Subcontract to Camco.

In any event, judicial estoppel applies again here to demonstrate that Helix did novate[15] the Subcontract to Camco. The district court's determination that Helix

[15] "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

knowingly replaced APCO with Camco is based, in part, on Helix's own affirmations in its filings with the court:

> 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.
>
> . . . .
>
> 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.
> >
> > 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 in a manner that was unfaith to the purpose of the Ratification

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extinguish the old contract; and (4) the new contract must be valid." *United Fire Ins. Co. v. McClelland*, 105 Nev. 504, 508, 780 P.2d 193, 195 (1989).

> Agreement, thereby denying Helix's justified expectations.

Helix's Mr. Johnson admitted that Trial Exhibit 172, the Ratification Agreement, was the document that Helix referenced in its complaint (Trial Exhibit 77) as the Ratification. 84-JA006237, FF ¶¶ 214, 219. Helix's argument that it "did not execute" the Camco Ratification so it is allegedly ineffective is an about-face given that Helix clearly pleaded the opposite.

C. The Subcontract was properly assigned from APCO to Camco.

Helix asserts that because APCO terminated the Gemstone-APCO Contract under NRS 624.610 and *not* pursuant to Section 10.02 of the Gemstone-APCO Contract, the Subcontract itself could not be assigned under the Gemstone-APCO Contract. OB at 54. The terms of the Gemstone-APCO Contract reject Helix's argument. It does not require that an assignment of a third-party agreement can *only* occur after Gemstone terminates APCO for cause.[16] Section 10.02 of that Contract *allows*—but does not require—Gemstone to accept the assignment of any Third-Party Agreements if Gemstone terminates APCO for cause:

> **10.02 Termination by Developer for Cause.**
>
> . . . .

[16] Such a construction would be nonsensical as a practical matter. Under Helix's argument, Gemstone could never accept any assignment of APCO's subcontracts with its subcontractors simply because APCO terminated the Gemstone-APCO Contract first pursuant to its statutory rights.

> (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 hour 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-JA001849 (emphasis added). Section 10.04 discusses the timing of an assignment's effective date (i.e., after termination)—not that an assignment is *only* effective *if* Gemstone terminated APCO for cause:

> **10.4 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.

29-JA001850 (emphasis added).

Helix further asserts that it was not given the required notice pursuant to Section 10.04 of the Gemstone-APCO Contract. OB at 54–55. The record disproves Helix's assertion. First, Helix received a letter from Gemstone to Helix confirming its intention to have Helix continue performing work under the new general contractor, Camco. *See* 48-JA002719–2730 (Letter from Gemstone's J. Griffith to Helix's Victor Fuchs regarding Gemstone's intention to continue retention of Helix with a copy of the Ratification and Amendment of Subcontract Agreement).

Helix also received Gemstone's notice of termination of APCO, received direction from and work directly with Gemstone, was copied on communications between APCO and Gemstone, and even had private meetings directly with Gemstone. *See* 78-JA005358–5360 (Testimony of Helix's Andy Rivera confirming that Helix 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); *see also* 78-JA005305–5306 (Testimony of Helix's Bob Johnson regarding Helix's private meeting with Gemstone 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").

Lastly, Gemstone did invoke the assignment in written communication to Helix. When Gemstone hired Camco to replace APCO as the general contractor, Gemstone provided Helix with the Camco Subcontract, Camco pay applications, and directed Helix to start sending its payment applications to Camco. 84-JA006233, FF ¶ 200 & 84-JA006235, FF ¶¶ 203–04.

V. APCO IS NOT LIABLE FOR A DEFICIENCY JUDGMENT UNDER NRS 108.239(12) BECAUSE APCO IS NOT CONTRACTUALLY LIABLE FOR THE RETAINAGE.

NRS 108.239(12) 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.

Helix contends that APCO is the "party legally liable," OB at 55–56, despite the fact that the district court held that Helix did not prevail on any of its claims (i.e., breach of contract, breach of the covenant of good faith and fair dealing, and unjust enrichment) against APCO.

