

IN THE SUPREME COURT OF THE STATE OF NEVADA

Supreme Court Case No. 80508

Electronically Filed
Mar 05 2020 07:30 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

HELIX ELECTRIC OF NEVADA, LLC,

Appellant,

v.

APCO CONSTRUCTION, INC., A NEVADA CORPORATION,

Respondent.

**APPENDIX TO DOCKETING STATEMENT
Volume III**

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Helix Electric of Nevada, LLC

<u>Exhibit</u>	<u>Description</u>	<u>Bates Range</u>	<u>Volume</u>
A	Court Docket for Case No. 09A587168	Helix000001 – Helix000044	I
B	Notice of Entry of Order to Consolidate	Helix000045 – Helix000053	I
C	Consolidated Case List	Helix000054 – Helix000062	I
D			
D-1	Pleadings Related to Accuracy	Helix000063 - Helix000066	I
	Complaint Re Foreclosure filed by Accuracy Glass & Mirror Company	Helix000067 – Helix000103	I
	First Amended Complaint Re: Foreclosure	Helix000104 – Helix000119	I
	APCO's Answer to Accuracy's First Amended Complaint Re: Foreclosure	Helix000120 – Helix000135	I & II
	CAMCO's Answer and Counterclaim	Helix000136 – Helix000155	II
	Accuracy's Answer to CAMCO's Counterclaim	Helix000156 – Helix000160	II
D-2	Pleadings Related to Helix Electric of Nevada, LLC d/b/a Helix Electric	Helix000161 – Helix000163	II
	Helix Electric's Amended Statement of Facts Constituting Lien and Third-Party Complaint	Helix000164 – Helix000179	II

	APCO's Answer to Helix's Amended Statement of Facts Constituting Notice of Lien and Third-Party Complaint	Helix000180 – Helix000195	II
	CAMCO and Fidelity's Answer and CAMCO's Counterclaim	Helix000196 – Helix000211	II
	Notice of Entry of Granting Helix's Motion for Fees, Interest and Costs	Helix000212 – Helix000220	II
	Notice of Entry of Judgment	Helix000221 – Helix000240	II
	Notice of Entry of Judgment [As to the Claims of Helix and National Wood Products Against APCO]	Helix000241 – Helix000251	II & III
	Findings of Fact and Conclusions of Law and Order as to the Claims of Helix and Cabenetec Against APCO	Helix000252 – Helix000323	III
D-3	Pleadings Related to WRG Design, Inc.	Helix000324 – Helix000326	III
	WRG's Amended Statement of Facts Constituting Notice of Lien and Third-Party Complaint	Helix000327 – Helix000343	III
	APCO's Answer to Helix's Amended Statement of Facts Constituting Notice of Lien and Third-Party Complaint	Helix000344 – Helix000359	III
	CAMCO & FDCM's Answer and CAMCO's Third-Party Complaint	Helix000360 – Helix000380	III & IV
	Notice of Entry of Stipulation and Order of Dismissal	Helix000381 – Helix000388	IV

	WRG's Answer to CAMCO's Counterclaim	Helix000389 – Helix000393	IV
D-4	Pleadings Related to Heinaman Contract Glazing	Helix000394 – Helix000396	IV
	Heinaman's Amended Statement of Facts Constituting Notice of Lien and Third-Party Complaint	Helix000397 – Helix000409	IV
	CAMCO and FDCM's Answer to Heinaman's Statement of Facts and CAMCO's Counterclaim	Helix000410 – Helix000430	IV
	Notice of Entry of Order	Helix000431 – Helix000439	IV
	Notice of Entry of Judgment	Helix000440 – Helix000462	IV
	Heinaman's Answer to CAMCO's Counterclaim	Helix000463 – Helix000467	IV
D-5	Pleadings Related to Bruin Painting Corporation	Helix000468 – Helix000469	IV
	Bruin Painting's Amended Statement of Facts Constituting Amended Notice of Lien and Third-Party Complaint	Helix000470 – Helix000482	IV
	CAMCO's Answer and Counterclaim	Helix000483 – Helix000503	IV & V
	Voluntary Dismissal	Helix000503 – Helix000505	V

D-6	Pleadings Related to HD Supply Waterworks, LP	Helix000506 – Helix000508	V
	HD Supply's Amended Statement of Facts Constituting Notice of Lien and Third-Party Complaint	Helix000509 – Helix000526	V
	APCO's Answer to Amended Statement of Facts Constituting Notice of Lien and Third-Party Complaint	Helix000527 – Helix000541	V
	Amended Answer to HD Supply & Waterworks, LP's Statement of Facts Constituting Lien and CAMCO's Third-Party Complaint	Helix000542 – Helix000548	V
	Jeff Heit Plumbing and Old Republic's Answer to HD Supply's Amended Statement of Facts Constituting Notice of Lien and Third-Party Complaint	Helix000549 – Helix000558	V
	Stipulation and Order to Dismiss E&E Fire Protection	Helix000559 – Helix000569	V
	Voluntary Dismissal of Platte River Insurance	Helix000570 – Helix000577	V
	Scott Financial's Answer to HD Supply's Amended Statement of Facts Constituting Notice of Lien and Third-Party Complaint	Helix000578 – Helix000601	V
E	Accuracy Glass & Mirror Company's Complaint Re: Foreclosure	Helix000602 – Helix000638	V & VI

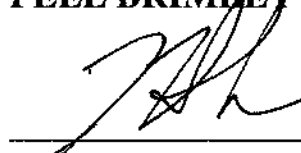
F	Accuracy Glass & Mirror Company's First Amended Complaint Re: Foreclosure	Helix000639 – Helix 000654	VI
G	Bruin Painting	Helix000655- Helix691	VI
H	HD Supply	Helix000692 – Helix000785	VI & VII
I	Heinaman	Helix000786 – Helix000857	VII & VIII
J	WRG	Helix000858 – Helix000925	VIII & IX
K	131 Nev Advance Opinion	Helix000926 – Helix000943	IX
L	Notice of Entry of Order Granting Plaintiff's Motion to Dismiss	Helix000944 – Helix000950	IX
M	Notice of Entry of Judgment [As to the Claims of Helix Electric of Nevada, LLC and Plaintiff in Intervention National Wood Products, Inc.'s Against APCO Construction, Inc.	Helix000951 – Helix961	IX
N	Notice of Entry of Judgment [As to the Claims of Helix Electric of Nevada, LLC Against CAMCO Construction Co., Inc.]	Helix000962 – Helix000981	IX
O	Notice of Entry of Judgment [As to the Claims of Heinaman Contract Glazing Against CAMCO Construction Co., Inc.)	Helix000982 – Helix001004	IX & X

P	Order Dismissing Appeal (NV Supreme Court Case No. 76276)	Helix001005 – Helix001008	X
Q	Notice of Entry of Granting Helix Electric of Nevada's Motion for Rule 54(b) Certification	Helix001009 – Helix001017	X
R	Notice of Appeal	Helix001018 – Helix1607	X & XI & XII & XIII

Dated this 5th day of March, 2020.

PEEL BRIMLEY LLP

Bar # 14377



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Helix Electric of Nevada, LLC

CERTIFICATE OF SERVICE

Pursuant to Nev. R. App. P. 25(b) and NEFCR 9(f), I certify that I am an employee of **PEEL BRIMLEY, LLP**, and that on this 3rd day of March, 2020, I caused the above and foregoing document, **APPENDIX TO DOCKETING STATEMENT**, 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 Nevada Supreme Court's electronic filing system;
- ☐ pursuant to EDCR 7.26, to be sent **via facsimile**;
- ☐ to be hand-delivered; and/or
- ☐ other _____

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

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*Attorneys for Respondent/Cross-Appellant
APCO Construction, Inc.*

Settlement Judge:

Stephen E. Haberfeld
8224 Blackburn Ave, Suite 100
Los Angeles, CA 90048


An employee of **PEEL BRIMLEY, LLP**

1 determine APCO's costs, currently pending before the Court.¹

2

3 Dated this 29th day of May, 2018.

4


DISTRICT COURT JUDGE

5

6

7 Respectfully submitted by:

8

SPENCER FANE LLP

9



10 John H. Mowbray, Esq. (Bar No. 1140)
11 John Randall Jefferies, Esq. (Bar No. 3512)
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14 Las Vegas, NV 89101
15 Attorneys for Apco Construction, Inc.

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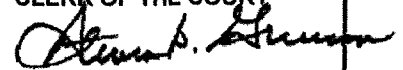
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¹ The amended judgment will be in accordance with the court's decisions on the pending motion for attorney's fees and any motion/pleadings for costs.

**Findings of Fact and Conclusions of Law and
Order as to the Claims of Helix and
Cabenetec Against APCO**



1 FFCO

DISTRICT COURT

CLARK COUNTY, NEVADA

4 APCO CONSTRUCTION, a Nevada
corporation,

6 Plaintiff,

7 v.

8 GEMSTONE DEVELOPMENT WEST, INC., A
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
the briefs of counsel and good cause appearing; the Court hereby makes the following:

23 I. FINDINGS OF FACT

24 A. The Project

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

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

CLERK OF THE COURT

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MARK R. DENTON
DISTRICT JUDGE

DEPARTMENT THIRTEEN
LAS VEGAS, NV 89155

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

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).²

5 5. The Contract price for Phase 1 was \$78,938,160.00.³ APCO started work on the
6 Project in September, 2007.⁴

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").⁵

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

20

21 _____
22 ¹ 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 ² 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 ³ Testimony of Joe Pelan (APCO), Day 1, p. 28.

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

26 ⁵ Exhibit 2, Section 2.10.

27 ⁶ 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.⁷

⁷ 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 20th 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).⁸
- 4 11. APCO would then provide all of these documents to Gemstone.⁹
- 5 12. Gemstone would then walk the Project and determine the percentage each
6 subcontractor had completed.¹⁰
- 7 13. Gemstone would adjust each subcontractor's billings to match its estimate of the
8 percentage complete.¹¹
- 9 14. Gemstone would give the revised billings back to APCO, and APCO would
10 return them to each subcontractor to revise.¹²
- 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.¹³
- 14 16. NCS would then send an inspector to verify the work was complete.¹⁴
- 15 17. NCS would then request funds from the lender and pay the total amount directly
16 to APCO.¹⁵
- 17 18. APCO then paid the subcontractor the final amount received from Gemstone.¹⁶
- 18 19. As discussed more fully below, this process continued until June 2008.¹⁷

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

21 ⁹ Testimony of Joe Pelan (APCO), Day 1, p. 24.

22 ¹⁰ Testimony of Joe Pelan (APCO), Day 1, p. 24.

23 ¹¹ Testimony of Joe Pelan (APCO), Day 1, p. 24.

24 ¹² Testimony of Joe Pelan (APCO), Day 1, p. 24.

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

27 ¹⁴ Testimony of Joe Pelan (APCO), Day 1, p. 25.

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

¹⁶ Testimony of Joe Pelan (APCO), Day 1, p. 25.

¹⁷ 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.¹⁸

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

21 **4. Retainage**

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

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 ¹⁸ Exhibit 2 at Section 5.06(c).

27 ¹⁹ Testimony of Joe Pelan (APCO), Day 1, p. 63.

28 ²⁰ 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.²¹

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

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

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.²⁴

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

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

19 **5. Termination for Convenience**

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

22 ²¹ 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 ²² Testimony of Joe Pelan (APCO), Day 1, pp. 25-26.

25 ²³ Testimony of Joe Pelan (APCO), Day 1, p. 26.

26 ²⁴ Exhibit 2 at Section 5.07(f).

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

28 ²⁶ 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."²⁸

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:

11 ...

