

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

2   **HELIX ELECTRIC OF NEVADA, LLC**

3                   Appellant/Cross-Respondent

4                   vs.

5   **APCO CONSTRUCTION, INC., A**  
6   **NEVADA CORPORATION,**

7                   Respondent/Cross-Appellant.

**Case No. 80508**

District Court Case No. A696429

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Clerk of Supreme Court

8                   **APPENDIX TO DOCKETING STATEMENT**  
9                   **VOLUME 5**

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**APPENDIX TO DOCKETING STATEMENT  
VOLUME 5**

<b>EX.</b>	<b>DOCUMENTS</b>	<b>BATES STAMP NO.</b>	<b>VOL.</b>
1.	Eighth Judicial District Court Docket in Case No. A587168 and consolidated cases in A571228 (PART 1 of 2)	0001-0595	1, 2 & 3
2.	Notice of Entry of Order and Order (1) Granting APCO Construction, Inc.'s Motion for Attorneys' Fees and Costs (2) Granting APCO Construction, Inc.'s Memorandum of Costs in Part, (3) Granting Helix Electric of Nevada LLC's Motion to Retax in Part and Denying in Part, (4) Granting Plaintiff In Intervention National Wood Products LLC's Motion to Retax in Part and Denying in Part and (5) Granting National Wood Products, Inc.'s Motion to File a Surreply	0596-0610	3
3.	Chart outlining each the claims brought by and against the parties to Eighth Judicial District Court Case No. A587168 and how each claim was resolved	0611-0628	3
4.	Accuracy Glass & Mirror Co.'s First Amended Complaint	0629-0644	3
5.	APCO Construction, Inc.'s Counter and Claim Claims to Interstate Plumbing and Air Conditioning. Inc.'s Third Party Complaint	0645-0669	3
6.	Bruin Painting Corp.'s Third Party Complaint	0670-0682	3
7.	Cactus Rose Construction, Inc.'s Third Party Complaint dated April 1, 2010	0683-0696	3
8.	Camco Pacific Construction Co.'s Answer and Counterclaim re: Dave Peterson Framing	0697-0721	3
9.	Camco Pacific Construction Co.'s Answer and Counterclaim re: Helix Electric	0722-0744	4

1	10.	Camco Pacific Construction Co.'s Answer and Counterclaim re: Accuracy Glass	0745-0764	4
2	11.	Camco Pacific Construction Co.'s Answer and Counterclaim re: Bruin Painting	0765-0784	4
3	12.	Camco Pacific Construction Co.'s Answer and Counterclaim re: WRG Design, Inc.	0785-0805	4
4	13.	Camco Pacific Construction Co.'s Answer and Counterclaim re: Cactus Rose Construction	0806-0823	4
5	14.	Camco Pacific Construction Co.'s Answer and Counterclaim re: Heinaman Contract Glazing	0824-0844	4
6	15.	Camco Pacific Construction Co.'s Amended Answer and Counterclaim re: HD Supply & Waterworks	0845-0851	4
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8	16.	HD Supply Waterworks, LP's Third Party Complaint	0852-0869	4
9	17.	Helix Electric of Nevada, LLC's Third Party Complaint	0870-0885	4
10	18.	Heinaman Contract Glazing's Third Party Complaint	0886-0898	4
11	19.	Interstate Plumbing and Air Conditioning, LLC's Third Party Complaint	0899-0916	4
12	20.	WRG Design, Inc.'s Third Party Complaint	0917-0933	4
13	21.	April 5, 2010 Voluntary Dismissal	0934-0941	4
14	22.	May 26, 2010 Order Striking Gemstone's Answer and Counterclaims and Entering Default	0942-0944	4
15	23.	May 7, 2012 Order and Judgement on Scott Financial's Motion for Summary Judgment as to Priority of Liens	0945-0958	4
16	24.	April 4, 2013 Stipulation and Order to Dismiss	0959-0969	5
17	25.	October 7, 2016 Special Master Report Regarding Remaining Parties to the Litigation, Special Master Recommendation, and District Court Order	0970-0974	5
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26.	September 20, 2017 Order Granting Plaintiff's Motion to Dismiss	0975-0977	5
27.	September 20, 2017 Stipulation and Order of Dismissal of All Claims Relating to Cardno WRG, Inc.	0978-0981	5
28.	February 5, 2018 Stipulation and Order to Dismiss Third Party Complaint of Interstate Plumbing & Air Conditioning, LLC Against APCO Construction With Prejudice	0982-0984	5
29.	April 25, 2018 4.25.18 Findings of Fact and Conclusions of Law as to the Claims of Helix Electric and Cabenetec Against APCO	0985-1056	5
30.	April 26, 2018 Findings of Fact and Conclusions of Law as to the Claims of Cactus Rose Construction Co., Inc.	1057-1069	5
31.	April 26, 2018 Findings of Fact and Conclusions of Law as to the Claims of Heinaman Contract Glazing	1070-1083	5
32.	April 26, 2018 Findings of Fact and Conclusions of Law as to the Claims of Helix Electric of Nevada, LLC Against Camco Pacific Construction, Inc.	1084-1094	5
33.	July 19, 2018 Order Granting Motion to Deposit Bond Penal Sum With Court, Exoneration of Bond, and Dismissal	1095-1097	5
34.	July 26, 2018 Order Approving Distribution of Fidelity and Deposit Company of Maryland's Bond	1098-1100	5
35.	Order Granting Helix Electric of Nevada's Motion for Rule 54(b) Certification	1101-1108	5

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/s/ Elizabeth J. Bassett  
An employee of Fennemore Craig P.C.

**EXHIBIT “24”**

**EXHIBIT “24”**

  
CLERK OF THE COURT

1 **SAO**  
2 RICHARD L. PEEL, ESQ.  
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13 Attorneys for HD Supply Waterworks, LP

**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

9 **ACCURACY GLASS & MIRROR**  
10 **COMPANY, INC.,** a Nevada corporation,

**LEAD CASE NO.: A571228**  
**DEPT. NO.: XIII**

11 Plaintiff,

*Consolidated with:*

12 vs.

*A574792*

*A574391*

*A577623*

13 **ASPHALT PRODUCTS CORP.,** a Nevada  
14 corporation; **APCO CONSTRUCTION,** a

*A580889*

*A583289*

15 Nevada corporation; **CAMCO PACIFIC**  
16 **CONSTRUCTION COMPANY, INC.,** a

*A584730*

*A587168*

17 California corporation; **GEMSTONE**  
18 **DEVELOPMENT WEST, INC.,** Nevada

*A589195*

*A589677*

19 corporation; **FIDELITY AND DEPOSIT**  
20 **COMPANY OF MARYLAND; SCOTT**

*A590319*

*A592826*

21 **FINANCIAL CORPORATION,** a North Dakota  
22 corporation; **DOES I through X; ROE**

*A596924*

*A597089*

23 **CORPORATIONS I through X; BOE**  
24 **BONDING COMPANIES I through X; LOE**

*A606730*

*A608717*

25 **LENDERS I through X, inclusive,**

*A608718*

26 Defendants.

**STIPULATION AND ORDER TO  
DISMISS E & E FIRE PROTECTION,  
LLC ONLY PURSUANT TO THE  
TERMS STATED BELOW**

27 **HD SUPPLY WATERWORKS, LP,** a Florida  
28 limited partnership,

Plaintiff in Intervention,

vs.

29 **APCO CONSTRUCTION,** a Nevada  
30 corporation; **CAMCO PACIFIC**  
31 **CONSTRUCTION COMPANY, INC.,** a

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California corporation; GEMSTONE DEVELOPMENT WEST, INC., Nevada corporation; JEFF HEIT PLUMBING CO, LLC, a Nevada limited-liability company; E & E FIRE PROTECTION, LLC, a Nevada limited liability company; FIDELITY AND DEPOSIT COMPANY OF MARYLAND; OLD REPUBLIC SURETY; PLATTE RIVER INSURANCE COMPANY; SCOTT FINANCIAL CORPORATION, a North Dakota corporation ; DOES I through X; ROE CORPORATIONS I through X; BOE BONDING COMPANIES I through X; LOE LENDERS I through X, inclusive,

Defendants.

The Undersigned Parties (the "Parties") by and through their respective attorneys of record as identified below hereby stipulate and agree as follows:

1. The Parties represent and warrant that they have the necessary authority and capacity to enter into the instant Stipulation and agree to be bound by the terms and conditions contained herein.

2. The Parties hereby stipulate and agree to dismiss the following claims pursuant to Nevada's Rules of Civil Procedure, Rule 41(a)(1) and 41(c) with prejudice, as follows:

a. Any and all claims, counterclaims and third-party claims that HD Supply Waterworks, LP ("HD Supply") brought against E&E Fire Protection, LLC ("E&E") or any other named Party in its Amended Statement of Facts Constituting A Notice of Lien and Third-Party Complaint ("Statement of Facts"), with respect to the materials that HD Supply provided to E&E for the Project ("Materials"); and

b. Any and all claims, counterclaims and third-party claims that E&E brought against HD Supply in this action with respect to the Materials that HD Supply provided to E&E for the Project.

///



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3. Within ten (10) business days of the entry of this Order, HD Supply will cause its Notice of Lien which it caused to be recorded with the Office of the County Recorder, Clark County, Nevada as Instrument #200902130004359 to be discharged.

4. Nothing herein shall be deemed to be a waiver or release of the rights, claims or causes of action other than those specifically set forth above.

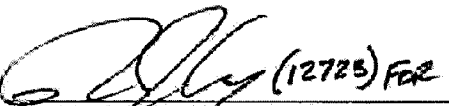
5. Each party shall bear their own attorney's fees and costs.

Dated this 25<sup>th</sup> day of March 2013.

Dated this \_\_\_\_ day of March 2013.

**PEEL BRIMLEY LLP**

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Dated this \_\_\_\_ day of March, 2013.

Dated this \_\_\_\_ day of March, 2013.

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**HOWARD & HOWARD**

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5. Each party shall bear their own attorney's fees and costs.

Dated this \_\_\_\_ day of March 2013.

Dated this 29 day of March 2013.

**PEEL BRIMLEY LLP**

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Dated this \_\_\_\_ day of March, 2013.

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Dated this 25 day of March, 2013.

Dated this \_\_\_\_ day of March, 2013.

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Dated this \_\_\_\_ day of March 2013.

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Dated this \_\_\_\_ day of March, 2013.

Dated this 25 day of March, 2013.

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1 Dated this 25<sup>th</sup> day of March, 2013.

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Dated this \_\_\_\_\_ day of March, 2013.

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Dated this 1<sup>st</sup> April day of March, 2013.

GREENBERG TRAURIG, LLP

  
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1 Dated this \_\_\_\_\_ day of March, 2013.

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Dated this \_\_\_\_\_ day of March, 2013.

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Clerk # AS71228 SWS

ORDER Dismissing E & E Fire Protection, LLC  
Only

IT IS SO ORDERED as stipulated,

Dated this <sup>April</sup> 3rd day of March, 2013.

*Dea O'Leary*  
DISTRICT COURT JUDGE

Respectfully Submitted by:

PEEL BRIMLEY LLP

*(#12723)*  
*For*  
RICHARD L. PEEL, ESQ.

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**EXHIBIT “25”**

**EXHIBIT “25”**

  
CLERK OF THE COURT

1 SMRO  
2 FLOYD A. HALE, ESQ.  
3 Nevada Bar No. 1873  
4 JAMS  
5 3800 Howard Hughes Pkwy, 11<sup>th</sup> Fl.  
6 Las Vegas, NV 89169  
7 Ph: (702) 457-5267  
8 Fax: (702) 437-5267  
9 *Special Master*

DISTRICT COURT

CLARK COUNTY, NEVADA

9 APCO CONSTRUCTION, a Nevada corporation, ) CASE NO. A571228  
10 ) DEPT NO. XIII  
11 )  
12 Plaintiff, )  
13 ) Consolidated with:  
14 v. )  
15 ) A574391; A574792; A577623; A583289;  
16 GEMSTONE DEVELOPMENT WEST, INC., ) A587168; A580889; A584730; A589195;  
17 a Nevada corporation, ) A595552; A597089; A592826; A589677;  
18 ) A596924; A584960; A608717; A608718;  
19 Defendant. ) and A590319  
20 )  
21 AND ALL RELATED MATTERS, )  
22 )  
23 )

24 SPECIAL MASTER REPORT REGARDING REMAINING PARTIES  
25 TO THE LITIGATION, SPECIAL MASTER RECOMMENDATION AND  
26 DISTRICT COURT ORDER AMENDING CASE AGENDA

27 APCO Construction filed a first Amended Complaint on December 8, 2008, seeking damages  
28 for construction services performed for the construction of the Manhattan West mixed use development  
project, located at 9205 W. Russell Road, Clark County, Nevada. The Amended Complaint, in addition  
to seeking monetary damages, sought a declaration from the Court ranking the priority of all lien claims  
and secured claims and other declaratory relief, including a requested foreclosure sale. Since that time,  
numerous lienclaimants have joined the litigation which has now been consolidated. A Special Master  
was appointed on June 9, 2016, by the District Court.

Special Master Report:

Pursuant to a prior Special Master Order, the parties were required to complete Questionnaire by electronic service in this litigation by September 23, 2016. That Questionnaire, drafted by counsel in this litigation and approved by the Special Master, was to limit unnecessary discovery requests and to document what parties were remaining in this litigation. The September 1, 2016, Special Master Order indicated, "It will be assumed the parties that do not respond to the Questionnaire have abandoned any claim related to this litigation. The following parties provided a timely Questionnaire and have provided NRCP 16.1 documentation by September 23, 2016, or subsequently obtained approval of the Special Master to extend the deadline. It is being Recommended to the District Court that the only remaining parties that have claims in this consolidated litigation are the following parties which did provide the necessary NRCP 16.1 documents and a completed Questionnaire:

APCO Construction	Camco Pacific Construction Co.
Steel Structures, Inc.	Nevada Prefab Engineers, Inc.
Unitah Investments, LLC	Noorda Sheet Metal
E&E Fire Protection	Insulpro Projects, Inc.
SWPP Compliance Solutions, LLC	Interstate Plumbing and Air Conditioning, LLC
Helix Electric of Nevada, Inc.	Heinaman Contract Glazing, Inc.
Fast Glass, Inc.	Cardo WRG fka WRG Design, Inc.
Buchele, Inc.	Cactus Rose Construction, Inc.
Accuracy Glass & Mirror Co.	National Wood Products, Inc.
Zitting Brothers Construction, Inc.	United Subcontractors dba Sky Line Insulation

Due to the delay in completing the Questionnaire format, and obtaining response to the Questionnaire, it was agreed that the Case Agenda or discovery schedule submitted to the District Court on August 2, 2016, by the Special Master and approved by the District Court on August 4, 2016, required amendment. The parties also acknowledged that the designated depository for this litigation is Litigation Services, located at 3770 Howard Hughes Parkway, #300, Las Vegas, Nevada, 89169. Under the amended Case Agenda, initial expert disclosures will be required by January 9, 2017, with rebuttal expert disclosures to be deposited by February 13, 2017. The discovery cut-off date for the

1 litigation will be May 15, 2017, with the earliest trial date being July 10, 2017. There will be no Stay  
2 of discovery, however, the Special Master will consider requests to limit discovery requests to the  
3 parties.

4 IT IS RECOMMENDED that the Court enter the following Order:  
5

6 1. That the only remaining parties that have claims in this consolidated litigation are the parties  
7 listed in this Special Master Report as having responded to the Questionnaire and having provided  
8 NRCP 16.1 documents;

9 2. That the designated document depository for this litigation is Litigation Services, located at  
10 3770 Howard Hughes Parkway, #300, Las Vegas, Nevada, 89169;

11 3. The Court adopts and approves the Amended Case Agenda attached hereto as Exhibit "A."

12 RECOMMENDED this 4<sup>th</sup> day of October, 2016.

13 By: 

14 FLOYD A. HALE, Esq.  
15 Nevada Bar No. 1873  
16 3800 Howard Hughes Pkwy, 11<sup>th</sup> Fl.  
17 Las Vegas, NV 89169  
Special Master

18 IT IS SO ORDERED this 6<sup>th</sup> day of October, 2016.

19 By: 

20 DISTRICT COURT JUDGE  
21  
22  
23  
24  
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27  
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**APCO CONSTRUCTION v. GEMSTONE DEVELOPMENT**  
**Case No. A571228**  
**(Pursuant to September 29, 2016, Special Master Hearing)**

8/1/16 3:30 p.m.	Special Master Hearing, 3800 Howard Hughes Parkway, 11 <sup>th</sup> Floor, Las Vegas, Nevada
8/31/16	Parties to provide documents and all information required to be produced pursuant to NRS 16.1
9/29/16 4:00 p.m.	Special Master Hearing, 3800 Howard Hughes Parkway, 11 <sup>th</sup> Floor, Las Vegas, Nevada
1/9/17	Initial expert disclosures to be served
2/13/17	Rebuttal expert disclosures to be served
2/16/17 2:00 p.m.	Special Master Hearing, 3800 Howard Hughes Parkway, 11 <sup>th</sup> Floor, Las Vegas, Nevada
5/15/17	Discovery cut-off
7/10/17	Earliest date to schedule trial

**EXHIBIT "A"**

**EXHIBIT “26”**

**EXHIBIT “26”**



1 **Marquis Aurbach Coffing**  
2 Jack Chen Min Juan, Esq.  
3 Nevada Bar No. 6367  
4 Cody S. Mounteer, Esq.  
5 Nevada Bar No. 11220  
6 10001 Park Run Drive  
7 Las Vegas, Nevada 89145  
8 Telephone: (702) 382-0711  
9 Facsimile: (702) 382-5816  
10 jjuan@maclaw.com  
11 cmounteer@maclaw.com  
12 *Attorneys for APCO Construction*

13 **DISTRICT COURT**  
14 **CLARK COUNTY, NEVADA**

15 APCO CONSTRUCTION, a Nevada  
16 corporation,

17 Plaintiff,

Case No.: A571228

18 vs.

Dept. No.: XIII

19 GEMSTONE DEVELOPMENT WEST, INC., A  
20 Nevada corporation,

21 Defendant.

*Consolidated with:*

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

22 **AND ALL RELATED MATTERS**

23 **ORDER GRANTING PLAINTIFF'S MOTION TO DISMISS**

24 This matter having come on for hearing before this court on September 11, 2017, the  
25 Court having heard the oral arguments, no opposition having been filed, and for good cause  
26 shown:

27 1. On September 5, 2017, there was calendar call on the claims of the remaining  
28 parties of this case;

2. During this calendar call, APCO, CAMCO, Helix and Zitting orally moved  
pursuant to NRCP 7(b) to dismiss, with prejudice, those parties that have not filed their Pre-Trial  
Disclosures;

3. The Court set the final Pre-Trial Disclosure date to Friday, September 8th, 2017 at  
5:00pm, with a follow up hearing set for September 11, 2017 at 9:00am on the NRCP 7(b) oral  
motion to dismiss;

MARQUIS AURBACH COFFING

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

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SEP 18 2017

DISTRICT COURT DEPT#13

1 4. At the hearing on Monday, September 11, 2017, the Court granted the oral  
2 Motion to Dismiss the following parties:

3 Accuracy Glass and Mirror Company; Noorda Sheet Metal; and  
4 Tri-City Drywall Inc.;

5 5. The parties remaining in this litigation are thus:

6 APCO Construction; Camco Pacific Construction Co.;  
7 Steel Structures, Inc.; Unitah Investments, LLC;  
8 E&E Fire Protection, LLC; SWPP Compliance Solutions, LLC;  
9 Helix Electric of Nevada, Inc.; Fast Glass, Inc.; Buchele, Inc.;  
10 Zitting Brothers Construction, Inc.; Nevada Prefab Engineers, Inc.;  
11 Heinaman Contract Glazing, Inc.; Cactus Rose Construction, Inc.;  
12 National Wood Products, Inc.; United Subcontractors dba Sky Line Insulation; and  
13 Interstate Plumbing and Air Conditioning LLC;

14 6. All other parties and claims were previously resolved pursuant to a separate  
15 stipulation and order and/or separate settlement; and

16 7. The remaining parties may now proceed to a settlement conference or mediation.

17 **ORDER**

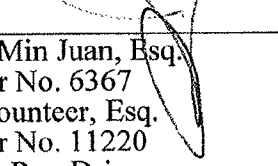
18 IT IS SO ORDERED.

19 Dated: September 19, 2017.

20   
DISTRICT COURT JUDGE

21 Respectfully submitted by:

22 MARQUIS AURBACH COFFING

23 By   
24 Jack Chen Min Juan, Esq.  
25 Nevada Bar No. 6367  
26 Cody S. Mounteer, Esq.  
27 Nevada Bar No. 11220  
28 10001 Park Run Drive  
Las Vegas, Nevada 89145  
Telephone: (702) 382-0711  
Facsimile: (702) 382-5816  
*Attorneys for APCO Construction*



**EXHIBIT “27”**

**EXHIBIT “27”**



1 **SAO**  
2 ERIC B. ZIMBELMAN,  
3 Nevada Bar No. 9407  
4 RICHARD L. PEEL, ESQ.  
5 Nevada Bar No. 4359  
6 **PEEL BRIMLEY LLP**  
7 3333 E. Serene Avenue, Suite 200  
8 Henderson, NV 89074-6571  
9 Telephone: (702) 990-7272  
10 Fax: (702) 990-7273  
11 ezimbelman@peelbrimley.com  
12 rpeel@peelbrimley.com  
13 *Attorneys for Various Lien Claimants*

14 **DISTRICT COURT**  
15 **CLARK COUNTY, NEVADA**

16 APCO CONSTRUCTION, a Nevada  
17 corporation,

18 Plaintiff,

19 vs

20 GEMSTONE DEVELOPMENT WEST, INC.,  
21 Nevada corporation; NEVADA  
22 CONSTRUCTION SERVICES, a Nevada  
23 corporation; SCOTT FINANCIAL  
24 CORPORATION, a North Dakota corporation;  
25 COMMONWEALTH LAND TITLE  
26 INSURANCE COMPANY; FIRST  
27 AMERICAN TITLE INSURANCE  
28 COMPANY and DOES I through X,

29 Defendants.

30 **AND ALL RELATED MATTERS.**

LEAD CASE NO.: A571228  
DEPT. NO.: XIII

*Consolidated with:*  
A571792, A574391, A577623, A580889,  
A583289, A584730, and A587168

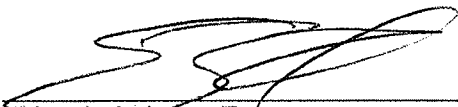
**STIPULATION AND ORDER OF  
DISMISSAL OF ALL CLAIMS  
RELATING TO CARDO WRG, INC.**

31 APCO CONSTRUCTION ("APCO"), CAMCO PACIFIC CONSTRUCTION  
32 COMPANY, INC. ("Camco"), and CARDNO WRG, INC. fka WRG Design, Inc. ("Cardno")  
33 hereby stipulate as follows:

- 34 1. All claims between and APCO and Cardno are mutually dismissed with prejudice and  
35 without an award of costs or fees to any party;
- 36 2. All claims between Camco and Cardno are mutually dismissed with prejudice and  
37 without an award of costs or fees to any party.

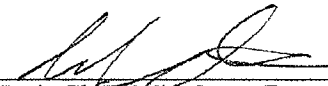
1 Dated: 9/14/2017

2 **PEEL BRIMLEY LLP**

3  
4 By:   
5 Eric Zimbelman, Esq.  
6 Nevada Bar No. 9407  
7 3333 E. Serene Avenue, Suite 200  
8 Henderson, Nevada 89074  
9 *Attorneys for Cardno WRG, Inc.*

Dated: 9/12/17

**MARQUIS AURBACH COFFING**

By:   
Jack Chen Min Juan, Esq.  
Nevada Bar No. 6367  
10001 Park Run Drive  
Las Vegas, Nevada 89145  
*Attorneys for APCO Construction*

8 Dated: \_\_\_\_\_

9 **GRANT MORRIS DODDS PLLC**

10  
11 By: \_\_\_\_\_  
12 Steven L. Morris, Esq.  
13 Nevada Bar No. 7454  
14 2520 St. Rose Parkway, Suite 319  
15 Henderson Nevada 89074  
16 *Attorneys for Camco Pacific Construction*  
17 *Company, Inc.*

15 **ORDER**

16 Upon the Stipulation of APCO CONSTRUCTION ("APCO"), CAMCO PACIFIC  
17 CONSTRUCTION COMPANY, INC. ("Camco"), and CARDNO WRG, INC. fka WRG Design,  
18 Inc. ("Cardno"),  
19

20 IT IS HEREBY ORDERED as follows:

- 21 1. All claims between and APCO and Cardno are mutually dismissed with prejudice and  
22 without an award of costs or fees to any party.;
- 23 2. All claims between Camco and Cardno are mutually dismissed with prejudice and  
24 without an award of costs or fees to any party.

25 DATED: Sept 19 2017.

26  
27   
28 DISTRICT COURT JUDGE 

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

1 Dated: \_\_\_\_\_

Dated: \_\_\_\_\_

2 **PEEL BRIMLEY LLP**

**MARQUIS AURBACH COFFING**

4 By: \_\_\_\_\_

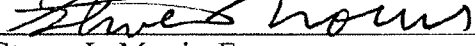
By: \_\_\_\_\_

5 Eric Zimbelman, Esq.  
6 Nevada Bar No. 9407  
7 3333 E. Serene Avenue, Suite 200  
8 Henderson, Nevada 89074  
9 *Attorneys for Cardno WRG, Inc.*

Jack Chen Min Juan, Esq.  
Nevada Bar No. 6367  
10001 Park Run Drive  
Las Vegas, Nevada 89145  
*Attorneys for APCO Construction*

8 Dated: \_\_\_\_\_

9 **GRANT MORRIS DODDS PLLC**

10 By:   
11 Steven L. Morris, Esq.  
12 Nevada Bar No. 7454  
13 2520 St. Rose Parkway, Suite 319  
14 Henderson Nevada 89074  
15 *Attorneys for Camco Pacific Construction*  
16 *Company, Inc.*

**ORDER**

17 Upon the Stipulation of APCO CONSTRUCTION ("APCO"), CAMCO PACIFIC  
18 CONSTRUCTION COMPANY, INC. ("Camco"), and CARDNO WRG, INC. fka WRG Design,  
19 Inc. ("Cardno"),

20 IT IS HEREBY ORDERED as follows:

- 21 1. All claims between and APCO and Cardno are mutually dismissed with prejudice and  
22 without an award of costs or fees to any party.;
- 23 2. All claims between Camco and Cardno are mutually dismissed with prejudice and  
24 without an award of costs or fees to any party.

25 DATED: \_\_\_\_\_ 2017.

26  
27 \_\_\_\_\_  
28 DISTRICT COURT JUDGE

**EXHIBIT “28”**

**EXHIBIT “28”**



**SAO**  
SULLIVAN HILL LEWIN REZ & ENGEL  
A Professional Law Corporation  
Elizabeth E. Stephens, NV SBN 5788  
228 South Fourth Street, First Floor  
Las Vegas, NV 89101  
Telephone: (702) 382-6440  
Fax Number: (702) 384-9102

*Attorneys for William A. Leonard, Jr., Chapter 7 Trustee of the Jointly Administered Bankruptcy  
Estate of Interstate Plumbing & Air Conditioning, LLC dba Interstate Services, dba IPAC  
Mechanical, in the United States Bankruptcy Court, District of Nevada, Case No. 11-25053-BAM*

DISTRICT COURT  
CLARK COUNTY, NEVADA

ACCURACY GLASS & MIRROR  
COMPANY, INC., a Nevada corporation,

Plaintiff,

v.

ASPHALT PRODUCTS CORP., a Nevada  
corporation; APCO CONSTRUCTION, a  
Nevada corporation; CAMCO PACIFIC  
CONSTRUCTION COMPANY, INC., a  
California corporation; GEMSTONE  
DEVELOPMENT WEST, INC., a Nevada  
corporation; FIDELITY AND DEPOSIT  
COMPANY OF MARYLAND; SCOTT  
FINANCIAL CORPORATION, a North  
Dakota corporation; DOES I through X;  
ROE CORPORATIONS I through X; BOE  
BONDING COMPANIES I through X;  
LOE LENDERS I through X, inclusive,

Defendants.

INTERSTATE PLUMBING & AIR  
CONDITIONING, LLC, a Nevada limited –  
liability company,

Plaintiff in Intervention,

v.

ASPHALT PRODUCTS CORP., a Nevada  
corporation; APCO CONSTRUCTION, a  
Nevada corporation; CAMCO PACIFIC  
CONSTRUCTION COMPANY, INC., a  
California corporation; GEMSTONE  
DEVELOPMENT WEST, INC., a Nevada  
corporation; FIDELITY AND DEPOSIT  
COMPANY OF MARYLAND; SCOTT  
FINANCIAL CORPORATION, a North

) LEASE CASE NO. A571228  
) DEPT. NO." XIII

) Consolidated with:

) A571792

) A574391

) A577623

) A583289

) A584730

) A587168

) STIPULATION AND ORDER TO DISMISS  
) THIRD PARTY COMPLAINT OF  
) INTERSTATE PLUMBING & AIR  
) CONDITIONING, LLC AGAINST APCO  
) CONSTRUCTION, INC. WITH  
) PREJUDICE

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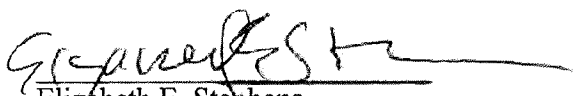
1 Dakota corporation; DOES I through X; )  
2 ROE CORPORATIONS I through X; BOE )  
3 BONDING COMPANIES I through X; )  
4 LOE LENDERS I through X, inclusive, )  
5 Defendants. )

6 Third party Plaintiff, William A. Leonard, Jr., trustee of the Interstate Plumbing & Air  
7 Conditioning, LLC ("IPAC") ("Plaintiff" or "Trustee"), by and through his counsel of record,  
8 Elizabeth E. Stephens, Esq., of the law office of Sullivan Hill Lewin Rez & Engel, APLC  
9 ("Sullivan Hill") and APCO Construction, Inc. ("APCO") by and through its attorneys John  
10 Randall Jefferies Esq. and Mary E. Bacon, Esq. of the law office of Spencer Fane, LLP hereby  
11 represent and stipulate as follows: APCO and the Trustee hereby stipulate and agree to dismiss  
12 IPAC's complaint in its entirety *with prejudice*. Each party will bear its own attorneys' fees and  
13 costs.

14 IT IS SO STIPULATED.

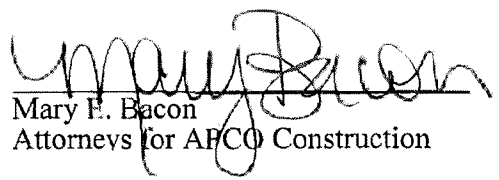
15 Dated: January 29, 2018

SULLIVAN HILL LEWIN REZ & ENGEL  
A Professional Law Corporation

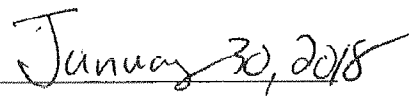
17 By:   
18 Elizabeth E. Stephens  
19 Attorneys for William A. Leonard, Jr.,  
20 Chapter 7 Trustee

21 Dated: January 29, 2018

SPENCER FANE, LLP

22 By:   
23 Mary E. Bacon  
24 Attorneys for APCO Construction

25 IT IS SO ORDERED.

26 Date:   
27  
28

DISTRICT JUDGE

**EXHIBIT “29”**

**EXHIBIT “29”**



*Steven D. Grierson*

1 FFCO

DISTRICT COURT

CLARK COUNTY, NEVADA

4 APCO CONSTRUCTION, a Nevada  
5 corporation,

6 Plaintiff,

7 v.

8 GEMSTONE DEVELOPMENT WEST, INC., A  
9 Nevada corporation,

10 Defendant.

Case No.: 08A571228

Dept. No.: XIII

Consolidated with:

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

11 AND ALL RELATED MATTERS

12 FINDINGS OF FACT AND CONCLUSIONS OF LAW  
13 AS TO THE CLAIMS OF HELIX ELECTRIC  
14 AND CABENETEC AGAINST APCO

15 This matter having come on for a non-jury trial on January 17-19, 23, 24, and  
16 February 6, 2018, APCO Construction, Inc., appearing through Spencer Fane, LLP and  
17 Marquis & Aurbach; Camco Construction, Inc., through Grant Morris Dodds; National Wood  
18 Products, LLC through Cadden Fuller and Richard L. Tobler, Ltd.; United Subcontractors, Inc.  
19 through Fabian Vancott; and Helix Electric of Nevada, LLC, SWPP Compliance Solution,  
20 Cactus Rose Construction, Inc., Fast Glass, Inc., Heinaman Contract Glazing all through Peel  
21 Brimley; and, the Court having heard the testimony of witnesses, having reviewed the evidence  
22 provided by the parties, having heard the arguments of counsel, and having read and considered  
23 the briefs of counsel and good cause appearing; the Court hereby makes the following:

24 I. FINDINGS OF FACT

25 A. The Project

26 1. This action arises out of a construction project in Las Vegas, Nevada known as  
27 the Manhattan West Condominiums project in Clark County Nevada, (the "Project").

