

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

2 ZITTING BROTHERS
3 CONSTRUCTION, INC.,

4 Appellant,

5 vs.

6 FENNEMORE CRAIG, P.C.,

7 Respondent.

Case No. 79301

District Court Case No. A571228

Electronically Filed
Sep 06 2019 03:29 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

8 **MOTION TO DISMISS APPEAL**

10 **FENNEMORE CRAIG, P.C.**

11 John Randall Jefferies, Esq.

12 Nevada Bar No. 3512

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Attorneys for Respondent

1 Respondent Fennemore Craig, P.C. (“Fennemore Craig”) hereby submits
2 its Motion to Dismiss Appellant Zitting Brothers Construction, Inc.’s (“Zitting”)
3 Appeal pursuant to NRAP 14(f).

4 INTRODUCTION

5 This appeal arises from an underlying District Court action known as the
6 Manhattan West Mechanic’s Lien Litigation (“Lien Litigation”). Fennemore
7 Craig filed a Motion for Determination of Potential Attorney Conflict
8 (“Motion”), asking the District Court to determine whether Fennemore Craig
9 would be disqualified from continuing its representation of APCO Construction,
10 Inc. (“APCO”) in the Lien Litigation if attorney Richard Dreitzer accepted an
11 offer to join Fennemore Craig. Mr. Dreitzer previously worked at the Wilson
12 Elser law firm representing Zitting in the litigation.

13 The District Court entered an Order granting Fennemore Craig’s Motion,
14 and finding that so long as Mr. Dreitzer was properly screened and Zitting was
15 given notice, Fennemore Craig would not be disqualified under NRPC 1.10
16 from continuing its representation of APCO in the Lien Litigation when Mr.
17 Dreitzer joined Fennemore Craig. Zitting thereafter filed this appeal from that
18 Order.

19 ///

LEGAL ARGUMENT

The District Court Order appealed by Zitting concerns the disqualification of counsel. See Exhibit B to Docketing Statement, *Findings of Fact, Conclusions of Law, and Order Granting Fennemore Craig's Motion for Determination of Potential Conflict*. This Court has consistently held that attorney disqualification orders are properly challenged through a petition for writ of mandamus. *Nevada Yellow Cab Corp. v. Eighth Judicial Dist. Court*, 123 Nev. 44, 49, 152 P.3d 737, 740 (2007) ("This court has consistently held that mandamus is the appropriate vehicle for challenging orders that disqualify counsel."); *Waid v. Eighth Judicial Dist. Court*, 121 Nev. 605, 609, 119 P.3d 1219, 1222 (2005) ("Attorney disqualification orders are properly challenged through a petition for a writ of mandamus"); *Cronin v. Eighth Judicial Dist. Court*, 105 Nev. 635, 639 n.4, 781 P.2d 1150, 1152 n.4 (1989) ("Mandamus is used properly to challenge orders disqualifying attorneys from representing parties in actions that are pending in the district courts"). Zitting's Notice of Appeal from the District Court's Order is therefore jurisdictionally defective.

Zitting's Docketing Statement asserts that the District Court's Order is appealable pursuant to NRAP 3A(b)(8) as a special order entered after final judgment. Docketing Statement, ¶ 21. "An appealable special order entered

1 after final judgment is an ‘order affecting the rights of some party to the action,
2 growing out of the judgment previously entered. It must be an order affecting
3 rights incorporated in the judgment.’” *Peck v. Crouser*, 129 Nev. 120, 123, 295
4 P.3d 586, 587-88 (2013); quoting *Gumm v. Mainor*, 118 Nev. 912, 920, 59 P.3d
5 1220, 1225 (2002). Zitting identifies the operative final judgment as the District
6 Court’s Order granting NRCP 54(b) certification of an order granting Zitting’s
7 motion for partial summary judgment. Docketing Statement, ¶ 21; see **Exhibit**
8 **A** hereto, July 31, 2018, *Notice of Entry of Order Granting Motion for NRCP*
9 *54(b) Certification and for Stay Pending Appeal*.¹