12 (ii) Accept assignment of any Third-Party Agreements pursuant
13 to Section 10.04.²⁹

14 33. Although Gemstone purported to terminate the Contract for cause,³⁰ the
15 undisputed evidence established that APCO was not in default.³¹

16 **7. Assignment**

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

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

21 **10.04 Assignment.** Each Third-Party Agreement for a portion of
22 the Work is hereby assigned by General Contractor to Developer
23 provided that such assignment is effective only after termination
of the Agreement by Developer for cause pursuant to Section

24 ²⁷ Exhibit 2 at Section 10.01.

25 ²⁸ Testimony of Joe Pelan (APCO), Day 1, p. 27.

26 ²⁹ Exhibit 2 at Section 10.02(b)(2).

27 ³⁰ Testimony of Joe Pelan (APCO), Day 1, p. 27.

28 ³¹ 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.³²

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.³³

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

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

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.³⁶

25 ³² Exhibit 2, Section 10.04 (p. 36).

26 ³³ Testimony of Joe Pelan (APCO), Day 1, p. 75.

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

³⁵ 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.

³⁶ Testimony of Joe Pelan (APCO), Day 1, p. 58.

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

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.³⁹

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."⁴⁰

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

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

³⁸ Testimony of Bob Johnson (Helix) Day 2, p. 6.

³⁹ Exhibit 45, Helix Subcontract; Testimony of Joe Pelan (APCO), Day 1, p. 58.

⁴⁰ Testimony of Bob Johnson (Helix) at Day 2, p. 10.

⁴¹ 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...⁴²

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

⁴² Exhibit 45.

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

46. As documented below, Helix admitted that these preconditions were not met while Apco was the contractor.⁴⁴

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

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

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

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

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

⁴³ Exhibit 45.

⁴⁴ Testimony of Bob Johnson, Day 2, pp. 36 and 37.

⁴⁵ Exhibits 512 pp. 5-6, 7-9, 10-11.

⁴⁶ Exhibit 77.

⁴⁷ Exhibit 231.

⁴⁸ 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...⁴⁹

4 Exhibit 1 to the declaration was the first fifteen pages of Exhibit 45.⁵⁰

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.⁵¹

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?

⁴⁹ Exhibit 314.

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

⁵¹ 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.⁵²

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.⁵³ 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")⁵⁴

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

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

26 ⁵³ Testimony of Joe Pelan (APCO), Day 1, p. 89.

27 ⁵⁴ Exhibit 149, CabineTec Subcontract.

28 ⁵⁵ Exhibit 149.

1 55. CabineTec's Nicholas Cox⁵⁶ admitted CabineTec did not change the retention
2 payment schedule found in Section 3.8.⁵⁷

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

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

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.⁶⁰

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.⁶¹

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."⁶²

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.⁶³

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

22 ⁵⁷ Testimony of Nicholas Cox (CabineTec), Day 3, p. 29.

23 ⁵⁸ Exhibit 152.

24 ⁵⁹ Exhibit 152.

25 ⁶⁰ Testimony of Brian Benson (APCO) at Day 3, p. 50; Testimony of Mary Jo
Allen (APCO), Day 3, p. 122.

26 ⁶¹ Testimony of Joe Pelan (APCO), Day 1, pp. 28 and 31.

27 ⁶² Exhibit 212-1.

28 ⁶³ 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").⁶⁴

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.⁶⁵

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

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.⁶⁷

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 _____
25 ⁶⁴ Exhibit 4.

26 ⁶⁵ Testimony of Joe Pelan (APCO), Day 1, pp. 28 and 29; Exhibit 4.

27 ⁶⁶ Exhibit 4; Testimony of Joe Pelan (APCO), Day 1, p. 30.

28 ⁶⁷ Exhibit 5.

1 As you area 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, 2008.⁶⁸

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

20 70. Gemstone ultimately paid APCO for May.⁷¹

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
 status of the work suspension changes. Should you have any
 questions, feel free to call.⁷²

5 72. On July 30, 2008, Scott Financial, the Project's lender, sent a letter to APCO
6 confirming the loan for the Project was in good standing.⁷³

7 73. On or about August 6, 2008, Gemstone provided APCO notice of its intent to
8 withhold the sum of \$1,770,444.28 from APCO for the June Application.⁷⁴

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

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

...

⁷² Exhibit 48.

⁷³ Exhibit 7.

⁷⁴ 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 As such, the correct amount of the June Progress Payment
7 should be \$6,183,445.24. As of this date, Gemstone has failed
8 and/or refused to pay the June Progress Payment.

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

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

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

25 75. All subcontractors were copied on this notice.⁷⁶

26 76. APCO informed all subcontractors that it intended to terminate the Contract as
27 of September 5, 2008.⁷⁷

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

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

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

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

⁷⁸ 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 2008.⁸⁰

5 79. That letter divided APCO's alleged breaches into curable breaches and non-
6 curable breaches⁸¹ 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."⁸²

10 80. APCO's counsel responded to the letter the same day, August 15, 2008.⁸³

11 81. That letter refuted Gemstone's purported basis for termination for cause,⁸⁴ 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 ⁷⁹ Testimony of Bob Johnson (Helix), Day 1, p. 113.

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

⁸¹ Exhibit 13 - 1-13.

⁸² Exhibit 13, p. 14, Section C.3.

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

⁸⁴ 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
(ii), (iii), (iv) and (v) were all complete months ago as part of the
normal job process.⁸⁵

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

8 83. And since the Court has stricken Gemstone's answer and counterclaim against
9 APCO,⁸⁶ the Court must find that APCO was not in breach.

10 84. On or about August 15, 2008, prior to its purported termination, Gemstone
11 improperly contacted APCO's subcontractors and notified them that Gemstone was terminating
12 APCO as of Monday, August 18, 2008.⁸⁷

13 85. Gemstone confirmed it had already retained a replacement general contractor.⁸⁸
14 Gemstone advised the APCO subcontractors as follows:

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

20 86. The replacement contractor turned out to be Camco.⁹⁰

21
22
23 ⁸⁵ Exhibit 14; Testimony of Joe Pelan (APCO), Day 1, p. 100.

24 ⁸⁶ Docket at May 26, 2010 Order Striking Defendant Gemstone Development
West, Inc.'s Answer and Counterclaims, and Entering Default.

25 ⁸⁷ Exhibit 215; Testimony of Joe Pelan (APCO), Day 1, pp. 34 and 35.

26 ⁸⁸ Exhibit 215.

27 ⁸⁹ Exhibit 215-2.

28 ⁹⁰ 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."⁹¹

7 88. That same day, APCO submitted its July 2008 pay application for
8 \$6,307,487.15.⁹²

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.⁹³

⁹¹ Exhibit 216-1.

⁹² Exhibit 8.

⁹³ 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 Manhattan West, but similar to
5 how we have paid some Manhattan Pay Apps in the past."⁹⁴

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

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.⁹⁶

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

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.⁹⁸

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

⁹⁵ Testimony of Joe Pelan (APCO), Day 1, p. 38.

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

⁹⁷ Testimony Day 1, p. 38.

⁹⁸ 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.⁹⁹

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

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.¹⁰¹

15 98. On August 21, 2008 APCO also provided Gemstone with written notice of
16 APCO's intent to terminate the Contract as of September 5, 2008.¹⁰²

17 99. APCO's last work on the Project was August 21, 2008.¹⁰³

18 100. On August 22, 2008, APCO sent a letter to the Clark County Building
19 Department advising that APCO was withdrawing as the general contractor for the Project.¹⁰⁴
20

21
22 ⁹⁹ Exhibit 218-10; Testimony of Steven Parry (Camco), Day 5, pp. 31-32. Mr.
23 Parry was Camco's project manager for the approximate four months that Camco
worked on the Project. Testimony of Steven Parry (Camco), Day 5, p. 24.

24 ¹⁰⁰ Testimony of Joe Pelan (APCO), Day 1, p. 33.

25 ¹⁰¹ Exhibit 23; Testimony of Joe Pelan (APCO), Day 1, p. 32.

26 ¹⁰² Exhibit 23.

27 ¹⁰³ Testimony of Brian Benson (APCO), Day 3, p. 50; Testimony of Joe Pelan
28 (APCO), Day 1, p. 40.

¹⁰⁴ 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.¹⁰⁵

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.¹⁰⁶

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

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, 2008.¹⁰⁸

20 105. Helix and CabineTec both received a copy of the termination letter.¹⁰⁹ APCO
21 considered its notice of termination to be effective as of September 5, 2008.¹¹⁰

22 106. But Gemstone proceeded with the Project as if it had terminated the Contract
23 with APCO.¹¹¹ APCO was physically asked to leave the Project as of the end of August,
24 2008.¹¹²

25 ¹⁰⁵ Testimony of Joe Pelan (APCO), Day 1, p. 100.

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

27 ¹⁰⁷ Testimony of Joe Pelan (APCO), Day 1, p. 42.

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

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

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

¹¹¹ 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.¹¹³

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.¹¹⁴

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

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.¹¹⁶

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.¹¹⁷

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

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

16 ¹¹³ Exhibit 118.

17 ¹¹⁴ 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.

¹¹⁵ Testimony of Mary Jo Allen (APCO), Day 3, p. 127.

¹¹⁶ Testimony of Mary Jo Allen (APCO), Day 3, p. 127.

¹¹⁷ Testimony of Mary Jo Allen (APCO), Day 3, p. 127.

¹¹⁸ 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.¹¹⁹

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

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

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 2008.¹²³

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,¹²⁴ but advised its subcontractors that they could suspend work on the Project in
12 accordance with NRS Chapter 624.¹²⁵

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

14 119. Helix admitted it knew APCO was off the Project as of August 28, 2008¹²⁷ and
15 that neither APCO nor Helix terminated the Helix Subcontract.¹²⁸

16
17
18 ¹¹⁹ Exhibit 218; Testimony of Joe Pelan (APCO), Day 1, pp. 43-44.

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

20 ¹²¹ Exhibit 218-10.

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

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

26 ¹²⁴ Testimony of Joe Pelan (APCO), Day 1, p. 39.

27 ¹²⁵ Exhibit 23.

28 ¹²⁶ Testimony of Joe Pelan (APCO) Day 1, p. 71.

¹²⁷ Testimony of Andy Rivera (Helix) Day 2, p. 62.

¹²⁸ 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.¹²⁹

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.¹³⁰

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

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

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

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.¹³⁴

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
21 ¹²⁹ Testimony of Bob Johnson (Helix) Day 1, p. 127.

22 ¹³⁰ Exhibit 13.

23 ¹³¹ Testimony of Joe Pelan (APCO) Day 1, p. 75.

24 ¹³² Testimony of Andy Rivera (Helix) Day 2, p. 76.

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

26 ¹³⁴ Testimony of Brian Benson (APCO) Day 3, pp. 50-58, 63-64 and 97. Those
27 videos are a correct and accurate representation and reproduction of the status of the
28 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, 2008.¹³⁵

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

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

8 130. Camco obtained permits in its own name to complete the Project.¹³⁸

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.¹³⁹

11 132. Gemstone and Camco estimated the Project to be 74% complete for Phase 1.¹⁴⁰
12 Those estimates also confirmed that:

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

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)."¹⁴³

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

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

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

24 ¹³⁸ Testimony of Steve Parry (Camco) Day 5, p. 37.

25 ¹³⁹ Testimony of Steve Parry (Camco) Day 5, p. 27.

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

27 ¹⁴¹ Exhibit 160-3.

28 ¹⁴² Exhibit 160-3.

¹⁴³ Exhibit 162-2.

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

3 135. And Camco had worked with Helix before.¹⁴⁵

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.¹⁴⁶

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

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

22 _____
23 ¹⁴⁴ Exhibit 162-23.

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

25 ¹⁴⁶ Testimony of Steve Parry (Camco) Day 5, p. 26.

26 ¹⁴⁷ Testimony of Joe Pelan (APCO) Day 1, p. 99.

