IN THE SUPREME COURT OF THE STATE OF NEVADA

APCO CONSTRUCTION, INC., a Nevada Corporation; and SAFECO INSURANCE COMPANY OF AMERICA, Appellants, vs. HELIX ELECTRIC OF NEVADA, LLC, a Nevada limited liability company, Respondent.	Case No. 80177 District Court Case No. A571228

APPELLANTS' PETITION FOR EN BANC RECONSIDERATION

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INTRODUCTION

Pursuant to NRAP 40A, Appellants APCO Construction, Inc. and Safeco Insurance Company of America (collectively, "APCO") hereby petition this Court for en banc reconsideration of its opinion entered on May 5, 2022. APCO seeks en banc reconsideration because this appeal involves a substantial precedential issue involving the scope of the implied covenant of good faith and fair dealing, and en banc consideration is appropriate to ensure uniformity of this Court's and the Court of Appeal's decisions.

First, this Court has not yet addressed the proper scope of the implied covenant of good faith and fair dealing in a published opinion. Every other court to address this issue has found that the implied covenant may not be used in a manner which varies, contradicts, or expands upon the parties' rights and remedies set forth in the underlying agreement. Yet, this Court did precisely that when it relied upon the implied covenant to rewrite the parties' contract by refusing to limit respondent Helix Electric of Nevada's ("Helix") remedy to a time extension rather than damages, by inserting additional obligations into the subcontract for APCO, and by awarding Helix an amount of damages that exceed the expectancy interests of the parties because Helix did not, and could not, prove that its claimed damages were actual delay damages.

Second, en banc reconsideration is also warranted to maintain uniformity of decisions with this Court and the Court of Appeals. This Court's opinion does not address the standard set forth for a finding of "bad faith" conduct sufficient to sustain a breach of the implied covenant in the *Restatement (Second) of Contracts* and this Court's prior order *Renown Health v. Holland & Hart, LLP*, No. 72039, 2019 WL 1530161 (Apr. 5, 2019). If this Court applies the standard it previously adopted, then APCO cannot be held liable for breaching the implied covenant because APCO did not act with either a dishonest purpose or an interested or corrupt motive. The record is clear that APCO's handling of Helix's demand for delay damages, if improper at all, was nothing more than an honest mistake, which is not actionable under the implied covenant. Specifically, APCO did advise Helix that one of the City of North Las Vegas' ("CNLV's") stated reasons for not approving Helix change order request ("COR") was that CNLV did not have a contract with Helix and that CNLV had never previously rejected a COR for that reason; CNLV never rejected any COR, including those from Helix based upon the settlement with APCO; APCO's rights under the prime contract to submit a claim without including Helix, particularly when Helix refused to comply with its obligations under the subcontract to document a claim; Helix agreed to be bound by the terms of the prime contract, which required Helix to submit detailed backup documentation; and Helix's failure

to exhaust its contractual remedies by appealing CNLV's decision through the appeals process set forth in the prime contract.

For these reasons, APCO respectfully seeks en banc reconsideration of this Court's opinion.

PETITION FOR EN BANC RECONSIDERATION STANDARDS

En banc reconsideration is warranted when "(1) reconsideration by the full court is necessary to secure or maintain uniformity of decisions of the Supreme Court or Court of Appeals," or "(2) the proceeding involves a substantial precedential, constitutional or public policy issue." NRAP 40A(a). By publishing an opinion in this case, this Court has indicated that this case presents an issue of first impression and/or involves an issue of public importance. NRAP 36(c)(1)(A), (C).

ARGUMENT

I. THIS COURT'S OPINION IMPROPERLY EXPANDS THE SCOPE OF THE IMPLIED COVENANT AND REWRITES THE SUBCONTRACT.

This Court has not yet addressed the proper scope of the implied covenant of good faith and fair dealing in a published opinion. The implied covenant of good faith and fair dealing prohibits a party from engaging in "unfair" or "arbitrary" behavior that may disadvantage a party to the agreement. *State Dep't of Transportation v. Eighth Jud. Dist. Ct.*, 133 Nev. 549, 555, 402 P.3d 677, 683 (Nev.