10 The District Court Order appealed by Zitting does not affect rights
11 incorporated in the July 31, 2018 judgment identified in Zitting’s Docketing
12 Statement. Rather, the order at issue addresses a question regarding the Rules
13 of Professional Conduct and attorney disqualification raised by Fennemore
14 Craig, counsel to one of the parties in the Lien Litigation. The attorney
15 disqualification order did not grow out of or relate to either the NRCP 54(b)
16 certification or the order granting partial summary judgment in favor of Zitting
17 in its contract and lien claims that are the subject of that order. See **Exhibit B**
18 hereto, December 29, 2017, *Findings of Fact, Conclusions of Law, and Order*

19 ¹Zitting failed to provide this Court with any of the pleadings required by ¶ 27
of the Docketing Statement.

1 *Granting Zitting Brothers Construction, Inc.'s Motion for Partial Summary*
2 *Judgment Against APCO Construction.* The District Court's Order at issue in
3 this appeal is therefore not appealable under NRAP 3A(b)(8). *Taylor Constr.*
4 *Co. v. Hilton Hotels*, 100 Nev. 207, 209, 678 P.2d 1152, 1153 (1984) (holding
5 that this Court "has jurisdiction to consider an appeal only when the appeal is
6 authorized by statute or court rule").

7 **CONCLUSION**

8 The procedurally proper method for Zitting to challenge the District
9 Court's Order is through a petition for writ of mandamus. *Nevada Yellow Cab*,
10 123 Nev. at 49, 152 P.3d at 740. Accordingly, Zitting's Notice of Appeal must
11 be dismissed as jurisdictionally defective. NRAP 14(f) (allowing respondents to
12 move to dismiss jurisdictionally defective appeals).

13 Dated this 6th day of September, 2019.

14 **FENNEMORE CRAIG, P.C.**

15 */s/Christopher H. Byrd, Esq.*

16 By: _____
17 John Randall Jefferies, Esq. (Bar No. 3512)
Christopher H. Byrd, Esq. (Bar No. 1633)
Attorneys for Respondent

18 **CERTIFICATE OF SERVICE**

19 I hereby certify that this document was filed electronically with the

1 Nevada Supreme Court on the 6th day of September, 2019 and was served
2 electronically in accordance with the Master Service List and via the United
3 States Mail, first class, postage prepaid, addressed as follows:

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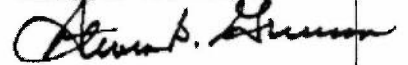
9
10 */s/Trista Day*

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An employee of Fennemore Craig P.C.

Exhibit A

Exhibit A



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Attorneys for Apco Construction, Inc.

DISTRICT COURT

CLARK COUNTY, NEVADA

APCO CONSTRUCTION, a Nevada
corporation,

Plaintiff,

v.

GEMSTONE DEVELOPMENT WEST, INC., A
Nevada corporation,

Defendant.

Case No.: A571228

Dept. No.: XIII

Consolidated with:

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

AND ALL RELATED MATTERS

NOTICE OF ENTRY OF ORDER

Please take notice that the Order Granting Motion for 54(b) Certification and for Stay
Pending Appeal was entered in the above-captioned matter on the 30th day of July, 2018, a copy

///

///

1 Of which is attached hereto.

2 Dated this 31st day of July, 2018.

3
4 MARQUIS AURBACH COFFING

5 By /s/Cody S. Mounter

6 Cody S. Mounter, Esq.

7 Nevada Bar No. 11220

8 10001 Park Run Drive

9 Las Vegas, Nevada 89145

10 *Attorneys for Plaintiff*

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **NOTICE OF ENTRY OF ORDER** was submitted electronically for filing and/or service with the Eighth Judicial District Court on the 31st day of July, 2018. Electronic service of the foregoing document shall be made in accordance with the E-Service List as follows:¹

Counter Claimant: Camco Pacific Construction Co Inc

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Intervenor Plaintiff: Interstate Plumbing & Air Conditioning Inc

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Intervenor: National Wood Products, Inc.'s

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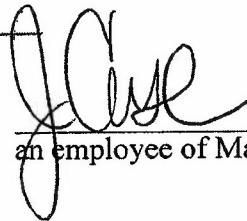
¹ Pursuant to EDCR 8.05(a), each party who submits an E-Filed document through the E-Filing System consents to electronic service in accordance with NRCP 5(b)(2)(D).