27 ¹⁴⁸ Testimony of Steve Parry (Camco) Day 5, p. 27.

28 ¹⁴⁹ 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 2008.¹⁵⁰

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.¹⁵¹

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, 2008.¹⁵²

7 142. Camco's first pay application was for the period through August 31, 2008.¹⁵³

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 ...

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

20 A. That's correct.¹⁵⁴

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

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

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

26 ¹⁵⁰ Testimony of Joe Pelan (APCO) Day 1, p. 98.

27 ¹⁵¹ Testimony of Joe Pelan (APCO) Day 1, p. 98.

28 ¹⁵² Testimony of Joe Pelan (APCO) Day 3, pp. 149-150.

¹⁵³ Testimony of Steve Parry (Camco) Day 5, p. 29.

¹⁵⁴ 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."¹⁵⁶

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.¹⁵⁷

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."¹⁵⁸
- 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 9.¹⁵⁹
- 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."¹⁶⁰

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

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

¹⁵⁶ Testimony of Nicholas Cox (CabineTec) Day 3, p. 35.

¹⁵⁷ Testimony of Nicholas Cox (CabineTec) Day 3, p. 36.

¹⁵⁸ Exhibit 183-1.

¹⁵⁹ 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.")...¹⁶¹

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.¹⁶²

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

21 151. CabineTec submitted two invoices while APCO was on the Project.¹⁶³

22 152. Exhibit 148 is CabineTec's first invoice to Camco for \$70,836.00.¹⁶⁴

23 153. CabineTec's second invoice is for \$72,540.00.¹⁶⁵

24 154. The total amount due to CabineTec, less retention, was \$129,038.40.¹⁶⁶

25 ¹⁶⁰ Exhibit 172-5.

26 ¹⁶¹ Exhibit 156 at ¶ 10-15.

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

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

¹⁶⁴ Testimony of Mary Jo Allen (APCO) Day 3, p. 130.

¹⁶⁵ Testimony of Mary Jo Allen (APCO) Day 3, p. 131.

¹⁶⁶ 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.¹⁶⁷

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 2008.¹⁶⁸

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
\$19,547.00, together with interest thereon at the highest legal
rate."¹⁶⁹

12 160. And, CabineTec's initial and first supplemental disclosures only disclosed
13 \$30,110.95 in damages against APCO: "...National Wood seeks to recover those damages
14 claimed by CabineTec in its complaint in intervention against APCO in the amount of
15 \$30,110.95 and CAMCO in the amount of \$1,125,374.94..."¹⁷⁰ The \$30,110.95 represented
16 \$19,547.00 in alleged retention, and \$10,563.95 in interest and fees.¹⁷¹

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

21
22 ¹⁶⁷ Testimony of Mary Jo Allen (APCO) Day 3, p. 131.

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

24 ¹⁶⁹ Exhibit 156-8.

25 ¹⁷⁰ Exhibit 157 (CabineTec's Initial Disclosure); Exhibit 158 (CabineTec's First
Supplemental Disclosure), and Exhibit 159 (CabineTec's Second Supplemental
Disclosure).

26 ¹⁷¹ Compare Exhibit 156, CabineTec's Complaint to Exhibit 157, CabineTec's
Initial Disclosure.

27 ¹⁷² 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.¹⁷³

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 \$505,021.00.¹⁷⁴

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

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.

24 ¹⁷³ Exhibit 147 summarizing payments and releases.

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

26 ¹⁷⁵ 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.").

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

5 A. Yes.

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

8 A. No. No. I'm sorry.

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

11 A. I would not know.

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

15 A. Correct.

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

19 A. Yes.¹⁷⁶

20 166. Helix received direct payments from APCO through May 2008.¹⁷⁷

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

23 168. Helix's first billing to Camco was on September 19, 2008.¹⁷⁹

24 169. Mr. Rivera admitted Helix is only seeking \$505,021.00 in retention from APCO,
25 which Helix never billed APCO.¹⁸⁰

26

27

28 ¹⁷⁶ Testimony of Andy Rivera (Helix) Day 2, pp. 73-75.

¹⁷⁷ Testimony of Andy Rivera (Helix) Day 2, p. 61.

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

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

¹⁸⁰ 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:¹⁸¹

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
general contractor on the project?

11 A. Not to my knowledge.¹⁸²

12 173. CabineTec's Mr. Thompson admitted that the buildings had to be drywalled and
13 painted before the cabinets were installed¹⁸³ and he had no documentation (daily reports,
14 photographs, etc.) that would confirm that CabineTec ultimately installed cabinets in Phase 1
15 for APCO.¹⁸⁴

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

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

20 176. Instead, the Court saw pictures¹⁸⁶ and videos¹⁸⁷ confirming that Helix's and
21 CabineTec's work was not completed.

22
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.

24 ¹⁸¹ Testimony of Bob Johnson (Helix) Day 2, pp. 36-37.

25 ¹⁸² Testimony of Bob Johnson (Helix) Day 2, p. 19.

26 ¹⁸³ Testimony of Mr. Thompson (CabineTec) Day 5, p. 69.

26 ¹⁸⁴ Testimony of Mr. Thompson (CabineTec) Day 5, p. 69.

27 ¹⁸⁵ 108 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.¹⁸⁸

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.¹⁸⁹

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.¹⁹⁰

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.¹⁹¹

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.¹⁹²

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.¹⁹³

19
20 ¹⁸⁶ 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.

22 ¹⁸⁷ Exhibits 17-22, Videos of Project.

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

25 ¹⁸⁹ 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.

27 ¹⁹⁰ Testimony of Bob Johnson (Helix) Day 2, p. 31.

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

¹⁹² 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.¹⁹⁴

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

5 187. In fact, APCO never billed Gemstone for retention¹⁹⁶ because APCO had not
6 earned the retention and thus was not entitled to it.¹⁹⁷

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

9 189. APCO never received CabineTec's or Helix's retention from Gemstone.¹⁹⁹

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

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

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.²⁰²

16
17 ¹⁹³ 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).

21 ¹⁹⁴ Testimony of Joe Pelan (APCO) Day 1, p. 30.

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

23 ¹⁹⁶ Testimony of Joe Pelan (APCO) Day 1, p. 30.

24 ¹⁹⁷ Testimony of Joe Pelan (APCO) Day 1, p. 83.

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

26 ¹⁹⁹ Testimony of Joe Pelan (APCO) Day 3, p. 150.

27 ²⁰⁰ Testimony of Bob Johnson (Helix) Day 2, p. 19.

28 ²⁰¹ Testimony of Bob Johnson (Helix) Day 2, p. 20.

²⁰² 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.²⁰³

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

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.²⁰⁵

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

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.²⁰⁷

22 _____
23 ²⁰³ 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.

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

26 ²⁰⁵ Testimony of Andy Rivera (Helix) Day 2, p. 75.

27 ²⁰⁶ Testimony of Andy Rivera (Helix) Day 2, p. 76.

²⁰⁷ Testimony of Andy Rivera (Helix) Day 2, p. 76.

1
2 Q. Okay. But do you recall receiving APCO generated
3 correspondence indicating to the owner, which was sent to
4 subcontractors as well, that APCO was suspending and/or
5 terminating its work, correct?

6 A. Correct.²⁰⁸

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

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

11 A. Gemstone.

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

14 A. Correct.

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

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

20 Q. Did you come to find out?

21 A. Yes.

22 Q. that was, in fact, the case?

23 A. Yes.²⁰⁹

24 199. Helix was directed to hook up power to the Camco trailer on August 26, 2008.²¹⁰

25 200. Gemstone provided Helix with the Camco subcontract and Camco pay
26 applications,²¹¹ and directed Helix to start directing its payment applications to Camco.²¹²

27 201. On August 26, 2008 Camco sent Helix a checklist for starting work.²¹³ Among
28 the provisions included:

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

208 Testimony of Andy Rivera (Helix) Day 2, p. 77.

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

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

211 Exhibit 170.

212 Testimony of Andy Rivera (Helix) Day 2, p. 66.

213 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.²¹⁴

²¹⁴ 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
7 Camco—

8 A. Yeah.

9 Q. —for Helix?

10 A. Yes.²¹⁵

11 203. During the transition of APCO to Camco, Helix had a meeting with
12 Gemstone.²¹⁶

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

16 205. Helix never sent APCO a letter or requested that APCO clarify or provide any
17 information to Helix on the status of its relationship to the Project.²¹⁸

18 206. Camco presented Helix with a ratification agreement.²¹⁹

19 207. It was Camco's intent and understanding that it was replacing APCO in the
20 Helix-APCO subcontract.²²⁰

21 208. Helix had a copy of the ratification agreement by at least September 3, 2008.²²¹

22

23

24 ²¹⁵ Testimony of Andy Rivera (Helix) Day 2, p. 78.

25 ²¹⁶ Testimony of Bob Johnson (Helix) Day 2, p. 22.

26 ²¹⁷ Testimony of Bob Johnson (Helix) Day 2, pp. 22-23.

27 ²¹⁸ Testimony of Bob Johnson (Helix) Day 2, p. 23.

28 ²¹⁹ Testimony of Bob Johnson (Helix) Day 1, p. 124.

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

²²¹ 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."²²²

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.²²³

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

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."²²⁵

27 ²²² Testimony of Bob Johnson (Helix) Day 1, p. 124.

28 ²²³ Exhibit 172. Testimony of Steve Parry (Camco) Day 5, p. 29.

²²⁴ Testimony of Bob Johnson (Helix) Day 2, p. 28.

²²⁵ 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.²²⁶

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

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.²²⁸

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.²²⁹

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."²³⁰

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.

25 ²²⁶ Exhibit 77, Helix Complaint, ¶18.

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

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

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

²³⁰ 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...²³¹

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.²³²

13 220. Helix sought \$834,476.45 against Camco.²³³

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

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.²³⁵

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

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.²³⁷

24 ²³¹ Exhibit 77.

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

26 ²³³ Testimony of Joe Pelan (APCO) Day 1 at p. 10.

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

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

²³⁶ Testimony of Bob Johnson (Helix) Day 2, p. 14.

²³⁷ 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.²³⁸

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.²³⁹

5 228. And it is undisputed that Helix submitted its September 2008 pay application
6 for \$354,456.90 to Camco.²⁴⁰

7 229. That pay application tracked Helix's full retainage of \$553,404.81 for the
8 Project, not just work completed under Camco.²⁴¹

9 230. Helix also submitted its October 2008 billing for \$361,117.44,²⁴² its
10 November 2008 pay application for \$159,475.68,²⁴³ and its December 2008 billing for
11 \$224,805.30 to Camco.²⁴⁴

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

13 231. Camco never finished the Project²⁴⁵ and was never paid retention by
14 Gemstone.²⁴⁶

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).

21 ²³⁸ Testimony of Andy Rivera (Helix) Day 2, p. 74.

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

23 ²⁴⁰ Exhibit 173-1.

24 ²⁴¹ Exhibit 173-2

25 ²⁴² Exhibit 176-2.

26 ²⁴³ Exhibit 177-4.

27 ²⁴⁴ Exhibit 178-4.

28 ²⁴⁵ Testimony of Steve Parry (Camco) Day 5, p. 36.

²⁴⁶ 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.²⁴⁷

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.²⁴⁸

- 22 • Exhibit 220 is Camco's second pay application for the Project, through
23 September 30, 2008.²⁴⁹ That pay application accounted \$6,004,763.00 in
24 retention.²⁵⁰ Camco's Parry admitted that Exhibit 220 does include
25 billings from Helix to Camco that Camco was passing on to
26 Gemstone.²⁵¹
- 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,²⁵² Exhibit 163, Camco's best estimate of the
work completed on Phase 1 was 86%.²⁵³

²⁴⁷ Exhibit 40 and Exhibit 39.

