

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

2 APCO CONSTRUCTION, INC., A
3 NEVADA CORPORATION; AND
4 SAFECO INSURANCE COMPANY
 OF AMERICA,

5 Appellants,

6 vs.

7 HELIX ELECTRIC OF NEVADA,
8 LLC, A NEVADA LIMITED
 LIABILITY COMPANY,

9 Respondent.

Case No. 80177

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Mar 19 2021 06:24 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

10 **APPEAL**

11 from the Eighth Judicial District Court, Clark County
12 The Honorable ELIZABETH GOFF GONZALEZ, District Judge
 District Court Case No. A-16-730091-B

13 Joint Appendix
14 Volume XXI

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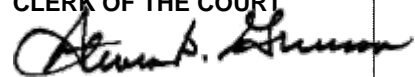
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1 **OPP**

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13 **DISTRICT COURT**

14 **CLARK COUNTY, NEVADA**

15 HELIX ELECTRIC OF NEVADA, LLC, a
16 Nevada limited liability company,

17 Plaintiff,

18 v.

19 APCO CONSTRUCTION, a Nevada
20 corporation; SAFECO INSURANCE
21 COMPANY OF AMERICA; DOES I through X;
22 and BOE BONDING COMPANIES, I through
23 X.

24 Defendants.

Case No.: A-16-730091-C

Dept. No.: XI

25 **DEFENDANTS' OPPOSITION TO MOTION**
26 **FOR ATTORNEYS' FEES, COSTS AND**
27 **INTEREST**

28 APCO Construction, Inc. and Safeco Insurance Company of America (collectively referred to as "APCO") hereby submit their Opposition to Helix Electric of Nevada, LLC's ("Helix") Motion for Attorneys' Fees, Costs and Interest.

Helix admits that despite the attorneys' fee clause, it is only entitled to a reasonable fee. The most critical *Brunzell* factors that undermine the current request is the result obtained and the work performed. In addition, an award of attorneys' fees pursuant to an express agreement is permitted if such an award is "not restrained by law". NRS 18.010(1). Helix's fee award is restrained by key events that Helix does not mention and is properly denied or significantly reduced.

///

1 This Opposition is supported by the following points and authorities, any exhibits attached
2 hereto and any oral argument the Court may entertain on the Motion.

3 DATED: September 12, 2019

4 **FENNEMORE CRAIG, P.C.**

5 /s/ John Randall Jeffries

6 John Randall Jefferies, Esq. (Bar No. 3512)

7 Brandi M. Planet, Esq. (Bar No. 11710)

8 *Attorneys for APCO Construction, Inc.*

9 *and Safeco Insurance Company of America*

1 MEMORANDUM OF POINTS AND AUTHORITIES

2 **I. INTRODUCTION**

3 Helix is not entitled to a significant award of attorneys' fees under *Brunzell*. APCO has
4 disputed Helix's request for \$138,000 in extended overhead costs since submission given the no
5 damage for delay clause and lack of support for the claimed costs. At no time in this entire
6 process has Helix provided the cost support for its claims. Given these continued deficiencies,
7 APCO necessarily had to mount an formidable defense that included necessary discovery and
8 motion practice to avoid further fees. While APCO's motions may not have been granted, this
9 does not mean the Helix's claims were meritorious. In fact, the Court agreed that Helix's recovery
10 was properly limited to only 33 percent of its total requested damages.

11 Had Helix been reasonable in evaluating its evidence and the time, effort and resources
12 expended, then this action would have been resolved long ago. From the very beginning, Helix
13 overvalued its claims, issuing a \$75,000 OOJ on August 16, 2016. **Exhibit A.** APCO rejected
14 this OOJ because, as found by the Court, Helix's job cost reporting clearly does not support even
15 this reduced demand. On December 18, 2018, APCO issued an OOJ for \$40,000, which Helix
16 rejected. **Exhibit B.** When considering these two factors, which Helix did not reference in its
17 application, and the result, Helix did not derive any material benefit over APCO's OOJ. So
18 Helix's motion for \$185,592.54 in attorneys' fees is properly denied or significantly reduced at the
19 Court's discretion to properly consider APCO's OOJ and the significantly reduced award.¹

20 **II. STATEMENT OF FACTS**

21 From the beginning, Helix overvalued its damages. When APCO requested documentation
22 that supported Helix's actual extended overhead costs, Helix could not provide accurate cost
23 records and only provided one page letters with estimates that this Court rejected. In fact, Helix
24 did not produce its full job cost report until approximately two days before the start of trial.

25 In order to defend against these specious claims, APCO filed motions to try and stave off
26 fees and costs, not to expand the litigation. Although the Court denied those motions for

27 _____
28 ¹ APCO is not disputing Helix's \$8,949.40 in costs.

1 procedural reasons, at no time prior to trial did the Court rule that Helix's claims were meritorious
2 or Helix was entitled to all of its claimed damages. In fact, the late disclosed job cost report
3 totally undermined the Helix's claims and confirmed APCO's reasonable objections to the claim.
4 This is why Helix only recovered 33 percent of its requested damages, even losing its motion for
5 reconsideration asking again for the full unsupported amount.

6 This case could have been resolved sooner if Helix had taken a more realistic look at its
7 claimed damages, which this Court valued at only \$43,992.39 and \$1,960.85 in interest under
8 NRS 338, which APCO never disputed. Even after this ruling, Helix still claimed that it was
9 entitled to the full \$138,151.40. The unreasonableness of Helix's current fee request is confirmed
10 by the Court's 66 percent reduction in the principle claims and proper consideration of APCO's
11 OOJ for \$40,000. Helix rejected this OOJ, but recovered just a few thousand more at trial at
12 significant and unreasonable time and expense to all parties. The Court should exercise its sound
13 discretion and deny the application or significantly reduce any fees awarded to reflect these
14 factors.

15 **III. LEGAL ARGUMENT**

16 **A. The contract language does not provide for an automatic fee award.**

17 While the subcontract includes an attorneys' fees provision, an award of all attorneys' fees
18 and costs is not automatic. If it was, then there would be no need for motion practice and the law
19 governing attorneys' fees would be meaningless. As Helix has admitted, it is only entitled to a
20 reasonable fee. The Court must still therefore analyze whether the award is justified under
21 *Brunzell* and other applicable case law. As set forth below, Helix is not entitled to recovery of
22 nearly \$200,000 in attorneys' fees on a \$43,992.39 recovery on these disputed claims.

23 **B. Helix's fees are unreasonable under *Brunzell*.**

24 Helix has accurately set forth the *Brunzell* factors in its application. The undersigned does
25 not question the capabilities or qualifications of Mr. Domina and his team. But APCO does
26 dispute those instances where Helix unnecessarily had multiple equally qualified people
27 performing the same task or attending the same proceedings.

28 ///

Helix further bears the burden of documenting the hours expended in the litigation and must submit evidence supporting those hours and the rates claimed. *See Hensley v. Eckerhart*, 461 U.S. 424, 433, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983). The Court must exclude from the fee request any hours that are “excessive, redundant, or otherwise unnecessary.” *Id.* at 434, 103 S.Ct. 1933. Where a requesting party fails to meet its burden, a court may reduce or deny the requested fees. *Id.* (holding that applicant should “maintain billing time records in a manner that will enable a reviewing court to identify distinct claims”). Helix is precluded from recovering for “excessive, redundant, or otherwise unnecessary” tasks. *Hensley* at 433.

There were several tasks Helix billed for that should be excluded under just this standard, including:

Date:	Task:	Hours:	Amount:	Basis for Exclusion:
12/9/15	RLP:...Conference with Cary regarding things to do	.1	35.00	“Cary” (hereinafter “Mr. Domina”) is an experienced and qualified attorney who is more than capable of knowing how to litigate a case. He certainly needs no instruction of vague “things to do.”
12/10/15	RLP:...give further direction to Cary regarding things to do	.2	70.00	Mr. Domina is an experienced and qualified attorney who is more than capable of knowing how to litigate a case. He certainly needs no instruction of vague “things to do.”
1/11/16	CBD: Receive, review and revise Complaint; Instruct secretary to file same	1.3	325.00	The time spent on this task is excessive. APCO cannot determine how much time Helix billed to receive a complaint or instruct a secretary to file a complaint. These are administrative tasks for which APCO should not have to pay for.
1/12/16	KAG: Prepare civil cover & IAFD; finalize complaint, cover and IAFD e-file	.4	50.00	These are administrative tasks.
2/8/16	RLP:...Telephone call with Cary regarding documents needed...	.2	70.00	Mr. Domina is an experienced attorney who does not need instruction regarding documents needed.

Date:	Task:	Hours:	Amount:	Basis for Exclusion:
2/29/16	RLP: Conference with Cary regarding outcome of conversation with attorney for Apco; advise Cary of thoughts concerning same; exchange emails with Victor	.3	105.00	APCO does not agree that it should be liable for basic inter-office communications where one attorney is getting another up-to-speed on basic issues. As an experienced attorney, Mr. Domina is qualified to handle this case without the monitoring of a more senior attorney.
5/10/16	CBD: Discussions with Mediator regarding extension to submit Mediation Brief.	.3	82.50	This is an administrative task. Further, .3 is an excessive amount of time to simply seek an extension.
5/13/16	CBD: Gather Exhibits...Discussions with Mediator regarding providing Biider [sic] of Brief and Exhibits.	4.9	1,347.50	These are administrative tasks. APCO also cannot determine how much time was spent completing these specific tasks, but this entry should be reduced accordingly.
6/23/16	LC: Write supplemental brief	5.2	520.00	The amount of time spent on a supplemental brief appears excessive. This entry should be reduced accordingly.
6/24/16	LC: Mediation supplemental brief revision	3.0	300.00	See above.
6/27/16	CBD: Receive and review draft of Supplemental Mediation Statement	1.2	330.00	See above. APCO should also not have to pay for an attorney receiving a draft of a brief drafted by a coworker.
6/28/16	CBD: Continue drafting supplemental mediation brief; Gather exhibits to include in the mediation statement	1.4	385.00	See above.
9/30/16	CBD: Multiple discussions with Victor and Cody regarding possible arbitrator; Discussions with Bill Turner regarding the same.	1.10	302.50	Arbitrator Bill Turner has a significant connection with Peel Brimley, including renting space from the firm. This rendered him too biased to serve as an arbitrator on the case. APCO did not learn about the connection for several weeks. APCO should therefore not have to pay for fees incurred for

Date:	Task:	Hours:	Amount:	Basis for Exclusion:
				someone who should have never been suggested as an arbitrator.
10/7/16	CBD: Discussions with APCO's attorney and Mediator Bill Turner regarding Early Arbitration Conference; send email to Victor regarding same	.3	82.50	All fees related to Arbitrator Bill Turner should be excluded.
10/7/16	CBD: Discussions with Bill Turner regarding Early Case Conference...	.2	55.00	All fees related to Arbitrator Bill Turner should be excluded.
10/13/16	CBD: Prepare for and participate in Early Case Arbitration Call with Arbitrator	.6	165.00	All fees related to Arbitrator Bill Turner should be excluded.
12/9/16	RLP: Conference with Cary regarding motion to dismiss and things to do.	.2	70.00	Mr. Domina is an experienced and qualified attorney who is more than capable of knowing how to litigate a case. He certainly needs no instruction of vague "things to do."
12/9/16	CBD: Conference call with Arbitrator, Bill Turner, regarding briefing deadline and hearing date on APCO's motions	.6	165.00	All fees related to Arbitrator Bill Turner should be excluded.
1/19/17	RLP: Review Bill Turner's disclosures; conference with Cary regarding same	.2	70.00	All fees related to Arbitrator Bill Turner should be excluded.
1/19/17	CBD: Receive, review and respond to email from Bill Turner regarding written stipulation acknowledging his ties with Peel Brimley and Marquis and Aurbach	.3	82.50	All fees related to Arbitrator Bill Turner should be excluded.
1/24/17	RLP: Conference with Cary regarding outcome of email exchange amount Bill Turner and counsel for APCO; telephone call with Victor regarding same	.3	105.00	All fees related to Arbitrator Bill Turner should be excluded.
1/24/17	CBD: Receive and review several emails regarding APCO's claim that the Arbitrator will be biased;	2.9	797.50	All fees related to Arbitrator Bill Turner should be excluded.

Date:	Task:	Hours:	Amount:	Basis for Exclusion:
	Discussions with APCO's counsel regarding issues with Arbitrator; Review voluminous emails from APCO's attorney and the Arbitrator			
1/31/17	CBD: Discussions with Cody regarding selection of new arbitrator	.2	55.00	All fees related to Arbitrator Bill Turner should be excluded.
5/16/17	CBD: Prepare for hearing in APCO's Motion to Dismiss...review relevant cases cited in all briefs; conduct additional research	6.4	1,760	Time spent re-reviewing cases that have already been reviewed in preparation of drafting an opposition or conducting new research for a hearing after a matter has been fully briefed is excessive.
9/7/17	TH: Receive e-mail from Litigation Services confirming deposition of September 8, 2017; confirm deposition going forward with Attorney Domina; Reply to Litigation Services confirming deposition going forward	.3	37.50	These are administrative tasks.
2/21/18	TH: Receive, review and revise Subpoena for Deposition	1.10	302.20	The amount of time spent on this task is excessive.
2/21/18	JDH: Review subpoenas from other cases to understand format and draft subpoena for NLV project manager, exchange emails with C. Domina regarding same	.7	157.50	APCO should not have to pay for someone who is learning how to do a basic task or conversations related to the same.
2/26/18	TH: Receive and process conformed Notice of Deposition; Receive and process conformed Deposition Subpoena; Reserve conference room; Telephone call with Dalos Court Reporting to reserve Court Reporter; E-mail to same confirming request	.5	62.50	These are administrative tasks.

Date:	Task:	Hours:	Amount:	Basis for Exclusion:
	for Court Reporter; File review			
4/6/18	TH: Receive and process Joemel Llamado's deposition transcript	.3	37.50	These are administrative tasks.
4/12/18	TH: Telephone calls to Archer Hotel and Meritage Hotel regarding conference room accommodations and room reservations	.5	62.50	These are administrative tasks.
6/27/18	RLP: Conference with Cary regarding outcome of his conversation with opposing counsel; conference with Cary and Eric regarding same	.5	175.00	As an experienced attorney, Mr. Domina is qualified to handle this case without the monitoring of a more senior attorney.
11/16/18	RLP: Conference with Cary regarding arguments to be made in response to APCO's Motion in Limine	.5	175.00	As an experienced attorney, Mr. Domina is qualified to handle this case without the monitoring of a more senior attorney.
1/8/19	CBD: Receive, review and revise Peremptory Challenge; Instruct secretary to file same	.5	137.50	The time spent on this task is excessive and includes administrative tasks.
1/10/19	CBD: Receive and review notice from Court that based on Peremptory Challenge, the Case has been reassigned to Judge Tierra Jones	.3	82.5	The time spent on this task is excessive.
1/10/19	TH: Receive and process Peremptory Challenge [<i>sic</i>]; Receive and process Notice of Department Reassignment; File review; Summarize same to Attorneys Domina and Holmes;	.4	50.00	The time spent on this task is excessive.
1/28/19	TH: Receive and respond to e-mail from Court Clerk requesting Business Court Cover Sheet; Prepare Business Court Cover Sheet; Submit same for filing; Receive	.3	37.50	These are administrative tasks.

Date:	Task:	Hours:	Amount:	Basis for Exclusion:
	and process Business Court Cover Sheet and Request for Transfer to Business Court; Receive and process Notice of Department Reassignment to Dept. 11; Summarize same to Attorney Domina			
5/24/19	AEA: Submit Pre-trial Memorandum to the court, email courtesy copy to Dpt. For review	.4	30.00	The time spent on this task is excessive and includes administrative tasks.
6/1/19	RON: Continue preparing for trial	9.10	2,047.50	APCO cannot determine what was actually being done by this person or why this person needed to be involved with trial preparation given that Mr. Domina was lead counsel and spent several hours preparing for trial.
6/2/19	RON: Continue preparing for trial	16.60	3,735	APCO cannot determine what was actually being done by this person or why this person needed to be involved with trial preparation given that Mr. Domina was lead counsel and spent several hours preparing for trial.
6/3/19	RON: Prepare for, travel and attend Day 1 of trial; prepare for Day 2 of trial	16.80	3,780	APCO cannot determine what was actually being done by this person or why this person needed to be involved with trial preparation given that Mr. Domina was lead counsel and spent several hours preparing for trial. APCO should also not have to pay for a second person's attendance at trial when Mr. Domina was lead counsel and handled the trial himself.
6/3/19	CJT: Prepare for and set up and attend first day of trial. Set up electronic equipment and run TrialDirector during direct and cross and assist as	10.25	1,153.13	APCO cannot determine why this person needed to be involved with trial preparation given that Mr. Domina was lead counsel and spent several hours preparing for trial.

Date:	Task:	Hours:	Amount:	Basis for Exclusion:
	necessary.			APCO should also not have to pay for excessive costs for optional administrative trial support.
6/4/19	RON: Prepaer [sic] for, travel and attend Day 2 of trial; prepare for Day 3 of trial	12.7	2,857.50	APCO cannot determine what was actually being done by this person or why this person needed to be involved with trial preparation given that Mr. Domina was lead counsel and spent several hours preparing for trial. APCO should also not have to pay for a second person's attendance at trial when Mr. Domina was lead counsel and handled the trial himself.
6/4/19	CJT: Prepare for and set up and attend second day of trial. Run TrialDirector during direct and cross and assist as necessary.	9.75	1,096.88	APCO cannot determine why this person needed to be involved with trial preparation given that Mr. Domina was lead counsel and spent several hours preparing for trial. APCO should also not have to pay for excessive costs for optional administrative trial support.
6/5/19	RON: Prepare for, travel to and attend Day 1 of trial	7.00	1,575.00	APCO cannot determine what was actually being done by this person or why this person needed to be involved with trial preparation given that Mr. Domina was lead counsel and spent several hours preparing for trial. APCO should also not have to pay for a second person's attendance at trial when Mr. Domina was lead counsel and handled the trial himself.
6/5/19	CJT: Prepare for and set up and attend last day of trial. Run TrialDirector during direct and cross and assist as necessary. Disassemble all electronic	10.5	1,181.24	APCO cannot determine why this person needed to be involved with trial preparation given that Mr. Domina was lead counsel and spent several hours preparing for trial.

Date:	Task:	Hours:	Amount:	Basis for Exclusion:
	equipment and pack up trial items and return to office			APCO should also not have to pay for excessive costs for optional administrative trial support.
TOTAL:			\$26,103.45	

Additionally, this was not a complex case, as confirmed by the limited evidence presented by both parties. The fact is APCO had been asking for cost support since Helix's initial notice of claim. APCO even issued two sets of requests for production requesting all accounting to support the claim on December 28, 2016 and October 13, 2017. **Exhibits C and D.** Helix never provided the requested documentation. This made it extremely difficult for APCO to properly evaluate the case. APCO was further prevented from issuing a supplemental offer of judgment based on the actual case documentation within the required 21 days before trial. In fact, the full job cost report was not provided until approximately two weeks before trial by order of the Court. This was the same information the Court relied on in significantly reducing Helix's recovery. This case could and should have been resolved without a trial had Helix properly evaluated its lack of proof.

The Court must also consider the difficulty of the work actually performed by the lawyer. This matter did not require an attorney with exceptional skill or unparalleled experience in order to provide effective representation. There were also few tasks that required more than one person to complete. And while APCO needed to file a number of motions in this case to address the lack of documentation supporting Helix's damages or to address the complete lack of preparation by Helix's 30(b)(6) representatives, these motions were attributable to Helix's conduct and not any different than standard motions filed in similar construction cases. This case should not have presented any difficulty for counsel.

The most important *Brunzell* factor is "the result: whether the attorney was successful and what benefits were derived." *Brunzell* at 349-350, 33. *Cf. Shuette v. Beazer Homes Holdings Corp.*, 121 Nev. 837, 864, 124 P.3d 530, 548-49 (2005) ("the method upon which a reasonable fee is determined is subject to the discretion of the court,' which 'is tempered only by reason and fairness.'") (internal citations omitted).

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1 Despite maintaining for years that it was owed more than \$138,000, Helix only recovered
2 33 percent of its claimed damages. Helix represents that it was awarded 100 percent of its other
3 costs except for its superintendent costs. That is not correct. The Court relied on Exhibit D5 in
4 calculating the award, which was a chart based on Helix's late produced job cost report, that
5 showed Helix's actual costs versus the excessive claimed costs. *See*, Findings of Fact and
6 Conclusions of Law on file at p. 17, fn. 5. This further shows that Helix was unreasonable in its
7 request for more than \$138,000.

8 Helix claims that the only reason this case made it to trial was because it defeated APCOs
9 motions. In reality, the only reason this case made it to trial (and the reason why motions were
10 filed) was because Helix consistently overvalued its claims, failed to prepare its witnesses to be
11 able to effectively testify as to damages, and never produced documentation that evidenced its
12 actual damages. Instead, Helix wanted APCO to pay excessive damages based on a phantom
13 billed amount—an amount this Court rejected.

