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IN THE SUPREME COURT OF THE STATE OF NEVADA

ZITTING BROTHERS CONCSTRUCTION, INC.,	)	
Appellant,	)	
v.	)	No. 79301
FENNEMORE CRAIG, P.C.,	)	
Respondent.	)	

APPELLANT ZITTING BROTHERS CONSTRUCTION, INC.'S OPPOSITION TO RESPONDENT'S MOTION TO DISMISS APPEAL

Zitting Brothers Construction, Inc. ("Zitting"), the appellant, respectfully opposes Fennemore Craig, P.C.'s motion to dismiss the appeal. As discussed below, the order granting Fennemore Craig, P.C.'s motion for an advisory opinion on an attorney's conflict of interest is appealable either as a final judgment or as a special order entered after final judgment. Therefore, this Court should deny Fennemore Craig, P.C.'s motion.

I. Nev. R. App. P. 3A(b) justifies this Court's exercise of jurisdiction over this appeal.

"This [C]ourt has appellate jurisdiction to review decisions of the district courts" and "may only consider appeals authorized by statute or court rule." *Brown v. MHC Stagecoach*, 129 Nev. 343, 345, 301 P.3d 850, 851 (2013). Here, Nev. R. App. P. 3A(b) provides a ground for appellate jurisdiction regarding the review of the district court's order granting Fennemore Craig, P.C.'s motion for an advisory opinion on an attorney's conflict of interest.

A. The district court's order is a "final judgment" subject to appeal under Nev. R. App. P. 3A(b)(1).

Nev. R. App. P. 3A(b)(1) allows for an appeal from an "order [that] constitutes a final judgment." *Brown*, 129 Nev. at 345, 301 P.3d at 851. "The finality of an order" turns on "what the order or judgment actually does, not what it is called." *Id.* "To be final, an order or judgment must dispose ... of all the issues presented in the case, and leave[] nothing for the future consideration of the court, except for post-judgment issues such as attorney's fees and costs." *Id.* (citation omitted). Therefore, courts "look to the text of the order ... to determine whether the order renders a final, appealable judgment." *Id.*

For example, courts have concluded that a post-judgment order granting a party's or non-party's post-judgment motion for relief is appealable as a "final order" when there were no other pending matters before the district court and the order

resolved all issues raised in the motion. *See, e.g.*, *Beckman Indus., Inc. v. Int'l Ins. Co.*, 966 F.2d 470, 472 (9th Cir. 1992) (appeal from post-judgment order granting intervenor's motion to modify protective order); *Martindell v. International Tel. & Tel. Corp.*, 594 F.2d 291, 293–94 (2nd Cir. 1979) (appeal from orders granting intervenor status and modification of protective order proper under 28 U.S.C. § 1291, the federal counterpart to Nev. R. App. P. 3A(b)(1) because no other matter pending before the district court). And this Court has included orders resolving a post-judgment proceeding unrelated to the merits of the underlying action as "final judgments" subject to appeal under Nev. R. App. P. 3A(b)(1). *See Rawson v. Dist. Ct.,* 133 Nev. 309, 314, 396 P.3d 842, 846 (2017) (concluding "that a joint debtor proceeding is an action independent from the underlying action" and that an order resolving that proceeding "giv[es] rise to a final judgment that may be appealed by an aggrieved party under" Nev. R. App. P. 3A(b)(1)).

Based on these principles, the order at issue in this appeal constituted a "final judgment" under Nev. R. App. P. 3A(b)(1). The underlying case involved a breach of contract and mechanic's lien dispute between APCO Construction, Inc. ("APCO") and Zitting that resulted in a summary judgment resolving the underlying case in favor of Zitting. (Mot. to Dismiss Appeal,[1] Ex. B at 10.) The district court

[1] Zitting cites Fennemore Craig, P.C.'s motion to dismiss the appeal as "Mot. to Dismiss Appeal."

later awarded attorney's fees and costs in a separate order, certified the summary judgment and the order granting attorney's fees and costs as final under Nev. R. Civ. P. 54(b), and entered judgment in the case. (Mot. to Dismiss Appeal, Ex. A at 2.) Fennemore Craig, P.C. admits that there were no issues—other than those raised in its motion giving rise to the order at issue in this appeal—pending before the district court. (Ex. A at 4.)

As a non-party to the underlying action, Fennemore Craig, P.C. filed the motion to commence an independent proceeding against Zitting in the underlying case regarding the single issue of whether the hiring of Richard Dreitzer, a partner associated with Zitting's counsel of record at the time, would create a disqualifying conflict of interest. (*Id.* at 1, 3-4, 6.) The district court exercised jurisdiction over the motion and issued an order finding no such conflict. (Ex. C at 5-8.) This "dispose[d] of all the issues presented in the case[] and [left] ... nothing for the future consideration of the court, except for post-judgment issues such as attorney's fees and costs." *Cf. Brown*, 129 Nev. at 345, 301 P.3d at 851 (internal quotation marks omitted). Therefore, the order is appealable under Nev. R. App. P. 3A(b)(1).

B. Alternatively, the district court's order is a post-judgment "special order" subject to appeal under Nev. R. App. P. 3A(b)(8).

Alternatively, Nev. R. App. P. 3A(b)(8) allows for an appeal from a "special order entered after final judgment...." "[T]o be appealable ..., a special order made

after final judgment must be an order affecting the rights of some party to the action, growing out of the judgment previously entered." *Davidson v. Davidson*, 132 Nev. 709, 713, 382 P.3d 880, 882 (2016). Here, the order at issue on appeal may qualify as a post-judgment order that affects some party's rights growing out of the summary judgment order.

If this Court determines that the order is not a final judgment, then the final judgment in this case was the summary judgment and order granting attorney's fees and costs certified as final under Nev. R. Civ. P. 54(b). (Mot. to Dismiss Appeal, Ex. A.) The summary judgment and order granting attorney's fees and costs gave Zitting the right to collect at least $1,516,723.46.[2] (Mot. to Dismiss Appeal, Exs. A, B.) Zitting's right to collect the amount owed "grows out" of the judgment previously entered.

If this Court affirms the summary judgment and order on appeal, the "attorney disqualification order," as described by Fennemore Craig, P.C. in its motion to dismiss this appeal, (Mot. to Dismiss Appeal at 4), affects Zitting's right to collect the full amount granted by the judgment previously entered.[3]

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[2] APCO has appealed to this Court the summary judgment and order granting attorney's fees.

[3] Although APCO has posted a supersedeas bond, the bond amount is not enough to cover the attorney's fees, costs, and interest that accrued during the pendency of the underlying appeal.

In Fennemore Craig, P.C.'s motion giving rise to the order at issue on this appeal, Fennemore Craig, P.C. requested an advisory opinion from the district court concluding that the hiring of Mr. Dreitzer would not disqualify Fennemore Craig, P.C. from assisting APCO in the appeal of the summary judgment order and attorney's fees order and the defense against Zitting's claims if this Court reverse the summary judgment order. (*E.g.*, Ex. A at 1.) Zitting had opposed the motion because Mr. Dreitzer possesses privileged and material information regarding Zitting's strategy in the enforcement of the summary judgment order and attorney's fees order. (Ex. B at 2-5.) The attorney disqualification order affects—if not impairs—Zitting's enforcement rights. The attorney disqualification order is therefore a special order subject to appeal under Nev. R. App. P. 3A(b)(8). *Cf. Davidson v. Davidson*, 132 Nev. 709, 713, 382 P.3d 880, 882–83 (2016) (concluding that an order on appeal is an appealable special order under Nev. R. App. P. 3A(b)(8) because it affected the appellant's right to enforce a judgment).

C. Fennemore Craig, P.C. is incorrect about a writ being Zitting's exclusive remedy to challenge the order at issue on this appeal.

Fennemore Craig, P.C. argues that because the order at issue in this appeal does not fall under any of the appealable orders or judgment set forth in Nev. R. App. P. 3A(b) categories, a writ is the only option to challenge the order. (Mot. to

Dismiss Appeal at 3-4.) Fennemore Craig, P.C. cites various cases to support this argument. (*Id.*) However, those cases are all distinguishable.

None of those cases support the position that a writ—while appropriate in those cases—is the exclusive remedy of challenging an order regarding attorney disqualification. *See, e.g.*, *Nevada Yellow Cab Corp. v. Dist. Ct.*, 123 Nev. 44, 49, 152 P.3d 737, 740 (2007); *see also Leibowitz v. Dist. Ct.*, 119 Nev. 523, 529, 78 P.3d 515, 519 (2003) (stating that "mandamus is ***an*** appropriate remedy in lawyer disqualification matters") (emphasis added). Rather, those cases state that a party can challenge an attorney disqualification order via writ while the action is still pending in the district court. *See, e.g.*, *Nevada Yellow Cab Corp.*, 123 Nev. at 49, 152 P.3d at 740. This statement arises from the principle that the "right to an appeal is generally an 'adequate and speedy legal remedy' that precludes writ relief." *Rawson v. Dist. Ct.*, 133 Nev. 309, 314, 396 P.3d 842, 846 (2017). But lawyer disqualification matters are "not subject to immediate appeal." *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424, 431, 105 S. Ct. 2757, 2761 (1985). So writ relief provides a method for immediate appellate review. *See, e.g.*, *Leibowitz*, 119 Nev. at 529, 78 P.3d at 519.

This is not warranted in this case. As discussed above, with the resolution of the motion giving rise to this appeal, there are no longer any matters pending in the district court. Zitting can therefore appeal the order at issue in this appeal.

D. Fennemore Craig, P.C.'s motion results in a waste of judicial resources and increased litigation expenses.

Fennemore Craig, P.C.'s position in this motion is at odds with its motion before the district court. Before the district court, Fennemore Craig, P.C. sought, and was granted, an order shortening the time to hear the motion giving rise to this appeal because it was so imperative that they hire Mr. Dreitzer. Yet, now Fennemore Craig, P.C. wants to delay the resolution of this matter by moving to dismiss this appeal. This action is a waste of judicial resources and is only done to increase Zitting's litigation expense because the writ that Fennemore Craig, P.C. says is the appropriate vehicle to come before this Court can be filed at any time. Therefore, there is no justifiable reason why this appeal should not proceed. It is not as if Zitting is now barred from still challenging the violation of its right to seek refuse that counsel that worked on his case go to the firm that represents the party against whom he has a litigated dispute. This right is contemplated in the Nevada Rules of Professional Conduct.

II. CONCLUSION

For the foregoing reasons, this Court should deny Fennemore Craig, P.C.'s motion to dismiss the appeal.

Respectfully submitted on September 27, 2019,

WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP

/s/I-Che Lai

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CERTIFICATE OF SERVICE

Pursuant to Nev. R. App. P. 25, I certify that I am an employee of Wilson Elser Moskowitz Edelman & Dicker LLP, and that on this 27th day of September, 2019, I have electronically filed and served Appellant Zitting Brothers Construction, Inc.'s Opposition to Respondent's Motion to Dismiss Appeal. Electronic service of the foregoing document is made in accordance with the Master Service List as follows:

John Randall Jefferies (Fennemore Craig, P.C.)

Christopher H. Byrd (Fennemore Craig, P.C.)

By: */s/Annemarie Gourley*
An Employee of WILSON ELSER MOSKOWITZ EDELMAN & DICKER LLP

EXHIBIT A

EXHIBIT A

MOT
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DISTRICT COURT

CLARK COUNTY, NEVADA

APCO CONSTRUCTION, a Nevada corporation, Plaintiff, v. GEMSTONE DEVELOPMENT WEST, INC., a Nevada corporation, Defendant.	Case No. : 08A571228 Supreme Ct. Case No.: 77320 Dept. No.: XIII **MOTION FOR DETERMINATION OF POTENTIAL ATTORNEY CONFLICT ON AN ORDER SHORTENING TIME** **(Hearing Requested)**
AND ALL RELATED MATTERS.	Consolidated with: A574391; A574792; A577623; A583289; A587168; A580889; A584730; A589195; A595552; A597089; A592826; A589677; A596924; A584960; A608717; A608718; and A590319

Fennemore Craig, P.C. ("Fennemore Craig") hereby moves this Court for an Order finding that if attorney Richard Dreitzer is associated with Fennemore Craig that, pursuant to Nevada Rule of Professional Conduct 1.10(e)(1), Fennemore Craig will not be disqualified from continuing to represent Plaintiff APCO Construction ("APCO") in this litigation.

Dated this 30th day of May, 2019.

FENNEMORE CRAIG, P.C.

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ORDER SHORTENING TIME

This matter having been brought on a MOTION FOR DETERMINATION OF POTENTIAL ATTORNEY CONFLICT ON AN ORDER SHORTENING TIME, the Court having examined the pleadings and papers on file herein, the points and authorities submitted herewith, and the Affidavit of Christopher H. Byrd, Esq., counsel for APCO; and good cause appearing therefore,

IT IS HEREBY ORDERED that the time for hearing MOTION FOR DETERMINATION OF POTENTIAL ATTORNEY CONFLICT ON AN ORDER SHORTENING TIME is shortened to the 6th day of June, 2019, at the hour of 9:00 a.m./p.m.

5/30/19

DISTRICT COURT JUDGE

AFFIDAVIT OF CHRISTOPHER H. BYRD, ESQ. IN SUPPORT OF ORDER SHORTENING TIME

I, Christopher H. Byrd, hereby declare under penalty of perjury as follows:

1. I am a director of the law firm of Fennemore Craig, P.C. ("Fennemore Craig"). I have personal knowledge of the facts stated herein, and if called upon to testify as to matters set forth herein, I would be competent to do so. I am making this Affidavit in support of an Order Shortening Time for the Motion for Determination of Potential Attorney Conflict.

2. Fennemore Craig seeks an Order finding that if attorney Richard Dreitzer is associated with Fennemore Craig that, pursuant to Nevada Rule of Professional Conduct 1.10(e)(1), Fennemore Craig will not be disqualified from continuing to represent APCO Construction ("APCO") in this litigation.

3. Time is of the essence, because Mr. Dreitzer is waiting to join Fennemore Craig until the issue of any potential conflict regarding Fennemore Craig's representation of Plaintiff APCO Construction in this matter is resolved.

4. As such, it is respectfully requested that the Court hear this Motion on an Order Shortening Time to prevent further damage.

I declare under penalty of perjury under the laws of the State of Nevada that the foregoing is true and correct.

Dated this 30th day of May, 2019.

CHRISTOPHER H. BYRD

MEMORANDUM OF POINTS AND AUTHORITIES

I. JURISDICTION

An appeal of this Court's Order granting Zitting Brothers Construction, Inc.'s ("Zitting") Motion for Partial Summary Judgment is currently pending in the Nevada Supreme Court pursuant to this Court's NRCP 54(b) certification of its Order. All other remaining claims against all remaining parties were subsequently resolved and reduced to judgment and only the issues on appeal remain pending.

Although the order granting partial summary judgment is currently on appeal, this Court retains jurisdiction to "enter orders on matters that are collateral to and independent from the appealed order, *i.e.*, matters that in no way affect the appeal's merits." *Mack–Manley v. Manley*, 122 Nev. 849, 855, 138 P.3d 525, 529-30 (2006). This Court therefore has jurisdiction to hear and resolve this motion, which is collateral to the appeal and in no way affects the appeal's merits.

II. FACTUAL BACKGROUND

A. Manhattan West Litigation.

This Court is very familiar with the history of this complex case and we will therefore not provide any procedural or factual background beyond what is directly relevant to this motion.

The case underlying the potential attorney conflict at issue is known as the Manhattan West Mechanic's Lien Litigation ("Manhattan West Litigation"). *See In re Manhattan W. Mech.'s Lien Litig.*, 131 Nev., Adv. Op. 70, 359 P.3d 125 (2015). The Manhattan West Litigation was initiated in 2008, has involved seventeen consolidated cases and nearly ninety parties, and has lasted more than 10 years.

The case has also been the subject of multiple appeals and writ proceedings, which have (so far) resulted in two published opinions. The Nevada Supreme Court's published opinion in *In re Manhattan West Mechanic's Lien Litigation* listed twenty-eight law firms and thirty-three lawyers as representing the parties to that appeal. 359 P.3d at 126-27. This Manhattan West Litigation can accurately be described as a very complex case.

B. Richard Dreitzer's Limited Involvement in the Manhattan West Litigation.

Richard Dreitzer was formerly a partner at Wilson Elser Moskowitz Edelman & Dicker

LLP ("Wilson Elser") in Las Vegas. Declaration of Richard Dreitzer, attached hereto as **Exhibit 1**, at ¶ 2. Wilson Elser represents Zitting in the Manhattan West litigation and has done so since its entry into the litigation in 2009. Fennemore Craig represents APCO in this litigation.

Mr. Dreitzer did not have primary responsibility for representing Zitting in the Manhattan West Litigation, never performed any significant work on the case, and never directed any of Wilson Elser's work on the case. Dreitzer Decl. at ¶ 8 Rather, as a favor to the partner who was primarily responsible for the case – Jorge Ramirez – Mr. Dreitzer attended one court hearing and one deposition. *Id.* at ¶ ¶ 3, 6 In all, Mr. Dreitzer billed less than 12 total hours to the matter. *Id.* at ¶ 9.

On October 26 and 27, 2017, Mr. Dreitzer prepared for and defended the deposition of Sam Zitting, the NRCP 30(b) witness for Zitting. *Id.* at ¶ 3. Mr. Dreitzer's preparation for the deposition consisted of several hours of reviewing discovery responses, several phone conversations with Mr. Zitting, and a discussion of the case with Mr. Ramirez. *Id.* at ¶ 4.

Prior to the deposition, Mr. Dreitzer discussed a potential settlement number with Mr. Zitting. He subsequently conveyed that number to Mr. Jefferies, APCO's counsel. *Id.* at ¶ 5 The settlement number was rejected, and no further discussions of potential settlement offers were had between Mr. Dreitzer and Mr. Zitting. *Id.*

On November 20, 2017, Mr. Dreitzer represented Zitting at a mandatory pretrial conference. *Id.* at ¶ 6. No arguments were made and nothing significant occurred at the pretrial conference. *Id.*

Prior to the mandatory pretrial conference, Mr. Dreitzer was present for an approximately fifteen-minute conversation between Mr. Ramirez and associate I-Che Lai, the two Wilson Elser attorneys handling the Zitting matter. *Id.* at ¶ 7. The general topic of the conversation was strategies Wilson Elser was considering regarding negotiating a settlement with APCO. *Id.* Mr. Dreitzer is not aware if any of these strategies were employed by Wilson Elser or if they are even still relevant given then current procedural posture of the case, i.e. judgment has been entered against APCO which is currently on appeal. *Id.*

Mr. Dreitzer's work on the Manhattan West Litigation was limited to less than 12 total

hours during a short period after Zitting's partial summary judgment motion was filed and briefed and before the Court's order on the motion was entered. *Id.* at ¶ 9.

Mr. Dreitzer has since left Wilson Elser. *Id.* at ¶ 2. Fennemore Craig has extended an offer for Mr. Dreitzer to join the firm, but Mr. Dreitzer has not yet become associated with Fennemore Craig. *Id.* at ¶ 10.

Although Mr. Dreitzer has requested a waiver of any potential conflict from Zitting, Zitting has refused to waive the conflict. *Id.* at ¶ 11. Additionally, Zitting takes the position that no resolution of the conflict is possible which would sufficiently protect Zitting's interests, other than to refuse to waive it. *Id.* Zitting claims that no screening mechanism could be created under any circumstances which would solve this problem, but Zitting has provided no explanation or justification for this claim. *Id.*

III. LEGAL ARGUMENT

A. This Court Should Decide the Question of Whether Fennemore Craig Will Be Disqualified from Continuing its Representation of APCO in the Manhattan West Litigation if Richard Dreitzer Joins the Firm.

If Zitting were to move to disqualify Fennemore Craig from continuing its representation of APCO, its motion would be filed in and decided by this Court. *Brown v. Eighth Judicial Dist. Court*, 116 Nev. 1200, 1205, 14 P.3d 1266, 1269 (2000) ("District courts are responsible for controlling the conduct of attorneys practicing before them"). Thus, the issue of potential disqualification is properly brought before this Court.

Further, the question of whether Fennemore Craig would be disqualified from representing APCO in this litigation is ripe. Mr. Dreitzer has left Wilson Elser, and therefore the facts relevant to and necessary for this Court's consideration of the issue are fixed and fully available to the parties and the Court. *See Nat'l Park Hosp. Ass'n v. Dep't of Interior*, 538 U.S. 803, 807, 123 S. Ct. 2026, 2030 (2003) (holding "[r]ipeness is a justiciability doctrine designed to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements" and stating that in determining ripeness courts should consider (1) the fitness of the issues for judicial decision and (2) the hardship to the parties if court consideration is

withheld). This Court should therefore address the disqualification issue at this time. *See Eberle Design, Inc. v. Reno A & E*, 354 F. Supp. 2d 1093, 1094 (D. Ariz. 2005) (deciding a factually similar potential disqualification issue prior to an attorney joining a new law firm "[b]ecause the Court will be called upon to decide any disqualification motion that is filed as a result of this development and because Bryan Cave has sought the Court's guidance before Mr. Watts joins the firm this week").