Helix exclusively relies on *Zitting*, 473 P.3d at 1029, where this Court held that APCO was the party legally liable to Zitting. *Zitting*, however, is entirely different from this one because there, Zitting obtained summary judgment against APCO on its breach of contract claim. Whereas here, Helix did not prevail on *any* of its claims against APCO, so APCO cannot constitute the party legally liable as a matter of law.

VI. APCO'S OFFER OF JUDGMENT UNDER NRCP 68 WAS TIMELY SO THE DISTRICT COURT PROPERLY AWARDED ATTORNEYS' FEES TO APCO UNDER NRCP 68.

The district court awarded APCO a portion of its requested $447,809.28 in attorneys' fees pursuant to NRCP 68. 100-JA007281. The district court found that APCO made an offer of judgment to Helix for $25,000 on November 13, 2017, which Helix did not accept. Helix argued that APCO's offer was untimely under NRCP 68 because it was not made 10 days before trial. Helix argued that the "trial"

in this consolidated matter started five years earlier on October 30, 2012 because that is when the lien amount, lien validity, and related claims of Ready Mix, Inc. started—even though the trial on Helix's claims started much later on January 17, 2018. Under *Allianz Ins. Co. v. Gagnon*, 109 Nev. 990 (1993), the district court found that APCO's offer was timely. 100-JA007276–77. Helix advances the same untimeliness argument it did below in its appeal. OB at 57–61. Just as this district court held, this Court should reject Helix's argument.

Allianz is instructive and on point. There, the district court bifurcated the trial. After the first phase of the trial, the defendants made an offer of judgment to each of the plaintiffs, which they did not accept. 109 Nev. at 992. After the second phase of the trial, the defendants were completely exonerated of any liability. The district court held that the offers of judgment were invalid because defendants failed to make the offers of judgment prior to the first phase of the trial. *Id.* The Nevada Supreme Court, however, reversed, finding that the offers of judgment were timely, because they were made 10 days prior to the second "trial" in the case. *Id.* at 994. The court relied on the purpose behind Rule 69, which was to "encourage settlement of lawsuits before trial" so that an offeree has "adequate time after service and before trial to consider the offer." *Id.* at 994–95 (noting that "there is no reason why avoiding one of two partial trials is undesirable" and the ten-day rule "protect[s] an offeree who receives an offer prior to the second phase of a bifurcated trial as

effectively as an offeree who receives an offer prior to the commencement of a single trial").

Helix argues that *Allianz* is distinguishable because this case was never bifurcated. OB at 57. That is a distinction without a difference. The trial on Helix's claims against APCO, for which APCO sought attorneys' fees for, clearly started on January 17, 2018, and APCO served its offer on November 13, 2017—45 days prior to trial. *See* 29-JA001668 (Transcript of Bench Trial – Day 1). It is quite foolish to assert that APCO needed to serve its offer of judgment 10 days prior to the trial date regarding an entirely separate party's claims unrelated to the dispute between Helix and APCO.[17] In any event, the entire point of NRCP 68 is to "encourage settlements before trial" and the 10-day rule is imposed so that the offeree has adequate time to consider the offer before trial. Requiring that APCO serve its offer on Helix nearly five years before the October 30, 2012 start date of Ready Mix's lien claims (as opposed to the trial on Helix's claims) is perverse to the entire point of Rule 68, especially under the guidance of *Allianz*.

[17] Under Helix's timing argument, it would mean that every filing Helix and APCO have done (e.g., motions in limine, motions for summary judgment, pretrial disclosures) have been five years *after* trial. Helix's construction of Rule 68's timing makes no sense.

ARGUMENT ON APCO'S CROSS-APPEAL

I. THE DISTRICT COURT ERRED IN NOT GRANTING ALL OF APCO'S ATTORNEYS' FEES PURSUANT TO SECTION 18.5 OF THE SUBCONTRACT.

The district court acknowledged that APCO had requested $447,809.28 in attorneys' fees pursuant to (1) the attorneys' fee provision in Section 18.5 of the Subcontract, (2) APCO's November 13, 2018 offers of judgment and NRCP 68, and (3) NRS 108.237(3). 100-JA007275. The court, however, awarded *only* APCO's attorneys' fees incurred *after* APCO made an offer of judgment pursuant to NRCP 68—ignoring the controlling attorneys' fee provision in Section 18.5 of the Subcontract. 100-JA007281. Specifically, the court held:

> The Court finds that **although there are certainly viable bases supporting APCO's contention that contractual provisions in the respective subcontracts and equitable estoppel can support an award of attorneys' fees going back in time to a point long before making of the November 13, 2018 offers of judgment**, the Court determines, in the context of this complex case, involving multiple parties and claims and consolidation of cases and period party alignments and realignments and contractual reconfigurations, **that the *best* basis for attorney fee awards is NRCP 68**.