14 Helix cannot ignore its own actions and lack of documentation, which APCO had been
15 requesting for years by the time this case made it to trial. The fees would have been significantly
16 lower or avoided altogether had Helix provided sufficient documentation or reasonably analyzed
17 its excessive demands. The benefit derived from trial does not support the recovery of nearly
18 \$200,000 for its attorneys' fees. Helix's request for attorney's fees should therefore be denied or
19 significantly reduced.

20 This is especially true given that Helix recovered just \$3,992.39 more than what APCO
21 offered six months before trial in its OOJ and significantly less than the \$60,000 APCO offered
22 just before trial. These considerations go directly to the results factor under *Brunzell*.

23 Helix maintained that it was owed an excessive amount of damages that was unsupported
24 by documentation since the inception of the case. The Court properly rejected Helix's evidence
25 given the award. To this day, Helix has never supported its claim for \$138,000, which is what all
26 the fees were spent chasing. With Helix only recovering a third of its damages, APCO's decision
27 to defend against the claims was entirely justified.

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1 Based on the work performed, the lack of difficulty and the result Helix obtained, “reason
2 and fairness” dictate that Helix’s fee request should be denied or significantly reduced.

3 **C. Helix’s request for interest should be reduced.**

4 Helix miscalculates the amount of interest it is entitled to by applying a rate of 7.5 percent
5 each year rather than the applicable rate for each year. Interest is properly calculated as follows:

- 6 • 10/03/2013 - 12/31/2013 \$ 569.49 (90 days at \$6.33/daily at 5.250%/year)
- 7 • 01/01/2014 - 06/30/2014 \$ 1,145.31 (181 days at \$6.33/daily at 5.250%/year)
- 8 • 7/01/2014 - 12/31/2014 \$ 1,164.29 (184 days at \$6.33/daily at 5.250%/year)
- 9 • 1/01/2015 - 06/30/2015 \$ 1,145.31 (181 days at \$6.33/daily at 5.250%/year)
- 10 • 07/01/2015 - 12/31/2015 \$ 1,164.29 (184 days at \$6.33/daily at 5.250%/year)
- 11 • 01/01/2016 - 06/30/2016 \$ 1,203.18 (182 days at \$6.61/daily at 5.500%/year)
- 12 • 07/01/2016 - 12/31/2016 \$ 1,216.40 (184 days at \$6.61/daily at 5.500%/year)
- 13 • 1/01/2017 - 06/30/2017 \$ 1,254.39 (181 days at \$6.93/daily at 5.750%/year)
- 14 • 07/01/2017 - 12/31/2017 \$ 1,386.06 (184 days at \$7.53/daily at 6.250%/year)
- 15 • 1/01/2018 - 06/30/2018 \$ 1,418.00 (181 days at \$7.83/daily at 6.500%/year)
- 16 • 07/01/2018 - 12/31/2018 \$ 1,552.39 (184 days at \$8.44/daily at 7.000%/year)
- 17 • 1/01/2019 - 06/30/2019 \$ 1,636.16 (181 days at \$9.04/daily at 7.500%/year)
- 18 • 07/01/2019 - 07/08/2019 \$ 72.32 (8 days at \$9.04/daily at 7.500%/year)

19 The interest should be no more than \$14,927.58 based on the application of the actual interest rates
20 for each year Helix claims it is owed interest.

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1 **IV. CONCLUSION**

2 Helix's failure to adequately prove it incurred the claimed damages and failure to prepare
3 PMK witnesses necessitated APCO's motions. Further, Helix only recovered 33 percent of its
4 damages—not a significant result. Therefore, Helix's request for its unreasonable fees should be
5 denied.

6 DATED: September 12, 2019

7 **FENNEMORE CRAIG, P.C.**

8 /s/ John Randall Jeffries

9 John Randall Jefferies, Esq. (Bar No. 3512)

10 Brandi M. Planet, Esq. (Bar No. 11710)

11 *Attorneys for APCO Construction, Inc.*

12 *and Safeco Insurance Company of America*

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that I am an employee of Fennemore Craig, P.C., and further certify that
3 the: was served by electronic filing via Odyssey File & Serve e-filing system and serving all parties
4 with an email address on record, pursuant to the Administrative Order 14-2 and Rule 9 N.E.F.C.

5 **Other Service Contacts:**

6 Amanda Armstrong aarmstrongatpeelbrimley.com
7 Cary B. Domina cdominaatpeelbrimley.com
8 Rosey Jeffrey rjeffreayatpeelbrimley.com
9 Terri Hansen thansenatpeelbrimley.com
10 Chelsie A. Adams cadamsatfclaw.com
11 Mary Bacon mbaconatspencerfane.com
12 Trista Day tdayatfclaw.com
13 Jeremy Holmes jholmesatpeelbrimley.com
14 Laura Hougard LHougardatfclaw.com
15 John Randy Jefferies rjefferiesatfclaw.com
16 Cheryl Landis clandisatfclaw.com
17 Adam Miller amilleratspencerfane.com
18 Brandi Planet bplanetatfclaw.com
19 Kassi Rife KRifeatfclaw.com

20 DATED: September 12, 2019.

21 /s/ Trista Day
22 An Employee of Fennemore Craig, P.C.
23
24
25
26
27
28

Exhibit A

PEEL BRIMLEY LLP
3333 E. SERENE AVENUE, STE. 200
HENDERSON, NEVADA 89074
(702) 990-7272 ♦ FAX (702) 990-7273

RICHARD L. PEEL ESQ.
Nevada Bar No. 4359
CARY B. DOMINA, ESQ.
Nevada Bar No. 10567
PEEL BRIMLEY LLP
3333 E. Serene Avenue, Suite 200
Henderson, Nevada 89074-6571
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Fax: (702) 990-7273
rpeel@peelbrimley.com
cdomina@peelbrimley.com
Attorneys for Plaintiff Helix Electric of Nevada, LLC

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY, NEVADA

HELIX ELECTRIC OF NEVADA, LLC, a Nevada limited liability company,

CASE NO.: A-16-730091-C
DEPT. NO.: XVII

Plaintiff,

ARBITRATION DEMAND MADE

vs.

OFFER OF JUDGMENT

APCO CONSTRUCTION, a Nevada corporation; SAFECO INSURANCE COMPANY OF AMERICA; DOES I through X; and BOE BONDING COMPANIES I through X,

Defendants.

TO: Defendants, APCO CONSTRUCTION, and SAFECO INSURANCE COMPANY OF AMERICA, and their attorneys, Marquis, Aurbach Coffing

FROM: Plaintiff, HELIX ELECTRIC OF NEVADA, LLC ("Helix"), by and through its attorneys, Peel Brimley LLP

PLEASE TAKE NOTICE that in accordance with NRCP 68 and the Uniform Arbitration Act of 2000 as adopted by NRS 38.206 through NRS 38.248, Plaintiff Helix Electric of Nevada, LLC ("Helix"), hereby offers to allow judgment to be taken in favor of Helix and against APCO CONSTRUCTION ("APCO") and SAFECO INSURANCE COMPANY OF AMERICA ("Safeco") in the amount of SEVENTY-FIVE THOUSAND DOLLARS AND NO/100 (\$75,000.00) ("Offer of Judgment"), in full and complete satisfaction of any and all known and

PEEL BRIMLEY LLP
3333 E. SERENE AVENUE, STE. 200
HENDERSON, NEVADA 89074
(702) 990-7272 ♦ FAX (702) 990-7273

1 unknown claims and causes of action (including all claims and causes of action for interest, costs
2 and attorneys' fees), arising out of or related to (i) those facts that are the subject matter of the
3 above captioned matter (whether before the district court or in arbitration), or (ii) the work,
4 materials or equipment (collectively, "Work") provided by Helix for the Project that is the subject
5 of this lawsuit and arbitration, brought or which could be brought by Helix against APCO and
6 Safeco, or by APCO and Safeco against Helix.

7
8 This Offer of Judgment (i) is made solely for the purposes intended by N.R.C.P. 68 and is
9 not to be construed as an admission of liability for any party hereto, and (ii) shall be open for a
10 period of ten (10) days from the date of service, after which time, if it has not been accepted, it shall
11 be considered rejected by APCO and Safeco, pursuant to NRCP 68.

12 DATED this 16 day of August, 2016.

13
14 **PEEL BRIMLEY LLP**

15
16 
17 RICHARD L. PEEL, ESQ.

18 Nevada Bar No. 4359

19 CARY B. DOMINA, ESQ.

20 Nevada Bar No. 10567

21 3333 E. Serene Avenue, Suite 200

22 Henderson, Nevada 89074-6571

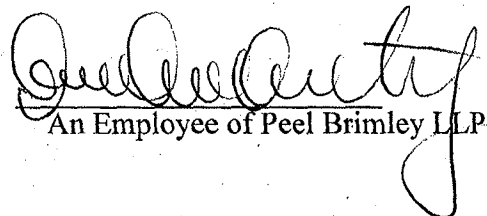
23 *Attorneys for Helix Electric of Nevada, LLC*
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CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of PEEL BRIMLEY LLP and that on this 16th day of August, 2016, I caused the above and foregoing document entitled **Arbitration Demand Made Offer of Judgment** to be served to the party(ies) and/or attorney(s) as follows:

- ☒ by placing same to be deposited for mailing in the United States Mail, in a sealed envelope upon which first class postage was prepaid in Las Vegas, Nevada to the parties identified below; and/or
- ☐ pursuant to NEFCR 9, upon all registered parties via the Court's electronic filing system;
- ☐ pursuant to EDCR 7.26, to be sent **via facsimile**;
- ☐ to be hand-delivered; and/or
- ☐ other _____

Cody S. Monteer, Esq.
MARQUIS AURBACH COFFING
10001 Park Run Dr.
Las Vegas, NV 89145
*Attorneys for APCO Construction and
SAFECO Insurance Company of America*


An Employee of Peel Brimley LLP

PEEL BRIMLEY LLP
3333 E. SERENE AVE., STE 200
HENDERSON, NEVADA 89074

Exhibit B

1 **OOJ**
SPENCER FANE LLP
2 John H. Mowbray, Esq. (Bar No. 1140)
John Randall Jefferies, Esq. (Bar No. 3512)
3 Mary E. Bacon, Esq. (Bar No. 12686)
300 S. Fourth Street, Suite 950
4 Las Vegas, NV 89101
Telephone: (702) 408-3411
5 Facsimile: (702) 408-3401
E-mail: RJefferies@spencerfane.com
6 MBacon@spencerfane.com
7 *Attorneys for Apco Construction, Inc.*
and *Safeco Insurance Company of America*

8
9
10 **DISTRICT COURT**
CLARK COUNTY, NEVADA

11 HELIX ELECTRIC OF NEVADA, LLC,
12 a Nevada limited liability company,

13 Plaintiff,

14 v.

15 APCO CONSTRUCTION, a Nevada
16 corporation; SAFECO INSURANCE
17 COMPANY OF AMERICA; DOES I
through X; and BOE BONDING
18 COMPANIES, I through
X, Defendants.

Case No.: A-16-730091-C
Dept. No.: XVII

OFFER OF JUDGMENT TO
HELIX ELECTRIC OF NEVADA, LLC

19
20 TO: HELIX ELECTRIC OF NEVADA, LLC

21 TO: Cary Domina, Esq. of PEEL BRIMLEY, its attorney.

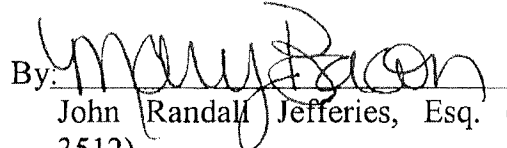
22 Pursuant to N.R.C.P. Rule 68 and NRS 117.115, Defendants, APCO
23 CONSTRUCTION, INC. and SAFECO INSURANCE COMPANY OF AMERICA,
24 hereby offers to allow judgment to be taken against them in this action in the total amount
25 of FORTY THOUSAND DOLLARS (\$40,000.00), inclusive of all interest accrued and
26 attorneys' fees incurred to date. This offer does not include taxable costs, which can be set

1 by the Court upon application by Helix Electric of Nevada, LLC ("Helix") upon
2 acceptance. This will resolve and include all claims and counts that Helix has or could
3 have asserted in this matter.

4
5 This Offer of Judgment is made for the purpose specified in N.R.C.P. Rule 68 and
6 N.R.S. 117.115 and is not an admission that APCO CONSTRUCTION, INC. or SAFECO
7 INSURANCE COMPANY OF AMERICA are in any way liable in this action.

8 DATED this 18th day of December, 2018.

9 **SPENCER FANE**

10 By: 
11 John Randall Jefferies, Esq. (Bar No.
12 3512)
13 Mary E. Bacon, Esq. (Bar No. 12686)
14 300 S. Fourth Street, Suite 950
15 Las Vegas, NV 89101
16 Telephone: (702) 408-3400
17 Facsimile: (702) 408-3401
18 *Attorneys for Apco Construction, Inc. and*
19 *Safeco Insurance Company of America*
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RECEIPT OF COPY

Receipt of Copy of the foregoing **OFFER OF JUDGMENT TO HELIX**
ELECTRIC OF NEVADA, LLC is hereby acknowledged on this 8 day of December,
2018.

PEEL BRIMLEY



Cary Doulina, Esq.
3333 E. Serene Avenue, Suite 200
Henderson, Nevada 89074-6571
Attorneys for Helix Electric of Nevada, LLC

Exhibit C

MARQUIS AURBACH COFFING

10001 Park Run Drive
Las Vegas, Nevada 89145
(702) 382-0711 FAX: (702) 382-5816

1 **Marquis Aurbach Coffing**
Avecc M. Higbee, Esq.
2 Nevada Bar No. 3739
Cody S. Mounteer, Esq.
3 Nevada Bar No. 11220
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4 Las Vegas, Nevada 89145
Telephone: (702) 382-0711
5 Facsimile: (702) 382-5816
ahigbee@maclaw.com
6 emounteer@maclaw.com
Attorneys for Defendants

7
8 **DISTRICT COURT**

9 **CLARK COUNTY, NEVADA**

10 HELIX ELECTRIC OF NEVADA, LLC, a
Nevada limited liability company,

11 Plaintiff,

12 vs.

13 APCO CONSTRUCTION, a Nevada
corporation; SAFECO INSURANCE
14 COMPANY OF AMERICA; DOES I through X;
and BOE BONDING COMPANIES, I through
15 X,

16 Defendants.

Case No.: A-16-730091-C
Dept. No.: XVII

(IN ARBITRATION)

17 **DEFENDANTS FIRST REQUEST FOR PRODUCTION OF DOCUMENTS AND**
18 **THINGS TO HELIX ELECTRIC OF NEVADA**

19 TO: Cary Domina, Esq. of Peel Brimley LLP, Attorney for HELIX ELECTRIC OF
20 NEVADA,

21 In accordance with NRCP 34, APCO Construction and Safeco Insurance Company of
22 America, by and through their attorneys, Marquis Aurbach Coffing, hereby requests that PEEL
23 BRIMLEY LLP respond in writing and under oath, and serve upon the undersigned counsel for
24 Defendants, within thirty (30) days of the date of service thereof, its' responses to the Requests
25 for Production of Documents and Things set forth below.

26 ...

27 ...

28 ...

INSTRUCTIONS AND DEFINITIONS

The following Instructions shall apply to each request:

1. The answer to each request for production shall include all knowledge as is within your possession, custody or control and/or in the possession, custody or control of your attorneys, agents, employees, investigators, and others acting on your behalf or under your direction or control and others associated with you.

2. You are required to disclose any matter or information, not privileged, which is relevant to the subject matters involved in this pending litigation, whether it relates to the claim or defenses of the parties seeking discovery or the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. The information sought need not be admissible at the trial to be required for disclosure.

3. When you are asked to identify a person, you must state that person's full name, present or last known address, present or last known position and business affiliation, and relationship of this person to you. If this person is a corporation, you shall set forth the State of its incorporation.

4. **Procedure for Claiming Limitation on Discovery:** If you contend that any document, communication or information which is requested is privileged or otherwise subject to protection, you shall make the claim expressly and shall describe the nature of the documents, communications or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to this litigation to assess the applicability of the privilege or protection.

The following Definitions shall apply to each request:

1. **"Person"** as used herein, or its plural or any synonym thereof, is intended to and shall mean any natural person or legal entity, including but not limited to any corporation, partnership, business trust, agency, joint venture, association, estate, trust, receiver, syndicate or any other group or combination acting as a unit or acting as a form of a legal entity,

1 governmental agency (whether Federal, State, local, or any agency of the government of a
2 foreign country), or any other entity.

3 2. **"You"** and **"Your"** used herein, its plural, or any synonym thereof, is intended to
4 and shall embrace and include, in addition to the party or parties to whom this Request for
5 Production of Documents is addressed, and, in addition, the counsel for such party or parties, all
6 agents, servants, employees, representatives, officers, directors, shareholders, and others who are
7 in possession of or who may obtain information for or on behalf of the party or parties to whom
8 this Request for Production of Documents is addressed.

9 3. **"Document"** and **"writing,"** as used herein, shall refer to any information
10 recorded on any tangible medium of expression, including all written, recorded or graphic
11 records of every kind or description however produced or reproduced whether in the form of a
12 draft, in final, original or reproduction, signed or unsigned, and regardless of whether approved,
13 sent, received, redrafted or executed, including but not limited to written communications,
14 letters, telegrams, correspondence, memoranda, notes, facsimiles, records, business records,
15 video recordings, photographs or films, microfiche or microfilms, tape or sound recordings,
16 transcripts or recordings, contracts, agreements, notations of telephone conversations or personal
17 conversations, diaries, calendars, desk calendars, reports, work sheets, computer records,
18 summaries, schedules, drawings, charts, graphs, blueprints, mylars, ozalids, minutes, forecasts,
19 appraisals, studies, computer programs or data, data compilations of any type or kind or material
20 similar to any of the foregoing however dominated and to whomever addressed. "Document"
21 shall not exclude exact duplicates when originals are available, but shall include all copies made
22 different from originals by virtue of any writings, notations, symbols, charters, impressions or
23 any marks thereon, or other graphic, symbolic, recorded or written material of any nature
24 whatsoever, along with all other data compilations from which information can be obtained and
25 all drafts and preliminary drafts thereof.

26 4. **"Project"** as used herein shall refer to the Craig Ranch Regional Park Phase II
27 project located in Clark County, Nevada.

28 ...

REQUESTS**REQUEST NO. 1:**

Please produce and identify all Agreements between You and APCO for any work you conducted at the Project.

REQUEST NO. 2:

Please produce and identify all documents that evidence work on the Project You assert You were not paid for.

REQUEST NO. 3:

Please produce and identify all documents where You demanded payment from APCO for any purported outstanding balance due.

REQUEST NO. 4:

Please produce and identify all accounting documents, including, but not limited to, all receipts, invoices and other related documents You claim support the damages asserted through Your causes of action.

REQUEST NO. 5:

Please produce and identify all documents that support Your allegation that APCO benefitted, or received payment, as a result of Your Work conducted at the Property.

REQUEST NO. 6:

Please produce and identify any documents that evidence the last day You performed the labor on the Project You assert You were not paid for.

REQUEST NO. 7:

Please produce and identify any documents that evidence the last day You furnished materials for the Project You assert You were not paid for.

REQUEST NO. 8:

Please produce all documents used in preparing the answers to the interrogatories concurrently served herewith, and identify the particular responsive interrogatory.

...

...

REQUEST NO. 9:

Please produce and identify all Your insurance policies, bonds, etc. that may be available to pay any portion of fees or judgment resulting against You from this action should You not be deemed a prevailing party under the APCO Agreement.

REQUEST NO. 10:

Please produce and identify any documents demonstrating Mr. Prietzel was qualified to act as a Superintendent during Your work on the Project.

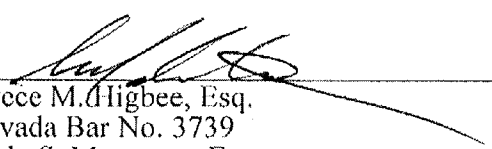
REQUEST NO. 11:

Please produce and identify all documents demonstrating the work You assert you were not paid for was not a part of the original scope under the Agreement.

Dated this 20th day of December, 2016.