B. <u>This Court Should Find that Fennemore Craig Would Not Be Disqualified from Continuing to Represent APCO in the Manhattan West Litigation if Richard Dreitzer Joins the Firm.</u>

Nevada Rule of Professional Conduct (NRPC) 1.10(e) provides:

> When a lawyer becomes associated with a firm, no lawyer associated in the firm shall knowingly represent a person in a matter in which that lawyer is disqualified under Rule 1.9[1] unless:
> . . .
> (1) The personally disqualified lawyer did not have a substantial role in or primary responsibility for the matter that causes the disqualification under Rule 1.9;
> (2) The personally disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and
> (3) Written notice is promptly given to any affected former client to enable it to ascertain compliance with the provisions of this Rule.

Thus, when the screening and notice requirements of NRPC 1.10(e)(2) and (3) are followed, Nevada law allows a law firm that would otherwise be disqualified from representing a client in a particular matter based on the association of an attorney disqualified under NRPC 1.9 to continue its representation if it can show that the disqualified attorney "did not have a substantial role in or primary responsibility for the matter". *New Horizon Kids Quest III, Inc. v. Eighth Judicial Dist. Court*, 392 P.3d 166, 169 (2017) ("Pursuant to RPC 1.10(a), an attorney's disqualification under RPC 1.9 is imputed to all other attorneys in that disqualified attorney's law firm. However, a disqualified attorney's law firm may nevertheless represent a client in certain circumstances if screening and notice procedures are followed" citing to NRPC 1.10(e)).

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[1]NRPC 1.9(b), states that "[a] lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client: (1) Whose interests are materially adverse to that person; and (2) About whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter". For purposes of this motion, we do no dispute that Mr. Dreitzer is disqualified from personally representing APCO under NRPC 1.9(b).

It is undisputed that Mr. Dreitzer did not have primary responsibility for the Manhattan West Litigation while he was associated with Wilson Elser; that role belonged to Mr. Ramirez and Mr. Lai. Therefore, the question before this Court is whether Mr. Dreitzer had a "substantial role in . . . the matter". NRPC 1.10(e)(1).

1. *Mr. Dreitzer Did Not Have a Substantial Role in the Manhattan West Litigation.*

NRPC 1.0(l) defines "[s]ubstantial" as "denot[ing] a material matter of clear and weighty importance." Thus, under NRPC 1.10(e), an attorney's role in a matter must have been of clear and weighty importance to preclude the attorney's new law firm from continuing its representation of an adverse party in that litigation. No Nevada court has interpreted exactly what "substantial role" as used in NRPC 1.10(e)(1) means.

An analysis of whether Mr. Dreitzer's role in the Manhattan West Litigation was "substantial" necessarily requires an analysis of Mr. Dreitzer's involvement in relation to the overall scale of the matter. There is no question that the Manhattan West Litigation is a very complex matter. It has involved nearly 90 parties, 17 consolidated cases, over a decade of litigation and ***many*** attorneys who have had varying degrees of responsibility and involvement in the litigation.

In contrast to the lengthy and substantial involvement of many of these lawyers, Mr. Dreitzer spent less than 12 hours on this matter at the request of, and as a favor to, a fellow partner. He defended a deposition. He reviewed discovery responses to prepare and conveyed a settlement offer that was rejected (and thus no longer confidential). He engaged in a short office conversation about settlement strategy. He covered a non-substantive pre-trial hearing.

Mr. Dreitzer did not direct any work on the matter. He was not responsible for directing the strategy of the case. He did not manage the case. The client did not rely on him for advice regarding the strategy of the case. He has no knowledge of Zitting's overall or current litigation strategy ***if*** APCO is successful on its appeal and the case is remanded to this Court.

The NRCP 30(b) deposition that Mr. Dreitzer defended was arguably a significant deposition in the litigation between APCO and Zitting. However, the testimony given by Mr.

Zitting at the deposition is not confidential and nothing in the hearing transcript shows that Mr. Dreitzer possesses confidential information that was not disclosed by Mr. Zitting at his deposition.

Nor did Mr. Dreitzer's attendance at Mr. Zitting's deposition have any impact on any of the issues presently on appeal. Indeed, it can be said that Mr. Dreitzer's presence at a deposition of significance was mere happenstance – it was and is completely incidental to Zitting's defense of the pending APCO appeal. Simply because Mr. Dreitzer was present for what was arguably an important deposition does not mean that Mr. Dreitzer's role in representing Zitting was, by definition, substantial, material or weighty. Indeed, if that were the standard, then instances of imputed disqualification would run rampant with every multi-party complex litigation case in Nevada.

When viewed in the context of the overall Manhattan West Litigation, Mr. Dreitzer's 12 hours of work on the matter cannot be deemed "substantial". Even when considering only Wilson Elser and Zitting's involvement in the litigation Mr. Dreitzer's involvement is minimal. Wilson Elser has represented Zitting in the Manhattan West Litigation for 10 years. Mr. Dreitzer's limited 12-hour involvement must constitute a very small fraction of the work that Wilson Elser has performed on the matter.

Far from being "substantial", Mr. Dreitzer's involvement in the Manhattan West Litigation could, at best, be described as limited. Such limited involvement should not prevent Mr. Dreitzer from being associated with a new law firm without disqualifying the law firm from representing a party in the litigation. This is the very situation contemplated in NRPC 1.10(e)'s exception to the imputed disqualification rule. It should also be emphasized that other than making the assertion that a properly constituted screening mechanism will not protect Zitting's interests in this matter, Zitting has provided no justification whatsoever for its refusal to waive the conflict.

This Court should therefore find that, if the provisions of NRPC 1.10(e)(2) and (3) are complied with, Mr. Dreitzer's association with Fennemore Craig will not disqualify Fennemore Craig from continuing its representation of APCO in this matter.

Looking to other states with current or former rules similar to NRPC 1.10(e) supports this

position.

a. California Rule of Professional Conduct 1.10(a)

California Rule of Professional Conduct ("CRPC") 1.10(a) similarly provides that a lawyer's disqualification from a matter will not be imputed to their entire firm where the disqualified lawyer "did not substantially participate in the same . . . matter". A comment to CRPC 1.10(a) states:

> In determining whether a prohibited lawyer's previous participation was substantial, a number of factors should be considered, such as the lawyer's level of responsibility in the prior matter, the duration of the lawyer's participation, the extent to which the lawyer advised or had personal contact with the former client, and the extent to which the lawyer was exposed to confidential information of the former client likely to be material in the current matter.

Applying these factors to Mr. Dreitzer's involvement in the Manhattan West Litigation supports a finding that he did not have a substantial role in the litigation. Mr. Dreitzer was never responsible for the matter. The duration of his involvement was extremely limited. Mr. Dreitzer did not advise the client and his only personal contact with the client was through defending the NRCP 30(b) deposition. And, given his limited contact with the client and the matter, Mr. Dreitzer was not exposed to confidential information that is currently material in the matter.

b. Arizona's Previous ER 1.10(d)

Although it was amended in 2016[2], Arizona's previous ER 1.10(d) (2003) stated:

> When a lawyer becomes associated with a firm, no lawyer associated in the firm shall knowingly represent a person in a matter in which that lawyer is disqualified under ER 1.9 unless: (1) the matter does not involve a proceeding before a tribunal in which the personally disqualified lawyer had a substantial role; (2) the personally disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and (3) written notice is promptly given to any affected former client to enable it to ascertain compliance with the provisions of this Rule.

Further, at that time, Arizona's ethical rules provided an identical definition of "substantial" as

[2] Arizona's current ER 1.10(d) (2016) changes the reference from "a proceeding before a tribunal in which the personally disqualified lawyer had a substantial role" to "did not have primary responsibility in the matter".

Nevada's Rules of Professional Conduct. *See* ER 1.0(l) (2003) ("'[s]ubstantial' when used in reference to degree or extent denotes a material matter of clear and weighty importance."). Thus, we can look to Arizona law interpreting ER 1.10(d) (2003).

In *Eberle Design, Inc. v. Reno A & E*, 354 F. Supp. 2d 1093, 1097 (D. Ariz. 2005), the court held that to have been a "substantial role" "the lawyer's role in the former client's representation must have been material and weighty. Whether a lawyer played a material and weighty role in the former client's representation will depend on the nature and amount of the work he performed, the responsibility he assumed, the degree to which the client relied on him for managing the case, and similar considerations".

Again, under Arizona courts' interpretation of what constitutes a "substantial role" in a litigation matter, Mr. Dreitzer's involvement in this matter cannot be found to be "substantial". Mr. Dreitzer performed very little work in the matter, and the work he did perform was to defend a deposition and a non-substantive court hearing. He had no responsibility for the matter. The client did not rely on him to manage the case. Mr. Dreitzer provided a minimal amount of assistance to his partner responsible for the case.

This Court should find that Mr. Dreitzer did not have a substantial role in the representation of Zitting in the Manhattan West Litigation and that Mr. Dreitzer and Fennemore Craig can comply with the requirements of NRPC 1.10(e), allowing Mr. Dreitzer to associate with Fennemore Craig without disqualifying the firm from its representation of APCO in the Manhattan West Litigation.

2. *Under these Factual Circumstances, APCO's Right to Choose its Counsel Outweighs Any Risk to Zitting.*

The Nevada Supreme Court has recognized that in considering the issue of a law firm's imputed disqualification, a court is weighing one client's right to its choice of counsel against another client's interest in avoiding disclosure of confidential information. *Ryan's Express v. Amador Stage Lines*, 128 Nev. 289, 295, 279 P.3d 166, 170 (2012). This Court must therefore weigh the actual risk of disclosure of Zitting's confidential information against APCO's right to be represented by its counsel of choice and the counsel that represented it at trial. *Id.*

As the Nevada Supreme Court has discussed, disqualifying an entire law firm comes at a "heavy cost". *Id.* "Lawyers, simply, are not fungible goods . . . One lawyer cannot substitute for another lawyer's skills, experience, and other unquantifiable characteristics". *Id.*; *see Ryan v. Dist. Ct.*, 123 Nev. 419, 427, 168 P.3d 703, 709 (2007); *Bongiovi v. Sullivan*, 122 Nev. 556, 571, 138 P.3d 433, 444 (2006); *see also UMG Recordings, Inc. v. MySpace, Inc.*, 526 F.Supp.2d 1046, 1065 (C.D. Cal.) (finding that courts have recognized the "interest in preserving the continuity of the lawyer-client relationship; otherwise, if such relationships were easily disrupted, complicated cases . . . would take even longer to resolve, the costs of litigation would be even higher, and unscrupulous attorneys would have an incentive to seize on strained facts and theories to pursue the tactical advantage of ousting their adversary's lawyers."). Mr. Dreitzer's limited involvement in this litigation should not weigh more heavily than APCO's right to choose its counsel in this complex and specialized litigation.

As a matter of public policy, a finding that 12-hours of work on a matter involving this number of parties and years of litigation would also come with a heavy cost to Nevada attorneys and law firms. If Mr. Dreitzer's limited involvement in this matter could serve to disqualify any firm he moves to from representing any party in this litigation, the ability of lawyers to change employment, for law firms to hire lawyers and still retain current clients, and for clients to select and/or maintain continuity of counsel would all be negatively impacted. As a comment to the ABA Model Rules of Professional Conduct recognizes:

> [I]t should be recognized that today many lawyers . . . move from one association to another several times in their careers. If the concept of imputation were applied with unqualified rigor, the result would be radical curtailment of the opportunity of lawyers to move from one practice setting to another and of the opportunity of clients to change counsel.

ABA Model Rules of Prof'l Conduct, Rule 1.9 Cmt. 4 (2016).

Given the potential impact to Nevada lawyers and law firms, as well as their clients, this Court should find that Mr. Dreitzer's limited involvement in this matter would not disqualify Fennemore Craig's continued representation of APCO if Fennemore Craig were to comply with the requirements of NRPC 1.10(e).

3. *An Ethical Screen Will Protect Zitting's Interests.*

Nevada courts have generally held that attorneys should be disqualified only where a court believes that real harm could result to a client. *See Leibowitz v. Eighth Judicial Dist. Court*, 119 Nev. 523, 78 P.3d 515 (2003) (holding that imputed disqualification of an attorney is considered a harsh remedy that should be invoked if, and only if, the court is satisfied that real harm is likely to result from failing to invoke it). Particularly because Mr. Dreitzer would be screened from any participation in the Manhattan West Litigation immediately upon being associated with Fennemore Craig, an ethical screen would adequately protect Zitting's interests and address its concerns regarding the sharing of any confidential information that Mr. Dreitzer could have obtained in his short, limited involvement in the litigation and prevent Zitting from suffering any real harm. *Ryan's Express v. Amador Stage Lines*, 128 Nev. 289, 298, 279 P.3d 166, 172 (2012); *see also Kirk v. First Am. Title Ins. Co.*, 183 Cal. App. 4th 776, 805–06, 108 Cal. Rptr. 3d 620, 641–42 (2010), as modified (May 6, 2010) ("It is undisputed that the presumption of imputed knowledge is uniformly rebuttable and may be overcome by a proper ethical screen . . . The effectiveness of the screening process depends on the policies implemented by the law firm, not on the former employment of the screened attorney").

Fennemore Craig has an internal procedure already in place for screening lawyers who have or may have a conflict regarding one of its cases: Fennemore Craig's Information Systems department deprives the screened lawyer from any access to the electronic file for the screened matter. *See* Declaration of Timothy Berg, Esq., attached hereto as **Exhibit 2**, at ¶ 3. A screening memo is circulated to the entire law firm explaining the potential conflict and that the screened lawyer is being screened from the matter, that the matter should not be discussed with screened lawyer, and that the screened lawyer should not be given any of the client files or other documents relating to the matter. *Id.* The screened lawyer is provided with a copy of the screening memo, the screen is explained to them, and the screened lawyer is required to sign a copy of the screening memo acknowledging that they have been screened from the matter. *Id.* A copy of the screening memo is also provided to the former client of the screened attorney and/or their former firm. *Id.* at ¶ 4.

This screening procedure will be in place at the outset of Mr. Dreitzer's association with Fennemore Craig and will ensure that no confidential information – assuming Mr. Dreitzer could have any confidential information relevant to the litigation at this point in time – would be shared with the attorneys representing APCO in this matter. *Id.* at ¶ 6. Thus, no real harm could result to Zitting by Mr. Dreitzer's association with Fennemore Craig and Fennemore Craig's continued representation of APCO in the Manhattan West Litigation, and this Court should find that there would be no disqualification on these facts. *Leibowitz*, 119 Nev. At 523, 78 P.3d at 515.

As referenced earlier, Zitting has taken the extreme position that Mr. Dreitzer's mere presence at Fennemore Craig would be sufficient to harm Zitting's interests, notwithstanding the implementation of any type of screening procedure. Unfortunately, Zitting has provided no justification whatsoever for taking such an expansive view of this issue. For its part, Fennemore Craig is certain that any concerns that Zitting may express regarding this scenario can be alleviated with a properly constituted screen.

IV. CONCLUSION

The Nevada Supreme Court has adopted the Seventh Circuit's determination that:

> ...disqualification, as a prophylactic device for protecting the attorney-client relationship, is a drastic measure which courts should hesitate to impose except when absolutely necessary. A disqualification of counsel, while protecting the attorney-client relationship, also serves to destroy a relationship by depriving a party of representation of their own choosing . . . We do not mean to infer that motions to disqualify counsel may not be legitimate, for there obviously are situations where they are both legitimate and necessary; nonetheless, such motions should be viewed with extreme caution for they can be misused as techniques of harassment.

Ryan's Express, 128 Nev. at 295, 279 P.3d at 170, quoting *Freeman v. Chicago Musical Instrument Co.*, 689 F.2d 715, 721–22 (7th Cir. 1982). Here, disqualification of Fennemore Craig from continuing its representation of APCO in the Manhattan West Litigation based on Mr. Dreitzer's 12-hours of work on a decade-long complex matter is neither legitimate or necessary. Mr. Dreitzer's role in the litigation was not substantial. An ethical screen can be put into place immediately upon his association with Fennemore Craig, and Zitting will not suffer any real harm as a result of Fennemore Craig's continued representation of APCO. This Court should therefore

find that Fennemore Craig will not be disqualified from representing APCO in this matter when Mr. Dreitzer joins the firm.

Dated this 30th day of May, 2019.

FENNEMORE CRAIG, P.C.

John Randall Jefferies, Esq. (No. 3512)
Christopher H. Byrd, Esq. (No. 1633)
300 South Fourth St. 14th Floor
Las Vegas, NV 89101
Attorneys for Cross Appellant/Respondent

CERTIFICATE OF SERVICE

Pursuant to EDCR 8.05(a) and 8.05(f) and Rule 9 of N.E.F.C.R, I hereby certify that I am an employee of the law firm of FENNEMORE CRAIG, P.C., and that on the 31st day of May, 2019, I caused to be served a true and correct copy of the document described herein to the following addressed entities by the method stated below:

Document Served: **MOTION FOR DETERMINATION OF POTENTIAL ATTORNEY CONFLICT ON AN ORDER SHORTENING TIME**

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An Employee of FENNEMORE CRAIG, P.C.

Exhibit 1

DECLARATION OF RICHARD DREITZER, ESQ. IN SUPPORT OF MOTION FOR DETERMINATION OF CONFLICT

Richard Dreitzer, Esq. declares as follows:

1. I am over the age of 18 years and am, in all respects, competent to make this Declaration. I have personal knowledge of the matters and facts set forth in this Declaration and, if sworn as a witness, am competent to testify thereto.

2. I was previously a partner in the Las Vegas office of Wilson Elser Moskowitz Edelman & Dicker LLP ("Wilson Elser"). I left Wilson Elser as of April 2019.

3. As a favor to Wilson Elser partner, Jorge Ramirez, I defended the deposition of Sam Zitting, the NRCP 30(b) witness for Zitting Brothers Construction, Inc. ("Zitting") in October 2017 in the Manhattan West Mechanic's Lien Litigation ("Manhattan West Litigation"). Mr. Ramirez has primary responsibility at Wilson Elser for representing Zitting in the Manhattan West Litigation.

4. I prepared to defend Mr. Zitting's deposition by reviewing discovery responses, discussing the case with Mr. Ramirez, and having several phone calls with Mr. Zitting.

5. Prior to the deposition I discussed a potential settlement number with Mr. Zitting for Zitting's claim against APCO Construction ("APCO"). I conveyed that settlement number to counsel for APCO–Randy Jefferies–at the deposition. The settlement offer was rejected by APCO and I had no further discussions of potential settlement offers with Mr. Zitting.

6. On November 20, 2017, I represented Zitting at a mandatory pretrial conference. No arguments were made during this hearing and nothing significant or substantive occurred.

7. Prior to the pretrial conference, I was present for an approximately 15-minute conversation between Mr. Ramirez and Wilson Elser associate I-Che Lai discussing strategies that Wilson Elser was considering using to negotiate a settlement with APCO.

8. I never had primary responsibility for the representation of Zitting, I did not direct how any of the work on the matter would be performed, and I did not direct any of the strategy in the case.

9. In total, I billed less than 12-hours to the Zitting matter.

10. Fennemore Craig, P.C. ("Fennemore Craig") has made an offer to me to join their law firm but I have not yet become associated with Fennemore Craig.

11. I requested a waiver of any potential conflict from Zitting, but Zitting has refused to waive the conflict. Zitting has taken the position that no resolution of the conflict is possible which would sufficiently protect its interest, including any screening mechanism that Fennemore Craig would put in place. Zitting has provided no explanation or justification for its position.

Pursuant to NRS 53.045, I declare under penalty of perjury under the laws of the State of Nevada that the foregoing is true and correct.

Dated this 30th day of May, 2019.

Richard Dreitzer

Exhibit 2

DECLARATION OF TIMOTHY BERG, ESQ. IN SUPPORT OF MOTION FOR DETERMINATION OF POTENTIAL ATTORNEY CONFLICT

Timothy Berg, Esq. declares as follows:

1. I am over the age of 18 years and am, in all respects, competent to make this Declaration. I have personal knowledge of the matters and facts set forth in this Declaration and, if sworn as a witness, am competent to testify thereto. I am making this Declaration in support of the Motion for Determination of Potential Attorney Conflict.

2. I am currently an attorney with the law firm of Fennemore Craig, P.C. ("Fennemore Craig") and serve as the firm's General Counsel.

3. The firm has the following internal procedure in place for screening lawyers who have or may have a conflict regarding one of Fennemore Craig's matters from any information about that matter:

a. The firm's Information Systems department deprives the screened lawyer of any electronic access to the file for the screened matter;

b. A screening memo is circulated to the entire law firm explaining the conflict and that the screened lawyer is being screened from the matter, that the matter should not be discussed with the screened lawyer, and that the screened lawyer should not be given the client flies or other documents relating to the matter.

c. The screened lawyer is provided with a copy of screening memo, the screening memo is explained to them, and the screened lawyer is required to sign a copy of the screening memo acknowledging that they have been screened from the matter.

4. Fennemore Craig also provides a copy of the screening memo to the screened lawyer's former client and/or their former law firm.

5. Fennemore Craig has extended an offer to Richard Dreitzer to join the firm. Mr. Dreitzer has not yet become associated with Fennemore Craig.

6. If Mr. Dreitzer does join Fennemore Craig, he would be screened from the

APCO Construction/Manhattan West Mechanic's Lien Litigation matter as described above.

Pursuant to NRS 53.045, I declare under penalty of perjury under the laws of the State of Nevada that the foregoing is true and correct.