2017). The purpose of the covenant is to "ensure[] that parties to a contract perform the substantive bargained-for terms of their agreement." *Andrichyn v. TD Bank, N.A.*, 93 F. Supp. 3d 375, 387 (E.D. Pa. 2015) (internal quotations omitted). [1]

Because the purpose of the implied covenant is to ensure performance of the contract's terms, the implied covenant "can only impose an obligation consistent with other mutually agreed upon terms in the contract." *Id.* (Internal quotations omitted). Therefore, the implied covenant "cannot impose substantive duties or limits on the contracting parties beyond those incorporated in the specific terms of their agreement." *Durell v. Sharp Healthcare*, 108 Cal. Rptr. 3d 682, 698-99 (Ct. App. 2010) (internal quotations omitted). And, the implied covenant cannot be used to contradict an express term in a written agreement. *Bevis v. Terrace View Partners, LP*, 244 Cal. Rptr. 3d 797, 816 (Ct. App. 2019).[2]

Yet, this Court's opinion does precisely that by expanding Helix's remedies under the subcontract. Under Paragraph 6.5, Helix agreed that it would not be

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[1] *See* Appellants' Opening Brief, pp. 35-36.

[2] *See also Kuehn v. Stanley*, 91 P.3d 346, 354 (Ariz. Ct. App. 2004) ("As a general rule, an implied covenant of good faith and fair dealing cannot directly contradict an express term."); *Miller v. Bank of N.Y. Mellon*, 379 P.3d 342, 348-49 (Colo. Ct. App. 2015) (holding that "the implied duty of good faith and fair dealing cannot contradict terms or conditions for which a party has bargained"); *Zygar v. Johnson*, 10 P.3d 326, 330 (Or. App. 2000) ("The implied covenant of good faith and fair dealing cannot contradict an express contractual term . . . ." (internal quotations omitted)); *Goodyear Tire & Rubber Co. v. Whiteman Tire, Inc.*, 935 P.2d 628, 632 (Wash. App. 1997) (holding that the implied covenant "does not apply to *contradict* contract terms").

entitled to damages for any delay. 13 JA 2505-06. This Court's finding that Section 6.3 provides an exception to the no damage for delay provision in 6.5 and that APCO's failure to submit a joint claim with Helix precluded Helix from recovery under Section 6.3, is contrary to the parties' stipulation and the plain language of Section 6.3. *See* 13 JA 2601; 17 JA 3487, 3491, 3499. By its plain language, Section 6.3 only provides additional compensation to Helix for APCO's instructions to "suspend, delay or accelerate" provided APCO and CNLV also agree "in writing" to the extra compensation. *Id*. Here, the parties stipulated that APCO's conduct ***did not*** extend the completion date for the project to trigger Section 6.3. 17 JA 3487 at n. 1. As a result, this Court's opinion effectively rewrites the subcontract to require APCO to pay damages to Helix, which Helix stipulated APCO did not cause. Furthermore, neither APCO nor CNLV agreed that Helix was entitled to extra compensation. 13 JA 2602.

This result improperly expands the scope of the implied covenant to expressly contradict and/or insert additional terms into the contract, something which the implied covenant cannot be used to accomplish. *Durell,* 108 Cal. Rptr. 3d at 698-99. When the parties "have agreed to terms that address the circumstance that gave rise to their dispute," a "court has no business injecting its own sense of what amounts to 'fair dealing.'" *Vander Veur v. Groove Ent. Techs.*, 452 P.3d 1173, 1178 (Utah 2019) (internal quotations omitted).

Furthermore, this Court's opinion expands the scope of the implied covenant to provide for damages which Helix would not otherwise be entitled to under the subcontract. Because the implied covenant is tied to the underlying agreement, the measure of damages for breach of the implied covenant is the same as that for breach of the contract itself. *See Morris Newspaper Corp. v. Allen*, 932 So. 2d 810, 818 n.1 (Miss. Ct. App. 2005); *House v. U.S. Bank Nat'l Ass'n,* 481 P.3d 820, 831 (Mont. 2021). This means that Helix must show its claimed damages were proper "expectancy" damages within the context of the subcontract. *Century Sur. Co. v. Andrew*, 134 Nev. 819, 821-22, 432 P.3d 180, 183 (Nev. 2018).

Under the subcontract, Helix can expect to recover only delay damages it can "connect . . . to the particular incident of the delay." *A.G. Cullen Constr., Inc. v. State Sys. of Higher Educ.*, 898 A.2d 1145, 1160-61 (Pa. Commw. Ct. 2006); *see also Thalle Constr. Co. v. The Whiting-Turner Contr. Co.*, 39 F.3d 412, 417 (2d. Cir. 1994) (explaining that delay damages are solely those "costs [that] were increased" by the delay). The fact that costs are incurred after the scheduled completion date does not render them delay damages. *Manshul Constr. Corp., v,. Dormitory Auth. of N.Y.*, 436 N.Y.S.2d 724, 729 (N.Y. Sup. Ct. App. Div. 1981).