MARQUIS AURBACH COFFING

By

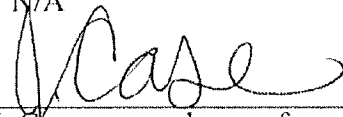

Avece M. Higbee, Esq.
Nevada Bar No. 3739
Cody S. Mounteer, Esq.
Nevada Bar No. 11220
10001 Park Run Drive
Las Vegas, Nevada 89145
Attorney(s) for Defendants

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **DEFENDANTS FIRST REQUEST FOR PRODUCTION OF DOCUMENTS AND THINGS TO HELIX ELECTRIC OF NEVADA** was submitted electronically for service with the Eighth Judicial District Court on the 29 day of December, 2016. Electronic service of the foregoing document shall be made in accordance with the E-Service List as follows:¹

Richard L. Peel, Esq.
Cary B. Domina, Esq.
Peel Brimley, LLP
3333 E. Serene Avenue, Suite 200
Henderson, Nevada 89074-6571
Email: aarmstrong@peelbrimley.com
Email: cdomina@peelbrimley.com
Email: rjeffrey@peelbrimley.com
Attorneys for Plaintiff

I further certify that I served a copy of this document by mailing a true and correct copy thereof, postage prepaid, addressed to:

N/A

J. Case, an employee of
Marquis Aurbach Coffing

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

Exhibit D

MARQUIS AURBACH COFFING

10001 Park Run Drive
Las Vegas, Nevada 89145
(702) 382-0711 FAX: (702) 382-5816

Marquis Aurbach Coffing

Avece M. Higbee, Esq.
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cmounteer@maclaw.com
kwilde@maclaw.com
Attorneys for Defendants

DISTRICT COURT

CLARK COUNTY, NEVADA

HELIX ELECTRIC OF NEVADA, LLC, a
Nevada limited liability company,

Plaintiff,

vs.

APCO CONSTRUCTION, a Nevada
corporation; SAFECO INSURANCE
COMPANY OF AMERICA; DOES I through X;
and BOE BONDING COMPANIES, I through
X,

Defendants.

Case No.: A-16-730091-C
Dept. No.: XVII

**DEFENDANTS' SECOND REQUEST FOR PRODUCTION OF DOCUMENTS AND
THINGS TO HELIX ELECTRIC OF NEVADA, LLC**

TO: Cary Domina, Esq., of Peel Brimley LLP, Attorney for HELIX ELECTRIC OF
NEVADA

In accordance with NRCP 34, Defendants, APCO Construction and Safeco Insurance
Company of America (collectively "Defendants"), by and through their attorneys, Marquis
Aurbach Coffing, hereby requests that Plaintiff, Helix Electric of Nevada, LLC ("Plaintiff")
respond in writing and under oath, and serve upon the undersigned counsel for Defendants,
within thirty (30) days of the date of service thereof, their responses to Defendants' Second
Requests for Production of Documents and Things set forth below.

INSTRUCTIONS AND DEFINITIONS

The following Instructions shall apply to each request:

1. The answer to each request for production shall include all knowledge as is within your possession, custody or control and/or in the possession, custody or control of your attorneys, agents, employees, investigators, and others acting on your behalf or under your direction or control and others associated with you.

2. You are required to disclose any matter or information, not privileged, which is relevant to the subject matters involved in this pending litigation, whether it relates to the claim or defenses of the parties seeking discovery or the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. The information sought need not be admissible at the trial to be required for disclosure.

3. When you are asked to identify a person, you must state that person's full name, present or last known address, present or last known position and business affiliation, and relationship of this person to you. If this person is a corporation, you shall set forth the State of its incorporation.

4. **Procedure for Claiming Limitation on Discovery:** If you contend that any document, communication or information which is requested is privileged or otherwise subject to protection, you shall make the claim expressly and shall describe the nature of the documents, communications or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to this litigation to assess the applicability of the privilege or protection.

The following Definitions shall apply to each request:

1. "Person" as used herein, or its plural or any synonym thereof, is intended to and shall mean any natural person or legal entity, including but not limited to any corporation, partnership, business trust, agency, joint venture, association, estate, trust, receiver, syndicate or any other group or combination acting as a unit or acting as a form of a legal entity,

1 governmental agency (whether Federal, State, local, or any agency of the government of a
2 foreign country), or any other entity.

3 2. "You" used herein, its plural, or any synonym thereof, is intended to and shall
4 embrace and include, in addition to the party or parties to whom this Request for Production of
5 Documents is addressed, and, in addition, the counsel for such party or parties, all agents,
6 servants, employees, representatives, officers, directors, shareholders, and others who are in
7 possession of or who may obtain information for or on behalf of the party or parties to whom this
8 Request for Production of Documents is addressed.

9 3. "Document" and "writing," as used herein, shall refer to any information recorded
10 on any tangible medium of expression, including all written, recorded or graphic records of every
11 kind or description however produced or reproduced whether in the form of a draft, in final,
12 original or reproduction, signed or unsigned, and regardless of whether approved, sent, received,
13 redrafted or executed, including but not limited to written communications, letters, telegrams,
14 correspondence, memoranda, notes, facsimiles, records, business records, video recordings,
15 photographs or films, microfiche or microfilms, tape or sound recordings, transcripts or
16 recordings, contracts, agreements, notations of telephone conversations or personal
17 conversations, diaries, calendars, desk calendars, reports, work sheets, computer records,
18 summaries, schedules, drawings, charts, graphs, blueprints, mylars, ozalids, minutes, forecasts,
19 appraisals, studies, computer programs or data, data compilations of any type or kind or material
20 similar to any of the foregoing however dominated and to whomever addressed. "Document"
21 shall not exclude exact duplicates when originals are available, but shall include all copies made
22 different from originals by virtue of any writings, notations, symbols, charters, impressions or
23 any marks thereon, or other graphic, symbolic, recorded or written material of any nature
24 whatsoever, along with all other data compilations from which information can be obtained and
25 all drafts and preliminary drafts thereof.

26 ///

27 ///

28 ///

REQUESTS

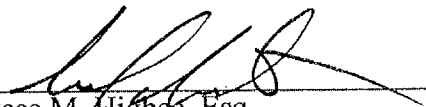
REQUEST NO. 12:

Please produce and identify all of Helix's accounting documents for the Craig Ranch Park, e.g., bids, invoices, payment requests, submissions, requests for payment, checks, lien releases, etc..

Dated this 13th day of October, 2017.

MARQUIS AURBACH COFFING

By


Avece M. Higbee, Esq.
Nevada Bar No. 3739
Cody S. Munteer, Esq.
Nevada Bar No. 11220
Kathleen A. Wilde, Esq.
Nevada Bar No. 12522
10001 Park Run Drive
Las Vegas, Nevada 89145
Attorneys for Defendants

CERTIFICATE OF SERVICE**I hereby certify that the foregoing DEFENDANTS' SECOND REQUEST FOR PRODUCTION OF DOCUMENTS AND THINGS TO HELIX ELECTRIC OF NEVADA,**

LLC was submitted electronically for service with the Eighth Judicial District Court on the 13th day of October, 2017. Electronic service of the foregoing document shall be made in accordance with the E-Service List as follows:¹

Peel Brimley LLP**Contact**

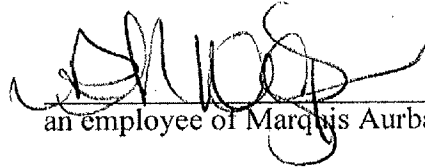
Amanda Armstrong
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thansen@peelbrimley.com

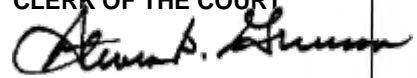
I further certify that I served a copy of this document by mailing a true and correct copy thereof, postage prepaid, addressed to:

N/A



an employee of Marquis Aurbach Coffing

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



1 **RIS**
2 CARY B. DOMINA, ESQ.
3 Nevada Bar No. 10567
4 RONALD J. COX, ESQ.
5 Nevada Bar No. 12723
6 JEREMY HOLMES, ESQ.
7 Nevada Bar No. 14379
8 **PEEL BRIMLEY LLP**
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14 rcox@peelbrimley.com
15 jholmes@peelbrimley.com
16 *Attorneys for Plaintiff*
17 *Helix Electric of Nevada, LLC*

10 **DISTRICT COURT**

11 **CLARK COUNTY, NEVADA**

12 HELIX ELECTRIC OF NEVADA, LLC, a Nevada
13 limited liability company,

14 Plaintiff,

15 vs.

16 APCO CONSTRUCTION, a Nevada corporation;
17 SAFECO INSURANCE COMPANY OF
18 AMERICA; DOES I through X; and BOE
19 BONDING COMPANIES I through X,

20 Defendants.

CASE NO. : A-16-730091-C
DEPT. NO. : XI

21 **HELIX ELECTRIC OF NEVADA, LLC'S REPLY IN SUPPORT OF ITS MOTION**
22 **FOR ATTORNEYS' FEES, COSTS AND INTEREST**

23 Hearing Date: September 30, 2019
24 Hearing Time: 9:00 a.m.

25 Plaintiff, HELIX ELECTRIC OF NEVADA, LLC ("Helix") by and through its attorneys
26 of record, the law firm of Peel Brimley, LLP, hereby files its Reply in Support of its Motion for
27 Attorney's Fees, Costs and Interest ("Motion") against Defendants APCO CONSTRUCTION
28 ("APCO") and Safeco Insurance Company of America ("Safeco") (collectively, "Defendants").

///

PEEL BRIMLEY LLP
3333 E. SERENE AVENUE, STE. 200
HENDERSON, NEVADA 89074
(702) 990-7272 ♦ FAX (702) 990-7273

1 This Reply is based on and supported by the following Memorandum of Points and
2 Authorities, all exhibits attached herein, the pleadings on file herein, and any oral argument this
3 Court may wish to entertain on this matter.

4 Dated this 23rd day of September, 2019.

6 **PEEL BRIMLEY LLP**

7 
8 CARY B. DOMINA, ESQ.
9 Nevada Bar No. 10567
10 RONALD J. COX, ESQ.
11 Nevada Bar No. 12723
12 JEREMY HOLMES, ESQ.
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20 Attorneys for Plaintiff
21 Helix Electric of Nevada, LLC
22
23
24
25
26
27
28

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

APCO's Opposition to Helix's Motion continues the problematic trend that has plagued APCO's post-trial motion practice; its arguments are largely based on fabricated rulings that this Court never made. While APCO continues to argue that Helix's job cost report was the nail in the coffin for Helix's claim and this Court rejected Helix's evidence presented at trial, such arguments are simply not true. Helix's claim was reduced, it is true, but its reduction was largely based on the recoverable period determined by the Court, not any argument raised by APCO or evidentiary deficiency of Helix's. APCO also argues that Helix's recovery of fees should be limited because it is unreasonable for attorneys to work together on a case, senior attorneys should never need to confer with one another, and tasks performed by support staff and paralegals should be excluded from any recovery. APCO does not cite any case law to support these arguments. Furthermore, APCO's reliance on its Offer of Judgment as a basis for reducing or denying Helix's request for fees ignores a key provision of Nevada Rule of Civil Procedure 68 which explains how a party determines if it beat such an Offer. Rather than beating APCO's Offer by several thousand, as APCO alleges, when using the correct calculation as required by statute Helix's recovery is more than triple APCO's Offer.

As a result of APCO's Opposition being unfounded legally, as well as factually, Helix should be awarded its requested attorneys' fees, costs, and interest in the amount of \$255,422.76.

II. STATEMENT OF FACTS

As explained in Helix's Motion, APCO has filed 8 motions¹ throughout the life of this case. APCO's Motion to Dismiss and for Fees and Costs was denied due to the plain language of the bond clearly stating the bond would stay in effect for two years, rather than the one-year limitation APCO inexplicably argued for APCO's Motion for Partial Summary Judgment was denied² due to the existence of questions of fact regarding Helix's notices of claim for payment to APCO and whether APCO could have brought Helix's claim into the negotiations it was participating in with

¹ Two of APCO's motions were briefed during Arbitration but the Arbitration fell apart prior to a decision being made.

² A true and correct copy of the Order Denying APCO's Motion to Dismiss and for Fees and Costs is attached hereto as **Exhibit 1**.

1 CNLV.³ APCO's Motions in Limine 1-2, which effectively sought summary judgment based on
2 the release and waiver this Court found to be unenforceable at trial, was deferred until the time of
3 trial.⁴ APCO's Motions in Limine 3-4, which again effectively sought summary judgment and
4 sought to prevent any and all evidence supporting Helix's claims from being introduced at trial,
5 was denied.⁵

6 Minutes before trial began, APCO's Motion to Exclude Testimony was denied entirely as
7 the Court completely disagreed with APCO's argument that an entity is required to produce former
8 employees as the entity's person most knowledgeable for a 30(b)(6) Deposition.⁶ Post-trial, both
9 Helix's and APCO's Motions for Clarification and/or Amendments to the Court's Findings of Fact
10 and Conclusions of Law were denied on their merits.⁷ None of these motions were denied due to
11 procedural reasons, and instead were all defeated based on the arguments raised in defense by
12 Helix.

13 On December 18, 2018, several months before trial, APCO served Helix with an Offer of
14 Judgment ("OOJ") in the amount of \$40,000.00, inclusive of attorney's fees and interest. Helix
15 did not accept APCO's OOJ. By December 18, 2018, Helix had already incurred \$73,882.50 in
16 attorney's fees. No other OOJ was received by Helix from APCO after this point.

17 **III. LEGAL ARGUMENT**

18 **A. Helix is Entitled to an Award of its Attorneys' Fees and Costs Pursuant to the** 19 **Language of Section 20.5 of the Subcontract**

20 Contrary to the assertions made by APCO in its Opposition, the language of Section 20.5
21 of the Subcontract does create an automatic fee award. Specifically, Section 20.5 reads as follows:
22 "In the event either party employs an attorney to institute or lawsuit . . . the prevailing party **shall**
23 **be entitled** to all costs, attorney's fees and any other reasonable expenses incurred therein."

24 ³ A true and correct copy of the Order Denying APCO's Motion for Partial Summary Judgment is attached hereto as
Exhibit 2.

25 ⁴ A true and correct copy of the Minute Order Deferring APCO's Motions in Limine 1-2 until the time of trial is
attached hereto as **Exhibit 3.**

26 ⁵ A true and correct copy of the Minute Order Denying APCO's Motions in Limine 3-4 is attached hereto as **Exhibit**
4.

27 ⁶ A true and correct copy of the Minute Order Denying APCO's Motion to Exclude Testimony is attached hereto as
Exhibit 5.

28 ⁷ A true and correct copy of the Minute Order Denying APCO's and Helix's Motions/Counter-motion for Clarification
and/or Amendment of the Court's Findings of Fact and Conclusions of Law is attached hereto as **Exhibit 6.**

(emphasis added). It is well established in Nevada that “the word “shall” is generally regarded as mandatory.” *Markowitz v. Saxon Special Servicing*, 129 Nev. 660, 665, 310 P.3d 569, 572 (2013); *see also Res. Grp., LLC as Tr. of E. Sunset Rd. Tr. v. Nevada Ass’n Servs., Inc.*, 135 Nev. Adv. Op. 8, 437 P.3d 154, 159 (2019) (“The use of the word “shall” denotes a lack of discretion.”). While APCO argues that such a provision could not be mandatory because it would render the law governing attorneys’ fees “meaningless,” such a position ignores the reality that sophisticated parties contract around generally applicable law and statutes frequently. In this case the award of attorney’s fees is governed by Section 20.5 of the Subcontract, and that entitlement is mandatory. Furthermore, it is worth noting that Section 20.5 states that the prevailing party is entitled to all costs and attorney’s fees, without limitation or further inquiry into whether the fees are “reasonable.”

B. Helix’s Attorneys’ Fees are Reasonable

1) *APCO’s objections to various billing entries of Helix’s counsel fail to establish why those entries should be reduced*

APCO acknowledges the qualifications of Helix’s Counsel but takes offense to various billing entries, which APCO has laid out in its Opposition. First, APCO objects to attorneys working together on how to approach a developing case, stating that an experienced attorney such as Mr. Domina has no need to consult with Mr. Richard Peel for several minutes about how to approach this case in December 2015 and on occasion over the next several years of litigation. *See Opposition*, at 5:12-19. There is nothing excessive or improper about attorneys working together to ensure they achieve the best possible result for their client, and the minimal amount of time spent doing so hardly justifies an objection from APCO.

Next, APCO objects to various amounts of time spent on tasks as excessive, such as a little over an hour reviewing the Complaint, (*Opposition*, at 5:19-23), a day spent by a law clerk drafting a mediation brief (at a reduced rate), (*Id.* at 6:13-16), or several hours being spent preparing for a hearing on a Motion to Dismiss, (*Id.* at 8:7-11). It is worth nothing that had Mr. Domina been forced to draft the entire mediation brief rather than having a law clerk spend nearly a day doing so, it would undoubtedly have been more expensive, as Mr. Domina’s rate is almost three times

1 higher than the \$100 per hour billed by the law clerk. As a result, this division of labor most likely
2 resulted in a reduced cost to Helix. Further, Helix is perplexed by APCO's argument that
3 conducting any research after briefing on a matter has concluded, but prior to the hearing, is
4 "excessive," especially when Helix was opposing the Motion and was researching issues raised in
5 APCO's Reply to which Helix had no opportunity to respond prior to the hearing. Given that Helix
6 was successful in defeating APCO's Motion to Dismiss, it would appear that this was time well
7 spent by Helix's counsel.

8 APCO also objects to what it calls "administrative tasks" throughout the course of the
9 litigation. APCO presents no argument as to why tasks performed by paralegals such as filing and
10 serving documents and other necessary tasks that assist the attorneys handling the case should be
11 viewed as unrecoverable. Nor does APCO present any legal authority for this position. Helix's
12 Counsel, as is the case with most, if not all, law firms, relies heavily upon its paralegals and support
13 staff to successfully represent its clients, and while these tasks are deemed "administrative," they
14 are fundamental to the proper handling and prosecution of a case.

15 APCO objects to an entry related to the drafting of a subpoena and alleges that it should
16 not be billed for "someone who is learning how to do a basic task." Opposition, at 8:19-22. This
17 entry was for an associate who had days before transferred to Peel Brimley and simply wished to
18 review and confirm the preferred subpoena format of his new firm, which took less than a minute
19 or two. Indeed, the bulk of the time spent on that entry was related to locating the proper individual
20 and ensuring the subpoena was properly addressed, as it took some time to come to Mr. Llamado
21 as the proper deponent for CNLV and it was critically important to obtain his testimony.

22 APCO also objects to several entries related to tasks performed in conjunction with the
23 Arbitration in this case while Bill Turner was serving as the arbitrator. Opposition, at 6:22-8:6.
24 APCO falsely alleges that Bill Turner hid a connection with Peel Brimley from APCO for "several
25 weeks" and that Mr. Turner "rent[ed] space from [Peel Brimley]" which rendered him too biased
26 to serve as arbitrator. *Id.*, at 6:22-27. Mr. Turner disclosed that he had connections with both Peel
27 Brimley and APCO's Counsel at the time, Marquis Aurbach Coffing, in September or October of
28 2016. It was not until late January 2017, about 30 days prior to the arbitration hearing, that APCO

1 developed its concern with Mr. Turner's connections to Peel Brimley, rather than the several weeks
2 that APCO states had passed. Indeed, APCO had even filed two motions with Mr. Turner prior to
3 abruptly demanding his recusal. Further, Mr. Turner never "rent[ed]" space from Peel Brimley,
4 but rather was allowed by Peel Brimley to use, free of charge, open conference rooms to conduct
5 Supreme Court settlement conferences two to three times a year. Mr. Turner also detailed
6 numerous connections with attorneys at Marquis Aurbach Coffing, including serving on some the
7 same arbitration panels as Mr. Aurbach himself. Nevertheless, APCO decided several months after
8 learning of these connections that Mr. Turner would be "too biased to serve as an arbitrator on the
9 case."

10 There is no basis for the preclusion of the fees incurred relating to that arbitration. Had
11 APCO objected to Mr. Turner's involvement when his connections with Peel Brimley were first
12 disclosed, these costs would have never been incurred. Instead, APCO waited until approximately
13 30 days prior to the arbitration hearing to suddenly have an issue with Mr. Turner, despite having
14 already filed motions to be decided by Mr. Turner. Helix believed at that time, and still does to
15 this day, that APCO's sudden concern about Mr. Turner several months into arbitration was
16 nothing more than a delay tactic. Regardless, APCO has presented no proper grounds upon which
17 Helix's billings related to Mr. Turner should be excluded.

18 Lastly, APCO inexplicably objects to the time spent by one of Helix's trial counsel in
19 preparing for trial as unnecessary as well as the time spent by Mr. Tertipes providing exhibit
20 support through Trial Director at trial for all parties. APCO correctly points out that Mr. Domina
21 was lead trial counsel for Helix, but Mr. Cox handled the questioning of several witnesses as well
22 as taking on an enormous number of duties during preparation for trial. While APCO presented
23 only one witness at trial, Helix called five witnesses and expecting Mr. Domina alone to prepare
24 for and question every witness and single-handedly prepare for a trial involving this many issues
25 is simply unrealistic. It is common within the legal industry for there to be two or three attorneys
26 involved in a case during trial. Notably, Helix had a third associate involved in the trial, but other
27 than arguing a pretrial motion, did not attempt to charge his time. With respect to the charges for
28 Mr. Tertipes' time, he was the person who operated the Trial Director program that allowed for

1 seamless transitions between exhibits, saving the parties and the Court a significant amount of
2 time. While the use of Trial Director may not in the literal sense of the word be “necessary,” the
3 convenience and amount of time and frustration spared on behalf of all parties is undeniable.
4 Further, outside of alleging these costs are excessive, APCO has provided no support for the
5 position that these costs are unrecoverable.