Dated this 30th day of May, 2019.

Timothy Berg

EXHIBIT B

EXHIBIT B

OPP
JORGE RAMIREZ, ESQ.
Nevada Bar No. 6787
I-CHE LAI, ESQ.
Nevada Bar No. 12247
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Attorneys for Lien Clamant,
Zitting Brothers Construction, Inc.

DISTRICT COURT

CLARK COUNTY, NEVADA

APCO CONSTRUCTION, a Nevada corporation, Plaintiff, vs. GEMSTONE DEVELOPMENT WEST, INC., a Nevada corporation, Defendant.	CASE NO. A571228 DEPT. NO. XIII Consolidated with: A574391; A574792; A577623; A583289; A587168; A580889; A584730; A589195; A595552; A597089; A592826; A589677; A596924; A584960; A608717; A608718; and A590319 Hearing Date: June 6, 2019 Hearing Time: 9:00 a.m.
AND ALL RELATED MATTERS	

ZITTING BROTHERS CONSTRUCTION, INC.'S OPPOSITION TO MOTION FOR DETERMINATION OF POTENTIAL ATTORNEY CONFLICT ON AN ORDER SHORTENING TIME

Zitting Brothers Construction, Inc., submits this opposition to APCO Construction's motion for determination of potential attorney conflict on an order shortening time. The accompanying memorandum of points and authorities provides the basis for Zitting's opposition and is further supported by the attached exhibits, the record of this case and any oral argument that this Court may entertain at the hearing on APCO's motion.

. . .

. . .

. . .

DATED this 4th day of June, 2019

WILSON ELSER MOSKOWITZ EDELMAN & DICKER LLP

Jorge Ramirez, Esq.
Nevada Bar No. 6787
I-Che Lai, Esq.
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Attorneys for Lien Claimant, Zitting Brothers Construction, Inc.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Richard Dreitzer, Esq. was employed with Wilson, Elser, Moskowitz, Edelman & Dicker ("WEMED") for over five years. Throughout the course of litigation during his employment, Mr. Dreitzer often volunteered to strategize litigation alternatives with various members of the firm on this very case. Mr. Dreitzer's participation was substantially more involved than APCO Construction ("APCO") admits in its motion. Although APCO admits that Mr. Dreitzer defended Zitting Brothers Construction, Inc.'s ("Zitting") corporate designee's deposition, APCO completely disregarded the substantive appeal issues that bear directly on Mr. Dreitzer's participation. Specifically, APCO alleges that the NRCP 30(b)(6) deposition testimony raises issues of material fact.

After Zitting prevailed on summary judgment, Mr. Dreitzer informed WEMED of his intention to take a position with the law firm of Fennemore Craig. Given his intimate knowledge of this case, Mr. Dreitzer was informed that he needed to obtain a written waiver of conflict of interest from Zitting. The request was made to Zitting, seeking a waiver of conflict after explanation that Fennemore Craig intended to screen Mr. Dreitzer off as he requested. Zitting consulted independent legal counsel about the implications of Mr. Dreitzer working as an attorney at Fennemore Craig and its proposed screening while the case was still pending in the Nevada Supreme Court and potentially

on future remand. Upon analyzing Mr. Dreitzer's connection to the case, independent counsel informed Zitting that due to the substantial involvement of Mr. Dreitzer in this matter an untold risk would be associated with waiving the conflict and for that reason Zitting declined to waive the conflict.

As it will be demonstrated, Mr. Dreitzer assumed a substantial role in this very litigation. By actively engaging in litigation strategy, participating in arguably one of the most important deposition and making a subsequent formal appearance, Mr. Dreitzer's participation is hardly trivial. By finding that Mr. Dreitzer assumed a substantial role, the Nevada Rules of Professional Conduct do not require this Court to even consider the screening methods offered up by APCO. In reality, the simplest solution will be for Fennemore Craig to withdraw from the lawsuit and allow the capable firm of Marquis Aurbach Coffing to act as APCO's legal counsel if they intend to hire Mr. Dreitzer. Marquis Aurbach Coffing have been heavily involved in the appeal and are well suited to represent APCO's interests in the appeal and it will allow Fennemore Craig to hire Mr. Dreitzer.

II. RICHARD DREITZER'S SUBSTANTIAL PARTICIPATION IN THIS CASE

While the underlying lawsuit was indeed very complex, simply analyzing Mr. Dreitzer' billable hours ignores the big picture. Mr. Dreitzer was a former WEMED partner who met with and counseled Zitting's corporate designee and company president, Sam Zitting. Mr. Dreitzer also discussed and was at least a party to multiple discussions involving strategy in this case. Moreover, Mr. Dreitzer' role, however minimized in the APCO's Motion, is contradicted by APCO's own appeal brief.

A. Mr. Dreitzer's active role as defense counsel for Zitting's Corporate Designee.

APCO and Mr. Dreitzer admit that Mr. Dreitzer met with Sam Zitting to prepare him for his deposition. Prior to the deposition, counsel and client spoke on the telephone on multiple occasions and met once in person. On the day of the deposition, Mr. Dreitzer, along with WEMED attorney, I-Che Lai, met in person with Sam Zitting at Starbucks to [Declaration of I-Che Lai at 10, attached hereto as **Exhibit "A"**] Mr. Dreitzer was solely responsible for defending Sam Zitting's deposition. During this process, Mr. Dreitzer undoubtedly discussed confidential matters pertaining to the lawsuit. Mr. Dreitzer counseled Sam Zitting about the deposition process, what to expect

from opposing counsel and other strategy. [Declaration of Sam Zitting at 6-7, attached hereto as **Exhibit "B"**] Prior to the deposition, Sam Zitting asked Mr. Dreitzer to communicate a settlement offer to APCO. Zitting cannot comment further as to the substance of the conversations between Sam Zitting and Mr. Dreitzer as it would jeopardize the attorney-client relationship. In addition to this matter, Sam Zitting would often seek construction law advice from Mr. Dreitzer about lien claims and other issues. During his conversations with Sam Zitting, gained intimate details about Zitting's practices.

B. Mr. Dreitzer actively engaged in litigation strategy during the lawsuit.

Mr. Dreitzer and WEMED partner, Jorge Ramirez, Esq. often spoke about the status of the lawsuit. [Declaration of Jorge Ramirez at 7-10, attached hereto as **Exhibit "C"**] During these litigation strategy meetings, Mr. Dreitzer offered up specific advice concerning Zitting's strategy and alternatives. [*Id* at 8] Mr. Dreitzer is a seasoned mechanics lien law attorney that often represented contractors over the course of his legal career. Not surprisingly, given APCO's status as the general contractor, Mr. Dreitzer's input was valuable. These conversations generally took place between two or more members of WEMED firm, so billable hours could not be generated and billed by each attorney. Again, Zitting cannot comment further on the substance of these conversations to ensure that the sanctity of the attorney-client relationship is preserved.

C. APCO's appeal is directly relates to Mr. Dreitzer's participation in his lawsuit.

Section V(E) of APCO's appeal brief is entitled **"ZITTING'S NRCP 30(B)(6) DESIGNEE DIRECTLY CONTRADICTS HIS EARLIER SWORN TESTIMONY DURING HIS DEPOSITION."** [See Appeal Brief at 24-28, attached hereto as **Exhibit "D"**] As discussed, the NRCP 30(b)(6) corporate designee is Zitting President, Sam Zitting.

APCO's ensuing legal argument supporting this alleged assignment of error is replete with citations to Sam Zitting's deposition testimony. [*Id*] APCO claims that Sam Zitting contradicted himself by dedicating nearly four pages of its brief to his deposition testimony. [*Id*] Ignoring the misguided arguments advanced in the opening brief, it is certain that APCO devotes much of its appeal to this testimony that Mr. Dreitzer defended. Therefore, Mr. Dreitzer's involvement in this

case is not insignificant as claimed by APCO. Section VIII(B)(5) is entitled **"Zitting's contradictory testimony, when viewed in a light most favorable to APCO, created genuine issues of material fact precluding summary judgment."** [*Id* at 47] Sections V(E) and VIII(B)(5) also specifically refer to the deposition that Mr. Dreitzer defended.

Under APCO's interpretation of the relevant NRPC provisions, a simple billable hours analysis is dispositive. The number of hours billed to a particular case is meaningless. If that were the case, then a contingency fee based case would never result in a finding of substantial participation. Conversations pertaining to deposition preparation, litigation strategy and settlement bear directly on the potential outcome of this case. Even assuming that Mr. Dreitzer did not defend the corporate designee's deposition, his learned knowledge of the case from attorneys within the WEMED firm rises to the level of substantial participation in the matter.

III. ARGUMENT

A. Legal Standard

Nevada Rules of Professional Conduct are very clear. NRPC 1.10(e) states:

> When a lawyer becomes associated with a firm, no lawyer associated in the firm shall knowingly represent a person in a matter in which that lawyer is disqualified under Rule 1.9 unless:
>
> (1) The personally disqualified lawyer did not have a substantial role in or primary responsibility for the matter that causes the disqualification under Rule 1.9;
>
> (2) The personally disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and
>
> (3) Written notice is promptly given to any affected former client to enable it to ascertain compliance with the provisions of this Rule.

Here, it is clear that Richard Dreitzer is disqualified under NRPC 1.9 or Fennemore Craig would not have filed the instant motion. This Court should therefore focus on whether Mr. Dreitzer had a substantial role in the matter causing his disqualification. The NRPC defines "substantial" as "a material matter of clear and weighty importance." NRPC 1.0(l). As set forth herein, Mr. Dreitzer' participation in this case was substantial, and therefore Fennemore Craig cannot continue representing APCO should it take on Mr. Dreitzer as a member of its firm.

Courts are responsible for controlling the conduct of attorneys practicing before them, and have broad discretion in determining whether disqualification is required in a particular case. *See Tr. Corp. of Mont. v. Piper Aircraft Corp.*, 701 F.2d 85, 87 (9th Cir. 1983); *see also Robbins v. Gillock*, 109 Nev. 1015, 1018, 862 P.2d 1195, 1197 (1993); *Cronin v. District Court*, 105 Nev. 635, 640, 781 P.2d 1150, 1153 (1989) (rejected on other grounds by *Nevada Yellow Cab Corp. v. Eighth Jud. Dist. Ct. ex rel. County of Clark*, 123 Nev. 44, 152 P.3d 737, n. 26 (2007)). Additionally, courts have inherent power to enjoin an attorney from representing conflicting interests. *See Boyd v. Second Judicial District Court*, 51 Nev. 264, 274 P. 7 (1929).

Although the current matter presents unusual circumstances, it is one that is intertwined with general disqualification principles. Courts deciding attorney disqualification motions are faced with the delicate and sometimes difficult task of balancing competing interests: the individual's right to be represented by counsel of one's choice, each party's right to be free from the risk of even inadvertent disclosure of confidential information, and the public's interest in the scrupulous administration of justice. *See Hull v. Celanese Corp.*, 513 F.2d 568, 570 (2d Cir. 1975).

When considering whether to disqualify counsel, the district court must balance the prejudices that will inure to the parties as a result of its decision. *Cronin*, 105 Nev. at 640, 781 P.2d at 1153. Specifically, to prevail on a motion to disqualify opposing counsel, the moving party must first **(1)** establish "at least a reasonable possibility that some specifically identifiable impropriety did in fact occur", and must then **(2)** establish that "the likelihood of public suspicion or obloquy outweighs the social interests which will be served by a lawyer's continued participation in a particular case." *Id.* at 641, 781 P.2d at 1153 (quoting *Shelton v. Hess*, 599 F. Supp. 905, 909 (S.D. Tex. 1984)). Similarly, the Nevada Supreme Court has held that all that is necessary to support disqualification of co-counsel is a reasonable probability that counsel actually acquired privileged, confidential information." *Brown v. Eighth Jud. Dist. Ct.*, 116 Nev. 1200 (2000).

"'Attorney disqualification of counsel is part of a court's duty to safeguard the sacrosanct privacy of the attorney-client relationship which is necessary to maintain public confidences in the legal profession and to protect the integrity of the judicial process.'" *Ciaffone v. District Court*, 113 Nev. 1165, 1169, 945 P.2d 950, 953 (1997) (quoting *Pandit Corp. v. All States Plastic Mfg. Co.*, 744 F.2d 1564, 1576 (Fed.Cir.1984)),overruled on other grounds by_*Leibowitz v. District Court*, 119

Nev. , 78 P.3d 515 (2003). It is important for a client to "be secure in the knowledge that any information he reveals to counsel will remain confidential.'" Id., (quoting *United States v. Schell*, 775 F.2d 559, 565 (4th Cir. 1985) (emphasis added)). A client should not have to worry that confidences will be exposed to the "enemy" if his former counsel joins the "enemy camp." See *Brown v. District Court*, 116 Nev. 1200, 1209, 14 P.3d 1266, 1273 (2000) (Agosti, J., with whom Shearing and Leavitt, JJ., agree, dissenting). Mr. Dreitzer' affidavit has already raised cause for concern.

A. The requested relief is not ripe for adjudication.

APCO's requested relief for a prospective opinion on the Nevada Rules of Professional Conduct fails to raise a genuine controversy. The Court would be putting the cart before the horse if it makes a determination that a hypothetical conflict would exist. Such a proclamation would be tantamount to an advisory opinion, which is obviously barred by the Nevada Constitution. Nev.Const. art. 6, §4; *North Las Vegas v. Cluff*, 85 Nev. 200 (1969). "Of course, the duty of every judicial tribunal is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles of law which cannot affect the matter in issue before it." *National Collegiate Athletic Association and West Coast Athletic Conference v. University of Nevada*, 97 Nev. 56 (1981) citing *Miller v. West*, 88 Nev. 105, 110, 493 P.2d 1332 (1972); *Morrow v. Morrow*, 62 Nev. 492, 497, 156 P.2d 827 (1945); *City of Reno v. District Court*, 58 Nev. 325, 328, 78 P.2d 101 (1938). Clearly, the matter before this court is an abstract proposition. There is no current conflict of interest as Mr. Dreitzer is not an employee of Fennemore Craig, therefore this matter is not ripe for adjudication.

"Although the question of ripeness closely resembles the question of standing, ripeness focuses on the timing of the action rather than on the party bringing the action. . . . The factors to be weighed in deciding whether a case is ripe for judicial review include: (1) the hardship to the parties of withholding judicial review, and (2) the suitability of the issues for review." *Herbst Gaming, Inc. v. Heller*, 122 Nev. 877 (2006). The relief sought by APCO is analogous to declaratory relief matters pertaining to constitutionality of certain statutes. "It is well-settled that the court will not entertain a declaratory action with respect to the effect and validity of a statute in advance of its enactment." *City of North Las Vegas v. Cluff*, 85 Nev. 200, 202 452 P.2d 461 (1969) *citing*

Hodgman v. City of Taunton, 323 Mass. 79, 80 N.E.2d 31 (1948); *Anderson v. Byrne*, 62 N.D. 218, 242 N.W. 687 (1932); *Drockton v. Cuyahoga County*, 240 N.E.2d 896 (Com. Pleas Ohio 1968); 2 W.Anderson, Actions for Declaratory Judgments, s 621 at 1415 (2d ed. 1951). The present matter is very similar to the declaratory relief cases insofar as APCO is a determination of conflict of interest before an actual conflict has arisen. Therefore, it would be premature for the Court to make a prospective decision before Mr. Dreitzer actually joins Fennemore Craig.

B. Richard Dreitzer undertook a substantial role in formulating litigation strategy, key witness deposition preparation and settlement discussions.

NRPC Sections 1.9(a) and 1.10(e) govern how conflicts of interest are imputed from an attorney to a law firm. "The purpose of the rule is to acknowledge the close personal and financial relationships that exist between an attorney and other members of a law firm." *People ex rel. Peters v. District Court In and For County of Arapahoe*, 951 P.2d 926, 930 *citing Wright v. District Court,* 731 P.2d 661, 663 (Colo.1987); *see generally ABA Standards for Criminal Justice, Prosecution and Defense Function* § 4–3.5(a) (3d ed. 1993) ("Defense Counsel should not permit his or her professional judgment or obligations to be affected by his or her own political, financial, business, property, or personal interests."). "The rule of **imputed** disqualification 'can be considered from the premise that a firm of attorneys is essentially one attorney for purposes of the rules governing loyalty to the client, or from the premise that each attorney is vicariously bound by the obligation of loyalty owed by each lawyer' in the firm." *Id;* Colo. RPC 1.10 cmt.

NRPC 1.9(a) states the following:

> A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

NRPC 1.10(e)

> (e) When a lawyer becomes associated with a firm, no lawyer associated in the firm shall knowingly represent a person in a matter in which that lawyer is disqualified under Rule 1.9 unless:
>
> (1) The personally disqualified lawyer did not have a ***substantial role*** in or primary responsibility for the matter that causes the disqualification under Rule 1.9;

(2) The personally disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and
(3) Written notice is promptly given to any affected former client to enable it to ascertain compliance with the provisions of this Rule.

NRPC 1.0(l) defines "substantial" as a "material matter of clear and weighty importance." It is important to note that this definition refers to matter in the singular rather than plural. Mr. Dreitzer' actual participation took several forms, all of which individually would constitute material matters of clear and weighty importance.

1. Nevada Federal District Court

At least one Nevada Federal District Court has analyzed the rules in conjunction with imputed disqualification analysis. In *Gonzalez v. Shotgun Nevada Investments*, LLC 2016 WL 4548675, Judge Robert C. Jones specifically articulated what a *substantial role* entails in light of NRPC 1.10. Judge Jones applied the plain language of Black's Law Dictionary. The definition indicates that the word means "Of, relating to, or involving substance ... [r]eal and not imaginary ... [i]mportant, essential, and material ...." Black's Law Dictionary 1656 (10th ed. 2014). Judge Jones applied this definition and found NRCP 1.10 interprets "substantial" involvement to be something less than "primary," because either is enough.

In that case, attorney Joe Attorney Kistler, Esq. ("Attorney Kistler"), formerly of Gordon & Silver, represented a Plaintiff, Tom Gonzales ("Gonzales") against Desert Oasis Apartments, Desert Land and Desert Ranch ("Desert Entities"), in a matter referred to as the Desert Entities Bankruptcy case. Attorney Kistler subsequently took a position with Hutchison & Steffen. Gonzales filed a subsequent breach of contract lawsuit ("Member Lawsuit") against the Desert Entities, among others. Gonzales argued that because Attorney Kistler represented him while at Gordon & Silver, the entire firm of Hutchison & Steffen should be disqualified from representing the Desert Entities in the Member Lawsuit. Attorney Kistler denied representing Gonzales in the bankruptcy related Desert Entities matter. In response, Gonzales stated that Attorney Kistler represented him in his deposition and attended some meetings on how to proceed. Judge Jones found that Attorney Kistler represented Gonzales on a matter substantially related to the Member Lawsuit. After finding the matters to be substantially related, Judge Jones determined that any conflicts of interest under NRPC

1.9 would be imputed to Hutchison & Steffen unless Attorney Kistler did not have a substantial role in or primarily responsibility for representing Gonzales in the Desert Entities Bankruptcy, was timely screened off the case, received no fee and was promptly given written notice of waiver of conflict under NRPC 1.10(e).

Judge Jones found that "Kistler's representation of Plaintiff at the deposition in the Desert Entities bankruptcy cases related to the substance of the case, was real, and was important, essential, and material to Plaintiff's participation in that case." *Gonzalez* at 4. The facts central to the current matter are completely analogous. Rather than defend the Plaintiff's deposition, Mr. Dreitzer defended Zitting's President, who acted as the NRCP 30(b)(6) corporate designee during his deposition. Prior to acting as counsel at the deposition, Mr. Dreitzer spent time discussing the case with Sam Zitting both in person and on the telephone. Mr. Dreitzer spent untold time consulting with lead counsel, Jorge Ramirez, about the overall strategy of the case, and even assisted in formulating some of the strategy going forward should a judgment be obtained. Based on his extensive knowledge of the case, the attorneys determined that Mr. Dreitzer was well suited to defend Mr. Zitting's deposition.

Whether Mr. Dreitzer billed 1 hour or 100 hours to this specific case is immaterial. The materiality centers on what knowledge Mr. Dreitzer accumulated during the course of his involvement in the case. APCO conveniently glosses over the significance of Mr. Dreitzer' actually involvement in this case. *Roy D. Mercer LLC v. Reynolds*, 292 P.2d 466, 469-473 (N.M. 2012). In that New Mexico case, the Court analyzed a similar rule that allows screening, so long as the attorney did not assume a substantial role in the litigation and obtained a written waiver from the client. Judge Jones noted that the *Mercer* Court found "...the test to be satisfied based on representation as to a single, important event in a matter's litigation plus attendance at strategy meetings with other attorneys..." That is precisely what occurred in this case.