28 2. Gemstone Development West, Inc. ("Gemstone") was the owner and developer  
of the Project that contracted APCO to serve as the prime contractor.

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MARK R. DENTON  
DISTRICT JUDGE

DEPARTMENT THIRTEEN  
LAS VEGAS, NV 89165

0986

1           3.       On or about September 6, 2007, Gemstone and APCO entered into the  
2 Manhattan West General Construction Contract for GMP (the "Contract")<sup>1</sup>.

3           4.       The Contract included Phase 1 and Phase 2 and consisted of nine buildings, with  
4 five of the nine buildings in Phase 1 (buildings 2, 3, 7, 8 and 9).<sup>2</sup>

5           5.       The Contract price for Phase 1 was \$78,938,160.00.<sup>3</sup> APCO started work on the  
6 Project in September, 2007.<sup>4</sup>

7           **B.       The Contract**

8           6.       The following are several critical Contract provisions that relate to the current  
9 claims.

10          **1.       Completion**

11          7.       Section 2.10 of the Contract defines completion as follows:

12               (a) The Work within or related to each Building shall be deemed  
13 completed upon the (i) completion of the Work in such Building  
14 and the Corresponding Common Area; (ii) issuance of the  
15 Certificate of Occupancy for such Building; (iii) completion of  
16 any corrections that are requested by Developer, set forth on a  
17 Developer Punch List; and (iv) delivery of the applicable  
Completion Documents (collectively, a "Building Completion").  
The Project shall be deemed completed upon the Building  
Completion of each Building (collectively "Final Completion").<sup>5</sup>

18          8.       Given the ultimate disputes between APCO and Gemstone, APCO did not meet  
19 this definition of completion.<sup>6</sup>

20          .....

21 \_\_\_\_\_  
22          <sup>1</sup> Exhibit 2. Gemstone and APCO also entered into a grading contract on April  
17, 2007 but that contract is not the subject of this lawsuit. Exhibit 1.

23          <sup>2</sup> Testimony of Joe Pelan (APCO) Day 1, pp. 19 and 22; Exhibit 13, p.1. Joe  
Pelan is the General Manager of APCO Construction.

24          <sup>3</sup> Testimony of Joe Pelan (APCO), Day 1, p. 28.

25          <sup>4</sup> Testimony of Joe Pelan (APCO), Day 1, p. 28. APCO first started work under  
the grading contract. Exhibit 1.

26          <sup>5</sup> Exhibit 2, Section 2.10.

27          <sup>6</sup> Testimony of Joe Pelan (APCO), Day 1, p. 23.

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2. **Progress Payments.**

9. Section 5.05 outlined the progress payment process as follows:

(a) On the first business day of each month, General Contractor and the Developer shall meet to review the Work that was completed during the previous month and the corresponding payment required for such Work.

...

(e) Upon receipt of an Application for Payment that is acceptable to Developer pursuant to Sections 5.05(a-d), Developer shall, within 12 calendar days, submit, to Developer's lender or such lender's authorized designee, the corresponding draw application for the undisputed amount to be paid pursuant to such Application for Payment (the "Draw Application"). Thereafter, Developer shall take such actions as are necessary for the payment of the amount owed to General Contractor pursuant to such Draw Application of the amount owed to the General Contractor pursuant to such Draw Application (the "Progress Payment"). In the event that a Draw Application is not submitted to Developer's lender or such lender's authorized designee within the above 12 calendar day period, Developer shall pay to General Contractor \$5,000 for each day that the submission of the Draw Application is delayed after such 12 calendar day period.

...

(g) Upon receipt of the Progress Payment, General Contractor shall promptly pay each Third-Party Service Provider the amount represented by the portion of the Percentage of Work Completed that was completed by such Third-Party Service Provider during the period covered by the corresponding Progress Payment. General Contractor shall, by appropriate agreement with each Third-Party Service Provider, require each Third-Party Service Provider to make payment to sub-contractors in a similar manner.<sup>7</sup>

---

<sup>7</sup> Exhibit 2 at Section 5.05. The Contract defines APCO's subcontractors as a "Third Party Service Provider." Exhibit 2, Section 2.02(a).

1           10. Per this provision, on the 20<sup>th</sup> of each month subcontractors submitted their  
2 billings to APCO for the current month (including a projection of what each intended to  
3 complete through the end of that month).<sup>8</sup>

4           11. APCO would then provide all of these documents to Gemstone.<sup>9</sup>

5           12. Gemstone would then walk the Project and determine the percentage each  
6 subcontractor had completed.<sup>10</sup>

7           13. Gemstone would adjust each subcontractor's billings to match its estimate of the  
8 percentage complete.<sup>11</sup>

9           14. Gemstone would give the revised billings back to APCO, and APCO would  
10 return them to each subcontractor to revise.<sup>12</sup>

11           15. Once revised, the subcontractors would submit them to APCO, APCO would  
12 submit them to Gemstone, and Gemstone would submit them to its construction funds control  
13 company, Nevada Construction Services ("NCS") for further review and payment.<sup>13</sup>

14           16. NCS would then send an inspector to verify the work was complete.<sup>14</sup>

15           17. NCS would then request funds from the lender and pay the total amount directly  
16 to APCO.<sup>15</sup>

17           18. APCO then paid the subcontractor the final amount received from Gemstone.<sup>16</sup>

18           19. As discussed more fully below, this process continued until June 2008.<sup>17</sup>

19  
20           <sup>8</sup> Testimony of Joe Pelan (APCO), Day 1, p. 24.

21           <sup>9</sup> Testimony of Joe Pelan (APCO), Day 1, p. 24.

22           <sup>10</sup> Testimony of Joe Pelan (APCO), Day 1, p. 24.

23           <sup>11</sup> Testimony of Joe Pelan (APCO), Day 1, p. 24.

24           <sup>12</sup> Testimony of Joe Pelan (APCO), Day 1, p. 24.

25           <sup>13</sup> Testimony of Joe Pelan (APCO), Day 1, p. 24; Exhibit 3, Nevada Construction  
26 Services Agreement.

27           <sup>14</sup> Testimony of Joe Pelan (APCO), Day 1, p. 25.

28           <sup>15</sup> Testimony of Joe Pelan (APCO), Day 1, p. 25, and 59.

<sup>16</sup> Testimony of Joe Pelan (APCO), Day 1, p. 25.

<sup>17</sup> Testimony of Joe Pelan (APCO), Day 1, p. 25.

1           **3.     Final Payment**

2           20.    Per the payment schedule in Section 5.06, Gemstone was required to make final  
3 payment when the following preconditions were met:

4                   (c) ...Prior to final payment, and as a condition precedent,  
5                   General Contractor shall furnish Developer with the following  
6                   (the "Completed Documents"):

7                   (i) All maintenance and operating manuals;

8                   (ii) Marked set of drawings and specifications reflecting "as-  
9                   built" conditions, upon which General Contractor shall have  
10                  transferred all changes in the location of concealed utilities...

11                  (iii) the documents set forth in Section 2.06(e)

12                  (iv) Any assignment and/or transfer of all guaranties and  
13                  warranties from Third-Party Service Providers, vendors or  
14                  suppliers and manufacturers;

15                  (v) A list of the names, address and phone numbers of all parties  
16                  providing guarantees and warranties, and

17                  (vi) verification that all waivers that should be issued to  
18                  Developer concurrent with Final payment.<sup>18</sup>

19           21.    APCO admitted that none of these preconditions were met while APCO was on  
20 the Project.<sup>19</sup>

21           **4.     Retainage**

22           22.    Section 5.07 contained the Contract's retention (or retainage) payment  
23 schedule.<sup>20</sup>

24           23.    Retainage is essentially an "escrow account" representing a temporarily  
25 withheld portion of a billing that is retained by Gemstone to ensure that the work is completed

26                   <sup>18</sup> Exhibit 2 at Section 5.06(c).

27                   <sup>19</sup> Testimony of Joe Pelan (APCO), Day 1, p. 63.

28                   <sup>20</sup> Exhibit 2 at Section 5.07.

1 properly, that all material suppliers are paid and lien releases have been provided, and that all  
2 certificates of occupancy were issued.<sup>21</sup>

3 24. APCO and the subcontractors tracked the 10% retention in their billings each  
4 month.<sup>22</sup>

5 25. APCO never held or otherwise received any subcontractor's retention withheld  
6 by Gemstone and kept by the lender for the Project.<sup>23</sup>

7 26. Section 5.07(f) sets forth the preconditions for APCO to receive its retention:

8 (f) Any remaining Standard Retainage, Monthly Retainage, and  
9 Milestone Retainage shall be released to General Contractor on  
10 the date that (i) Final Completion is attained and (ii) all  
11 outstanding disputes between Developer and General Contractor  
12 and Developer and any Third Party Service Providers have been  
13 resolved, and any liens against the Project related to such  
14 disputes have been removed.<sup>24</sup>

15 27. APCO admits that it never met any of the milestones or preconditions to be  
16 entitled to its retention from Gemstone.<sup>25</sup>

17 28. Accordingly, APCO never billed and did not receive any retention from  
18 Gemstone.<sup>26</sup>

19 **5. Termination for Convenience**

20 29. Section 10.01 of the Contract is entitled "Termination by the Developer  
21 Without Cause."<sup>27</sup>

22 <sup>21</sup> Testimony of Joe Pelan (APCO), Day 1, p. 25; Exhibit 2 at Section 5.07;  
23 Helix's Post-Trial Brief, p. 3, ll. 10-11.

24 <sup>22</sup> Testimony of Joe Pelan (APCO), Day 1, pp. 25-26.

25 <sup>23</sup> Testimony of Joe Pelan (APCO), Day 1, p. 26.

26 <sup>24</sup> Exhibit 2 at Section 5.07(f).

27 <sup>25</sup> Testimony of Joe Pelan (APCO), Day 1, pp. 1-4, 26.

28 <sup>26</sup> Testimony of Mary Jo Allen (APCO), Day 3, p. 127. Mary Jo Allen is a  
bookkeeper for APCO, and has been a bookkeeper for approximately 40 years.  
Testimony of Mary Jo Allen (APCO), Day 3, p. 121. She assisted in preparing the pay  
applications to Gemstone for the Project. Testimony of Mary Jo Allen (APCO), Day 3,  
p. 121.

1 30. In the construction industry, this is known as a "termination for convenience."<sup>28</sup>

2 31. Gemstone never terminated the Contract for convenience.

3 6. **Termination for Cause**

4 32. Section 10.02 of the Contract is entitled "**Termination by Developer With**  
5 **Cause**" and states:

6 ...

7 (b) When any of the reasons set forth in Section 10.02(a) exist,  
8 Developer may without prejudice to any other rights or remedies  
9 available to Developer and after giving General Contractor seven  
10 days' written notice (in addition to the 48 hours notice for  
11 purposes of Section 10.02 (a)(vi)), terminate employment of  
12 General Contractor and may do the following:

13 ...

14 (ii) Accept assignment of any Third-Party Agreements pursuant  
15 to Section 10.04.<sup>29</sup>

16 33. Although Gemstone purported to terminate the Contract for cause,<sup>30</sup> the  
17 undisputed evidence established that APCO was not in default.<sup>31</sup>

18 7. **Assignment**

19 34. The Contract contained an assignment provision confirming that upon the  
20 Contract's termination, APCO's subcontracts would be assigned to Gemstone.

21 35. At that point, Gemstone would be responsible for any amounts that Gemstone  
22 had not already paid APCO for the subcontractors' work:

23 **10.04 Assignment.** Each Third-Party Agreement for a portion of  
24 the Work is hereby assigned by General Contractor to Developer  
25 provided that such assignment is effective only after termination  
26 of the Agreement by Developer for cause pursuant to Section  
27

---

28 <sup>27</sup> Exhibit 2 at Section 10.01.

<sup>28</sup> Testimony of Joe Pelan (APCO), Day 1, p. 27.

<sup>29</sup> Exhibit 2 at Section 10.02(b)(2).

<sup>30</sup> Testimony of Joe Pelan (APCO), Day 1, p. 27.

<sup>31</sup> Testimony of Joe Pelan (APCO), Day 1, p. 100.

1 10.02 and only for those Third-Party Agreements which  
2 Developer accepts by notifying General Contractor and the  
3 applicable Third Party Service Provider in writing. General  
4 Contractor shall execute and deliver all such documents and take  
5 all such steps as Developer may require for the purpose of fully  
6 vesting in Developer the rights and benefits of General  
7 Contractor under such documents. Upon the acceptance by  
8 Developer of any Third-Party Agreement, subject to the other  
9 terms of this Article X, Developer shall pay to the corresponding  
10 Third-Party Service Provider any undisputed amounts owed for  
11 any Work completed by such Third Party Provider, prior to the  
12 underlying termination for which Developer had not yet paid  
13 General Contractor prior to such underlying termination.<sup>32</sup>

14 36. Despite its dispute with Gemstone, APCO could not have terminated its  
15 subcontracts or it would have been in breach of the Contract.<sup>33</sup>

16 37. Notably, the Contract and this assignment clause were incorporated into the  
17 APCO subcontracts.<sup>34</sup>

18 38. And before APCO left the Project, Gemstone and APCO ensured that all  
19 subcontractors were properly paid up through that last period.<sup>35</sup>

20 **C. Subcontracts**

21 **1. Helix**

22 39. Helix Electric of Nevada, LLC ("Helix") was originally selected and retained by  
23 Gemstone and performed work on the Project prior to APCO becoming the general  
24 contractor.<sup>36</sup>

25 <sup>32</sup> Exhibit 2, Section 10.04 (p. 36).

26 <sup>33</sup> Testimony of Joe Pelan (APCO), Day 1, p. 75.

27 <sup>34</sup> Exhibit 45 (Helix Subcontract) and Exhibit 149 (CabineTec Subcontract),  
28 Section 1.1.

<sup>35</sup> Exhibit 26; Exhibit 152; Testimony of Joe Pelan, Day 1, pp. 46, 67, and 82.  
Testimony of Mary Jo Allen (APCO), Day 3, pp. 127-128.

<sup>36</sup> Testimony of Joe Pelan (APCO), Day 1, p. 58.



1           40.     Specifically, Helix's Vice President, Bob Johnson,<sup>37</sup> admitted Helix participated  
2 in preparing engineering and design services for Gemstone on the Project's electrical scope of  
3 work.<sup>38</sup>

4           41.     So at Gemstone's direction, APCO entered into a subcontract with Helix for the  
5 electrical work (the "Helix Subcontract") required on the Project.<sup>39</sup>

6           42.     Helix's scope of work included "electrical installation for the project, which  
7 consists of distribution of power, lighting, power for the units, connections to equipment that  
8 required electrical."<sup>40</sup>

9           43.     So Helix's work was based, in part, on the electrical drawings that Helix  
10 prepared under contract to Gemstone.<sup>41</sup>

11          44.     The Helix subcontract included the following relevant provisions:

- 12           ○     Section 1.1: The subcontract incorporates the Contract including all
- 13           ○     exhibits and attachments, specifically including the Helix exhibit.
- 14           ○     Section 1.3: Helix was bound to APCO to the same extent and duration
- 15           ○     that APCO was bound to Gemstone.
- 16           ○     Section 3.4 outlined the agreed upon progress payment schedule as
- 17           ○     follows: Progress Payments
- 18           ▪     The progress payment to Subcontractor shall be one
- 19           ▪     hundred percent (100%) of the value of Subcontract work
- 20           ▪     completed (less 10% retention) during the preceding
- 21           ▪     month as determined by the Owner, less such other
- 22           ▪     amounts as Contractor shall determine as being properly
- 23           ▪     withheld as allowed under this Article or as provided

24           <sup>37</sup> Bob Johnson is the Vice President of the major projects group at Helix.  
25           Testimony of Bob Johnson (Helix), Day 1, p. 106. Mr. Johnson has negotiated more  
26           than 50 subcontracts in his career, three to four of which have been with APCO.  
27           Testimony of Bob Johnson (Helix), Day 2, p. 17. Mr. Johnson was involved in the  
28           negotiation and execution of the final terms and conditions of Helix's subcontract with  
29           APCO for the Project. Testimony of Bob Johnson (Helix), Day 1, p. 107. Mr. Johnson  
30           admitted Andy Rivera received most of the project related correspondence and had the  
31           most information on Helix's damages claim. Testimony of Bob Johnson (Helix), at Day  
32           2, p. 24.

33           <sup>38</sup> Testimony of Bob Johnson (Helix) Day 2, p. 6.

34           <sup>39</sup> Exhibit 45, Helix Subcontract; Testimony of Joe Pelan (APCO), Day 1, p. 58.

35           <sup>40</sup> Testimony of Bob Johnson (Helix) at Day 2, p. 10.

36           <sup>41</sup> Testimony of Bob Johnson (Helix) Day 2, p. 7.

1 elsewhere in this Subcontract. The estimates of Owner as  
2 to the amount of Work completed by Subcontractor shall  
3 be binding upon Contractor and Subcontractor and shall  
4 conclusively establish the amount of Work performed by  
5 Subcontractor. As a condition precedent to receiving  
6 partial payments from Contractor for Work performed,  
7 Subcontractor shall execute and deliver to Contractor,  
8 with its application for payment, a full and complete  
9 release (Forms attached) of all claims and causes of action  
10 Subcontractor may have against Contractor and Owner  
11 through the date of the execution of said release, save and  
12 except those claims specifically listed on said release and  
13 described in a manner sufficient for Contractor to identify  
14 such claim or claims with certainty. Upon the request of  
15 Contractor, Subcontractor shall provide an Unconditional  
16 Waiver of Release in form required by Contractor for any  
17 previous payment made to Subcontractor. Any payment to  
18 Subcontractor shall be conditioned upon receipt of the  
19 actual payments by Contractor from Owner.  
20 Subcontractor herein agrees to assume the same risk that  
21 the Owner may become insolvent that Contractor has  
22 assumed by entering into the Prime Contract with the  
23 Owner.

- 24 ○ 3.5 Progress Payments
- 25 ▪ Progress payments will be made by Contractor to  
26 Subcontractor within 15 days after Contractor actually  
27 receives payment for Subcontractor's work from  
28 Owner.... The estimate of owner as to the amount of  
Work completed by Subcontractor be binding upon  
Contractor and Subcontractor and shall conclusively  
establish the amount of Work performed by  
Subcontractor...<sup>42</sup>

45. Of critical importance to the present action and claims, the Helix Subcontract  
contained the following agreed upon retention payment schedule:

- Section 3.8: Retainage

The 10 percent withheld retention shall be payable to Subcontractor  
upon, and only upon the occurrence of all the following events, each of  
which is a condition precedent to Subcontractor's right to receive final  
payment hereunder and payment of such retention: (a) Completion of the

---

<sup>42</sup> Exhibit 45.

1 entire project as described in the Contract Documents; (b) The approval  
2 of final acceptance of the project Work by Owner; (c) Receipt of final  
3 payment by Contractor from Owner; (d) Delivery to Contractor from  
4 Subcontractor all as-built drawings for it's (*sic*) scope of work and other  
5 close out documents; (e) Delivery to Contractor from Subcontractor a  
6 Release and Waiver of Claims from all of Subcontractor's laborers,  
7 material and equipment suppliers, and subcontractors, providing labor,  
8 materials or services to the Project.<sup>43</sup>

9 46. As documented below, Helix admitted that these preconditions were not met  
10 while Apco was the contractor.<sup>44</sup>

11 47. In its lien documents,<sup>45</sup> Complaint against APCO,<sup>46</sup> and its Amended  
12 Complaint, Helix has unequivocally admitted that it had a binding subcontract with APCO.<sup>47</sup>

13 48. In fact, Victor Fuchs, the President of Helix,<sup>48</sup> also confirmed the following in  
14 an affidavit attached to Helix's May 5, 2010 Motion for Summary Judgment Against Gemstone  
15 Development West (and corresponding errata) filed with this Court:

16 4. On or around April 17, 2007 [the date of Exhibit 45],  
17 APCO contracted with Helix to perform certain work on the  
18 Property.

19 5. Helix's relationship with APCO was governed by a  
20 subcontract, which provided the scope of Helix's work and  
21 method of billing and payments to Helix for work performed on  
22 the Property (the "Subcontract"). A true and correct copy of the  
23 Subcontract is attached hereto as Exhibit 1.

24 6. Helix also performed work and provided equipment and  
25 services directly for and to Gemstone, namely design engineering  
26 and temporary power.

---

27 <sup>43</sup> Exhibit 45.

28 <sup>44</sup> Testimony of Bob Johnson, Day 2, pp. 36 and 37.

<sup>45</sup> Exhibits 512 pp. 5-6, 7-9, 10-11.

<sup>46</sup> Exhibit 77.

<sup>47</sup> Exhibit 231.

<sup>48</sup> Testimony of Bob Johnson (Helix), Day 1, p. 108.

1 7. Camco Pacific Construction Company, Inc. ("Camco")  
2 replaced APCO as the general contractor. Thereafter, Helix  
3 performed its Work for Gemstone and/or Camco...<sup>49</sup>

4 Exhibit 1 to the declaration was the first fifteen pages of Exhibit 45.<sup>50</sup>

5 49. And notwithstanding Helix's proposed interlineations to the subcontract, Helix's  
6 Mr. Johnson admitted he did not change the retention payment schedule in the subcontract:

7 Q. Okay. Would you turn to page 4 [of Exhibit 45] And  
8 directing your attention to paragraph 3.8?

9 A. Okay.

10 Q. Do you recognize that as the agreed-upon retention  
11 payment schedule in the subcontract?

12 A. I do.

13 Q. And in fairness to you and the record, you did propose  
14 a change to paragraph 3.8. Could you turn to page 16 of the  
15 exhibit, Exhibit 45? And directing your attention to paragraph 7,  
16 does this reflect your proposed change to the retention payment  
17 schedule in the original form of Exhibit 45?

18 A. In the original form, yes.

19 Q. Okay. And APCO accepted your added sentence that if  
20 the retention was reduced on the Project, the same would be  
21 passed on to the subcontractor, correct?

22 A. Correct.

23 Q. Through your change in paragraph 7, on page 16 of  
24 Exhibit 45, you did not otherwise modify the preconditions in the  
25 retention payment schedule of 3.8, did you?

26 A. We did not.<sup>51</sup>

27 50. Mr. Johnson, also admitted that Exhibit 45 represented the APCO agreement  
28 that Helix alleges APCO somehow breached:

Q. Okay, sitting here today, is it your contention that  
APCO breached a contract with Helix?

A. I would say they did in the respect that we haven't  
been paid.

Q. Okay. And which contract is it in your opinion that  
APCO breached?

<sup>49</sup> Exhibit 314.

<sup>50</sup> Helix Electric's May 5, 2010 Motion for Partial Summary Judgment Against  
Gemstone Development West (and corresponding errata).

<sup>51</sup> Testimony of Bob Johnson, Day 2, pp. 17-18.

1 A. For the Manhattan West project.

2 Q. Is there a document?

3 A. There is a document.

4 Q. Okay. And, sir, would you turn—if you could, grab  
Exhibit 45. You spent some time talking about this yesterday.

5 A. Okay.

6 The Court: Which item is it, counsel?

7 Mr. Jefferies: Exhibit 45.

8 Q. Is it your position that APCO breached this agreement?

9 A. My assumption would be they breached it, yes.

10 Q. Okay. But this is the document that represents the  
agreement between APCO and Helix for the project?

11 A. It is the agreement between APCO and Helix.<sup>52</sup>

12 51. Notably, the Helix Subcontract did not contain a provision purporting to waive  
Helix's statutory lien rights.

13 2. CabineTec

14 52. Gemstone also selected CabineTec, Inc. ("CabineTec") to serve as APCO's  
15 cabinet subcontractor.<sup>53</sup> Plaintiff in Intervention National Wood Products, Inc. ("National  
16 Wood") is a judgment creditor of CabineTec which has assigned all of its right, title, and  
17 interest in the project to National Wood. Such parties are collectively referred to herein as  
18 "CabineTec."

19 53. APCO entered into a subcontract with CabineTec on April 28, 2008 for the  
20 delivery and installation of cabinets on the Project (the "CabineTec Subcontract")<sup>54</sup>

21 54. CabineTec's Subcontract contained the same retention and progress payment  
22 schedules quoted above from the Helix Subcontract.<sup>55</sup>

23  
24  
25 <sup>52</sup> Testimony of Bob Johnson (Helix), Day 2, p. 9.

26 <sup>53</sup> Testimony of Joe Pelan (APCO), Day 1, p. 89.

27 <sup>54</sup> Exhibit 149, CabineTec Subcontract.

28 <sup>55</sup> Exhibit 149.

1           55. CabineTec's Nicholas Cox<sup>56</sup> admitted CabineTec did not change the retention  
2 payment schedule found in Section 3.8.<sup>57</sup>

3           56. CabineTec and APCO also signed an August 6, 2008 letter regarding Terms &  
4 Conditions.<sup>58</sup>

5           57. That letter confirmed that CabineTec would be paid when "APCO receives  
6 payment from Gemstone per subcontract."<sup>59</sup>

7           58. The CabineTec Subcontract does not contain a waiver of CabineTec's right to  
8 place a mechanic's lien on the Project.

9           **D. The Contract was terminated.**

10          59. APCO did not finish the Project as the general contractor.<sup>60</sup>

11          60. Despite APCO's performance, issues with Gemstone's payments started in May  
12 2008 and Gemstone reduced the May Pay Application to exclude any money for APCO.<sup>61</sup>

13          61. "...Gemstone will withhold \$226,360.88 from the May Progress Payment (the  
14 "Withheld Amount") in addition to the 10% retainage that was already being withheld. The  
15 Withheld Amount represents the APCO Construction Contractor's Fee line-item from the May  
16 Progress Payment."<sup>62</sup>

17          62. As a result, Gemstone only paid the subcontractors for the May time period.

18          63. Given the wrongful withholding, APCO provided Gemstone with written notice  
19 of its intent to stop work pursuant to NRS 624.610 if APCO was not paid in full.<sup>63</sup>

20  
21           <sup>56</sup> Mr. Cox was the president of CabineTec during the Project. Testimony of  
22 Nicholas Cox (CabineTec) Testimony Day 3, p. 13.

23           <sup>57</sup> Testimony of Nicholas Cox (CabineTec), Day 3, p. 29.

24           <sup>58</sup> Exhibit 152.

25           <sup>59</sup> Exhibit 152.

26           <sup>60</sup> Testimony of Brian Benson (APCO) at Day 3, p. 50; Testimony of Mary Jo  
27 Allen (APCO), Day 3, p. 122.

28           <sup>61</sup> Testimony of Joe Pelan (APCO), Day 1, pp. 28 and 31.

<sup>62</sup> Exhibit 212-1.

<sup>63</sup> Exhibit 5.

1           64.    On or about July 18, 2008, APCO submitted its pay application for the month  
2 ending June 30, 2008, and requested \$6,566,720.38 (the "June Application").<sup>64</sup>

3           65.    The cover page of the June Application, like all other pay applications, tracked  
4 the total value of the Contract, the total requested for that month, subcontractor billings and  
5 retention.<sup>65</sup>

6           66.    The June Application shows Gemstone was withholding \$4,742,574.01 in  
7 retainage as of that date.<sup>66</sup>

8           67.    On July 18, 2008, APCO sent Gemstone a notice of intent to stop work for its  
9 failure to pay the May Application as follows.

10                       Specifically, Gemstone has failed to pay \$3,434,396.50 for  
11                       Application for Payment No. 8, Owner Draw No. 7, which was  
12                       submitted to Gemstone on June 20, 2008, and was due no later  
13                       than July 11, 2008 pursuant to NRS 624.609(A). Accordingly,  
14                       THIS LETTER SHALL SERVE AS APCO'S NOTICE OF  
15                       INTENT TO STOP WORK PURSUANT TO NRS 624.609  
16                       THROUGH NRS 624.630, INCLUSIVE, UNLESS APCO IS  
17                       PAID THE TOTAL AMOUNT OF \$3,434,396.50 FOR ITS  
18                       WORK ON THE PROJECT... Accordingly, pursuant to NRS  
19                       624.609(1)(b), payment was due to APCO within 21 days of its  
20                       request for payment (again, no later than July 11, 2008). To date,  
21                       no payment has been made...If APCO has not been paid for  
22                       Application for Payment No. 8, Owner Construction Draw No. 7,  
23                       in the amount of \$3,434,396.50 by the close of business on  
24                       Monday, July 28, 2008, APCO reserves the right to stop work on  
25                       the Project anytime after that date. While APCO is willing to  
26                       continue to work with Gemstone to get these issues resolved,  
27                       APCO is not waiving its right to stop work any time after July 28,  
28                       2008, if APCO continues to work on the Project or otherwise  
                     attempts to resolve these issues with Gemstone.<sup>67</sup>

22           68.    On July 28, 2008, APCO sent a letter confirming that APCO would stop  
23 working unless Gemstone made full payment to APCO for all past due amounts:

24                       

---

<sup>64</sup> Exhibit 4.

25                       <sup>65</sup> Testimony of Joe Pelan (APCO), Day 1, pp. 28 and 29; Exhibit 4.

26                       <sup>66</sup> Exhibit 4; Testimony of Joe Pelan (APCO), Day 1, p. 30.

27                       <sup>67</sup> Exhibit 5.

1 As you are aware, on July 17, 2008, APCO provided Gemstone  
2 with written notice that unless APCO was paid the full amount of  
3 \$3,434,396 by the close of business on Monday, July 28, 2008,  
4 that APCO would stop work on the Project. Gemstone failed to  
5 make full payment and has improperly withheld \$203,724.29,  
6 despite having no good faith or proper statutory basis for  
7 withholding the payment. AS a result, APCO is stopping work on  
8 the Manhattan West Project effective immediately.  
9 In addition to stopping work on the project, APCO hereby asserts  
10 its rights to terminate the contract pursuant to NRS 624.610(2).  
11 THIS LETTER SHALL SERVICE AS APCO'S NOTICE OF  
12 INTENT TO TERMINATE THE MANHATTAN WEST  
13 GENERAL CONSTRUCTION CONTRACT FOR GMP  
14 PURSUANT TO NRS 624.606 THROUGH NRS 624.630,  
15 INCLUSIVE, PURSUANT TO THE TERMS OF THE NRS  
16 624.610, THE CONTRACT SHALL BE TERMINATED AS OF  
17 AUGUST 14, 2008.<sup>68</sup>

18 69. Helix was aware that shortly after a July 11, 2008 email,<sup>69</sup> APCO began issuing  
19 stop work notices to Gemstone on the Project.<sup>70</sup>

20 70. Gemstone ultimately paid APCO for May.<sup>71</sup>

21 71. In addition, on July 29, 2008, APCO sent the following letter to its  
22 subcontractors:

23 As most of you are now aware, APCO Construction and  
24 GEMSTONE are embroiled in an unfortunate contractual dispute  
25 which has resulted in the issuance of a STOP WORK NOTICE to  
26 GEMSTONE. While it is APCO Construction's desire to  
27 amicably resolve these issues so work may resume, it must also  
28 protect its contractual and legal rights. This directive is to advise  
all subcontractors on this project that until further notice, all work  
on the Manhattan West project will remain suspended.  
THIS SUSPENSION IS NOT A TERMINATION OF THE  
GENERAL CONTRACT AT THIS TIME AND AS SUCH ALL  
SUBCONTRACTORS ARE STILL CONTRACTUALLY  
BOUND TO THE TERMS OF THEIR RESPECTIVE  
SUBCONTRACTS WITH APCO CONSTRUCTION.

68 Exhibit 6.

69 Exhibit 506, p. 1.

70 Testimony of Bob Johnson (Helix), Day 1, p. 113.

71 Testimony of Joe Pelan (APCO) Day 1, p. 31.



1           Additionally, the subcontractors are advised that, at the present  
2           time they are not obligated to perform any subcontract work on  
3           the project at the direction or insistence of Gemstone.

4           We will keep all subcontractors advised on a timely basis if the  
5           status of the work suspension changes. Should you have any  
6           questions, feel free to call.<sup>72</sup>

7           72.    On July 30, 2008, Scott Financial, the Project's lender, sent a letter to APCO  
8           confirming the loan for the Project was in good standing.<sup>73</sup>

9           73.    On or about August 6, 2008, Gemstone provided APCO notice of its intent to  
10          withhold the sum of \$1,770,444.28 from APCO for the June Application.<sup>74</sup>

11          74.    Accordingly, APCO sent Gemstone another notice of intent to stop work on  
12          August 11, 2008, noting that if APCO was not paid by August 21, 2008, APCO would suspend  
13          work on the Project:

14                   On July 18, 2008, APCO Construction submitted its Progress  
15                   Payment for June 2008 pursuant to the terms of the General  
16                   Construction Agreement for GMP, dated September 6, 2007 in  
17                   the amount of \$6,566,720.38. This number has since been  
18                   adjusted on your submittal to the lender to reflect \$5,409,029.42  
19                   currently due to APCO Construction. We understand this number  
20                   reflects certain upward adjustments to change orders made after  
21                   the Progress Payment was submitted on July 18, 2008. Pursuant  
22                   to NRS 624.609(1), this payment was due on or before August 8,  
23                   2008. By way of good faith agreement extended by APCO  
24                   Construction to Peter Smith, this deadline was extended for three  
25                   (3) days as a result of what were intended to be "good faith"  
26                   efforts to fully resolve certain change order issues. While APCO  
27                   Construction does not feel at this time that Gemstone participated  
28                   in good faith, we will nevertheless honor our commitment to you  
                 to extend the deadline. Accordingly, and pursuant to the  
                 aforementioned statute and agreement, deadline for payment for  
                 the June Progress Payment was close of business Monday,  
                 August 11, 2008.