6 **2) *Helix’s fees are reasonable given the extent and difficulty of the work***

7 APCO moves on to argue that Helix’s fees are excessive because this case was not complex
8 and “should not have presented any difficulty for counsel.” Opposition, at 12:21-22. Helix finds it
9 interesting that APCO believes that Helix defeating all of APCO’s dispositive motions and
10 prevailing at trial should have been easy for Helix’s counsel. If, as APCO claims, it should have
11 been easy for Helix to defeat APCO’s Motions and prevail at trial, why did APCO file so many of
12 them and decide not to offer a reasonable amount to settle this case? APCO’s decision to file
13 multiple motions that were entirely defeated and “should not have presented any difficulty for
14 counsel” are a major component in the amount of fees Helix seeks against APCO. Similarly, while
15 APCO argues that it was Helix’s conduct that forced APCO to file these motions, the fact that they
16 were all denied paints a clear picture that these motions, and APCO’s complaints, were
17 unsubstantiated.

18 APCO also circles back to their complaints regarding Helix not producing its full job cost
19 report until ordered by this Court to do so and argues that the absence of this document prejudiced
20 APCO. This document was never requested specifically by APCO until long after discovery had
21 closed and was not produced initially because it had no relevance to Helix’s claim. As has been
22 discussed at length in previous motion practice, Helix’s costs for the beginning of the Project
23 simply do not matter when determining the costs Helix incurred for extended general conditions.
24 APCO also argues that Helix’s full job cost report “was the same information the Court relied on
25 in reducing Helix’s recovery.” Opposition, at 12:12-13. Similar to many other arguments and
26 assertions made by APCO in its post-trial briefing, this is a total fabrication and misrepresentation
27 of this Court’s findings. At no point in the Court’s findings related to Helix’s award is the job cost
28 report even mentioned. Instead, this Court significantly reduced Helix’s award solely due to the

1 compensable period agreed to between CNLV and APCO and the Court's belief that Mr. Prietzel's
2 time was not compensable as he was the only Helix employee on site at the time in question. FFCL,
3 at ¶¶ 115, 116. Neither of these bases for the reduction of Helix's award involve the full job cost
4 report, or the shortened version initially provided in this case, in any way. Once more, APCO
5 makes a blatantly false assertion with no citation to the record and no plausible good-faith basis to
6 make such a statement.

7 3) *Helix's fees are reasonable given the results obtained at trial and the*
8 *Court should disregard APCO's repeated false assertions regarding this*
9 *Court's findings*

10 In its Motion, Helix asserted that it was awarded 100-percent of its billed costs minus the
11 Superintendent line item for the recoverable period as determined by the Court. APCO argues that
12 this is not correct and directs the Court's attention to a footnote that shows the total amounts
13 awarded for each month of the recoverable period and that the Court instead relied upon the
14 amounts argued by APCO in Exhibit D5. APCO fails to realize that by looking at Exhibit D5 and
15 removing the Superintendent line item from each of the "Helix Bill" columns, the result is the
16 exact amount awarded by the Court for each of these months. Helix fails to understand how APCO
17 can genuinely argue that the Court instead relied upon APCO's numbers when the amounts
18 awarded by the Court do not even match the amounts APCO argued Helix was entitled to.

19 APCO then falsely alleges that this Court "rejected Helix's evidence" despite the Court
20 awarding Helix the entirety of its claimed amounts for the recoverable period except for Prietzel's
21 time. Opposition, at 13:24-25. Notably, the Court's rejection of Prietzel's time was not based on
22 the rejection of any evidence, but rather the fact that Prietzel was the sole Helix employee on the
23 Project for those periods. Indeed, in stark contrast to the alleged rejection of Helix's evidence, this
24 Court held "Helix has supported its claim for certain additional costs," when awarding Helix for
25 all of its costs minus Prietzel's time. FFCL, at ¶ 116. APCO made similar false arguments in its
26 Motion for Clarification and its Reply which Helix pointed out at that time to be completely
27 frivolous.

28 ///

///

1 In the end, the major blow to Helix's claim was not the result of any arguments advanced
2 by APCO or any lack of evidence, but by this Court's decision to limit Helix's recovery to the
3 same compensable period APCO agreed to in its negotiations with CNLV. At no point in this
4 Court's decision did the Court agree with any of the arguments or challenges raised by APCO at
5 trial outside of limiting Prietzel's time. In fact, had Helix been allowed to recover for the full period
6 of its extended time on the Project, Helix would have been awarded \$96,150.35 based on the same
7 principles the Court used to reach the \$43,992.39 amount actually awarded. APCO's repeated
8 assertions that it defeated Helix's evidence and exposed the weaknesses of its claim are completely
9 without merit.

10 Regarding the OOJ made by APCO for \$40,000.00 on December 18, 2018, APCO claims
11 that Helix only beat this OOJ by \$3,992.39, despite Helix's total award being \$45,953.24.
12 Regardless, pursuant to NRCP 68(g), in determining whether the offeree obtained a more favorable
13 judgment, the amount of fees, costs, and interest incurred up until the date of the offer must be
14 added to the principal amount of the judgment unless excluded by the terms of the offer. In this
15 case, APCO's OOJ included attorney's fees and interest, but not taxable costs.⁸ By the time of
16 APCO's OOJ, Helix had already incurred \$73,882.50⁹ in attorney's fees, which must be added to
17 the \$45,953.24 awarded at trial. In addition, interest in the amount of \$13,109.39 would have
18 accrued by the time of APCO's OOJ on the amount Helix was awarded. In total, this brings the
19 amount used to determine if Helix beat APCO's OOJ to \$132,945.13. Rather than barely
20 surpassing the OOJ as argued by APCO, Helix more than tripled it. As such, APCO's arguments
21 related to its \$40,000 OOJ are meritless. While APCO also argues that it made a \$60,000 offer
22 prior to trial, Helix has no record of ever receiving a \$60,000 offer whether written or verbal. Even
23 if it had, when the proper attorneys' fees and interest calculation is added, by that point in time
24 Helix would have been even further north of the \$132,945.13 figure based on the December 18,
25 2018 date.

26 ///

27 ⁸ See **Exhibit B** to APCO's Opposition.

28 ⁹ A true and correct copy of Peel Brimley's Client Ledger for Helix through December 18, 2018 is attached hereto as **Exhibit 7**.

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C. Helix is Entitled to \$14,927.58 in Interest

After being brought to Helix's attention in APCO's Opposition, Helix recognizes that it based its interest calculation off of the method used in a different statute, leading it to incorrectly claim entitlement to \$19,029.20 in interest. The proper amount using the correct calculation, as demonstrated in APCO's Opposition, is \$14,927.58.

IV. CONCLUSION

Pursuant to Section 20.5 of the Subcontract, in addition to the principal award of \$45,953.24, Helix is entitled to recover all of its attorney's fees and costs, as well as interest as allowed by this Court. Helix is entitled to \$185,592.54 in attorneys' fees, \$8,949.40 in costs, and \$14,927.58 in interest, for a total of **\$255,422.76.**

Dated this 23rd day of September, 2019.

PEEL BRIMLEY LLP

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Helix Electric of Nevada, LLC

CERTIFICATE OF SERVICE

Pursuant to Nev. R. Civ. P. 5(b), I certify that I am an employee of **PEEL BRIMLEY, LLP**, and that on this 23rd day of September, 2019, I caused the above and foregoing document, **HELIX ELECTRIC OF NEVADA, LLC'S REPLY IN SUPPORT OF ITS MOTION FOR ATTORNEYS' FEES, COSTS AND INTEREST**, to be served as follows:

- ☐ by placing same to be deposited for mailing in the United States Mail, in a sealed envelope upon which first class postage was prepaid in Las Vegas, Nevada; and/or
- ☒ pursuant to NEFCR 9, upon all registered parties via the Court's electronic filing system;
- ☐ pursuant to EDCR 7.26, to be sent **via facsimile**;
- ☐ to be hand-delivered; and/or
- ☐ other _____

to the attorney(s) and/or party(ies) listed below at the address and/or facsimile number indicated below:

Attorneys for APCO Construction and Safeco Insurance Co.

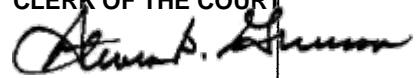
John Randall Jefferies, Esq. (rjefferies@fclaw.com)

Brandi M. Planet, Esq. (bplanet@fclaw.com)



An employee of **PEEL BRIMLEY, LLP**

EXHIBIT 1



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7 *Attorneys for Helix Electric of Nevada, LLC*

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

10 HELIX ELECTRIC OF NEVADA, LLC, a
Nevada limited liability company,

11 Plaintiff,

12 vs.

13 APCO CONSTRUCTION, a Nevada
corporation; SAFECO INSURANCE
14 COMPANY OF AMERICA; DOES I through
X; and BOE BONDING COMPANIES I
15 through X,

16 Defendants.

CASE NO.: A-16-730091-C
DEPT. NO.: XVII

ORDER DENYING:

- (I) MOTION TO DISMISS; AND
(II) MOTION FOR FEES AND
COSTS

17
18 This matter came on for hearing May 17, 2017 before the Honorable Michael Villani in
19 Dept. 16 on Defendant's Motion to Dismiss Plaintiff's Claims Against Bond and
20 Countermotion for Fees and Costs of Motion. Cary B. Domina, Esq. of PEEL BRIMLEY LLP
21 appeared on behalf of Plaintiff, HELIX ELECTRIC OF NEVADA ("Helix" or "Plaintiff") and
22 Cody Munteer of MARQUIS AURBACH COFFING appeared on behalf of Defendants
23 APCO Construction and Safeco Insurance Company of America.

24 The Court having considered all of the pleadings and papers on file, and after review of
25 the pleadings on file and oral argument by counsel, this COURT DEFERRED its decision on
26 this matter and now rules as follows:
27
28

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JA4178

1 1. In ruling upon a motion to dismiss, the court recognizes all factual allegations in
2 the complaint as true and draws all inferences in its favor. *Buzz Stew. LLC v. City of N. Las*
3 *Vegas*, 124 Nev. 224, 228, 181 P.3d 670, 672 (2008).

4 2. The Complaint should be dismissed under NRCP 12(b)(5) only if it appears
5 beyond a doubt that it could prove no set of facts, which, if true, would entitle it to relief. *Id.*
6 Allegations in the Complaint must be taken at face value and must be construed favorably in
7 the nonmoving party's behalf. *Edgar v. Wagner*, 101 Nev. 226, 228, 699 P.2d 110, 111 (1985).

8 3. To determine if a cause of action is sufficient to assert a claim for relief, the
9 Court should determine “whether the allegations give fair notice of the nature and basis of the
10 claim and the relief requested.” *Ravera v. City of Reno*, 100 Nev. 68, 70, 675 P.2d 407, 408
11 (1984).

12 4. The instant Motion requires this Court to determine the date in which a claim is
13 to be made against a bond for a public works project known as the Craig Ranch Regional Park
14 Phase II project (the “Project”).

15 5. Safeco, as surety and APCO as principal executed and delivered a labor and
16 material bond for said Project. It is undisputed that the City of North Las Vegas (“CNLV”)
17 approved the final work on the Project on July 2, 2014.

18 6. Safeco argues that pursuant to NRS 339.055 Helix was required to commence
19 its action within one year from the date the claimant (Helix) performed the last of the labor or
20 furnished materials.

21 7. Giving Helix the benefit of the doubt, Safeco argues the last date to file such a
22 claim on the Bond would be July 2, 2015 and because Helix filed the present matter on January
23 12, 2016, it is barred as a matter of law from pursuing its claim under the Bond.

24 8. Helix argues that the Bond in question provides for a two-year time frame for
25 claims based on the language of the contract, thereby superseding the statute by agreement of
26 the parties and supports its claim by urging this Court to adopt the reasoning of *Royal*
27 *Indemnity Co. v. Special Service*, 82 Nev. 148, 150, 413 P.2d 500, 502 (1966).

28 9. The language of the Bond in dispute is the following:

1 “This bond shall insure [sic] to the benefit of any persons,
2 companies or corporations entitled to the claims under applicable
3 State law. This bond shall remain in effect until two (2) years after
4 the date of the final acceptance of the Work by the City Council.”

5 10. It is undisputed that NRS 339.005 provides that a claim under a bond must be
6 brought within one year. The first sentence in the quoted language “persons, companies or
7 corporations entitled to the claims under applicable State law” incorporates those entities
8 covered under NRS 339.035.

9 11. However, the second sentence of the bond language in question demonstrates a
10 clear intent by the parties to extend the claims period of the bond to two years. To support its
11 conclusion, the Court looks to the language “shall remain in effect until two (2) years after the
12 date of the final acceptance.”

13 12. The plain meaning of “in effect” is defined as “operating or functioning; in
14 force.” See TAKE EFFECT, Black's Law Dictionary (10th ed. 2014). Therefore, based on a
15 plain interpretation of the clause in question, the two-year language expands the contract, as
16 allowed under Royal for the following reasons.

17 13. The purpose of NRS 339.025 cannot be read in harmony with the two-year
18 claims provision contained on the face of the Bond. NRS 339.025(1)(b) states “*The bond must*
19 *be solely for the protection of claimants supplying labor or materials to the contractor to*
20 *whom the contract was awarded, or to any of his or her subcontractors, in the prosecution of*
21 *the work provided for in such contract.*” (emphasis added). Such language makes it clear that
22 the bond in question was only required for claims of labor or materials and for nothing else.

23 14. Therefore, the only parties who could make a claim to this bond would be those
24 who supply labor or materials and by statute, these parties would be bound to a one-year
25 Statute of Limitations period under NRS 339.055, which directly conflicts with the two-year
26 language on the face of the bond.

27 15. Because such a conflict exists, the Court finds that no other intent could have
28 existed, except for the drafter to have intended to extend the claims period in excess of the time
allowed by statute. See generally, *Royal Indemnity Co. v. Special Service*, 82 Nev.

1 148,150,413 P.2d 500, 502 (1966); *Balboa Ins. Co. v. S. Distributors Corp.* 101 Nev. 774, 710
2 P.2d 725 (1985), (Holding that bonds should be liberally construed to the benefit of
3 beneficiaries under the bond, as opposed to in favor a surety).

4 Therefore, the Court Orders as follows:

5 **IT IS HEREBY ORDERED, ADJUDGED AND DECREED** that Safeco's Motion
6 to Dismiss is **DENIED**; and

7 **IT IS FURTHER ORDERED, ADJUDGED AND DECREED** that Safeco's Motion
8 for Fees and Costs is also **DENIED**.

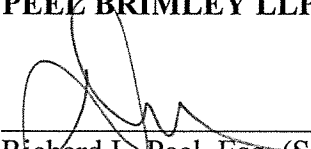
9 DATED this ____ day of August, 2017.

10
11 DISTRICT COURT JUDGE

12 Approved as to Form and Content:
13 **MARQUIS AURBACH COFFING**

14
15 Avece M. Higbee, Esq. (SBN 3739)
16 Cody S. Munteer, Esq. (SBN 11220)
17 Neil M. Sansone, Esq. (SBN 13948)
18 10001 Park Run Drive
19 Las Vegas, Nevada 89145
20 Phone: (702) 382-0711
21 *Attorneys for Defendants*
22 *APCO Construction and Safeco*
23 *Insurance Company of America*

24 Submitted by:
25 **PEEL BRIMLEY LLP**

26 
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28 Cary B. Domina, Esq. (SBN 10567)
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1 148,150,413 P.2d 500, 502 (1966); *Balboa Ins. Co. v. S. Distributors Corp.* 101 Nev. 774, 710
2 P.2d 725 (1985), (Holding that bonds should be liberally construed to the benefit of
3 beneficiaries under the bond, as opposed to in favor a surety).

4 Therefore, the Court Orders as follows:

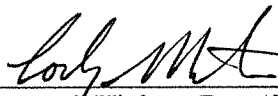
5 **IT IS HEREBY ORDERED, ADJUDGED AND DECREED** that Safeco's Motion
6 to Dismiss is **DENIED**; and

7 **IT IS FURTHER ORDERED, ADJUDGED AND DECREED** that Safeco's Motion
8 for Fees and Costs is also **DENIED**.

9 DATED this 3 day of August, 2017.

10 
11 DISTRICT COURT JUDGE *Fl*

12 Approved as to Form and Content:
13 **MARQUIS AURBACH COFFING**

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24 Submitted by:
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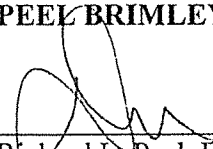
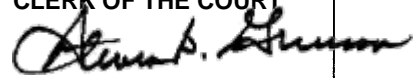
26 
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EXHIBIT 2



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Attorneys for Helix Electric of Nevada, LLC

DISTRICT COURT
CLARK COUNTY, NEVADA

HELIX ELECTRIC OF NEVADA, LLC, a
Nevada limited liability company,

Plaintiff,

vs.

APCO CONSTRUCTION, a Nevada
corporation; SAFECO INSURANCE
COMPANY OF AMERICA; DOES I through
X; and BOE BONDING COMPANIES I
through X,

Defendants.

CASE NO.: A-16-730091-C
DEPT. NO.: XVII

**ORDER DENYING MOTION FOR
PARTIAL SUMMARY JUDGMENT**

This matter came on for hearing July 26, 2017 before the Honorable Michael Villani in Dept. 16 on Defendant's Motion for Partial Summary Judgment. Cary B. Domina, Esq. of PEEL BRIMLEY LLP appeared on behalf of Plaintiff, HELIX ELECTRIC OF NEVADA ("Helix" or "Plaintiff") and Cody Munteer of MARQUIS AURBACH COFFING appeared on behalf of Defendants APCO Construction and Safeco Insurance Company of America.

The Court having considered all of the pleadings and papers on file, and after review of the pleadings on file and oral argument by counsel, finds as follows:

1. The Court finds that it must deny the Motion for Partial Summary Judgment as there are questions of fact which preclude the Court from granting the Motion.

2. The Court specifically finds that there are questions of fact regarding:

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- 1 a. the timeliness and extent of Helix's notices of claim for payment to APCO;
2 and
3 b. whether APCO could have supplemented Helix's notices of claim for
4 payment in the settlement negotiations and the settlement package APCO
5 submitted to the City of North Las Vegas.

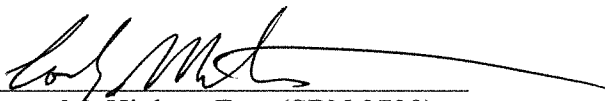
6 Therefore, the Court Orders as follows:

7 **IT IS HEREBY ORDERED, ADJUDGED AND DECREED** that Defendants'
8 Motion for Partial Summary Judgment is **DENIED**.

9 DATED this 31 day of August, 2017.

10 
11 **DISTRICT COURT JUDGE** *fn*

12 Approved as to Form and Content:
13 **MARQUIS AURBACH COFFING**

14 
15 Avece M. Higbee, Esq. (SBN 3739)
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Insurance Company of America

21 Submitted by:
22 **PEEL BRIMLEY LLP**

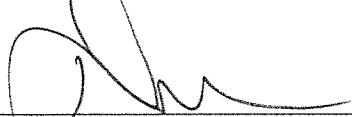
23 
24 Richard L. Peel, Esq. (SBN 4359)
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Attorneys for Plaintiff
Helix Electric of Nevada, LLC

EXHIBIT 3

**DISTRICT COURT
CLARK COUNTY, NEVADA****Building and Construction****COURT MINUTES****November 28, 2018**

A-16-730091-C Helix Electric of Nevada LLC, Plaintiff(s)
vs.
APCO Construction, Defendant(s)

**November 28, 2018 08:30 AM APCO Construction Inc and Safeco Insurance Company of
America's Omnibus Motion in Limine 1-2**

HEARD BY: Villani, Michael **COURTROOM:** RJC Courtroom 11A

COURT CLERK: Donahoo, Carol

RECORDER: Ramsey, Michelle

REPORTER:

PARTIES PRESENT:

Cary Domina Attorney for Plaintiff

John R. Jefferies Attorney for Defendant

JOURNAL ENTRIES

Arguments by counsel. Court does not find that there is a contract and stated there are still remaining questions; therefore, ORDERED, ruling DEFERRED as to Motions in Limine 1-2 to the time of trial. Upon Court's inquiry, Mr. Jefferies advised he has another trial going forward and has filed a Motion to Continue Trial. COURT SO NOTED. COURT FINDS this matter raises issue of fact that is better to be referred to the time of trial and ORDERED Mr. Domina to prepare the Order.