100-JA007275 (emphases added).

The district court also determined that "the fees sought by APCO are reasonable." 100-JA7277 (citing *Brunzell v. Golden Gate Nat. Bank*, 85 Nev. 345, 455 P.2d 31 (1969), which sets forth the "well known basic elements to be considered in determining the reasonable value of an attorney's services").

However, the court looked to the factors in reviewing an application for attorneys' fees pursuant to Rule 68 in *Beattie v. Thomas*, 99 Nev. 579, 668 P.2d 268 (1983), and then reduced APCO's post-offer attorneys' fees attributable to Helix from $130,933.73 to $85,000. 100-JA7277.

As set forth below, the district court erred as a matter of law in limiting APCO's attorneys' fees solely to those incurred after APCO's November 13, 2018 offer of judgment given APCO's contractual right to attorneys' fees under Section 18.5 of the Subcontract. *See Davis v. Beling*, 128 Nev. 301, 321, 278 P.3d 501, 515 (2012) ("While the district court's award of attorney fees is typically reviewed for an abuse of discretion, [the Nevada Supreme Court's] plenary review is implicated when questions of law, such as in the interpretation of a contract, are at issue.").

A. The Subcontract affords APCO a contractual right to attorneys' fees.

Section 18.5 provides:

> 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 the Subcontract, or any of the Contract Documents, the **prevailing party** shall be entitled to all costs, attorney's fees and any other reasonable expenses incurred therein.

35-JA002135. When the attorneys' fee provision is "clear and unambiguous," as Section 18.5 is, "the contract will be enforced as written." *Davis*, 128 Nev. at 321, 278 P.3d at 515. Here, it is clear that Helix (one of the parties to the Subcontract)

employed an attorney to institute a lawsuit against APCO, and APCO was the "prevailing party." As a result, based on the plain language of Section 18.5, APCO is entitled to "all costs, attorney's fees and other reasonable expenses incurred."

Helix has argued that because the district court determined that the Subcontract was assigned to Camco, APCO cannot seek its attorneys' fees under Section 18.5 of the Subcontract. That argument lacks any merit because Helix sued APCO for an alleged breach of the Subcontract that allegedly occurred during the time the Subcontract was in force between APCO and Helix.[18] Moreover, Helix sought retention from APCO that was allegedly "incurred" and "owing" during the time the Subcontract between APCO and Helix was in effect. Stated simply, Helix's lawsuit against APCO clearly "ar[ose] out of the Subcontract" under the terms of Section 18.5.

[18] Helix's own Complaint sought attorneys' fees for its breach of contract action against APCO. 1-JA000005 ("Helix has been required to engage the services of an attorney to collect the APCO Outstanding Balance [pursuant to the APCO Agreement], and Helix is entitled to recover its reasonable costs, attorney's fees, and interest therefore."). Helix also sought attorneys' fees under the Subcontract in its Proposed Conclusions of Law. 81-JA005984 ("Helix is the prevailing party and/or prevailing lien claimant as to APCO and Helix and is entitled to an award of reasonable attorney's fees pursuant to NRS 108.237 and/or the APCO Subcontract and/or the Camco Subcontract."). Had Helix prevailed on its breach of contract claims against APCO (it did not), then Helix would have sought fees against APCO under Section 18.5 as it made clear in its Complaint and Proposed Conclusions of Law.