...

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<sup>72</sup> Exhibit 48.

<sup>73</sup> Exhibit 7.

<sup>74</sup> Exhibit 313.

1 In review of your August 6, 2008 correspondence you have  
2 provided a "withholding breakdown" wherein you have given  
3 notice of your intent to withhold \$1,770,444.28, allegedly  
4 pursuant to NRS 624.609(3) and Section 5.05(d) and 5.05(f)(vii)  
5 of the Agreement.

6 ...

7 **As such, the correct amount of the June Progress Payment**  
8 **should be \$6,183,445.24.** As of this date, Gemstone has failed  
9 and/or refused to pay the June Progress Payment.

10 THIS LETTER SHALL SERVE AS APCO'S NOTICE OF  
11 INTENT TO STOP WORK PURSUANT TO NRS 624.606  
12 THROUGH NRS 624.630, INCLUSIVE, UNLESS APCO IS  
13 PAID THE TOTAL AMOUNT OF \$6,183,445.24 FOR ITS  
14 WORK ON THE PROJECT.

15 IF APCO CONSTRUCTION HAS NOT BEEN PAID FOR  
16 PAYMENT NO. 9 OWNER CONSTRUCTION DRAW NO. 8,  
17 IN THE AMOUNT OF \$6,183,445.24 BY CLOSE OF  
18 BUSINESS ON THURSDAY, AUGUST 21, 2008, APCO  
19 CONSTRUCTION RESERVES THE RIGHT TO STOP WORK  
20 ON THE PROJECT ANYTIME AFTER THAT DATE.

21 As we have previously demonstrated, APCO Construction will  
22 continue to work with Gemstone to resolve the various issues  
23 affecting this project, however, we will not waive our right to  
24 stop work anytime after August 21, 2008. We trust you will give  
25 this Notice appropriate attention.<sup>75</sup>

26 75. All subcontractors were copied on this notice.<sup>76</sup>

27 76. APCO informed all subcontractors that it intended to terminate the Contract as  
28 of September 5, 2008.<sup>77</sup>

77. Helix's Project Manager, Andy Rivera,<sup>78</sup> admitted that he received APCO's stop  
work notice and possible termination.<sup>79</sup>

<sup>75</sup> Exhibit 10; Testimony of Joe Pelan (APCO) Day 1, pp. 30 and 32.

<sup>76</sup> Testimony of Joe Pelan (APCO), Day 1, p. 31; Exhibit 10.

<sup>77</sup> Exhibit 23; Testimony of Joe Pelan (APCO), Day 1, p. 74.

<sup>78</sup> Andy Rivera was Helix's Project Manager. Testimony of Andy River (Helix),  
Day 2, p. 48. As the Project Manager, he was in charge of labor, materials,

1           78.     After receipt of APCO's written notice, Gemstone sent a letter on Friday,  
2 August 15, 2008, claiming that APCO was in breach of contract and that Gemstone would  
3 terminate the Contract for cause if the alleged breaches were not cured by Sunday, August 17,  
4 2008.<sup>80</sup>

5           79.     That letter divided APCO's alleged breaches into curable breaches and non-  
6 curable breaches<sup>81</sup> and also confirmed that upon termination: "(a) all Third-Party Agreements  
7 shall be assigned to Gemstone and (b) APCO must execute and deliver all documents and take  
8 such steps as Gemstone may require for the purpose of fully vesting in Gemstone the rights and  
9 benefits of such assigned Third-Party Agreements."<sup>82</sup>

10           80.     APCO's counsel responded to the letter the same day, August 15, 2008.<sup>83</sup>

11           81.     That letter refuted Gemstone's purported basis for termination for cause,<sup>84</sup> as  
12 there was no factual basis for any of the alleged defaults in Gemstone's letter:

13                   Gemstone's demand is factually incorrect as APCO is not in  
14 default of the agreement, and even if APCO was in default of the  
15 Agreement as alleged, the issues set forth by Gemstone would  
16 not support a termination of the contract... APCO has provided  
17 Gemstone with a 10 day Notice of Intent to Stop Work on the  
18 project due to Gemstone's failure to pay the June 2008  
Application. Instead of making the payment that is due,  
Gemstone is seeking to terminate the contract on or before the  
date that APCO will stop work on the project...APCO has

19  
20 subcontractors, labor reports, billings, change orders, submittals, requests for  
21 information, and most other documents on the Project. Mr. Rivera reported to Robert  
22 Johnson. Testimony of Andy Rivera (Helix), Day 2, p. 48. Andy Rivera prepared  
23 Helix's pay applications. Testimony of Bob Johnson (Helix), Day 2, p. 8. So while  
24 Robert Johnson signed the pay applications for Helix, Mr. Andy Rivera had the most  
25 personal knowledge of the financial aspects of the Project for Helix and was actually  
26 designated as Helix's PMK on Helix's claim. Testimony of Andy Rivera, Day 2, p. 73.

27           <sup>79</sup> Testimony of Bob Johnson (Helix), Day 1, p. 113.

28           <sup>80</sup> Exhibit 13; Testimony of Joe Pelan (APCO), Day 1, pp. 35-36.

<sup>81</sup> Exhibit 13 - 1-13.

<sup>82</sup> Exhibit 13, p. 14, Section C.3.

<sup>83</sup> Exhibit 14; Testimony of Joe Pelan (APCO), Day 1, p. 36.

<sup>84</sup> Exhibit 14; Testimony of Joe Pelan (APCO), Day 1, pp. 37 and 79.

1 received a copy of the e-mail sent to APCO's subcontractors by  
2 Gemstone. The e-mail notes that Gemstone has a replacement  
3 General Contractor in place. Obviously, Gemstone's intent is to  
4 improperly declare APCO in default and then attempt to move  
5 forward with the project using APCO's subcontractors... Items  
6 (ii), (iii), (iv) and (v) were all complete months ago as part of the  
7 normal job process.<sup>85</sup>

8 82. There was no evidence presented at trial rebutting Mr. Pelan's testimony that  
9 APCO was not in default.

10 83. And since the Court has stricken Gemstone's answer and counterclaim against  
11 APCO,<sup>86</sup> the Court must find that APCO was not in breach.

12 84. On or about August 15, 2008, prior to its purported termination, Gemstone  
13 improperly contacted APCO's subcontractors and notified them that Gemstone was terminating  
14 APCO as of Monday, August 18, 2008.<sup>87</sup>

15 85. Gemstone confirmed it had already retained a replacement general contractor.<sup>88</sup>  
16 Gemstone advised the APCO subcontractors as follows:

17 In the event that APCO does not cure breaches to Gemstone's  
18 satisfaction during the cure period, Gemstone will proceed with a  
19 new general contractor. This GC has been selected and they are  
20 ready to go. We do not expect any delays or demobilizations in  
21 this event... If APCO does not cure all breaches, we will be  
22 providing extensive additional information on the transition to a  
23 new GC in 48 hours time.<sup>89</sup>

24 86. The replacement contractor turned out to be Camco.<sup>90</sup>

25 <sup>85</sup> Exhibit 14; Testimony of Joe Pelan (APCO), Day 1, p. 100.

26 <sup>86</sup> Docket at May 26, 2010 Order Striking Defendant Gemstone Development  
27 West, Inc.'s Answer and Counterclaims, and Entering Default.

28 <sup>87</sup> Exhibit 215; Testimony of Joe Pelan (APCO), Day 1, pp. 34 and 35.

<sup>88</sup> Exhibit 215.

<sup>89</sup> Exhibit 215-2.

<sup>90</sup> Exhibit 162, Camco/Gemstone Prime Contract.

1           87.    On August 18, 2008, APCO emailed Gemstone objecting to such direct  
2 communications with the subcontractors: "The APCO Construction GMP and Grading  
3 Contracts are still in effect and as such Gemstone shall not meet with our subcontractors. Please  
4 read the contract and other correspondence closely. If APCO didn't (and APCO did) cure the  
5 breach, Gemstone must issue a seven day notice of termination. You are disrupting my ability  
6 to perform the work."<sup>91</sup>

7           88.    That same day, APCO submitted its July 2008 pay application for  
8 \$6,307,487.15.<sup>92</sup>

9           89.    The next day on August 19, 2008, APCO sent Gemstone a letter noting  
10 Gemstone's breaches:

11                   [I]t was and is my clear position that any termination of our  
12 contract would be a breach of the agreement. Then today before I  
13 could send my letter I received a letter from your lawyer saying  
14 our contract was over.... As with the other changes, it is  
15 impossible to fully account for the delays and full impacts to our  
16 schedule at this stage. Consistent with the (2) two change orders  
17 that Alex signed after Pete initially rejected them for the HVAC  
18 deltas, I would propose that we hold the time issues for now... I  
19 also find it interesting that you have sent us letters to terminate  
20 the contract all within the time that we were allowed to provide  
21 you notice of our intent to suspend the work if the change orders  
22 on the June pay application were not paid. That was to elapse on  
23 Thursday and now your lawyer is proposing that we agree to a  
24 termination before that date. We will not agree and intend to fully  
25 proceed with our contract obligations... Yesterday morning, Alex  
26 came in and asked me what we were still doing on site because  
27 there was nothing that we could do to satisfy Gemstone. That  
28 would be consistent with the email that was sent to all of our  
subcontractors on Friday advising that we were being removed  
from the project before we even had a chance to respond to the  
48 hour notice... Craig also told me that Gemstone had  
previously selected Camco to complete the project.<sup>93</sup>

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<sup>91</sup> Exhibit 216-1.

<sup>92</sup> Exhibit 8.

<sup>93</sup> Exhibit 15.

1           90.    On August 19, 2008, Gemstone confirmed that joint checks to the  
2 Subcontractors and Apco would be written for the June 2008's pay application: "I'd like to  
3 have dual checks cut for this [June, 2008] pay application directly to the subs and the general. I  
4 believe this is different than what we have historically done on ManhattanWest, but similar to  
5 how we have paid some Manhattan Pay Apps in the past."<sup>94</sup>

6           91.    Gemstone confirmed that all future payments would essentially go directly from  
7 Nevada Construction Control to the subcontractors.<sup>95</sup>

8           92.    Although it disagreed with Gemstone's conduct, APCO cooperated in this post  
9 termination process to ensure that all subcontractors were properly paid for work performed on  
10 APCO's watch:

11                   An APCO representative has to sign all of the subcontractor  
12 checks due to Gemstone's request to prepare the "joint checks".  
13 An APCO signer should be doing that by the end of today or  
14 tomorrow morning. At that time, NCS will contact all of the  
15 subcontractors to pick up their checks. Furthermore, today the  
16 APCO's July pay application was submitted to NCS. As  
17 mentioned in the meeting on Monday, August 25, 2008, enclosed  
18 is the contact information for Camco Pacific regarding pay  
19 applications... Please forward your July and August pay requests  
20 to Yvonne. Obviously, July was already submitted to NCS but we  
21 would like Camco to have record of the most current pay  
22 requests.<sup>96</sup>

23           93.    None of the joint checks that NCS and Gemstone issued and that APCO  
24 properly endorsed included any funds for APCO.<sup>97</sup>

25           94.    And none of the joint checks accounted for any APCO or subcontractor  
26 retention because retention had not been earned under either the Contract or the various  
27 subcontracts.<sup>98</sup>

28           <sup>94</sup> Exhibit 16; Testimony of Joe Pelan (APCO), Day 1, p. 38.

<sup>95</sup> Testimony of Joe Pelan (APCO), Day 1, p. 38.

<sup>96</sup> Exhibit 26. Testimony of Joe Pelan (APCO), Day 1, pp. 38 and 41.

<sup>97</sup> Testimony Day 1, p. 38.

<sup>98</sup> Testimony of Joe Pelan (APCO), Day 1, pp. 38-39.

1           95.    As of the end of August, the Project was only about 74% complete.<sup>99</sup>

2           96.    Ultimately, APCO was not paid for its share of June Application even though  
3 the subcontractors received their money.<sup>100</sup>

4           97.    On August 21, 2008, APCO sent a letter to its subcontractors informing them  
5 that APCO would stop work on the Project on August 21, 2008:

6                   Attached hereto is APCO Construction's Notice of Stopping  
7 Work and Notice of Intent to Terminate Contract for  
8 nonpayment. As of 5:00p.m., Thursday, August 21, 2008 all  
9 work in furtherance of the subcontracts you have with APCO  
10 CONSTRUCTION on the Manhattan West project is to stop until  
11 you are advised otherwise, in writing, by APCO  
12 CONSTRUCTION... If a prime contractor terminates an  
13 agreement pursuant to this section, all such lower tiered  
14 subcontractors may terminate their agreements with the prime  
15 contractor... Pursuant to statute, APCO CONSTRUCTION is  
16 only stopping work on this project. At this time it has not  
17 terminated its contract with Gemstone. As such, all  
18 subcontractors, until advised in writing by APCO  
19 CONSTRUCTION, remain under contract with APCO  
20 CONSTRUCTION.<sup>101</sup>

21           98.    On August 21, 2008 APCO also provided Gemstone with written notice of  
22 APCO's intent to terminate the Contract as of September 5, 2008.<sup>102</sup>

23           99.    APCO's last work on the Project was August 21, 2008.<sup>103</sup>

24           100.   On August 22, 2008, APCO sent a letter to the Clark County Building  
25 Department advising that APCO was withdrawing as the general contractor for the Project.<sup>104</sup>

26                   <sup>99</sup> Exhibit 218-10; Testimony of Steven Parry (Camco), Day 5, pp. 31-32. Mr.  
27 Parry was Camco's project manager for the approximate four months that Camco  
28 worked on the Project. Testimony of Steven Parry (Camco), Day 5, p. 24.

<sup>100</sup> Testimony of Joe Pelan (APCO), Day 1, p. 33.

<sup>101</sup> Exhibit 23; Testimony of Joe Pelan (APCO), Day 1, p. 32.

<sup>102</sup> Exhibit 23.

<sup>103</sup> Testimony of Brian Benson (APCO), Day 3, p. 50; Testimony of Joe Pelan  
(APCO), Day 1, p. 40.

<sup>104</sup> Exhibit 24; Testimony of Joe Pelan (APCO), Day 1, p. 40.

1           101. APCO was required to cancel its current building permits so the Project permits  
2 could be issued and transferred to Camco.<sup>105</sup>

3           102. In an August 28, 2008 letter, Gemstone advised that APCO was terminated for  
4 cause as of August 24, 2008:

5                       Furthermore, pursuant to the ManhattanWest's August 15, 2008  
6 notice regarding Termination of Phase 1 for Cause, and APCO's  
7 failure to cure the breaches set forth in the notice prior to August  
8 17, 2008, the Contract terminated for cause on August 24, 2008.  
9 Consequently, pursuant to Section 10.02(c) of the Contract,  
10 APCO is not entitled to receive any further payments until the  
11 Work [as defined in the Contract] is finished. Later today,  
12 Gemstone will issue joint checks to the subcontractors pursuant  
13 to the June Progress Payment; however, payment will not include  
14 any fees or general conditions to APCO.<sup>106</sup>

15           103. APCO contested Gemstone's purported termination and APCO's evidence was  
16 uncontested on that issue that it was not in default.<sup>107</sup>

17           104. APCO properly terminated the Contract for cause in accordance with NRS  
18 624.610 and APCO's notice of termination since Gemstone did not pay the June Application,  
19 as of September 5, 2008.<sup>108</sup>

20           105. Helix and CabineTec both received a copy of the termination letter.<sup>109</sup> APCO  
21 considered its notice of termination to be effective as of September 5, 2008.<sup>110</sup>

22           106. But Gemstone proceeded with the Project as if it had terminated the Contract  
23 with APCO.<sup>111</sup> APCO was physically asked to leave the Project as of the end of August,  
24 2008.<sup>112</sup>

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25           <sup>105</sup> Testimony of Joe Pelan (APCO), Day 1, p. 100.

26           <sup>106</sup> Exhibit 27; Testimony of Joe Pelan (APCO), Day 1, p. 41.

27           <sup>107</sup> Testimony of Joe Pelan (APCO), Day 1, p. 42.

28           <sup>108</sup> Exhibit 28; Testimony of Joe Pelan (APCO), Day 1, pp. 73 and 80.

<sup>109</sup> Exhibit 28; Testimony of Bob Johnson (Helix), Day 1, p. 113.

<sup>110</sup> Testimony of Joe Pelan (APCO), Day 1, pp. 42-43.

<sup>111</sup> Testimony of Joe Pelan (APCO), Day 1, pp. 100-101; Exhibit 29.



1 107. And all subcontractors received notice from Gemstone that APCO was  
2 terminated on August 26, 2008 and would not be returning to the Project.<sup>113</sup>

3 E. Gemstone owed APCO \$1.4 million when APCO left the Project.

4 108. Even though the subcontractors had received all amounts billed through August  
5 2008, Gemstone owed APCO \$1,400,036.75 for APCO's June, July, and August 2008 payment  
6 applications.<sup>114</sup>

7 109. Gemstone also owed APCO \$200,000.00 from various reimbursements.<sup>115</sup>

8 110. APCO has never received payment in any form from any entity for these pay  
9 applications or the \$200,000.00 in reimbursements.<sup>116</sup>

10 111. The \$1,400,036.75 does not reflect any of the retention that Gemstone withheld  
11 from APCO on the Project because the retention never became due.<sup>117</sup>

12 112. Ultimately, Gemstone would not accept APCO's final August 2008 pay  
13 application.<sup>118</sup>

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14  
15 <sup>112</sup> Testimony of Joe Pelan (APCO) Day 3, p. 150.

16 <sup>113</sup> Exhibit 118.

17 <sup>114</sup> Exhibit 320/321, Summary of June, July and August 2008 payment  
18 applications to Gemstone that were not paid; Testimony of Joe Pelan (APCO) Day 1, p.  
19 67; Testimony of Mary Jo Allen (APCO) Day 3, p. 144. Exhibit 4 is APCO's June  
20 Application. Testimony of Mary Jo Allen (APCO), Day 3, p. 124. APCO's share of the  
21 June Pay Application was \$700,802.90, which was not paid. Testimony of Mary Jo  
22 Allen (APCO), Day 3, pp. 125-127. Exhibit 8 is APCO's July pay application.  
23 Testimony of Mary Jo Allen (APCO), Day 3, p. 125. APCO's share of the July 2008  
24 pay application was \$431,183.67, which was not paid. Testimony of Mary Jo Allen  
25 (APCO), Day 3, pp. 125-127. Exhibit 31 was APCO's August 2008 pay application and  
26 its final pay application. Accordingly, the August 2008 application shows everything  
27 that was done by APCO and its subcontractors through the end of August 2008.  
28 Testimony of Mary Jo Allen (APCO) Day 3, p. 135. APCO's share of the August 2008  
pay application was \$268,050.18, which was not paid. Testimony of Joe Pelan (APCO)  
Day 1, p. 46; Testimony of Mary Jo Allen (APCO), Day 3, pp. 126-127. In total,  
Gemstone owed APCO \$1,400,036.75 for its last three pay applications. Testimony of  
Mary Jo Allen (APCO), Day 3, p. 122.

<sup>115</sup> Testimony of Mary Jo Allen (APCO), Day 3, p. 127.

<sup>116</sup> Testimony of Mary Jo Allen (APCO), Day 3, p. 127.

<sup>117</sup> Testimony of Mary Jo Allen (APCO), Day 3, p. 127.

<sup>118</sup> Testimony of Joe Pelan (APCO), Day 1, pp. 44-45. Exhibit 31.

1 113. So Camco submitted APCO's August 2008 billing so APCO's subcontractors  
2 would get paid.<sup>119</sup>

3 114. Camco's August 2008 pay application tracked the full retention from the Project  
4 (including APCO's)<sup>120</sup> and APCO's full contract amount.<sup>121</sup>

5 115. As of its last pay application, APCO believed it was 76% complete with the  
6 Project.<sup>122</sup>

7 116. Despite the amounts owed to APCO, the evidence was uncontested that the  
8 subcontractors received all of their billed amounts, less retention, up through August 2008.<sup>123</sup>

9 **F. APCO did not terminate the Helix or CabineTec Subcontracts.**

10 117. During this dispute, APCO did not terminate the Helix or CabineTec  
11 subcontracts,<sup>124</sup> but advised its subcontractors that they could suspend work on the Project in  
12 accordance with NRS Chapter 624.<sup>125</sup>

13 118. If APCO wanted to terminate its subcontractors, it had to do so in writing.<sup>126</sup>

14 119. Helix admitted it knew APCO was off the Project as of August 28, 2008<sup>127</sup> and  
15 that neither APCO nor Helix terminated the Helix Subcontract.<sup>128</sup>

16

17

18 <sup>119</sup> Exhibit 218; Testimony of Joe Pelan (APCO), Day 1, pp. 43-44.

19 <sup>120</sup> Testimony of Joe Pelan (APCO), Day 1, p. 44; Exhibit 218-2.

20 <sup>121</sup> Exhibit 218-10.

21 <sup>122</sup> Exhibit 31; Testimony of Joe Pelan (APCO) Day 1, p. 45.

22 <sup>123</sup> Testimony of Mary Jo Allen (APCO) Day 3, pp. 127-129 and 144; Testimony  
of Andy Rivera (Helix) Day 2, pp. 73 and 75; Testimony of Joe Pelan (APCO) Day 3,  
23 p. 150; Exhibit 26; Exhibit 152; Testimony of Joe Pelan (APCO) Day 1, pp. 26, 46, 67  
and 82.

24 <sup>124</sup> Testimony of Joe Pelan (APCO), Day 1, p. 39.

25 <sup>125</sup> Exhibit 23.

26 <sup>126</sup> Testimony of Joe Pelan (APCO) Day 1, p. 71.

27 <sup>127</sup> Testimony of Andy Rivera (Helix) Day 2, p. 62.

28 <sup>128</sup> Testimony of Joe Pelan (APCO) Day 1 at p. 126; Testimony of Bob Johnson  
(Helix) Day 2, p. 33.

1           120. Additionally, Helix admitted it never issued a stop work notice to APCO  
2 pursuant to NRS 624 because it had no payment disputes with APCO.<sup>129</sup>

3           121. In fact, per Gemstone's notice dated August 15, 2008, Gemstone gave APCO  
4 notice that it exercised its right under Contract Section 10.04 to accept an assignment of the  
5 APCO subcontracts.<sup>130</sup>

6           122. Accordingly, any purported termination of a subcontract by APCO would have  
7 breached the Contract.<sup>131</sup>

8           123. During August 2008, subcontractors on the Project were getting information  
9 directly from Gemstone.<sup>132</sup>

10          124. Helix and CabineTec both continued work on the Project for Gemstone and  
11 Camco, and submitted their August billings to Camco.<sup>133</sup>

12           **G. Status of the Project when APCO was off the Project**

13          125. Before APCO was asked to leave the Project on August 19 and 20, 2008, APCO  
14 documented the as-built conditions and confirmed that Helix and CabineTec were not  
15 anywhere close to completing their respective scopes of work.<sup>134</sup>

16          126. So the evidence was undisputed that at the time APCO left the Project,  
17 Gemstone did not owe APCO or the subcontractors their retention.

18                 .....

19                 .....

20

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21           <sup>129</sup> Testimony of Bob Johnson (Helix) Day 1, p. 127.

22           <sup>130</sup> Exhibit 13.

23           <sup>131</sup> Testimony of Joe Pelan (APCO) Day 1, p. 75.

24           <sup>132</sup> Testimony of Andy Rivera (Helix) Day 2, p. 76.

25           <sup>133</sup> Exhibit 29; Exhibit 173, Helix's first payment application to Camco; Exhibits  
26 182/185, CabineTec's first payment application to Camco.

27           <sup>134</sup> Testimony of Brian Benson (APCO) Day 3, pp. 50-58, 63-64 and 97. Those  
28 videos are a correct and accurate representation and reproduction of the status of the  
Project on August 19 and August 20, 2008. Testimony of Brian Benson (APCO) Day 3,  
p. 52.

1           **H.     Camco became the Prime Contractor.**

2           127. Camco and Gemstone had several meetings and Gemstone contracted with  
3 Camco to complete the Project on August 25, 2008.<sup>135</sup>

4           128. In terms of the plans, specifications and technical scope of work, Camco's work  
5 was the same as APCO's.<sup>136</sup>

6           129. In fact, Camco used the same schedule of values and cost coding that APCO had  
7 been using on the Project.<sup>137</sup>

8           130. Camco obtained permits in its own name to complete the Project.<sup>138</sup>

9           131. Camco's Steve Parry confirmed that Exhibit E to the Camco contract  
10 represented the state of the Project when Camco took over.<sup>139</sup>

11           132. Gemstone and Camco estimated the Project to be 74% complete for Phase 1.<sup>140</sup>  
12 Those estimates also confirmed that:

- 13                     • The first floor drywall taping in building 8 was 70% complete.<sup>141</sup>
- 14                     • The first floor drywall taping in building 9 was 65% complete.<sup>142</sup>

15           133. Among other things, the Camco contract required that Camco "shall engage the  
16 Third-Party Service Providers listed on Exhibit C (the "Existing Third-Party Service  
17 Providers)."<sup>143</sup>

18  
19  
20           <sup>135</sup> Exhibit 162, Camco/Gemstone Prime Contract; Testimony of Steve Parry  
(Camco) Day 5, pp. 25-26.

21           <sup>136</sup> Exhibit 162; Testimony of Joe Pelan (APCO) Day 1, pp. 45 and 98;  
22 Testimony of Steve Parry (Camco) Day 5, p. 31.

23           <sup>137</sup> Testimony of Steve Parry (Camco) Day 5, pp. 30-31.

24           <sup>138</sup> Testimony of Steve Parry (Camco) Day 5, p. 37.

25           <sup>139</sup> Testimony of Steve Parry (Camco) Day 5, p. 27.

26           <sup>140</sup> Exhibit 218, p. 10; Testimony of Steven Parry (Camco) Day 5, p. 31-32.

27           <sup>141</sup> Exhibit 160-3.

28           <sup>142</sup> Exhibit 160-3.

<sup>143</sup> Exhibit 162-2.

1 134. Helix and CabineTec are both listed as Existing Third-Party Service Providers  
2 on Exhibit C.<sup>144</sup>

3 135. And Camco had worked with Helix before.<sup>145</sup>

4 136. Camco's Steve Parry admitted that Camco was assuming the subcontracts that  
5 APCO had with Helix and CabineTec:

6 [Exhibit 162 was on the elmo]

7 Q. ...I've highlighted a sentence that says, "General contractor  
shall engage third-party service providers." Do you see that?

8 A. Yes.

9 Q. Okay. What did you understand that to mean?

10 A. That we would use subcontractors on the site that had already  
been under contract to perform work on the project.

11 Q. Okay. So you were assuming the Subcontracts that APCO had  
issued on the Project; is that right?

12 A. Yes.

13 Q. And, sir, if you would, turn to Exhibit C within the exhibit.  
Those assumed contracts from APCO included CabineTec and  
Helix; correct?

14 A. Yes.

15 Q. And, sir, if you would, turn to Exhibit C within the exhibit.  
Those assumed subcontracts from APCO included CabineTec  
and Helix; correct?

16 A. Yes.<sup>146</sup>

17 137. After Camco became the general contractor, it was responsible to pay  
18 subcontractors for work performed under it.<sup>147</sup>

19 138. Camco never had any contact or involvement with APCO on the Project,<sup>148</sup> nor  
20 did APCO provide any direction or impose any scheduling requirements on subcontractors  
21 proceeding with their work.<sup>149</sup>

22 \_\_\_\_\_  
23 <sup>144</sup> Exhibit 162-23.

24 <sup>145</sup> Testimony of Steve Parry (Camco) Day 5, pp. 13-14.

25 <sup>146</sup> Testimony of Steve Parry (Camco) Day 5, p. 26.

26 <sup>147</sup> Testimony of Joe Pelan (APCO) Day 1, p. 99.

27 <sup>148</sup> Testimony of Steve Parry (Camco) Day 5, p. 27.

28 <sup>149</sup> Testimony of Joe Pelan (APCO) Day 1, p. 97; Testimony of Joe Pelan  
(APCO) Day 3, p. 150; Testimony of Steve Parry (Camco) Day 5, p. 27.

1 139. APCO played no role in the pay application process or the actual field work on  
2 the Project from September-December 2008.<sup>150</sup>

3 140. And no Helix nor CabineTec representative ever approached APCO with  
4 questions or concerns about proceeding with work on the Project after APCO's termination.<sup>151</sup>

5 141. So APCO did not receive any benefit from the work or materials that Helix or  
6 CabineTec performed or provided to the Project after August 21, 2008.<sup>152</sup>

7 142. Camco's first pay application was for the period through August 31, 2008.<sup>153</sup>

8 143. That billing reflected Gemstone retainage account for APCO's work:

9 Q. Now, I have highlighted the retainage line item of  
10 \$5,337,982.74 [on Exhibit 218]. Do you see that?

11 A. Yes.

12 Q. What did that figure represent?

13 A. The retainage that was being withheld on the Project.

14 Q. And who was the retainage being withheld by?

15 A. Gemstone, the owner.

16 Q. Okay. So my point simply was what you're depicting  
17 here in the retainage is the accounting of the retainage that was  
18 withheld from APCO as you're going forward on the Project.

19 A. That's correct.<sup>154</sup>

20 So all parties knew that the subcontract retention amounts were maintained with Gemstone  
21 after APCO was terminated.

22 **I. CabineTec entered into a ratification agreement with Camco.**

23 144. After APCO left the Project, CabineTec signed a ratification agreement with  
24 Camco whereby CabineTec agreed to complete its original scope of work for Camco.<sup>155</sup>

25 <sup>150</sup> Testimony of Joe Pelan (APCO) Day 1, p. 98.

26 <sup>151</sup> Testimony of Joe Pelan (APCO) Day 1, p. 98.

27 <sup>152</sup> Testimony of Joe Pelan (APCO) Day 3, pp. 149-150.

28 <sup>153</sup> Testimony of Steve Parry (Camco) Day 5, p. 29.

<sup>154</sup> Testimony of Steve Parry (Camco) Day 5, p. 30.

1 145. CabineTec understood the ratification to mean that "you guys [APCO] were  
2 stepping out and Camco was stepping in."<sup>156</sup>

3 146. CabineTec further clarified its understanding of the ratification agreement as  
4 follows:

5 Q. Okay. Sir, but going forward from and after the point that  
6 CabineTec signed the ratification agreement with Camco, you  
7 knew and understood that Camco was going to be the  
8 "contractor", as that term was used in the original subcontract  
9 that Cabinetec had for the project, correct?

10 A. So APCO was going away and Camco was coming on. That's  
11 what was happening.<sup>157</sup>

12 147. In addition, the signed ratification agreement contained the following terms:

- 13 • "B. Subcontractor and Camco desire to acknowledge, ratify and agree to  
14 the terms of the Subcontract Agreement, whereby Camco will replace  
15 APCO as the "Contractor" under the Subcontract Agreement but, subject  
16 to the terms of this Ratification, all other terms and conditions of the  
17 Subcontract Agreement will remain in full force and effect."<sup>158</sup>
- 18 • The ratification agreement acknowledged that \$264,395.00 of work  
19 remained to be finished on Building 8 and \$264,395.00 on Building 9.<sup>159</sup>
- 20 • "5. Ratification. Subcontractor and Camco agree that (a) the terms of the  
21 Subcontract Agreement (as amended by this Ratification and including  
22 all Amendments, Previously Approved Change Orders, and the Camco  
23 Schedule) will govern their relationship regarding the Project, (b) Camco  
24 will be the "Contractor" under the Subcontract Agreement, and (c)  
25 Subcontractor and Camco agree to perform and fulfill all of the  
26 executory terms, covenants, conditions and obligations required to be  
27 performed and fulfilled thereunder by Subcontractor and Camco,  
28 respectively."<sup>160</sup>

Accordingly, all retention and future payments to CabineTec, which were executory  
obligations, were Camco's responsibility.

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<sup>155</sup> Exhibit 3096; Testimony of Nicholas Cox (CabineTec) Day 3, p. 34;  
Testimony of Mr. Thompson (CabineTec) Day 5, p. 60.

<sup>156</sup> Testimony of Nicholas Cox (CabineTec) Day 3, p. 35.

<sup>157</sup> Testimony of Nicholas Cox (CabineTec) Day 3, p. 36.

<sup>158</sup> Exhibit 183-1.