EXHIBIT 4

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Other Business Court Matters**COURT MINUTES****May 13, 2019**

A-16-730091-B Helix Electric of Nevada LLC, Plaintiff(s)
vs.
APCO Construction, Defendant(s)

May 13, 2019 9:00 AM Apco Construction, Inc. and Safeco Insurance Company of America's Motion in Limine No. 3 to Preclude the Introduction of Evidence Related to Helix's Extended General Conditions and Motion in Limine No. 4 to Preclude Any Evidence of Helix's Accounting Data or Job Cost Reports

HEARD BY: Gonzalez, Elizabeth**COURTROOM:** RJC Courtroom 03E**COURT CLERK:** Dulce Romea**RECORDER:** Jill Hawkins**PARTIES**

PRESENT: Domina, Cary Attorney for Plaintiff
 Jefferies, John R. Attorney for Defendants

JOURNAL ENTRIES

- APPEARANCES CONTINUED: Joe Pelan, Client Representative for Defendant.

Following arguments by counsel, COURT ORDERED, the Motions in Limine are both DENIED. While the issue related to the 30(b)(6) would be of concern the Court will treat that as a credibility issue as to the knowledge of the witness who appeared. The entire job cost report needs to be produced immediately, and if there are any issues related to the job cost report when counsel receives it, the Court will have a discussion about the timing of trial. Mr. Domina stated the job cost report will be generated this week.

5-14-19 9:30 AM CALENDAR CALL

5-28-19 1:30 PM BENCH TRIAL

PRINT DATE: 05/14/2019

Page 1 of 1

Minutes Date: May 13, 2019

EXHIBIT 5

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Other Business Court Matters

COURT MINUTES

June 03, 2019

A-16-730091-B Helix Electric of Nevada LLC, Plaintiff(s)
vs.
APCO Construction, Defendant(s)

**June 03, 2019 10:15 AM APCO Construction, Inc. and Safeco Insurance
Company of America's Motion to Exclude the
Testimony of Kurt Williams on Order Shortening Time**

HEARD BY: Gonzalez, Elizabeth

COURTROOM: RJC Courtroom 03E

COURT CLERK: Dulce Romea

RECORDER: Jill Hawkins

PARTIES

PRESENT: Domina, Cary Attorney for Plaintiff
 Holmes, Jeremy D. Attorney for Plaintiff
 Jefferies, John R. Attorney for Defendants

JOURNAL ENTRIES

- Following arguments by Mr. Jefferies and Mr. Holmes, COURT ORDERED, motion DENIED. While the Court understands the issues of the challenge of producing someone for a 30(b)(6), the corporation cannot be forced to provide a former employee.

6-3-19 10:30 AM BENCH TRIAL

EXHIBIT 6

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Other Business Court Matters

COURT MINUTES

August 19, 2019

A-16-730091-B Helix Electric of Nevada LLC, Plaintiff(s)
vs.
APCO Construction, Defendant(s)

August 19, 2019 9:00 AM All Pending Motions

HEARD BY: Gonzalez, Elizabeth **COURTROOM:** RJC Courtroom 03E

COURT CLERK: Dulce Romea

RECORDER: Jill Hawkins

PARTIES

PRESENT: Domina, Cary Attorney for Plaintiff
 Jefferies, John R. Attorney for Defendants

JOURNAL ENTRIES

- APCO CONSTRUCTION, INC.'S AND SAFECO INSURANCE COMPANY OF AMERICA'S MOTION FOR CLARIFICATION AND/OR AMENDMENT TO FINDINGS OF FACT AND CONCLUSIONS OF LAW...PLAINTIFF HELIX ELECTRIC OF NEVADA, LLC'S (I) OPPOSITION TO APCO CONSTRUCTION, INC.'S AND SAFE INSURANCE COMPANY OF AMERICA'S MOTION FOR CLARIFICATION AND/OR AMENDMENT TO FINDINGS OF FACT AND CONCLUSIONS OF LAW; AND (II) COUNTERMOTION FOR AMENDMENT TO FINDINGS OF FACT AND CONCLUSIONS AF LAW

Following arguments by counsel, COURT ORDERED both motions DENIED.

9-9-19 9:00 AM HELIX ELECTRIC OF NEVADA, LLC'S MOTION FOR ATTORNEY'S FEES, COSTS, AND INTEREST

EXHIBIT 7

Sep/17/2019

PEEL BRIMLEY, LLP

Client Ledger

To Dec/18/2018

Date	Received From/Paid To	Chq#	----- General -----		Bld	----- Trust Activity -----				
Entry #	Explanation	Rec#	Rpts	Disbs	Fees	Inv#	Acc	Rpts	Disbs	Balance

3562 Helix Electric of Nevada, LLC.

3562-098 File No. 3562-098-- vs. APCO (Craig Ranch Par

Resp Lawyer: RLP

	----- UNBILLED -----				----- BILLED -----				
TOTALS	CHE	+	RECOV	+	FEES	= TOTAL	DISBS	+	FEES
PERIOD	15.00		0.00		972.50	987.50	4381.89		72910.00
END DATE	15.00		0.00		972.50	987.50	4381.89		72910.00

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Other Business Court Matters

COURT MINUTES

September 30, 2019

A-16-730091-B Helix Electric of Nevada LLC, Plaintiff(s)
vs.
APCO Construction, Defendant(s)

**September 30, 2019 9:00 AM Helix Electric of Nevada, LLC's Motion for Attorney's
Fees, Costs, and Interest**

HEARD BY: Gonzalez, Elizabeth **COURTROOM:** RJC Courtroom 03E

COURT CLERK: Dulce Romea

RECORDER: Jill Hawkins

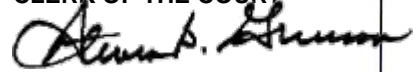
PARTIES

PRESENT: Domina, Cary Attorney for Plaintiff
 Jefferies, John R. Attorney for Defendants

JOURNAL ENTRIES

- Following arguments by counsel, COURT ORDERED, \$14,927.58 in interest and \$8,949.40 in costs AWARDED. Motion CONTINUED to the chambers calendar for Friday, October 4th, for counsel for Plaintiff to PROVIDE a chart with the time keeper, rate, number of hours, and total amount billed on attorney's fees.

10-4-19 CHAMBERS HELIX ELECTRIC OF NEVADA, LLC'S MOTION FOR
ATTORNEY'S FEES, COSTS, AND INTEREST



1 **SUPPL**
2 CARY B. DOMINA, ESQ.
3 Nevada Bar No. 10567
4 RONALD J. COX, ESQ.
5 Nevada Bar No. 12723
6 JEREMY HOLMES, ESQ.
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14 rcox@peelbrimley.com
15 jholmes@peelbrimley.com
16 *Attorneys for Plaintiff*
17 *Helix Electric of Nevada, LLC*

18 **DISTRICT COURT**

19 **CLARK COUNTY, NEVADA**

20 HELIX ELECTRIC OF NEVADA, LLC, a Nevada
21 limited liability company,

22 Plaintiff,

23 vs.

24 APCO CONSTRUCTION, a Nevada corporation;
25 SAFECO INSURANCE COMPANY OF
26 AMERICA; DOES I through X; and BOE
27 BONDING COMPANIES I through X,

28 Defendants.

CASE NO. : A-16-730091-C
DEPT. NO. : XI

**HELIX ELECTRIC OF NEVADA, LLC'S SUPPLEMENT TO ITS MOTION FOR
ATTORNEYS' FEES, COSTS AND INTEREST**

Hearing Date: September 30, 2019

Hearing Time: 9:00 a.m.

Plaintiff, HELIX ELECTRIC OF NEVADA, LLC ("Helix") by and through its attorneys
of record, the law firm of Peel Brimley, LLP, hereby files this Supplement to its Motion for
Attorney's Fees, Costs and Interest ("Motion") against Defendants APCO CONSTRUCTION
("APCO") and Safeco Insurance Company of America ("Safeco") (collectively, "Defendants").

///


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1 At the hearing on Helix's Motion on September 30, 2019, the Court requested from Helix
2 a more detailed breakdown of its requested attorney's fees prior to the Court issuing a ruling on
3 Helix's request for fees. Pursuant to the Court's request, Helix hereby submits its Supplement with
4 a breakdown of the fees incurred by person, that person's role and hourly rate, as well as an
5 additional breakdown into several categories of work performed as it relates to trial, motion
6 practice, mediation, arbitration, and depositions. Said breakdown is attached hereto as **Exhibit 1**.

7
8 Dated this 1st day of October, 2019.

9 **PEEL BRIMLEY LLP**

10 
11 _____
12 CARY B. DOMINA, ESQ.
13 Nevada Bar No. 10567
14 RONALD J. COX, ESQ.
15 Nevada Bar No. 12723
16 JEREMY HOLMES, ESQ.
17 Nevada Bar No. 14379
18 3333 E. Serene Avenue, Suite 200
19 Henderson, Nevada 89074-6571
20 Telephone: (702) 990-7272
21 cdomina@peelbrimley.com
22 rcox@peelbrimley.com
23 jholmes@peelbrimley.com
24 *Attorneys for Plaintiff*
25 *Helix Electric of Nevada, LLC*
26
27
28

1 **CERTIFICATE OF SERVICE**

2 Pursuant to Nev. R. Civ. P. 5(b), I certify that I am an employee of **PEEL BRIMLEY,**
3 **LLP**, and that on this 13th day of October, 2019, I caused the above and foregoing document,
4 **HELIX ELECTRIC OF NEVADA, LLC'S SUPPLEMENT TO ITS MOTION FOR**
5 **ATTORNEYS' FEES, COSTS AND INTEREST**, to be served as follows:

- 6
- 7 ☐ by placing same to be deposited for mailing in the United States Mail, in a sealed
8 envelope upon which first class postage was prepaid in Las Vegas, Nevada; and/or
- 9 ☒ pursuant to NEFCR 9, upon all registered parties via the Court's electronic filing
10 system;
- 11 ☐ pursuant to EDCR 7.26, to be sent **via facsimile**;
- 12 ☐ to be hand-delivered; and/or
- 13 ☐ other _____

14 to the attorney(s) and/or party(ies) listed below at the address and/or facsimile number indicated
15 below:

16 **Attorneys for APCO Construction and Safeco Insurance Co.**

17 John Randall Jefferies, Esq. (rjefferies@fclaw.com)

18 Brandi M. Planet, Esq. (bplanet@fclaw.com)

19 

20 An employee of **PEEL BRIMLEY, LLP**

21
22
23
24
25
26
27
28
PEEL BRIMLEY LLP
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(702) 990-7272 ♦ FAX (702) 990-7273

EXHIBIT 1

Name	Richard Peel	Cary Domina	Steve Meacham	Ronald Cox	Jefferson Boswell	Jeremy Holmes
Position	Managing Partner	Partner	Partner	Partner	Partner	Associate
Time	14.3	424.6	2.9	116.3	0.8	116.5
Rate	\$350/hr	\$275/hr & \$320/hr	\$325/hr	\$225/hr	\$225/hr	\$225/hr
Amount	\$ 4,837.29	\$ 118,243.10	\$ 942.50	\$ 25,852.50	\$ -	\$ 19,687.50
No Charge	\$ 167.71	\$ 3,649.40	\$ -	\$ 367.50	\$ 180.00	\$ 6,975.00
Trial	\$ 770.00	\$ 47,306.00	\$ 747.50	\$ 23,872.50	\$ -	\$ 2,000.00
Mediation	\$ 175.00	\$ 7,587.50	\$ -	\$ -	\$ -	\$ -
Arbitration	\$ 560.00	\$ 3,235.00	\$ -	\$ -	\$ -	\$ -
Motions	\$ 210.00	\$ 35,274.00	\$ -	\$ 1,755.00	\$ -	\$ 16,090.00
Depositions	\$ -	\$ 15,362.50	\$ 195.00	\$ -	\$ -	\$ 157.50

Name	Blayne Grondel	Law Clerk	Terri Hansen	Kathy Gentile	Chris Tertipes	Amanda Armstrong
Position	Associate	Law Clerk	Paralegal	Paralegal	IT	Secretary
Time	2.1	18.7	44.05	2.5	75.5	4.4
Rate	\$225/hr	\$100/hr	\$125/hr	\$125/hr	\$112.5/hr	\$75/hr
Amount	\$ -	\$ 1,770.00	\$ 5,240.46	\$ 312.50	\$ 8,381.25	\$ 325.40
No Charge	\$ 472.50	\$ 100.00	\$ 250.00	\$ -	\$ 112.50	\$ 4.60
Trial	\$ -	\$ -	\$ 1,243.75	\$ -	\$ 8,381.25	\$ 67.50
Mediation	\$ -	\$ 1,770.00	\$ -	\$ -	\$ -	\$ -
Arbitration	\$ -	\$ -	\$ -	\$ 75.00	\$ -	\$ -
Motions	\$ -	\$ -	\$ 250.00	\$ -	\$ -	\$ -
Depositions	\$ -	\$ -	\$ 125.00	\$ -	\$ -	\$ -

Grand Totals

822.65	Hours Spent
---------------	--------------------

\$ 185,592.50	Fees Incurred
\$ 12,279.21	No Charged Amounts
\$ 84,388.50	Amounts Spent Exclusively on Trial and Trial Prep
\$ 9,532.50	Amounts Spent on Mediation
\$ 3,870.00	Amounts Spent on Arbitration (not including Motions)
\$ 53,579.00	Amounts Spent on Motion Practice
\$ 15,840.00	Amounts Spent on Depositions

**DISTRICT COURT
CLARK COUNTY, NEVADA**

Other Business Court Matters

COURT MINUTES

October 04, 2019

A-16-730091-B	Helix Electric of Nevada LLC, Plaintiff(s) vs. APCO Construction, Defendant(s)
---------------	--

October 04, 2019	3:00 AM	Helix Electric of Nevada, LLC's Motion for Attorney's Fees, Costs and Interest
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HEARD BY: Gonzalez, Elizabeth

COURTROOM: Chambers

COURT CLERK: Dulce Romea

PARTIES None. Minute order only - no hearing held.
PRESENT:

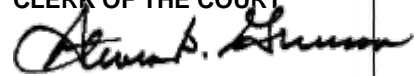
JOURNAL ENTRIES

- Court reviewed supplement. The attorney's fees of Mr. Domina, Mr. Cox, and Ms. Hansen are AWARDED. The Court has determined that there was duplication of work among other referenced counsel as well as administrative tasks billed and has reduced the requested fee award to those timekeepers. Mr. Domina to submit an order.

CLERK'S NOTE: A copy of this minute order was distributed via Odyssey File and Serve. / dr 10-4-19

ORIGINAL

Electronically Filed
11/6/2019 10:22 AM
Steven D. Grierson
CLERK OF THE COURT



JUDG

CARY B. DOMINA, ESQ.

Nevada Bar No. 10567

RONALD J. COX, ESQ.

Nevada Bar No. 12723

JEREMY HOLMES, ESQ.

Nevada Bar No. 14379

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cdomina@peelbrimley.com

rcox@peelbrimley.com

jholmes@peelbrimley.com

Attorneys for Plaintiff

Helix Electric of Nevada, LLC

DISTRICT COURT

CLARK COUNTY, NEVADA

HELIX ELECTRIC OF NEVADA, LLC, a
Nevada limited liability company,

Plaintiff,

vs.

APCO CONSTRUCTION, a Nevada corporation;
SAFECO INSURANCE COMPANY OF
AMERICA; DOES I through X; and BOE
BONDING COMPANIES I through X,

Defendants.

CASE NO. : A-16-730091-B
DEPT. NO. : XI

FINAL JUDGMENT

This matter having come before the Honorable Elizabeth Gonzalez on for a non-jury trial beginning on June 3, 2019, and continuing day to day, until its completion on June 5, 2019; Plaintiff HELIX ELECTRIC OF NEVADA, LLC ("Helix"), was represented by and through its counsel, Cary B. Domina, Esq. and Ronald J. Cox, Esq., of the law firm of Peel Brimley LLP, and Defendants APCO CONSTRUCTION ("APCO") and SAFECO INSURANCE COMPANY OF AMERICA ("Safeco"), were represented by and through their counsel, Randy Jeffries, Esq. of Fennemore Craig; the Court having read and considered the pleadings filed by the parties; having reviewed the evidence admitted during the trial; having heard and carefully considered the

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JA4203

1 testimony of the witnesses called to testify; having considered the oral and written arguments of
2 counsel, and with the intent of rendering a decision on all remaining claims before the Court
3 pursuant to NRCp 52(a) and 58, the Court hereby enters its Final Judgment pursuant to the Court's
4 Findings of Fact and Conclusions of Law¹ and the Court's ruling on Helix's Motion for Fees, Costs
5 and Interest as follows:

- 6 1. **IT IS HEREBY ORDERED** that, as to Helix's Claims for Breach of Contract and
7 Breach of the Implied Covenant of Good Faith and Fair Dealing against APCO, this
8 Court finds in favor of Helix and awards damages in the amount of \$43,992.39 together
9 with interest as provided by law and taxable costs of suit;
- 10 2. **IT IS FURTHER ORDERED** that, as to Helix's Claim for violations of NRS 338
11 against APCO, this Court finds in favor of Helix in the amount of \$1,960.85;
- 12 3. **IT IS FURTHER ORDERED** that, as to Helix's Motion for Attorney's Fees, Costs
13 and Interest, after careful consideration of the parties' briefing and the *Brunzell*² factors,
14 the Court awards Helix attorney's fees for the work provided by Cary B. Domina, Esq.,
15 Ronald J. Cox, Esq., and Terri Hansen only, in the amount of \$149,336.06, as the Court
16 believes the remaining requested fees were duplicative and should not be awarded. The
17 Court finds that the amount awarded is reasonable considering the qualifications of
18 Helix's counsel, the character of the work performed, the number of dispositive motions
19 filed in this matter that Helix successfully defended itself against, as well as the
20 favorable result obtained by Helix at trial.
- 21 4. **IT IS FURTHER ORDERED** that, the Court awards Helix its costs in the amount of
22 \$8,949.40, and interest in the amount of \$14,927.58.
- 23 5. **IT IS FURTHER ORDERED** that Judgment is hereby entered in favor of Helix and
24 against APCO and Safeco in the total amount of **\$219,166.28**.

25 ///

26 ///

27 ///

28 ¹The Court's Findings of Fact and Conclusions of Law are incorporated herein to support the Court's Final Judgment.

² See *Brunzell v. Golden Gate Nat'l Bank*, 85 Nev. 345, 349, 455 P.2d 31, 33 (1969).

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6. Any claim not otherwise disposed of by this decision is dismissed.


IT IS SO ORDERED

Dated this 4 ^{November} day of ~~October~~, 2019.


DISTRICT COURT JUDGE

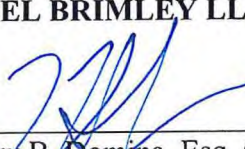
Approved as to Form and Content:

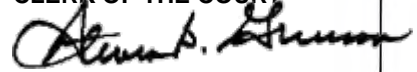
FENNEMORE CRAIG P.C.


John Randall Jeffries, Esq. (SBN 3512)
Brandi M. Planet, Esq. (SBN 11710)
300 South Fourth Street, Suite 1400
Las Vegas, Nevada 89101
Phone: (702) 692-8000
Attorneys for Defendants
APCO Construction and Safeco
Insurance Company of America

Submitted by:

PEEL BRIMLEY LLP


Cary B. Domina, Esq. (SBN 10567)
Ronald J. Cox, Esq. (SBN 12723)
Jeremy D. Holmes Esq. (SBN 14379)
3333 E. Serene Avenue, Suite 200
Henderson, NV 89074-6571
Phone: (702) 990-7272
Attorneys for Plaintiff
Helix Electric of Nevada, LLC



1 **NEOJ**
2 CARY B. DOMINA, ESQ.
3 Nevada Bar No. 10567
4 JEREMY HOLMES, ESQ.
5 Nevada Bar No. 14379
6 **PEEL BRIMLEY LLP**
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10 Facsimile: (702) 990-7273
11 cdomina@peelbrimley.com
12 jholmes@peelbrimley.com
13 *Attorneys for Plaintiff*
14 *Helix Electric of Nevada, LLC*

8 **DISTRICT COURT**

9 **CLARK COUNTY, NEVADA**

10 HELIX ELECTRIC OF NEVADA, LLC, a
11 Nevada limited liability company,

CASE NO. : A-16-730091-C
DEPT. NO. : XI

12 Plaintiff,

13 vs.

14 APCO CONSTRUCTION, a Nevada corporation;
15 SAFECO INSURANCE COMPANY OF
16 AMERICA; DOES I through X; and BOE
17 BONDING COMPANIES I through X,

Defendants.

18 **NOTICE OF ENTRY OF FINAL JUDGMENT**

19 PLEASE TAKE NOTICE that a Final Judgment entered November 4, 2019 and filed on
20 **November 6, 2019**, a copy of which is attached as Exhibit 1.