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

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

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

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

²⁵² Testimony of Steve Parry (Camco), Day 5, p. 36.

²⁵³ 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.²⁵⁴

4 236. Gemstone counterclaimed alleging that APCO breached the Contract.²⁵⁵

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.²⁵⁶

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.²⁵⁷

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

25 ²⁵⁴ Exhibit 219.

26 ²⁵⁵ Exhibit 226.

27 ²⁵⁶ Exhibit 138.

28 ²⁵⁷ Exhibit 48; Exhibit 138.

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

3 In response, Camco terminated the subcontracts with its subcontractors on December 22,
4 2008.²⁵⁹

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.²⁶⁰

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.²⁶¹

16 243. On June 13, 2013, the Court (Judge Susan Scann) granted that motion.²⁶² 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.

23 ²⁵⁸ Exhibit 165.

24 ²⁵⁹ Exhibit 166-2.

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

27 ²⁶¹ Docket at June 6, 2013, Motion for Summary Judgment against Gemstone.

28 ²⁶² 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."²⁶³

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.²⁶⁴ 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 3.8.²⁶⁵ 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.²⁶⁶

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

22 5. Parties can agree to a schedule of payments.²⁶⁸

23
24 ²⁶³ *Laguerre v. Nevada System of Higher Education*, 837 F.Supp.2d 1176, 1180
(D. Nev. 2011).

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

26 ²⁶⁵ Exhibit 45 at Section 3.8.

27 ²⁶⁶ Exhibit 45 at Section 3.8.

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

6. Parties can agree to proper conditions precedent to payment.²⁶⁹

7. Under Nevada precedent and legislative action, acceptance provisions are valid conditions precedent to payment when not combined with a waiver of a mechanic's lien rights.²⁷⁰

8. NRS 624.624 was meant, *inter alia*, to ensure payment to subcontractors after the owner paid the general for the subcontractor's work.²⁷¹

9. In the present action, the Helix Subcontract: (1) incorporated the Contract,²⁷² (2) confirmed that the subcontractors would be bound to Gemstone to the same extent APCO was,²⁷³ and (3) contained a schedule of payments for both retention and change orders with preconditions before APCO had an obligation to pay the subcontractors.²⁷⁴

10. Only one of those preconditions involved Gemstone's payment of retention to APCO. The others concerned the right to receive payment, not the fact of payment.

11. Pursuant to NRS 624.624(1)(a), payment was due to Helix in accordance with the retention payment schedule or within 10 days after APCO received payment from Gemstone:

**NRS 624.624 Payment of lower-tiered subcontractor;
grounds and procedure for withholding amounts from**

²⁶⁸ NRS 624.624(1)(a).

²⁶⁹ *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 due to Padilla under the subcontract or NRS 624.624(1)(a); see generally, NRS 624.626.

²⁷⁰ *Id.*

²⁷¹ *Padilla Construction Company of Nevada v. Big-D Construction Corp*, 386 P.3d 982 (Nev. 2016) (unpublished).

²⁷² Exhibits 45 and 149, Helix and CabineTec Subcontracts at Sections 1.1.

²⁷³ Exhibits 45 and 149, Helix and CabineTec Subcontracts at Sections 3.4.

²⁷⁴ *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*,²⁷⁵ (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.²⁷⁶

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

27 ²⁷⁶ 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."²⁷⁷ 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."²⁷⁸

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.²⁷⁹

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

25 ²⁷⁸ *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).

27 ²⁷⁹ *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.²⁸⁰

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

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."²⁸²

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),²⁸³

12 b. APCO signed joint checks so that its subcontractors, including Helix,
13 would get paid, even though APCO was not getting paid,²⁸⁴

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),²⁸⁵ 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
21 ²⁸⁰ *Perry v. Jordan*, 111 Nev. 943, 948, 900 P.2d 335, 338 (Nev. 1995).

22 ²⁸¹ *Consolidated Generator-Nevada, Inc. v. Commins Engine Co., Inc.*, 114 Nev.
1304, 1312, 971 P.2d 1251, 1256 (Nev. 1998).

23 ²⁸² Exhibit 231, Helix's amended complaint at ¶ 27.

24 ²⁸³ 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.

26 ²⁸⁴ Exhibit 26. See also: Testimony of Joe Pelan (APCO), Day 1 at pg. 38;
Testimony of Joe Pelan (APCO), Day 1 at pg. 41.

27 ²⁸⁵ Testimony of Joe Pelan (APCO), Day 1 at pg. 100.
28

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.²⁸⁶

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.²⁸⁷ 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.²⁸⁸

21 32. As such, APCO was not unjustly enriched by Helix's work.

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25 ²⁸⁶ See Exhibit 45, Helix Subcontract, and Exhibit 149, CabineTec Subcontract.

26 ²⁸⁷ *Leasepartner's Corp. v. Robert L. Brooks Trust*, 113 Nev. 747, 942 P.2d 182
(1997).

27 ²⁸⁸ 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.²⁸⁹

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.²⁹⁰ 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
26 ²⁸⁹ NRS 108.239(12); *Nev. Nat'l Bank v. Snyder*, 108 Nev. 151, 157, 826 P.2d
560, 563 (1992).

27 ²⁹⁰ 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."²⁹¹

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 3.8.²⁹² 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.²⁹³

46. A party who seeks to recover on a contract has the burden of establishing any condition precedent to the respective contract.²⁹⁴

47. Parties can agree to a schedule of payments.²⁹⁵

48. Parties can agree to proper conditions precedent to payment.²⁹⁶

²⁹¹ *Laguerre v. Nevada System of Higher Education*, 837 F.Supp.2d 1176, 1180 (D. Nev. 2011).

²⁹² Exhibit 149, CabineTec Subcontract at Section 3.8.

²⁹³ Exhibit 149, CabineTec Subcontract at Section 3.8.

²⁹⁴ *See Lucini-Parish Ins. v. Buck*, 108 Nev. 617, 620, 836 P.2d 627, 629 (1992).

²⁹⁵ NRS 624.624(1)(a).

²⁹⁶ *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.

3 ²⁹⁷

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.²⁹⁸

6 51. In the present action, the CabineTec Subcontract: (1) incorporated the
7 Contract,²⁹⁹ (2) confirmed that the subcontractors would be bound to Gemstone to the same
8 extent APCO was,³⁰⁰ 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.³⁰¹

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.

24 ²⁹⁷ *Id.*

25 ²⁹⁸ *Padilla Construction Company of Nevada v. Big-D Construction Corp*, 386
26 P.3d 982 (Nev. 2016) (unpublished).

27 ²⁹⁹ Exhibits 45 and 149, Helix and CabineTec Subcontracts at Sections 1.1.

28 ³⁰⁰ Exhibits 45 and 149, Helix and CabineTec Subcontracts at Sections 3.4.

³⁰¹ *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
4 subcontractor:

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

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

11 → whichever is earlier.

12 These provisions place a time obligation on a higher-tiered contractor to make
13 payment but they do not restrict the right of a lower-tiered contractor to receive
14 payment if the higher-tiered contractor has not been paid.

15 54. Section 3.8 of the CabineTec Subcontract contained retention payment
16 schedules that were acknowledged and affirmed by CabineTec and APCO at trial. As such,
17 CabineTec needed to show that applicable and enforceable conditions precedent were satisfied
18 before APCO had to pay retention. *See Lucini-Parish Ins. v. Buck*,³⁰² (a party who seeks to
19 recover on a contract has the burden of establishing any condition precedent to the respective
20 contract).

21 55. CabineTec did not even attempt to show: (1) completion of the entire Project,
22 (2) final acceptance of the Project by Gemstone, (3) receipt of final payment from Gemstone to
23 APCO, (4) delivery of all as-builts and close out document, and (5) delivery of all final waivers
24 and releases.

25 56. CabineTec did not meet its burden of proof and APCO never received
26 CabineTec's retention to trigger the 10 day period.

27 57. Accordingly, CabineTec's retention payment never became due from APCO.

28
302 108 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] **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..."³⁰³

12 61. A plaintiff "is not excused from making its disclosures because it has not fully
13 completed its investigation of the case."³⁰⁴

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.³⁰⁵

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."³⁰⁶ *See Keener v. United States*,³⁰⁷ (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 ³⁰³NRCP16.1(a)(1)(c)(emphasis added).

25 ³⁰⁴*Id.*

26 ³⁰⁵NRCP 16.1(a)(1)(c).

27 ³⁰⁶NRCP 26(e)(1).

28 ³⁰⁷181 F.R.D. 639, 640 (D. Mont. 1998)

1 64. CabineTec's complaint alleged \$19,547.00 against APCO.³⁰⁸

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 \$19,547.00.³⁰⁹

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 installed³¹⁰ and he had no documentation (daily
19 reports, photographs, etc.) that would confirm that CabineTec ultimately installed cabinets in
20 Phase 1 for APCO.³¹¹

21

22

23 _____

24 ³⁰⁸ Exhibit 156-8.

25 ³⁰⁹ Exhibits 157 (CabineTec's initial disclosures); Exhibit 158 (CabineTec's First
26 Supplemental Disclosure), and Exhibit 159 (CabineTec's second supplemental
27 disclosure).

26 ³¹⁰ Testimony of Mr. Thompson (CabineTec) at Day 5 p. 69.

27 ³¹¹ Testimony of Mr. Thompson (CabineTec) at Day 5 p. 69.

28

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.”³¹² 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.”³¹³

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.³¹⁴

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.³¹⁵

14 75. The Nevada Supreme Court has held that good faith is a question of fact.³¹⁶

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),³¹⁷

18 b. APCO signed joint checks so that its subcontractors, including
19 CabineTec, would get paid, even though APCO was not getting paid,³¹⁸

20
21 ³¹² *A.C. Shaw Cont., Inc. v. Washoe Cnty.*, 105 Nev. 913, 914, 784 P.2d 9, 9
(Nev. 1989) (quoting NRS 104.1203).

22 ³¹³ *Morris v. Bank of Am. Nev.*, 110 Nev. 1274, 1278 n.2, 886 P.2d 454, 457 n.2
(Nev. 1994) (internal quotations omitted).

23 ³¹⁴ See *Hilton Hotels v. Butch Lewis Prods.*, 107 Nev. 226, 232, 808 P.2d
24 919,923 (Nev. 1991).

25 ³¹⁵ *Perry v. Jordan*, 111 Nev. 943, 948, 900 P.2d 335, 338 (Nev. 1995).

26 ³¹⁶ *Consolidated Generator-Nevada, Inc. v. Commins Engine Co., Inc.*, 114 Nev..
27 1304, 1312, 971 P.2d 1251, 1256 (Nev. 1998).

28 ³¹⁷ 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),³¹⁹ 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.³²⁰

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.³²¹ 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
24 ³¹⁸ 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.

25 ³¹⁹ Testimony of Joe Pelan (APCO) Day 1 at p. 100.

26 ³²⁰ See Exhibit 149, CabineTec Subcontract.

27 ³²¹ *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.³²²

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."³²³

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
26 ³²² Testimony of Mary Jo Allen (APCO), Day 3, p. 122.

27 ³²³ *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."³²⁴

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."³²⁵

10 96. "The genesis of an account stated is the agreement of the parties, express or
11 implied."³²⁶ 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 Helix and CabineTec ratified their subcontracts with Camco.

20
21 100. "Ratification of a contract occurs when one approves, adopts, or confirms a
22 contract previously executed by another..."³²⁷

23
24 ³²⁴ *Old W. Enterprises, Inc. v. Reno Escrow Co.*, 86 Nev. 727, 729, 476 P.2d 1, 2
25 (1970).