In its opinion, this Court does not attempt to connect Helix's claimed damages to any particular delay in accordance with the expectations of the parties. Helix did not prove its claimed costs were increased by the delay. *See, e.g. George Solitt*

Constr. Co. v. U.S., 64 Fed. Cl. 229, 238 (Ct. Cl. 2005) (holding that in addition to having "the burden of proving the extent of the delay," a subcontractor must also prove "that the delay harmed the [sub]contractor" by increasing its costs). The District Court specifically found that during the claimed delay period Helix had only one person on the job who was working on completing subcontract work and change order work for which Helix was being paid by CNLV. 17 JA 3521, FOF 52. Helix was still billing for its general conditions through October of 2014. 7 JA 1146. As a result, there was no way to determine whether Helix's delay costs were duplicative of the costs CNLV was already paying. Furthermore, Helix admitted that it never performed any analysis that its claimed costs increased because the project was not completed on time. 7 JA 1146; 8 JA 1392-93.

And, Helix never presented the expert testimony required to establish that specific delays caused increased costs. *TechDyn Sys. Corp. v. Whittaker Corp.*, 427 S.E. 2d 334 (Va. 1993).[3] A time impact analysis ("TIA") is necessary to show when, where and why a contractor's scope of work was delayed. 8 JA 1441. Furthermore, the level of mitigation and the opportunities for mitigation are different for general contractors and subcontractors, so this Court cannot use APCO's compensable delays as a basis for awarding Helix delay damages. 7 JA 1134.

[3] Opening Brief p. 9; Reply Brief pp. 5-6.

Without such evidence, these damages could not be said to have been within the reasonable expectations of the parties. This Court's opinion improperly expanded the scope of the implied covenant to award damages to Helix that would not otherwise be recoverable under the plain language of the subcontract. Accordingly, Appellants respectfully request that this Court grant its petition for en banc reconsideration.

II. EN BANC RECONSIDERATION IS WARRANTED BECAUSE THIS COURT'S OPINION OVERLOOKS ITS PRIOR AUTHORITY

A. This Court's Opinion Contradicts its Holding in *Senteney v. Fire Ins. Exchange,* 101 Nev. 654, 707 P.2d 1149 (1985).

As shown above, this Court's opinion relied upon the implied covenant of good faith and fair dealing to expand the legal obligations and remedies of APCO and Helix under the subcontract. By doing so, this Court contradicted its earlier holding that courts may not "attempt to increase the legal obligations of the parties where the parties intentionally limited such obligations." *Senteney v. Fire Ins. Exch.*, 101 Nev. 654, 656, 707 P.2d 1149, 1151 (1985). Since *Senteney*, this Court has repeatedly refused to expand the legal remedies and obligations in contracts. *See, e.g., Traffic Control Servs., Inc. v. United Rentals Nw., Inc.*, 120 Nev. 168, 175-76, 87 P.3d 1054, 1059 (2004) (holding that this Court cannot "interpolate in a contract what a contract does not contain"). This Court has consistently held that it may not "disregard words used by the parties" or "insert words which the parties have not

made use of." *Edelstein v. Bank of N.Y. Mellon,* 128 Nev. 505, 518, 286 P.3d 249, 258 (2012) (internal quotations omitted). Furthermore, it "cannot reject what the parties inserted" into their agreement. *Id.*

If this Court cannot directly increase the obligations of the parties to the contracts under its prior precedent, it should not be able to use the implied covenant to do so because the implied covenant is not an end-run around contractual language. To the contrary, the scope of conduct prohibited by the implied covenant is limited by the terms of the underlying agreement. *Ass'n for Los Angeles Deputy Sheriffs v. Cnty. of L.A.*, 256 Cal. Rptr. 3d 139, 157 (Ct. App. 2019); *Moore v. Wells Fargo Bank, N.A.*, 251 Cal. Rptr. 3d 779, 788 (Ct. App. 2019). Thus, a court cannot use the implied covenant to "impose substantive duties or limits on the contracting parties beyond those incorporated in the specific terms of their agreement." *Durell,* 108 Cal. Rptr. 3d at 698; *see also Racine & Laramie, Ltd. v. Dep't of Parks & Recreation,* 14 Cal. Rptr. 335 (Ct. App. 1992) (holding that the implied covenant "cannot be extended to create obligations not contemplated in the contract."). Accordingly, APCO respectfully submits that en banc reconsideration is warranted.