Moreover, Section 18.5 does not require APCO to have been a "current" party to the Subcontract in order to be entitled to attorneys' fees. Helix—not APCO—sued for breach of the Subcontract; APCO merely defended against Helix's breach of contract claims and prevailed. *See Kaintz v. PLG, Inc.*, 147 Wash. App. 782, 197 P.3d 710 (2008) (holding that the equitable principle of mutuality of remedy authorizes an award of attorneys' fees pursuant to the terms of the contract even to the party who defeats a contract claim by establishing the invalidity or unenforceability of the contract). Even though APCO was not a current party to the Subcontract and therefore was not liable for any of Helix's retention claims (i.e., the Subcontract was unenforceable as to APCO), APCO still prevailed. Had Helix prevailed, it certainly would have been entitled to fees under Section 18.5. *Kaintz*'s mutuality of obligation principle demands that APCO be entitled to its attorneys' fees under the same logic.

B. Equitable estoppel prohibits Helix from contesting Section 18.5.

Even if Helix's assignment argument had any merit (it does not), equitable estoppel prohibits Helix from disclaiming its contractual obligation to pay APCO's attorneys' fees. Traditional principles of state law allow a contract to be enforced by a nonparty to the contract through estoppel. *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 631 (2009); *Truck Ins. Exch. v. Palmer J. Swanson, Inc.*, 124 Nev. 629, 634–35, 189 P.3d 656, 660 (2008) (confirming that a non-signatory may be

bound to an agreement if so dictated by the ordinary principles of contract and agency and may do so under estoppel); *see also International Paper v. Schwabedissen Maschinen & Anlagen GMBH*, 206 F.3d 411, 417–18 (4th Cir. 2000) (holding that "[e]quitable estoppel precludes a party from asserting rights he otherwise would have had against another when his own conduct renders assertion of those rights contrary to equity").

To that end, a non-signatory to a contract may recover attorneys' fees when the non-signatory is sued on the contract as if he or she were a party, and the contract contains an attorneys' fees provision. *Reynolds Metals Co. v. Alperson*, 25 Cal. 3d 124, 128, 599 P.2d 83, 85 (1979) (holding that a non-signatory who successfully defends against a breach-of-contract action may recover his or her attorneys' fees pursuant to a fee provision in the contract, despite the fact that he or she was not a party to the contract); *Jones v. Drain*, 149 Cal. App. 3d 484, 489–90, 196 Cal. Rptr. 827, 831 (App. 1983) ("We believe that it is extraordinarily inequitable to deny a party who successfully defends an action on a contact, which claims attorney's fees, the right to recover its attorney's fees and costs simply because the party initiating the case filed a frivolous lawsuit. As a consequence, we find that a prevailing defendant sued for breach of contract containing an attorney's fees provision and having had to defend the contract cause of action, is entitled to recover its own attorney's fees and costs therefore, even though the trial court finds no contract

existed."); *Katz v. Van Der Noord*, 546 So. 2d 1047, 1049 (Fla. 1989) (holding that "when parties enter into a contract and litigation later ensues over that contract, attorney's fees may be recovered under a prevailing-party attorney's fee provision contained therein even though the contract is rescinded or held to be unenforceable").

Equitable estoppel prohibits Helix from denying APCO's right to enforce a fee provision in the Subcontract. Helix's claims against APCO were dependent upon the Subcontract work, and Helix's Complaint even asserts that APCO is liable for breaching the Subcontract. Since Helix alleged the validity of and sought to enforce the Subcontract against APCO, Helix should be equitably estopped from denying APCO the related benefits when APCO certainly would have been liable had it lost.

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CONCLUSION

For the reasons stated above, APCO respectfully requests that the Court (1) affirm the district court's judgment, (2) reverse the district court's September 27, 2018 Order partially granting APCO's Motion for Attorneys' fees, and (3) remand back to the district court with instructions to award APCO $447,809.28 for its reasonable attorneys' fees pursuant to Section 18.5 of the Subcontract.

RESPECTFULLY SUBMITTED this 17th day of February 2020.

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CERTIFICATE OF COMPLIANCE

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

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

☒ proportionally spaced, has a typeface of 14 points or more and contains 13710 words; or

☐ does not exceed _____ pages.

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

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

Dated this 18th day of February, 2021.

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I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 18th day of February, 2021 and was served electronically in accordance with the Master Service List and via the United States Mail, first class, postage prepaid, addressed as follows:

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