Mr. Dreitzer admittedly met with Sam Zitting before the deposition and communicated a settlement offer to APCO. APCO attempts to downplay the significance of this communication by stating nothing further materialized as result of the offer. Obviously, when parties make settlement offers, a great deal of thought and strategy play into these decisions. The parties and their legal

counsel discuss why particular offers are made and whether counteroffers will be entertained. Equally as important was Mr. Dreitzer' consultation with lead counsel, Jorge Ramirez, Esq. on numerous occasions. As stated above, Mr. Dreitzer' mechanic lien law background served Zitting well in its pursuit of summary judgment, which was granted by this Court. The issues raised in APCO's opening brief are also directly related to Mr. Dreitzer' specific representation of Zitting. APCO further admits that during a conversation with WEMED attorneys, the general topic "...was strategies Wilson Elser was considering regarding negotiating a settlement with APCO." *See* APCO's Motion at 5:23-24. Whether any of these strategies were ever implemented is completely irrelevant. This case is currently on appeal and could potentially be remanded by the Nevada Supreme Court, so it would be wildly speculative to guess what the future holds for the final outcome of the case. Zitting cannot be expected to disclose the exact details surrounding these discussions, nor should it be expected to do so under these circumstances.

2. Arizona

APCO correctly pointed out that Arizona has addressed the substantial role analysis in *Eberle Design, Inc. v. Reno A & E*, 354 F. Supp. 2d 1093 (D. Ariz. 2005) (emphasis added) in terms of Arizona's rule prior to a 2016 amendment. In *Eberle*, the Court concluded that the attorney's role was not substantial because he only spent 9.2 hours drafting voir dire questions and took no part in fact discovery, expert witness preparation, discovery, summary judgment briefing or argument, motions in limine, or jury instructions. While the *Eberle* Court may have scrutinized the number of hours billed, that court articulated the types of participation that rise to the level of substantial participation.

Unlike the attorney in *Eberle*, Mr. Dreitzer took part in Zitting's corporate designee witness preparation, corporate designee deposition defense, mandatory pretrial conference, settlement strategy and key litigation strategy. He was also privy to several discussions during partner lunches where this particular case was discussed, including the overall strategy of the case. [Exhibit "C" at 10] In fact, Mr. Dreitzer was so engrossed in the case that he even said that he would help with the appeal given that a central issue was probably going to be his defense of Zitting's corporate representative. [*Id* at 11]

Moreover, as stated in the declaration of Jorge Ramirez, Mr. Dreitzer' exposure and participation in this case was not limited to a mere 12 billable hours, as suggested by APCO. [*Id* at 15] Thus, the *Eberle* standard actually supports a finding of imputed conflict to Fennemore Craig should they take on Mr. Dreitzer as a member for their firm. Even if Mr. Dreitzer' participation was only limited to 12 hours, these hours were dedicated to significant tasks. Mr. Dreitzer also fails to account for the other numerous hours spent discussing strategy for this case, which were not billed.

3. California Case law

California courts apply a "Substantial Relationship Test" in determining whether disqualification is required. *Rosenfeld Constr. Co. v. Superior Court*, 235 Cal. App. 3d 566 (1991). This test requires the Court to "focus on the similarities between the two factual situations, the legal questions posed, and the nature and extent of the attorney's involvement with the cases. As part of its review, the court should examine the time spent by the attorney on the earlier cases, ***the type of work performed, and the attorney's possible exposure to formulation of policy or strategy.***" Id. at 576. The present recollection of members of the firm to be disqualified, standing alone, is not an adequate criterion. Id at 576. The Court thus analyzed the question of whether a substantial relationship existed by applying three factors: (1) factual similarity, (2) legal similarity, and (3) nature and extent of the attorney's involvement with the cases. Id.

Obviously, the factual and legal similarities exist because there is only one case at issue. APCO has filed an appeal that directly relates to the testimony that was addressed in APCO's Motion to Reconsider and its Opening Brief. Allowing Fennemore Craig to represent APCO in this matter is highly prejudicial to Zitting should they take on Mr. Dreitzer as a member of their firm. It has already been substantiated that Mr. Dreitzer' involvement with the case was very prominent.

C. Screening Mr. Dreitzer from participating in this matter will not alleviate Zitting's legitimate concerns.

It cannot be understated that the effect of allowing Mr. Dreitzer to join Fennemore Craig will seriously jeopardize the sanctity of this case. If the Court determines that Mr. Dreitzer undertook a substantial role in the lawsuit, the issue of adequate screening becomes entirely moot. In reality, no amount of screening can justify allowing Fennemore Craig to represent APCO if Mr. Dreitzer joins

the firm as an attorney. NRPC 1.10(e). As stated above and the supporting Declarations, Mr. Dreitzer' role in this case is much more than what he submitted in his affidavit.

D. APCO's imputed disqualification arguments are irrelevant

APCO argues that its right to choose counsel outweighs risk to Zitting. Zitting is not asking the Court to disqualify Fennemore Craig. Now, if they eventually hire Mr. Dreitzer, then the imputed disqualification should be mandated under NRPC 1.10(e) to protect the integrity of the attorney-client relationship. The Nevada Rules of Professional Conduct are intended to be interpreted with reference to the purposes of legal representation and of the law itself. The NRPC also establishes standards of conduct by lawyers. *See, e.g.,* NRPC 1.0A.

Upon review and consideration of these rules, along with an assessment of the facts of this case, it becomes unequivocally clear that Fennemore Craig has already gained information for which an unwaivable and direct conflict of interest exists with respect to Zitting. Judge Jones in *Gonzales* found Attorney Kistler's claim that "...he does not believe his participation in the deposition exposed him to any client confidences..." not to be credible. Like Attorney Kistler, Mr. Dreitzer was certainly exposed to confidential information during his representation of Zitting. Under APCO's interpretation of the NRPC, imputed disqualification would never be implemented by a court. Clearly, the rule was adopted for good reason, to ensure that matters such as this one do not jeopardize a party's right to litigate without fear of betrayal of confidence. Zitting, as the party with the most to lose, has a paramount right to ensure their strategy is revealed, whether intentional or not.

Zitting is not asserting that Mr. Dreitzer would purposefully disclose any confidential information to Fennemore Craig, however he has already disclosed the existence of settlement negotiations without first obtaining the consent of Zitting do so. This elevates the cause for concern that future information could be inadvertently disclosed through a variety of situations, which proves that Zitting's independent counsel had the client make the right decision on denying waiver. The only proper conclusion is to ensure that no such possibility will exist. APCO has already retained the law firm of Marquis Aurbach Coffing, a firm more than capable of representing APCO in the appeal. Fennemore Craig can simply withdraw on this single case and bring Mr. Dreitzer aboard as

an attorney if that is what they want to do. However, it is improper for them to seek an order from this Court forcing Zitting to forgo his right to refuse to waive the actual conflict that exists.

IV. CONCLUSION

This Court should deny APCO's Motion because under NRPC 1.10(e) the entire Fennemore Craig firm is imputed with Mr. Dreitzer's conflict as he took a much more substantial role in the case than what APCO is claiming. Moreover, APCO's Motion seeks an advisory opinion as there is no justiciable controversy. As such, Zitting should be granted its attorney fees and costs for having to defend this motion pursuant to NRCP 11.

For the foregoing reasons, this Court should deny APCO's Motion.

DATED this 4th day of June, 2019.

WILSON ELSER MOSKOWITZ EDELMAN & DICKER LLP

Jorge Ramirez, Esq.
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Telephone: (702) 727-1400
Facsimile: (702) 727-1401
Attorneys for Lien Claimant, Zitting Brothers Construction, Inc.

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of Wilson Elser Moskowitz Edelman & Dicker LLP, and that on this 4th day of June, 2019, I served a true and correct copy of the foregoing **ZITTING BROTHERS CONSTRUCTION, INC.'S OPPOSITION TO APCO CONSTRUCTION'S MOTION FOR DETERMINATION OF POTENTIAL ATTORNEY CONFLICT ON AN ORDER SHORTENING TIME** document as follows:

☐ by placing same to be deposited for mailing in the United States Mail, in a sealed envelope upon which first class postage was prepaid in Las Vegas, Nevada;

☒ via electronic means by operation of the Court's electronic filing system, upon each party in this case who is registered as an electronic case filing user with the Clerk;

☐ via hand-delivery to the addressees listed below;

☐ via facsimile;

☐ by transmitting via email the document listed above to the email address set forth below on this date before 5:00 p.m.

BY _____
An Employee of WILSON ELSER MOSKOWITZ EDELMAN & DICKER LLP

Exhibit A

DECL
JORGE RAMIREZ, ESQ.
Nevada Bar No. 6787
I-CHE LAI, ESQ.
Nevada Bar No. 12247
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Attorneys for Lien Clamant,
Zitting Brothers Construction, Inc.

DISTRICT COURT

CLARK COUNTY, NEVADA

APCO CONSTRUCTION, a Nevada corporation, Plaintiff, vs. GEMSTONE DEVELOPMENT WEST, INC., a Nevada corporation, Defendant. AND ALL RELATED MATTERS	CASE NO. A571228 DEPT. NO. XIII Consolidated with: A574391; A574792; A577623; A583289; A587168; A580889; A584730; A589195; A595552; A597089; A592826; A589677; A596924; A584960; A608717; A608718; and A590319 Date of Hearing: June 6, 2019 Time of Hearing: 9:00 a.m.

DECLARATION OF I-CHE LAI IN SUPPORT OF OPPOSITION TO MOTION FOR DETERMINATION OF POTENTIAL ATTORNEY CONFLICT ON AN ORDER SHORTENING TIME

I, I-Che Lai, declare as follows:

1. I am over eighteen years of age and competent to testify in a court of law.

2. I am an attorney, duly licensed to practice law in the state of Arizona. I am an attorney with the law firm of Wilson, Elsner, Moskowitz, Edelman & Dicker ("WEMED"), attorney of record for Zitting Brothers Construction, Inc. ("Zitting").

3. I have personal knowledge of the facts set forth below, unless otherwise stated. If called upon to testify, I will do so truthfully.

4. I make this declaration in support of Zitting's Opposition to Motion for Determination of Potential Attorney Conflict on an Order Shortening Time.

5. During the course of this litigation, I acted as counsel for Zitting.

6. Zitting prevailed on its motion for partial summary judgment against APCO Construction ("APCO"). Zitting also prevailed on APCO's motion for reconsideration of order granting partial summary judgment.

7. While Richard Dreitzer, Esq. was employed with WEMED, I personally consulted with Mr. Dreitzer about this case on multiple occasions during the course of the litigation.

8. Because of Mr. Dreitzer's extensive experience with construction law, I had spoken with him about the ongoing substantive aspects of this case. Mr. Dreitzer provided substantial input about the procedural and substantive aspects of the case, much of which was incorporated into Zitting's litigation strategy.

9. Prior to the deposition, Mr. Dreitzer spoke to Sam Zitting to discuss the overall case, deposition, and even settlement.

10. I personally met with Mr. Dreitzer and Mr. Zitting to prepare Mr. Zitting for his deposition.

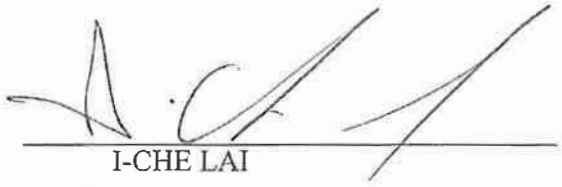
11. Following the successful conclusion of the motion for partial summary judgment and motion for reconsideration, APCO appealed this Court's judgment in favor of Zitting.

12. Much of APCO's motion for reconsideration centered on the deposition testimony provided by Zitting's NRCP 30(b)(6) designee, Mr. Zitting.

13. Most importantly, upon reviewing APCO's Opening Brief, filed with the Nevada Supreme Court, I recognized that APCO's appeal focused on Mr. Zitting's NRCP 30(b)(6) deposition testimony.

I declare under penalty of perjury under the law of the State of Nevada that the foregoing is true and correct.

Executed on June 4, 2019.



I-CHE LAI

Exhibit B

DECL

JORGE RAMIREZ, ESQ.
Nevada Bar No. 6787
I-CHE LAI, ESQ.
Nevada Bar No. 12247
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Attorneys for Lien Clamant,
Zitting Brothers Construction, Inc.

DISTRICT COURT

CLARK COUNTY, NEVADA

APCO CONSTRUCTION, a Nevada corporation, Plaintiff, vs. GEMSTONE DEVELOPMENT WEST, INC., a Nevada corporation, Defendant. AND ALL RELATED MATTERS	CASE NO. A571228 DEPT. NO. XIII Consolidated with: A574391; A574792; A577623; A583289; A587168; A580889; A584730; A589195; A595552; A597089; A592826; A589677; A596924; A584960; A608717; A608718; and A590319 Date of Hearing: June 6, 2019 Time of Hearing: 9:00 a.m.

DECLARATION OF SAM ZITTING IN SUPPORT OF OPPOSITION TO MOTION FOR DETERMINATION OF POTENTIAL ATTORNEY CONFLICT ON AN ORDER SHORTENING TIME

I, Sam Zitting, declare as follows:

1. I am over eighteen years of age and competent to testify in a court of law.

2. I am the President of Zitting Brothers Construction, Inc. ("Zitting").

3. I have personal knowledge of the facts set forth below, unless otherwise stated. If called upon to testify, I will do so truthfully.

4. I make this declaration in support of Zitting's Opposition to Motion for Determination of Potential Attorney Conflict on an Order Shortening Time.

5. During the lawsuit, I was called to testify as Zitting's corporate designee at deposition.

6. On the day of my deposition, I met with Wilson, Elsner, Moskowitz, Edelman & Dicker attorneys, Richard Dreitzer, Esq. and I-Che Lai, Esq., to prepare for my deposition. The meeting occurred at Starbucks and lasted approximately 1 hour. Prior to that meeting I also spoke multiple times on the telephone with Mr. Dreitzer about legal strategy of the case and the impending deposition.

7. A week prior to my deposition, I specifically recall a 30 minute conversation in which attorney, Jorge Ramirez, Esq. and Mr. Dreitzer counseled me on what to expect at the deposition. .

8. Mr. Dreitzer has also assisted Zitting with regard to other ancillary matters, including but not limited to, lien claims. In this capacity, Mr. Dreitzer obtained intimate knowledge about Zitting's construction business.

9. Following the successful conclusion of a Motion for Summary Judgment and Motion for Reconsideration, APCO Construction appealed this Court's judgment in favor of Zitting.

10. On or about March 13, 2019 I was informed that Mr. Dreitzer intended to take a position with Fennemore Craig, the same law firm that acts as legal counsel for APCO.

11. Due to Mr. Dreitzer's involvement with this case, Zitting was approached with a request for Zitting to sign a waiver of conflict of interest that would allow Mr. Dreitzer to take a position with Fennemore Craig, while allowing that firm to continue to represent APCO's interests in the appeal, and ostensibly in any future proceedings before this court.

12. Zitting sought the advice of independent legal counsel regarding the potential implications of waiving a conflict of interest. Upon consultation with independent counsel, Zitting could not approve a waiver of an obvious conflict of interest that would simultaneously allow Mr. Dreitzer to work as a Fennemore Craig attorney, while Fennemore Craig continued to act as legal counsel for APCO in this matter.

I declare under penalty of perjury under the law of the State of Nevada that the foregoing is true and correct.

Executed on June 3, 2019.

SAM ZITTING

Exhibit C

DECL
JORGE RAMIREZ, ESQ.
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I-CHE LAI, ESQ.
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Attorneys for Lien Clamant,
Zitting Brothers Construction, Inc.

DISTRICT COURT

CLARK COUNTY, NEVADA

APCO CONSTRUCTION, a Nevada corporation, Plaintiff, vs. GEMSTONE DEVELOPMENT WEST, INC., a Nevada corporation, Defendant. AND ALL RELATED MATTERS	CASE NO. A571228 DEPT. NO. XIII Consolidated with: A574391; A574792; A577623; A583289; A587168; A580889; A584730; A589195; A595552; A597089; A592826; A589677; A596924; A584960; A608717; A608718; and A590319 Date of Hearing: June 6, 2019 Time of Hearing: 9:00 a.m.

DECLARATION OF JORGE RAMIREZ IN SUPPORT OF OPPOSITION TO MOTION FOR DETERMINATION OF POTENTIAL ATTORNEY CONFLICT ON AN ORDER SHORTENING TIME

I, Jorge Ramirez, declare as follows:

1. I am over eighteen years of age and competent to testify in a court of law.

2. I am an attorney, duly licensed to practice law in the states of Nevada and Arizona. I am a partner with the law firm of WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP, attorney of record for Zitting Brothers Construction, Inc. ("Zitting").

3. I have personal knowledge of the facts set forth below, unless otherwise stated. If called upon to testify, I will do so truthfully.

4. I make this declaration in support of Zitting's Opposition to Motion for Determination of Potential Attorney Conflict on an Order Shortening Time.

5. Throughout most of this litigation, I acted as lead counsel for Zitting.

6. Zitting prevailed on its Motion for Summary Judgment against APCO Construction ("APCO"). Zitting also prevailed on APCO's Motion for Reconsideration.

7. While Richard Dreitzer, Esq. was employed with Wilson, Elsner, Moskowitz, Edelman & Dicker ("WEMED"), I personally consulted with Mr. Dreitzer throughout the duration of the litigation.

8. Because Mr. Dreitzer has represented general contractors and is well versed in mechanics lien law, I often spoke with him about the ongoing substantive aspects of this case. Mr. Dreitzer provided substantial input about the procedural and substantive aspects of the case, much of which was incorporated into Zitting's litigation strategy.

9. Because Mr. Dreitzer became familiar with the lawsuit and the litigation strategy, we collectively determined that Mr. Dreitzer was well suited to personally defend Zitting's NRCP 30(b)(6) designee.

10. Mr. Dreitzer was also privy to several discussions during partner lunches where this particular case was discussed, including the overall strategy.

11. After summary judgment was granted, Mr. Dreitzer was so engrossed in the case that he offered to assist with the appeal, wherein we believed, based on the motion for reconsideration, a central issue was to be the defense of Zitting's corporate representative.

12. Prior to the deposition, Mr. Dreitzer spoke to Sam Zitting on numerous occasions to discuss the overall case, deposition and even settlement.

13. I was informed that Mr. Dreitzer and WEMED attorney, I-Che Lai personally met with Sam Zitting to prepare him for his deposition.

14. Mr. Dreitzer defended Sam Zitting at his deposition testimony.

15. While Mr. Dreitzer's WEMED billing statements will only reflect approximately 12 hours of billable time, Mr. Dreitzer personally met with me in intra-office conferences discussing

litigation strategy that directly resulted to this Court's granting of summary judgment in favor of Zitting.

16. Following the successful conclusion of the Motion for Summary Judgment and Motion for Reconsideration, APCO appealed this Court's judgment in favor of Zitting.

17. Much of APCO's Motion for Reconsideration centered on the deposition testimony provided by Zitting's NRCP 30(b)(6) designee, Sam Zitting.

18. Most importantly, upon reviewing APCO's Nevada Supreme Court Opening Brief, it was evident that a substantial portion of APCO's appeal directly centers on Sam Zitting's NRCP 30(b)(6) deposition testimony.

19. After WEMED was informed of Mr. Dreitzer's intention to take a position with Fennemore Craig, I informed Sam Zitting that Mr. Dreitzer was requesting a written waiver of conflict of interest and that Fennomore Craig proposed screening him off.

20. I advised Zitting to seek advice of independent legal counsel regarding the potential implications of waiving a conflict of interest.

21. Upon consultation with independent counsel, Reuben Cawley, Esq., Zitting chose not to approve a waiver of conflict of interest that would simultaneously allow Mr. Dreitzer to work as a Fennemore Craig attorney, while Fennemore Craig continued to act as legal counsel for APCO in this matter.

22. While WEMED does not take motions to disqualify lightly, the present circumstances are such that it would be an unwaivable conflict to allow Fennemore Craig to represent APCO if Mr. Dreitzer is employed with the firm.

I declare under penalty of perjury under the law of the State of Nevada that the foregoing is true and correct.

Executed on June 4, 2019.

JORGE RAMIREZ

Exhibit D

IN THE SUPREME COURT OF THE STATE OF NEVADA

APCO CONSTRUCTION, INC., A NEVADA CORPORATION, Appellant, vs. ZITTING BROTHERS CONSTRUCTION, INC., Respondent.	Case No.: 75197 Appeal from the Eighth Judicial District Court, the Honorable Mark Denton Presiding

APPELLANT'S OPENING BRIEF

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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, and is not operating under a pseudonym.

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. Micah Echols, Esq., Cody Mounteer, Esq., and Tom Stewart, Esq. of Marquis Aurbach Coffing; John Randall Jefferies, Esq., and Chris Byrd, Esq., represent APCO in this Court.

Dated this 18th day of April, 2019.

MARQUIS AURBACH COFFING

By /s/ Tom W. Stewart
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I. JURISDICTIONAL STATEMENT

Appellant, APCO Construction, Inc. (APCO), timely appealed from an order granting partial summary judgment in favor of Respondent, Zitting Brothers Construction, Inc. (Zitting), which was certified as final under NRCP 54(b). 26 Appellant's Appendix (AA) 6052-6054. Thus, this Court has jurisdiction under NRAP 3A(b)(1).[1] As detailed below, the order granting partial summary judgment, certified as final under NRCP 54(b), is "an order finally resolving a constituent consolidated case" and is, thus, "immediately appealable as a final judgment" under NRAP 3A(b)(1). *In re Estate of Sarge*, 134 Nev., Adv. Op. 105, 432 P.3d 718, 722 (2018).