21 Dated this 6th day of November, 2019.

22 **PEEL BRIMLEY LLP**

23 
24 CARY B. DOMINA, ESQ. (10567)
25 JEREMY HOLMES, ESQ. (14379)
26 3333 E. Serene Avenue, Suite 200
27 Henderson, Nevada 89074-6571
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Helix Electric of Nevada, LLC

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HENDERSON, NEVADA 89074
(702) 990-7272 ♦ FAX (702) 990-7273

CERTIFICATE OF SERVICE

Pursuant to Nev. R. Civ. P. 5(b), I certify that I am an employee of **PEEL BRIMLEY, LLP**, and that on this 14 day of November, 2019, I caused the above and foregoing document, **NOTICE OF ENTRY OF FINAL JUDGMENT**, to be served as follows:

- ☐ by placing same to be deposited for mailing in the United States Mail, in a sealed envelope upon which first class postage was prepaid in Las Vegas, Nevada; and/or
- ☒ pursuant to NEFCR 9, upon all registered parties via the Court's electronic filing system;
- ☐ pursuant to EDCR 7.26, to be sent **via facsimile**;
- ☐ to be hand-delivered; and/or
- ☐ other _____

to the attorney(s) and/or party(ies) listed below at the address and/or facsimile number indicated below:

Attorneys for APCO Construction and Safeco Insurance Co.
John Randall Jefferies, Esq. (rjefferies@fclaw.com)
Brandi M. Planet, Esq. (bplanet@fclaw.com)



An employee of **PEEL BRIMLEY, LLP**

EXHIBIT 1

ORIGINAL

Electronically Filed
11/6/2019 10:22 AM
Steven D. Grierson
CLERK OF THE COURT

Steven D. Grierson

1 **JUDG**
2 CARY B. DOMINA, ESQ.
3 Nevada Bar No. 10567
4 RONALD J. COX, ESQ.
5 Nevada Bar No. 12723
6 JEREMY HOLMES, ESQ.
7 Nevada Bar No. 14379
8 **PEEL BRIMLEY LLP**
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13 cdomina@peelbrimley.com
14 rcox@peelbrimley.com
15 jholmes@peelbrimley.com
16 *Attorneys for Plaintiff*
17 *Helix Electric of Nevada, LLC*

18 **DISTRICT COURT**

19 **CLARK COUNTY, NEVADA**

20 HELIX ELECTRIC OF NEVADA, LLC, a
21 Nevada limited liability company,

22 Plaintiff,

23 vs.

24 APCO CONSTRUCTION, a Nevada corporation;
25 SAFECO INSURANCE COMPANY OF
26 AMERICA; DOES I through X; and BOE
27 BONDING COMPANIES I through X,

28 Defendants.

CASE NO. : A-16-730091-B
DEPT. NO. : XI

FINAL JUDGMENT

29 This matter having come before the Honorable Elizabeth Gonzalez on for a non-jury trial
30 beginning on June 3, 2019, and continuing day to day, until its completion on June 5, 2019; Plaintiff
31 HELIX ELECTRIC OF NEVADA, LLC ("Helix"), was represented by and through its counsel,
32 Cary B. Domina, Esq. and Ronald J. Cox, Esq., of the law firm of Peel Brimley LLP, and
33 Defendants APCO CONSTRUCTION ("APCO") and SAFECO INSURANCE COMPANY OF
34 AMERICA ("Safeco"), were represented by and through their counsel, Randy Jeffries, Esq. of
35 Fennemore Craig; the Court having read and considered the pleadings filed by the parties; having
36 reviewed the evidence admitted during the trial; having heard and carefully considered the

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JA4209

1 testimony of the witnesses called to testify; having considered the oral and written arguments of
2 counsel, and with the intent of rendering a decision on all remaining claims before the Court
3 pursuant to NRCP 52(a) and 58, the Court hereby enters its Final Judgment pursuant to the Court's
4 Findings of Fact and Conclusions of Law¹ and the Court's ruling on Helix's Motion for Fees, Costs
5 and Interest as follows:

- 6 1. **IT IS HEREBY ORDERED** that, as to Helix's Claims for Breach of Contract and
7 Breach of the Implied Covenant of Good Faith and Fair Dealing against APCO, this
8 Court finds in favor of Helix and awards damages in the amount of \$43,992.39 together
9 with interest as provided by law and taxable costs of suit;
- 10 2. **IT IS FURTHER ORDERED** that, as to Helix's Claim for violations of NRS 338
11 against APCO, this Court finds in favor of Helix in the amount of \$1,960.85;
- 12 3. **IT IS FURTHER ORDERED** that, as to Helix's Motion for Attorney's Fees, Costs
13 and Interest, after careful consideration of the parties' briefing and the *Brunzell*² factors,
14 the Court awards Helix attorney's fees for the work provided by Cary B. Domina, Esq.,
15 Ronald J. Cox, Esq., and Terri Hansen only, in the amount of \$149,336.06, as the Court
16 believes the remaining requested fees were duplicative and should not be awarded. The
17 Court finds that the amount awarded is reasonable considering the qualifications of
18 Helix's counsel, the character of the work performed, the number of dispositive motions
19 filed in this matter that Helix successfully defended itself against, as well as the
20 favorable result obtained by Helix at trial.
- 21 4. **IT IS FURTHER ORDERED** that, the Court awards Helix its costs in the amount of
22 \$8,949.40, and interest in the amount of \$14,927.58.
- 23 5. **IT IS FURTHER ORDERED** that Judgment is hereby entered in favor of Helix and
24 against APCO and Safeco in the total amount of **\$219,166.28**.

25 ///

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28 ¹ The Court's Findings of Fact and Conclusions of Law are incorporated herein to support the Court's Final Judgment.
² See *Brunzell v. Golden Gate Nat'l Bank*, 85 Nev. 345, 349, 455 P.2d 31, 33 (1969).

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6. Any claim not otherwise disposed of by this decision is dismissed.


IT IS SO ORDERED

Dated this 4 day of ^{November}~~October~~, 2019.


DISTRICT COURT JUDGE

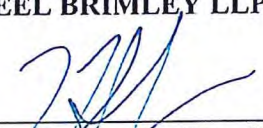
Approved as to Form and Content:

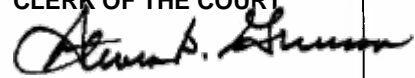
FENNEMORE CRAIG P.C.


John Randall Jeffries, Esq. (SBN 3512)
Brandi M. Planet, Esq. (SBN 11710)
300 South Fourth Street, Suite 1400
Las Vegas, Nevada 89101
Phone: (702) 692-8000
Attorneys for Defendants
APCO Construction and Safeco
Insurance Company of America

Submitted by:

PEEL BRIMLEY LLP


Cary B. Domina, Esq. (SBN 10567)
Ronald J. Cox, Esq. (SBN 12723)
Jeremy D. Holmes Esq. (SBN 14379)
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Henderson, NV 89074-6571
Phone: (702) 990-7272
Attorneys for Plaintiff
Helix Electric of Nevada, LLC



1 **NOA**

2 John Randall Jefferies, Esq. (Bar No. 3512)

3 Brandi M. Planet, Esq. (Bar No. 11710)

4 Christopher H. Byrd, Esq. (Bar No. 1633)

5 FENNEMORE CRAIG, P.C.

6 300 S. Fourth Street, Suite 1400

7 Las Vegas, NV 89101

8 Telephone: (702) 692-8000

9 Facsimile: (702) 692-8099

10 E-mail: rjefferies@fclaw.com

11 bplanet@fclaw.com

12 cbyrd@fclaw.com

13 *Attorneys for APCO Construction, Inc.*

14 *and Safeco Insurance Company of America*

15 **DISTRICT COURT**

16 **CLARK COUNTY, NEVADA**

17 HELIX ELECTRIC OF NEVADA, LLC, a Case No.: A-16-730091-B

18 Nevada limited liability company,

Dept. No.: XI

Plaintiff,

v.

NOTICE OF APPEAL

19 APCO CONSTRUCTION, a Nevada
20 corporation; SAFECO INSURANCE
21 COMPANY OF AMERICA; DOES I through X;
22 and BOE BONDING COMPANIES, I through
23 X.

Defendants.

24 NOTICE IS HEREBY GIVEN that Defendants APCO Construction, Inc. and Safeco
25 Insurance Company of America in the above-captioned action, hereby appeal to the Supreme
26 Court of Nevada from the following:

27 A. Final Judgment, written notice of entry of which was given November 6, 2019; the
28 Findings of Fact and Conclusions of Law incorporated by reference in the Final
Judgment, written notice of entry of which was given on July 10, 2019; both of
which are attached as Exhibit "1"; and all orders prior to the entry of the Final
Judgment, including but not limited to the following:

1. Denial of Appellants' Omnibus Motion in Limine 1-2;

2. Denial of Appellants' Motion in Limine No. 3 to Preclude the Introduction of Evidence Related to Helix's Extended General Conditions and Motion in Limine No. 4 to Preclude Any Evidence of Helix's Accounting Data or Job Cost Reports;
3. Denial of Appellants' Motion to Exclude the Testimony of Kurt Williams;
4. Denial of Appellants' Motion for Clarification and or Amendment of Findings of fact and Conclusions of Law; and
5. Grant of Respondent's Motion for Attorneys' Fees, Costs and Interest,

Dated this 6th day of December, 2019.

FENNEMORE CRAIG, P.C.

/s/ John Randall Jefferies

John Randall Jefferies, Esq. (Bar No. 3512)

Brandi M. Planet, Esq. (Bar No. 11710)

Christopher H. Byrd, Esq. (Bar No. 1633)

Attorneys for APCO Construction, Inc.

and Safeco Insurance Company of America

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of Fennemore Craig, P.C., and further certify that the **NOTICE OF APPEAL** was served by electronic filing via Odyssey File & Serve e-filing system and serving all parties with an email address on record, pursuant to the Administrative Order 14-2 and Rule 9 N.E.F.C. as follows:

Other Service Contacts:

Amanda Armstrong aarmstrongatpeelbrimley.com

Cary B. Domina cdominaatpeelbrimley.com

Rosey Jeffrey rjeffreyatpeelbrimley.com

Terri Hansen thansenatpeelbrimley.com

Chelsie A. Adams cadamsatfclaw.com

Mary Bacon mbaconatspencerfane.com

Trista Day tdayatfclaw.com

Jeremy Holmes jholmesatpeelbrimley.com

Laura Hougard LHougardatfclaw.com

John Randy Jefferies rjefferiesatfclaw.com

Cheryl Landis clandisatfclaw.com

Adam Miller amilleratspencerfane.com

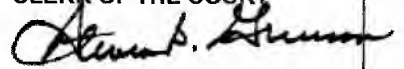
Brandi Planet bplanetatfclaw.com

Kassi Rife KRifeatfclaw.com

Dated this 6th day of December, 2019.

/s/ Trista Day
An Employee of Fennemore Craig, P.C.

Exhibit 1



1 **NEOJ**
2 CARY B. DOMINA, ESQ.
3 Nevada Bar No. 10567
4 JEREMY HOLMES, ESQ.
5 Nevada Bar No. 14379
6 **PEEL BRIMLEY LLP**
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13 *Attorneys for Plaintiff*
14 *Helix Electric of Nevada, LLC*

8 **DISTRICT COURT**

9 **CLARK COUNTY, NEVADA**

10 HELIX ELECTRIC OF NEVADA, LLC, a
11 Nevada limited liability company,

CASE NO. : A-16-730091-C
DEPT. NO. : XI

12 Plaintiff,

13 vs.

14 APCO CONSTRUCTION, a Nevada corporation;
15 SAFECO INSURANCE COMPANY OF
16 AMERICA; DOES I through X; and BOE
17 BONDING COMPANIES I through X,


Defendants.

18 **NOTICE OF ENTRY OF FINAL JUDGMENT**

19 PLEASE TAKE NOTICE that a Final Judgment entered November 4, 2019 and filed on
20 **November 6, 2019**, a copy of which is attached as Exhibit 1.

21 Dated this 6th day of November, 2019.

22 **PEEL BRIMLEY LLP**

23 
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Attorneys for Plaintiff
Helix Electric of Nevada, LLC

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CERTIFICATE OF SERVICE

Pursuant to Nev. R. Civ. P. 5(b), I certify that I am an employee of **PEEL BRIMLEY, LLP**, and that on this 11 day of November, 2019, I caused the above and foregoing document, **NOTICE OF ENTRY OF FINAL JUDGMENT**, to be served as follows:

- ☐ by placing same to be deposited for mailing in the United States Mail, in a sealed envelope upon which first class postage was prepaid in Las Vegas, Nevada; and/or
- ☒ pursuant to NEFCR 9, upon all registered parties via the Court's electronic filing system;
- ☐ pursuant to EDCR 7.26, to be sent via **facsimile**;
- ☐ to be hand-delivered; and/or
- ☐ other _____

to the attorney(s) and/or party(ies) listed below at the address and/or facsimile number indicated below:

Attorneys for APCO Construction and Safeco Insurance Co.
John Randall Jefferies, Esq. (rjefferies@fclaw.com)
Brandi M. Planet, Esq. (bplanet@fclaw.com)



An employee of **PEEL BRIMLEY, LLP**

EXHIBIT 1

ORIGINAL

Electronically Filed
11/6/2019 10:22 AM
Steven D. Grierson
CLERK OF THE COURT

Steven D. Grierson

1 JUDGE
2 CARY B. DOMINA, ESQ.
3 Nevada Bar No. 10567
4 RONALD J. COX, ESQ.
5 Nevada Bar No. 12723
6 JEREMY HOLMES, ESQ.
7 Nevada Bar No. 14379
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14 rcox@peelbrimley.com
15 jholmes@peelbrimley.com
16 *Attorneys for Plaintiff*
17 *Helix Electric of Nevada, LLC*

10 DISTRICT COURT

11 CLARK COUNTY, NEVADA

12 HELIX ELECTRIC OF NEVADA, LLC, a
13 Nevada limited liability company,

14 Plaintiff,

15 vs.

16 APCO CONSTRUCTION, a Nevada corporation;
17 SAFECO INSURANCE COMPANY OF
18 AMERICA; DOES I through X; and BOE
19 BONDING COMPANIES I through X,

20 Defendants.

CASE NO. : A-16-730091-B
DEPT. NO. : XI

21 FINAL JUDGMENT

22 This matter having come before the Honorable Elizabeth Gonzalez on for a non-jury trial
23 beginning on June 3, 2019, and continuing day to day, until its completion on June 5, 2019; Plaintiff
24 HELIX ELECTRIC OF NEVADA, LLC ("Helix"), was represented by and through its counsel,
25 Cary B. Domina, Esq. and Ronald J. Cox, Esq., of the law firm of Peel Brimley LLP, and
26 Defendants APCO CONSTRUCTION ("APCO") and SAFECO INSURANCE COMPANY OF
27 AMERICA ("Safeco"), were represented by and through their counsel, Randy Jeffries, Esq. of
28 Fennemore Craig; the Court having read and considered the pleadings filed by the parties; having
reviewed the evidence admitted during the trial; having heard and carefully considered the

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1 testimony of the witnesses called to testify; having considered the oral and written arguments of
2 counsel, and with the intent of rendering a decision on all remaining claims before the Court
3 pursuant to NRCP 52(a) and 58, the Court hereby enters its Final Judgment pursuant to the Court's
4 Findings of Fact and Conclusions of Law¹ and the Court's ruling on Helix's Motion for Fees, Costs
5 and Interest as follows:

- 6 1. **IT IS HEREBY ORDERED** that, as to Helix's Claims for Breach of Contract and
7 Breach of the Implied Covenant of Good Faith and Fair Dealing against APCO, this
8 Court finds in favor of Helix and awards damages in the amount of \$43,992.39 together
9 with interest as provided by law and taxable costs of suit;
- 10 2. **IT IS FURTHER ORDERED** that, as to Helix's Claim for violations of NRS 338
11 against APCO, this Court finds in favor of Helix in the amount of \$1,960.85;
- 12 3. **IT IS FURTHER ORDERED** that, as to Helix's Motion for Attorney's Fees, Costs
13 and Interest, after careful consideration of the parties' briefing and the *Brunzell*² factors,
14 the Court awards Helix attorney's fees for the work provided by Cary B. Domina, Esq.,
15 Ronald J. Cox, Esq., and Terri Hansen only, in the amount of \$149,336.06, as the Court
16 believes the remaining requested fees were duplicative and should not be awarded. The
17 Court finds that the amount awarded is reasonable considering the qualifications of
18 Helix's counsel, the character of the work performed, the number of dispositive motions
19 filed in this matter that Helix successfully defended itself against, as well as the
20 favorable result obtained by Helix at trial.
- 21 4. **IT IS FURTHER ORDERED** that, the Court awards Helix its costs in the amount of
22 \$8,949.40, and interest in the amount of \$14,927.58.
- 23 5. **IT IS FURTHER ORDERED** that Judgment is hereby entered in favor of Helix and
24 against APCO and Safeco in the total amount of **\$219,166.28**.

25 ///

26 ///

27 ///

28 ¹ The Court's Findings of Fact and Conclusions of Law are incorporated herein to support the Court's Final Judgment.

² See *Brunzell v. Golden Gate Nat'l Bank*, 85 Nev. 345, 349, 455 P.2d 31, 33 (1969).

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6. Any claim not otherwise disposed of by this decision is dismissed.

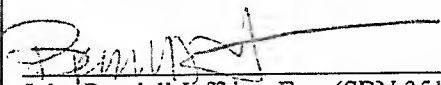
IT IS SO ORDERED

Dated this 4 day of ~~October~~^{November}, 2019.


DISTRICT COURT JUDGE

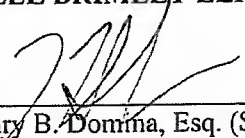
Approved as to Form and Content:

FENNEMORE CRAIG P.C.


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300 South Fourth Street, Suite 1400
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Attorneys for Defendants
APCO Construction and Safeco
Insurance Company of America

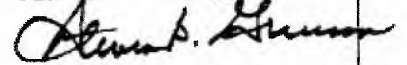
Submitted by:

PEEL BRIMLEY LLP


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ORIGINAL

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CLERK OF THE COURT



JUDG

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Attorneys for Plaintiff

Helix Electric of Nevada, LLC

DISTRICT COURT

CLARK COUNTY, NEVADA

HELIX ELECTRIC OF NEVADA, LLC, a
Nevada limited liability company,

Plaintiff,

vs.

APCO CONSTRUCTION, a Nevada corporation;
SAFECO INSURANCE COMPANY OF
AMERICA; DOES I through X; and BOE
BONDING COMPANIES I through X,

Defendants.

CASE NO. : A-16-730091-B
DEPT. NO. : XI

FINAL JUDGMENT

This matter having come before the Honorable Elizabeth Gonzalez on for a non-jury trial beginning on June 3, 2019, and continuing day to day, until its completion on June 5, 2019; Plaintiff HELIX ELECTRIC OF NEVADA, LLC ("Helix"), was represented by and through its counsel, Cary B. Domina, Esq. and Ronald J. Cox, Esq., of the law firm of Peel Brimley LLP, and Defendants APCO CONSTRUCTION ("APCO") and SAFECO INSURANCE COMPANY OF AMERICA ("Safeco"), were represented by and through their counsel, Randy Jeffries, Esq. of Fennemore Craig; the Court having read and considered the pleadings filed by the parties; having reviewed the evidence admitted during the trial; having heard and carefully considered the

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1 testimony of the witnesses called to testify; having considered the oral and written arguments of
2 counsel, and with the intent of rendering a decision on all remaining claims before the Court
3 pursuant to NRCP 52(a) and 58, the Court hereby enters its Final Judgment pursuant to the Court's
4 Findings of Fact and Conclusions of Law¹ and the Court's ruling on Helix's Motion for Fees, Costs
5 and Interest as follows:

- 6 1. **IT IS HEREBY ORDERED** that, as to Helix's Claims for Breach of Contract and
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15 Ronald J. Cox, Esq., and Terri Hansen only, in the amount of \$149,336.06, as the Court
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17 Court finds that the amount awarded is reasonable considering the qualifications of
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- 23 5. **IT IS FURTHER ORDERED** that Judgment is hereby entered in favor of Helix and
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28 ¹ The Court's Findings of Fact and Conclusions of Law are incorporated herein to support the Court's Final Judgment.


² See *Brunzell v. Golden Gate Nat'l Bank*, 85 Nev. 345, 349, 455 P.2d 31, 33 (1969).

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6. Any claim not otherwise disposed of by this decision is dismissed.

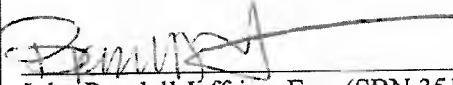
IT IS SO ORDERED

Dated this 4 day of ~~October~~ ^{November}, 2019.