<sup>159</sup> Exhibit 183-2.

1 148. After Gemstone could no longer pay Camco, CabineTec filed a complaint  
2 against APCO and Camco and alleged that it entered into a ratification agreement with Camco:

3 10. On or about August 26, 2008, pursuant to Gemstone's request  
4 CABINETEC entered into a Ratification and Amendment of  
5 Subcontract Agreement (the "Ratification") with CAMCO,  
6 whereby CAMCO agreed to the terms of the APCO Subcontract  
7 and to replace APCO as the "Contractor" under the APCO  
8 Contract. . .

9 14. CABINETEC entered into the Ratification with CAMCO,  
10 pursuant to Gemstone's request, wherein CAMCO agreed to pay  
11 CABINETEC for the services and materials on the Project.

12 15. Pursuant to, and in reliance upon, the aforementioned  
13 Subcontract, Ratification and representations, CABINETEC  
14 performed the work of providing services and materials (the  
15 "Work.")...<sup>161</sup>

16 APCO had no liability for the materials CabineTec provided to Camco and Gemstone after  
17 termination.

18 149. The fact is, APCO paid (and even overpaid) CabineTec for materials delivered  
19 to the Project while APCO was contractor.<sup>162</sup>

20 150. CabineTec did not dispute this overpayment at trial.

21 151. CabineTec submitted two invoices while APCO was on the Project.<sup>163</sup>

22 152. Exhibit 148 is CabineTec's first invoice to Camco for \$70,836.00.<sup>164</sup>

23 153. CabineTec's second invoice is for \$72,540.00.<sup>165</sup>

24 154. The total amount due to CabineTec, less retention, was \$129,038.40.<sup>166</sup>

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25 <sup>160</sup> Exhibit 172-5.

26 <sup>161</sup> Exhibit 156 at ¶ 10-15.

27 <sup>162</sup> Testimony of Mary Jo Allen (APCO) Day 3, pp. 131-132.

28 <sup>163</sup> Exhibits Nos. 148, 150, 151, and 320-321, Calculation of CabineTec  
overpayment; Testimony of Mary Jo Allen (APCO) Day 3, p. 130.

<sup>164</sup> Testimony of Mary Jo Allen (APCO) Day 3, p. 130.

<sup>165</sup> Testimony of Mary Jo Allen (APCO) Day 3, p. 131.

<sup>166</sup> Testimony of Mary Jo Allen (APCO) Day 3, p. 131.



1 155. But APCO actually paid CabineTec a total of \$161,262.00 for these two  
2 invoices.<sup>167</sup>

3 156. As such, CabineTec was overpaid \$32,223.60 by APCO on the Project.

4 157. CabineTec did not submit a pay application for August 2008.<sup>168</sup>

5 158. APCO is entitled to credit for this over payment.

6 **J. CabineTec Claims retention against APCO.**

7 159. When CabineTec originally filed suit CabineTec disclosed \$19,547.00 in  
8 damages against APCO in its complaint:

9 "50. As a result of the foregoing, and in accordance with the  
10 principles of equity and common law, CABINETEC is entitled to  
11 judgment in its favor, and against APCO in the amount of  
12 \$19,547.00, together with interest thereon at the highest legal  
13 rate."<sup>169</sup>

14 160. And, CabineTec's initial and first supplemental disclosures only disclosed  
15 \$30,110.95 in damages against APCO: "...National Wood seeks to recover those damages  
16 claimed by CabineTec in its complaint in intervention against APCO in the amount of  
17 \$30,110.95 and CAMCO in the amount of \$1,125,374.94..."<sup>170</sup> The \$30,110.95 represented  
18 \$19,547.00 in alleged retention, and \$10,563.95 in interest and fees.<sup>171</sup>

19 161. Those were the only two disclosures CabineTec made before the close of  
20 discovery, as was extended by the Court. Then on the eve of trial, CabineTec attempted to  
21 disclose and seek \$1,154,680.40 in damages against APCO.<sup>172</sup>

22 <sup>167</sup> Testimony of Mary Jo Allen (APCO) Day 3, p. 131.

23 <sup>168</sup> Testimony of Mary Jo Allen (APCO) Day 3, p. 134.

24 <sup>169</sup> Exhibit 156-8.

25 <sup>170</sup> Exhibit 157 (CabineTec's Initial Disclosure); Exhibit 158 (CabineTec's First  
26 Supplemental Disclosure), and Exhibit 159 (CabineTec's Second Supplemental  
27 Disclosure).

28 <sup>171</sup> Compare Exhibit 156, CabineTec's Complaint to Exhibit 157, CabineTec's  
Initial Disclosure.

<sup>172</sup> Exhibit 159-6.

1 162. Aside from the late disclosure there is no basis for that amount as it is  
2 undisputed that CabineTec was paid every dollar it billed APCO, less retention,  
3 notwithstanding the overpayment.<sup>173</sup>

4 K. Helix's claim for \$505,021.00 in retention.

5 163. Helix's designated PMK and Project Manager, Andy Rivera, confirmed that  
6 Helix's only claim in this litigation against APCO was for the retention of \$505,021.00.<sup>174</sup>

7 164. Helix's counsel admitted this limited claim in its opening statement.<sup>175</sup>

8 165. And then at trial, Mr. Rivera confirmed Helix was only seeking retention and  
9 not the unpaid invoices submitted to Camco:

10 Q. Sir, could you pull out Exhibit 44. And I want to make  
11 sure my record's clear. Exhibit 44 that I marked is, in fact, the  
12 same summary that was found in Exhibit 535, page 252, that you  
and Mr. Zimbleman went over; is that—

13 A. Correct.

14 Q. Okay. And does Exhibit 44 represent the damages that  
you are seeking from APCO in this matter?

15 A. Yes.

16 Q. And do you recall if you were designated as the person  
most knowledgeable for one of the topics being the damages that  
Helix was seeking from APCO in these proceedings, correct?

17 A. Correct.

18 Q. And would you agree that as the PMK, you identified a  
figure of \$505,021 as the amount that Helix in this lawsuit claims  
APCO owes it, correct?

19 A. Correct.

20 Q. And there are no other amounts that you identified in  
your PMK depo as being APCO's liability on this Project,  
correct?

21 A. Correct.

22 Q. Okay. And we are in agreement that the 505—that's  
your handwriting, where you wrote: Retention?

23 A. Yes.

24 <sup>173</sup> Exhibit 147 summarizing payments and releases.

25 <sup>174</sup> Exhibit 279, Testimony of Andy Rivera (Helix) Day 2, pp. 63-65; Helix's  
PMK Deposition at p. 52.

26 <sup>175</sup> Testimony, Day 1 at p. 10. ("...Helix remains to be unpaid \$505,021, while  
27 APCO was the general contractor. This is to say amounts still owing from pay  
applications submitted to APCO, and yes, that is essentially our retention.").

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Q. And would it be fair to conclude that that retention represents retention that had been accounted for and accrued while APCO was serving as the prime contract – prime contractor on the Project?

A. Yes.

Q. Prior to today has Helix ever billed APCO for that retention?

A. No. No. I'm sorry.

Q. Do you have any information to suggest that APCO ever received Helix's retention from Gemstone?

A. I would not know.

Q. Okay. You don't have any information to suggest that APCO has collected Helix's retention but not forwarded it on to Helix, correct?

A. Correct.

Q. Okay. And in light of your summary within Exhibit 44, would it be fair to conclude that all of the amounts that Helix billed to APCO were, in fact, paid but for retention?

A. Yes.<sup>176</sup>

166. Helix received direct payments from APCO through May 2008.<sup>177</sup>

167. After May 2008, Helix received payment for its APCO billings directly from NCS through joint checks to Helix and APCO, which APCO endorsed over to Helix.<sup>178</sup>

168. Helix's first billing to Camco was on September 19, 2008.<sup>179</sup>

169. Mr. Rivera admitted Helix is only seeking \$505,021.00 in retention from APCO, which Helix never billed APCO.<sup>180</sup>

.....  
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<sup>176</sup> Testimony of Andy Rivera (Helix) Day 2, pp. 73-75.

<sup>177</sup> Testimony of Andy Rivera (Helix) Day 2, p. 61.

<sup>178</sup> Testimony of Andy Rivera (Helix) Day 2, pp. 61-64

<sup>179</sup> Exhibit 508, p. 1; Testimony of Andy Rivera (Helix) Day 2 at p. 65.

<sup>180</sup> Testimony of Andy Rivera (Helix) Day 2, pp. 50 and 58. Exhibit 501, p. 393 is the spreadsheet Helix created of payments it applied for and received from APCO. Helix's Mr. Rivera admitted Helix was paid a total of \$4,626,186.11 on the Project by and through APCO, which reflected payment for work billed (and retention) through August 31, 2008. Testimony of Andy Rivera (Helix) Day 2, pp. 58-59; Exhibits 46-47,

1           L.     Retention never became due to Helix or CabineTec from APCO.

2           170. As noted above, both the Helix Subcontract and the CabineTec Subcontract  
3 included an agreed upon retention payment schedule in Paragraph 3.8.

4           171. The evidence was undisputed, and even acknowledged by Helix and CabineTec,  
5 that the level of completion and other preconditions of the retention payment schedule were not  
6 met while APCO was the general contractor.

7           172. More specifically, Helix's Mr. Johnson admitted Helix did not meet the  
8 preconditions in Section 3.8 of the Subcontract to be entitled to retention:<sup>181</sup>

9                     Q. Well, let me ask it this way: Did Helix satisfy any of  
10 these preconditions found in paragraph 3.8 while APCO was the  
11 general contractor on the project?

12                     A. Not to my knowledge.<sup>182</sup>

13           173. CabineTec's Mr. Thompson admitted that the buildings had to be drywalled and  
14 painted before the cabinets were installed<sup>183</sup> and he had no documentation (daily reports,  
15 photographs, etc.) that would confirm that CabineTec ultimately installed cabinets in Phase 1  
16 for APCO.<sup>184</sup>

17           174. It is undisputed that neither Helix nor CabineTec presented *any* testimony that  
18 they met the valid conditions precedent to payment to be entitled to retention.

19           175. See *Lucini-Parish Ins. v. Buck*,<sup>185</sup> (a party who seeks to recover on a contract has  
20 the burden of establishing any condition precedent to the respective contract).

21           176. Instead, the Court saw pictures<sup>186</sup> and videos<sup>187</sup> confirming that Helix's and  
22 CabineTec's work was not completed.

23 Helix May and June billings; Exhibit 49-50; APCO Checks to Helix, Exhibit 58, Exhibit  
24 59, Exhibit 60, Exhibit 61, Exhibit 66, Exhibit 75.

25           <sup>181</sup> Testimony of Bob Johnson (Helix) Day 2, pp. 36-37.

26           <sup>182</sup> Testimony of Bob Johnson (Helix) Day 2, p. 19.

27           <sup>183</sup> Testimony of Mr. Thompson (CabineTec) Day 5, p. 69.

28           <sup>184</sup> Testimony of Mr. Thompson (CabineTec) Day 5, p. 69.

<sup>185</sup> 108 Nev. 617, 620, 836 P.2d 627, 629 (1992).

1 177. The Court also heard unrefuted testimony that APCO was never paid from  
2 Gemstone for Helix's or CabineTec's retention.<sup>188</sup>

3 178. The fact is APCO and its subcontractors never got to the point where they could  
4 request retention while APCO was the contractor.<sup>189</sup>

5 179. To that end, Helix's Mr. Johnson admitted that Helix did not present a claim to  
6 APCO for any additional compensation for disputed claims or changes while APCO was on the  
7 Project.<sup>190</sup>

8 180. Helix's Mr. Rivera admitted Helix *has never* billed APCO for retention, and that  
9 all amounts that Helix did bill APCO were paid, less retention.<sup>191</sup>

10 181. The fact that Helix did not bill retention confirms that Helix recognized that  
11 retention never became due from APCO under the retention payment schedule which governed  
12 the same.

13 182. Both Helix and CabineTec rolled their retention account over to Camco and  
14 Gemstone in their post-APCO billings as it was truly a Project and Gemstone liability.<sup>192</sup>

15 183. APCO's responsibility for retention under the subcontract's retention payment  
16 schedule was governed by the same.

17 184. That is confirmed by Helix's and Camco's conduct at the Project level through  
18 their pay applications.<sup>193</sup>

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19  
20 <sup>186</sup> Exhibit 32-38, 51-57, 108-114, 62-65, 67-74, 125-132, Pictures of Status of  
21 Project; Testimony of Brian Benson (APCO) Day 3, pp. 53-71.

22 <sup>187</sup> Exhibits 17-22, Videos of Project.

23 <sup>188</sup> Testimony of Mary Jo Allen (APCO) Day 3, p. 144; Testimony of Joe Pelan  
24 (APCO) Day 1, p. 26.

25 <sup>189</sup> Testimony of Joe Pelan (APCO) Day 1, pp. 60 and 82; Testimony of Bob  
26 Johnson (Helix) Day 2, pp. 36-37; Testimony of Joe Pelan (APCO) Day 3, p. 151.

27 <sup>190</sup> Testimony of Bob Johnson (Helix) Day 2, p. 31.

28 <sup>191</sup> Testimony of Andy Rivera (Helix) Day 2, p. 74; Exhibits 43, 50, 61 and 75.

<sup>192</sup> Exhibits 170-177, Helix billings to Camco and Exhibit 185, CabineTec's  
billings to Camco; Testimony of Mary Jo Allen (APCO) Day 3, pp. 129-130; Testimony  
of Andy Rivera (Helix) Day 2, p. 74.

1 M. Similarly, APCO never earned or received its retention.

2 185. Gemstone and/or its lender maintained the retention account.<sup>194</sup>

3 186. APCO's August 2008 pay application did not bill Gemstone for APCO's  
4 retention.<sup>195</sup>

5 187. In fact, APCO never billed Gemstone for retention<sup>196</sup> because APCO had not  
6 earned the retention and thus was not entitled to it.<sup>197</sup>

7 188. And APCO never billed or received the retention funds from Gemstone for any  
8 of the subcontractors.<sup>198</sup>

9 189. APCO never received CabineTec's or Helix's retention from Gemstone.<sup>199</sup>

10 190. Helix's Mr. Johnson admitted that Gemstone, not APCO, was holding its  
11 retention.<sup>200</sup>

12 191. And Helix admitted it had no information to suggest that APCO was ever paid  
13 Helix's retention.<sup>201</sup>

14 192. Neither Helix nor CabineTec ever billed APCO for any of the materials or work  
15 it performed after Camco signed its prime contract with Gemstone.<sup>202</sup>

16  
17 <sup>193</sup> Compare Exhibit 58, Helix's August 2008 pay application to APCO, to  
18 reflecting \$513,120.71 in retention to Exhibit 173, Helix's September 2008 payment  
19 application to Camco reflecting \$553,404.81 in retention. See also, Exhibit 151 pgs. 1, 2  
20 CabineTec's last pay application to APCO for \$179,180.00 reflecting \$17,918.00 in  
retention, to Exhibit-185, CabineTec's first payment application to Camco showing  
approved amount of \$537,404.80 less \$53,740.48 in retention. See also Exhibit 30  
(Camco's August 2008 draw request confirming retention was being held for the entire  
project).

21 <sup>194</sup> Testimony of Joe Pelan (APCO) Day 1, p. 30.

22 <sup>195</sup> Exhibit 31; Testimony of Joe Pelan (APCO) Day 1, p. 45.

23 <sup>196</sup> Testimony of Joe Pelan (APCO) Day 1, p. 30.

24 <sup>197</sup> Testimony of Joe Pelan (APCO) Day 1, p. 83.

25 <sup>198</sup> Testimony of Mary Jo Allen (APCO) Day 3, p. 128.

26 <sup>199</sup> Testimony of Joe Pelan (APCO) Day 3, p. 150.

27 <sup>200</sup> Testimony of Bob Johnson (Helix) Day 2, p. 19.

28 <sup>201</sup> Testimony of Bob Johnson (Helix) Day 2, p. 20.

<sup>202</sup> Testimony of Joe Pelan (APCO) Day 1, p. 97.

1 193. And notably, neither Helix nor CabineTec billed APCO nor submitted a claim  
2 letter for the retention they now claim.<sup>203</sup>

3 194. In fact, CabineTec actually billed Camco for the retention it incurred under  
4 APCO.<sup>204</sup>

5 N. Helix also entered into a ratification agreement with Camco.

6 195. Helix's Project Manager, Mr. Rivera understood that Gemstone purported to  
7 terminate the Contract:

8 Q. Wouldn't it be fair to say that based on  
9 communications, both written and verbal, that you received from  
10 APCO and/or Gemstone, you knew that Gemstone had purported  
to terminate APCO's prime contract?

11 A. We knew they were having issues.

12 Q. Okay. And those issues had culminated in APCO  
purporting to terminate the prime contract and/or Gemstone  
purporting to terminate the prime contract, correct?

13 A. Correct.<sup>205</sup>

14 196. In fact, during the August 2008 timeframe, Helix was getting information  
15 directly from Gemstone.<sup>206</sup>

16 197. Mr. Rivera admitted Helix was copied on certain communications between  
17 APCO and Gemstone:

18 Q. And wouldn't it be fair to say that you received copies  
19 of certain communications from APCO to the owner, Gemstone,  
20 whereby APCO indicated that we're having payment issues and  
we're giving notice of our intent to exercise statutory rights to  
suspend and/or terminate?

21 A. Something to that effect, yes.<sup>207</sup>

22  
23 <sup>203</sup> Testimony of Joe Pelan (APCO) Day 1, p. 97; Testimony of Mary Jo Allen  
(APCO) Day 3, p. 128 (as to CabineTec); Testimony of Joe Pelan (APCO) Day 3, p.  
150.

24 <sup>204</sup> Exhibit 3103 confirming CabineTec billed Camco for its retention. Testimony  
25 of Nicholas Cox (CabineTec) Day 3, p. 38-39.

26 <sup>205</sup> Testimony of Andy Rivera (Helix) Day 2, p. 75.

27 <sup>206</sup> Testimony of Andy Rivera (Helix) Day 2, p. 76.

28 <sup>207</sup> Testimony of Andy Rivera (Helix) Day 2, p. 76.

....  
Q. Okay. But do you recall receiving APCO generated correspondence indicating to the owner, which was sent to subcontractors as well, that APCO was suspending and/or terminating its work, correct?

A. Correct.<sup>208</sup>

198. Mr. Rivera also admitted Helix was performing work under Gemstone's direction by August 26, 2008:

Q. And from and after about August 26, 2008, Helix was taking its direction from Gemstone and/or Camco, correct?

A. Gemstone.

Q. Okay. APCO was not directing, requesting any work on behalf of Helix after September 5, 2008, correct?

A. Correct.

Q. And based on your personal involvement with Gemstone and Camco, did you understand that, in fact, Camco was replacing APCO as the prime contractor?

A. At that time did not know exactly how that was—the agreement was going to be.

Q. Did you come to find out?

A. Yes.

Q. that was, in fact, the case?

A. Yes.<sup>209</sup>

199. Helix was directed to hook up power to the Camco trailer on August 26, 2008.<sup>210</sup>

200. Gemstone provided Helix with the Camco subcontract and Camco pay applications,<sup>211</sup> and directed Helix to start directing its payment applications to Camco.<sup>212</sup>

201. On August 26, 2008 Camco sent Helix a checklist for starting work.<sup>213</sup> Among the provisions included:

- **RETENTION MONIES** Final retention monies will only be released to Camco Pacific from Owner when all Punch list

<sup>208</sup> Testimony of Andy Rivera (Helix) Day 2, p. 77.

<sup>209</sup> Testimony of Andy Rivera (Helix) Day 2, pp. 76-77. *See also* Testimony of Bob Johnson (Helix) Day 2, p. 25.

<sup>210</sup> Exhibit 171; Testimony of Bob Johnson (Helix) Day 2, p. 25.

<sup>211</sup> Exhibit 170.

<sup>212</sup> Testimony of Andy Rivera (Helix) Day 2, p. 66.

<sup>213</sup> Exhibit 170.



1 Items, Contract Items, and Close-Out Documents have been  
2 fully completed and inspected by the owner. Any delay by a  
3 single Subcontractor in completing this will delay the entire  
4 project's final payment. PLEASE DO NOT DELAY IN  
5 COMPLETING YOUR PUNCHLIST ITEMS. Exhibit 170-3.  
6 ...

- 7 • **D. Final Payment.** Subcontractor shall not be entitled to  
8 payment of the balance of the Contract Price, including,  
9 without limitation, the Retainage, until (1) the Contract Work  
10 has been completed to the satisfaction of Contractor, (2)  
11 Subcontractor has submitted to Contractor an invoice for the  
12 final payment accompanied by (i) a final complete list of all  
13 suppliers and subcontractors whose materials or services have  
14 been utilized by Subcontractor, (ii) all closeout documents  
15 including, warranties, guarantees, as-builts, drawings,  
16 operating and maintenance manuals and such other items  
17 required of Subcontractor have been provided and such have  
18 been accepted by Owner, (iii) executed unconditional lien  
19 releases and waivers from Subcontractor and all of its  
20 mechanics, subcontractors, and suppliers for the Contract  
21 Work covered by all preceding progress payments, and (iv)  
22 executed unconditional lien releases and waivers upon final  
23 payment from all mechanics, subcontractors, and suppliers  
24 who have previously received final payment, and conditional  
25 lien releases and waivers upon final payment from  
26 Subcontractor and each mechanic, subcontractor, and supplier  
27 from which an unconditional lien release and waiver upon  
28 final payment has not been submitted to Contractor, (3)  
Contractor has received the corresponding final payment  
from Owner, (4) Contractor has received evidence of  
Subcontractor's insurance required to be in place, (5) 45 days  
have elapsed after a Notice of Completion has been recorded  
or if a valid Notice of Completion is not recorded, upon  
Subcontractor's receipt of a written notice of acceptance of  
the Contract Work that shall be given by Contractor not later  
than 91 days after Contractor determines in good faith that the  
Contract Work has been performed completed and in  
acceptable manner and (6) all outstanding disputes related to  
the Project have been resolved, and any liens against the  
Project have been removed.<sup>214</sup>

<sup>214</sup> Exhibit 170-11, 170-12.

1 Having received these requirements, Helix continued on as the electrical subcontractor for  
2 Camco after APCO's termination.

3 202. Helix's Andy Rivera admitted Helix's technical scope of work remained the  
4 same under Camco:

5 Q. Would it be fair to conclude the technical scope of  
6 work remained the same as you transitioned to work with  
Camco—

7 A. Yeah.

8 Q. —for Helix?

8 A. Yes.<sup>215</sup>

9 203. During the transition of APCO to Camco, Helix had a meeting with  
10 Gemstone.<sup>216</sup>

11 204. The purpose of that meeting was to: "represent that work was still proceeding,  
12 nothing had changed with our contracts with the current APCO relationship, and that we were  
13 to take direction for construction from Camco, and they wanted to negotiate a contract."<sup>217</sup>

14 205. Helix never sent APCO a letter or requested that APCO clarify or provide any  
15 information to Helix on the status of its relationship to the Project.<sup>218</sup>

16 206. Camco presented Helix with a ratification agreement.<sup>219</sup>

17 207. It was Camco's intent and understanding that it was replacing APCO in the  
18 Helix-APCO subcontract.<sup>220</sup>

19 208. Helix had a copy of the ratification agreement by at least September 3, 2008.<sup>221</sup>

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<sup>215</sup> Testimony of Andy Rivera (Helix) Day 2, p. 78.

<sup>216</sup> Testimony of Bob Johnson (Helix) Day 2, p. 22.

<sup>217</sup> Testimony of Bob Johnson (Helix) Day 2, pp. 22-23.

<sup>218</sup> Testimony of Bob Johnson (Helix) Day 2, p. 23.

<sup>219</sup> Testimony of Bob Johnson (Helix) Day 1, p. 124.

<sup>220</sup> Testimony of Steve Parry (Camco) Day 5, pp. 28, 29 and 60.

<sup>221</sup> Exhibit 172. Testimony of Bob Johnson (Helix) Day 2, p. 27.

1           209. Helix understood the purpose of the ratification agreement as follows: "...they  
2 [Camco] were stepping in as construction management for the project and that they were using  
3 that agreement in order to proceed with – hold us as the subcontractor going forward."<sup>222</sup>

4           210. Camco's understanding was the same, i.e. the ratification agreement formed the  
5 basis of Camco's agreement in allowing Helix to proceed on the Project.<sup>223</sup>

6           211. Helix continued working on the Project after receiving the ratification agreement  
7 from Gemstone.<sup>224</sup>

8           212. Camco sent Helix the ratification agreement with a September 4, 2008 letter that  
9 included the following representations: "The conditional acceptance of this work is based on  
10 the execution of a standard Camco Pacific Ratification Agreement... We have provided you a  
11 copy of the Camco Pacific Ratification Agreement for your review and acceptance."

12           213. The Ratification Agreement contained the following additional terms:

- 13           • "B. Subcontractor and Camco desire to acknowledge, ratify and agree to  
14 the terms of the Subcontract Agreement, whereby Camco will replace  
15 APCO as the "Contractor" under the Subcontract Agreement but, subject  
16 to the terms of this Ratification, all other terms and conditions of the  
17 Subcontract Agreement will remain in full force and effect."
- 18           • "5. Ratification. Subcontractor and Camco agree that (a) the terms of the  
19 Subcontract Agreement (as amended by this Ratification and including  
20 all Amendments, Previously Approved Change Orders, and the Camco  
21 Schedule) will govern their relationship regarding the Project, (b) Camco  
22 will be the "Contractor" under the Subcontract Agreement, and (c)  
23 Subcontractor and Camco agree to perform and fulfill all of the  
24 executory terms, covenants, conditions and obligations required to be  
25 performed and fulfilled thereunder by Subcontractor and Camco,  
26 respectively."<sup>225</sup>

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<sup>222</sup> Testimony of Bob Johnson (Helix) Day 1, p. 124.

<sup>223</sup> Exhibit 172. Testimony of Steve Parry (Camco) Day 5, p. 29.

<sup>224</sup> Testimony of Bob Johnson (Helix) Day 2, p. 28.

<sup>225</sup> Exhibit 172-5.

1           214. Helix admitted it entered into a ratification agreement with Camco on  
2 September 4, 2008 to continue on and complete the APCO scope of work.<sup>226</sup>

3           215. Helix even added a document to the ratification entitled "Helix Electric's  
4 Exhibit to the Ratification and Amendment."<sup>227</sup>

5           216. The Helix Exhibit to the Ratification and Amendment contained language  
6 confirming that APCO was removed as the general contractor and that Helix submitted  
7 \$994,025.00 in change orders to APCO prior to August 26, 2008, the date Camco was using for  
8 its ratification agreement.<sup>228</sup>

9           217. Helix included a total contract price of \$5.55 million for the Project, which was  
10 its original contract price with APCO for Phase 1, and added \$480,689.00 as approved change  
11 orders under APCO to the total contract price.<sup>229</sup>

12           218. The proposed Helix Amendment to the ratification agreement also included the  
13 following term: "All close out documents must be turned in before Camco Pacific can release  
14 final payment."<sup>230</sup>

15           219. And although Helix has not produced a signed copy of the ratification  
16 agreement, Helix has admitted entering into its ratification and amended subcontract agreement  
17 in its complaint as follows:

18                   18. On or about September 4, 2008, Helix entered into the  
19 Ratification and Amendment of Subcontract Agreement ("CPCC  
20 Agreement") with Camco who replaced APCO as the general  
21 contractor on the Project, to continue the work for the Property  
22 ("CPCC Work").

23                   19. Helix furnished the CPCC Work for the benefit of and at the  
24 specific instance and request of CPCC and/or Owner.

25                   <sup>226</sup> Exhibit 77, Helix Complaint, ¶18.

26                   <sup>227</sup> Exhibit 170; Testimony of Bob Johnson (Helix) Day 2, p. 42.

27                   <sup>228</sup> Exhibit 170; Testimony of Bob Johnson (Helix) Day 2, pp. 42-43.

28                   <sup>229</sup> Exhibit 170-54; Testimony of Bob Johnson (Helix) Day 2, p. 44; Exhibit 169-  
8.

<sup>230</sup> Exhibit 169-1.

1 20. Pursuant to the CPCC Agreement, Helix was to be paid an  
2 amount in excess of Ten Thousand Dollars (\$10,000.00)  
3 (hereinafter "CPCC Outstanding Balance") for the CPCC Work.  
4 21. Helix furnished the CPCC Work and has otherwise performed  
5 its duties and obligations as required by the CPCC Agreement.  
6 22. CPCC has breached the CPCC Agreement...  
7 CPCC breached its duty to act in good faith by performing the  
8 Ratification Agreement in a manner that was unfaithful to the  
9 purpose of the Ratification Agreement, thereby denying Helix's  
10 justified expectations...<sup>231</sup>

11 Helix's Mr. Johnson admitted that Exhibit 172, the Ratification Agreement, was the document  
12 that Helix referenced in its complaint (Exhibit 77) as the Ratification.<sup>232</sup>

13 220. Helix sought \$834,476.45 against Camco.<sup>233</sup>

14 221. Helix also admitted it had a contract with Camco/Gemstone for \$8.6 million in  
15 its lien documents.<sup>234</sup>

16 222. The scope of work that Helix and CabineTec undertook on the Project was the  
17 same as each had previously contracted with APCO for.<sup>235</sup>

18 223. Helix did not have any further communication with APCO after Camco took  
19 over the Project.<sup>236</sup>

20 224. That is because both knew that APCO was no longer involved and had no  
21 further liability.

22 225. In fact, both Helix and CabineTec rolled their retention over into the Camco  
23 billings.<sup>237</sup>

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24 <sup>231</sup> Exhibit 77.

25 <sup>232</sup> Testimony of Bob Johnson (Helix) at Day 2, p. 28.

26 <sup>233</sup> Testimony of Joe Pelan (APCO) Day 1 at p. 10.

27 <sup>234</sup> Exhibit 512; Testimony of Bob Johnson (Helix) at Day 2, p. 29.

28 <sup>235</sup> Exhibit 314 and Testimony of Bob Johnson (Helix) Day 2, p. 10.

<sup>236</sup> Testimony of Bob Johnson (Helix) Day 2, p. 14.

<sup>237</sup> Compare Exhibit 58, Helix's last pay application to APCO to Exhibit 173, Helix's first payment application to Camco. *See also* Exhibit 176 and 177 showing Helix's retention rolled over. *See also*, Exhibit 150, CabineTec's last pay application to APCO, to Exhibit 185, CabineTec's first payment application to Camco showing

1           226.     Helix's Andy Rivera specifically admitted that it rolled its \$505,000.00 in  
2 retention billings over to Camco.<sup>238</sup>  
3           227.     After Helix and CabineTec went to work for Camco, neither sent APCO any  
4 further pay applications or billings for work they performed on the Project.<sup>239</sup>  
5           228.     And it is undisputed that Helix submitted its September 2008 pay application  
6 for \$354,456.90 to Camco.<sup>240</sup>  
7           229.     That pay application tracked Helix's full retainage of \$553,404.81 for the  
8 Project, not just work completed under Camco.<sup>241</sup>  
9           230.     Helix also submitted its October 2008 billing for \$361,117.44,<sup>242</sup> its  
10 November 2008 pay application for \$159,475.68,<sup>243</sup> and its December 2008 billing for  
11 \$224,805.30 to Camco.<sup>244</sup>

12           **O.     Camco never completed the Project.**

13           231.     Camco never finished the Project<sup>245</sup> and was never paid retention by  
14 Gemstone.<sup>246</sup>

15           232.     In its letter to the subcontractors dated December 22, 2008, Camco advised the  
16 subcontractors as follows:

17                     [I]t has come to Camco Construction, Inc.'s attention that  
18                     funding for the completion of the Manhattan West project (the

19 CabineTec's retention rolled over. See also, Exhibit 30 (Camco's August 2008 draw  
20 request confirming retention was being held for the entire Project).

21                     <sup>238</sup> Testimony of Andy Rivera (Helix) Day 2, p. 74.

22                     <sup>239</sup> Testimony of Mary Jo Allen (APCO) Day 3, at pp. 127-128; Testimony of  
23 Andy Rivera (Helix) Day 2, p. 76.

24                     <sup>240</sup> Exhibit 173-1.

25                     <sup>241</sup> Exhibit 173-2

26                     <sup>242</sup> Exhibit 176-2.

27                     <sup>243</sup> Exhibit 177-4.

28                     <sup>244</sup> Exhibit 178-4.

<sup>245</sup> Testimony of Steve Parry (Camco) Day 5, p. 36.

<sup>246</sup> Testimony of Steven Parry (Camco) Day 5, p. 36.