The underlying litigation involved seventeen consolidated cases and nearly ninety parties asserting claims, counterclaims, third-party claims, and claims in

[1] Additionally, APCO timely appealed from prior orders that were entered prior to this final appealable order, including the findings of fact, conclusions of law, and order granting Zitting's motion for partial summary judgment, entered on January 2, 2018, 14 AA 3239-3249; the order denying APCO's motion for reconsideration of the order granting Zitting's motion for partial summary judgment, entered on January 25, 2018, 19 AA 4474-4475; the order determining the amount of Zitting's attorney fees, costs, and prejudgment interest, entered on May 8, 2018, 23 AA 5291-5293; and the order granting the motion in limine to limit the defenses of APCO to the enforceability of pay-if-paid provisions, entered on December 15, 2017, 14 AA 3250-3255. Because the order granting partial summary judgment was certified as final under NRCP 54(b), the prior orders may properly be reviewed by this Court. *See Consol. Generator-Nevada, Inc. v. Cummins Engine Co., Inc.*, 114 Nev. 1304, 1312, 971 P.2d 1251, 1256 (1998).

intervention that can generally be described as claims related to payment of either labor or materials provided to Manhattan West, a failed, large-scale condominium construction project. *See generally* 1 AA 1-8 AA 1738 (various underlying complaints and answers); *see also APCO Constr., Inc., v. Zitting Bros. Constr., Inc.*, Docket No. 75197 (Appellant's Response to Order to Show Cause, Dec. 20, 2018). The district court action was initiated in 2008 during the economic recession, endured three appeals, and lasted approximately ten years. *Id.* at 1-2. Eventually, the district court ordered the sale of Manhattan West and ordered that the sale would be "free and clear of all liens," including liens asserted by APCO and Zitting, and that "all liens on [Manhattan West] . . . be transferred to the net proceeds from the sale." 8 AA 1816; *see also* 8 AA 1742-1808 (ordering sale of property). However, the district court ordered the net proceeds from the sale be transferred into an interest-bearing account pending resolution of the ongoing dispute over priority that had emerged between Manhattan West's lender, Scott Financial Corporation, and the various mechanic's lienholders, including APCO and Zitting. *See* 8 AA 1816-1818; *see also In re Manhattan W. Mech.'s Lien Litig.*, 131 Nev., Adv. Op. 70, 359 P.3d 125 (2015). Eventually, this Court determined "the priority of the mechanic's lien remains junior to the amount secured by the original senior lien" held by Scott Financial Corporation. *In re Manhattan W. Mech.'s Lien Litig.*, 131 Nev., Adv. Op. 70, 359 P.3d at 128.

Following this Court's priority determination, the district court eventually ordered the proceeds of the sale disbursed to Manhattan West's lender, Scott Financial Corporation. 8 AA 1816-1818 (releasing net proceeds from the sale to Scott Financial Corporation).

Following the sale of the property and despite the massive number of parties and claims involved in the consolidated action, several events disposed of a vast number of the remaining parties and claims prior to trial—including the order granting partial summary judgment on appeal here. *See APCO Constr., Inc., v. Zitting Bros. Constr., Inc.*, Docket No. 75197, at 3-7 (Appellant's Response to Order to Show Cause, Dec. 20, 2018). The first such event was the October 7, 2016 order adopting the special master's recommendation that any party who had not completed the special master's questionnaire was dismissed from the litigation. 8 AA 1819-1822. Indeed, the special master ordered every party that wished to proceed in the litigation to complete a questionnaire by September 23, 2016 and warned that any party that did not would be deemed to have "abandoned any claim related to this litigation." 8 AA 1820. Following that order, only twenty parties remained in the litigation, including, among others, Zitting and APCO. *See* 8 AA 1820 (listing remaining parties).

The next such event took place on September 5, 2017 at a calendar call on the claims of the remaining parties in the case. 10 AA 2350-2351. During the

calendar call, APCO and other parties orally moved to dismiss those parties that had not filed their pre-trial disclosures. 10 AA 2350. The district court set the final pre-trial disclosure date for September 8, 2017. 10 AA 2350. The district court set a follow-up hearing on the matter for September 11, 2017. 10 AA 2351. At that hearing, and pursuant to the district court's order, only fifteen parties remained in the litigation, including, among others, Zitting and APCO. 10 AA 2351 (listing remaining parties). Then, several more parties were dismissed either by stipulation or summary judgment. *See* 8 AA 1823-1830.

Zitting had partial summary judgment entered against APCO on January 2, 2018, prior to trial, which is the underlying judgment on appeal here.[2] 14 AA 3239-3249. Although Zitting initially brought claims against APCO and other parties, at the time Zitting moved for partial summary judgment, Zitting had no other claims or defenses pending against any other party in the litigation. *See generally APCO Constr., Inc., v. Zitting Bros. Constr., Inc.*, Docket No. 75197

[2] APCO prevailed at trial against the remaining subcontractors, each of whom had nearly identical subcontracts, and at least one subcontractor has appealed the outcome of that trial. *See APCO Constr., Inc. v. Zitting Bros. Constr., Inc.*, Docket No. 75197 (Appellant's Response to Order to Show Cause, Dec. 20, 2018) at 8-9; *see also Helix Elec. of Nev., LLC v. APCO Constr., Inc.*, Docket No. 76276 (Notice of Appeal, July 5, 2018); *Helix Elec. of Nev., LLC v. APCO Constr., Inc.*, Docket No. 77320 (Notice of Appeal, Nov. 5, 2018). APCO has also lodged a cross-appeal from the trial. *See Helix Elec. of Nev., LLC v. APCO Constr., Inc.*, Docket No. 77320 (Notice of Cross-Appeal, Nov. 5, 2018).

(Appellant's Response to Order to Show Cause, Dec. 20, 2018) at 3 n.2, 7-8. Zitting moved for partial summary judgment on its claims of breach of contract and NRS 108 claims against APCO. 8 AA 1891-10 AA 2198. Zitting's motion for partial summary judgment was granted on its breach of contract and NRS 108 claims, and the district court ordered that, as a result, all of Zitting's remaining claims were moot. 14 AA 3239-3249. Accordingly, the partial summary judgment order disposed of all of Zitting's claims and defenses in the multi-party action.

APCO timely moved for reconsideration of the order granting partial summary judgment. 16 AA 3634-19 AA 4344. The district court denied APCO's motion for reconsideration, 19 AA 4474-4475, and APCO timely appealed the order denying APCO's motion for reconsideration and the order granting partial summary judgment, 21 AA 4752-23 AA 5288. The district court then entered an order awarding Zitting its attorney fees and costs. 23 AA 5291-5293. APCO timely appealed that order. 23 AA 5305-25 AA 5871.

Eventually, APCO moved for NRCP 54(b) certification of the partial summary judgment order, 25 AA 5872-26 AA 6038, because it was "a final judgment as to one or more but fewer than all of the parties" and "there [wa]s no just reason for delay." NRCP 54(b). The district court granted that motion, and certified as final the order granting Zitting's motion for partial summary judgment. 26 AA 6052-6054. As a result, the partial summary judgment order "finally

dispose[d] of all claims and defenses of one . . . part[y] in a multi-party action, leaving the action pending as to the claims and/or defenses of other parties." Nevada Appellate Practice Manual § 3:37 (2018 ed.) (citing *Loomis v. Whitehead*, 124 Nev. 65, 67 n.3, 183 P.3d 890, 891 n.3 (2008)).

Although other constituent cases remained pending at the time summary judgment was entered against APCO, "an order finally resolving a constituent consolidated case is immediately appealable as a final judgment even where the other constituent case or cases remain pending." *In re Estate of Sarge*, 134 Nev., Adv. Op. 105, 432 P.3d 718, 719-720 (2018). Consolidated cases "retain their separate identities so that an order resolving all of the claims in one of the consolidated cases is immediately appealable as a final judgment under NRAP 3A(b)(1)." *In re Estate of Sarge*, 134 Nev., Adv. Op. 105, 432 P.3d at 722. APCO timely appealed from that order. 26 AA 6064-29 AA 6854. Thus, the order granting partial summary judgment, certified as final under NRCP 54(b), grants this Court jurisdiction pursuant to NRAP 3A(b)(1).

II. ROUTING STATEMENT

The Supreme Court should retain this case pursuant to NRAP 17(a)(11) because it raises as principal issues several questions of statewide public importance, namely whether payment preconditions and agreed-upon payment schedules are valid conditions precedent to payments when not combined with a

waiver of a mechanic's lien, as announced by this Court in *Padilla Constr. Co. of Nevada v. Big-D Constr. Corp.*, Docket No. 67397, 2016 WL 6837851 (Order of Affirmance, Nov. 18 2016) (unpublished); whether NRCP 26(e)(2)'s requirement for a party to "seasonably" amend prior interrogatory responses is inapplicable when the opposing party has actual knowledge and evidence of the information that would otherwise be amended; and whether, under NRS 108.239(12), a prime contractor with no ownership interest in a subject property can be personally liable for a deficiency judgment after the statutory foreclosure of that property did not result in sufficient funds to satisfy all mechanic's liens. Additionally, issues raised in this appeal do not fall within those issues that are presumptively assigned to the Court of Appeals as identified in NRAP 17(b). Thus, the Supreme Court should retain this appeal.

III. ISSUES ON APPEAL

1. Whether payment preconditions and agreed-upon payment schedules are valid conditions precedent to payments when not combined with a waiver of a mechanic's lien as announced in *Padilla Constr. Co. of Nevada v. Big-D Constr. Corp.*, Docket No. 67397, 2016 WL 6837851 (Order of Affirmance, Nov. 18 2016) (unpublished);

2. Whether NRCP 26(e)(2)'s requirement for a party to "seasonably" amend prior interrogatory responses is inapplicable when the opposing party is in

possession of the information and has actual knowledge of the information that would otherwise be amended or, under NRCP 15(b), that issue should be tried by consent;

3. Whether, under NRS 108.239(12), a prime contractor with no ownership interest in a subject property can be personally liable for a deficiency judgment after the statutory foreclosure of that property did not result in sufficient funds to satisfy all mechanic's liens.

IV. STATEMENT OF THE CASE

The genesis of this case is a failed, large-scale condominium construction project, Manhattan West, whose owner and developer, Gemstone Development West, Inc. (Gemstone), lost financing and stopped work prior to the project's completion. As a result, the project's contractors—including the prime contractor, APCO, and a subcontractor, Zitting—went unpaid.[3]

In the immediate aftermath of the project's failure, contractors filed competing mechanics' liens on the property and began litigating lien priority against Gemstone's lender. Ultimately, this Court held in favor of the lender, and

[3] Between APCO's $8,000,000 of unpaid labor and supplies on Manhattan West, 17 AA 3869, and Zitting's eventual judgment in excess of $900,000 entered against APCO, 15 AA 5299-5300, APCO lost almost $9,000,000 as a result of Gemstone's failure to secure funding for Manhattan West.

determined "the priority of the mechanic's lien[s] remains junior to the amount secured by the original senior lien."[4]

Following the priority determination, a statutory foreclosure sale occurred, and the proceeds went to Gemstone's lender. Zitting then pursued APCO for certain payments that Gemstone failed to remit, eventually prevailing before the district court on partial summary judgment as a result of a materially false affidavit signed by Zitting's NRCP 30(b)(6) designee.

However, in precluding APCO's affirmative defenses by order in limine and in ordering partial summary judgment, the district court erred in several ways: first, Zitting ignored the agreed-upon payment schedules and failed to meet the agreed-upon conditions precedent to receiving payment and, thus, was not entitled to receive payment; second, even if Zitting had met the conditions precedent, APCO never received those monies from Gemstone, and, thus, APCO was not contractually obligated to provide them to Zitting; third, APCO's affirmative defenses involving these conditions precedent were disclosed to Zitting, or were in Zitting's possession, throughout the litigation, and, thus, the district court improperly excluded them; fourth, because Zitting had fair notice and would not be prejudiced by conditions precedent defenses, the district court should have allowed

[4] *See In re Manhattan W. Mech.'s Lien Litig.*, 131 Nev., Adv. Op. 70, 359 P.3d at 125.

them to be tried by consent; fifth, a prime contractor with no ownership interest in a subject property cannot be personally liable for a deficiency judgment after the statutory foreclosure of that property; and, finally, at a minimum, Zitting's own contradictory testimony, when viewed in a light most favorable to the non-moving party, created a genuine issue of material fact that precluded summary judgment. As a result, summary judgment was improper, and this Court should reverse.

V. STANDARDS OF REVIEW

Questions of law and statutory interpretation are reviewed de novo. *N. Nevada Homes, LLC v. GL Constr., Inc.*, 134 Nev., Adv. Op. 60, 422 P.3d 1234, 1236 (2018). Likewise, a district court's order granting summary judgment is reviewed de novo. *Nevada Recycling & Salvage, Ltd. v. Reno Disposal Co., Inc.*, 134 Nev., Adv. Op. 55, 423 P.3d 605, 607 (2018) (citing *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005)). Additionally, "[w]hen the facts in a case are not in dispute, contract interpretation is a question of law, which this [C]ourt reviews de novo." *Klabacka v. Nelson*, 133 Nev., Adv. Op. 24, 394 P.3d 940, 946 (2017). A district court's decision to exclude evidence, however, is reviewed for an abuse of discretion. *Pizarro-Ortega v. Cervantes-Lopez*, 133 Nev., Adv. Op. 37, 396 P.3d 783, 790 (2017).

VI. FACTUAL BACKGROUND

A. THE PRIME CONTRACT.

In late 2007, Gemstone hired APCO as the prime contractor for Manhattan West. 8 AA 1874-1916 (the prime contract). As the prime contractor, APCO was authorized to "engage . . . subcontractors . . . to complete" work on Manhattan West. 8 AA 1879. Additionally, the prime contract specificed that APCO would be paid incrementally, according to the work performed on the project—an arrangement known as "progress payments." 8 AA 1898-1902.

The prime contract outlined that "[o]n the first business day of each month, [APCO] and [Gemstone] shall meet and review the Work that was completed during the previous month and the corresponding payment required for such Work." 8 AA 1898. Two days later, APCO would submit to Gemstone an "application for payment" that would "show the [p]ercentage of [c]ompletion of each portion of the [w]ork as of the end of the period covered by" the application. 8 AA 1898. Within twelve days of receipt of that application for payment, Gemstone would provide to APCO the progress payment, subject to other contractual deductions, to compensate APCO for the work performed on Manhattan West. 8 AA 1899.

Additionally, the prime contract specified that, in the event of a termination of the prime contract, each subcontract "for a portion of the [w]ork is hereby

assigned by [APCO] to [Gemstone]" and that "[Gemstone] shall pay the corresponding [subcontractor] any undisputed amounts owed for any [w]ork completed by such [subcontractor], prior to the underlying termination for which [Gemstone] had not yet paid [APCO] prior to such underlying termination." 8 AA 1909.

B. THE SUBCONTRACT.

About two months later, APCO hired Zitting as a subcontractor to provide framing materials and labor at Manhattan West. To ratify this agreement, APCO and Zitting entered into a subcontract for Zitting's framing and drywall services (the subcontract). 9 AA 1918-1950.

The subcontract set forth, among other things, that Zitting would be paid per building, subject to an agreed-upon payment schedule, certain conditions precedent to payment, and to a "pay-if-paid" restriction—meaning that "[a]ny payments to [Zitting] [were] conditioned upon receipt of the actual payments by APCO from [Gemstone]." 9 AA 1920. In assenting to this pay condition, Zitting "agree[d] to assume the same risk that [Gemstone] may become insolvent that [APCO] assumed by entering into" the prime contract. 9 AA 1920-1921.

Further, like APCO, Zitting would also be paid progress payments. The subcontract defined Zitting's progress payment schedule and specified that

> As a condition precedent to receiving partial payments from [APCO] for Work performed, [Zitting] shall execute and deliver to [APCO], with its application for payment, a full and complete release . . . of all claims and causes of action [Zitting] may have against [APCO] and [Gemstone] through the date of the execution of said release, save and except those claims specifically listed on said release and described in a manner sufficient for [APCO] to identify such claim or claims with certainty . . . , [Zitting] herein agrees to assume the same risk that [Gemstone] may become insolvent that [APCO] has assumed by entering into the [prime contract] with [Gemstone].

9 AA 1920.

The subcontract further provided that "[p]rogress payments will be made by [APCO] to [Zitting] within 15 days after [APCO] actually receives payment for [Zitting]'s work for [Gemstone]." 9 AA 1920.

And, like APCO, Zitting would have 10% of the progress payment withheld until certain conditions precedent were met, an arrangement known as "retention payments." 9 AA 1921. The subcontract set forth the retention payment schedule that required five conditions precedent: (1) completion of drywall within the buildings;[5] (2) the approval and final acceptance of building work by Gemstone; (3) receipt of final payment by APCO from Gemstone; (4) Zitting's delivery of all as-built drawings for its scope of work and other close-out documents to APCO; and (5) Zitting's delivery of releases and waiver of claims from all of Zitting's

[5] The subcontract states "[c]ompletion of the entire building" as a condition precedent to the lease of retention payments, and later specifies that a "[b]uilding is considered complete as soon as drywall is completed." 9 AA 1921.

laborers, material and equipment suppliers, and subcontractors providing labor, materials or services to Manhattan West. 9 AA 1921.

The subcontract further required that Zitting needed to meet certain, specified conditions precedent to be entitled to change order payments. 9 AA 1921. Those conditions precedent were:

> [Zitting] agrees that [APCO] shall have no obligation to pay [Zitting] for any changed or extra work performed by [Zitting] until or unless [APCO] has actually been paid for such work by [Gemstone] unless [APCO] has executed and approved change order directing [Zitting] to perform certain changes in writing and certain changes have been completed by [Zitting].

9 AA 1921.

Finally, the subcontract specified that, if the prime contract was terminated, "[Zitting] shall be paid the amount due from [Gemstone] to [APCO] for [Zitting]'s completed work . . . after payment by [Gemstone] to [APCO]." 9 AA 1929.

C. GEMSTONE STOPS WORK BEFORE COMPLETION OF MANHATTAN WEST.

In late 2007, work began on Manhattan West. 8 AA 1834. In mid-2008, however, Gemstone purported to terminate the prime contract and stopped paying APCO for its work on Manhattan West. 8 AA 1867. As a result, on August 21, 2008, APCO stopped worked on the project and provided written notice of its intent to stop work to the subcontractors, including Zitting. 8 AA 1864-1867. The unpaid amounts owed by Gemstone to APCO included amounts earned based on

Zitting's work under the subcontract. 8 AA 1864. Following APCO's departure, APCO assigned to Gemstone all of the subcontracts, including Zitting's subcontract, and Gemstone hired a new prime contractor to replace APCO. 8 AA 1909. Zitting continued work on Manhattan West after APCO left, and did not leave the project until December 2008, when Manhattan West's lender stopped funding the project and all contractors ceased work. 8 AA 1850. However, APCO ensured that Zitting was paid for all work, less retention and certain unapproved change orders, performed while APCO was the prime contractor. 10 AA 2285. Zitting did not invoice APCO after June 30, 2008, for work performed on Manhattan West. 10 AA 2285. In total, APCO lost nearly $8,000,000 on the job. 17 AA 3868-3869. Following APCO's departure, Gemstone hired Camco as the prime contractor for Manhattan West. 12 AA 2678.

VII. PROCEDURAL HISTORY

Less than a year later, Zitting filed its complaint against APCO, alleging claims for, among other things, breach of contract and foreclosure of Zitting's mechanic's lien, seeking amounts allegedly owed for retention and change order payments.[6] 4 AA 793-810. Zitting's complaint sought damages for retention and change order payments allegedly owed by APCO. 4 AA 793-810.

[6] As noted in the jurisdictional statement, Zitting's complaint was one of seventeen consolidated cases, involving nearly ninety parties all asserting claims,

APCO timely answered Zitting's complaint. 5 AA 1106-1117. In doing so, APCO asserted affirmative defenses for, among other things, Zitting's failure to meet conditions precedent to payment, 5 AA 1113, and Gemstone's failure to pay APCO for Zitting's work,[7] 5 AA 1112.

A. INTERROGATORIES.

In March 2010, Zitting sent APCO interrogatories, *see* 9 AA 2118-2164, asking, among other things, about the basis of APCO's conditions precedent defense, 9 AA 2138. APCO's initial interrogatory responses indicated that APCO would rely on the enforceability of the pay-if-paid provision in the subcontract to excuse payment to Zitting. *See* 9 AA 2122-2139.

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counterclaims, third-party claims, and claims in intervention related to payment of either labor or materials provided to Manhattan West. Further description of the various claims and parties is provided in APCO's response to this Court's order to show cause. *See APCO Constr., Inc., v. Zitting Bros. Constr., Inc.*, Docket No. 75197 (Appellant's Response to Order to Show Cause, Dec. 20, 2018).

[7] As noted above, the subcontract required (1) completion of drywall within the buildings; (2) the approval and final acceptance of the work by Gemstone; (3) receipt of final payment by APCO from Gemstone; (4) Zitting's delivery of all as-built drawings and other close-out documents to APCO; and (5) Zitting's delivery of releases and waiver of claims. 9 AA 1921. The subcontract further states that "[c]ompletion of the entire building" is a condition precedent to the release of retention payments, and specifies that a "[b]uilding is considered complete as soon as drywall is completed." 9 AA 1921. APCO's assertion that Zitting failed to meet these conditions precedent became known as APCO's "conditions precedent" defenses, while APCO's assertion that Zitting ignored the agreed-upon payment schedule became known as APCO's "payment schedule" defenses.