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DISTRICT COURT DEPT# 13

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DISTRICT COURT
CLARK COUNTY, NEVADA

17 APCO CONSTRUCTION, a Nevada
18 corporation,
19 Plaintiff,

20 vs.

21
22 GEMSTONE DEVELOPMENT WEST, INC., A
23 Nevada corporation,
24 Defendant.

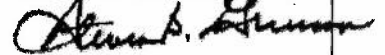
25
26 AND ALL RELATED MATTERS

Case No.: A571228
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A595552; A597089; A592826; A589677;
A596924; A584960; A608717; A608718 and
A590319

**ORDER GRANTING MOTION
FOR 54(b) CERTIFICATION AND FOR
STAY PENDING APPEAL**

27 Plaintiff APCO Construction's Motion for 54(b) Certification and for Stay Pending
28 Appeal on Order Shortening Time having come on for hearing before this Court on June 21,



1 2018, Plaintiff APCO Construction, being represented by and through its attorney of record,
2 Cody S. Munteer, Esq. of the law firm of Marquis Aurbach Coffing, and Defendant Zitting
3 Brothers Construction, Inc., being represented by and through its attorney of record, I-Che Lai,
4 Esq. of the law firm of Wilson, Elser, Moskowitz, Edelman & Dicker LLP; the Court having
5 reviewed the papers and pleadings on file herein, having heard arguments of the parties, and for
6 good cause shown;

7 IT IS HEREBY ORDERED, ADJUDGED AND DECREED that, APCO's Motion for
8 NRCP 54(b) Certification is GRANTED;

9 IT IS FURTHER ORDERED that because no just reason for delay exists, this Court
10 enters an express direction for the entry of judgment as to the Findings of Fact, Conclusions of
11 Law, and Order Granting Zitting Brother Construction, Inc.'s Motion for Partial Summary
12 Judgment, which is hereby certified as final under NRCP 54(b);

13 IT IS FURTHER ORDERED that because no just reason for delay exists, this Court
14 enters an express direction for the entry of judgment as to the Order Denying APCO's Motion
15 for Reconsideration of Court's Order Granting Zitting Brother Construction, Inc.'s Partial
16 Motion for Summary Judgment, which is hereby certified as final under NRCP 54(b);

17 IT IS FURTHER ORDERED that because no just reason for delay exists, this Court
18 enters an express direction for the entry of judgment as to Order Determining Amount of Zitting
19 Brothers Construction, Inc.'s Attorney's Fees, Costs, and Prejudgment Interest, which is hereby
20 certified as final under NRCP 54(b);

21 IT IS FURTHER ORDERED that because no just reason for delay exists, this Court
22 enters an express direction for the entry the Judgment in Favor of Zitting Brothers Construction,
23 Inc., which is hereby is certified as final under NRCP 54(b);

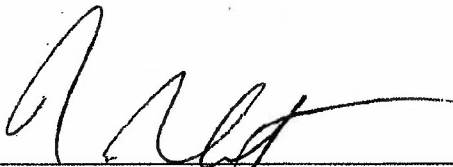
24 IT IS FURTHER ORDERED that APCO's Motion for Stay Pending Appeal is also
25 GRANTED;

1 IT IS FURTHER ORDERED that APCO shall have thirty days from notice of entry of
2 this order to post a bond for the full amount of the Judgment in favor of Zitting Brothers
3 Construction, Inc., \$1,516,723.46, in order to stay these proceedings pending appeal.