26 ³²⁵ *Id.*

27 ³²⁶ *Id.*

28 ³²⁷ *Id.*

1 101. Ratification may be express or implied by the conduct of the parties.³²⁸ The
2 party to be charged with ratification of such a contract must have acted voluntarily and with full
3 knowledge of the facts.³²⁹

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."³³⁰

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."³³¹

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."³³²

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."³³³

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
23 ³²⁸ 17A Am Jur 2d Contracts § 10.

24 ³²⁹ *Id.*

25 ³³⁰ 3 Am Jur 2d Agency § 169.

26 ³³¹ *Id.*

27 ³³² 3 Am Jur 2d Agency § 171.

28 ³³³ 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.³³⁴

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.*,³³⁵ ("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*,³³⁶ (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.*,³³⁷ (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*,³³⁸ (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
23 ³³⁴ CabineTec admittedly sent one billing for the full amount of CabineTec's
24 delivered (but uninstalled) cabinets that incorrectly included retention. Retention clearly
25 was not due under the retention payment schedule.

26 ³³⁵ 28 Kan. App. 2d 219, 15 P.3d 353 (2000)

27 ³³⁶ 116 Mich.App. 15, 321 N.W.2d 823 (1982)

28 ³³⁷ 542 S.W.2d 436 (Tex.App.1976), *rev'd in part on other grounds* 552 S.W.2d
425 (Tex.1977)

³³⁸ 8 Cal.3d 67, 104 Cal.Rptr. 57, 500 P.2d 1401 (1972)

1 114. CabineTec and Helix ratified their subcontracts with Camco and discharged
2 APCO.

3
4 The Subcontracts were assigned to Gemstone.

5 115. The following factors are relevant in determining whether an assignment of a
6 construction contract took place: which party was responsible for the administration of the
7 project, which party ensured the design was correctly carried out, who paid the subcontractors
8 and materialmen, which party answered questions from the owner, which parties were on the
9 job site, which party had ongoing involvement with the project, and which party was
10 corresponding with the owner.³³⁹

11 116. These factors weigh in APCO's favor. Each party's behavior is consistent with
12 the assignment of the Helix and CabineTec Subcontracts to Gemstone:

- 13 • **Gemstone:** Gemstone attempted to "terminate" the APCO/Gemstone prime
14 contract and stopped giving direction and/or orders to APCO. Gemstone told the
15 subcontractors to stop working for APCO and that their contracts would be
16 assumed by Camco. Gemstone also ordered APCO off the site.
- 17 • **Camco:** Camco started giving direction to the subcontractors and dictating their
18 work. Camco sent subcontracts and/or Ratification agreements to both Helix and
19 CabineTec. It engaged in negotiations of the respective subcontracts, and it
20 received billings directly from Helix and CabineTec, including the rollover of
21 their retention.
- 22 • **Helix:** Helix did not contact APCO after August 2008 and remained on-site
23 working directly for Gemstone and Camco. It engaged in subcontract
24 negotiations for the same scope of work as it had initially subcontracted for with
25 APCO with Camco, and took direction and performed work under Camco's and
26 Gemstone's direction. Helix submitted pay applications to Camco and even
27 rolled its retention account over to Camco billings. Helix also represented that it
28 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

339 *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.³⁴⁰

118. The Contract was incorporated into the subcontracts.³⁴¹

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.³⁴²

121. After the subcontracts were assigned, Gemstone/Camco were responsible for all executory obligations including payments for retention and future work.³⁴³

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."³⁴⁴

124. "If intent is to be inferred from conduct, the conduct must clearly indicate the party's intention."³⁴⁵

³⁴⁰ Exhibit 2 at 10.4.

³⁴¹ 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.

³⁴² See Exhibit 170/169 Helix's subcontract and Helix Amendment with Camco; and Exhibit 184, CabineTec's subcontract with Camco.

³⁴³ See Exhibit 2, Section 10.4.

³⁴⁴ *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).

1 125. "Thus, the waiver of a right may be inferred when a party engages in conduct so
2 inconsistent with an intent to enforce the right as to induce a reasonable belief that the right has
3 been relinquished."³⁴⁶

4 126. In this case, CabineTec's and Helix's intent was clear: they understood that
5 APCO left the Project. They entered into ratification agreements with Camco and continued
6 working for Camco and Gemstone on the Project without any further dealings with APCO.

7 127. Helix and CabineTec did not negotiate entirely new contracts and their
8 subsequent billings to Camco depicted their retention that was being held by Gemstone, not
9 APCO. They took orders and direction from Camco employees. They sent billings to Camco.
10 They submitted change orders to Camco. They showed up to the Project at Camco's direction
11 and Camco ultimately informed them the Project had shut down. By pursuing this course of
12 action, it was clear that none of the parties believed APCO was the general contractor on the
13 Project. This conduct is entirely inconsistent with any claim that APCO was the general
14 contractor and was responsible for retention or other future payments. APCO paid Helix and
15 CabineTec all amounts due while APCO was the general contractor.

16 Any of the foregoing conclusions of law that would more appropriately be considered to
17 be findings of fact shall be so deemed.

18 ORDER

19 NOW, THEREFORE, the Court hereby directs entry of the foregoing Findings of Fact
20 and Conclusions of Law; and

21 IT IS FURTHER ORDERED that, based upon the foregoing Findings of Fact and
22 Conclusions of Law, and those made regarding the other parties and claims involved in the

23

24

26 ³⁴⁵ *Id.*

27 ³⁴⁶ *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 24th 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.

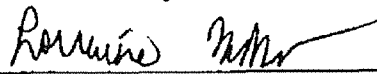
10 
11 _____
12 LORRAINE TASHIRO
13 Judicial Executive Assistant
14 Dept. No. XIII

EXHIBIT D-3
(Pleadings Related to
WRG Design, Inc.)

**WRG DESIGN, INC'S AMENDED STATEMENT OF FACTS
CONSTITUTING NOTICE OF LIEN AND THIRD-PARTY COMPLAINT**

Plaintiff in Intervention	WRG, Inc.		
Original Defendant	Asphalt Products Corp.		
Original Defendant	APCO Construction ("APCO")		
Original Defendant	CAMCO Pacific Construction Company, Inc. ("CAMCO")		
Original Defendant	Gemstone Development West, Inc. ("Gemstone")		
Original Defendant	Fidelity and Deposit Company of Maryland ("FDCM")		
Original Defendant	Scott Financial Corporation		
<u>Causes of Action</u>		<u>Party Name</u>	<u>Disposition</u>
Substantially identical claims to Helix's Amended Statement of Facts Constituting Lien and Complaint-in-Intervention			Notice of Entry of Stipulation and Order of Dismissal filed September 21, 2017
First Cause of Action	Breach of Contract	Gemstone	Dismissed
Second Cause of Action	Breach of Contract	APCO	Dismissed
Third Cause of Action	Breach of Contract	CAMCO	Dismissed
Fourth Cause of Action	Breach of Implied Covenant of Good Faith and Fair Dealing	Gemstone	Dismissed
Fifth Cause of Action	Breach of Implied Covenant of Good Faith and Fair Dealing	APCO	Dismissed
Sixth Cause of Action	Breach of Implied Covenant of Good Faith and Fair Dealing	CAMCO	Dismissed
Seventh Cause of Action	Unjust Enrichment or in the Alternative <i>Quantum Meruit</i>	All Defendants	Dismissed
Eighth Cause of Action	Foreclosure of Mechanic's Lien	All Defendants	Dismissed
Ninth Cause of Action	Claim of Priority	All Defendants	Dismissed
Tenth Cause of Action	Claim Against Bond	CAMCO Surety	Dismissed
Eleventh Cause of Action	Declaratory Judgment	All Defendants	Dismissed

COUNTERCLAIM OF CAMCO AGAINST WRG DESIGN

First Cause of Action	Breach of Contract	WRG Design, Inc.	Dismissed Answer filed April 15, 2010
Second Cause of Action	Breach of Covenant and Good Faith and Fair Dealing	WRG Design, Inc.	Dismissed Answer filed April 15, 2010

**WRG's Amended Statement of Facts
Constituting Notice of Lien and Third-Party
Complaint**

Emil A. Fink
CLERK OF THE COURT

1 **STMT**
2 RICHARD L. PEEL, ESQ.
3 Nevada Bar No. 4359
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16 Attorneys for WRG Design, Inc.

DISTRICT COURT
CLARK COUNTY, NEVADA

11 **ACCURACY GLASS & MIRROR**
12 **COMPANY, INC.,** a Nevada corporation,

13 Plaintiff,

14 vs.

15 **ASPHALT PRODUCTS CORP.,** a Nevada
16 corporation; **APCO CONSTRUCTION,** a
17 Nevada corporation; **CAMCO PACIFIC**
18 **CONSTRUCTION COMPANY, INC.,** a
19 California corporation; **GEMSTONE**
20 **DEVELOPMENT WEST, INC.,** Nevada
21 corporation; **FIDELITY AND DEPOSIT**
22 **COMPANY OF MARYLAND;** **SCOTT**
23 **FINANCIAL CORPORATION,** a North Dakota
24 corporation; **DOES I through X;** **ROE**
25 **CORPORATIONS I through X;** **BOE**
26 **BONDING COMPANIES I through X;** **LOE**
27 **LENDERS I through X,** inclusive,

28 Defendants.

23 **WRG DESIGN, INC.,** a Delaware corporation,

24 Plaintiff in Intervention,

25 vs.

26 **ASPHALT PRODUCTS CORP.,** a Nevada
27 corporation; **APCO CONSTRUCTION,** a
28 Nevada corporation; **CAMCO PACIFIC**
CONSTRUCTION COMPANY, INC., a
California corporation; **GEMSTONE**

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

Consolidated with:

A571792
A574391
A577623
A583289
A584730
A587168

09A587168
203739



WRG DESIGN, INC.'S AMENDED
STATEMENT OF FACTS
CONSTITUTING NOTICE OF LIEN
AND THIRD-PARTY COMPLAINT

EXEMPTION FROM ARBITRATION:
Title to Real Estate

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1 DEVELOPMENT WEST, INC., Nevada
2 corporation; FIDELITY AND DEPOSIT
3 COMPANY OF MARYLAND; SCOTT
4 FINANCIAL CORPORATION, a North Dakota
5 corporation; DOES I through X; ROE
6 CORPORATIONS I through X; BOE
7 BONDING COMPANIES I through X; LOE
8 LENDERS I through X, inclusive,

9 Defendants.

10 WRG DESIGN, INC. ("WRG") by and through its attorneys PEEL BRIMLEY LLP, as
11 for its Amended Statement of Facts Constituting a Notice of Lien and Third Party Complaint
12 ("Amended Complaint") against the above-named defendants complains, avers and alleges as
13 follows:

14 THE PARTIES

15 1. WRG is and was at all times relevant to this action a Delaware corporation, duly
16 authorized, licensed and qualified to do business in Clark County, Nevada.

17 2. WRG is informed and believes and therefore alleges that Defendant GEMSTONE
18 DEVELOPMENT WEST, INC., Nevada corporation ("Owner") is and was at all times relevant
19 to this action, the owner, reputed owner, or the person, individual and/or entity who claims an
20 ownership interest in that certain real property portions thereof located in Clark County, Nevada
21 and more particularly described as follows:

22 Manhattan West Condominiums (Project)
23 Spring Valley

24 County Assessor Description: PT NE4 NW4 SEC 32 21 60 &
25 PT N2 NW4 SEC 32 21 60
26 SEC 32 TWP 21 RNG 60

27 and more particularly described as Clark County Assessor Parcel Numbers 163-32-101-020 and
28 163-32-101-022 through 163-32-101-024 (formerly known as 163-32-101-019 and 163-32-112-
001 thru 163-32-112-246) including all easements, rights-of-way, common areas and
appurtenances thereto, and surrounding space may be required for the convenient use and

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1 occupation thereof, upon which Owners caused or allowed to be constructed certain
2 improvements (the "Property").