In 2017, following a lengthy writ proceeding that effectively halted the underlying litigation,[8] Zitting served APCO with another set of interrogatories similar to those served in 2010. *See* 11 AA 2520-2570. The interrogatories requested, among other things, APCO's basis for its condition precedent defense. 11 AA 2538. APCO responded to Zitting's interrogatories indicating, among other things, the pay-if-paid provision in the subcontract, alleged problems with the quality of Zitting's work, and Zitting's continuation of work on the project following APCO's termination as the foundations of its defense. 11 AA 2538-2539.

B. DEPOSITIONS.

In mid-2017, Zitting deposed two of APCO's NRCP 30(b)(6) designees—one for construction topics and another for accounting topics. 8 AA 1853-1872 (construction designee); 17 AA 3900-4013 (accounting designee). In noticing those depositions, Zitting requested the designees be prepared to testify on topics including, among others, "[a]ll facts related to [APCO's] defenses against [Zitting]'s claims as alleged in [Zitting]'s complaint in this case." 17 AA 3857-3860.

[8] *See In re Manhattan W. Mech.'s Lien Litig.*, 131 Nev., Adv. Op. 70, 359 P.3d 125 (2015).

APCO's construction designee testified that Gemstone's failure to pay APCO was the reason for APCO's nonpayment of Zitting. 8 AA 1853-1872.

Additionally, APCO's accounting designee testified about the facts that gave rise to several of APCO's defenses, including that Zitting was not entitled to payment under the agreed-upon payment schedule and did not meet the conditions precedent of the subcontract's retention payment:

> [Zitting's counsel]: You testified that Zitting would not get . . . [retention payments] until certain conditions were met, correct?
>
> [APCO accounting designee]: Yes, sir.
>
> [Zitting's counsel]: Until those conditions were met, was there an actual retention check being issued to anyone and held by anyone?
>
> [APCO accounting designee]: No.

13 AA 2857.

Zitting's counsel asked APCO's accounting designee for clarification on this point, and APCO's accounting designee maintained that the conditions precedent to payment were not met:

> [Zitting's counsel]: Let me clarify. When you say completed by all subcontractors, that's only when the retention is being paid to Zitting, correct?
>
> [APCO accounting designee]: The project had to be completed in its entirety. Th[e] [subcontract] was bound to the [prime contract]. [Zitting] signed [the subcontract, which means] . . . [Zitting] [is] bound to the same terms of the [prime contract]. The [prime contract]

states that no retention will be released until the entire project is completed in its entirety.

13 AA 2858.

Asked a third time, APCO's accounting designee testified that retention payments were not issued to Zitting because they were not due under the payment schedule and the express conditions precedent to payment were not satisfied when APCO was terminated from Manhattan West and the subcontract assigned:

> [Zitting's counsel]: Right, so the only reason why the retention was not paid right away was that there were other conditions that may depend on other subcontractors, correct?
>
> [APCO accounting designee]: The job in its entirety.
>
> [Zitting's counsel]: Earlier you testified that the retention would be released once the entire project is complete; is that correct?
>
> [APCO accounting designee]: Yes.

13 AA 2858.

Given APCO's precondition defenses in the interrogatory answers, Zitting's counsel further questioned APCO's accounting designee about the precondition requirements in the subcontract:

> [Zitting's counsel]: Can I have you read [the definition of retention precondition language within the subcontract, 9 AA 1921], where it starts with "the ten percent withheld" into the record, please.
>
> [APCO accounting designee]: "The ten percent withheld retention shall be payable to subcontractor upon and only upon the occurrence of the following events, each of which is a condition precedent to the

subcontractor's right to receive final payment hereunder and payment of such retainer."

[Zitting's counsel]: Earlier you talked about how the release of retention is conditioned precedent to the completion. Can I have you read the handwritten part at the end of section 3.8 [of the subcontract, 9 AA 1921] into the record.

. . .

[APCO accounting designee]: "Building is considered complete as soon as the drywall is complete."

13 AA 2858.

Additionally, APCO's accounting designee testified that not all of Zitting's change order work was approved by Gemstone, a condition precedent to Zitting being paid under the change order payment schedule. 13 AA 2864-2866. In discussing accounting figures showing change order work completed, APCO's accounting designee testified that, "[n]ot all of it was approved." 13 AA 2865. Zitting's counsel asked for clarification, and was provided additional testimony regarding Zitting's failure to meet conditions precedent to payment:

[Zitting's counsel]: Is there a reason for APCO to submit a bill containing change orders that was not approved by [Gemstone]?

[APCO accounting designee]: [Gemstone] was the one that would determine what was approved. If Zitting gave [APCO] a change order billing, [APCO] would give it to [Gemstone]. [Gemstone] would say yes or no.

[Zitting's counsel]: Understood. So during the application review process that's when, as far as you know, [Gemstone] would approve or disapprove of the change order work being billed, correct?

[APCO accounting designee]: Correct.

13 AA 2865.

C. APCO NOTICES ZITTING'S NRCP 30(b)(6) DEPOSITION

On March 29, 2017, APCO noticed Zitting's NRCP 30(b)(6) deposition. 18 AA 4018-4025. Upon Zitting's request, APCO and Zitting agreed to continue the deposition to permit the parties to spend less on attorney fees and more time engaging in settlement discussions. 16 AA 3731. Three months later, APCO re-noticed Zitting's NRCP 30(b)(6) deposition, this time for June 28, 2017. 19 AA 4290-4297. Once again, upon Zitting's request, APCO and Zitting agreed to postpone the deposition to engage in further settlement discussions. 16 AA 3731.

D. ZITTING'S MOTION FOR PARTIAL SUMMARY JUDGMENT.

1. Zitting moves for partial summary judgment and mischaracterizes APCO's defenses for non-payment.

On July 31, 2017, despite agreeing the postpone their own NRCP 30(b)(6) deposition to engage in further settlement discussions, Zitting filed a motion for partial summary judgment against APCO. 8 AA 1831-10 AA 2198. Zitting sought summary judgment on its breach of contract and NRS 108 claims.[9] 8 AA 1831-

[9] NRS 108 governs, generally, the process for perfecting and foreclosing on statutory liens, including mechanics' liens. *See generally* NRS 108.221–108.246.

1841. Zitting's motion asserted that, despite APCO's accounting designee testimony regarding Zitting's failure to meet conditions precedent to payment and APCO's eighteen other affirmative defenses, that APCO's sole basis for refusing to pay Zitting was a pay-if-paid defense. 8 AA 1838-1839. Implicitly recognizing the subcontract's retention payment schedule and preconditions and Zitting's burden to prove that it satisfied all conditions precedent as part of its claim, Zitting's owner and NRCP 30(b)(6) designee provided an affidavit that, contrary to the testimony of APCO's accounting designee, represented that Zitting had met the five preconditions for the retention payment schedule:

> 7. By the time [Manhattan West] shut down, Zitting had completed its scope of work for two buildings on the Project---Buildings 8 and 9. The drywall was complete for those two buildings.
>
> 8. Zitting had submitted close-out documents for its scope of work, including as-built drawings and releases of claims for Zitting's vendors.
>
> 9. I am not aware of any complaints with the timing or quality of Zitting's work on [Manhattan West]. As far as I am aware, [Gemstone] has approved the timing and quality of Zitting's work.

8 AA 1850.

2. APCO opposes summary judgment and demonstrates a litany of genuine issues of material fact precluding summary judgment.

In opposing partial summary judgment, APCO cited testimonial and documentary evidence that demonstrated genuine disputes over a litany of material

facts, 10 AA 2264-2329, including whether Zitting met the requisite conditions precedent to payment, 10 AA 2266-2267; whether Zitting's drywall was complete as required for a release of retention payments, 10 AA 2267; whether Zitting invoiced APCO after June 30, 2008, 10 AA 2267-2268; whether Zitting's purported pay applications were inconsistent or ever received by APCO, 10 AA 2267-2268; whether Zitting segregated the amount of work it allegedly completed under APCO or Camco in calculating its purported damages, 10 AA 2268; the value of Zitting's completed work (and whether it was ever submitted, approved, or rejected by APCO or Camco), 10 AA 2268; whether Zitting ever submitted the required close-out documents, 10 AA 2269; and whether Zitting received a notice of stop work, 10 AA 2269.

To authenticate and support the issues of material fact presented by the opposition, APCO provided the declaration of APCO's accounting designee, 10 AA 2285-2286; photos showing, unequivocally, the drywall on the relevant portions of Manhattan West was not complete and, thus, that acknowledged preconditions to payment had not occurred, 10 AA 2288-2302; the final, June 30, 2008, Zitting invoice and application for payment received by APCO, 10 AA 2304-2307; APCO's stop-work notice served on Zitting in August, 2008, 10 AA 2309-2310; and subsequent Zitting invoices and applications for payment directed to Camco following APCO's termination, 10 AA 2312-2329.

3. Zitting replies and fails to address crucial disputed facts.

On reply, Zitting failed to address four of APCO's disputed facts: (1) Camco's responsibility for the amount owed to Zitting, (2) Zitting's failure to submit the pay applications at issue, (3) the claimed change orders were never approved, and (4) the incomplete drywall. 10 AA 2358-2413.

4. The district court allows additional discovery before deciding partial summary judgment.

On October 5, 2017, at the initial hearing set for Zitting's motion for partial summary judgment, the district court reopened discovery to allow the parties forty-five days to complete depositions that had been intentionally delayed per the parties' mutual agreement, including the deposition of Zitting's NRCP 30(b)(6) designee. 11 AA 2414-2433; 17 AA 3880.

E. ZITTING'S NRCP 30(B)(6) DESIGNEE DIRECTLY CONTRADICTS HIS EARLIER SWORN TESTIMONY DURING HIS DEPOSITION.

Following the district court reopening discovery, Zitting's NRCP 30(b)(6) designee was deposed. Contrary to his earlier sworn affidavit to the district court, 8 AA 1850, Zitting's designee's testimony confirmed that Zitting did not meet the five conditions precedent to be entitled to any retention payment. 12 AA 2671-2701. First, contrary to his earlier declaration, Zitting's designee testified the drywall was not, in fact, complete:

> [APCO's counsel]: Okay. So as you sit here today, are you able to testify as to whether the drywall was complete prior to the time you stopped working for APCO on [Manhattan West]?
>
> [Zitting's designee]: I can testify that the first layer, if you will, of drywall was complete and the only thing that was, to my knowledge, not complete was some soffits in the kitchens . . . So they were not done . . . And so there was some open soffits that they were
>
> still waiting for clarification or design on. And to my knowledge, that's the only thing that was not complete, in terms of drywall.

12 AA 2678.

When presented with documentation showing the drywall throughout Manhattan West was either incomplete or not started, Zitting's designee could not provide "any facts, documents, or information to rebut" the documentary evidence demonstrating the condition precedent had not been fulfilled:

> [APCO's counsel]: Continuing on to the next page [of the deposition exhibit], Building 9, it says, Corridors, drywall has not started. First floor corridor lid framing is 70 percent complete and then the drywall itself is shown as being 55 to 70 percent complete depending upon the building. My question to you is: Sitting here as the corporate designee for Zitting, do you have any facts, documents, or information to rebut these purported percentages of completion for the drywall on Buildings 8 and 9?
>
> [Zitting's designee]: I don't.

12 AA 2695 (discussing 12 AA 2751-2766).

Then, again contrary to his earlier declaration, Zitting's designee testified he had no knowledge as to whether Zitting's work was approved by Gemstone, another explicit precondition to payment:

> [APCO's counsel]: [The subcontract requires] . . . the approval and final acceptance of the building work by [Gemstone]. While you were working for APCO, did that occur, to your knowledge?
>
> [Zitting's designee]: I have no knowledge of that.

12 AA 2693.

As for the third precondition, APCO's receipt of final payment from Gemstone, Zitting testified:

> [APCO's counsel]: Okay. Next item is, receipt of final payment by [APCO] from [Gemstone]. Do you have any personal knowledge or information to suggest whether that occurred?
>
> [Zitting's designee]: I do not.

12 AA 2679.

As for the fourth precondition requiring Zitting to submit close-out documents for its scope of work—and again directly contrary to his earlier declaration testimony that Zitting "had submitted close-out documents for its scope of work, including as-built drawings and releases of claims," 8 AA 1850—Zitting's designee testified:

> [APCO's counsel]: [The subcontract requires] delivery to [APCO] from [Zitting], all as-built drawings for its scope of work,

and other closeout documents. Did Zitting ever satisfy that requirement?

[Zitting's designee]: I don't recall.

[APCO's counsel]: Do you know?

[Zitting's designee]: I don't recall.

[APCO's counsel]: Prior to today, have you seen any records in your file that would reflect the transmittal of that type of closeout documentation and as-builts?

[Zitting's designee]: Not that I recall.

12 AA 2679.

At the deposition, Zitting's designee also admitted that Zitting agreed to a change order payment schedule. 12 AA 2680. In fact, Zitting added the language confirming that it was required to have an "executed and approved change order" to receive payment for change orders if Gemstone did not pay APCO for the change order. 12 AA 2680 (discussing 9 AA 1921). Zitting's designee admitted the same in his deposition:

[APCO's counsel]: . . . [I]f I understand your testimony, your entitlement to a change order could be determined separate, apart from whether the owner paid APCO, if you had executed approved change orders?

[Zitting's designee]: That was my intention here.

12 AA 2679.

Zitting's designee then confirmed Zitting could not prove that APCO was paid for the change orders that Zitting submitted, or that it had "executed and approved change orders" for some change orders for which it sought payment:

> [APCO's counsel]: Okay -- do you have executed and approved change order forms from APCO on those [unpaid change order claims]?
>
> [Zitting's designee]: Not on all of them.
>
> . . .
>
> [APCO's counsel]: . . . [A]s the corporate designee, do you have any information, documentation, evidence to suggest that APCO was paid your retention that you're seeking in this action?
>
> [Zitting's designee]: Not that I know of.
>
> [APCO's counsel]: As you sit here today as the corporate designee, do you have any documents, facts, information to suggest that APCO received payment for the change orders you're seeking payment for in this action?
>
> [Zitting's designee]: Not that I know of.

12 AA 2681.

F. APCO FILES SUPPLEMENTAL BRIEFING AND SUPPLEMENTS ITS PRIOR INTERROGATORY ANSWERS FOLLOWING THE CONTRADICTORY TESTIMONY.

The critical contradictions and admissions revealed in Zitting's designee's deposition testimony demonstrated that Zitting was not entitled to payment from APCO and that there were further disputes over the material facts at issue in the lawsuit. As a result, on November 6, 2017, APCO filed supplemental briefing to

"account for the recent deposition testimony" of Zitting's designee and provided the district court further evidence of the material facts still in dispute. 12 AA 2628-2789.

The same day—despite the APCO's accounting designee's deposition testimony, 17 AA 3900-4013, and the affirmative defenses in APCO's answer, 4 AA 112-113—Zitting filed a motion in limine to limit APCO's defenses to the enforceability of the pay-if-paid provision in the subcontract. 11 AA 2434-2627. Zitting argued that, despite the binding admissions of its NRCP 30(b)(6) designee that directly contradicted Zitting's prior partial summary judgment affidavit, there was purportedly "no explanation" for APCO's decision to assert defenses based on the testimony of Zitting's designee. 11 AA 2434-2445. Zitting argued that APCO was required to supplement its prior interrogatory responses pursuant to NRCP 26(e)(2).[10] 11 AA 2443-2445.

The next day, and within the forty-five days of additional discovery allowed by the district court, APCO supplemented its prior interrogatory responses to

[10] NRCP 26(e)(2) requires that "[a] party who has . . . responded to a request for discovery . . . is under a duty to supplement or correct the . . . response to include information thereafter acquired" and that the party "is under a duty seasonably to amend a prior response to an interrogatory . . . , if the party learns that the response is in some material respect incomplete or incorrect *and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing*." (Emphasis added).

Zitting to confirm and underscore the defenses that APCO was able to magnify through Zitting's designee's deposition. 17 AA 3765-3817. Specifically, APCO supplemented interrogatories requesting the basis for APCO's defenses to the claims alleged by Zitting, providing, in part, the following response:

> Zitting's own NRCP 30(b)(6) witness admitted during deposition that the subcontract provisions were not complied with, e.g., but not limited to, the conditions precedent detailed in various subsections . . . of the subcontract between APCO and Zitting. With specific regard to retention, which APCO never held or received, Zitting admittedly failed to satisfy the preconditions to release of retention specified in paragraph 3.8 of the subcontract. . . .

17 AA 3770-3771; 17 AA 3786-3787.

Additionally, in opposing Zitting's motion in limine, APCO noted that Zitting had actual notice of APCO's additional defenses throughout the life of the case. 12 AA 2790-14 AA 3108. Specifically, APCO highlighted APCO's affirmative defenses when APCO answered Zitting's complaint eight years earlier, 12 AA 2791-2792; that, before Zitting moved for partial summary judgment, APCO's accounting designee testified about "[a]ll facts related to [APCO's] defenses against [Zitting]'s claims as alleged in the complaint," including Zitting's failure to meet conditions precedent to payment, 12 AA 2792-2797; that Zitting's work was not complete, as acknowledged by Zitting's designee during his deposition only weeks before, 12 AA 2797-2802; and that, within two weeks of

Zitting's designee's deposition, APCO supplemented its prior interrogatory responses to Zitting, 12 AA 2802-2803.

G. THE DISTRICT COURT'S ORDERS.

A week later, the district court held an abbreviated hearing on the pending motions and granted Zitting's motion for partial summary judgment awarding Zitting over $900,000 despite the numerous, documented factual disputes and the contradictory testimony of Zitting's NRCP 30(b)(6) designee. 14 AA 3239-3249. The district court concluded that the subcontract's pay-if-paid agreements are illegal and unenforceable as against public policy. 14 AA 3244-3245. The district court's order granting partial summary judgment also precluded APCO from asserting any defense besides APCO's pay-if-paid defense, despite Zitting having actual notice of all aspects of APCO's condition precedent defenses, because the district court concluded APCO did not "seasonably amend its prior interrogatory answers" pursuant to NRCP 26(e)(2). 14 AA 3246-3247. Finally, the district court concluded Zitting was a prevailing party under the subcontract and as a prevailing lien claimant under NRS 108.237(1) and was thus entitled to its attorney fees and costs. 14 AA 3247-3248.

APCO timely moved for reconsideration of the order granting partial summary judgment. 16 AA 3634-19 AA 4344. The district court denied APCO's motion for reconsideration, 19 AA 4474-4475, and APCO timely appealed the

order denying APCO's motion for reconsideration and the order granting partial summary judgment, 21 AA 4752-23 AA 5288. The district court then entered an order awarding Zitting its attorney fees and costs. 23 AA 5291-5293. APCO timely appealed that order as well. 23 AA 5305-25 AA 5871.

APCO then moved for NRCP 54(b) certification of the order granting Zitting partial summary judgment; the order denying APCO's motion for reconsideration; the order determining the amount of Zitting's attorney fees, costs, and prejudgment interest; and the judgment in favor of Zitting. 25 AA 5872-26 AA 6038. The district court granted that motion, and certified as final the orders and judgment. 26 AA 6052-6054. APCO timely appealed from that order, 26 AA 6034-29 AA 6854, and this appeal follows.

VIII. LEGAL ARGUMENT

A. SUMMARY OF ARGUMENT.

The district court erred in precluding APCO's affirmative defenses in limine and in ordering partial summary judgment. First, the district court erred in granting summary judgment as to Zitting's breach of contract claim because Zitting ignored the subcontract's agreed-upon payment schedule and failed to meet the agreed-upon conditions precedent to receiving payment and, thus, was not entitled to receive payment. Even if Zitting had met the conditions precedent, APCO never received those monies from Gemstone, and, thus, APCO was not

contractually obligated to provide them to Zitting. APCO's affirmative defenses involving these conditions precedent were known to Zitting throughout the litigation and, thus, the district court improperly excluded them. Zitting had fair notice and would not be prejudiced by conditions precedent defenses, and, thus, the district court should have allowed them to be tried by consent. At a minimum, Zitting's own contradictory testimony, when viewed in a light most favorable to the non-moving party, created a genuine issue of material fact that precluded summary judgment. Additionally, the district court erred in granting partial summary on Zitting's NRS 108 claim because a prime contractor with no ownership interest in a subject property cannot be personally liable for a deficiency judgment after the statutory foreclosure of that property. Further, because the district court erred in granting summary judgment on Zitting's claims, the district court erred in awarding Zitting attorney fees and costs. As a result, summary judgment was improper, and reversal is warranted.

B. THE DISTRICT COURT ERRED IN GRANTING PARTIAL SUMMARY JUDGMENT ON ZITTING'S BREACH OF CONTRACT CLAIM.

1. The district court erred in concluding the subcontract's payment preconditions were unenforceable and against public policy.