DISTRICT COURT JUDGE

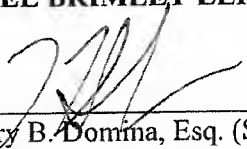
Approved as to Form and Content:

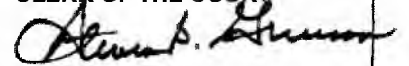
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APCO Construction and Safeco
Insurance Company of America

Submitted by:

PEEL BRIMLEY LLP


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5 Nevada Bar No. 12723
6 JEREMY HOLMES, ESQ.
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14 rcox@peelbrimley.com
15 jholmes@peelbrimley.com

16 *Attorneys for Plaintiff*
17 *HELIX ELECTRIC OF NEVADA, LLC*

18 **DISTRICT COURT**

19 **CLARK COUNTY, NEVADA**

20 HELIX ELECTRIC OF NEVADA, LLC, a
21 Nevada limited liability company,

22 Plaintiff,

23 vs.

24 APCO CONSTRUCTION, a Nevada corporation;
25 SAFECO INSURANCE COMPANY OF
26 AMERICA; DOES I through X; and BOE
27 BONDING COMPANIES I through X,

28 Defendants.

CASE NO. : A-16-730091-C
DEPT. NO. : XI

**NOTICE OF ENTRY OF FINDINGS
OF FACT AND CONCLUSIONS OF
LAW AND ORDER**

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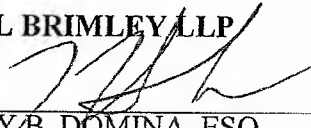
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**NOTICE OF ENTRY OF FINDINGS
OF FACT AND CONCLUSIONS OF LAW AND ORDER**

PLEASE TAKE NOTICE that the **FINDINGS OF FACT AND CONCLUSIONS OF
LAW AND ORDER** was filed on **July 8, 2019**, a copy of which is attached as Exhibit 1.

Dated this 10th day of July, 2019.

PEEL BRIMLEY LLP


CARY B. DOMINA, ESQ.
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(702) 990-7272 ♦ FAX (702) 990-7273

CERTIFICATE OF SERVICE

Pursuant to Nev. R. Civ. P. 5(b), I certify that I am an employee of **PEEL BRIMLEY, LLP**, and that on this 10th day of July, 2019, I caused the above and foregoing document, **NOTICE OF ENTRY OF FINDINGS OF FACT AND CONCLUSIONS OF LAW AND ORDER**, to be served as follows:

- ☐ by placing same to be deposited for mailing in the United States Mail, in a sealed envelope upon which first class postage was prepaid in Las Vegas, Nevada; and/or
- ☒ pursuant to NEFCR 9, upon all registered parties via the Court's electronic filing system;
- ☐ pursuant to EDCR 7.26, to be sent **via facsimile**;
- ☐ to be hand-delivered; and/or
- ☐ other _____

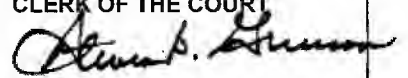
to the attorney(s) and/or party(ies) listed below at the address and/or facsimile number indicated below:

Attorneys for APCO Construction and Safeco Insurance Co.
John Randall Jefferies, Esq. (rjefferies@fclaw.com)
Brandi M. Planet, Esq. (bplanet@fclaw.com)



An employee of **PEEL BRIMLEY, LLP**

EXHIBIT 1



1 FFCL

2
3 DISTRICT COURT

4 CLARK COUNTY, NEVADA

5 HELIX ELECTRIC OF NEVADA, LLC, a
6 Nevada limited liability company,

7 Plaintiff,

8 v.

9
10 APCO CONSTRUCTION, a Nevada
11 corporation; SAFECO INSURANCE
12 COMPANY OF AMERICA; DOES I through
13 X; and BOE BONDING COMPANIES, I
14 through X,

15 Defendants.

Case No.: A-16-730091-C

Dept.: XI

16 **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

17 This matter having come on for non-jury trial before the Honorable Elizabeth Gonzalez
18 beginning on June 3, 2019, and continuing day to day, until its completion on June 5, 2019;
19 Plaintiff, HELIX ELECTRIC OF NEVADA, LLC ("Helix"), was represented by and through its
20 counsel, Cary B. Domina, Esq. and Ronald J. Cox, Esq. of the law firm of Peel Brimley LLP, and
21 Defendants, APCO CONSTRUCTION ("APCO") and SAFECO INSURANCE COMPANY OF
22 AMERICA ("Safeco"), were represented by and through their counsel, Randy Jefferies, Esq. of
23 Fennemore Craig; the Court having read and considered the pleadings filed by the parties; having
24 reviewed the evidence admitted during the trial; having heard and carefully considered the
25 testimony of the witnesses called to testify; having considered the oral and written arguments of
26 counsel, and with the intent of rendering a decision on all remaining claims before the Court,

RECEIVED

JUL 08 2019

CLERK OF THE COURT

1 pursuant to NRCP 52(a) and 58;¹ the Court makes the following findings of fact and conclusions
2 of law:

3 FINDINGS OF FACT

4 1. In July 2011, APCO submitted a bid for the Craig Ranch Regional Park – Phase II
5 - Project No. 10294 (“Project”) to the City of North Las Vegas (“CNLV”). At that time, the
6 anticipated Project duration was approximately 550 calendar days.
7

8 2. Helix submitted a bid of approximately \$4,600,000 to APCO for the electrical
9 work required on the Project. Helix’s estimate assumed a Project duration of 550 days.

10 3. CNLV canceled the original solicitation and ultimately requested a second round
11 of bids in October 2011. Among other things, CNLV changed the duration of the Project from 18
12 months to 12 months.
13

14 4. On or about October 26, 2011, APCO submitted its second bid to CNLV for the
15 Project with a 12-month schedule.

16 5. CNLV issued its notice to proceed to APCO on January 11, 2012. APCO started
17 work on the Project on approximately January 16, 2012.

18 6. Helix mobilized its equipment and started work full time on or about February 20,
19 2012.
20

21 7. In the spring of 2012, APCO entered into a construction agreement (the “Prime
22 Contract”) with the CNLV in which APCO agreed to serve as the general contractor on the
23 Project.

24 8. Section 6.3.2 the General Conditions of the Prime Contract which are incorporated
25 into the Subcontract, states in part:
26

27 ¹ In the pretrial statement, the parties have stipulated that the Contract time was extended from January 2013
28 into November 2013 through no fault of either APCO or Helix.

1 [a]ll other claims notices for extra work shall be filed in writing to the Construction
2 Manager prior to the commencement of such work. Written notices shall use the words
3 "Notice of Potential Claim." Such Notice of Potential Claim shall state the circumstances
4 and all reasons for the claim, but need not state the amount.

5 9. After receiving the notice of proposed award, APCO agreed to contract terms with
6 Helix subject to certain specially negotiated terms modifying the form subcontract ("Helix
7 Addendum").

8 10. As part of the negotiation, APCO agreed to purchase certain materials totaling
9 \$2,248,248 as specified by Helix, which was to be removed from Helix's original proposed scope
10 and pricing.

11 11. Helix entered into an agreement with APCO to provide certain electrical related
12 labor, materials and equipment (the "Work") to the Project for the lump sum amount of
13 \$2,356,520.

14 12. On or about April 19, 2012, APCO and Helix entered into a formal subcontract for
15 the electrical work required on the Project (the "Subcontract").

16 13. Helix's Daily Reports, Certified Pay Roll Records and the Project Sign-in Sheets
17 establish that Helix started performing work for the Project as early as January 23, 2012, and
18 mobilized on the Project on or about February 28, 2012.

19 14. Pursuant to Exhibit "A" of the Subcontract, Helix was required to supply "all
20 labor, materials, tools, equipment, hoisting, forklift, supervision, management, permits and taxes
21 necessary to complete all of the scope of work" for the 'complete electrical package' for the
22 Project.
23

24 15. Section 6.5 contains a "no damage for delay" provision.

25 If Subcontractor shall be delayed in the performance of the Work by any act or neglect of
26 the Owner or Architect, or by agents or representatives of either, or by changes ordered in
27 the Work, or by fire, unavoidable casualties, national emergency, or by any cause other
28 that [SIC] the intentional Interference of Contractor, Subcontractor shall be entitled, as
Subcontractor's exclusive remedy, to an extension of time reasonably necessary to

1 compensate for the time lost due to the delay, but only if Subcontractor shall notify
2 Contractor in writing within twenty four (24) hours after such occurrences, and only if
3 Contractor shall be granted such time extension by Owner.

4 This clause was not modified by the Helix Addendum.

5 16. Section 6.7 of the Subcontract provided in pertinent part:

6 Contractor shall not be liable to Subcontractor for delays caused by reason of fire or other
7 casualty, or on account of riots, strikes, labor trouble, terrorism, acts of God, cataclysmic
8 event, or by reason of any other event or cause beyond Contractor's control, or
9 contributed to by Subcontractor.

10 Section 6.7 was not modified by the Helix Addendum.

11 17. The Parties Contract requires proof of actual cost increase. Section 7.1—which
12 was unchanged by the Helix Addendum—provides:

13 Contractor may order or direct changes, additions, deletions or other revisions in the
14 Subcontract work without invalidating the Subcontract. No changes, additions, deletions,
15 or other revisions to the Subcontract shall be valid unless made in writing. Subcontractor
16 markup shall be limited to that stated in the contract documents in addition to the
17 direct/actual on-site cost of the work, however, no profit and overhead markup on
18 overtime shall be allowed.

19 18. Section 7.2 as modified by the Helix Addendum, provided:

20 Subcontractor, prior to the commencement of such changed or revised work, shall submit,
21 (within 5 days of Contractor's written request) to Contractor, written copies of the
22 breakdown of cost or credit proposal, including work schedule revisions, for changes,
23 additions, deletions, or other revisions in a manner consistent with the Contract
24 Documents. Contractor shall not be liable to Subcontractor for a greater sum, or
25 additional time extensions, than Contractor obtains from Owner for such additional work.

26 19. The parties negotiated additional language that was included in Section 6 by the
27 Helix Addendum:

28 In the event the schedule as set forth above is changed by Contractor for whatever reason
so that Subcontractor either is precluded from performing the work in accordance with
said schedule and thereby suffers delay, or, is not allowed the number of calendar days to
perform the work under such modified schedule and must accelerate its performance, then
Subcontractor shall be entitled to receive from Contractor payment representing the costs
and damages sustained by Subcontractor for such delay or acceleration, providing said
costs and damages are first paid to Contractor.

20. Section 4.4 of the Subcontract—as amended by the Helix Addendum provides:

1 Progress payments will be made by Contractor to Subcontractor within 10 calendar days
2 after Contractor actually receives payment for Subcontractor's work from Owner. The
3 progress payment to Subcontractor shall be one hundred percent (100%) of the value of
4 Subcontract work completed (less 10% retention) during the preceding month as
5 determined by the Owner, less such other amounts as Contractor shall determine as being
6 properly withheld as allowed under this Article or as provided elsewhere in this
7 Subcontract. The estimates of Owner as to the amount of Work completed by
8 Subcontractor shall be binding upon Contractor and Subcontractor and shall conclusively
9 establish the amount of Work performed by Subcontractor. As a condition precedent to
10 receiving partial payments from Contractor for Work performed, Subcontractor shall
11 execute and deliver to Contractor, with its application for payment, a full and complete
12 release (Forms attached) of all claims and causes of action Subcontractor may have
13 against Contractor and Owner through the date of the execution of said release, save and
14 except those claims specifically listed on said release and described in a manner sufficient
15 for Contractor to identify such claim or claims with certainty. Upon the request of
16 Contractor, Subcontractor shall provide an Unconditional Waiver of Release in form
17 required by Contractor for any previous payment made to Subcontractor. Any payments
18 to Subcontractor shall be conditioned upon receipt of the actual payments by Contractor
19 from Owner. Subcontractor herein agrees to assume the same risk that the Owner may
20 become insolvent that Contractor has assumed by entering into the Prime Contract with
21 the Owner per NRS Statutes.

22 21. The Subcontract also incorporated the Prime Contract, which included the claim
23 procedures set forth in the Contract.

24 22. Helix assigned Kurk Williams as its Project Manager. Williams never signed in
25 using APCO's sign in sheets that were maintained at the Project site. By his own admission,
26 Williams' time devoted to the Project was not accurately tracked in Helix's certified payroll
27 reports, only Helix's job cost report.

28 23. Richard Clement was Helix's Project Superintendent. Clement was on site
occasionally and signed in with APCO at the Project twice during 2012.

24 24. Clement did not work on the Project between June 11, 2012 and September 26,
25 2012. Clement only worked two weeks on the Project from September 27, 2012 to October 7,
26 2012. Clement did not work on the Project from October 8, 2012 through January 20, 2013. In
27 all of 2013, which was the extended Project time, Clement only worked 32 hours during the week
28 ending January 27, 2013.

1 25. In late January 2013, Helix assigned Clement to another project and designated
2 Rainer Prietzel, Helix's Foreman to oversee work in the field, as the new Project Superintendent
3 and foreman.

4 26. According to the Labor Commissioner, and OSHA regulations, Helix must always
5 have a project superintendent on site at all times during the Project.
6

7 27. From January 2013 to May 2013, Helix typically had a three to five man crew on
8 the Project.

9 28. In early May 2013, with the exception of a few days, Prietzel was the only Helix
10 employee on the Project, and he split his time as the Project Superintendent and self-performing
11 contract and change order work on the Project.

12 29. Prietzel remained the Project Superintendent until the end of the Project in mid-
13 October 2013.
14

15 30. Helix's original line item for its general conditions, as reflected in its pay
16 application, was \$108,040 on a Subcontract price of \$2,380,085, which represents 4.5%.

17 31. The Project encountered significant delays and was not substantially completed
18 until October 25, 2013, thus resulting in Helix claiming approximately, \$138,000 in additional
19 extended overhead costs.
20

21 32. The project was never abandoned by CNLV.

22 33. Prior to the original project completion date passing, on January 9, 2013, APCO
23 submitted its first request for an extension of time to CNLV. APCO submitted its Time Impact
24 Analysis #1 ("TIA #1") to CNLV where it sought extended general conditions and home office
25 overhead of \$418,059 (\$266,229 for general conditions and \$151,830 for home office overhead).

26 34. Helix first notified APCO in writing that it would be asserting a claim for extended
27 overhead costs on January 28, 2013 and reserved its rights to submit a claim for "all additional
28

1 costs incurred due to scheduled delays for this project" (the "Claim").

2 35. As of May 9, 2013, CNLV had not made a decision on APCO's TIA #1.

3 36. On May 9, 2013, APCO submitted a revised Time Impact Analysis ("TIA #2") to
4 CNLV seeking an additional five (5) months of compensation for general conditions and home
5 office overhead, among other claims, for a total delay claim of nine (9) months.
6

7 37. As part of TIA #2, APCO submitted Change Order Request No. 39.1 to CNLV
8 seeking compensation of \$752,499 for its extended general conditions and home office overhead
9 (\$479,205 for general conditions and \$273,294 for home office overhead).

10 38. This represented approximately seventy percent (70%) of APCO's \$1,090,066.50
11 total claim against CNLV for the 9-month delay to the Project.
12

13 39. APCO's claim did not include any amounts for its subcontractors, and APCO
14 acknowledges that as a company policy, it does not include its subcontractors' claims with its
15 own claims.

16 40. Through no fault of APCO, Helix did not take delivery of various light poles and
17 related equipment until approximately January 30, 2013.

18 41. On June 19, 2013, APCO and Helix exchanged emails regarding various Project
19 issues, including Helix's delay rates. APCO confirmed that if Helix submitted a request for
20 compensation that it would be forwarded to CNLV.
21

22 42. On June 19, 2013 Helix provided a supplemental notice of claim but did not
23 provide any back up to support its daily rates or the impacts alleged to be attributed to the delay.
24 At that time, Helix still only had Prietzel working on site.

25 43. On June 21, 2013 Helix and APCO exchanged emails related to the support for
26 Helix's claimed costs, with APCO noting that a project manager was considered home office
27 overhead. Helix indicated that its job cost reports would reflect the actual costs for the extended
28

1 overhead.

2 44. In June 2013, Helix realized the Project was still several months away from being
3 completed. According to Helix's June 19 letter entitled "Extended overhead cost", Helix's cost
4 for extended overhead was \$640/day.

5 45. The \$640/day cost is comprised of (1) \$260 for the Project Manager; (2) \$280 for
6 the Superintendent; (3) \$25 for the site trailer; (4) \$5 for the Connex box; (5) \$25 for the forklift;
7 and (6) \$45 for the truck.

8 46. The email that accompanied Helix's June 19, 2013 letter advised APCO that to
9 date, Helix's Claim totaled \$72,960, but that Helix's Claim would increase for each day the
10 Project continued past the original completion date.

11 47. Also on June 19, 2013, APCO informed Helix, by way of an email, that it "is in
12 the process of presenting CNLV with a Time Impact Analysis containing facts as to why the
13 additional costs should be paid." APCO had submitted TIA #2 to CNLV on May 9, 2013, six
14 weeks prior to this email.

15 48. In the email, APCO further advised Helix that "[o]nce we fight the battle, and
16 hopefully come out successfully, this will open the door for Helix...to present their case for the
17 same."

18 49. While APCO notified Helix that it would forward to CNLV any letter Helix
19 provided regarding its claim for extended overhead costs, APCO did not inform Helix that it
20 needed Helix's Claim immediately so it could include it with APCO's claim to CNLV. Indeed,
21 according to APCO, it would first "fight that battle, and hopefully come out successfully..."
22 which would only then "open the door for Helix...to present their case..."

23 50. On August 27, 2013, despite the fact that the Project was still ongoing, Helix
24 furnished APCO with its first invoice for its Claim in the amount of \$102,400, which constituted
25
26
27
28

1 32 weeks of extended overhead costs incurred between January 13, 2013, and August 30, 2013
2 (or 160 business days).

3 51. Helix's invoice identified an extended overhead cost of \$640/day for 32 weeks,
4 which had been provided to APCO in June 2013.

5 52. From May 6, 2013 through November 6, 2013, Prietzel was the only Helix person
6 on site. Prietzel confirmed that during that time period he was either working on completing
7 original Subcontract work for which Helix would be paid or change order work that was
8 acknowledged and paid by APCO and CNLV.
9

10 53. During construction, CNLV made changes or otherwise caused issues that
11 impacted Helix. In those instances, Helix submitted a request for additional compensation and
12 CNLV issued APCO change orders that compensated Helix for the related impacts. During the
13 extended Contract time, CNLV issued eleven change orders that resulted in additional
14 compensation to Helix through the Subcontract. Helix's pricing for the change orders included a
15 10% markup on materials and a 15% markup on labor to cover Helix's overhead.
16

17 54. APCO submitted Change Order Request No. 68 ("COR 68") to CNLV on
18 September 9, 2013, requesting compensation for Helix's Claim.

19 55. On September 16, 2013, CNLV rejected the COR 68 stating, "This COR is
20 REJECTED. The City of North Las Vegas does not have a contract with Helix Electric."
21

22 56. CNLV stated that it did not reject COR 68 for lack of backup or untimeliness.

23 57. The Construction Manager for CNLV during the Project, Joemel Llamado,
24 testified that the only reason he rejected Helix's Claim was because CNLV did not have a
25 contract with Helix. APCO should have included Helix's Claim in its own claim to CNLV since
26 Helix's Subcontract was with APCO, not CNLV.

27 58. Llamado did not look at the merits of the Claim because the Claim should have
28

1 been included with APCO's claim.

2 59. APCO informed Helix that CNLV rejected COR 68 because of lack of backup
3 documentation.

4 60. On October 2, 2013, CNLV issued its decision on APCO's request for additional
5 time and compensation. CNLV determined that the time period from January 11, 2013 to May
6 10, 2013 was an excusable but not compensable delay. APCO was not charged liquidated
7 damages, but also was not provided compensation from January thru May 10, 2013. CNLV did
8 confirm that it would pay APCO \$560,724.16 for the delay from May 10, 2013 to October 25,
9 2013. APCO accepted that determination on or about October 10, 2013.

10 61. On October 3, 2013, APCO sent Helix a letter requesting additional back-up
11 documentation for the Claim so it could resubmit the Claim to CNLV.

12 62. That letter states in relevant part:

13
14 Attached is your invoice of August 27, 2013 in the amount of \$102,400. At this time
15 APCO has not received any back-up documentation to undo the previous formal rejection
16 made by the City of North Las Vegas. If you want APCO to re-submit your request,
17 please provide appropriate back-up for review.

18 63. On October 2, 2013, CNLV and APCO entered into a settlement agreement
19 through which CNLV agreed to pay APCO \$560,724.16 for its claim submitted under TIA #2,
20 including APCO's claim for added overhead and general conditions it incurred as a result of the
21 nine-month delay to the Project.

22 64. According to that settlement agreement, APCO agreed to "forgo any claims for
23 delays, disruptions, general conditions and overtime costs associated with the weekend work
24 previously performed...and for any other claim, present or future, that may occur on the project.

25 65. APCO did not notify Helix that it had entered into this settlement agreement.