3 3. The whole of the Property is reasonably necessary for the convenient use and
4 occupation of the improvements.

5
6 4. WRG is informed and believes and therefore alleges that Defendant APCO
7 CONSTRUCTION, a Nevada corporation ("APCO"), is and was at all times relevant to this
8 action doing business as a licensed contractor authorized to conduct business in Clark County,
9 Nevada. APCO may also be known as Asphalt Products Company.

10 5. WRG is informed and believes and therefore alleges that Defendant CAMCO
11 PACIFIC CONSTRUCTION COMPANY, INC., a California corporation ("CPCC"), is and was
12 at all times relevant to this action doing business as a licensed contractor authorized to conduct
13 business in Clark County, Nevada.

14 6. WRG is informed and believes and therefore alleges that Defendant, FIDELITY
15 AND DEPOSIT COMPANY OF MARYLAND (hereinafter "CPCC Surety"), was and is a
16 bonding company licensed and qualified to do business as a surety in Nevada.

17 7. WRG is informed and believes and therefore alleges that Defendant Scott
18 Financial Corporation ("SFC") is a North Dakota corporation with its principle place of business
19 in Bismark, North Dakota. SFC is engaged in the business of underwriting and originating loans,
20 selling participation in those loans, and servicing the loans. SFC has recorded deeds of trust
21 securing loans given to the Owner for, inter alia, development of the Property.

22 8. WRG does not know the true names of the individuals, corporations, partnerships
23 and entities sued and identified in fictitious names as DOES I through X, ROE
24 CORPORATIONS I through X, BOE BONDING COMPANIES I through X and LOE
25 LENDERS I through X. WRG alleges that such Defendants claim an interest in or to the
26
27
28

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1 Properties, and/or are responsible for damages suffered by WRG as more fully discussed under
2 the claims for relief set forth below. WRG will request leave of this Honorable Court to amend
3 this Amended Complaint to show the true names and capacities of each such fictitious Defendant
4 when WRG discovers such information.

5
6 **FIRST CAUSE OF ACTION**
(Breach of Contract against Owner)

7 9. WRG repeats and realleges each and every allegation contained in the preceding
8 paragraphs of this Amended Complaint, incorporates them by reference, and further alleges as
9 follows:

10
11 10. On or about July 31, 2006 WRG entered into an Agreement with Owner (the
12 "Owner Agreement") to provide certain surveying and mapping related work, materials and
13 equipment to the Property located in Clark County, Nevada (the "Owner Services")

14 11. WRG furnished the Services for the benefit of and at the specific instance and
15 request of the Owner.

16 12. Pursuant to the Owner Agreement, WRG was to be paid an amount in excess of
17 Ten Thousand Dollars (\$10,000.00) (hereinafter "Owner Outstanding Balance") for the Owner
18 Services.

19
20 13. WRG furnished the Owner Services and has otherwise performed its duties and
21 obligations as required by the Owner Agreement.

22 14. The Owner has breached the Owner Agreement by, among other things:

23 a. Failing and/or refusing to pay the monies owed to WRG for the Owner
24 Services;

25 b. Failing to adjust the Owner Agreement price to account for extra and/or
26 changed work, as well as suspensions and delays of Owner Services caused or ordered by the
27 Defendants and/or their representatives;

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1 c. Failing to promptly recognize and grant time extensions to reflect additional
2 time allowable under the Owner Agreement and permit related adjustments in scheduled
3 performance;

4 d. Failing and/or refusing to comply with the Owner Agreement and Nevada law;
5 and
6

7 e. Negligently or intentionally preventing, obstructing, hindering or interfering
8 with WRG's performance of the Owner Services.

9 15. WRG is owed an amount in excess of Ten Thousand Dollars (\$10,000.00) for the
10 Owner Services.

11 16. WRG has been required to engage the services of an attorney to collect the Owner
12 Outstanding Balance, and WRG is entitled to recover its reasonable costs, attorney's fees and
13 interest therefore.
14

15 **SECOND CAUSE OF ACTION**
16 **(Breach of Contract against APCO)**

17 17. WRG repeats and realleges each and every allegation contained in the preceding
18 paragraphs of this Amended Complaint, incorporates them by reference, and further alleges as
19 follows:

20 18. On or about April 17, 2007 WRG entered into an Agreement with APCO (the
21 "APCO Agreement") to provide certain surveying and mapping related work, materials and
22 equipment to the Property located in Clark County, Nevada (the "APCO Services")

23 19. WRG furnished the APCO Services for the benefit of and at the specific instance
24 and request of APCO and/or Owner.
25

26 20. Pursuant to the APCO Agreement, WRG was to be paid an amount in excess of
27 Ten Thousand Dollars (\$10,000.00) (hereinafter "APCO Outstanding Balance") for the APCO
28 Services.

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1 21. WRG furnished the APCO Services and has otherwise performed its duties and
2 obligations as required by the APCO Agreement.

3 22. APCO has breached the APCO Agreement by, among other things:

4 a. Failing and/or refusing to pay the monies owed to WRG for the APCO
5 Services;

6 b. Failing to adjust the APCO Agreement price to account for extra and/or
7 changed work, as well as suspensions and delays of APCO Services caused or ordered by the
8 Defendants and/or their representatives;

9 c. Failing to promptly recognize and grant time extensions to reflect additional
10 time allowable under the APCO Agreement and permit related adjustments in scheduled
11 performance;

12 d. Failing and/or refusing to comply with the APCO Agreement and Nevada law;
13 and

14 e. Negligently or intentionally preventing, obstructing, hindering or interfering
15 with WRG's performance of the APCO Services.

16 23. WRG is owed an amount in excess of Ten Thousand Dollars (\$10,000.00) for the
17 APCO Services.

18 24. WRG has been required to engage the services of an attorney to collect the APCO
19 Outstanding Balance, and WRG is entitled to recover its reasonable costs, attorney's fees and
20 interest therefore.

21 **THIRD CAUSE OF ACTION**
22 **(Breach of Contract against CPCC)**

23 25. WRG repeats and realleges each and every allegation contained in the preceding
24 paragraphs of this Amended Complaint, incorporates them by reference, and further alleges as
25 follows:

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1 26. On or about August 26, 2008, WRG entered into the Ratification and Amendment
2 of Subcontract Agreement ("CPCC Agreement") with CPCC, who replaced APCO as the general
3 contractor on the Project, to continue the services for the Property ("CPCC Services").

4 27. WRG furnished the CPCC Services for the benefit of and at the specific instance
5 and request of CPCC and/or Owner.

6 28. Pursuant to the CPCC Agreement, WRG was to be paid an amount in excess of
7 Ten Thousand Dollars (\$10,000.00) (hereinafter "CPCC Outstanding Balance") for the CPCC
8 Services.

9 29. WRG furnished the CPCC Services and has otherwise performed its duties and
10 obligations as required by the CPCC Agreement.

11 30. CPCC has breached the CPCC Agreement by, among other things:

12 a. Failing and/or refusing to pay the monies owed to WRG for the CPCC
13 Services;

14 b. Failing to adjust the CPCC Agreement price to account for extra and/or
15 changed work, as well as suspensions and delays of CPCC Services caused or ordered by the
16 Defendants and/or their representatives;

17 c. Failing to promptly recognize and grant time extensions to reflect additional
18 time allowable under the CPCC Agreement and permit related adjustments in scheduled
19 performance;

20 d. Failing and/or refusing to comply with the CPCC Agreement and Nevada law;
21 and

22 e. Negligently or intentionally preventing, obstructing, hindering or interfering
23 with WRG's performance of the CPCC Services.
24
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1 31. WRG is owed an amount in excess of Ten Thousand Dollars (\$10,000.00) for the
2 CPCC Services.

3 32. WRG has been required to engage the services of an attorney to collect the CPCC
4 Outstanding Balance, and WRG is entitled to recover its reasonable costs, attorney's fees and
5 interest therefore.
6

7 **FOURTH CAUSE OF ACTION**

8 **(Breach of Implied Covenant of Good Faith & Fair Dealing Against Owner)**

9 33. WRG repeats and realleges each and every allegation contained in the preceding
10 paragraphs of this Amended Complaint, incorporates them by reference, and further alleges as
11 follows:

12 34. There is a covenant of good faith and fair dealing implied in every agreement,
13 including the Owner Agreement.

14 35. Owner breached its duty to act in good faith by performing the Owner Agreement
15 in a manner that was unfaithful to the purpose of the Owner Agreement, thereby denying WRG's
16 justified expectations.
17

18 36. Due to the actions of Owner, WRG suffered damages in an amount to be
19 determined at trial for which WRG is entitled to judgment plus interest.

20 37. WRG has been required to engage the services of an attorney to collect the Owner
21 Outstanding Balance, and WRG is entitled to recover its reasonable costs, attorney's fees and
22 interest therefore.
23

24 **FIFTH CAUSE OF ACTION**

25 **(Breach of Implied Covenant of Good Faith & Fair Dealing Against APCO)**

26 38. WRG repeats and realleges each and every allegation contained in the preceding
27 paragraphs of this Amended Complaint, incorporates them by reference, and further alleges as
28 follows:

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1 39. There is a covenant of good faith and fair dealing implied in every agreement,
2 including the APCO Agreement.

3 40. APCO breached its duty to act in good faith by performing the APCO Agreement
4 in a manner that was unfaithful to the purpose of the APCO Agreement, thereby denying WRG's
5 justified expectations.
6

7 41. Due to the actions of APCO, WRG suffered damages in an amount to be
8 determined at trial for which WRG is entitled to judgment plus interest.

9 42. WRG has been required to engage the services of an attorney to collect the APCO
10 Outstanding Balance, and WRG is entitled to recover its reasonable costs, attorney's fees and
11 interest therefore.
12

13 SIXTH CAUSE OF ACTION

14 (Breach of Implied Covenant of Good Faith & Fair Dealing Against CPCC)

15 43. WRG repeats and realleges each and every allegation contained in the preceding
16 paragraphs of this Amended Complaint, incorporates them by reference, and further alleges as
17 follows:

18 44. There is a covenant of good faith and fair dealing implied in every agreement,
19 including the CPCC Agreement.

20 45. CPCC breached its duty to act in good faith by performing the CPCC Agreement
21 in a manner that was unfaithful to the purpose of the CPCC Agreement, thereby denying WRG's
22 justified expectations.

23 46. Due to the actions of CPCC, WRG suffered damages in an amount to be
24 determined at trial for which WRG is entitled to judgment plus interest.

25 47. WRG has been required to engage the services of an attorney to collect the CPCC
26 Outstanding Balance, and WRG is entitled to recover its reasonable costs, attorney's fees and
27 interest therefore.
28

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SEVENTH CAUSE OF ACTION

(Unjust Enrichment or in the Alternative Quantum Meruit – Against All Defendants)

48. WRG repeats and realleges each and every allegation contained in the preceding paragraphs of this Amended Complaint, incorporates them by reference, and further alleges as follows:

49. WRG furnished the Owner Services, APCO Services and CPCC Services for the benefit of and at the specific instance and request of the Defendants.

50. As to Owner, Asphalt, APCO and CPCC, this cause of action is being pled in the alternative.

51. The Defendants accepted, used and enjoyed the benefit of the Owner Services, APCO Services and CPCC Services.

52. The Defendants knew or should have known that WRG expected to be paid for the Owner Services, APCO Services and CPCC Services.

53. WRG has demanded payment of the Owner Outstanding Balance, APCO Outstanding Balance and CPCC Outstanding Balance.

54. To date, the Defendants have failed, neglected, and/or refused to pay the APCO Outstanding Balance and CPCC Outstanding Balance.

55. The Defendants have been unjustly enriched, to the detriment of WRG.

56. WRG has been required to engage the services of an attorney to collect the APCO Outstanding Balance and CPCC Outstanding Balance, and WRG is entitled to recover its reasonable costs, attorney's fees and interest therefore.