B. This Court Overlooks Its Earlier Decision in *Renown Health*.

This Court's opinion overlooks its earlier decision in which it found that a breach of the implied covenant requires evidence of actual bad faith. Although not binding authority, in *Renown Health v. Holland & Hart, LLP*, No. 72039, 2019 WL

1530161 (Apr. 5, 2019),[4] this Court explained that "the central question in determining whether the [implied] covenant was breached is whether the party acted in bad faith." *Id.* at * 2 (citing to *Geysen v. Securitas Sec. Servs. USA, Inc.*, 142 A.3d 227 (Conn. 2016)). This Court further explained:

> "[b]ad faith generally implies . . . actual or constructive fraud, or a design to mislead or deceive another, *or a neglect or refusal to fulfill some duty or some contractual obligation,* ***not prompted by an honest mistake as to one's rights or duties,*** *but by some interested or sinister motive . . . Bad faith means more than mere negligence; it involves a dishonest purpose.*"

Id. (quoting *Geysen,* 142 A.3d at 238 (italics and alterations in original, bold emphasis added)). Notably, this Court affirmed the lower court's directed verdict on the appellant's claim for breach of the implied covenant because there was no evidence that the respondent "acted with an interested or corrupt motive, or with anything other than an honest mistake, bad judgment or negligence." *Id.* (Internal quotations omitted). This identical line of authority has also been relied upon by the Court of Appeals. *See Minturn Tr. v. Morawska,* No. 73804-COA, 2019 WL 2714827 (Nev. App. Ct. June 20, 2019).

This Court's holding in *Renown* is the standard established by Section 205 of the *Restatement (Second) of Contracts*, as well by the majority of jurisdictions to address this issue. *See Restatement (Second) of Contracts,* § 205 (1981); *see also Himmelstein v. Comcast of the Dist., LLC,* 908 F. Supp. 2d 49, 53-54 (D.D.C. 2012);

[4] *See* Opening Brief p. 55 and Reply Brief, p. 21.

Careau & Co. v. Sec. Pac. Bus. Credit, Inc., 272 Cal. Rptr. 399-400 (Ct. App. 1990); *Geysen*, 142 A.3d at 238; *Targus Int'l, Inc. v. Sherman,* 922 N.E.2d 841, 853 (Mass. App. Ct. 2010) (holding that "a breach of the implied covenant involves 'bad faith' conduct implicating a dishonest purpose, consciousness of wrong, or ill will in the nature of fraud").[5] Moreover, this Court's holding in *Renown* is consistent with earlier Nevada law, which generally adopted Section 205 of the Second Restatement in the context of a public works contract. *See A.C. Shaw Constr., Inc. v. Washoe Cnty.*, 105 Nev. 913, 914, 784 P.2d 9, 9 (1989). If this Court applies the Restatement standard adopted by this Court in *Renown*, there is no evidence in the record to support a finding that APCO acted in bad faith.

First, this Court found that APCO misled Helix about the reasons for CNLV's rejection, but overlooked that APCO did inform Helix about CNLV's stated reason for the rejection when it sent Helix CNLV's rejection form in October 2013 that stated, "This COr (sic) is rejected. The City of North Las Vegas does not have a contract with Helix Electric." *See* 14 JA 2691-2692.

[5] Additional cases are *Jordet v. Just Energy Solutions, Inc.*, 2020 WL 7167514 (W.D.N.Y. 2020); *Courtean v. Tchrs. Ins. Co.*, 338 F. Supp. 3d 88, 101-102 (D. Conn. 2018); *Andrichyn v. TD Bank, N.A.*, 93 F. Supp. 3d 375, 387 (E.D. Pa. 2015); *Third Fed. S. & L. Ass'n of Cleveland v. Formanik,* 64 N.E.3d 1034, 1048-49 (Ohio 2016); *Khalid v. Citrix Sys., Inc.*, 489 P.3d 252 (Wash. Ct. App. 2020).