4 ORDER

5 IT IS SO ORDERED.

6 Dated this 28th day of July, 2018

7
8 
9 DISTRICT COURT JUDGE

10 Respectfully submitted by:

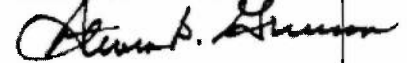
11 MARQUIS AURBACH COFFING

12 By 

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Exhibit B

Exhibit B



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9 **DISTRICT COURT**
10 **CLARK COUNTY, NEVADA**

11 APCO CONSTRUCTION, a Nevada
12 corporation,

13 Plaintiff,

14 vs.

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

17 Defendant.

18 AND ALL RELATED MATTERS

CASE NO. A571228
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A595552; A597089; A592826; A589677;
A596924; A584960; A608717; A608718; and
A590319

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

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

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

21 **JUDGMENT AGAINST APCO CONSTRUCTION**

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

//

FINDINGS OF FACT

A. APCO's Subcontract with ZBCI

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 **C. Procedural History**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

33. On August 21, 2017, APCO filed its opposition to ZBCI's motion, arguing—for the first time—other grounds for refusing payment of the amount owed to ZBCI. ZBCI objected to the admissibility of the evidence in support of APCO's opposition.

34. APCO's refusal to pay ZBCI the amount owed under the Subcontract had compelled ZBCI to incur attorney's fees and costs to collect the amount owed.

CONCLUSIONS OF LAW

A. Burden of Proof

1. Summary judgment is appropriate “when the pleadings, depositions, answers to interrogatories, admissions, and affidavits, if any, that are properly before the court demonstrate that no genuine issue of material fact exists, and the moving party is entitled to judgment as a matter of law.” *Cuzze v. Univ. & Cmty. Coll. Sys. of Nevada*, 123 Nev. 598, 602, 172 P.3d 131, 134 (2007).

2. As the party moving for summary judgment, ZBCI bears the initial burden of production to show the absence of a genuine issue of material fact. *Id.* ZBCI also bears the burden of persuasion at trial on its breach of contract and Chapter 108 claims and therefore must present evidence that would entitle it to a judgment as a matter of law on those two claims in the absence of contrary evidence. *See id.*

B. APCO's Breach of the Subcontract

3. To establish a breach of contract under Nevada law, ZBCI must provide admissible evidence of (1) the existence of a valid contract, (2) a breach by APCO, and (3) damage as a result of the breach. See *Richardson v. Jones*, 1 Nev. 405, 408 (1865). In this case, this Court concludes that ZBCI has presented sufficient admissible evidence on all elements of a breach of contract.

4. The Subcontract between the respective parties is a valid contract. However, as discussed in this Court's separate decision regarding the enforceability of the Subcontract's "pay-if-paid provisions," the pay-if-paid provisions are against public policy and are void and unenforceable under Nev. Rev. Stat. 624.628(e). The remaining terms of the Subcontract remain enforceable.

5. Nev. Rev. Stat. 624.626(3) automatically approves written requests for change orders unless the higher-tiered contractor denies the requests in writing within 30 days after the lower-tiered contractor submits the requests. Here, this Court concludes that because ZBCI did not receive any

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

6 **ORDER**

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

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

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

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

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

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

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

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

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

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

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

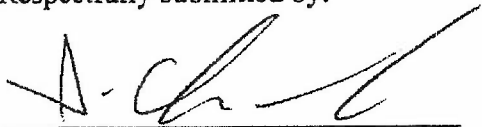
4 **IT IS FURTHER ORDERED** that the trial on ZBCI's complaint and all pending hearings
5 associated with ZBCI's complaint are vacated.

6 **IT IS SO ORDERED.**

7 Dated this 26th day of December, 2017.

8 
9 _____
10 DISTRICT COURT JUDGE

11 Respectfully submitted by:

12 
13 _____
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