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EIGHTH CAUSE OF ACTION
(Foreclosure of Mechanic's Lien)

57. WRG repeats and realleges each and every allegation contained in the preceding paragraphs of this Amended Complaint, incorporates them by reference, and further alleges as follows:

58. The provision of the Owner Services, APCO Services and CPCC Services was at the special instance and request of the Defendants for the Property.

59. As provided at NRS 108.245 and common law, the Defendants had knowledge of WRG's delivery of the Owner Services, APCO Services and CPCC Services Services to the Property or WRG provided a Notice of Right to Lien.

60. WRG demanded payment of an amount in excess of Ten Thousand and no/100 Dollars (\$10,000.00), which amount remains past due and owing.

61. On or about February 13, 2009, WRG timely recorded a Notice of Lien in Book 20090213 of the Official Records of Clark County, Nevada, as Instrument No. 0004321 (the "Original Lien").

62. One or about April 27, 2009, WRG timely recorded an Amended Notice of Lien in Book 20090427 of the Official Records of Clark County, Nevada, as Instrument No. 0000107 (the "Amended Lien").

63. The Original Lien and Amended Lien are hereinafter collectively referred to as the "Liens".

64. The Liens were in writing and were recorded against the Property for the outstanding balance due to WRG in the amount of Two Hundred Seventy-Five Thousand One Hundred Fifteen and 66/100 Dollars (\$275,115.66).

65. The Liens were served upon the Owner and/or its authorized agents, as required by law.

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1 66. WRG is entitled to an award of reasonable attorney's fees, costs and interest on the
2 APCO Outstanding Balance and CPCC Outstanding Balance, as provided in Chapter 108 of the
3 Nevada Revised Statutes.

4 **NINTH CAUSE OF ACTION**
5 **(Claim of Priority)**

6 67. WRG repeats and realleges each and every allegation contained in the preceding
7 paragraphs of this Amended Complaint, incorporates them by reference, and further alleges as
8 follows:
9

10 68. WRG is informed and believes and therefore alleges that construction on the
11 Property commenced before the recording of any deed(s) of trust and/or other interest(s) in the
12 Property, including the deeds of trust recorded by SFC.

13 69. WRG is informed and believes and therefore alleges that even if a deed(s) of trust
14 and/or other interest(s) in the Property were recorded before construction on the Property
15 commenced, those deed(s) of trust, including SFC's, were thereafter expressly subordinated to
16 WRG's statutory mechanics' lien thereby elevating WRG's statutory mechanics' lien to a
17 position superior to those deed(s) of trust and/or other interests(s) in the Property.
18

19 70. WRG's claim against the Property is superior to the claim(s) of SFC, any other
20 defendant, and/or any Loe Lender.

21 71. WRG has been required to engage the services of an attorney to collect the Owner
22 Outstanding Balance, APCO Outstanding Balance and CPCC Outstanding Balance due and
23 owing for the Owner Services, APCO Services and CPCC Services, and WRG is entitled to
24 recover its reasonable costs, attorney's fees and interest therefore.
25

26 ///

27 ///

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TENTH CAUSE OF ACTION
(Claim Against Bond – CPCC Surety)

72. WRG repeats and realleges each and every allegation contained in the preceding paragraphs of this Amended Complaint, incorporates them by reference, and further alleges as follows:

73. Prior to the events giving rise to this Amended Complaint, the CPCC Surety issued License Bond No. 8739721 (hereinafter the “Bond”) in the sum of Fifty Thousand Dollars (\$50,000.00).

74. CPCC is named as principal and CPCC Surety is named as surety on the Bond.

75. The Bond was provided pursuant to the requirements of NRS 624.270, which Bond was in force during all times relevant to this action.

76. WRG furnished the CPCC Services as stated herein and has not been paid for the same. WRG therefore claims payment on said Bond.

77. The CPCC Surety is obligated to pay WRG the sums due.

78. Demand for the payment of the sums due to WRG has been made, but CPCC and the CPCC Surety have failed, neglected and refused to pay the same to WRG.

79. CPCC and the CPCC Surety owe WRG the penal sum of the Bond.

80. WRG was required to engage the services of an attorney to collect the CPCC Outstanding Balance due and owing to WRG and WRG is entitled to recover its reasonable attorney’s fees and costs therefore.

ELEVENTH CAUSE OF ACTION
(Declaratory Judgment)

81. WRG repeats and realleges each and every allegation contained in the preceding paragraphs of this Complaint, incorporates them by reference, and further alleges as follows:

1 82. Upon information and belief, Owner is the Trustor and SFC is the beneficiary
2 under the following deeds of trust covering the real property at issue:

- 3 a. Senior Deed of Trust dated June 26, 2006, and recorded July 5, 2006, at Book
4 20060705, Instrument No. 0004264;
5 b. Junior Deed of Trust dated June 26, 2006, and recorded July 5, 2006, at Book
6 20060705, Instrument No. 0004265;
7 c. Third Deed of Trust dated June 26, 2006, and recorded July 5, 2006, at Book
8 20060705, Instrument No. 0004266; and,
9 d. Senior Debt Deed of Trust dated and recorded February 7, 2008, at Book
10 20080207, Instrument No. 01482.

11 83. On February 7, 2008, SFC executed a Mezzanine Deeds of Trust Subordination
12 Agreement that expressly subordinated the Senior, Junior, and Third Deeds of Trust to the Senior
13 Debt Deed of Trust "in all respects", "for all purposes", and, " regardless of any priority
14 otherwise available to SFC by law or agreement".

15 84. The Mezzanine Deeds of Trust Subordination Agreement contains a provision that
16 it shall not be construed as affecting the priority of any other lien or encumbrances in favor of
17 SFC. Thus, no presumptions or determinations are to be made in SFC's favor concerning the
18 priority of competing liens or encumbrances on the property, such as WRG's mechanics' lien.

19 85. Pursuant to the a Mezzanine Deeds of Trust Subordination Agreement, SFC was to
20 cause the Senior, Junior, and Third Deeds of Trust to contain specific statements thereon that they
21 were expressly subordinated to the Senior Debt Deed of Trust and SFC was to mark its books
22 conspicuously to evidence the subordination of the Senior, Junior, and Third Deeds of Trust to the
23 Senior Debt Deed of Trust.

24 86. WRG is informed and believes and therefore alleges that construction on the
25 Property commenced at least before the recording of the Senior Debt Deed of Trust and that by
26
27
28

1 law, all mechanics' liens, including WRG's, enjoy a position of priority over the Senior Debt
2 Deed of Trust.

3 87. Because the Mezzanine Deeds of Trust Subordination Agreement renders the
4 Senior, Junior, and Third Deeds of Trust expressly subordinate to the Senior Debt Deed of Trust,
5 it also renders, as a matter of law, the Senior, Junior, and Third Deeds of Trust expressly
6 subordinate to all mechanics' liens, including WRG's.

7 88. A dispute has arisen, and an actual controversy now exists over the priority issue
8 of WRG's mechanics' lien over other encumbrances on the property.

9 89. WRG is entitled to a court order declaring that its mechanics' lien has a superior
10 lien position on the Property over any other lien or encumbrance created by or for the benefit of
11 SFC or any other entity.

12 **WHEREFORE**, WRG prays that this Honorable Court:

13 1. Enters judgment against the Defendants, and each of them, jointly and severally, in
14 the Owner Outstanding Balance, APCO Outstanding Balance and CPCC Outstanding Balance
15 amounts;

16 2. Enters a judgment against Defendants, and each of them, jointly and severally, for
17 WRG's reasonable costs and attorney's fees incurred in the collection of the Owner Outstanding
18 Balance, APCO Outstanding Balance and CPCC Outstanding Balance, as well as an award of
19 interest thereon;

20 3. Enter a judgment declaring that WRG has valid and enforceable mechanic's liens
21 against the Property, with priority over all Defendants, in an amount of the Owner Outstanding
22 Balance, APCO Outstanding Balance and CPCC Outstanding Balance;

23 4. Adjudge a lien upon the Property for the Owner Outstanding Balance, APCO
24 Outstanding Balance and CPCC Outstanding Balance, plus reasonable attorneys fees, costs and
25

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1 interest thereon, and that this Honorable Court enter an Order that the Property, and
2 improvements, such as may be necessary, be sold pursuant to the laws of the State of Nevada, and
3 that the proceeds of said sale be applied to the payment of sums due WRG herein;

4 5. Enter a judgment declaring that WRG's mechanics' lien enjoys a position of
5 priority superior to any lien or encumbrance created by or for the benefit of SFC or any other
6 entity; and
7

8 6. For such other and further relief as this Honorable Court deems just and proper in
9 the premises.

10 Dated this 22 day of June 2009.

11 PEEL BRIMLEY LLP

12 
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26 Attorneys for WRG Design, Inc.

**APCO'S Answer to Helix's Amended
Statement of Facts Constituting Notice of
Lien and Third-Party Complaint**

Helix000344

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1 ANSW

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13 wbg@h2law.com

14 Attorneys for APCO Construction

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

17 APCO CONSTRUCTION, a Nevada
18 corporation,

19 Plaintiff,

20 vs.

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

Defendants.

WRG DESIGN, INC., a Delaware
corporation,

Lien Claimant/Intervenor,

vs.

APSPHALT PRODUCTS CORP., A Nevada

Electronically Filed
08/06/2009 08:00:28 AM

Emil H. Hines
CLERK OF THE COURT

A587168

CASE NO.: 08-A-571228
DEPT. NO.: XIII

Consolidated with: A574391, A574792,
A577623, A583289, A584730, A587168,
A580889 and A589195

**APCO CONSTRUCTION'S ANSWER TO
WRG DESIGN INC.'S AMENDED
STATEMENT OF FACTS
CONSTITUTING NOTICE OF LIEN
AND THIRD-PARTY COMPLAINT**

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1 corporation; APCO CONSTRUCTION, a
2 Nevada corporation; CAMCO PACIFIC
3 CONSTRUCTION COMPANY, INC., a
4 California corporation; GEMSTONE
5 DEVELOPMENT WEST, INC., a Nevada
6 corporation; FIDELITY AND DEPOSIT
7 COMPANY OF MARYLAND; SCOTT
8 FINANCIAL CORPORATION, a North
9 Dakota corporation; DOES I through X; ROE
10 CORPORATIONS I through X; BOE
11 BONDING COMPANIES I through X; LOE
12 LENDERS I through X, inclusive

Defendants.

AND ALL RELATED CASES AND
MATTERS.

APCO CONSTRUCTION'S ANSWER TO
WRG DESIGN INC.'S AMENDED STATEMENT OF FACTS CONSTITUTING
NOTICE OF LIEN AND THIRD-PARTY COMPLAINT

APCO CONSTRUCTION formerly ASPHALT PRODUCT CORPORATION
(hereinafter "APCO"), by and through its attorneys, Gwen Rutar Mullins, Esq. and Wade B.
Gochmour, Esq., of the law firm of Howard and Howard Attorneys PLLC, hereby files this
Answer to WRG Design Inc.'s Amended Statement of Facts Constituting Notice of Lien and
Third Party Complaint (hereinafter "Complaint") and hereby responds and alleges as follows:

THE PARTIES

1. Answering Paragraph 1, 5, 6, 7, and 8 of the Complaint, APCO does not have
sufficient knowledge or information upon which to base a belief as to the truth of the
allegations contained therein, and upon said grounds, denies each and every allegation
contained therein.

2. Answering Paragraphs 2, 3 and 4 of the Complaint, APCO admits the
allegations contained therein.

...

FIRST CAUSE OF ACTION

(Breach of Contract Against Owner)

3. Answering Paragraph 9 of the Complaint, APCO repeats and realleges each and every allegation contained in paragraphs 1 and 2 of this Answer to the Complaint as though fully set forth herein.