Second, the record is clear that APCO behaved consistently with its course of dealing with Helix.[6] *See Galardi v. Naples Polaris, LLC*, 129 Nev. 306, 301 P.3d 364 (2013) (explaining that a court may look to course of dealing in interpreting an agreement that is silent on an issue); *see also Restatement (Second) of Contracts*, § 223(1) (1981) (explaining that the "previous conduct between the parties of an agreement . . . is fairly regarded as establishing a common basis of understanding for interpreting their expression and other conduct"). APCO routinely submitted separate claims on behalf of its subcontractors, including Helix, before and after the rejection of Helix's claim that CNLV routinely approved. 7 JA 1198-1200; 8 JA 1430-31; 16 JA 3251-3364. Mr. Llamado, CNLV's representative, admitted that APCO used the correct form for Helix's COR. 7 JA 1200. No other change order on the project was rejected because the subcontractor did not have a contract with CNLV. 8 JA 1434. Furthermore, there was no contractual requirement for a joint claim submission and the parties' course of dealing did not include joint submissions and Helix never objected to the manner in which APCO processed the claim.

Third, APCO possessed a good faith belief that CNLV's denial of Helix's claim was due to Helix's failure to provide back-up documentation. APCO was told by Mr. Llamado, CNLV's representative, that Helix's change order was insufficient and that CNLV would not review a one line change order with no

[6] *See* Appellants' Opening Brief, p. 53

backup, which is why APCO requested additional backup from Helix. 8 JA 1434-35. In addition, Mr. Pelan, APCO's representative, testified that in February of 2014, CNLV's Deputy Director of facilities, Randy Duval again reviewed and rejected Helix's delay costs. 8 JA 1444. The District Court found Mr. Pelan's testimony on behalf of APCO on this issue to be credible. 17 JA 3499. This evidence, which this Court overlooks, resulted in APCO's good faith subjective belief that Helix needed to provide additional back up, which Helix refused to do in violation of the subcontract and applicable law.

Fourth, nothing in the record supports a finding that APCO was required to submit Helix's delay costs at the same time as APCO's. Even after APCO's settlement with CNLV, the record is clear that CNLV never rejected any change order after the settlement, including those for Helix's delay costs, based upon the settlement. 8 JA1439. Mr. Llamado testified on behalf of CNLV that he rejected Helix's COR's for delay after the settlement because CNLV did not have a contract with Helix—not because of the settlement. 7 JA 1193. This evidence is consistent with Mr. Pelan's testimony on behalf of APCO that the settlement could not affect the claims of other subcontractors because work was ongoing and was limited to APCO's claims. 9 JA 1544.

In fact, after the settlement, CNLV continued to approve change orders until March 17, 2014—more than five months after the settlement. 14 JA 2744-45. The

City wrote on the last COR : **"*With the acceptance of this CCA, APCO agrees that no further COR's will be submitted, thus concluding the project in its entirety.*"** *Id*. (Emphasis added.) Moreover, CNLV continued to meet and discuss Helix's delay COR's until February of 2014 when APCO met with CNLV's Randy DuVal. 8 JA 1444. This evidence is further indication of APCO's good faith belief that it was properly processing Helix's claim.

Fifth, APCO's belief that Helix was required to submit detailed documentation to the City in support of its claim was based upon the plain language of the parties' agreements.[7] Paragraph 1.1 of the Helix subcontract with APCO expressly incorporated all of the terms of the Prime Contract between APCO and CNLV. 13 JA 2601 ("The Contract Documents for this Subcontract Agreement shall include . . . . the Primary Contract between Owner and Contractor"). In Paragraph 1.2 of the subcontract, Helix expressly acknowledged that it had reviewed and understood the terms of the Prime Contract. *Id*. at 2602. And, in paragraph 1.3 of the subcontract, Helix agreed to comply with "all obligations, liabilities and responsibilities that [APCO], by the Contract Documents has assumed towards . . . [CNLV] in the Prime Contract." *Id.*

Paragraph 6.3 of the Prime Contract governed claims for payment. *Id.* at 1898. Under Paragraph 6.3.2.B, Helix was also required to submit ***detailed***

[7] *See* Appellants' Opening Brief, pp 40-42.

contemporaneous documentation of the costs that were in dispute. *Id*. at 1899. This required Helix to provide "a daily summary of the hours and classifications of equipment and labor utilized on the disputed work, as well as a summary of any materials or any specialized services which are used . . ." *Id.* Furthermore, if the costs claimed continued for more than 30 days, Helix was required to continue to submit *all* of its claimed costs, with backup, to CNLV as reasonably practicable in fifteen-day increments. *See id.*