1 "Project") has been withdrawn. Camco recently received the  
2 following email from [Gemstone]...As a result, Gemstone does  
3 not have funds sufficient to pay out the October draw or other  
4 obligations...Based on the foregoing facts and circumstances,  
5 Camco has no other alternative but to immediately terminate all  
6 subcontracts on the Project, including the agreement with your  
7 company... you have acknowledged that Camco is not liable to  
8 you for payment unless and until Camco receives the  
9 corresponding payment from the Owner...Camco's contract with  
10 Gemstone is a cost plus agreement wherein the subcontracts and  
11 supplies were paid directly by Gemstone and/or its agent, Nevada  
12 Construction Services, based on the invoices and/or payment  
13 applications submitted through voucher control... Therefore,  
14 Camco has no contractual and/or statutory obligation to pay any  
15 claim that may be alleged by any of the subcontractors and/or  
16 suppliers on the Project... any claim for payment alleged against  
17 Camco will result in additional fees, costs ...Therefore, all claims  
18 for payment must be directed to and/or alleged against Gemstone  
19 and the Project.<sup>247</sup>

20 233. Camco's Parry was not able to tell if CabineTec billed Camco in August 2008,  
21 Exhibit 218 and Camco's first pay app to Gemstone.<sup>248</sup>

- 22 • Exhibit 220 is Camco's second pay application for the Project, through  
23 September 30, 2008.<sup>249</sup> That pay application accounted \$6,004,763.00 in  
24 retention.<sup>250</sup> Camco's Parry admitted that Exhibit 220 does include  
25 billings from Helix to Camco that Camco was passing on to  
26 Gemstone.<sup>251</sup>
- 27 • Exhibit 221 is Camco's billing to Gemstone through October 31, 2008;  
28 reflecting a total retention of \$6,928,767.84 in retention.
- Exhibit 163 is Camco's November 2008 billing, reflecting a total  
retention of \$7,275,991.08.

234. Based on Camco's last billing,<sup>252</sup> Exhibit 163, Camco's best estimate of the  
work completed on Phase 1 was 86%.<sup>253</sup>

<sup>247</sup> Exhibit 40 and Exhibit 39.

<sup>248</sup> Exhibit 218; Testimony of Steven Parry (Camco) Day 5, p. 34.

<sup>249</sup> Exhibit 220; Testimony of Steven Parry (Camco) Day 5, p. 32.

<sup>250</sup> Exhibit 220; Testimony of Steven Parry (Camco) Day 5, p. 32.

<sup>251</sup> Exhibit 220; Testimony of Steven Parry (Camco) Day 5, p. 33.

<sup>252</sup> Testimony of Steve Parry (Camco), Day 5, p. 36.

<sup>253</sup> Exhibit 163; Testimony of Steven Parry (Camco), Day 5, p. 36.

1           P.     The litigation.

2           235. On September 9, 2008, APCO brought an action against Gemstone for breach of  
3 Contract and nonpayment.<sup>254</sup>

4           236. Gemstone counterclaimed alleging that APCO breached the Contract.<sup>255</sup>

5           237. On November 4, 2008, the Project lender confirmed that it was reviewing  
6 September's pay application, and confirmed that the subcontractors would be paid for the work  
7 performed for Camco.<sup>256</sup>

8           238. In December 2008 Gemstone suspended work on the Project and advised Camco  
9 and its various subcontractors that the lender was halting all financing for the Project.<sup>257</sup>

10          239. That led to the onslaught of liens and the related priority litigation.

11          240. On December 16, 2008, Camco officially terminated its prime contract with  
12 Gemstone:

13                   Pursuant to your notice to Camco on December 15, 2008,  
14                   Gemstone (a) has lost its funding for the ManhattanWest project  
15                   and (b) will be unable to meet its payment obligations pursuant to  
16                   Article VI of the Engagement Agreement. Furthermore,  
17                   Gemstone has failed to make payments to Camco pursuant to  
18                   Article VI of the Engagement Agreement for October 2008,  
19                   November 2008, and December 2008, and such failures are a  
20                   material breach of the Engagement Agreement. As Gemstone has  
21                   no means of curing such material breach in a timely manner, the  
22                   Engagement Agreement is terminated for cause, effective  
23                   December 19, 2008. Pursuant to our discussions, we understand  
24                   that you agree with the termination  
25                   and the effective date of termination.

26                   ...  
27                   Pursuant to our discussions and with Gemstone's consent, Camco  
28                   will immediately send notices to all of the subcontractors to  
                    terminate their subcontract agreements. In Camco's termination  
                    notice, we will ask the subcontractors to submit their payment  
                    applications to Camco. Camco will review the payment

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25           <sup>254</sup> Exhibit 219.

26           <sup>255</sup> Exhibit 226.

27           <sup>256</sup> Exhibit 138.

28           <sup>257</sup> Exhibit 48; Exhibit 138.



1 applications and, if they appear proper, Camco will forward them  
2 to Gemstone for payment.<sup>258</sup>

3 In response, Camco terminated the subcontracts with its subcontractors on December 22,  
4 2008.<sup>259</sup>

5 241. On May 26, 2010, Judge Kathleen Delaney filed an Order Striking Defendant  
6 Gemstone Development West, Inc.'s Answer and Counterclaims, and Entering Default for  
7 failure to give reasonable attention to matters, failure to obtain new counsel, failure to appear at  
8 hearings.<sup>260</sup>

9 242. On June 6, 2013, APCO filed a motion for summary judgment against  
10 Gemstone. That Motion confirmed that APCO complied with all terms of the Agreement and  
11 that Gemstone materially breached the Agreement by, among other things: (1) failing to make  
12 payments due to APCO; (2) interfering with APCO's relationships with its subcontractors; (3)  
13 refusing to review, negotiate, or consider change order requests in good faith; (4) removing  
14 APCO from the Project without valid or appropriate grounds; and (5) otherwise breaching the  
15 terms of the Agreement.<sup>261</sup>

16 243. On June 13, 2013, the Court (Judge Susan Scann) granted that motion.<sup>262</sup> The  
17 record does not reflect an order or judgment.

18 244. APCO did not receive any funds associated with its work from June, July or  
19 August 2008 on the Project and never received its or any subcontractor's retention.

20 245. APCO did cooperate with Gemstone to see that all subcontractors, including  
21 Helix and CabineTec were paid all progress payments that were billed and due while APCO  
22 was in charge.

23 <sup>258</sup> Exhibit 165.

24 <sup>259</sup> Exhibit 166-2.

25 <sup>260</sup> Docket at May 26, 2010 Order Striking Defendant Gemstone Development  
26 West, Inc.'s Answer and Counterclaims, and Entering Default.

27 <sup>261</sup> Docket at June 6, 2013, Motion for Summary Judgment against Gemstone.

28 <sup>262</sup> Docket at Minutes from June 13, 2013.

1           246. Despite APCO's efforts, Helix and CabineTec are seeking to hold APCO  
2 responsible for retention.

3           247. Any of the foregoing findings of fact that would be more appropriately  
4 considered conclusions of law should be deemed so.

5           FROM the foregoing Findings of Fact, the Court makes the following

6 **II. CONCLUSIONS OF LAW**

7  
8 **Helix's Claims Against APCO**

9 **A. Breach of Contract**

10           1. In Nevada, there are four elements to a claim for breach of contract: "(1)  
11 formation of a valid contract, (2) performance or excuse of performance by the plaintiff, (3)  
12 material breach by the defendant, and (4) damages."<sup>263</sup>

13           2. Exhibit 45 is the Helix Subcontract, which represents the valid, final written  
14 agreement between APCO and Helix.

15           3. Helix's claim against APCO is for \$505,021.00 in alleged retention.<sup>264</sup> As a  
16 condition precedent to payment for retention, the Helix Subcontract required Helix to properly  
17 comply with the retention payment schedule in Section 3.8.<sup>265</sup> Specifically, Section 3.8  
18 required: (1) completion of the entire project, (2) owner acceptance, (3) final payment from  
19 owner to APCO, (4) final as-built drawings, and (5) releases.<sup>266</sup>

20           4. A party who seeks to recover on a contract has the burden of establishing any  
21 condition precedent to the respective contract.<sup>267</sup>

22           5. Parties can agree to a schedule of payments.<sup>268</sup>

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24 <sup>263</sup> *Laguerre v. Nevada System of Higher Education*, 837 F.Supp.2d 1176, 1180  
(D. Nev. 2011).

25 <sup>264</sup> Testimony of Andy Rivera (Helix) Day 2, pp. 73-75.

26 <sup>265</sup> Exhibit 45 at Section 3.8.

27 <sup>266</sup> Exhibit 45 at Section 3.8.

28 <sup>267</sup> *See Lucini-Parish Ins. v. Buck*, 108 Nev. 617, 620, 836 P.2d 627, 629 (1992).

- 1           6.     Parties can agree to proper conditions precedent to payment.<sup>269</sup>
- 2           7.     Under Nevada precedent and legislative action, acceptance provisions are valid
- 3 conditions precedent to payment when not combined with a waiver of a mechanic's lien rights.
- 4 <sup>270</sup>
- 5           8.     NRS 624.624 was meant, *inter alia*, to ensure payment to subcontractors after
- 6 the owner paid the general for the subcontractor's work.<sup>271</sup>
- 7           9.     In the present action, the Helix Subcontract: (1) incorporated the Contract,<sup>272</sup> (2)
- 8 confirmed that the subcontractors would be bound to Gemstone to the same extent APCO
- 9 was,<sup>273</sup> and (3) contained a schedule of payments for both retention and change orders with
- 10 preconditions before APCO had an obligation to pay the subcontractors.<sup>274</sup>
- 11          10.    Only one of those preconditions involved Gemstone's payment of retention to
- 12 APCO. The others concerned the right to receive payment, not the fact of payment.
- 13          11.    Pursuant to NRS 624.624(1)(a), payment was due to Helix in accordance with
- 14 the retention payment schedule or within 10 days after APCO received payment from
- 15 Gemstone:

16                   **NRS 624.624 Payment of lower-tiered subcontractor;**

17                   **grounds and procedure for withholding amounts from**

18

19                   <sup>268</sup> NRS 624.624(1)(a).

20                   <sup>269</sup> *Padilla Construction Company of Nevada v. Big-D Construction Corp*, 386

21 P.3d 982 (Nev. 2016) (unpublished) ("Because the parties' subcontract contained a

22 payment schedule that required that Padilla be paid within ten days after IGT accepted

23 Padilla's work and paid Big-D for that work and it is undisputed that IGT never

accepted Padilla's work . . . the district court correctly found that payment never

became due to Padilla under the subcontract or *NRS 624.624(1)(a)*; *see generally*,

*NRS 624.626*.

24                   <sup>270</sup> *Id.*

25                   <sup>271</sup> *Padilla Construction Company of Nevada v. Big-D Construction Corp*, 386

26 P.3d 982 (Nev. 2016) (unpublished).

27                   <sup>272</sup> Exhibits 45 and 149, Helix and CabineTec Subcontracts at Sections 1.1.

28                   <sup>273</sup> Exhibits 45 and 149, Helix and CabineTec Subcontracts at Sections 3.4.

<sup>274</sup> *Id.* at Section 3.8 and Article 4.

1 payment; rights and duties after notice of withholding, notice  
2 of objection or notice of correction.

3 1. Except as otherwise provided in this section, if a  
4 higher-tiered contractor enters into:

5 (a) A written Contract with a lower-tiered  
6 subcontractor that includes a schedule for payments, the  
7 higher-tiered contractor shall pay the lower-tiered  
8 subcontractor:

9 (1) On or before the date payment is due; or

10 (2) Within 10 days after the date the higher-tiered  
11 contractor receives payment for all or a portion of  
12 the work, materials or equipment described in a  
13 request for payment submitted by the lower-tiered  
14 subcontractor,

15 → whichever is earlier.

16 12. These provisions place a time obligation on a higher-tiered contract to make  
17 payment, but they do not restrict the right of the lower-tiered contractor to receive payment if  
18 the higher-tiered contractor has not been paid. Section 3.8 of the Helix Subcontract contained a  
19 retention payment schedule that was acknowledged and affirmed by Helix and APCO at trial.  
20 As such, Helix needed to show that applicable and enforceable conditions precedent were  
21 satisfied before APCO had to pay retention. *See Lucini-Parish Ins. v. Buck*,<sup>275</sup> (a party who  
22 seeks to recover on a contract has the burden of establishing any condition precedent to the  
23 respective contract).

24 13. Helix admitted that it did not comply with the applicable and enforceable  
25 conditions precedent to be entitled to its retention payments from APCO.<sup>276</sup>

26 <sup>275</sup> 108 Nev. 617, 620, 836 P.2d 627, 629 (1992).

27 <sup>276</sup> See Testimony of Helix's Bob Johnson, Day 2 at pg. 19 ("Q. Well, let me ask  
28 it this way: Did Helix satisfy any of these preconditions found in paragraph 3.8 while  
APCO was the general contractor on the project? A. Not to my knowledge.")

1           14. Helix did not show: (1) completion of the entire Project, (2) final acceptance of  
2 the Project by Gemstone, (3) receipt of final payment from Gemstone to APCO, (4) delivery of  
3 all as-builts and close out document, and (5) delivery of all final waivers and releases.

4           15. Helix never sent APCO an invoice or billing for its retention.

5           16. Accordingly, Helix's retention payment was not due from APCO at the time  
6 APCO was removed from the project.

7           17. As a result, Helix's first claim for relief for breach of contract for failing to pay  
8 retention fails as a matter of law.

9           18. Lastly, there is no contractual obligation for APCO to pay Helix for the work it  
10 performed for Gemstone and/or Camco after APCO left the Project. Helix knowingly replaced  
11 APCO with Camco under the Helix Subcontract on all executory obligations, including  
12 payment for future work and retention.

13           **B. Breach of the Implied Covenant of Good Faith and Fair Dealing**

14           19. Helix's second claim for relief for breach of the covenant of good faith and fair  
15 dealing also fails.

16           20. In Nevada, "[e]very contract imposes upon each party a duty of good faith and  
17 fair dealing in its performance and enforcement."<sup>277</sup> This implied covenant requires that parties  
18 "act in a manner that is faithful to the purpose of the contract and the justified expectations of  
19 the other party."<sup>278</sup>

20           21. A breach of the implied covenant of good faith and fair dealing occurs when the  
21 terms of a contract are complied with but one party to the contract deliberately contravenes the  
22 intention of the contract.<sup>279</sup>

23  
24           <sup>277</sup> *A.C. Shaw Cont., Inc. v. Washoe Cnty.*, 105 Nev. 913, 914, 784 P.2d 9, 9  
(Nev. 1989) (quoting NRS 104.1203).

25           <sup>278</sup> *Morris v. Bank of Am. Nev.*, 110 Nev. 1274, 1278 n.2, 886 P.2d 454, 457 n.2  
26 (Nev. 1994) (internal quotations omitted).

27           <sup>279</sup> See *Hilton Hotels v. Butch Lewis Prods.*, 107 Nev. 226, 232, 808 P.2d  
28 919,923 (Nev. 1991).

1           22. To prevail on a theory of breach of the covenant of good faith and fair dealing, a  
2 plaintiff must establish: (1) plaintiff and defendants were parties to a contract, (2) defendants  
3 owed a duty of good faith to the plaintiff, (3) defendants breached that duty by performing in a  
4 manner that was unfaithful to the purpose of the contract, and (4) plaintiff's justified  
5 expectations were denied.<sup>280</sup>

6           23. The Nevada Supreme Court has held that good faith is a question of fact.<sup>281</sup>

7           24. Helix claims APCO breached its duty of good faith and fair dealing by  
8 "performing in a manner that was unfaithful to the purpose of the APCO Agreement."<sup>282</sup>

9           25. APCO acted in good faith with respect to Helix:

10           a. APCO paid Helix all sums Helix billed APCO through August 2008  
11 (when APCO left the Project),<sup>283</sup>

12           b. APCO signed joint checks so that its subcontractors, including Helix,  
13 would get paid, even though APCO was not getting paid,<sup>284</sup>

14           c. APCO pulled its general contractor permits so that Camco could get  
15 permits for the Project and APCO's subcontractors could continue on  
16 with the Project (less retention),<sup>285</sup> and

17           d. APCO also financed the related appeal to obtain priority for Helix and  
18 the other subcontractors once Gemstone shut the Project down.

19  
20  
21           <sup>280</sup> *Perry v. Jordan*, 111 Nev. 943, 948, 900 P.2d 335, 338 (Nev. 1995).

22           <sup>281</sup> *Consolidated Generator-Nevada, Inc. v. Commins Engine Co., Inc.*, 114 Nev.  
1304, 1312, 971 P.2d 1251, 1256 (Nev. 1998).

23           <sup>282</sup> Exhibit 231, Helix's amended complaint at ¶ 27.

24           <sup>283</sup> Exhibit 26; Exhibit 152; Testimony of Joe Pelan, Day 1 at pg. 67; Testimony  
of Mary Jo Allen (APCO), Day 3 pg. 127 (as to Helix) and Testimony of Mary Jo Allen  
25 (APCO), Day 3 at pg. 128; Testimony of Joe Pelan (APCO), Day 1 at pg. 46; Testimony  
of Joe Pelan (APCO), Day 1 at pg. 82.

26           <sup>284</sup> Exhibit 26. See also: Testimony of Joe Pelan (APCO), Day 1 at pg. 38;  
Testimony of Joe Pelan (APCO), Day 1 at pg. 41.

27           <sup>285</sup> Testimony of Joe Pelan (APCO), Day 1 at pg. 100.

1           26.     Helix failed to present any evidence that APCO failed to act in good faith under  
2 the Helix Subcontract or these circumstances. While it is undisputed that APCO did not pay  
3 Helix the retention, there is no evidence that this non-payment was in bad faith.

4           27.     As a result, Helix's second claim for breach of the implied covenant of good  
5 faith and fair dealing of the subcontract fails as a matter of law.

6           C.     Unjust Enrichment/Quantum Meruit

7           28.     Helix asserted breach of contract *and* unjust enrichment claims against  
8 APCO.<sup>286</sup>

9           29.     APCO had a subcontract with Helix, Exhibit 45. Helix admitted the same in its  
10 complaints, at trial, and in its May 10, 2010 Motion for Partial Summary Judgment Against  
11 Gemstone (and corresponding errata), on file with this Court.

12           30.     An action based upon a theory of unjust enrichment is not available when there  
13 is an express, written contract because no contract can be implied when there is an express  
14 contract.<sup>287</sup> However, frustration of an express contract's purpose can make unjust enrichment  
15 an available remedy. *See e.g. Restatement, Contracts 2d*, §377.

16           31.     Even if the Helix Subcontract did not preclude an unjust enrichment/*quantum*  
17 *meruit* theory of recovery (which it does), APCO was not unjustly enriched by Helix's work.  
18 The undisputed evidence confirms that APCO was not paid any amounts for Helix's work that  
19 it did not transmit to Helix, and APCO did not get to keep the property. Instead, APCO remains  
20 unpaid \$1,400,036.75 from the failed Project.<sup>288</sup>

21           32.     As such, APCO was not unjustly enriched by Helix's work.

22           .....

23           .....

24  
25           <sup>286</sup> See Exhibit 45, Helix Subcontract, and Exhibit 149, CabineTec Subcontract.

26           <sup>287</sup> *Leasepartner's Corp. v. Robert L. Brooks Trust*, 113 Nev. 747, 942 P.2d 182  
(1997).

27           <sup>288</sup> Testimony of Mary Jo Allen (APCO), Day 3, p. 122.

1           D.     Mechanic's Lien Foreclosure

2           33.    Helix's fourth claim for relief was of a mechanic's lien foreclosure, which also  
3 fails.

4           34.    APCO was not the owner of the Project.

5           35.    The Project has already been foreclosed upon and the proceeds were awarded to  
6 the lender. The Nevada Supreme Court affirmed the decision of the trial court that the lender  
7 was entitled to keep the Project and related proceeds, and the subcontractors (and APCO) were  
8 left with nothing. Thus, Helix cannot foreclose upon the property.

9           36.    APCO is not legally liable for any deficiency judgment because it is not the  
10 party responsible for any deficiency.<sup>289</sup>

11           E.     Violation of NRS 624.606 through 624.630 et seq.

12           37.    NRS 624.624 is designed to ensure that general contractors promptly pay  
13 subcontractors after the general contractor receives payment from the owner for the work  
14 performed by the subcontractor.

15           38.    Here, it is undisputed that Exhibit 45, the Helix Subcontract is a written  
16 agreement between APCO and Helix and contained a retention payment schedule in Section  
17 3.8. Accordingly, pursuant to NRS 624.624(1)(a) payment is due on the date specified in the  
18 subcontract.

19           39.    The Helix Subcontract confirmed that Helix would get paid retention after it  
20 met the five conditions precedent in the retention payment schedule.

21           40.    It is undisputed that Helix never met the five preconditions in the subcontract's  
22 payment schedule.<sup>290</sup> Accordingly, payment of retention to Helix never became due under NRS  
23 624 and Helix's claim for a violation of NRS 624 fails.

24  
25  
26           <sup>289</sup> NRS 108.239(12); *Nev. Nat'l Bank v. Snyder*, 108 Nev. 151, 157, 826 P.2d  
560, 563 (1992).

27           <sup>290</sup> Testimony of Bob Johnson (Helix) Day 2 at pg. 36 and 37



41. Additionally, Helix never billed APCO for its retention and APCO never received Helix's retention from Gemstone.

**CabineTec's claims against APCO**

**A. Breach of Contract**

42. In Nevada, there are four elements to a claim for breach of contract: "(1) formation of a valid contract, (2) performance or excuse of performance by the plaintiff, (3) material breach by the defendant, and (4) damages."<sup>291</sup>

43. Exhibit 149 is the CabineTec Subcontract, which represents the valid, final written agreement between APCO and CabineTec.

44. Exhibit 156, CabineTec's Complaint (page 7, paragraph 50) confirms that CabineTec's principal claim against APCO is for \$19,547.00 for retention.

45. As a condition precedent to payment for retention, the CabineTec Subcontract required CabineTec to properly comply with the retention payment schedule in Section 3.8.<sup>292</sup> Specifically, Section 3.8 required: (1) completion of the entire project, (2) owner acceptance, (3) final payment from owner to APCO, (4) final as-built drawings, and (5) releases.<sup>293</sup>

46. A party who seeks to recover on a contract has the burden of establishing any condition precedent to the respective contract.<sup>294</sup>

47. Parties can agree to a schedule of payments.<sup>295</sup>

48. Parties can agree to proper conditions precedent to payment.<sup>296</sup>

---

<sup>291</sup> *Laguerre v. Nevada System of Higher Education*, 837 F.Supp.2d 1176, 1180 (D. Nev. 2011).

<sup>292</sup> Exhibit 149, CabineTec Subcontract at Section 3.8.

<sup>293</sup> Exhibit 149, CabineTec Subcontract at Section 3.8.

<sup>294</sup> *See Lucini-Parish Ins. v. Buck*, 108 Nev. 617, 620, 836 P.2d 627, 629 (1992).

<sup>295</sup> NRS 624.624(1)(a).

<sup>296</sup> *Padilla Construction Company of Nevada v. Big-D Construction Corp.*, 386 P.3d 982 (Nev. 2016) (unpublished) ("Because the parties' subcontract contained a payment schedule that required that Padilla be paid within ten days after IGT accepted Padilla's work and paid Big-D for that work and it is undisputed that IGT never accepted Padilla's work the district court correctly found that payment never became

1           49. Under Nevada precedent and legislative action, acceptance provisions are valid  
2 conditions precedent to payment when not combined with a waiver of a mechanic's lien rights.

3 <sup>297</sup>

4           50. NRS 624.624 was meant, *inter alia*, to ensure payment to subcontractors after  
5 the owner paid the general for the subcontractor's work.<sup>298</sup>

6           51. In the present action, the CabineTec Subcontract: (1) incorporated the  
7 Contract,<sup>299</sup> (2) confirmed that the subcontractors would be bound to Gemstone to the same  
8 extent APCO was,<sup>300</sup> and (3) contained a schedule of payments for both retention and change  
9 orders with preconditions before APCO had an obligation to pay the subcontractors.<sup>301</sup>

10           52. Only one of those preconditions involved Gemstone's payment of retention to  
11 APCO, which never occurred. The others concerned the right to receive payment, not the fact  
12 of payment.

13           53. Pursuant to NRS 624.624(1)(a), payment was due to CabineTec in accordance  
14 with the retention payment schedule or within 10 days after APCO received payment from  
15 Gemstone:

16                   **NRS 624.624 Payment of lower-tiered subcontractor;**  
17                   **grounds and procedure for withholding amounts from**  
18                   **payment; rights and duties after notice of withholding, notice**  
19                   **of objection or notice of correction.**

20                   1. Except as otherwise provided in this section, if a  
21 higher-tiered contractor enters into:

22 due to Padilla under the subcontract or *NRS 624.624(1)(a)*; *see generally*, NRS  
23 624.626.

24                   <sup>297</sup> *Id.*

25                   <sup>298</sup> *Padilla Construction Company of Nevada v. Big-D Construction Corp*, 386  
26 P.3d 982 (Nev. 2016) (unpublished).

27                   <sup>299</sup> Exhibits 45 and 149, Helix and CabineTec Subcontracts at Sections 1.1.

28                   <sup>300</sup> Exhibits 45 and 149, Helix and CabineTec Subcontracts at Sections 3.4.

<sup>301</sup> *Id.* at Section 3.8 and Article 4.

1 (a) A written Contract with a lower-tiered  
2 subcontractor that includes a schedule for payments, the  
3 higher-tiered contractor shall pay the lower-tiered  
subcontractor:

4 (1) On or before the date payment is due; or

5 (2) Within 10 days after the date the higher-tiered  
6 contractor receives payment for all or a portion of  
7 the work, materials or equipment described in a  
8 request for payment submitted by the lower-tiered  
subcontractor,

9 → whichever is earlier.

10 These provisions place a time obligation on a higher-tiered contractor to make  
11 payment but they do not restrict the right of a lower-tiered contractor to receive  
12 payment if the higher-tiered contractor has not been paid.

13 54. Section 3.8 of the CabineTec Subcontract contained retention payment  
14 schedules that were acknowledged and affirmed by CabineTec and APCO at trial. As such,  
15 CabineTec needed to show that applicable and enforceable conditions precedent were satisfied  
16 before APCO had to pay retention. *See Lucini-Parish Ins. v. Buck*,<sup>302</sup> (a party who seeks to  
17 recover on a contract has the burden of establishing any condition precedent to the respective  
18 contract).

19 55. CabineTec did not even attempt to show: (1) completion of the entire Project,  
20 (2) final acceptance of the Project by Gemstone, (3) receipt of final payment from Gemstone to  
21 APCO, (4) delivery of all as-builts and close out document, and (5) delivery of all final waivers  
22 and releases.

23 56. CabineTec did not meet its burden of proof and APCO never received  
24 CabineTec's retention to trigger the 10 day period.

25 57. Accordingly, CabineTec's retention payment never became due from APCO.

26  
27 <sup>302</sup> 108 Nev. 617, 620, 836 P.2d 627, 629 (1992)

1           58. As a result, CabineTec's first claim for relief for breach of contract fails as a  
2 matter of law.

3           59. There is no contractual obligation for APCO to pay CabineTec for the work it  
4 performed for Gemstone and/or Camco after APCO left the Project. CabineTec knowingly  
5 replaced APCO with Camco under the CabineTec Subcontract on all executory obligations,  
6 including payment for future work and retention.

7           60. NRCP 16.1(a)(1)(c) requires that a plaintiff "**must, without awaiting a discovery**  
8 **request, provide to other parties . . . [a] a computation of any category of damages claimed**  
9 **by the disclosing party, making available for inspection and copying under Rule 34 of the**  
10 documents or other evidentiary matter... on which such computation is based, including  
11 materials bearing on the nature and extent of injuries suffered..."<sup>303</sup>

12           61. A plaintiff "is not excused from making its disclosures because it has not fully  
13 completed its investigation of the case."<sup>304</sup>

14           62. NRCP 16.1(a)(c) requires that parties voluntarily disclose "[a] computation of  
15 any category of damages claimed by the disclosing party" and documents to support the  
16 computation.<sup>305</sup>

17           63. Under NRCP 26(e)(1), a plaintiff must immediately supplement its initial  
18 damages computation if it "learns that in some material respect the information disclosed is  
19 incomplete or incorrect."<sup>306</sup> See *Keener v. United States*,<sup>307</sup> (finding a second disclosure so  
20 substantially different from the first that it could not qualify as a correction of an incomplete or  
21 inaccurate expert report).

22  
23  
24           <sup>303</sup>NRCP 16.1(a)(1)(c)(emphasis added).

25           <sup>304</sup>*Id.*

26           <sup>305</sup>NRCP 16.1(a)(1)(c).

27           <sup>306</sup>NRCP 26(e)(1).

28           <sup>307</sup>181 F.R.D. 639, 640 (D. Mont. 1998)

1           64.   CabineTec's complaint alleged \$19,547.00 against APCO.<sup>308</sup>

2           65.   CabineTec's initial, and first supplemental disclosures disclosed \$30,110.95 in

3 damages against APCO, which included interest and fees on the retention amount of

4 \$19,547.00.<sup>309</sup>

5           66.   Those were the only disclosures that CabineTec made prior to the close of

6 discovery, as extended by the Court.

7           67.   CabineTec's damage claims against APCO are limited to \$30,110.95.

8           68.   National Wood's Second Supplemental Disclosure containing amended

9 damages was filed on November 13, 2017, two weeks before a November 28 trial date. This

10 supplement increases the damages from \$30,110.95 to \$1,154,680.40, a 3600% increase.

11           69.   APCO has been prejudiced as a result of this late disclosure as APCO described

12 in its motion in limine, and National Wood's error in not disclosing its damages pursuant to

13 these rules was not harmless.

14           70.   CabineTec/National Wood has no adequate justification for its repeated failure

15 to comply with Rule 16.1(a)'s disclosure requirements.

16           71.   CabineTec did not present any testimony confirming it met any of the conditions

17 in Section 3.8. Instead, CabineTec's Mr. Thompson admitted that the buildings had to be

18 drywalled and painted before the cabinets were installed<sup>310</sup> and he had no documentation (daily

19 reports, photographs, etc.) that would confirm that CabineTec ultimately installed cabinets in

20 Phase 1 for APCO.<sup>311</sup>

21           .....

22           .....

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23

24           <sup>308</sup> Exhibit 156-8.

25           <sup>309</sup> Exhibits 157 (CabineTec's initial disclosures); Exhibit 158 (CabineTec's First

Supplemental Disclosure), and Exhibit 159 (CabineTec's second supplemental

26 disclosure).

27           <sup>310</sup> Testimony of Mr. Thompson (CabineTec) at Day 5 p. 69.

<sup>311</sup> Testimony of Mr. Thompson (CabineTec) at Day 5 p. 69.

1           **B.     Breach of the Implied Covenant of Good Faith and Fair Dealing**

2           72.     In Nevada, “[e]very contract imposes upon each party a duty of good faith and  
3           fair dealing in its performance and enforcement.”<sup>312</sup> This implied covenant requires that  
4           parties “act in a manner that is faithful to the purpose of the contract and the justified  
5           expectations of the other party.”<sup>313</sup>

6           73.     A breach of the implied covenant of good faith and fair dealing occurs when the  
7           terms of a contract are complied with but one party to the contract deliberately contravenes  
8           the intention of the contract.<sup>314</sup>

9           74.     To prevail on a theory of breach of the covenant of good faith and fair dealing, a  
10          plaintiff must establish: (1) plaintiff and defendants were parties to a contract, (2)  
11          defendants owed a duty of good faith to the plaintiff, (3) defendants breached that duty by  
12          performing in a manner that was unfaithful to the purpose of the contract, and (4) plaintiff’s  
13          justified expectations were denied.<sup>315</sup>

14          75.     The Nevada Supreme Court has held that good faith is a question of fact.<sup>316</sup>

15          76.     APCO acted in good faith with respect to CabineTec:

16           a.     APCO paid CabineTec all sums CabineTec billed APCO through August  
17                   2008 (when APCO left the Project),<sup>317</sup>

18           b.     APCO signed joint checks so that its subcontractors, including  
19                   CabineTec, would get paid, even though APCO was not getting paid,<sup>318</sup>

20  
21           <sup>312</sup> *A.C. Shaw Cont., Inc. v. Washoe Cnty.*, 105 Nev. 913, 914, 784 P.2d 9, 9  
(Nev. 1989) (quoting NRS 104.1203).

22           <sup>313</sup> *Morris v. Bank of Am. Nev.*, 110 Nev. 1274, 1278 n.2, 886 P.2d 454, 457 n.2  
(Nev. 1994) (internal quotations omitted).

23           <sup>314</sup> See *Hilton Hotels v. Butch Lewis Prods.*, 107 Nev. 226, 232, 808 P.2d  
24           919,923 (Nev. 1991).

25           <sup>315</sup> *Perry v. Jordan*, 111 Nev. 943, 948, 900 P.2d 335, 338 (Nev. 1995).

26           <sup>316</sup> *Consolidated Generator-Nevada, Inc. v. Commins Engine Co., Inc.*, 114 Nev..  
27           1304, 1312, 971 P.2d 1251, 1256 (Nev. 1998).

28           <sup>317</sup> Exhibit 26; Exhibit 152; Testimony of Joe Pelan, Day 1, pp. 46, 67 and 82;  
Testimony of Mary Jo Allen (APCO) Day 3, p. 128.