26 66. Llamado's position was that the settlement agreement resolved any and all claims
27 between CNLV and APCO for the nine-month delay to the Project, including any claims APCO's
28

1 subcontractors might have.²

2 67. Pursuant to this settlement agreement, CNLV issued Change Order No. 50 to
3 APCO and agreed to pay APCO \$560,724.16 for the added overhead and general conditions it
4 incurred as a result of the extended project completion date.

5 68. On October 3, 2013, APCO transmitted to Helix CNLV's rejection of its invoice
6 for extended overhead.

7 69. Near the end of the Project in October 2013, Pelan, notified Helix, that Helix could
8 not include the Claim for extended overhead in Helix's pay application for retention because
9 CNLV would not release the retention on the Project if there were outstanding Claims on the
10 Project.

11 70. In compliance with Pelan's instructions, on October 18, 2013, Helix submitted its
12 Pay Application for Retention only in the amount of \$105,677.01 and identified it as Pay
13 Application No. 161113-002 (the "Retention Pay App").

14 71. On October 18, 2013, Helix submitted its pay application for the time period up
15 through October 30, 2013. At that time, Helix billed its general conditions line item at 100%.

16 72. On October 18, 2013, Helix submitted its pay application for the release of
17 retention. As with prior pay applications, Helix enclosed a conditional waiver. The release was
18 conditioned on APCO issuing a final payment in the amount of \$105,677.01 and expressly
19 confirmed that there were "zero" claims outstanding. Helix signed and provided that release to
20 APCO after receiving CNLV's rejection of its extended overhead invoice.

21 73. Helix also provided to APCO a "Conditional Waiver and Release Upon Final
22 Payment" (the "Conditional Waiver") for the Retention Pay App only (i.e. Pay App No. 161113-
23

24
25
26
27 ² Joe Pelan, the Contract Manager for APCO, disagreed with this position, but APCO and Helix did not test it
28 through the claims process provided in the Prime Contract.

1 002).

2 74. Helix indicated in the Conditional Waiver that there was no "Disputed Claim
3 Amount" relating to the Retention Pay App.

4 75. Helix takes the position that the Conditional Waiver was not intended to release
5 Helix's Claim.
6

7 76. The evidence presented at trial of the circumstances surrounding the execution of
8 the Conditional Waiver do not support Helix's waiver of the Claim.

9 77. It took APCO more than a year to pay Helix for its Retention Pay App, during
10 which time, Helix made it clear to APCO that it would continue pursuing its Claim.

11 78. Between October 2013 and the end of October 2014 when APCO finally paid
12 Helix its retention, APCO forwarded Helix's Claim to CNLV on two separate occasions and
13 received multiple written notices from Helix that it maintained its Claim against APCO.
14

15 79. The project was substantially completed on October 25, 2013.

16 80. On October 31, 2013, in order to account for certain overhead items that were
17 omitted from the original Claim, Helix: (i) increased its Claim from \$102,400 to \$111,847; (ii)
18 resubmitted its Invoice to APCO; and (iii) provided additional backup information and
19 documents. Included with the revised invoice was a monthly breakdown of Helix's Claim from
20 January to August, which included the following categories of damages: (1) Project Manager; (2)
21 Project Engineer; (3) Superintendent; (4) Site trucks; (5) Project Fuel; (6) Site Trailer; (7) Wire
22 Trailer; (8) Office supplies; (9) Storage Connex boxes; (10) forklifts; (11) small tools; and (12)
23 consumables. According to the summary of the Claim, Helix charged the Project 4-hours a day
24 for its Project Manager, Kurk Williams at \$65/hour, and 4-hours a day for its Superintendent, Ray
25 Prietzel at \$70/day.
26

27 81. On or about November 5, 2013, three weeks after APCO received Helix's
28

1 Retention Pay App and Conditional Waiver, APCO submitted a revised COR 68 (68.1) to CNLV
2 seeking a total of \$111,847 for Helix's Claim.

3 82. Had APCO believed Helix's Conditional Waiver for the Retention Pay App
4 (received on October 18, 2013) waived any and all claims Helix had on the Project, including its
5 Claim for extended overhead, APCO would not have submitted revised COR 68.1 to CNLV three
6 weeks after receiving Helix's Conditional Waiver.

7
8 83. On November 18, 2013, CNLV again rejected the Change Order Request stating,
9 "This is the 2nd COR for Helix Electric's extended overhead submittal. The 1st one was submitted
10 on Sept. 9, 2013 and Rejected on Sept. 16, 2013. This submittal dated Nov. 5, 2013 is
11 REJECTED on Nov. 13, 2013."

12 84. Llamado's second rejection had nothing to do with lack of backup documents or
13 untimeliness and was rejected simply because APCO should have included Helix's Claim under
14 its own claim to CNLV.

15
16 85. By this time, APCO had already settled with CNLV to receive payment for its own
17 extended overhead costs, and in doing so, waived and released any further claims against CNLV,
18 including Helix's Claim.

19 86. As Helix had previously informed APCO it would, on or about November 13,
20 2013, Helix submitted to APCO another invoice including backup in the amount of \$26,304
21 accounting for the extended overhead costs for September and October ("COR 93").

22 87. APCO confirmed to Helix's Kurk Williams that there would be no APCO
23 approval unless and until CNLV approved Helix's request.

24 88. CNLV rejected COR 93.

25 89. By submitting COR 93 to CNLV on November 13, 2013, APCO once again
26 acknowledged that it knew Helix's Conditional Waiver submitted on October 18, 2013 related to
27
28

1 the Retention Pay App only, and did not waive Helix's Claim for extended overhead.

2 90. If APCO believed the Conditional Waiver released Helix's Claim, APCO would
3 not have continued to submit Helix's Claim to CNLV.

4 91. On January 28, 2014, APCO sent Helix's Victor Fuchs and Bob Johnson an email
5 confirming that he was meeting with CNLV to discuss the remaining change order issues on
6 February 4, 2014. Pelan testified that, CNLV advised APCO that it was rejecting Helix's claim
7 because it had no merit and Helix only had one person on the Project while completing Helix's
8 contract work in 2013. Pelan reported CNLV's position to Helix.³

10 92. The Subcontract incorporated APCO's prime contract with CNLV in Section 1.1,
11 which sets forth CNLV's claims procedure for requests for payment that are escalated to claims.
12 Helix did not request that APCO initiate these proceedings on its behalf regarding the claim for
13 extended overhead.

14 93. On March 31, 2014, CNLV and APCO agreed that there would be no further
15 COR's submitted on the Project.

17 94. On April 16, 2014, Helix's Victor Fuchs threatened to convert the outstanding
18 issues into a claim if Helix's retention was not released per its pay application and release that
19 were submitted on October 18, 2013.

20 95. APCO admitted that on June 10, 2014, it received final retention from CNLV.

21 96. However, because APCO had not paid Helix its Retention or its Claim, Helix sent
22 APCO another demand for payment on September 26, 2014, seeking payment for both its
23 Retention and the Claim.

24 97. CNLV issued the formal notice of completion of the project on July 8, 2014.

26
27 ³ While the Court finds Pelan's testimony on this issue credible, the testimony of Llamado
28 differs.

1 98. On October 21, 2014, APCO issued check number 1473 in the amount of
2 \$105,679, which represented final payment of Helix's retention, in accordance with the October
3 18, 2013 retention billing and related final release.⁴

4 99. On October 29, 2014, APCO sent Helix an email requesting that it sign a new
5 Conditional Waiver and Release Upon Final Payment which included Helix's Retention only, but
6 did not include any disputed amount for the Claim.
7

8 100. Attached to that email was a copy of the Retention Check APCO informed Helix it
9 could pickup once it received the new executed Conditional Release.

10 101. Upon receiving the new Conditional Waiver and before picking up the Retention
11 Check, Helix notified APCO that it was not going to sign the new Conditional Waiver without
12 reserving a right to its Claim.
13

14 102. APCO invited Helix to revise the new Conditional Waiver as it saw fit, and Helix
15 provided an unsigned copy of it seeking full payment of the Claim and the Retention for a total
16 amount of \$243,830.

17 103. APCO declined to pay the Claim, and after additional discussions between Helix
18 and APCO, it was decided that Helix would exchange for the Retention Check an Unconditional
19 Waiver and Release Upon Final Payment seeking payment of \$105,679 for Retention, and
20 reserving as its Disputed Claim, \$138,151.
21

22 104. As part of the "Disputed Claim" field, Helix referenced additional correspondence
23 which it had incorporated into the Unconditional Waiver and Release.

24 105. Helix included a letter dated October 30, 2014 clarifying that while it was
25 demanding its retention payment, it was also seeking payment for its Claim in the amount of
26

27 ⁴ Because of this lengthy delay in payment, Helix is entitled to interest on the retention amount under NRS
28 338.

1 \$138,151 for which it also provided a final invoice.

2 106. In one such email, Helix writes, "Joe, please accept this email as a 30 day
3 extension of time for the execution of [the] promissory note attached...In good faith we [are]
4 extending this time per your request, so you can come up with an arrangement to repay the
5 outstanding amount that is past due."
6

7 107. APCO never executed the Promissory Note or paid Helix its Claim.

8 108. On October 29, 2014, APCO tendered the check and another signed release for
9 final payment. That release mirrored the one that Helix submitted in October 2013.

10 109. On October 29, 2014, Helix's Victor Fuchs sent an email to Pelan stating: "this is
11 not going to work." Pelan responded that same day stating: "Victor, make changes for me to
12 approve. Thanks."
13

14 110. On October 18, 2013, the Senior Vice President of Helix, Robert D. Johnson,
15 signed a "Conditional Waiver and Release Upon Final Payment".

16 111. Helix received the funds on October 29, 2014.

17 112. On October 30, 2014, the day after negotiating the final payment check, Helix
18 tendered a signed final lien release that purported to reserve Helix's extended overhead invoices
19 in the amount of \$138,151.
20

21 113. Helix has established how certain of its costs increased due to the extended time
22 on the Project given its demobilization and reduction in crew size. Prietzel was the only person
23 on site after May 6, 2013 and he was completing base Subcontract work and change order work
24 that was paid by CNLV.

25 114. After weighing the testimony of the witnesses and a review of the admitted
26 documents, the Court finds, that the delay was not so unreasonable to amount to abandonment
27
28

1 and that therefore the provision limiting damages after a delay does not permit the recovery of
2 extended general conditions.

3 115. Since CNLV determined that the delays through May 13, 2013 were not
4 compensable, the only time period that APCO recovered payment for its delay costs was May 13,
5 2013 through October 13, 2013. During that same compensable time period, Helix's reasonable
6 costs totaled \$43,992.39.⁵ Although Helix was earning revenue and being paid during the time
7 period for the Work and certain approved change orders, APCO by its settlement with CNLV,
8 impaired Helix's ability to pursue the Claim.
9

10 116. Helix has supported its claim for certain additional costs. As Prietzel was paid for
11 his time on site under the approved change orders the claimed expense for acting as a
12 superintendent (supervising only himself) is not appropriate.
13

14 117. After weighing the testimony of the witnesses and a review of the admitted
15 documents, the Court finds, Helix has established that it suffered damages as a result of the delay
16 in project completion in the amount of \$43,992.39.

17 118. If any findings of fact are properly conclusions of law, they shall be treated as if
18 appropriately identified and designated.
19

20 CONCLUSIONS OF LAW

- 21 1. The Subcontract was a valid contract between Helix and APCO.

22
23 ⁵ The Court has utilized the summary used as D5 during the trial with the deletion of the line item
"Superintendent". Those totals for the compensable months with that modification are:

24 May 13	\$8501.05
25 June 13	\$7124.90
26 July 13	\$8270.69
27 August 13	\$6785.04
28 September 13	\$6170.56
October 13	\$7140.15
TOTAL	\$43992.39

1 2. The Court finds that the Conditional Waiver Helix submitted to APCO on or about
2 October 2013 did not constitute a waiver of Helix's Claim.

3 3. APCO's own conduct establishes that it knew Helix was not waiving its Claim as
4 it continued to submit Helix's Claim to CNLV after receiving the Conditional Waiver.

5 4. Helix provided sufficient evidence establishing that it incurred damages as a result
6 of the Project schedule extending nine months past its original completion date.

7 5. APCO had a duty to include Helix's Claim in its own claim to CNLV or otherwise
8 preserve the Claim when it settled, which it failed to do.

9 6. APCO's internal policy and decision to keep Helix's Claim separate from its own
10 claim impaired Helix's ability to pursue the Claim.

11 7. When APCO entered into the settlement agreement with CNLV on October 3,
12 2013 without Helix's knowledge, CNLV took the position that APCO waived and released any
13 and all claims arising from the nine month Project delay, including Helix's Claim.

14 8. In every contract, there is an implied covenant of good faith and fair dealing.

15 9. APCO's impairment of Helix's Claim constitutes a breach of the covenant of good
16 faith and fair dealing implied in the Subcontract.

17 10. APCO breached the covenant of good faith and fair dealing when it, without
18 notifying Helix, settled its claim with CNLV for extended general conditions, impairing Helix
19 from pursuing any pass-through claims to CNLV for its Claim, but continued to submit Helix's
20 Claim to CNLV knowing that CNLV rejected it because it had no contractual privity with Helix,
21 and now APCO had released any and all claims against CNLV.

22 11. Helix is entitled to judgment against APCO under its claim for Breach of Implied
23 Covenant of Good Faith and Fair Dealing and its damages are the damages it has established for
24

1 in the amount of \$43,992.39.⁶

2 12. Because the Project was a public works project, it was governed under NRS
3 Chapter 338.

4 13. Under NRS 338.490, a conditional waiver and release can only release payments
5 for work which is the subject of the payment application to which the wavier and release
6 corresponds.
7

8 14. The Conditional Waiver Helix provided APCO on October 18, 2013, was for
9 retention only and expressly referred to the Retention Pay App (Pay Application No. 161113-022)
10 which sought retention only.

11 15. The Retention Pay App did not include Helix's Claim.

12 16. Therefore, because by statute, the Conditional Waiver can only release work that is
13 the subject of the Retention Pay App, it did not constitute a waiver and release of Helix's Claim.
14

15 17. NRS 338.565 states in relevant part:

16 If a contractor makes payment to a subcontractor or supplier more
17 than 10 days after the occurrence of any of the following acts or
18 omissions: (a) the contractor fails to pay his or her subcontractor or
19 supplier in accordance with the provisions of subsection 1 of NRS
20 338.550...the contractor shall pay to the subcontractor or supplier,
21 in addition to the entire amount of the progress bill or the retainage
22 bill or any portion thereof, interest from the 10th day on the amount
23 delayed, at a rate equal to the lowest daily prime rate...plus 2
24 percent, until payment is made to the subcontractor or supplier.

25 18. NRS 338.550(1) required APCO to pay Helix its retention within 10 days of
26 receiving its retention payment from CNLV.

27 ⁶ The Court has not awarded separate damages for the breach of contract claim as those would be duplicative
28 of this award.

1 19. APCO admits it received its retention payment from CNLV on June 10, 2014, yet
2 it did not pay Helix its retention until October 30, 2014, more than four months later and in
3 violation of NRS 338.550(1).

4 20. APCO was required to pay Helix its retention amount of \$105,677.01, in addition
5 to interest at the rate of prime plus 2 percent from June 10, 2014 through October 30, 2014.
6
7 APCO failed to do so.

8 21. After providing APCO with the Conditional Waiver, Helix incurred additional
9 damages that could not be waived by way of the Conditional Waiver (i.e. the interest on its
10 wrongfully withheld retention).

11 22. On June 10, 2014, APCO received final retention from CNLV.

12 23. APCO failed to pay Helix its retention in the amount of \$105,679 until October 29,
13 2014.
14

15 24. Pursuant to NRS 338.550(1), APCO was required to pay Helix its retention no
16 later than June 21, 2014.

17 25. As a result of APCO's failure, and pursuant to NRS 338.565(1), APCO is required
18 to pay Helix interest on \$105,677.01 from June 22, 2014 through October 28, 2014, at a rate of
19 5.25% for a total of \$1,960.85.
20

21 26. Even if the pay-if-paid clause was enforceable, APCO cannot rely upon it to shield
22 itself from liability to Helix when its decision to submit Helix's Claim separately from its claim
23 led to CNLV rejecting Helix's Claim, and APCO's settlement with CNLV forever barred APCO
24 from receiving payment from CNLV for Helix's Claim.

25 27. To the extent the delays were caused by CNLV, APCO is still liable to Helix since
26 it impaired those claims in contradiction to NRS 624.628(3)(c) by entering into a settlement
27 agreement with CNLV on October 2, 2013.
28

1 28. Because this Court has found APCO breached the Subcontract and breached the
2 covenant of good faith and fair dealing, Helix is entitled to judgment against Safeco and the
3 Payment Bond as well.

4 29. NRS 339.025(1)(b) provides the following:
5

6 1. Before any contract,..., exceeding \$100,000 for any project
7 for the new construction, repair or reconstruction of any public
8 building or other public work or public improvement of any
9 contracting body is awarded to any contractor, the contractor shall
furnish to the contracting body the following bonds which become
binding upon the award of the contract to the contractor;

10 a.

11 b. A payment bond in an amount to be fixed by the
12 contracting body, but not less than 50 percent of the contract
13 amount, conditioned upon the faithful performance of the
14 contract in accordance with the plans, specifications and
15 conditions of the contract. The bond must be solely for the
protection of claimants supplying labor or materials to the
contractor to whom the contract was awarded, or to any of his
or her subcontractors, in the prosecution of the work provided
for in such contract.

16 30. NRS 339.035(1) provides:

17 ...any claimant who has performed labor or furnished material in
18 the prosecution of the work provided for in any contract for which
19 a payment bond has been given pursuant to the provisions of
20 subsection 1 of NRS 339.025, and who has not been paid in full
21 before the expiration of 90 days after the date on which the
22 claimant performed the last of such labor or furnished the last of
23 such materials for which the claimant claims payment, may bring
an action on such payment bond in his or her own name to recover
any amount due the claimant for such labor or material, and may
prosecute such action to final judgment and have execution on the
judgment.

24 31. SAFECO issued a Labor and Material Payment Bond, Bond No. 024043470,
25 wherein APCO is the principal and SAFECO is the surety.

26 32. Helix provided Work to the Project and remains unpaid for the same.

27 33. Therefore, Helix is a claimant against the Bond and may execute a judgment
28

1 against the same.

2 34. Section 20.5 of the Subcontract provides that “ [i]n the event either party employs
3 an attorney to institute a lawsuit or to demand arbitration for any cause arising out of the
4 Subcontract Work or the Subcontract, or any of the Contract Documents, the prevailing party
5 shall be entitled to all costs, attorney’s fees and any other reasonable expenses incurred therein.”
6

7 35. This provision was not modified by the Helix Addendum.

8 36. The Court finds that Helix is the prevailing party and is entitled to an award of its
9 attorneys’ fees and costs.

10 37. If any conclusions of law are properly findings of fact, they shall be treated as if
11 appropriately identified and designated.

12 Based upon the foregoing Findings of Fact and Conclusions of Law **IT IS HEREBY**
13 **ORDERED, ADJUDGED AND DECREED** as follows:
14

- 15 1. **IT IS HEREBY ORDERED** that, as to Plaintiff’s Claim for Breach of Contract
16 against APCO, this Court finds in favor of Plaintiff but as the Claim was impaired
17 awards damages under the Breach of the Implied Covenant of Good Faith and
18 Fair Dealing, rather than awarding duplicative damages;
- 19 2. **IT IS FURTHER ORDERED** that, as to Plaintiff’s Claim for Breach of the
20 Implied Covenant of Good Faith and Fair Dealing against APCO, this Court finds
21 in favor of Plaintiff and awards damages in the amount of \$43,992.39 together
22 with interest as provided by law and taxable costs of suit;
- 23 3. **IT IS FURTHER ORDERED** that, as to Plaintiff’s Claim for violations of NRS
24 338 against APCO, this Court finds in favor of Plaintiff in the amount of
25 \$1,960.85;⁷
26
27

28 ⁷ These damages are in addition to those awarded under the claim of Breach of the Implied Covenant of Good


- 1 4. **IT IS FURTHER ORDERED** that, given the Court's findings against APCO,
2 the Court finds in favor of Plaintiff and against Safeco and the Bond;
3 5. **IT IS FURTHER ORDERED** that this Court will address any issues of
4 attorneys' fees through motions that may be filed with the Court.
5 6. Any claim not otherwise disposed of by this decision is dismissed.
6

7 DATED this 8th day of July, 2019.
8

9 
10 Elizabeth Gonzalez, District Court Judge
11

12 **Certificate of Service**

13 I hereby certify that on the date filed, a copy of the foregoing Scheduling Order and
14 Order Setting Civil Jury Trial, Pre-Trial and Calendar Call was electronically served, pursuant to
15 N.E.F.C.R. Rule 9, to all registered parties in the Eighth Judicial District Court Electronic Filing
16 Program.
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19 Dan Kutinac
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Faith and Fair Dealing.