To begin, the district court erred in concluding the subcontract's payment preconditions were "void and unenforceable" or "against public policy" because

the district court applied an improper legal standard and, in so doing, failed to recognize that the subcontract's express payment schedules and owner-payment preconditions satisfy statutory requirements, and the subcontract's lack of a waiver of Zitting's mechanic's lien rights satisfies this Court's case-by-case test. 14 AA 3244. Instead, the district court's order incorporated faulty analysis from a prior order that leaned heavily on NRS 624.628(3)[11] and *Lehrer McGovern Bovis*

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[11] NRS 624.628(3) provides that

> [a] condition, stipulation or provision in an agreement [between a higher-tiered contractor and lower-tiered subcontractor] which:
>
> > (a) Requires a lower-tiered subcontractor to waive any rights [to payment as a lower-tiered subcontractor, as provided within the statute], inclusive, or which limits those rights;
> >
> > (b) Relieves a higher-tiered contractor of any obligation or liability imposed pursuant to [the relevant provisions of NRS 624]; or
> >
> > (c) Requires a lower-tiered subcontractor to waive, release or extinguish a claim or right for damages or an extension of time that the lower-tiered subcontractor may otherwise possess or acquire as a result of delay, acceleration, disruption or an impact event that is unreasonable under the circumstances, that was not within the contemplation of the parties at the time the agreement was entered into, or for which the lower-tiered subcontractor is not responsible,
>
> → is against public policy and is void and unenforceable.

v. Bullock Insulation, 124 Nev. 1102, 197 P.3d 1032 (2008), in concluding that the subcontract's pay-if-paid provisions were unenforceable. 14 AA 3244 (citing 14 AA 3250-3255). However, neither NRS 624.628(3) nor *Lehrer* provide support for the district court's conclusion. NRS 624.628(3) is inapplicable because the statute, when construed with the other controlling portions of NRS 624, allows for payment schedules containing owner-payment and other preconditions, while *Lehrer* is inapplicable because the subcontract contained no waiver or impairment of Zitting's mechanic's lien rights. Contrary to the district court's conclusions, the subcontract's payment schedule and preconditions were valid and enforceable but were not satisfied by Zitting, thus warranting reversal.

"Generally, the plaintiff has the burden to plead and prove that it fulfilled conditions precedent in order to recover on a breach of contract claim." *Clark County Sch. Dist. v. Richardson Constr., Inc.*, 123 Nev. 382, 395, 168 P.3d 87, 95 (2007). Certain conditions precedent—namely, pay-if-paid provisions—require closer judicial scrutiny. *Lehrer McGovern Bovis, Inc. v. Bullock Insulation, Inc.*, 124 Nev. 1102, 1118, 197 P.3d 1032, 1042 (2008). Indeed, pay-if-paid provisions are "enforceable only in limited circumstances and are subject to the restrictions laid out" in NRS 624.624 through NRS 624.628. *Id.*, 124 Nev. at 1118 n.50, 197 P.3d at 1042 n.50. The first of those restrictions allows for pay-if-paid provisions where the written agreement entered into between a higher-tiered

contractor and a lower-tiered subcontractor includes a schedule for payments as a precondition:

> [T]he higher-tiered contractor shall pay the lower-tiered subcontractor: (1) On or before the date payment is due; or (2) Within 10 days after the date the higher-tiered contractor receives payment for all or a portion of the work, materials or equipment described in a request for payment submitted by the lower-tiered subcontractor.

NRS 624.624(1)(a).

This provision allows payment schedules that are triggered after owner payment as a valid condition precedent to payment. *See Padilla Constr. Co. of Nevada v. Big-D Constr. Corp.*, Docket No. 67397, 2016 WL 6837851, at *2 (Order of Affirmance, Nov. 18 2016) (unpublished) ("Because the parties' subcontract contained a payment schedule that required that [subcontractor] be paid within ten days after [owner] accepted [subcontractor]'s work and paid [prime contractor] for that work and it is undisputed that [owner] never accepted [subcontractor]'s work and never paid [prime contractor] for [subcontractor]'s work, the district court correctly found that payment never became due to [subcontractor] under the subcontract or NRS 624.624(1)(a).")

On the other hand, a contractual provision between higher-tiered contractors and lower-tiered subcontractors may be "against public policy and[,] [thus] void and unenforceable" when the provision

> Requires a lower-tiered subcontractor to waive any rights [to payment, as provided within the statute], or which limits those rights; . . . [r]elieves a higher-tiered contractor of any obligation or liability [to pay, as provided within the statute]; or . . . [r]equires a lower-tiered subcontractor to waive, release or extinguish a claim or right for damages . . . that was not within the contemplation of the parties at the time the agreement was entered into, or for which the lower-tiered subcontractor is not responsible.

NRS 624.628(3).

Under this provision, a subcontract that contains both an explicit waiver of a subcontractor's right to place a mechanic's lien on the property *and* pay-if-paid provisions is unenforceable and against public policy. *Lehrer*, 124 Nev. at 1106, 197 P.3d at 1035.

Further, given the fact-intensive nature of reviewing contractual provisions and emphasizing that "not every lien waiver provision violates public policy," the Court requires trial courts review any purported mechanic's lien waiver and "engage in a public policy analysis particular to each lien waiver provision that the court is asked to enforce." *Lehrer*, 124 Nev. at 1117-1118, 197 P.3d at 1042. This "case-by-case" analysis should be undertaken with the understanding that pay-if-paid provisions are against public policy only when they effectively impair a subcontractor's right to place a mechanic's lien on the property. *Lehrer*, 124 Nev. at 1117-1118, 197 P.3d at 1042.

Here, the subcontract contained provisions requiring (1) payment from Gemstone to APCO, 9 AA 1921, and (2) a schedule of payments for both retention and change orders requiring APCO to be paid by Gemstone for Zitting's work before it had an obligation to pay Zitting, 9 AA 1921. It is undisputed that APCO did not receive payment from Gemstone for Zitting's work that Zitting now seeks to collect, 17 AA 3868-3869, and Zitting's designee admitted other preconditions were not met, 12 AA 2671-2701. Consistent with the plain text of NRS 624.624(1)(a)(2), and this Court's interpretation of that text, APCO's payment obligation to Zitting never became due. *See Padilla Constr. Co. of Nevada v. Big-D Constr. Corp.*, Docket No. 67397, 2016 WL 6837851, at *2 (Order of Affirmance, Nov. 18 2016) (unpublished).

The subcontract did not, however, contain any waiver or impairment of Zitting's mechanic's lien rights. 9 AA 1918-1950. Indeed, Zitting maintained such rights and liened the property, giving rise to this lawsuit. 4 AA 801-804. Thus, a proper "case-by-case analysis" of the contractual provisions at issue here reveals that the district court's reliance on *Lehrer* and NRS 624.628(3)—instead of NRS 624.624—to support its conclusion that the payment preconditions were void and unenforceable was fundamentally misplaced and, as a result, warrants

reversal.[12] *Holcomb Condo. Homeowners' Ass'n, Inc. v. Stewart Venture, LLC*, 129 Nev. 181, 184, 300 P.3d 124, 126 (2013) (reliance upon an inapplicable statute warrants reversal); *Auckenthaler v. Grundmeyer*, 110 Nev. 682, 690, 877 P.2d 1039, 1044 (1994) (reliance upon inapplicable case law warrants reversal).

2. The district court abused its discretion in granting the motion in limine pursuant to NRCP 26(e)(2) because Zitting had actual knowledge of APCO's condition precedent defenses throughout the life of the lawsuit.

The district court abused its discretion in granting the order in limine pursuant to NRCP 26(e)(2) because Zitting had actual knowledge of APCO's condition precedent defenses throughout the life of the lawsuit, as acknowledged by Zitting's pleadings, moving papers, deposition questions to APCO's designees, and the testimony of Zitting's designee.

Because "the rules of statutory interpretation apply to Nevada's Rules of Civil Procedure," this Court interprets rules of civil procedure by their plain meaning. *Logan v. Abe*, 131 Nev., Adv. Op. 31, 350 P.3d 1139, 1141–1142 (2015) (quoting *Webb v. Clark County School District*, 125 Nev. 611, 618, 218 P.3d 1239,

[12] Likewise, because the district court erred in concluding that the subcontract payment schedules were illegal under Nevada law, this Court should reverse the summary judgment, including the district court's award of attorney's fees and costs based upon that ruling. *See Mininni v. Wynn Las Vegas, LLC*, 126 Nev. 739, 367 P.3d 800 (2010) ("In light of our reversal of the summary judgment, the award of attorney fees must also be vacated.").

1244 (2009)). The plain meaning of NRCP 26(e)(2) mandates that a party must "seasonably" supplement prior interrogatory responses only "if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing."

Here, APCO had no duty to seasonably supplement because the information was made known to Zitting during the discovery process. Indeed, Zitting had actual knowledge of the conditions precedent defenses throughout the life of the case because the additional defenses were asserted as affirmative defenses when APCO answered Zitting's complaint eight years earlier, 5 AA 1106-1117; in response to questions from Zitting, APCO's accounting designee testified extensively about Zitting's payment schedule and APCO's conditions precedent defenses, 12 AA 2792-2797; because Zitting's scope of work—notably, the drywall—was not complete, as acknowledged by Zitting's designee during his deposition, 12 AA 2797-2802; and because Zitting's designee testified that Zitting did not submit its required close-out documents and releases required under the subcontract, 12 AA 2679. This "additional or corrective information" was "made known to [Zitting] during the discovery process," and, thus, NRCP 26(e)(2) was inapplicable.

Nonetheless, even if NRCP 26(e)(2) were to apply, APCO seasonably amended its interrogatory responses—APCO supplemented its prior interrogatory

responses within two weeks of taking Zitting's designee's deposition, which had been moved repeatedly on Zitting's request, *compare* 12 AA 2671, *with* 17 AA 3765—and, thus, APCO complied with NRCP 26(e)(2)'s duty to seasonably supplement.

In either respect, the district court abused its discretion by misapplying NRCP 26(e)(2) by granting the order in limine precluding APCO's condition precedent defenses and failing to consider those defenses in granting Zitting's motion for partial summary judgment. *See State v. Eighth Judicial Dist. Court (Armstrong)*, 127 Nev. 927, 931–932, 267 P.3d 777, 780 (2011) (providing that a manifest abuse of discretion occurs when a district court clearly misinterprets or misapplies a law or rule); *BMW v. Roth*, 127 Nev. 122, 133, 252 P.3d 649, 657 (2011) ("A district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law."). As a result, reversal is warranted.

3. The district court abused its discretion in not allowing the payment schedule and condition precedent defenses to be tried by consent.

In the alternative, the district court abused its discretion in precluding APCO's conditions precedent defenses pursuant to NRCP 15(b) because Zitting had fair notice of those defenses and would not be prejudiced by their admission; thus, the condition precedent defenses should have been allowed by consent. *See University & Cmty. Coll. Sys. v. Sutton*, 120 Nev. 972, 988, 103 P.3d 8, 19 (2004)

(reviwing a district court's denial of an NRCP 15(b) motion for an abuse of discretion).

"[A]n affirmative defense may be tried by consent or when fairness warrants consideration of the affirmative defense and the plaintiff will not be prejudiced by the district court's consideration of it." *Douglas Disposal, Inc. v. Wee Haul, LLC*, 123 Nev. 552, 558, 170 P.3d 508, 517 (2007) (affirming the district court's decision to consider affirmative defenses that were not included in defendants' answers because plaintiff had notice of them); *see also Schettler v. RalRon Capital Corp.*, 128 Nev. 209, 221 n.7, 275 P.3d 993, 941 n.7 (2012) (finding that fair notice of an affirmative defense was given on reconsideration and, thus, allowing the affirmative defense to be considered). Even if a party learns of an affirmative defense at a late stage of litigation, the affirmative defense may still be tried by consent if it does not prejudice the plaintiff. *Elliot v. Resnick*, 114 Nev. 25, 952 P.2d 961 (1998) (affirmative defense that was not raised in answer was tried by consent where plaintiff did not object when defendant raised issue in pretrial memorandum and presented evidence on issue at trial); *see also Mirage Casino-Hotel, LLC v. Eighth Judicial Dist. Court*, Docket No. 73770, 2018 WL 3625673, at *3 (Order Denying Petition for Writ of Mandamus, July 26, 2018) ("[W]e conclude that because [plaintiffs] had forty-eight days left for discovery when they learned of [defendants'] [affirmative] defense, the district court erred in finding

that [defendants] waived [that affirmative defense] . . . and that [plaintiffs] were prejudiced by [defendants'] assertion of [that defense]."). Notably, trial by consent under NRCP 15(b) does not require that the case actually progress to trial; the rule equally applies to pretrial motions. *Baughman & Turner, Inc. v. Jory*, 102 Nev. 582, 583, 729 P.2d 488, 489 (1986). When considering prejudice, a court should evaluate "the opposing party's ability to respond and its conduct of the case, not whether the amendment [could lead] to an unfavorable verdict." *W. Coast Paving, Inc. v. Engineered Structures, Inc.*, Docket No. 67877, 2016 WL 4082447, at *1 (Order of Affirmance, July 28, 2016) (citing *Jeong v. Minn. Mut. Life Ins. Co.*, 46 Fed. App'x. 448, 450 (9th Cir. 2002)).

Here, the district court abused its discretion in denying the payment schedule and condition precedent defenses' consideration because fairness warrants consideration of those defenses, which have been asserted throughout the life of the case. As noted above, Zitting has had notice and actual knowledge of these defenses for over a decade and, indeed, has submitted conflicting sworn testimony about these specific defenses at various points in the case. *Compare* 8 AA 1850 (affidavit stating conditions precedent were met), *with* 12 AA 2792-2797 (deposition testimony that conditions precedent were not met). Additionally, consideration of the conditions precedent defenses would not prejudice Zitting---indeed, because Zitting, as the plaintiff, "has the burden to plead and prove that it

fulfilled conditions precedent in order to recover on a breach of contract claim." *Clark County Sch. Dist.*, 123 Nev. at 395, 168 P.3d at 95. Zitting already has the burden of demonstrating the satisfaction of these conditions precedent before the district court and will, thus, have the ability to respond to the defenses. As a result, the district court abused its discretion in failing to allow APCO's condition precedent defenses to be considered by consent and, as a result, reversal is warranted.

4. The district court erred in its interpretation of the subcontract.

The district court also erred in its improper analysis of two important provisions of the subcontract upon which it relied in granting partial summary judgment: first, by determining that the conditions precedent only required "substantial performance" in order to be satisfied, 14 AA 3245 (citing *Laughlin Recreational Enterprises, Inc. v. Zab Dev. Co., Inc.*, 98 Nev. 285, 287, 646 P.2d 555, 557 (1982)); and, second, in concluding, contrary to the plain language of the subcontract, that Zitting was entitled to immediate payment of unbilled and undocumented retention and change order invoices upon APCO's termination of the prime contract, 14 AA 3245.

Contrary to the district court's conclusions, Nevada law requires "strict compliance"—not "substantial performance"—to satisfy contractual conditions

precedent. *MB Am., Inc. v. Alaska Pac. Leasing*, 132 Nev., Adv. Op. 8, 367 P.3d 1286, 1288 (2016). On this point, the district court's decision to apply the incorrect legal standard allowed for Zitting to meet a much lower burden than is imposed by Nevada law and, indeed, than Zitting agreed to be bound in the subcontract. *Compare Substantial-performance doctrine*, Black's Law Dictionary (10th ed. 2014) ("if a good-faith attempt to perform does not precisely meet the terms of an agreement or statutory requirements, the performance will still be considered complete if the essential purpose is accomplished"), *with MB Am., Inc.*, 132 Nev., Adv. Op. 8, 367 P.3d at 1288 (reasoning that because the contractual clause "was straightforward in stating that it was a condition precedent . . . [t]his required strict compliance with the provision"), *and* 9 AA 1919 ("[i]n consideration of the strict and complete and timely performance of all [s]ubcontract [w]ork," APCO and Zitting agree to the work and payment as described in the subcontract). Thus, the district court erred in applying the incorrect legal standard to Zitting's performance under the subcontract, and reversal is appropriate. *Staccato v. Valley Hosp.*, 123 Nev. 526, 528, 170 P.3d 503, 504 (2007) ("Because the district court's decision was based on an incorrect legal standard, we reverse its judgment and remand this matter.")

Additionally, the district court erred in its interpretation of the subcontract's provision regarding terminations for convenience because the district court's

interpretation contradicts the subcontract's plain terms and fails to recognize the integrated prime contract provisions. 14 AA 3245 (discussing 9 AA 1927). The starting point for the interpretation of any contract is the plain language of the contract. *See McDaniel v. Sierra Health and Life Ins. Co., Inc.*, 118 Nev. 596, 598-599, 53 P.3d 904, 906 (2002). When, as here, a contract's language is plain and unambiguous, the court "applies the contract as written." *Am. First Fed. Credit Union v. Soro*, 131 Nev., Adv. Op. 73, 359 P.3d 105, 106 (2015).

Here, by the subcontract's plain and unambiguous text, the section applies only to "terminations for convenience"—which the plain language of the prime contract defines as a "[t]ermination [b]y [Gemstone] [w]ithout [c]ause." 8 AA 1907. APCO's cessation of work on Manhattan West was neither a termination by Gemstone nor without cause—APCO stopped work because it was owed nearly $8,000,000, and, thus, the termination is not within the purview of the contractual provision cited by the district court. 17 AA 3869. Because the district court failed to interpret the subcontract according to its plain terms, reversal is warranted. *In re Amerco Derivative Litig.*, 127 Nev. 196, 212, 252 P.3d 681, 693 (2011).

Ultimately, however, that subcontractual provision is irrelevant because the subcontract was automatically assigned back to Gemstone upon APCO's termination pursuant to the prime contract. 8 AA 1909 (providing that in the event

of a termination of the prime contract, each subcontract "for a portion of the [w]ork is hereby assigned by [APCO] to [Gemstone]").[13] Because the subcontract was assigned back to Gemstone, the plain terms of the prime contract provide that Gemstone was obligated to "pay [Zitting] any undisputed amounts owed for any [w]ork completed by [Zitting], prior to the underlying termination for which [Gemstone] had not yet paid [APCO] prior to such underlying termination." 8 AA 1909. The district court failed to interpret these plain terms, and, again, reversal is warranted.

5. Zitting's contradictory testimony, when viewed in a light most favorable to APCO, created genuine issues of material fact precluding summary judgment.

At a minimum, the district court erred in granting summary judgment in favor of Zitting on its breach of contract claim because APCO submitted evidence establishing genuine factual disputes regarding whether Zitting satisfied the terms of the subcontract sufficient to warrant payment of the retention and progress payments.

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[13] The district court also concluded that this provision was to be interpreted "exclusive of the void pay-if-paid provisions." AA 3245. Because the pay-if-paid provisions in the subcontract are enforceable conditions precedent to payment under Nevada law, *see* NRS 624.624(1)(a); *Padilla Constr. Co.*, Docket No. 67397, 2016 WL 6837851, at *2, the district court again erred in this determination.

Summary judgment is only proper if, when viewed in the light most favorable to the non-moving party, "the pleadings and all other evidence on file demonstrate that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law." *Nevada Recycling & Salvage, Ltd. v. Reno Disposal Co., Inc.*, 134 Nev., Adv. Op. 55, 423 P.3d 605, 607 (2018). A fact is material "when it is relevant to an element of a claim or when its existence might affect the outcome." *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987). A factual dispute is genuine "when the evidence is such that a rational trier of fact could return a verdict for the nonmoving party." *Frederic & Barbara Rosenberg Living Tr. v. MacDonald Highlands Realty, LLC*, 134 Nev., Adv. Op. 69, 427 P.3d 104, 109 (2018) (citing *Wood v. Safeway, Inc.*, 121 Nev. 724, 731, 121 P.3d 1026, 1031 (2005)).

Here, when viewing the evidence most favorable to APCO, a litany of material factual disputes regarding elements of Zitting's breach of contract claim preclude summary judgment. First, contrary to the district court's findings that Zitting provided written change orders to APCO to which APCO failed to respond and that the change orders were "approved by operation of law," 14 AA 3244-3245, Zitting's designee testified that some change orders were completed after APCO left Manhattan West, while others were outright rejected by APCO. *See* 12 AA 2684 (Q. "Isn't it true, sir, that as the corporate representative for

Zitting today, that APCO . . . did reject some change order requests. Correct?" A. "It appeared that they had."); *see also* 12 AA 2682 (Zitting's designee admitting a document regarding change orders from September of 2008 demonstrates "Zitting employees doing change order work that was signed off by somebody with [Camco]" after APCO left Manhattan West).

This is material because it involves an essential element of Zitting's breach of contract claim—the performance of either party under the subcontract.[14] If APCO had rejected the change order requests, or if Zitting had not submitted the change orders while APCO was still the prime contractor, then Zitting did not perform the conditions precedent to payment under the subcontract and, thus, was not entitled to payment. *See* 9 AA 1921 (change order preconditions). Further, the dispute is genuine, because a reasonable jury could find that Zitting's failure to

[14] Breach of contract is "a material failure of performance of a duty arising under or imposed by agreement." *Bernard v. Rockhill Dev. Co.*, 103 Nev. 132, 135, 734 P.2d 1238, 1240 (1987). A breach of contract claim requires the plaintiff to show "(1) formation of a valid contract; (2) performance or excuse of performance by plaintiff; (3) material breach by the defendant; and (4) damages." *See Laguerre v. Nev. Sys. of Higher Educ.*, 837 F. Supp. 2d 1176, 1180 (D. Nev. 2011). However, "when contracting, a promisor may incorporate into the agreement a 'condition precedent'—that is, an event that must occur before the promisor becomes obligated to perform." *Cain v. Price*, 134 Nev., Adv. Op. 26, 415 P.3d 25, 28–29 (2018); *see also* Restatement (Second) of Contracts § 224 (1981). Nevada law requires "strict compliance" with conditions precedent. *MB Am., Inc. v. Alaska Pac. Leasing*, 132 Nev., Adv. Op. 8, 367 P.3d at 1288. Thus, Zitting's failure to "strict[ly] compl[y]" with conditions precedent of the subcontract would excuse APCO's alleged non-payment of the change order amounts.

meet these conditions precedent entitled APCO to verdict in its favor. The genuine dispute over this material fact, thus, precluded summary judgment, and the district court erred in granting it.