1 c. APCO pulled its general contractor permits so that Camco could get  
2 permits for the Project and APCO's subcontractors could continue on  
3 with the Project (less retention),<sup>319</sup> and

4 d. APCO also financed the related appeal to obtain priority for CabineTec  
5 and the other subcontractors once Gemstone shut the Project down.

6 77. CabineTec failed to present any evidence that APCO failed to act in good faith  
7 under the CabineTec Subcontract. While it is undisputed that APCO did not pay CabineTec the  
8 retention, there is no evidence that this non-payment was in bad faith.

9 78. As a result, CabineTec's second claim for breach of the implied covenant of  
10 good faith and fair dealing of the subcontract fails as a matter of law.

11 C. Unjust Enrichment/Quantum Meruit

12 79. CabineTec asserted breach of contract *and* unjust enrichment/ *quantum meruit*  
13 claims against APCO.<sup>320</sup>

14 80. APCO had a subcontract with CabineTec, **Exhibit 149**.

15 81. An action based upon a theory of unjust enrichment is not available when there  
16 is an express, written contract because no contract can be implied when there is an express  
17 contract.<sup>321</sup> However, frustration of an express contract's purpose can make unjust enrichment  
18 an available remedy. *See e.g. Restatement, Contracts 2d*, §377.

19 82. Even if the CabineTec Subcontract did not preclude an unjust  
20 enrichment/*quantum meruit* theory of recovery (which it does), APCO was not unjustly  
21 enriched by CabineTec's work. The undisputed evidence confirms that APCO was not paid any  
22

23  
24 <sup>318</sup> Exhibit 26. See also: Trial Testimony of Joe Pelan (APCO) Day 1 at p. 38;  
Testimony of Joe Pelan (APCO) Day 1 at p. 41.

25 <sup>319</sup> Testimony of Joe Pelan (APCO) Day 1 at p. 100.

26 <sup>320</sup> See Exhibit 149, CabineTec Subcontract.

27 <sup>321</sup> *Leasepartner's Corp. v. Robert L. Brooks Trust*, 113 Nev. 747, 942 P.2d 182  
(1997).

1 amounts for CabineTec's work that it did not transmit to CabineTec, and APCO did not get to  
2 keep the property. Instead, APCO remains unpaid \$1,400,036.75 from the failed Project.<sup>322</sup>

3 83. As such, APCO was not unjustly enriched by CabineTec's work.

4 **D. Violation of NRS 624.606 through 624.630 et seq.**

5 84. NRS 624.624 is designed to ensure that general contractors promptly pay  
6 subcontractors after the general contractor receives payment from the Owner for the work  
7 performed by the subcontractor.

8 85. Here, it is undisputed that Exhibit 149, the CabineTec Subcontract is a written  
9 agreement between APCO and CabineTec and contained a retention payment schedule in  
10 Section 3.8. Accordingly, pursuant to NRS 624.624(1)(a) payment is due on the date specified  
11 in the subcontract.

12 86. The CabineTec Subcontract confirmed that CabineTec would get paid retention  
13 after it met the five conditions precedent in the retention payment schedule.

14 87. It is undisputed that CabineTec never met the five preconditions in the  
15 subcontract's payment schedule. Accordingly, payment of retention to CabineTec never  
16 became due under NRS 624 and CabineTec's claim for a violation of NRS 624 fails.

17 88. Additionally, CabineTec never billed APCO for its retention and APCO never  
18 received CabineTec's retention from the Owner. CabineTec rolled its retention over to Camco  
19 as a Project liability, and actually billed its retention to Camco.

20 **E. Monies Due and Owing**

21 89. CabineTec has failed to prove that it is due monies from APCO.

22 90. "The word due always imports a fixed and settled obligation or liability."<sup>323</sup>

23 91. Exhibit 149 governed the relationship between the parties and it was subject to  
24 the retention payment schedule in Section 3.8.

25  
26 <sup>322</sup> Testimony of Mary Jo Allen (APCO), Day 3, p. 122.

27 <sup>323</sup> *Black's Law Dictionary*, Sixth Edition, 1990.



1           92.    Payment never became due under Section 3.8 for the reasons set forth above.

2           F.    Account Stated

3           93.    CabineTec's claim for account stated fails.

4           94.    In Nevada, "[a]n account stated may be broadly defined as an agreement based  
5 upon prior transactions between the parties with respect to the items composing the account and  
6 the balance due, if any, in favor of one of the parties."<sup>324</sup>

7           95.    "To effect an account stated, the outcome of the negotiations must be the  
8 recognition of a sum due from one of the parties to the other with a promise, express or  
9 implied, to pay that balance."<sup>325</sup>

10          96.    "The genesis of an account stated is the agreement of the parties, express or  
11 implied."<sup>326</sup> APCO and CabineTec had an express written agreement that governed their  
12 relationship.

13          97.    APCO and CabineTec did not have any prior transactions with respect to the  
14 items composing any account.

15          98.    No evidence was presented that APCO agreed that any sum was due. Instead,  
16 APCO disputed any payment obligation.

17          99.    APCO and CabineTec have not agreed to any other payment provisions outside  
18 of Exhibit 149 and this claim fails.

19  
20       Helix and CabineTec ratified their subcontracts with Camco.

21          100.    "Ratification of a contract occurs when one approves, adopts, or confirms a  
22 contract previously executed by another..."<sup>327</sup>

23  
24       <sup>324</sup> *Old W. Enterprises, Inc. v. Reno Escrow Co.*, 86 Nev. 727, 729, 476 P.2d 1, 2  
25 (1970).

26       <sup>325</sup> *Id.*

27       <sup>326</sup> *Id.*

28       <sup>327</sup> *Id.*

1           101. Ratification may be express or implied by the conduct of the parties.<sup>328</sup> The  
2 party to be charged with ratification of such a contract must have acted voluntarily and with full  
3 knowledge of the facts.<sup>329</sup>

4           102. "A person ratifies an act by manifesting assent that the act affects the person's  
5 legal relations or conduct that justifies a reasonable assumption that the person so consents."<sup>330</sup>

6           103. "Any conduct which indicates assent by the purported principal to become a  
7 party to the transaction or which is justifiable only if there is ratification is sufficient, and even  
8 silence with full knowledge of the facts may operate as a ratification."<sup>331</sup>

9           104. "If a person makes a manifestation that the person has ratified another's act and  
10 the manifestation, as reasonably understood by a third party, induces the third party to make a  
11 detrimental change in position, the person may be estopped to deny the ratification."<sup>332</sup>

12           105. "A valid ratification by the principal relieves the agent from any liability to the  
13 principal which would otherwise result from the fact that the agent acted in an unauthorized  
14 way or without authority."<sup>333</sup>

15           106. Helix legally admitted it ratified the Helix/APCO subcontract to the Court and to  
16 APCO in its complaint, thereby replacing Camco for APCO in all executory obligations under  
17 the Helix Subcontract, including payment for retention and future work.

18           107. CabineTec signed a ratification agreement with Camco.

19           108. After APCO left the Project, Helix and CabineTec took direction from  
20 Gemstone or Camco, not APCO.

21  
22  
23           <sup>328</sup> 17A Am Jur 2d Contracts § 10.

24           <sup>329</sup> *Id.*

25           <sup>330</sup> 3 Am Jur 2d Agency § 169.

26           <sup>331</sup> *Id.*

27           <sup>332</sup> 3 Am Jur 2d Agency § 171.

28           <sup>333</sup> 2A C.J.S. Agency § 85.

1 109. Helix and CabineTec submitted billings to Camco including rolling over the  
2 retention they now seek from APCO, and each performed work under the ratified original  
3 scope of work.

4 110. None of the ongoing work was done for or on behalf of APCO and there is no  
5 legal authority that would make APCO liable for their ongoing work on the Project, or the  
6 Project retention.

7 111. Helix never billed APCO for retention because it never became due.<sup>334</sup>

8 112. Helix and CabineTec waived all claims against APCO by knowingly contracting  
9 to work on the Project for Camco/Gemstone and rolling their retention over to Camco and  
10 Gemstone.

11 113. When Helix and CabineTec ratified their subcontracts with Camco, they  
12 replaced APCO. See *Foley Co. v. Scottsdale Ins. Co.*,<sup>335</sup> ("The ratification, by subcontractor's  
13 liability insurer, of its general agent's allegedly unauthorized placement of coverage released  
14 the general agent from liability to the insurer."); *Brooks v. January*,<sup>336</sup> (holding that because a  
15 dissident faction of a church congregation ratified their pastor's unauthorized sale of property,  
16 the pastor was relieved from liability to the church); *Southwest Title Ins. Co. v. Northland*  
17 *Bldg.*,<sup>337</sup> (holding that because the title insurance company ratified its agent's arguably  
18 unauthorized actions, the agent could not be held liable to the title insurance company);  
19 *Rakestraw v. Rodrigues*,<sup>338</sup> (holding that because a wife ratified forgery of her name on a deed  
20 of trust, the agent was relieved of liability to the principal).

21  
22  
23 <sup>334</sup> CabineTec admittedly sent one billing for the full amount of CabineTec's  
delivered (but uninstalled) cabinets that incorrectly included retention. Retention clearly  
was not due under the retention payment schedule.

24 <sup>335</sup> 28 Kan. App. 2d 219, 15 P.3d 353 (2000)

25 <sup>336</sup> 116 Mich.App. 15, 321 N.W.2d 823 (1982)

26 <sup>337</sup> 542 S.W.2d 436 (Tex.App.1976), *rev'd in part on other grounds* 552 S.W.2d  
425 (Tex.1977)

27 <sup>338</sup> 8 Cal.3d 67, 104 Cal.Rptr. 57, 500 P.2d 1401 (1972)

114. CabineTec and Helix ratified their subcontracts with Camco and discharged APCO.

**The Subcontracts were assigned to Gemstone.**

115. The following factors are relevant in determining whether an assignment of a construction contract took place: which party was responsible for the administration of the project, which party ensured the design was correctly carried out, who paid the subcontractors and materialmen, which party answered questions from the owner, which parties were on the job site, which party had ongoing involvement with the project, and which party was corresponding with the owner.<sup>339</sup>

116. These factors weigh in APCO's favor. Each party's behavior is consistent with the assignment of the Helix and CabineTec Subcontracts to Gemstone:

- **Gemstone:** Gemstone attempted to "terminate" the APCO/Gemstone prime contract and stopped giving direction and/or orders to APCO. Gemstone told the subcontractors to stop working for APCO and that their contracts would be assumed by Camco. Gemstone also ordered APCO off the site.
- **Camco:** Camco started giving direction to the subcontractors and dictating their work. Camco sent subcontracts and/or Ratification agreements to both Helix and CabineTec. It engaged in negotiations of the respective subcontracts, and it received billings directly from Helix and CabineTec, including the rollover of their retention.
- **Helix:** Helix did not contact APCO after August 2008 and remained on-site working directly for Gemstone and Camco. It engaged in subcontract negotiations for the same scope of work as it had initially subcontracted for with APCO with Camco, and took direction and performed work under Camco's and Gemstone's direction. Helix submitted pay applications to Camco and even rolled its retention account over to Camco billings. Helix also represented that it signed a ratification Contract and subcontract with Camco in its complaint and its amended complaint.
- **CabineTec:** CabineTec did not contact APCO after August 2008 and remained on-site working for Camco. It engaged in subcontract negotiations for the same scope of work as it had initially subcontracted for with APCO with Camco, and took direction and performed work under Camco's direction. CabineTec

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<sup>339</sup> *J. Christopher Stuhmer, Inc. v. Centaur Sculpture Galleries, Ltd., Inc.*, 110 Nev. 270, 274, 871 P.2d 327, 330 (1994)

submitted pay applications to Camco including all retention. CabineTec also signed a ratification agreement with Camco.

- **APCO:** APCO was off-site and did not dictate or control the subcontractors' work. It did not have any communication with Gemstone or the subcontractors after August 2008. It did not participate in construction related meetings, did not receive billings from subcontractors, or submit payment applications on behalf of subcontractors. In fact, Helix never invoiced APCO for its retention.

117. The Contract contained a subcontract assignment provision that assigned Gemstone APCO's subcontracts upon termination of the Contract.<sup>340</sup>

118. The Contract was incorporated into the subcontracts.<sup>341</sup>

119. Once APCO left the Project, the Helix and CabineTec Subcontracts were assigned to Gemstone per Gemstone's written notice to APCO.

120. Once Gemstone had those Subcontracts, it facilitated Camco's assumption of those subcontracts.<sup>342</sup>

121. After the subcontracts were assigned, Gemstone/Camco were responsible for all executory obligations including payments for retention and future work.<sup>343</sup>

122. An assignment took place thereby making Gemstone/Camco the party responsible for payment to the subcontractors.

**Helix and CabineTec waived any right to pursue APCO.**

123. "Waiver requires the intentional relinquishment of a known right."<sup>344</sup>

124. "If intent is to be inferred from conduct, the conduct must clearly indicate the party's intention."<sup>345</sup>

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<sup>340</sup> Exhibit 2 at 10.4.

<sup>341</sup> See Sections 1.1 of Helix and CabineTec subcontracts. Helix's Mr. Johnson admitted it was Helix's practice to request and review an incorporated prime contract. Testimony of Bob Johnson (Helix) Day 2, p.16.

<sup>342</sup> See Exhibit 170/169 Helix's subcontract and Helix Amendment with Camco; and Exhibit 184, CabineTec's subcontract with Camco.

<sup>343</sup> See Exhibit 2, Section 10.4.

<sup>344</sup> *Nevada Yellow Cab Corp. v. Eighth Judicial Dist. Court ex rel. Cty. of Clark*, 123 Nev. 44, 49, 152 P.3d 737, 740 (2007) (internal citations omitted).

125. “Thus, the waiver of a right may be inferred when a party engages in conduct so inconsistent with an intent to enforce the right as to induce a reasonable belief that the right has been relinquished.”<sup>346</sup>

126. In this case, CabineTec's and Helix's intent was clear: they understood that APCO left the Project. They entered into ratification agreements with Camco and continued working for Camco and Gemstone on the Project without any further dealings with APCO.

127. Helix and CabineTec did not negotiate entirely new contracts and their subsequent billings to Camco depicted their retention that was being held by Gemstone, not APCO. They took orders and direction from Camco employees. They sent billings to Camco. They submitted change orders to Camco. They showed up to the Project at Camco's direction and Camco ultimately informed them the Project had shut down. By pursuing this course of action, it was clear that none of the parties believed APCO was the general contractor on the Project. This conduct is entirely inconsistent with any claim that APCO was the general contractor and was responsible for retention or other future payments. APCO paid Helix and CabineTec all amounts due while APCO was the general contractor.

Any of the foregoing conclusions of law that would more appropriately be considered to be findings of fact shall be so deemed.

## ORDER

NOW, THEREFORE, the Court hereby directs entry of the foregoing Findings of Fact and Conclusions of Law; and

IT IS FURTHER ORDERED that, based upon the foregoing Findings of Fact and Conclusions of Law, and those made regarding the other parties and claims involved in the

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• • • • •

345 *Id.*

346 *Id.*

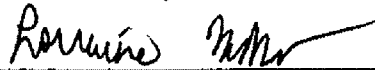
1 consolidated cases, the Court shall issue a separate Judgment or Judgments reflective of the  
2 same at the appropriate time subject to further order of the Court.

3 DATED this 24<sup>th</sup> day of April, 2018.

4  
5   
6 DISTRICT COURT JUDGE

7 **CERTIFICATE**

8 I hereby certify that on or about the date filed, this document was Electronically  
9 Served to the Counsel on Record on the Clark County E-File Electronic Service List.

10   
11 LORRAINE TASHIRO  
12 Judicial Executive Assistant  
13 Dept. No. XIII  
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MARK R. DENTON  
DISTRICT JUDGE

DEPARTMENT THIRTEEN  
LAS VEGAS, NV 89155

**EXHIBIT “30”**

**EXHIBIT “30”**





**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

APCO CONSTRUCTION, a Nevada  
corporation,

Plaintiff,

vs

GEMSTONE DEVELOPMENT WEST, INC.,  
Nevada corporation; NEVADA  
CONSTRUCTION SERVICES, a Nevada  
corporation; SCOTT FINANCIAL  
CORPORATION, a North Dakota  
corporation; COMMONWEALTH LAND  
TITLE INSURANCE COMPANY; FIRST  
AMERICAN TITLE INSURANCE  
COMPANY and DOES I through X,

Defendants.

CASE NO.: A571228

DEPT. NO.: XIII

*Consolidated with:*

A571792, A574391, A577623, A580889,  
A583289, A584730, and A587168

**FINDINGS OF FACT AND  
CONCLUSIONS OF LAW AS TO THE  
CLAIMS OF CACTUS ROSE  
CONSTRUCTION CO., INC.**

AND ALL RELATED MATTERS.

This matter came on for trial on January 17-19, 23-24, 31 and February 6, 2018,  
before the Honorable Mark Denton in Dept. 13, and the following parties having appeared  
through the following counsel:

<u>Party</u>	<u>Counsel for Party</u>
Apco Construction Co., Inc. ("Apco")	John Randall Jeffries, Esq. and Mary E. Bacon, Esq. of the Law Firm of Spencer Fane LLP
Camco Pacific Construction Co., Inc. ("Camco")	Steven L. Morris, Esq. of the Law Firm of the Law Firm of Grant Morris Dodds
Helix Electric of Nevada, LLC ("Helix")	Eric Zimbelman, Esq. and the Law Firm of Peel Brimley LLP
Heinaman Contract Glazing, Inc. ("Heinaman")	Eric Zimbelman, Esq. and the Law Firm of Peel Brimley LLP
Fast Glass, Inc. ("Fast Glass")	Eric Zimbelman, Esq. and the Law Firm of Peel Brimley LLP
Cactus Rose Construction Co., Inc. ("Cactus Rose")	Eric Zimbelman, Esq. and the Law Firm of Peel Brimley LLP

CLERK OF THE COURT

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**MARK R. DENTON**  
DISTRICT JUDGE

DEPARTMENT THIRTEEN  
LAS VEGAS, NV 89155

1058

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SWPPP Compliance Solutions, Inc. ("SWPPP")	Eric Zimbelman, Esq. and the Law Firm of Peel Brimley LLP
National Wood Products, LLC ("National Wood")	John B. Taylor, Esq. of the Law Firm of Cadden & Fuller LLP
E&E Fire Protection, LLC ("E&E")	T. James Truman, Esq. of the Law Firm of T. James Truman, & Associates

**A. Procedural History.**

1. This is one of the oldest cases on the Court's docket. This action arises out of a construction project in Las Vegas, Nevada known as the Manhattan West Condominiums Project ("the Project") located at West Russell Road and Rocky Hill Street in Clark County Nevada, APNs 163-32-101-003 through 163-32-101-005, 163-32-101-010 and 163-32-101-014 (the "Property" and/or "Project"), owned by Gemstone Development West, Inc. ("Gemstone" or "the Owner").

2. Gemstone hired APCO, and, subsequently, Camco as its general contractors, who in turn entered into subcontract agreements with various subcontractors. In December 2008 the Owner suspended the Project and advised the various contractors that Gemstone's lender did not expect to disburse further funds for construction. The Project was never completed. Numerous contractors, including the parties hereto, recorded mechanic's liens against the Property.

3. After several years of litigation and a Writ Action to determine the priority of the various lienors (during which the Property was sold, the proceeds of the same held in a blocked account and this action was stayed), the Nevada Supreme Court ruled that the Owner's lenders had priority over the proceeds of the sale of the Property, holding that the NRS Ch. 108 mechanic's liens were junior to the lenders' deeds of trust. The Court subsequently ordered the proceeds be released to the lenders. Thereafter, the stay was lifted and many of the trade contractors continued to pursue claims for non-payment from APCO and Camco. The trial focused on these claims.

.....

1           B.     **Significant Pre-Trial Orders**

2           1.     **Order Granting Partial Summary Judgment re: Pay-if-Paid.** On  
3 January 2, 2018, this Court issued an Order granting a Motion for Partial Summary  
4 Judgment brought by a group of subcontractors represented by the Peel Brimley Law Firm  
5 (the "Peel Brimley Lien Claimants"<sup>1</sup>) and joined in by others. Generally, but without  
6 limitation, the Court concluded that, pursuant to NRS 624.624 and *Lehrer McGovern*  
7 *Bovis, Inc. v. Bullock Insulation, Inc.*, 124 Nev. 1102, 1117-18, 197 P.3d 1032, 1042 (Nev.  
8 2008), higher-tiered contractors, such as APCO and Camco, are required to pay their  
9 lower-tiered subcontractors within the time periods set forth in NRS 624.626(1) and may  
10 not fail to make such payment based on so-called "pay-if-paid" agreements ("Pay-if-Paid")  
11 that are against public policy, void and unenforceable except under limited circumstances.  
12 Accordingly, the Court ruled that APCO and Camco may not assert or rely on any defense  
13 to their payment obligations, if any, to the party subcontractors that is based on a pay-if-  
14 paid agreement.

15          2.     **Order on Peel Brimley Lien Claimants' Motion in Limine Against**  
16 **Camco.** On December 29, 2017 the Court issued an order on motions *in limine* brought by  
17 the Peel Brimley Lien Claimants Against Camco. Specifically, the Court precluded Camco  
18 from asserting or offering evidence that any of the Peel Brimley Lien Claimants' work on  
19 the Project was (i) defective, (ii) not done in a workmanlike manner or (iii) not done in  
20 compliance with the terms of the parties' agreement because Camco's person most  
21 knowledgeable was not aware of any evidence to support such claims. For the same  
22 reason, the Court also precluded Camco from asserting or offering evidence at trial that the  
23 Peel Brimley Lien Claimants have breached their agreements other than with respect to  
24 pay-if-paid agreements, evidence and argument of which is otherwise precluded by the  
25 Partial Summary Judgment discussed above. For the same reason, the Court also precluded  
26 Camco from asserting or offering evidence at trial to dispute the amounts invoiced, paid

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<sup>1</sup> The Peel Brimley Lien Claimants are: Helix, Heinaman, Fast Glass, Cactus Rose and SWPPP.

1 and that remain to be owed as asserted by the Peel Brimley Lien Claimants in their  
2 respective Requests for Admission. For the same reason, the Court also precluded Camco  
3 from asserting or offering evidence at trial that any liens recorded by the Peel Brimley  
4 Lien Claimants were in any way defective or unperfected and are otherwise valid and  
5 enforceable.

6 **C. Findings of Fact.**

7 Having received evidence and having heard argument of counsel, the Court makes  
8 the following Findings of Fact:

9 1. The original general contractor on the Project was APCO. Gemstone and  
10 APCO entered into the ManhattanWest General Construction Agreement for GMP (the  
11 "APCO-Gemstone Agreement") on or about September 6, 2006. [See Exhibit 2].

12 2. Among other things, and in exchange for a guaranteed maximum price  
13 ("GMP") of \$153,472,300.00 as forth in the APCO-Gemstone Agreement (Ex. 2, ¶  
14 5.02(a)), APCO agreed to:

- 15 • "Complete the work" required by the APCO-Gemstone Agreement,  
16 "furnish efficient business administration and superintendence" and "use its  
17 best efforts to complete the Project;" [Ex 2., ¶ 2.01(a)];
- 18 • "...engage contractors, subcontractors, sub-subcontractors, service  
19 providers, [and others, collectively referred to as "Third-Party Service  
20 Providers"] to perform the work..."; [Ex 2., ¶ 2.02(a)];
- 21 • Monthly submit to Gemstone "applications for payment for the previous  
22 month on forms similar to AIA G702 and G703 and a corresponding  
23 approved Certificate for Payment;" [Ex 2., ¶ 5.05(a)]. Each payment  
24 application was to be "based on a Schedule of Values [that] shall allocate  
25 the entire GMP among the various portions of the Work" with APCO's fee  
26 to be shown as a separate line item." [Ex 2., ¶ 5.05(b)]; The payment  
27 applications were to "show the Percentage of Completion of each portion of  
28

1 the Work as of the end of the period covered by the Application for  
2 Payment. [Ex 2., ¶ 5.05(c)]; and  
3 • Upon receipt of a monthly progress payment, “promptly pay each Third-  
4 Party Service Provider the amount represented by the portion of the  
5 Percentage of the Work Completed that was completed by such Third-Party  
6 Service Provider<sup>2</sup> during the period covered by the corresponding Progress  
7 Payment.” [Ex 2., ¶ 5.05(g)];

8 3. APCO in turn hired various subcontractors to perform certain scopes of  
9 work and provided its form Subcontract Agreement to its subcontractors (“the APCO  
10 Subcontract”). Cactus Rose did not work for APCO on the Project and only first provided  
11 work after APCO ceased work on the project and, as discussed below, Gemstone hired  
12 Camco as the general contractor to replace APCO. APCO ceased work on the Project in or  
13 about the end of August 2008. APCO and Gemstone each claim to have terminated the  
14 other.

15 4. After APCO ceased work on the project, Gemstone hired Camco to be its  
16 general contractor pursuant to an Amended and Restated ManhattanWest General  
17 Construction Agreement effective as of August 25, 2008 (“the Camco-Gemstone  
18 Agreement”). [See Exhibit 162].

19 5. On cross examination, Camco’s Dave Parry could not point to any portion  
20 of the Camco-Gemstone Agreement that required Camco to supervise the work of the  
21 subcontractors. [TR5-50:17-51:9]. Nothing in Article II (“General Contractor  
22 Responsibilities”) obligates Camco to supervise the work or the subcontractors. [See Ex.  
23 162, ¶Article II]. Parry did not deny that Camco was “essentially ... there to lend [its]  
24 license” to Gemstone. [TR5-50:15-17].

25 6. Mr. Parry described Camco as “more of a construction manager at this point  
26

27 <sup>2</sup> Because the only Third-Party Service Providers at issue on this trial were subcontractors, the Court  
28 will herein use the terms “subcontractor” and “Third-Party Service Provider” interchangeably and  
synonymously.

1 than a general contractor" [TR5-31:10-11<sup>3</sup>]. Nonetheless, the Camco-Gemstone  
2 Agreement is plainly called a "General Construction Agreement." The Camco-Gemstone  
3 Agreement also requires Camco, in the same way that APCO did, to aggregate payment  
4 applications from subcontractors and prepare and submit to Gemstone payment  
5 applications for the amounts represented by the subcontractor payment applications and  
6 Camco's fee. [See Ex. 162-008-010; ¶7.01].

7           7. Camco continued the same payment application format and numbering and  
8 same schedule of values that APCO had been following. [See Exhibit 218; TR5-30:21-  
9 31:4<sup>4</sup>]. Like APCO before it, Camco compiled and included in its payment applications to  
10 Gemstone the amounts billed by its subcontractors, including Cactus Rose. [See e.g.,  
11 Exhibit 522-001-011]. Also, like the APCO-Gemstone Agreement, the Camco-Gemstone  
12 Agreement required Camco, upon receipt of a progress payment from Gemstone, to  
13 "promptly pay each [subcontractor] the amount represented by the portion of the  
14 Percentage of the Work Completed that was completed by such [subcontractor]." [Ex. 162-  
15 010, ¶7.03(e)].<sup>5</sup> It is only after Gemstone announced that the Project would be suspended  
16 that Camco asserted otherwise.

17           8. Camco's initial letter to subcontractors following Gemstone's  
18 announcement demonstrates both that it believed it had subcontracts (because it purported  
19 to terminate the same) and that it intended to continue to forward payment applications to  
20 Gemstone. [See e.g., Exhibit 804-003-004]. Specifically, Camco wrote:

21 Camco is left with no choice but to terminate our agreement with Gemstone and  
22 all subcontracts on the Project, including our agreement with your company.  
23 Accordingly, we have terminated for cause our agreement with Gemstone,  
24 effective December 19, 2008, and we hereby terminate for convenience our  
subcontract with your company, effective immediately.

25 Please submit to Camco all amounts you believe are due and owing on your  
subcontract. We will review and advise you of any issues regarding any amounts

26 <sup>3</sup> Testimony of Dave Parry.

27 <sup>4</sup> Testimony of Dave Parry.

28 <sup>5</sup> Unlike APCO and the subcontractors, no retention was to be withheld from the contractor's fee to be  
paid to Camco (through retention continued to be withheld from subcontractors). [Ex. 162-010, ¶7.03(a)].

1 you claim are owed. For all amounts that should properly be billed to Gemstone,  
2 Camco will forward to Gemstone such amounts for payment y Gemstone. If your  
claims appear to be excessive, we will ask you to justify and/or revise the amount.

3 [See e.g., Ex. 804-003-004].

4 9. Camco quickly retracted its initial communication and replaced it with a  
5 second letter [See e.g., Ex. 804-005-007] asking the subcontractors to “please disregard  
6 previous letter which was sent in error.” [See e.g., Ex. 804-005]. Among other things,  
7 Camco’s second letter:

- 8 • Deleted its statement that it had terminated the Camco-Gemstone
- 9 Agreement (while continuing to terminate the subcontractors);
- 10 • Asserts that the subcontractors agreed to Pay-if-Paid and accepted the risk
- 11 of non-payment from the owner (which is also Pay-if-Paid); and,
- 12 • Stated, inaccurately, that “Camco’s contract with Gemstone is a cost-plus
- 13 agreement wherein the subcontractors and suppliers were paid directly by
- 14 Gemstone and/or its agent Nevada Construction Services.” [See e.g., Ex.
- 15 804-007].

16 While Gemstone eventually did make partial payment to some subcontractors through  
17 NCS and not Camco [see discussion, *infra*], the Camco-Gemstone Agreement expressly  
18 required Camco, upon receipt of a progress payment from Gemstone, to “promptly pay  
19 each [subcontractor] the amount represented by the portion of the Percentage of the Work  
20 Completed that was completed by such [subcontractor].” [Ex. 162-010, ¶7.03(e)].

21 10. Some subcontractors stopped working after APCO left the Project. Others,  
22 such as Helix, continued to work on the Project and began working for Camco as the  
23 general contractor. Others, such as Heinaman, Fast Glass, Cactus Rose and SWPPP started  
24 working on the Project only after APCO left and worked only for Camco.

25 11. Camco presented some subcontractors with a standard form subcontract  
26 Agreement (“the Camco Subcontract”), a representative example of which is Camco’s  
27  
28

1 subcontract with Fast Glass. [See Exhibit 801-007-040; TR5-57:8-16<sup>6</sup>].

2 12. However, Cactus Rose and Camco never entered into the Camco  
3 Subcontract. Instead, the agreement between Cactus Rose and Camco is memorialized by a  
4 Time & Material Authorization ("the Cactus Rose Agreement") by which Camco agreed to  
5 hire Cactus Rose to perform certain scopes of work (specifically, replacing non-compliant  
6 firestopping and other related work) in exchange for payment of Cactus Roses' costs for  
7 (1) labor (at stated standard, overtime and double time rates), (2) materials plus a 30%  
8 markup and equipment (at stated daily rates). [See Exhibit 601].

9 13. Cactus Rose submitted multiple invoices to Camco totaling \$363,591.44,  
10 was paid \$124,964.19 and is still owed \$238,627.25 for its work on the Project. [See  
11 Exhibit 604-007-019].

12 14. Cactus Rose presented undisputed evidence that Cactus Rose timely  
13 recorded a mechanic's lien, as amended ("the Cactus Rose Lien"), pursuant to NRS  
14 Chapter 108 and perfected the same. [See Exhibits 605, 606, 607]. The Cactus Rose Lien  
15 identified both Camco as the "person by whom the lien claimant was employed or to  
16 whom the lien claimant furnished or agreed to furnish work, materials or equipment." [See  
17 Ex. 606-002].

18 15. After the project closed, Cactus Rose entered bankruptcy. Its Trustee  
19 authorized and employed the Peel Brimley firm to prosecute Cactus Rose's claims in this  
20 action. [See Exhibit 622].

21 16. Owing to the passage of time, no live witness was available to testify on  
22 Cactus Rose's behalf. However, the Court admitted without objection the Declaration of  
23 Cactus Rose's president, Dave Hofelich, which was signed in May 2010 attesting to the  
24 foregoing facts ("the Hofelich Declaration"). Camco has not disputed these facts or offered  
25 any contrary evidence.

26 17. Based on the foregoing, the Court finds, as attested by the Hofelich  
27

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<sup>6</sup> Testimony of Dave Parry.



1 Declaration and as set forth in the other admitted exhibits relating to Cactus Rose, that (i)  
2 Camco agreed to pay Cactus Rose for its work, (ii) Cactus Rose performed and invoiced  
3 Camco for its work consistent with the Cactus Rose Agreement, (iii) Camco breached the  
4 Cactus Rose Agreement by failing without excuse to pay Cactus Rose the sum of  
5 \$238,627.25 and (iv) Cactus Rose recorded and perfected the Cactus Rose Lien .

6 18. Any finding of fact herein that is more appropriately deemed a conclusion  
7 of law shall be treated as such.