Helix's consistent failure to provide required information despite APCO's repeated requests, is irreconcilable with the finding that APCO should have submitted Helix's claim together with APCO's claim. Specifically, APCO submitted its own independent delay claim on January 9, 2013 before Helix gave any notice of a potential claim. 8 JA 1425-26; 17 JA 3491. Twenty days later, Helix notified APCO of its intent to seek delay damages, but did not provide APCO with any of the detailed documentation required by Paragraph 6.3.2.B of the Prime Contract. 13 JA 2641; 17 JA 3491. The next day, APCO requested the documentation required by Paragraph 6.3 of the Prime Contract, but Helix ***did not provide this information.*** 14 JA 2645. In May 2013, APCO submitted its final claim for delay costs. *Id.* If APCO had submitted Helix's claim with its own on May 9, 2013, as this Court concludes good faith required, Helix's claim would have been as follows: "Helix reserves all rights to any and all additional cost incurred due to

schedule delays for this project." 13 JA 2641-42 . That is all Helix provided for a claim. The implied covenant cannot be applied to require APCO to force Helix to make a claim, nor does it require APCO to wait to process its claims on the off chance Helix might be able to prove the delay increased costs on the project. Helix did not provide APCO with any backup for a claim until October 31, 2013, ***after APCO had already settled APCO's claim with the City.*** 14 JA 2729.

Finally, this Court's opinion overlooks the fact that Helix made a deliberate choice not to appeal CNLV's rejection of its claim under Paragraph 6.3.2.A of the Prime Contract[8]. 11 JA 1898 at Sec. 6.2.3(a); Vol. XIII JA 2601-2602 at Sec 1.1, 1.3. The appeal process applies specifically to "decisions based on Contract interpretation." *Id.* The record is clear that Helix knew about its right to appeal, and that Helix ***intentionally*** chose not to pursue an appeal directly ***or*** to direct APCO to pursue such an appeal. 7 JA 1126, 1227-28; 17 JA 3487, 3499.

As APCO pointed out, by failing to address the issue, Helix conceded that without an appeal there was no evidence that CNLV would have approved Helix's claim, as it existed, even if jointly presented.[9] Thus, without proof of a claim acceptable to CNLV, there was no proof that APCO's conduct and not Helix's

[8] Opening Brief 7-8.
[9] Reply Brief pp. 4-5.

inability to prove a viable claim caused Helix's damages[10]. *Pemberton v. Farmers Ins. Exch.*, 109 Nev. 789, 796–97, 858 P.2d 380, 384 (1993)

Furthermore, by ignoring Helix's failure to appeal, this Court held APCO liable for an untested claim. In doing so, this Court again uses the covenant to rewrite the parties' contract. The subcontract provided a mechanism for Helix to contest any unfairness in the claim process, which remedy Helix declined to exercise.[11] By using the covenant as a substitute for an appeal by Helix, this Court provides a Helix a remedy for which the parties did not bargain. Such use of the covenant creates the potential for widespread misuse of the covenant as a means for courts to substitute their own notions of fairness for the terms the parties negotiated, which is improper.[12] *See Allen v. El Paso Pipeline Co., LLC*, 113 A.3d 167, 183 (Del. Ch. 2014).

Accordingly, the evidence in the record overwhelmingly indicates that APCO made, at worst, an honest mistake in judgment as to how to proceed with Helix's claim and the effect of the settlement. This is not a sufficient basis to find a breach of the implied covenant. *See Renown,* 2019 WL 1530161 at *2; *see also Restatement (Second) of Torts,* § 205 at cmt. d. APCO respectfully submits that en banc

[10] Opening Brief p. 24.
[11] The District Court agreed that an appeal could have resolved the differences of opinion about the scope of the settlement. 7 JA 3495-96.
[12] Opening Brief pp. 33-34.

reconsideration is warranted to conform this Court's opinion with its prior holdings in *Renown.*

CONCLUSION

For the foregoing reasons, APCO respectfully requests that this Court grant its petition for rehearing.

Dated this 16th day of June, 2022.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in size 14 font in Times New Roman. I further certify that this petition complies with the type-volume limitation of NRAP 32(a)(7) as **it contains 4,307 words.**

Finally, I hereby certify that to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires that every assertion in this brief regarding matters in the record be supported by appropriate references to the record on appeal.

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I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 16th day of June, 2022.

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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on the 16th day of June, 2022 and was served on the following by the Supreme Court Electronic Filing System (eFlex):

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