Next, contrary to the district court's finding that Zitting completed its scope of work on Buildings 8 and 9 "without any complaints on the timing or quality of the work," 14 AA 3241, APCO submitted authenticated photographs of Buildings 8 and 9 demonstrating the drywall was not complete at the time APCO left Manhattan West, 10 AA 2288-2302.[15] Again, this is material because it is relevant to whether Zitting completed the conditions precedent to payment under the subcontract. *See* 9 AA 1921 (the subcontract provision defining "[c]ompletion of the entire building" as a condition precedent to the release of retention payments, and specifying that a "[b]uilding is considered complete as soon as drywall is

[15] On this point, Zitting's motion for partial summary judgment represented that Zitting completed the drywall before APCO left the project in August 2008, which is why Zitting's motion sought the full amount of retention and change order payments against APCO. *See* 8 AA 1837 ("Zitting had requested payments of $347,441.67 for satisfactory work on owner-requested change order[s] before APCO left [Manhattan West]."). However, after Zitting's designee testified the change-order work was completed under Camco, 12 AA 2684, Zitting changed the language in the district court's order granting partial summary judgment to reflect that Zitting's work was completed in December, 2008 under Camco's direction. 14 AA 3241. This is important because Zitting's motion for partial summary judgment represented that the liability it was asking the district court to find against APCO was incurred while APCO was the prime contractor on Manhattan West, which was contrary to the evidence. 8 AA 1837; *see also* 10 AA 2313-2329 (Zitting invoices and applications directed to Camco).

completed"). And, again, the dispute is genuine because authenticated, photographic evidence demonstrating the drywall work was not completed pursuant to the subcontract could result in a verdict in APCO's favor. Summary judgment was inappropriate and should be reversed.

APCO cited admissible evidence, including the binding admissions of Zitting's designee, directly disputing material facts at the heart of Zitting's breach of contract claims. "Given the numerous factual disputes in this case . . . summary judgment was improper," *Wallis v. Spencer*, 202 F.3d 1126, 1145 (9th Cir. 2000), and this Court should reverse.

C. THE DISTRICT COURT ERRED IN GRANTING PARTIAL SUMMARY JUDGMENT ON ZITTING'S NRS 108 CLAIM.

The district court erred in holding APCO liable under NRS 108.239(12) for the deficiency judgment of a property in which it has no ownership interest because such a result runs directly contrary to the policy rationale behind mechanic's liens and the other statutory provisions within NRS 108.

Indeed, because "[t]he purpose of a mechanics' lien is to prevent unjust enrichment of a property owner at the expense of laborers or material suppliers," *Basic Modular Facilities, Inc. v. Ehsanipour*, 83 Cal. Rptr. 2d 462 (Cal. Ct. App. 4th 1999), the object of Nevada's "mechanics' lien statutes is to secure payment to those who perform labor or furnish material to improve the

property of the owner." *Lehrer McGovern Bovis, Inc. v. Bullock Insulation, Inc.*, 124 Nev. 1102, 1115, 197 P.3d 1032, 1041 (2008); *see also In re Fontainebleau Las Vegas Holdings*, 128 Nev. 556, 573-575, 289 P.3d 1199, 1210-1211 (2012) (providing history of mechanics' lien statutes). To this end, NRS 108.239(12) affords a party whose claim is not completely satisfied at a foreclosure sale the right to a "personal judgment for the residue against the party legally liable for the residue amount"—the property's owner. *See Hardy Companies, Inc. v. SNMARK, LLC*, 126 Nev. 528, 535-563, 245 P.3d 1149, 1154-1155 (2010) (describing statutory obligation imposed upon owners of property under NRS 108). Indeed, only in "cases where a prime contractor has been paid for the work, materials or equipment which are the subject of a [mechanic's lien]" is a prime contractor obligated to indemnify the owner. NRS 108.235(2).

Here, APCO did not own Manhattan West—Gemstone did. *See* 4 AA 801 (Zitting's lien identifying Gemstone as the owner). Thus, the subject of Zitting's mechanic's lien was not APCO but, rather, Gemstone's property, upon which both Zitting and APCO performed labor and for which Gemstone received value. *See* 4 AA 801 (providing that Zitting "claim a lien upon the [Manhattan West] property"). Because of this, NRS 108.239(12) is inapplicable—Zitting has a right to a personal judgment against Gemstone, not APCO, for the outstanding residue following Manhattan West's foreclosure sale. As a result, the district court erred in

holding APCO liable under NRS 108.239(12) for the deficiency judgment of a property in which it has no ownership interest.

Further, APCO was not paid for the work that is the subject of Zitting's mechanic's lien—to the contrary, Zitting's mechanic's lien concerns work performed on Manhattan West after APCO terminated its contract with Gemstone and had already stopped work on the project.[16] 17 AA 3869. Thus, given the lack of payment, APCO is not obligated to indemnify Gemstone for work performed upon Gemstone's land that is the subject of Zitting's mechanic's lien. NRS 108.235(2). The district court's order does exactly that—contrary to NRS 108.235(2), it requires APCO to become a guarantor of Gemstone's debt for which APCO was provided no benefit—and, as a result, this Court should reverse the order granting Zitting partial summary judgment.

IX. CONCLUSION

The district court erred in precluding APCO's affirmative defenses in limine and in ordering partial summary judgment. The district court erred in granting summary judgment as to Zitting's breach of contract claim because Zitting ignored

[16] Additionally, in signing the subcontract, Zitting "agree[d] to assume the same risk that [Gemstone] may become insolvent that [APCO] assumed by entering into" the prime contract, 9 AA 1920-1921, but, nonetheless, Zitting received a $900,000 benefit from Manhattan West while APCO lost nearly $8,000,000 on the project. 17 AA 3869.

the subcontract's agreed-upon payment schedule and failed to meet the agreed-upon conditions precedent to receiving payment and, thus, was not entitled to receive payment. Even if Zitting had met the conditions precedent, APCO never received those monies from Gemstone, and, thus, APCO was not contractually obligated to provide them to Zitting. APCO's affirmative defenses involving these conditions precedent were known to Zitting throughout the litigation and, thus, the district court improperly excluded them. Zitting had fair notice and would not be prejudiced by conditions precedent defenses and, thus, the district court should have allowed them to be tried by consent. At a minimum, Zitting's own contradictory testimony, when viewed in a light most favorable to the non-moving party, created a genuine issue of material fact that precluded summary judgment.

Additionally, the district court erred in granting partial summary on Zitting's NRS 108 claim because a prime contractor with no ownership interest in a subject property cannot be personally liable for a deficiency judgment after the statutory foreclosure of that property. Further, because the district court erred in granting summary judgment on Zitting's claims, the district court erred in awarding Zitting attorney fees and costs. As a result, APCO respectfully requests this Court reverse the district court's findings of fact, conclusions of law, and order granting Zitting's motion for partial summary judgment, entered on January 2, 2018, 14 AA 3239-3249, and certified as final under NRCP 54(b) on July 30, 2018, 26 AA 6052-

6054; the district court's order denying APCO's motion for reconsideration of the order granting Zitting's motion for partial summary judgment, entered on January 25, 2018, 19 AA 4474-4475; the district court's order determining the amount of Zitting's attorney fees, costs and prejudgment interest, entered on May 8, 2018, 23 AA 5291-5293; and the district court's order granting the motion in limine to limit the defenses of APCO to the enforceability of pay-if-paid provisions, entered on December 15, 2017, 14 AA 3250-3255.

Dated this 18th day of April, 2018.

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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 13,486 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 April, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing **APPELLANT'S OPENING BRIEF** was filed electronically with the Nevada Supreme Court on the 18th day of April, 2019. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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

/s/ Leah Dell
Leah Dell, an employee of
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EXHIBIT C

EXHIBIT C

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DISTRICT COURT

CLARK COUNTY, NEVADA

APCO CONSTRUCTION, a Nevada corporation, Plaintiff, v. GEMSTONE DEVELOPMENT WEST, INC., a Nevada corporation, Defendant.	Case No. : 08A571228 Supreme Ct. Case No.: 77320 Dept. No.: XIII **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER GRANTING FENNEMORE CRAIG, P.C.'S MOTION FOR DETERMINATION OF POTENTIAL CONFLICT** **Hearing Date: June 6, 2019** **Hearing Time: 9:00 a.m.**
AND ALL RELATED MATTERS.	Consolidated with: A574391; A574792; A577623; A583289; A587168; A580889; A584730; A589195; A595552; A597089; A592826; A589677; A596924; A584960; A608717; A608718; and A590319

On June 6, 2019, this Court heard Fennemore Craig, P.C.'s ("Fennemore Craig") Motion for Determination of Potential Attorney Conflict on an Order Shortening Time ("Motion"). Christopher H. Byrd of Fennemore Craig appeared at the hearing on behalf of Fennemore Craig and Jorge A. Ramirez and I-Che Lai of Wilson Elser Moskowitz Edelman & Dicker, LLC ("Wilson Elser") appeared for Zitting Brother's Construction, Inc. ("Zitting"). Having considered the Motion, Zitting's opposition, Helix Electric of Nevada, LLC's opposition and joinder to Zitting's opposition, Fennemore Craig's reply, the pleadings and papers filed in this case, and oral arguments of counsel, this Court makes the following findings of fact and conclusions of law:

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FINDINGS OF FACT

A. Manhattan West Mechanic's Lien Litigation

1. The litigation underlying the potential attorney conflict at issue in the Motion is known as the Manhattan West Mechanic's Lien Litigation ("Manhattan West Litigation"). The Manhattan West Litigation, which was initiated in 2008, has lasted for more than 10 years and has involved seventeen consolidated cases and nearly ninety parties. The current service list consists of more than 100 attorneys.

2. The Manhattan West Litigation has been the subject of multiple appeals and writ proceedings and has resulted in two published opinions.

3. The Manhattan West Litigation is a complex case.

4. This Court has presided over the Manhattan Lien Litigation since 2008.

5. Wilson Elser has represented Zitting in the Manhattan West Litigation since 2009.

6. Fennemore Craig represents APCO Construction ("APCO") in the Manhattan West Litigation.

7. The claims between Zitting and APCO and the claims of the remaining parties in the Manhattan West Litigation have been reduced to judgment and are now on appeal to the Nevada Supreme Court. The issues raised in this Motion are collateral to any issues presently on appeal.

B. Richard Dreitzer's Involvement in the Manhattan West Litigation

8. Richard Dreitzer was formerly a partner at Wilson Elser. Mr. Dreitzer left Wilson Elser in April 2019.

9. At all relevant times herein, Wilson Elser attorneys Jorge Ramirez and I-Che Lai had primary responsibility (as the Partner and Associate, respectively) for representing Zitting in the Manhattan West Litigation.

10. Mr. Dreitzer's involvement in the Manhattan West Litigation on behalf of Zitting was limited to the following:

a. Preparation for and defense of the deposition of Sam Zitting, the NRCP 30(b)(6) witness for Zitting. Mr. Dreitzer's preparation for defending this

deposition consisted of reviewing discovery responses, several conversations with Mr. Zitting, and a discussion of the case with Mr. Ramirez;

b. Discussion of a potential settlement offer with Mr. Zitting that was subsequently conveyed to and rejected by counsel for APCO;

c. Appearance at a mandatory pretrial conference;

d. Participation in an approximately fifteen-minute conversation between Mr. Ramirez and Mr. Lai on the general topic of strategies under consideration by Wilson Elser regarding negotiating a settlement with APCO; and

e. Being present at Wilson Elser partner lunches where the Manhattan West Litigation was discussed.

11. Mr. Dreitzer's billed work on the Manhattan West Litigation was limited to less than 12 total hours.

12. At no time did Mr Dreitzer direct how any of the work on the Zitting matter would be performed. Nor did he direct any of the strategy in the case, or which strategies would be implemented on Zitting's behalf.

13. At no time did Mr. Dreitzer have primary responsibility for the representation of Zitting in the Manhattan West Litigation.

14. Wilson Elser offered an in camera discussion of the exact input Mr. Dreitzer had in the Manhattan West Litigation, but the Court declined the request. The Court finds that the Declarations submitted to the Court were sufficient for the Court to determine Mr. Dreitzer's role in the representation of Zitting in the Manhattan West Litigation.

15. Mr. Dreitzer did not have a substantial role in the representation of Zitting in the Manhattan West Litigation, for purposes of the Nevada Rules of Professional Conduct (NRPC).

C. Richard Dreitzer's Offer to Join Fennemore Craig

16. Fennemore Craig has extended an offer for Mr. Dreitzer to join its firm. Mr. Dreitzer intends to join Fennemore Craig once the issue of the potential conflict in the Manhattan West Litigation is resolved.

17. Mr. Dreitzer requested a waiver of the conflict from Zitting after Fennemore Craig extended its offer to Mr. Dreitzer.

18. After receiving this request, Wilson Elser partner, Jorge Ramirez, represented he advised Zitting to seek advice from "independent counsel", who recommended that Zitting refuse to waive the conflict. This "independent counsel" was Reuben Cawley, a former partner at Wilson Elser and cousin to Mr. Zitting.

19. Upon Mr. Cawley's advice, Zitting refused to waive the conflict.

20. Fennemore Craig filed the Motion to determine whether NRPC 1.10(e) would apply if Mr. Dreitzer joins the firm, which would allow Fennemore Craig to continue its representation of APCO in the Manhattan West Litigation when Mr. Dreitzer joins the firm.

21. In support of the Motion, Fennemore Craig provided the Declaration of Timothy Berg, Esq., General Counsel for Fennemore Craig, outlining the screen that would be put in place if Mr. Dreitzer joins Fennemore Craig. Mr. Berg attested that Mr. Dreitzer would be screened as follows if he joins the firm:

a. The firm's Information Systems department would deprive Mr. Dreitzer of any electronic access to the to Manhattan West Litigation file;

b. A screening memo would be circulated to the entire law firm explaining the conflict and that Mr. Dreitzer is being screened from the Manhattan West Litigation matter, that the matter should not be discussed with Mr. Dreitzer, and that Mr. Dreitzer should not be given the client flies or other documents relating to the Manhattan West Litigation;

c. Mr. Dreitzer would be provided with a copy of screening memo, the screening memo would be explained to him, and Mr. Dreitzer would be required to sign a copy of the screening memo acknowledging that he has been screened from the Manhattan West Litigation matter;

d. Fennemore Craig would also provide a copy of the screening memo to Zitting and Wilson Elser.

19. Zitting contends that Mr. Dreitzer's presence at the Fennemore Craig firm would be prejudicial to their interests in this litigation, and has articulated certain general concerns to support this contention. In the Court's view, these concerns are unpersuasive. Zitting has articulated no specific facts to suggest that the screening procedure described by Fennemore Craig would be insufficient to protect Zitting's interests or would otherwise fail to satisfy the requirements of NRPC 1.10(e)(2).

20. The screening procedure described by Fennemore Craig is, therefore, sufficient to protect the interests of Zitting and satisfies the requirements of NRPC 1.10(e)(2).

CONCLUSIONS OF LAW

D. Jurisdiction and Justiciability

21. This Court has jurisdiction to hear and decide the Motion, which is collateral to and independent from any of the orders currently on appeal and does not in any way affect the merits of any of the pending appeals. *Mack–Manley v. Manley*, 122 Nev. 849, 855, 138 P.3d 525, 529-30 (2006).

22. The issue of Fennemore Craig's potential disqualification from its representation of APCO in the Manhattan West Litigation is properly brought before this Court. *Brown v. Eighth Judicial Dist. Court*, 116 Nev. 1200, 1205, 14 P.3d 1266, 1269 (2000) ("District courts are responsible for controlling the conduct of attorneys practicing before them").

23. The relief requested in the Motion is ripe for review by this Court. *Herbst Gaming, Inc. v. Heller*, 122 Nev. 877 (2006) (holding that in considering whether an issue is ripe the district court must weigh the following factors: "(1) the hardship to the parties of withholding judicial review, and (2) the suitability of the issues for review"). As to the first factor, the hardship to Fennemore Craig and Mr. Dreitzer will be considerable if this Court withholds its review of the potential attorney conflict issue raised in the Motion. Fennemore Craig will be forced to decide whether to associate Mr. Dreitzer and run the risk of being disqualified from representing its client, APCO, in this matter, or else not associate Mr. Dreitzer when this Court may in fact determine that NRPC 1.10(e) could apply, wrongfully depriving either Mr. Dreitzer of the employment of his choice or APCO of the attorney of its choice. As to the second factor, the

issue raised in the Motion is suitable for review because Mr. Dreitzer has left Wilson Elser, and the facts relevant to and necessary for this Court's consideration of the issue are fixed and fully available to the parties and the Court. *Eberle Design, Inc. v. Reno A & E*, 354 F. Supp. 2d 1093, 1094 (D. Ariz. 2005) (deciding a factually similar potential disqualification issue prior to an attorney joining a new law firm "[b]ecause the Court will be called upon to decide any disqualification motion that is filed as a result of this development and because Bryan Cave has sought the Court's guidance before Mr. Watts joins the firm this week").

24. Mr. Dreitzer testified that he intends to accept Fennemore Craig's offer if this Court determines that NRPC 1.10(e) applies in this case. The issue raised in the Motion is therefore not speculative.

NRPC 1.10(e)

25. NRPC 1.10(e) permits the screening of disqualified attorneys to prevent an associated law firms imputed disqualification where:

> (1) The personally disqualified lawyer did not have a substantial role in or primary responsibility for the matter that causes the disqualification under Rule 1.9;
> (2) The personally disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and
> (3) Written notice is promptly given to any affected former client to enable it to ascertain compliance with the provisions of this Rule.

See New Horizon Kids Quest III, Inc. v. Eighth Judicial Dist. Court, 392 P.3d 166, 169 (2017) ("Pursuant to RPC 1.10(a), an attorney's disqualification under RPC 1.9 is imputed to all other attorneys in that disqualified attorney's law firm. However, a disqualified attorney's law firm may nevertheless represent a client in certain circumstances if screening and notice procedures are followed" citing to NRPC 1.10(e)).

26. Mr. Ramirez and Mr. Lai had primary responsibility for Zitting's representation in the Manhattan West Litigation. Mr. Dreitzer did not have primary responsibility under NRPC 1.10(e)(1).

27. Given the size, length and complexity of the Manhattan West Litigation, Mr. Dreitzer's limited involvement in the matter does not rise to the level of a "substantial role" in the matter under NRPC 1.10(e)(1).

28. NRPC 1.0(l) defines "[s]ubstantial" as "denot[ing] a material matter of clear and weighty importance." Thus, under NRPC 1.10(e), in order to preclude Fennemore Craig from continuing its representation of APCO if Mr. Dreitzer were to join the Fennemore firm, Mr. Dreitzer's role in the Manhattan West Litigation would have to be deemed as having clear and weighty importance.

29. Yet, the facts of Mr. Dreitzer's involvement in the Manhattan West Litigation strongly suggest otherwise.

30. Zitting contends that the number of hours that Mr. Dreitzer worked on the Manhattan West Litigation is immaterial and that the Court's analysis needs to be "qualitative" rather than "quantitative". In the Court's view, Mr. Dreitzer's role in the Manhattan West Litigation was not substantial for purposes of NRPC 1.10(e)(1), from both a qualitative and quantitative standpoint.

31. It is undisputed that Mr. Dreitzer did not direct any of the work on the Manhattan West Litigation; he was not responsible for directing the strategy of the case; and he neither managed the case nor the client, Zitting.

32. Mr. Dreitzer's limited 12-hours of billable work on a matter that has been in litigation for over 10 years and has included nearly 90 parties does not rise to the level of "substantial" or "clear and weighty importance". *Eberle Design, Inc. v. Reno A & E*, 354 F. Supp. 2d 1093, 1097 (D. Ariz. 2005).

33. Given the number of law firms and attorneys that have worked on the Manhattan West Litigation, a finding that Mr. Dreitzer's limited involvement in the matter would improperly invade on a client's right to its choice of counsel and Mr. Dreitzer's right to choose his employment. *Ryan's Express v. Amador Stage Lines*, 128 Nev. 289, 295, 279 P.3d 166, 170 (2012).

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ORDER

THEREFORE, IT IS HEREBY ORDERED that Fennemore Craig's Motion is **GRANTED.**

IT IS FURTHER ORDERED that so long as the screening procedures outlined in Mr. Berg's declaration in support of the Motion are implemented, and written notice is promptly given to Zitting to enable it to ascertain compliance with the requirements of NRPC 1.10(e), as required by NRPC 1.10(e)(2) and (3), Fennemore Craig will not be disqualified under NRPC 1.10 from continuing its representation of APCO in the Manhattan West Litigation when Mr. Dreitzer joins Fennemore Craig.

IT IS SO ORDERED

Dated this 21st day of June, 2019.

DISTRICT COURT JUDGE

Respectfully submitted by:

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