8 FROM the foregoing Findings of Fact, the Court hereby makes the following

9 **B. Conclusions of Law.**

10 1. "Basic contract principles require, for an enforceable contract, an offer and  
11 acceptance, meeting of the minds, and consideration." *May v. Anderson*, 121 Nev. 668,  
12 672, 119 P.3d 1254, 1257 (2005). A meeting of the minds exists when the parties have  
13 agreed upon the contract's essential terms. *Roth v. Scott*, 112 Nev. 1078, 1083, 921 P.2d  
14 1262, 1265 (1996). Which terms are essential "depends on the agreement and its context  
15 and also on the subsequent conduct of the parties, including the dispute which arises, and  
16 the remedy sought." Restatement (Second) of Contracts § 131 cmt. g (1981). Whether a  
17 contract exists is a question of fact and the District Court's findings will be upheld unless  
18 they are clearly erroneous or not based on substantial evidence. *May*, 121 Nev. at 672-73,  
19 119 P.3d at 1257.

20 2. The Court concludes that Camco entered into and breached the Cactus Rose  
21 Agreement by failing, without excuse, to pay Cactus Rose in full for the invoices it  
22 submitted and for the work it performed in the amount of \$238,627.25 and that Cactus  
23 Rose is entitled to judgment for that amount, exclusive of interest, costs and attorney's  
24 fees.

25 3. Alternatively, the Court concludes that there is an implied contract between  
26 Cactus Rose and Camco and that Cactus Rose is entitled *quantum meruit* damages for  
27 recovery of the full and reasonable value of the work it has performed. See *Certified Fire*

1 *Prot. Inc. v. Precision Constr.*, 128 Nev. 371, 379, 283 P.3d 250, 257 (2012) (“*quantum*  
2 *meruit*’s first application is in actions based upon contracts implied-in-fact.”). A contract  
3 implied-in-fact must be “manifested by conduct.” *Id.* at 380 citing *Smith v. Recrion Corp.*,  
4 91 Nev. 666, 668, 541 P.2d 663, 664 (1975); *Hay v. Hay*, 100 Nev. 196, 198, 678 P.2d  
5 672, 674 (1984). It “is a true contract that arises from the tacit agreement of the parties.”  
6 *Id.* To find a contract implied-in-fact, the fact-finder must conclude that the parties  
7 intended to contract and promises were exchanged, the general obligations for which must  
8 be sufficiently clear. *Id.* Here, Cactus Rose and Camco clearly intended to enter into a  
9 contract whereby Cactus Rose would perform work for Camco and Camco would pay  
10 Cactus Rise for its work.

11 4. Where an implied-in-fact contract exists “*quantum meruit* ensures the  
12 laborer receives the reasonable value, usually market price, for his services.” *Precision*  
13 *Constr.*, 128 Nev. at 380 citing Restatement (Third) of Restitution and Unjust Enrichment  
14 § 31 cmt. e (2011), *Sack v. Tomlin*, 110 Nev. 204, 208, 871 P.2d 298, 302 (1994) (“The  
15 doctrine of *quantum meruit* generally applies to an action ... involving work and labor  
16 performed which is founded on a[n] oral promise [or other circumstances] on the part of  
17 the defendant to pay the plaintiff as much as the plaintiff reasonably deserves for his labor  
18 in the absence of an agreed upon amount.”). Cactus Rose is therefore entitled *quantum*  
19 *meruit* damages in the amount of \$238,627.25 for recovery of the full and reasonable value  
20 of the work it performed. *See Certified Fire Prot.*, 128 Nev. at 380.

21 5. The Court rejects Camco’s argument that it is not liable to Cactus Rose (and  
22 other subcontractors) because it never received payment from Gemstone who instead made  
23 payments to subcontractors through the disbursement company, NCS. Camco’s position  
24 notwithstanding, both the Camco-Gemstone Agreement and the Camco Subcontract  
25 demonstrate that (consistent with the APCO-Gemstone Agreement and the APCO  
26 Subcontract) payments to subcontractors were intended to flow through the general  
27 contractor. Camco presented no evidence that Cactus Rose or any other subcontractor  
28

1 consented in advance to Gemstone's eventual decision to release payments (in part)  
2 through NCS and not Camco.

3 6. Similarly, the Court rejects Camco's contention that the Court's decision on  
4 Pay-if-Paid is inapplicable because it was "impossible" for Camco to have paid Helix and  
5 other subcontractors. Camco presented no evidence that it, for example, declared  
6 Gemstone to be in breach for failing to make payments through Camco rather than through  
7 NCS. Instead, Camco appears to have acceded to Gemstone's deviation from the contract  
8 and, at least until Gemstone announced that it was suspending construction, continued to  
9 process subcontractor payment applications and submit them to Gemstone. Camco's  
10 "impossibility" claim is, in any event, another form of Pay-if-Paid, against the public  
11 policy of Nevada, void and unenforceable and barred by this Court's summary judgment.

12 7. Specific to Cactus Rose, the Court concludes that Camco's reliance on any  
13 form of Pay-if-Paid (i.e., even if the same could be deemed permissible under Nevada law)  
14 is inapplicable to its relationship with Cactus Rose because nothing in the Cactus Rose  
15 Agreement sets forth any Pay-if-Paid Agreement and Cactus Rose did not agree to the  
16 Camco Subcontract.

17 8. Cactus Rose is therefore awarded the principal sum of \$238,627.25 (i.e.,  
18 exclusive of interest, costs and attorney's fees) against Camco and may apply for judgment  
19 as to the same.

20 9. The Court denies all of Camco's affirmative defenses.

21 10. Cactus Rose is entitled to prejudgment interest pursuant to NRS 108.237  
22 and/or NRS 17.130 and is granted leave to apply for the same by way of an amendment or  
23 supplement to these Findings of Fact and Conclusions of Law and for judgment as to the  
24 same.

25 11. Cactus Rose is the prevailing party and/or prevailing lien claimant as to  
26 Camco and is entitled to an award of reasonable attorney's fees pursuant to NRS 108.237.  
27 Cactus Rose is granted leave to apply for the same by way of an amendment or supplement  
28

1 to these Findings of Fact and Conclusions of Law and for judgment as to the same.

2 12. As the prevailing party, Cactus Rose may also apply for an award of costs  
3 in accordance with the relevant statutes and for judgment as to the same.

4 13. Any conclusion of law herein that is more appropriately deemed a finding  
5 of fact shall be treated as such.

6 ORDER

7 NOW, THEREFORE, the Court hereby directs entry of the foregoing Findings of  
8 Fact and Conclusions of Law; and

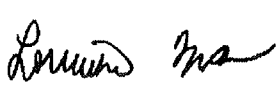
9 IT IS FURTHER ORDERED that, based upon the foregoing Findings of Fact and  
10 Conclusions of Law, and those made regarding the other parties and claims involved in the  
11 consolidated cases, the Court shall issue a separate Judgment or Judgments reflective of the  
12 same at the appropriate time subject to further order of the Court.

13 IT IS SO ORDERED this 24<sup>th</sup> day of April, 2018.

14   
15 DISTRICT COURT JUDGE

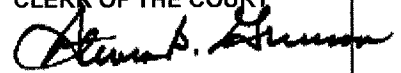
16  
17 CERTIFICATE

18 I hereby certify that on or about the date filed, this document was  
19 Electronically Served to the Counsel on Record on the Clark County E-File Electronic  
20 Service List.

21   
22 LORRAINE TASHIRO  
23 Judicial Executive Assistant  
24 Dept. No. XIII  
25  
26  
27  
28

**EXHIBIT “31”**

**EXHIBIT “31”**



DISTRICT COURT

CLARK COUNTY, NEVADA

APCO CONSTRUCTION, a Nevada  
corporation,

Plaintiff,

vs

GEMSTONE DEVELOPMENT WEST, INC.,  
Nevada corporation; NEVADA  
CONSTRUCTION SERVICES, a Nevada  
corporation; SCOTT FINANCIAL  
CORPORATION, a North Dakota  
corporation; COMMONWEALTH LAND  
TITLE INSURANCE COMPANY; FIRST  
AMERICAN TITLE INSURANCE  
COMPANY and DOES I through X,

Defendants.

CASE NO.: A571228

DEPT. NO.: XIII

*Consolidated with:*

A571792, A574391, A577623, A580889,  
A583289, A584730, and A587168

**FINDINGS OF FACT AND  
CONCLUSIONS OF LAW AS TO THE  
CLAIMS OF HEINAMAN CONTRACT  
GLAZING**

AND ALL RELATED MATTERS.

This matter came on for trial on January 17-19, 23-24, 31 and February 6, 2018,  
before the Honorable Mark Denton in Dept. 13, and the following parties having appeared  
through the following counsel:

<u>Party</u>	<u>Counsel for Party</u>
Apco Construction Co., Inc. ("Apco")	John Randall Jeffries, Esq. and Mary E. Bacon, Esq. of the Law Firm of Spencer Fane LLP
Camco Pacific Construction Co., Inc. ("Camco")	Steven L. Morris, Esq. of the Law Firm of the Law Firm of Grant Morris Dodds
Helix Electric of Nevada, LLC ("Helix")	Eric Zimbelman, Esq. and the Law Firm of Peel Brimley LLP
Heinaman Contract Glazing, Inc. ("Heinaman")	Eric Zimbelman, Esq. and the Law Firm of Peel Brimley LLP
Fast Glass, Inc. ("Fast Glass")	Eric Zimbelman, Esq. and the Law Firm of Peel Brimley LLP
Cactus Rose Construction Co., Inc. ("Cactus Rose")	Eric Zimbelman, Esq. and the Law Firm of Peel Brimley LLP

CLERK OF THE COURT

APR 26 2018

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MARK R. DENTON  
DISTRICT JUDGE

DEPARTMENT THIRTEEN  
LAS VEGAS, NV 89155

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13

SWPPP Compliance Solutions, Inc. ("SWPPP")	Eric Zimbelman, Esq. and the Law Firm of Peel Brimley LLP
National Wood Products, LLC ("National Wood")	John B. Taylor, Esq. of the Law Firm of Cadden & Fuller LLP
E&E Fire Protection, LLC ("E&E")	T. James Truman, Esq. of the Law Firm of T. James Truman, & Associates

**A. Procedural History.**

1. This is one of the oldest cases on the Court's docket. This action arises out of a construction project in Las Vegas, Nevada known as the Manhattan West Condominiums Project ("the Project") located at West Russell Road and Rocky Hill Street in Clark County Nevada, APNs 163-32-101-003 through 163-32-101-005, 163-32-101-010 and 163-32-101-014 (the "Property" and/or "Project"), owned by Gemstone Development West, Inc. ("Gemstone" or "the Owner").

2. Gemstone hired APCO, and, subsequently, Camco as its general contractors, who in turn entered into subcontract agreements with various subcontractors. In December 2008 the Owner suspended the Project and advised the various contractors that Gemstone's lender did not expect to disburse further funds for construction. The Project was never completed. Numerous contractors, including the parties hereto, recorded mechanic's liens against the Property.

3. After several years of litigation and a Writ Action to determine the priority of the various lienors (during which the Property was sold, the proceeds of the same held in a blocked account and this action was stayed), the Nevada Supreme Court ruled that the Owner's lenders had priority over the proceeds of the sale of the Property, holding that the NRS Ch. 108 mechanic's liens were junior to the lenders' deeds of trust. The Court subsequently ordered the proceeds be released to the lenders. Thereafter, the stay was lifted and many of the trade contractors continued to pursue claims for non-payment from APCO and Camco. The trial focused on these claims.

.....

1           B.     **Significant Pre-Trial Orders**

2           1.     **Order Granting Partial Summary Judgment re: Pay-if-Paid.** On  
3 January 2, 2018, this Court issued an Order granting a Motion for Partial Summary  
4 Judgment brought by a group of subcontractors represented by the Peel Brimley Law Firm  
5 (the "Peel Brimley Lien Claimants"<sup>1</sup>) and joined in by others. Generally, but without  
6 limitation, the Court concluded that, pursuant to NRS 624.624 and *Lehrer McGovern*  
7 *Bovis, Inc. v. Bullock Insulation, Inc.*, 124 Nev. 1102, 1117-18, 197 P.3d 1032, 1042 (Nev.  
8 2008), higher-tiered contractors, such as APCO and Camco, are required to pay their  
9 lower-tiered subcontractors within the time periods set forth in NRS 624.626(1) and may  
10 not fail to make such payment based on so-called "pay-if-paid" agreements ("Pay-if-Paid")  
11 that are against public policy, void and unenforceable except under limited circumstances.  
12 Accordingly, the Court ruled that APCO and Camco may not assert or rely on any defense  
13 to their payment obligations, if any, to the party subcontractors that is based on a pay-if-  
14 paid agreement.

15           2.     **Order on Peel Brimley Lien Claimants' Motion in Limine Against**  
16 **Camco.** On December 29, 2017 the Court issued an order on motions *in limine* brought by  
17 the Peel Brimley Lien Claimants Against Camco. Specifically, the Court precluded Camco  
18 from asserting or offering evidence that any of the Peel Brimley Lien Claimants' work on  
19 the Project was (i) defective, (ii) not done in a workmanlike manner or (iii) not done in  
20 compliance with the terms of the parties' agreement because Camco's person most  
21 knowledgeable was not aware of any evidence to support such claims. For the same  
22 reason, the Court also precluded Camco from asserting or offering evidence at trial that the  
23 Peel Brimley Lien Claimants have breached their agreements other than with respect to  
24 pay-if-paid agreements, evidence and argument of which is otherwise precluded by the  
25 Partial Summary Judgment discussed above. For the same reason, the Court also precluded  
26 Camco from asserting or offering evidence at trial to dispute the amounts invoiced, paid

27  
28  

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<sup>1</sup> The Peel Brimley Lien Claimants are: Helix, Heinaman, Fast Glass, Cactus Rose and SWPPP.



1 and that remain to be owed as asserted by the Peel Brimley Lien Claimants in their  
2 respective Requests for Admission. For the same reason, the Court also precluded Camco  
3 from asserting or offering evidence at trial that any liens recorded by the Peel Brimley  
4 Lien Claimants were in any way defective or unperfected and are otherwise valid and  
5 enforceable.

6 **C. Findings of Fact.**

7 Having received evidence and having heard argument of counsel, the Court makes  
8 the following Findings of Fact:

9 1. The original general contractor on the Project was APCO. Gemstone and  
10 APCO entered into the ManhattanWest General Construction Agreement for GMP (the  
11 "APCO-Gemstone Agreement") on or about September 6, 2006. [See Exhibit 2].

12 2. Among other things, and in exchange for a guaranteed maximum price  
13 ("GMP") of \$153,472,300.00 as forth in the APCO-Gemstone Agreement (Ex. 2, ¶  
14 5.02(a)), APCO agreed to:

- 15 • "Complete the work" required by the APCO-Gemstone Agreement,  
16 "furnish efficient business administration and superintendence" and "use its  
17 best efforts to complete the Project;" [Ex 2., ¶ 2.01(a)];
- 18 • "...engage contractors, subcontractors, sub-subcontractors, service  
19 providers, [and others, collectively referred to as "Third-Party Service  
20 Providers"] to perform the work..."; [Ex 2., ¶ 2.02(a)];
- 21 • Monthly submit to Gemstone "applications for payment for the previous  
22 month on forms similar to AIA G702 and G703 and a corresponding  
23 approved Certificate for Payment;" [Ex 2., ¶ 5.05(a)]. Each payment  
24 application was to be "based on a Schedule of Values [that] shall allocate  
25 the entire GMP among the various portions of the Work" with APCO's fee  
26 to be shown as a separate line item." [Ex 2., ¶ 5.05(b)]; The payment  
27 applications were to "show the Percentage of Completion of each portion of  
28

1 the Work as of the end of the period covered by the Application for  
2 Payment. [Ex 2., ¶ 5.05(c)]; and

- 3 • Upon receipt of a monthly progress payment, “promptly pay each Third-  
4 Party Service Provider the amount represented by the portion of the  
5 Percentage of the Work Completed that was completed by such Third-Party  
6 Service Provider<sup>2</sup> during the period covered by the corresponding Progress  
7 Payment.” [Ex 2., ¶ 5.05(g)];

8 3. APCO in turn hired various subcontractors to perform certain scopes of  
9 work and provided its form Subcontract Agreement to its subcontractors (“the APCO  
10 Subcontract”). Heinaman did not work for APCO on the Project and only first provided  
11 work after APCO ceased work on the project and, as discussed below, Gemstone hired  
12 Camco as the general contractor to replace APCO. APCO ceased work on the Project in or  
13 about the end of August 2008. APCO and Gemstone each claim to have terminated the  
14 other.

15 4. After APCO ceased work on the project, Gemstone hired Camco to be its  
16 general contractor pursuant to an Amended and Restated ManhattanWest General  
17 Construction Agreement effective as of August 25, 2008 (“the Camco-Gemstone  
18 Agreement”). [See Exhibit 162].

19 5. On cross examination, Camco’s Dave Parry could not point to any portion  
20 of the Camco-Gemstone Agreement that required Camco to supervise the work of the  
21 subcontractors. [TR5-50:17-51:9]. Nothing in Article II (“General Contractor  
22 Responsibilities”) obligates Camco to supervise the work or the subcontractors. [See Ex.  
23 162, ¶Article II]. Parry did not deny that Camco was “essentially ... there to lend [its]  
24 license” to Gemstone. [TR5-50:15-17].

25 6. Mr. Parry described Camco as “more of a construction manager at this point  
26

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27 <sup>2</sup> Because the only Third-Party Service Providers at issue on this trial were subcontractors, the Court  
28 will herein use the terms “subcontractor” and “Third-Party Service Provider” interchangeably and  
synonymously.

1 than a general contractor" [TR5-31:10-11<sup>3</sup>]. Nonetheless, the Camco-Gemstone  
2 Agreement is plainly called a "General Construction Agreement." The Camco-Gemstone  
3 Agreement also requires Camco, in the same way that APCO did, to aggregate payment  
4 applications from subcontractors and prepare and submit to Gemstone payment  
5 applications for the amounts represented by the subcontractor payment applications and  
6 Camco's fee. [See Ex. 162-008-010; ¶7.01].

7         7. Camco continued the same payment application format and numbering and  
8 same schedule of values that APCO had been following. [See **Exhibit 218**; TR5-30:21-  
9 31:4<sup>4</sup>]. Like APCO before it, Camco compiled and included in its payment applications to  
10 Gemstone the amounts billed by its subcontractors, including Heinaman. [See e.g., **Exhibit**  
11 **522-001-011**]. Also like the APCO-Gemstone Agreement, the Camco-Gemstone  
12 Agreement required Camco, upon receipt of a progress payment from Gemstone, to  
13 "promptly pay each [subcontractor] the amount represented by the portion of the  
14 Percentage of the Work Completed that was completed by such [subcontractor]." [Ex. 162-  
15 010, ¶7.03(e)].<sup>5</sup> It is only after Gemstone announced that the Project would be suspended  
16 that Camco asserted otherwise.

17         8. Camco's initial letter to subcontractors following Gemstone's  
18 announcement demonstrates both that it believed it had subcontracts (because it purported  
19 to terminate the same) and that it intended to continue to forward payment applications to  
20 Gemstone. [See e.g., **Exhibit 804-003-004**]. Specifically, Camco wrote:

21                 Camco is left with no choice but to terminate our agreement with Gemstone  
22 and all subcontracts on the Project, including our agreement with your  
23 company. Accordingly, we have terminated for cause our agreement with  
24 Gemstone, effective December 19, 2008, and we hereby terminate for  
convenience our subcontract with your company, effective immediately.

25                 Please submit to Camco all amounts you believe are due and owing on your  
subcontract. We will review and advise you of any issues regarding any

26                 <sup>3</sup> Testimony of Dave Parry.

27                 <sup>4</sup> Testimony of Dave Parry.

28                 <sup>5</sup> Unlike APCO and the subcontractors, no retention was to be withheld from the contractor's fee to be  
paid to Camco (through retention continued to be withheld from subcontractors). [Ex. 162-010, ¶7.03(a)].

1 amounts you claim are owed. For all amounts that should properly be billed to  
2 Gemstone, Camco will forward to Gemstone such amounts for payment y  
3 Gemstone. If your claims appear to be excessive, we will ask you to justify  
and/or revise the amount.

4 [See e.g., Ex. 804-003-004].

5 9. Camco quickly retracted its initial communication and replaced it with a  
6 second letter [See e.g., Ex. 804-005-007] asking the subcontractors to "please disregard  
7 previous letter which was sent in error." [See e.g., Ex. 804-005]. Among other things,  
8 Camco's second letter:

- 9 • Deleted its statement that it had terminated the Camco-Gemstone  
10 Agreement (while continuing to terminate the subcontractors);
- 11 • Asserts that the subcontractors agreed to Pay-if-Paid and accepted the risk  
12 of non-payment from the owner (which is also Pay-if-Paid); and,
- 13 • Stated, inaccurately, that "Camco's contract with Gemstone is a cost-plus  
14 agreement wherein the subcontractors and suppliers were paid directly by  
15 Gemstone and/or its agent Nevada Construction Services." [See e.g., Ex.  
16 804-007].

17 While Gemstone eventually did make partial payment to some subcontractors through  
18 NCS and not Camco [see discussion, *infra*], the Camco-Gemstone Agreement expressly  
19 required Camco, upon receipt of a progress payment from Gemstone, to "promptly pay  
20 each [subcontractor] the amount represented by the portion of the Percentage of the Work  
21 Completed that was completed by such [subcontractor]." [Ex. 162-010, ¶7.03(e)].

22 10. Some subcontractors stopped working after APCO left the Project. Others,  
23 such as Helix, continued to work on the Project and began working for Camco as the  
24 general contractor. Others, such as Heinaman, Fast Glass, Cactus Rose and SWPPP started  
25 working on the Project only after APCO left and worked only for Camco.

26 11. Camco presented some subcontractors with a standard form subcontract  
27 Agreement ("the Camco Subcontract"), a representative example of which is Camco's  
28

1 subcontract with Fast Glass. [See Exhibit 801-007-040; TR5-57:8-16<sup>6</sup>].

2           12.     However, Heinaman and Camco never entered into the Camco Subcontract.  
3 Instead, the agreement between Camco and Heinaman is memorialized by a Letter of  
4 Intent to proceed with the Work and Memorandum of Understanding Regarding Terms  
5 and Conditions between Heinaman, Camco and Gemstone. [Exhibit 701 - "the Heinaman  
6 Agreement"]. The Heinaman Agreement provides, among other things:

- 7           •     "CAMCO and Gemstone both promise to pay and to be liable to  
8 [Heinaman] ..."  
9           •     "CAMCO and Gemstone agree to be jointly and severally liable for  
10 payment of [Heinaman's invoices]" and to "pay [Heinaman on the fifth day  
11 after receipt of an Invoice from [Heinaman];"  
12           •     "Each [Heinaman] invoice shall be paid without retention;"  
13           •     "Each invoice shall be [prepared on a Time and Material basis plus 15%  
14 standard mark up on each invoice for Overhead and 10% mark up on each  
15 invoice for Profit;"  
16           •     CAMCO and Gemstone authorize [Heinaman] to proceed with the scope of  
17 work as referenced herein;" and  
18           •     The Parties understand that this document shall be binding on all Parties  
19 until a different contract is signed by all parties."

20 [Ex. 701].

21           13.     Heinaman's representative, Mark Heinaman, testified that there is no  
22 "different contract signed by all Parties." Camco did not dispute this testimony or offer any  
23 contract signed by Heinaman, Camco and Gemstone.

24           14.     In fact, Heinaman offered, and the Court admitted, a separate agreement  
25 between Camco, Gemstone, Scott Financial Corporation ("SCF" - Gemstone's lender) and  
26 Nevada Construction Services, Inc. ("NCS") titled ManhattanWest Heinaman Contract

27 \_\_\_\_\_  
28 <sup>6</sup> Testimony of Dave Parry.

1 Glazing Funding Instruction Agreement ("the Heinaman Funding Agreement") that  
2 confirms:

- 3 • "[I]t is in the best interests if the project to engage Heinaman ...," and
- 4 • "Heinaman has demanded the right to invoice Camco weekly and requires  
5 that Camco pay each invoice within five calendar days."

6 [Exhibit 718-002]. In addition, the Heinaman Funding Agreement identifies a source of  
7 payments to Heinaman (monies in the NCS account previously "earmarked" to pay a  
8 terminated glazing contractor) and sets forth a procedure as between Camco, Gemstone,  
9 Scott and NCS to make payments to Heinaman for its work. [Ex. 718-002-004] Heinaman  
10 was not a party to the Heinaman Funding Agreement.

11 15. Consistent with the Heinaman Agreement (i.e., time and materials plus 15%  
12 overhead and 10% profit), Heinaman submitted multiple invoices to Camco, some of  
13 which were paid [see Exhibit 702-001-003] and some of which were unpaid [see Ex. 702-  
14 004-007]. Heinaman's unpaid invoices total \$187,525.26. The Court finds that Camco  
15 agreed to pay all of Heinaman's invoices, breached the Heinaman Agreement by failing to  
16 pay the unpaid invoices and owes Heinaman the principal sum (i.e., exclusive of interest,  
17 costs and attorney's fees) of \$187,525.26.

18 16. The Court further finds that Heinaman performed the work for which it  
19 invoiced. [See e.g., Exhibits 704, 705, 706, 707 and 708 (project record documents)].  
20 Based in part on the undisputed testimony of Mark Heinaman the Court finds that  
21 Heinaman's invoices represent a reasonable value for the work performed.

22 17. Heinaman presented undisputed evidence, and the Court finds, that  
23 Heinaman timely recorded a mechanic's lien, as amended ("the Heinaman Lien"), pursuant  
24 to NRS Chapter 108 and perfected the same. [See Exhibit 703]. The Heinaman Lien  
25 identified both Camco as the "person by whom the lien claimant was employed or to  
26 whom the lien claimant furnished or agreed to furnish work, materials or equipment." [See  
27 Ex. 703-038].

28

1           18. Any finding of fact herein that is more appropriately deemed a conclusion  
2 of law shall be treated as such.

3           FROM the foregoing Findings of Fact, the Court hereby makes the following

4           **B. Conclusions of Law.**

5           1. "Basic contract principles require, for an enforceable contract, an offer and  
6 acceptance, meeting of the minds, and consideration." *May v. Anderson*, 121 Nev. 668,  
7 672, 119 P.3d 1254, 1257 (2005). A meeting of the minds exists when the parties have  
8 agreed upon the contract's essential terms. *Roth v. Scott*, 112 Nev. 1078, 1083, 921 P.2d  
9 1262, 1265 (1996). Which terms are essential "depends on the agreement and its context  
10 and also on the subsequent conduct of the parties, including the dispute which arises, and  
11 the remedy sought." Restatement (Second) of Contracts § 131 cmt. g (1981). Whether a  
12 contract exists is a question of fact and the District Court's findings will be upheld unless  
13 they are clearly erroneous or not based on substantial evidence. *May*, 121 Nev. at 672-73,  
14 119 P.3d at 1257.

15           2. The Court concludes that Camco entered into and breached the Heinaman  
16 Agreement by failing, without excuse, to pay Heinaman in full for the invoices it  
17 submitted and for the work it performed in the amount of \$187,525.26 and that Heinaman  
18 is entitled to judgment for that amount, exclusive of interest, costs and attorney's fees.

19           3. Alternatively, the Court concludes that there is an implied contract between  
20 Heinaman and Camco and that Heinaman is entitled *quantum meruit* damages for recovery  
21 of the full and reasonable value of the work it has performed. See *Certified Fire Prot. Inc.*  
22 *v. Precision Constr.*, 128 Nev. 371, 379, 283 P.3d 250, 257 (2012) ("*quantum meruit's*  
23 *first application is in actions based upon contracts implied-in-fact.*"). A contract implied-  
24 in-fact must be "manifested by conduct." *Id.* at 380 citing *Smith v. Recrion Corp.*, 91 Nev.  
25 666, 668, 541 P.2d 663, 664 (1975); *Hay v. Hay*, 100 Nev. 196, 198, 678 P.2d 672, 674  
26 (1984). It "is a true contract that arises from the tacit agreement of the parties." *Id.* To find  
27 a contract implied-in-fact, the fact-finder must conclude that the parties intended to

1 contract and promises were exchanged, the general obligations for which must be  
2 sufficiently clear. *Id.* Here, Heinaman and and Camco clearly intended to enter into a  
3 contract whereby Heinaman would perform work for Camco and Camco would pay  
4 Heinaman for its work.

5 4. Where an implied-in-fact contract exists "*quantum meruit* ensures the  
6 laborer receives the reasonable value, usually market price, for his services." *Precision*  
7 *Constr.*, 128 Nev. at 380 citing Restatement (Third) of Restitution and Unjust Enrichment  
8 § 31 cmt. e (2011), *Sack v. Tomlin*, 110 Nev. 204, 208, 871 P.2d 298, 302 (1994) ("The  
9 doctrine of *quantum meruit* generally applies to an action ... involving work and labor  
10 performed which is founded on a[n] oral promise [or other circumstances] on the part of  
11 the defendant to pay the plaintiff as much as the plaintiff reasonably deserves for his labor  
12 in the absence of an agreed upon amount."). Here, the only and undisputed testimony was  
13 that the monies Heinaman billed for its work were a reasonable value for the work  
14 performed. Moreover, Camco's submission of at least some of those amounts to Gemstone  
15 as part of its own pay application estopps Camco from disputing the reasonable value of  
16 Heinaman's work. Heinaman is therefore entitled *quantum meruit* damages in the amount  
17 of \$187,525.26 for recovery of the full and reasonable value of the work it performed. *See*  
18 *Certified Fire Prot.*, 128 Nev. at 380.

19 5. The Court rejects Camco's argument that it is not liable to Heinaman (and  
20 other subcontractors) because it never received payment from Gemstone who instead made  
21 payments to subcontractors through the disbursement company, NCS. Camco's position  
22 notwithstanding, both the Camco-Gemstone Agreement and the Camco Subcontract  
23 demonstrate that (consistent with the APCO-Gemstone Agreement and the APCO  
24 Subcontract) payments to subcontractors were intended to flow through the general  
25 contractor. Camco presented no evidence that Heinaman or any other subcontractor  
26 consented in advance to Gemstone's eventual decision to release payments (in part)  
27 through NCS and not Camco.



1           6.       Similarly, the Court rejects Camco's contention that the Court's decision on  
2 Pay-if-Paid is inapplicable because it was "impossible" for Camco to have paid Helix and  
3 other subcontractors. Camco presented no evidence that it, for example, declared  
4 Gemstone to be in breach for failing to make payments through Camco rather than through  
5 NCS. Instead, Camco appears to have acceded to Gemstone's deviation from the contract  
6 and, at least until Gemstone announced that it was suspending construction, continued to  
7 process subcontractor payment applications and submit them to Gemstone. Camco's  
8 "impossibility" claim is, in any event, another form of Pay-if-Paid, against the public  
9 policy of Nevada, void and unenforceable and barred by this Court's summary judgment.

10           7.       Specific to Heinaman, the Court concludes that Camco's reliance on any  
11 form of Pay-if-Paid (i.e., even if the same could be deemed permissible under Nevada law)  
12 is inapplicable to its relationship with Heinaman. Pursuant to the Heinaman Agreement,  
13 Camco expressly agreed to be liable to Heinaman "jointly and severally with Gemstone.  
14 Accordingly, even if (as Camco urges) the subcontractors as a whole are required to look  
15 solely to the defunct Gemstone for payment (which, for the reasons explained above, they  
16 are not), Camco has expressly agreed to be liable to Heinaman in the same way that  
17 Gemstone is liable.

18           8.       Heinaman is therefore awarded the principal sum of \$187,525.26 (i.e.,  
19 exclusive of interest, costs and attorney's fees) against Camco and may apply for judgment  
20 as to the same.

21           9.       The Court denies all of Camco's affirmative defenses.

22           10.      Heinaman is entitled to prejudgment interest pursuant to NRS 108.237  
23 and/or NRS 17.130 and is granted leave to apply for the same by way of an amendment or  
24 supplement to these Findings of Fact and Conclusions of Law and for judgment as to the  
25 same.

26           11.      Heinaman is the prevailing party and/or prevailing lien claimant as to  
27 Camco and is entitled to an award of reasonable attorney's fees pursuant to NRS 108.237.

1 Heinaman is granted leave to apply for the same by way of an amendment or supplement  
2 to these Findings of Fact and Conclusions of Law and for judgment as to the same.

3 12. As the prevailing party, Heinaman may also apply for an award of costs in  
4 accordance with the relevant statutes and for judgment as to the same.

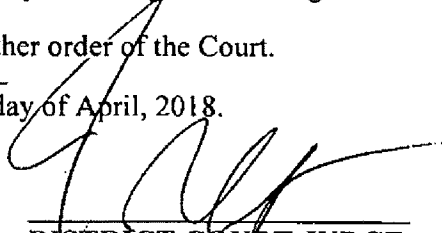
5 13. Any conclusion of law herein that is more appropriately deemed a finding  
6 of fact shall be treated as such.

7 ORDER

8 NOW, THEREFORE, the Court hereby directs entry of the foregoing Findings of  
9 Fact and Conclusions of Law; and

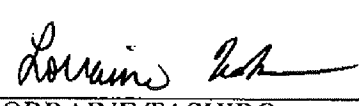
10 IT IS FURTHER ORDERED that, based upon the foregoing Findings of Fact and  
11 Conclusions of Law, and those made regarding the other parties and claims involved in the  
12 consolidated cases, the Court shall issue a separate Judgment or Judgments reflective of the  
13 same at the appropriate time subject to further order of the Court.

14 IT IS SO ORDERED this 24<sup>th</sup> day of April, 2018.

15  
16   
DISTRICT COURT JUDGE

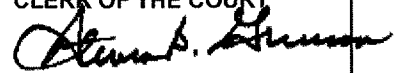
17  
18 CERTIFICATE

19 I hereby certify that on or about the date filed, this document was  
20 Electronically Served to the Counsel on Record on the Clark County E-File Electronic  
21 Service List.

22   
23 LORRAINE TASHIRO  
24 Judicial Executive Assistant  
25 Dept. No. XIII  
26  
27  
28

**EXHIBIT “32”**

**EXHIBIT “32”**



DISTRICT COURT  
CLARK COUNTY, NEVADA

APCO CONSTRUCTION, a Nevada  
corporation,

Plaintiff,

vs

GEMSTONE DEVELOPMENT WEST, INC.,  
Nevada corporation; NEVADA  
CONSTRUCTION SERVICES, a Nevada  
corporation; SCOTT FINANCIAL  
CORPORATION, a North Dakota  
corporation; COMMONWEALTH LAND  
TITLE INSURANCE COMPANY; FIRST  
AMERICAN TITLE INSURANCE  
COMPANY and DOES I through X,

Defendants.

AND ALL RELATED MATTERS.

CASE NO.: A571228

DEPT. NO.: XIII

*Consolidated with:*  
A571792, A574391, A577623, A580889,  
A583289, A584730, and A587168

**FINDINGS OF FACT AND  
CONCLUSIONS OF LAW AS TO THE  
CLAIMS OF HELIX ELECTRIC OF  
NEVADA, LLC AGAINST CAMCO  
PACIFIC CONSTRUCTION, INC.**

This matter came on for trial on January 17-19, 23-24, 31 and February 6, 2018,  
before the Honorable Mark Denton in Dept. 13, and the following parties having appeared  
through the following counsel:

<u>Party</u>	<u>Counsel for Party</u>
Apco Construction Co., Inc. ("Apco")	John Randall Jeffries, Esq. and Mary E. Bacon, Esq. of the Law Firm of Spencer Fane LLP
Camco Pacific Construction Co., Inc. ("Camco")	Steven L. Morris, Esq. of the Law Firm of the Law Firm of Grant Morris Dodds
Helix Electric of Nevada, LLC ("Helix")	Eric Zimbelman, Esq. and the Law Firm of Peel Brimley LLP
Heinaman Contract Glazing, Inc. ("Heinaman")	Eric Zimbelman, Esq. and the Law Firm of Peel Brimley LLP
Fast Glass, Inc. ("Fast Glass")	Eric Zimbelman, Esq. and the Law Firm of Peel Brimley LLP

MARK R. DENTON  
DISTRICT JUDGE

DEPARTMENT THIRTEEN  
LAS VEGAS, NV 89155

CLERK OF THE COURT

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40

Cactus Rose Construction Co., Inc. ("Cactus Rose")	Eric Zimbelman, Esq. and the Law Firm of Peel Brimley LLP
SWPPP Compliance Solutions, Inc. ("SWPPP")	Eric Zimbelman, Esq. and the Law Firm of Peel Brimley LLP
National Wood Products, LLC ("National Wood")	John B. Taylor, Esq. of the Law Firm of Cadden & Fuller LLP
E&E Fire Protection, LLC ("E&E").	T. James Truman, Esq. of the Law Firm of T. James Truman, & Associates

**A. Procedural History.**

1. This is one of the oldest cases on the Court's docket. This action arises out of a construction project in Las Vegas, Nevada known as the Manhattan West Condominiums Project ("the Project") located at West Russell Road and Rocky Hill Street in Clark County Nevada, APNs 163-32-101-003 through 163-32-101-005, 163-32-101-010 and 163-32-101-014 (the "Property" and/or "Project"), owned by Gemstone Development West, Inc. ("Gemstone" or "the Owner").

2. Gemstone hired APCO, and, subsequently, Camco as its general contractors, who in turn entered into subcontract agreements with various subcontractors. In December 2008 the Owner suspended the Project and advised the various contractors that Gemstone's lender did not expect to disburse further funds for construction. The Project was never completed. Numerous contractors, including the parties hereto, recorded mechanic's liens against the Property.

3. After several years of litigation and a Writ Action to determine the priority of the various lienors (during which the Property was sold, the proceeds of the same held in a blocked account and this action was stayed), the Nevada Supreme Court ruled that the Owner's lenders had priority over the proceeds of the sale of the Property, holding that the NRS Ch. 108 mechanic's liens were junior to the lenders' deeds of trust. The Court subsequently ordered the proceeds be released to the lenders. Thereafter, the stay was lifted and many of the trade contractors continued to pursue claims for non-payment from

1 APCO and Camco. The trial focused on these claims. The Court has separately treated  
2 Helix's claims against APCO and has made or is making separate Findings of Fact and  
3 Conclusions of Law regarding the same.

4 **B. Significant Pre-Trial Orders**

5 1. **Order Granting Partial Summary Judgment re: Pay-if-Paid.** On  
6 January 2, 2018, this Court issued an Order granting a Motion for Partial Summary  
7 Judgment brought by a group of subcontractors represented by the Peel Brimley Law Firm  
8 (the "Peel Brimley Lien Claimants"<sup>1</sup>) and joined in by others. Generally, but without  
9 limitation, the Court concluded that, pursuant to NRS 624.624 and *Lehrer McGovern*  
10 *Bovis, Inc. v. Bullock Insulation, Inc.*, 124 Nev. 1102, 1117-18, 197 P.3d 1032, 1042 (Nev.  
11 2008), higher-tiered contractors, such as APCO and Camco, are required to pay their  
12 lower-tiered subcontractors within the time periods set forth in NRS 624.626(1) and may  
13 not fail to make such payment based on so-called "pay-if-paid" agreements ("Pay-if-Paid")  
14 that are against public policy, void and unenforceable except under limited circumstances.  
15 Accordingly, the Court ruled that APCO and Camco may not assert or rely on a defense to  
16 their payment obligations to the party subcontractors that is based on a pay-if-paid  
17 agreement.

18 2. **Order on Peel Brimley Lien Claimants' Motion in Limine Against**  
19 **Camco.** On December 29, 2017 the Court issued an order on motions *in limine* brought by  
20 the Peel Brimley Lien Claimants Against Camco. Specifically, the Court precluded Camco  
21 from asserting or offering evidence that any of the Peel Brimley Lien Claimants' work on  
22 the Project was (i) defective, (ii) not done in a workmanlike manner or (iii) not done in  
23 compliance with the terms of the parties' agreement because Camco's person most  
24 knowledgeable was not aware of, and Camco did not otherwise offer, any evidence to  
25 support such claims. For the same reason, the Court also precluded Camco from asserting  
26 or offering evidence at trial that the Peel Brimley Lien Claimants have breached their

27  
28 <sup>1</sup> The Peel Brimley Lien Claimants are: Helix, Heinaman, Fast Glass, Cactus Rose and SWPPP.

1 agreements other than with respect to pay-if-paid agreements, evidence and argument of  
2 which is otherwise precluded by the Partial Summary Judgment discussed above. For the  
3 same reason, the Court also precluded Camco from asserting or offering evidence at trial to  
4 dispute the amounts invoiced, paid and that remain to be owed as asserted by the Peel  
5 Brimley Lien Claimants in their respective Requests for Admission. For the same reason,  
6 the Court also precluded Camco from asserting or offering evidence at trial that any liens  
7 recorded by the Peel Brimley Lien Claimants were in any way defective or unperfected  
8 and are otherwise valid and enforceable.

9 **C. Findings of Fact.**

10 Having received evidence and having heard argument of counsel, the Court makes  
11 the following Findings of Fact:

12 1. The original general contractor on the Project was APCO. Gemstone and  
13 APCO entered into the ManhattanWest General Construction Agreement for GMP (the  
14 "APCO-Gemstone Agreement") on or about September 6, 2006. [See **Exhibit 2**].

15 2. After APCO ceased work on the Project, Gemstone hired Camco to be its  
16 general contractor pursuant to an Amended and Restated ManhattanWest General  
17 Construction Agreement effective as of August 25, 2008 ("the Camco-Gemstone  
18 Agreement"). [See **Exhibit 162**].

19 3. Camco continued the same payment application format and numbering and  
20 same schedule of values that APCO had been following. [See **Exhibit 218**; TR5-30:21-  
21 31:4].<sup>2</sup> Like APCO before it, Camco compiled and included in its payment applications to  
22 Gemstone the amounts billed by its subcontractors, including Helix. [See *e.g.*, **Exhibit**  
23 **522-001-011**]. Also like the APCO-Gemstone Agreement, the Camco-Gemstone  
24 Agreement required Camco, upon receipt of a progress payment from Gemstone, to  
25 "promptly pay each [subcontractor] the amount represented by the portion of the  
26 Percentage of the Work Completed that was completed by such [subcontractor]." [Ex. 162-

27 \_\_\_\_\_  
28 <sup>2</sup> Testimony of Dave Parry.

1 010, ¶7.03(e)].<sup>3</sup> It is only after Gemstone announced that the Project would be suspended  
2 that Camco asserted otherwise.

3 4. Camco's initial letter to subcontractors following Gemstone's  
4 announcement demonstrates both that it believed it had subcontracts (because it purported  
5 to terminate the same) and that it intended to continue to forward payment applications to  
6 Gemstone. [See e.g., Exhibit 804-003-004]. Specifically, Camco wrote:

7 Camco is left with no choice but to terminate our agreement with Gemstone  
8 and all subcontracts on the Project, including our agreement with your  
9 company. Accordingly, we have terminated for cause our agreement with  
10 Gemstone, effective December 19, 2008, and we hereby terminate for  
11 convenience our subcontract with your company, effective immediately.

12 Please submit to Camco all amounts you believe are due and owing on your  
13 subcontract. We will review and advise you of any issues regarding any  
14 amounts you claim are owed. For all amounts that should properly be billed to  
15 Gemstone, Camco will forward to Gemstone such amounts for payment y  
16 Gemstone. If your claims appear to be excessive, we will ask you to justify  
17 and/or revise the amount.

18 [See e.g., Ex. 804-003-004].

19 5. Camco quickly retracted its initial communication and replaced it with a  
20 second letter [See e.g., Ex. 804-005-007] asking the subcontractors to "please disregard  
21 previous letter which was sent in error." [See e.g., Ex. 804-005]. Among other things,  
22 Camco's second letter:

- 23 • Deleted its statement that it had terminated the Camco-Gemstone  
24 Agreement (while continuing to terminate the subcontractors);
- 25 • Asserts that the subcontractors agreed to Pay-if-Paid and accepted the risk  
26 of non-payment from the owner (which is also Pay-if-Paid); and,
- 27 • Stated, inaccurately, that "Camco's contract with Gemstone is a cost-plus  
28 agreement wherein the subcontractors and suppliers were paid directly by  
Gemstone and/or its agent Nevada Construction Services." [See e.g., Ex.

---

<sup>3</sup> Unlike APCO and the subcontractors, no retention was to be withheld from the contractor's fee to be paid to Camco (though retention continued to be withheld from subcontractors). [Ex. 162-010, ¶7.03(a)].



1 804-007].

2 While Gemstone eventually did make partial payment through NCS and not Camco [see  
3 discussion, *infra*], the Camco-Gemstone Agreement expressly required Camco, upon  
4 receipt of a progress payment from Gemstone, to “promptly pay each [subcontractor] the  
5 amount represented by the portion of the Percentage of the Work Completed that was  
6 completed by such [subcontractor].” [Ex. 162-010, ¶7.03(e)].

7 6. Some subcontractors stopped working after APCO left the Project. Others,  
8 such as Helix, continued to work on the Project and began working for Camco as the  
9 general contractor. Others, such as Heinaman, Fast Glass, Cactus Rose and SWPPP started  
10 working on the Project only after APCO left and worked only for Camco.

11 7. Camco presented some subcontractors with a standard form subcontract  
12 Agreement (“the Camco Subcontract”), a representative example of which is Camco’s  
13 subcontract with Fast Glass. [See **Exhibit 801-007-040**; TR5-57:8-16].<sup>4</sup> Among other  
14 provisions, the Camco Subcontract (consistent with the Camco-Gemstone Agreement),  
15 requires Camco, no later than 10 days after receiving payment from Gemstone in response  
16 to its payment applications, to “pay to Subcontractor, in monthly progress payments, 90%<sup>5</sup>  
17 of labor and materials placed in position by Subcontractor during [the month preceding a  
18 payment application].” [See Ex. 701-012, ¶ II(C)].

19 8. Despite and contrary to the payment provisions of the Camco-Gemstone  
20 Agreement [see *supra* and Ex. 162-010, ¶7.03(e)] and the Camco Subcontract [See Ex.  
21 701-012, ¶ II(C)], no monies were ever distributed to the subcontractors through Camco.  
22 Instead, and until it ceased making payments, Gemstone released funds to NCS, which  
23 issued checks “on behalf of Camco Pacific” to some of the subcontractors and/or joint  
24 checks to the subcontractors and their lower tiers, including Helix and its lower tiers. [See  
25 e.g., Exhibit 508-062 (NCS check no. 531544 to Helix and its lower tier, Graybar Electric  
26 “on behalf of Camco Pacific.”)].

27 <sup>4</sup> Testimony of Dave Parry.

28 <sup>5</sup> i.e., less retention.

1           9. Camco also presented subcontractors who had previously worked for  
2 APCO, including Helix and Cabintec (National Wood), with a document titled Ratification  
3 and Amendment of Subcontract Agreement ("the Camco Ratification"). [See e.g., Exhibit  
4 3164].

5           10. Helix admitted in its Complaint and in its lien documents that it entered into  
6 the Camco Subcontract and the Camco Ratification.

7           11. As it was instructed to do, Camco continued to perform the work it had  
8 agreed to perform on the Project until Gemstone suspended work on December 15, 2008.  
9 As it was also instructed to do, Helix submitted payment applications to Camco using the  
10 same forms and same procedures as it had employed while APCO was still on the Project.  
11 [See e.g., Ex. 508-067-074]. Camco in turn submitted its pay applications to Gemstone in  
12 the same way, and using the same forms, as APCO had used. [See e.g., Ex. 522-001-011].

13           12. Helix submitted gross payment applications to Camco totaling  
14 \$1,010,255.25 (i.e., inclusive of retention). [See Ex. 508-001-002; 037-038; 049; 068-  
15 069].<sup>6</sup> Helix was paid only \$175,778.80 and is owed the balance, \$834,476.45.

16           13. The Court finds that Helix and Camco entered into a  
17 contractor/subcontractor relationship and agreement whereby they agreed on the material  
18 terms of a contract – i.e., the work to be performed, the price for the work and Camco's  
19 obligation to pay. The Court finds that Camco breached its obligation to pay Helix the sum  
20 of \$834,476.45.

21           14. Helix provided undisputed testimony that the amounts it billed were  
22 reasonable for the work performed. [TR2-71:22-72:3].<sup>7</sup> Because (i) this testimony was  
23 undisputed, (ii) Camco submitted these amounts on its certified pay applications to  
24 Gemstone, and (iii) Helix was paid in part for these amounts, the Court finds that the  
25 amounts Helix billed Camco for its work were reasonable for the work performed.

26  
27 <sup>6</sup> See also summary document, Ex. 508-061, which does not include Pay Application No. 15. [See  
28 TR3-68:17-69:7].

<sup>7</sup> Testimony of Andy Rivera.

1           15.     Helix presented undisputed evidence, and the Court finds, that Helix timely  
2 recorded a mechanic's lien, as amended ("the Helix Lien"), pursuant to NRS Chapter 108  
3 and perfected the same. [See **Exhibit 512**]. The Helix Lien identified both APCO and  
4 Camco as the "person by whom the lien claimant was employed or to whom the lien  
5 claimant furnished or agreed to furnish work, materials or equipment." [See *e.g.*, Ex. 512-  
6 007, 009].

7           16.     Any finding of fact herein that is more appropriately deemed a conclusion  
8 of law shall be treated as such.

9           FROM the foregoing Findings of Fact, the Court hereby makes the following

10          **B.     Conclusions of Law.**

11          1.       "Basic contract principles require, for an enforceable contract, an offer and  
12 acceptance, meeting of the minds, and consideration." *May v. Anderson*, 121 Nev. 668,  
13 672, 119 P.3d 1254, 1257 (2005). A meeting of the minds exists when the parties have  
14 agreed upon the contract's essential terms. *Roth v. Scott*, 112 Nev. 1078, 1083, 921 P.2d  
15 1262, 1265 (1996). Which terms are essential "depends on the agreement and its context  
16 and also on the subsequent conduct of the parties, including the dispute which arises and  
17 the remedy sought." Restatement (Second) of Contracts § 131 cmt. g (1981). Whether a  
18 contract exists is a question of fact and the District Court's findings will be upheld unless  
19 they are clearly erroneous or not based on substantial evidence. *May*, 121 Nev. at 672-73,  
20 119 P.3d at 1257.

21          2.       The Court concludes that Camco and Helix entered into a contract whereby  
22 they agreed on the material terms of a contract – i.e., the work to be performed, the price  
23 therefore and Camco's obligation to pay. The Court further concludes that Camco failed to  
24 pay Helix the undisputed sum of \$834,476.45 without excuse (other than Camco's reliance  
25 on Pay-if-Paid, which the Court has previously rejected).

26          3.       Camco did not dispute Helix's testimony that the amounts it billed were a  
27 reasonable value for the work performed, and the reasonableness thereof was demonstrated  
28

1 by Camco's payment in part and its inclusion of Helix's billings in its own payment  
2 applications to Gemstone. The court therefore concludes that the unpaid value of Helix's  
3 work while Camco was on site as the general contractor is \$834,476.45 and that Helix  
4 should be awarded that principal amount against Camco for that principal amount.

5 4. The Court rejects Camco's argument that it is not liable to Helix (and other  
6 subcontractors) because it never received payment from Gemstone who instead made  
7 payments to subcontractors through the disbursement company, NCS. Camco's position  
8 notwithstanding, both the Camco-Gemstone Agreement and the Camco Subcontract  
9 demonstrate that (consistent with the APCO-Gemstone Agreement and the APCO  
10 Subcontract) payments to subcontractors were intended to flow through the general  
11 contractor. Camco presented no evidence that Helix or any other subcontractor consented  
12 in advance to Gemstone's eventual decision to release payments (in part) through NCS and  
13 not Camco.

14 5. Similarly, the Court rejects Camco's contention that the Court's decision on  
15 Pay-if-Paid is inapplicable because it was "impossible" for Camco to have paid Helix and  
16 other subcontractors. Camco presented no evidence that it, for example, declared  
17 Gemstone to be in breach for failing to make payments through Camco rather than through  
18 NCS. Instead, Camco appears to have acceded to Gemstone's deviation from the contract  
19 and, at least until Gemstone announced that it was suspending construction, continued to  
20 process subcontractor payment applications and submit them to Gemstone. Camco's  
21 "impossibility" claim is, in any event, another form of Pay-if-Paid, against the public  
22 policy of Nevada, void and unenforceable and barred by this Court's summary judgment.

23 6. Helix is entitled to the principal sum of \$834,476.45 against Camco which  
24 will be the subject of a judgment to be entered by the Court.

25 7. The Court denies all of Camco's affirmative defenses.

26 8. Helix is entitled to prejudgment interest pursuant to NRS 108.237 and/or  
27 NRS 17.130.

28

**MARK R. DENTON**

DISTRICT JUDGE

DEPARTMENT THIRTEEN  
LAS VEGAS, NV 89155

9. Helix is the prevailing party and/or prevailing lien claimant as to Camco and Helix and is entitled to an award of reasonable attorney's fees pursuant to NRS 108.237 and/or the Camco Subcontract. Helix is granted leave to separately apply for the same.

10. As the prevailing party, Helix may also apply for an award of costs against Camco in accordance with the relevant statutes and for judgment as to the same.

11. Any conclusion of law herein that is more appropriately deemed a finding of fact shall be treated as such.

## ORDER

NOW, THEREFORE, the Court hereby directs entry of the foregoing Findings of Fact and Conclusions of Law; and

IT IS FURTHER ORDERED that, based upon the foregoing Findings of Fact and Conclusions of Law, and those made regarding the other parties and claims involved in the consolidated cases, the Court shall issue a separate Judgment or Judgments reflective of the same at the appropriate time subject to further order of the Court.

DATED this 24 day of April, 2018,

**DISTRICT COURT JUDGE**

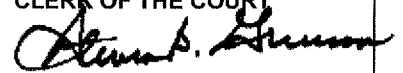
## CERTIFICATE

I hereby certify that on or about the date filed, this document was Electronically Served to the Counsel on Record on the Clark County E-File Electronic Service List.

LORRAINE TASHIRO  
Judicial Executive Assistant  
Dept. No. XIII

**EXHIBIT “33”**

**EXHIBIT “33”**



1 **OGM**  
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16 *Attorneys for Fidelity and Deposit Company of Maryland*

**DISTRICT COURT**  
**CLARK COUNTY, NEVADA**

12 APCO CONSTRUCTION, a Nevada corporation,  
13  
14 Plaintiff,  
15 vs.

16 GEMSTONE DEVELOPMENT WEST, INC., a Nevada  
17 corporation; et al.  
18  
19 Defendants.  
20  
21  
22  
23  
24

Case No.: A571228  
Dept. No.: XIII

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

**ORDER GRANTING MOTION TO  
DEPOSIT BOND PENAL SUM WITH  
COURT, EXONERATION OF BOND,  
AND DISMISSAL**

AND ALL RELATED MATTERS.

Case No.: A571228

Dept. No.: XIII

Consolidated with:

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

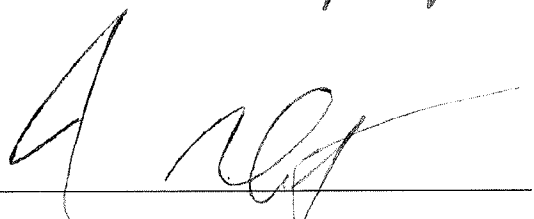
**ORDER**

Fidelity and Deposit Company of Maryland's ("Fidelity") Motion to Deposit Bond Penal Sum with the Court, for Exoneration of Bond, and for Dismissal of Fidelity (the "Motion") from this action came for oral argument before the Court on July 19, 2018 at 9:00 a.m.

GOOD CAUSE APPEARING THEREFORE and no opposition having been filed, the Court grants Fidelity's Motion and orders as follows:


- 1) Fidelity is to deposit \$50,000.00, the full penal sum of Bond No. 8739421, with the Clerk of the Court;
- 2) Bond No. 8739421 is exonerated and discharged, and;
- 3) Fidelity & Deposit Company of Maryland is dismissed from this action with prejudice.

Dated this 19<sup>th</sup> day of July, 2018.

  
DISTRICT COURT JUDGE

Respectfully submitted:

THE FAUX LAW GROUP

By:   
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Jordan F. Faux, Esq.  
1540 W. Warm Springs Rd., Suite 100  
Henderson, NV 89014  
Attorneys for Fidelity & Deposit Company of Maryland



**EXHIBIT “34”**

**EXHIBIT “34”**



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10 *Attorneys for E&E FIRE PROTECTION, LLC*

11 **DISTRICT COURT**

12 **CLARK COUNTY, NEVADA**

13 APCO CONSTRUCTION, a Nevada  
14 corporation,

15 Plaintiff,

16 vs.

17 GEMSTONE DEVELOPMENT WEST,  
18 INC., and DOES I through X,

19 Defendant

Case No. A571228  
Dept No. XIII

(Consolidated with Case Nos. A574391;  
A574792; A583289; A587168; AF89195;  
A597089; A577623; A584730; A580889;  
A571792)

**ORDER APPROVING DISTRIBUTION  
OF FIDELITY AND DEPOSIT  
COMPANY OF MARYLAND'S BOND**

20 AND ALL RELATED MATTERS

21 This matter coming on for hearing on the 19<sup>th</sup> day of July, 2018, at the hour of 9:00 a.m., with  
22 T. James Truman & Associates appearing on behalf of Judgment creditor E&E Fire Protection; The  
23 Faux Law Group appearing for Fidelity and Deposit Company of Maryland; and Eric Zibelman, Esq.  
24 of the law firm of Peel Brimley, appearing for Cactus Rose Construction, Inc., Fast Glass Inc.,  
25 Heinaman Contract Glazing, Helix Electric of Nevada, LLC and SWPPP Compliance Solutions,  
26 LLC, hereinafter collectively known as the "PB Judgment Creditors, and the Court having review  
27 the pleadings and papers on file relative to E&E Fire Protection's Motion for Order Approving  
28 Distribution of Fidelity and Deposit Company of Maryland's Bond, said hearing taking place on  
Order Shortening Time, and there being no opposition to the Motion presented at the hearing,

IT IS HEREBY ORDERED that the Motion to Deposit Bond Penal Sum be approved and

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1 said \$50,000.00 Bond be deposited with the court and upon said deposit, the bond shall be  
2 exonerated; and

3 IT IS FURTHER ORDERED, that such \$50,000.00 bond proceeds shall be distributed to the  
4 various claimants as follows:

Claimant	Total Judgment	% of total	% of \$50,000 Bond
E&E Fire	\$6,547,509.47	73.96%	\$36,980.00
Cactus Rose	\$ 326,244.84	3.68%	\$ 1,841.00
Fast Glass	\$ 280,927.71	3.17%	\$ 1,586.00
Heineman	\$ 262,010.64	2.95%	\$ 1,486.00
Helix	\$1,277,601.82	14.43%	\$ 7,216.00
SWPPP	\$ 157,846.63	1.78%	\$ 891.00
	\$8,852,141.11		\$50,000.00

12 IT IS FURTHER ORDERED that the Clerk of the Court is directed to distribute the  
13 interpleader funds to the parties in accordance with the foregoing schedule and that upon final  
14 distribution of the bond funds, this case shall be dismissed as to E & E's Claims against Fidelity and  
15 Deposit Company of Maryland, and the PB Judgment Creditors' claims against Fidelity and Deposit  
16 Company of Maryland, with prejudice.

17 IT IS SO ORDERED this 19<sup>th</sup> day of July, 2018.

18  
19  
20   
DISTRICT COURT JUDGE

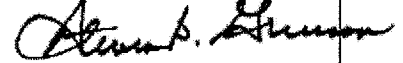
21 Submitted by:

22 T. JAMES TRUMAN & ASSOCIATES

23 By: 

24 T. James Truman, Esq.  
25 Nevada State Bar No. 003620  
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27 Las Vegas, Nevada 89130  
28 Attorneys for E&E Fire Protection

# Exhibit 35



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*Attorneys for Helix Electric of Nevada, LLC*

**DISTRICT COURT**

**CLARK COUNTY, NEVADA**

APCO CONSTRUCTION, a Nevada  
corporation,

Plaintiff,

vs

GEMSTONE DEVELOPMENT WEST, INC.,  
Nevada corporation; NEVADA  
CONSTRUCTION SERVICES, a Nevada  
corporation; SCOTT FINANCIAL  
CORPORATION, a North Dakota corporation;  
COMMONWEALTH LAND TITLE  
INSURANCE COMPANY; FIRST  
AMERICAN TITLE INSURANCE  
COMPANY and DOES I through X,

Defendants.

AND ALL RELATED MATTERS.

CASE NO.: A571228

DEPT. NO.: XIII

*Consolidated with:*

A571792, A574391, A577623, A580889,  
A583289, A584730, and A587168

**NOTICE OF ENTRY OF ORDER**

PLEASE TAKE NOTICE that an *Order Granting Helix Electric of Nevada's Motion for Rule 54(b) Certification* was filed on **January 3, 2020**, a copy of which is attached as Exhibit 1

DATED this 3rd day of January 2020.

**PEEL BRIMLEY LLP**

*/s/ Eric Zimbelman*

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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 3rd day of January 2020, I caused the above and foregoing document entitled **NOTICE OF ENTRY OF 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:

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Steven Morris ([steve@gmdlegal.com](mailto:steve@gmdlegal.com))

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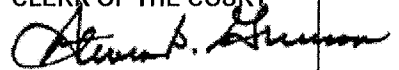
/s/ Amanda Armstrong

---

An employee of **PEEL BRIMLEY, LLP**



# **Exhibit 1**



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13 *Attorneys for Various Lien Claimants*

8 **DISTRICT COURT**

9 **CLARK COUNTY, NEVADA**

10 APCO CONSTRUCTION, a Nevada  
11 corporation,

12 Plaintiff,

13 vs

14 GEMSTONE DEVELOPMENT WEST, INC.,  
15 Nevada corporation; NEVADA  
16 CONSTRUCTION SERVICES, a Nevada  
17 corporation; SCOTT FINANCIAL  
18 CORPORATION, a North Dakota  
19 corporation; COMMONWEALTH LAND  
20 TITLE INSURANCE COMPANY; FIRST  
21 AMERICAN TITLE INSURANCE  
22 COMPANY and DOES I through X,

23 Defendants.

24 AND ALL RELATED MATTERS.

CASE NO.: A571228

DEPT. NO.: XIII

*Consolidated with:*

A571792, A574391, A577623, A580889,  
A583289, A584730, and A587168

**ORDER GRANTING HELIX  
ELECTRIC OF NEVADA'S MOTION  
FOR RULE 54(b) CERTIFICATION**

25 This matter came on for hearing September 9, 2019, before the Honorable Mark Denton  
26 in Dept. 13 on the Motion of Helix Electric of Nevada, LLC ("Helix") to (I) Re-Open  
27 Statistically Closed Case, (II) Dismiss all Unresolved Claims and/or, (III) in the Alternative, for  
28 a Rule 54(B) Certification as to Helix and APCO Construction ("APCO"). Helix appeared  
through Eric Zimbelman, Esq. of Peel Brimley LLP and APCO appeared through Christopher  
H. Byrd, Esq. of Fennemore Craig, P.C. Having received and reviewed Helix' Motion, APCO's  
Opposition and Helix's Reply, and having heard argument of counsel the Court finds that no  
just reason for delay exists to certify the Judgments set forth below as final and for good cause

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

RECEIVED  
DEC 13 2019

DISTRICT COURT DEPT#13

1 shown:

2 IT IS HEREBY ORDERED ADJUDGED AND DECREED that Helix's Motion for  
3 NRCP 54(b) Certification is GRANTED;

4 IT IS FURTHER ORDERED that because no just reason for delay exists, and with  
5 respect to the claims and defenses of Helix and APCO, this Court enters an express direction for  
6 the entry of judgment as to the Judgment [as to the Claims of Helix Electric of Nevada, LLC  
7 and Plaintiff in Intervention National Wood Products, Inc's (sic) against APCO Construction,  
8 Inc.] filed May 31, 2018 and entered June 1, 2018, which incorporated by reference the  
9 Findings of Fact, Conclusions of Law and Order as to the Claims of Helix Electric and  
10 Cabinetec Against APCO filed April 25, 2018, and which Judgment is hereby certified as final  
11 pursuant to NRCP 54(b);

12 IT IS FURTHER ORDERED that because no just reason for delay exists, and with  
13 respect to the claims and defenses of Helix and APCO, this Court enters an express direction for  
14 the entry of judgment as to the Order filed September 27, 2018 and entered September 28, 2018  
15 (1) Granting APCO Construction, Inc. (sic) Motion for Attorneys Fees and Costs, (2) Granting  
16 APCO Construction, Inc.'s Memorandum of Costs in Part, (3) Granting Helix Electric of  
17 Nevada LLC's Motion to Retax in Part and Denying in Part, (4) Granting Plaintiff in  
18 Intervention National Wood Product LLC's Motion to Retax in Part and Denying in Part, and  
19 (5) Granting National Wood Products, Inc's Motion to File a Surreply, which is hereby certified  
20 as final pursuant to NRCP 54(b).

21 ///

22 ///

23 ///

24 ///

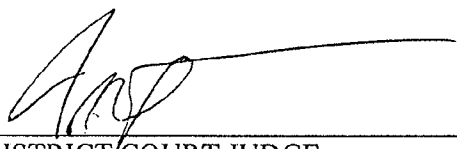
25 ///

26 ///

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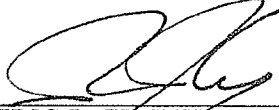
1 IT IS FURTHER ORDERED that Helix shall have thirty days from the notice of entry  
2 of this Order to post a bond for the full amount of the Judgment in favor of APCO, \$103,307.54,  
3 whereupon execution of said Judgment shall be stayed pending appeal.

4 IT IS SO ORDERED this 17<sup>th</sup> day of December, 2019.

5  
6  
7   
DISTRICT COURT JUDGE

8  
9 Respectfully submitted by:

10 PEEL BRIMLEY LLP

11  BAR 12723  
FEL  
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