4. Answering Paragraphs 10, 11, 12, 13, 14, 15, and 16 of the Complaint, APCO APCO does not have sufficient knowledge or information upon which to base a belief as to the truth of the allegations contained therein, and upon said grounds, denies each and every allegation contained therein on those basis.

SECOND CAUSE OF ACTION

(Breach of Contract Against APCO)

5. Answering Paragraph 17 of the Complaint, APCO repeats and realleges each and every allegation contained in paragraphs 1 through 4 of this Answer to the Complaint as though fully set forth herein.

6. Answering Paragraph 18 of the Complaint, APCO admits that APCO entered into subcontract with WRG Design, Inc. ("WRG") to provide certain surveying and mapping related work and materials on the Manhattan West Condominium Project. As to the remaining allegations of Paragraph 18 of the Complaint, APCO does not have sufficient knowledge or information upon which to base a belief as to the truth of the allegations contained therein, and upon said grounds, denies each and every allegation contained therein on those basis.

7. Answering Paragraph 19 of the Complaint, APCO admits that WRG's services benefited Owner. APCO denies the remaining allegations of Paragraph 19 of the Complaint.

8. Answering Paragraph 20 of the Complaint, APCO admits that the terms of the subcontract with WRG speak for themselves. APCO denies the remaining allegations of Paragraph 20 of the Complaint.

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1 9. Answering Paragraph 21 of the Complaint, APCO admits that WRG furnished
2 services under subcontract, which subcontract was subsequently ratified and assumed by CPCC
3 and/or Gemstone. APCO denies the remaining allegations of Paragraph 21 of the Complaint.

4 10. Answering Paragraphs 22, 23 and 24 of the Complaint, APCO denies each and
5 every allegation contained therein.

6 **THIRD CAUSE OF ACTION**

7 **(Breach of Contract Against CPCC)**

8 11. Answering Paragraph 25 of the Complaint, APCO repeats and realleges each
9 and every allegation contained in paragraphs 1 and 10 of this Answer to the Complaint as
10 though fully set forth herein.

11 12. Answering Paragraph 26 of the Complaint, APCO, upon information and belief,
12 admits the allegations contained therein

13 13. Answering Paragraphs 27, 28, 29, 30, 31, and 32 of the Complaint, APCO does
14 not have sufficient knowledge or information upon which to base a belief as to the truth of the
15 allegations contained therein, and upon said grounds, denies each and every allegation
16 contained therein on those basis.

17 **FOURTH CAUSE OF ACTION**

18 **(Breach of Implied Covenant of Good Faith & Fair Dealing Against Owner)**

19 14. Answering Paragraph 33 of the Complaint, APCO repeats and realleges each
20 and every allegation contained in paragraphs 1 through 13 of this Answer to the Complaint as
21 though fully set forth herein.

22 15. Answering Paragraph 34 of the Complaint, APCO, upon information and belief,
23 admits the allegations contained therein.

24 16. Answering Paragraphs 35, 36 and 37 of the Complaint, APCO does not have
25 sufficient knowledge or information upon which to base a belief as to the truth of the
26 allegations contained therein, and upon said grounds, denies each and every allegation
27 contained therein on those basis.
28

FIFTH CAUSE OF ACTION

(Breach of Implied Covenant of Good Faith & Fair Dealing Against APCO)

17. Answering Paragraph 38 of the Complaint, APCO repeats and realleges each and every allegation contained in paragraphs 1 through 16 of this Answer to the Complaint as though fully set forth herein.

18. Answering Paragraph 39 of the Complaint, APCO, upon information and belief, admits the allegations contained therein.

19. Answering Paragraphs 40, 41 and 42 of the Complaint, APCO does not have sufficient knowledge or information upon which to base a belief as to the truth of the allegations contained therein, and upon said grounds, denies each and every allegation contained therein on those basis.

SIXTH CAUSE OF ACTION

(Breach of Implied Covenant of Good Faith & Fair Dealing Against CPCC)

20. Answering Paragraph 43 of the Complaint, APCO repeats and realleges each and every allegation contained in paragraphs 1 through 19 of this Answer to the Complaint as though fully set forth herein.

21. Answering Paragraph 44 of the Complaint, APCO, upon information and belief, admits the allegations contained therein.

22. Answering Paragraphs 45, 46 and 47 of the Complaint, APCO does not have sufficient knowledge or information upon which to base a belief as to the truth of the allegations contained therein, and upon said grounds, denies each and every allegation contained therein on those basis.

SEVENTH CAUSE OF ACTION

(Unjust Enrichment or in the Alternative Quantum Meruit – Against All Defendants)

23. Answering Paragraph 48 of the Complaint, APCO repeats and realleges each and every allegation contained in paragraphs 1 through 22 of this Answer to the Complaint as though fully set forth herein.

24. Answering Paragraphs 49, 50, 51, 52, 53, 54, 55, and 56 of the Complaint, APCO denies all the allegations as they pertain to, or as they are alleged against, APCO. With respect to any allegations that have been asserted against the remaining Defendants, APCO does not have sufficient knowledge or information upon which to base a belief as to the truth of the allegations contained therein, and upon said grounds, denies each and every allegation contained therein.

EIGHTH CAUSE OF ACTION

(Foreclosure of Mechanic's Lien)

25. Answering Paragraph 57 of the Complaint, APCO repeats and realleges each and every allegation contained in paragraphs 1 through 24 of this Answer to the Complaint as though fully set forth herein.

26. Answering Paragraphs 58, 59, 60, 61, 62, 63, 64, 65, and 66 of the Complaint, APCO denies all the allegations as they pertain to, or as they are or may be alleged against, APCO. With respect to any allegations that have been asserted against the remaining Defendants, APCO does not have sufficient knowledge or information upon which to base a belief as to the truth of the allegations contained therein, and upon said grounds, denies each and every allegation contained therein.

NINTH CAUSE OF ACTION

(Claim of Priority)

27. Answering Paragraph 67 of the Complaint, APCO repeats and realleges each and every allegation contained in paragraphs 1 through 26 of this Answer to the Complaint as though fully set forth herein.

28. Answering Paragraph 68 of the Complaint, APCO admits the allegations contained therein.

29. Answering Paragraph 69 of the Complaint, APCO does not have sufficient knowledge or information upon which to base a belief as to the truth of the allegations contained therein, and upon said grounds, denies each and every allegation contained therein.

1 30. Answering Paragraphs 70 and 71 of the Complaint, APCO denies all the
2 allegations as they pertain to, or as they are alleged against, APCO. With respect to any
3 allegations that have been asserted against the remaining Defendants APCO does not have
4 sufficient knowledge or information upon which to base a belief as to the truth of the
5 allegations contained therein, and upon said grounds, denies each and every allegation
6 contained therein.

7 **TENTH CAUSE OF ACTION**

8 **(Claim Against Bond – CPCC Surety)**

9 31. Answering Paragraph 72 of the Complaint, APCO repeats and realleges each
10 and every allegation contained in paragraphs 1 through 30 of this Answer to the Complaint as
11 though fully set forth herein.

12 32. Answering Paragraphs 73, 74, 75, 76, 77, 78, 79, and 80 of the Complaint,
13 APCO does not have sufficient knowledge or information upon which to base a belief as to the
14 truth of the allegations contained therein, and upon said grounds, denies each and every
15 allegation contained therein.

16 **ELEVENTH CAUSE OF ACTION**

17 **(Declaratory Judgment)**

18 33. Answering Paragraph 81 of the Complaint, APCO repeats and realleges each
19 and every allegation contained in paragraphs 1 through 32 of this Answer to the Complaint as
20 though fully set forth herein.

21 34. Answering Paragraphs 82, 83, 84, 85, 86, 87, and 88 of the Complaint, APCO,
22 upon information and belief, admits the allegations contained therein.

23 35. Answering Paragraph 89 of the Complaint, APCO denies all the allegations as
24 they pertain to, or as they are alleged against, APCO. With respect to any allegations that have
25 been asserted against the remaining Defendants, APCO does not have sufficient knowledge or
26 information upon which to base a belief as to the truth of the allegations contained therein, and
27 upon said grounds, denies each and every allegation contained therein
28

FIRST AFFIRMATIVE DEFENSE

WRG has failed to state a claim against APCO upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

The claims of the WRG have been waived as a result of their respective acts and conduct.

THIRD AFFIRMATIVE DEFENSE

No monies are due WRG at this time as APCO has not received payment for WRG's work from Gemstone, the developer of the Manhattan West Project.

FOURTH AFFIRMATIVE DEFENSE

Any and all damages sustained by WRG are the result of negligence, breach of contract and/or breach of warranty, express and/or implied, of a third-party over whom APCO has no control, and for whose acts APCO is not responsible or liable to WRG.

FIFTH AFFIRMATIVE DEFENSE

At the time and place under the circumstances alleged by the WRG, WRG had full and complete knowledge and information with regard to the conditions and circumstances then and there existing, and through WRG's own knowledge, conduct, acts and omissions, assumed the risk attendant to any condition there or then present.

SIXTH AFFIRMATIVE DEFENSE

Whatever damages, if any, were sustained by WRG, were caused in whole or in part or were contributed to by reason of WRG's own actions.

SEVENTH AFFIRMATIVE DEFENSE

The liability, if any, of APCO must be reduced by the percentage of fault of others, including WRG.

EIGHTH AFFIRMATIVE DEFENSE

The damages alleged by WRG were caused by and arose out of the risk which WRG had knowledge and which WRG assumed.

...

...

NINTH AFFIRMATIVE DEFENSE

The alleged damages complained of by WRG were caused in whole or in part by a new, independent and intervening cause over which APCO had no control. Said independent, intervening cause was the result of any alleged damages resulting to WRG.

TENTH AFFIRMATIVE DEFENSE

APCO's obligations to WRG have been satisfied or excused.

ELEVENTH AFFIRMATIVE DEFENSE

WRG failed to perform their work in workmanlike manner thus causing damages in excess to the sums WRG claim are due under the subcontract with APCO.

TWELFTH AFFIRMATIVE DEFENSE

The claim for breach of contract is barred as a result of WRG's failure to satisfy conditions precedent.

THIRTEENTH AFFIRMATIVE DEFENSE

The claims, and each of them, are premature.

FOURTEENTH AFFIRMATIVE DEFENSE

WRG should indemnify APCO for any and all losses, damages or expenses APCO sustains as a result of any claims by Gemstone for damages that Gemstone allegedly sustained due to WRG's improper workmanship on the Manhattan West Project, including, but not limited to, any damage amount and the attorney's fees and costs incurred by APCO relative thereto.

FIFTEENTH AFFIRMATIVE DEFENSE

APCO is entitled to an offset or a setoff of any damages that APCO sustains as a result of WRG's failure to complete the work in a workmanlike manner and/or breach of contract.

SIXTEENTH AFFIRMATIVE DEFENSE

Any obligations or responsibilities of APCO under the subcontract with WRG, if any, have been replaced, terminated, voided, cancelled or otherwise released by the ratification entered into between WRG, Gemstone and CPCC and APCO no longer bears any liability thereunder.

SEVENTEENTH AFFIRMATIVE DEFENSE

APCO has been forced to retain the services of an attorney to defend this action and therefore is entitled to reasonable attorneys' fees and costs.

EIGHTEENTH AFFIRMATIVE DEFENSE

WRG has failed to comply with the requirements of NRS 624.

NINETIETH AFFIRMATIVE DEFENSE

WRG may have failed to comply with all requirements of NRS 108 to perfect its lien.

TWENTIETH AFFIRMATIVE DEFENSE

WRG has failed to promptly assert its respective claims against APCO and APCO reserves the right to request the Court to strike any improper pleadings filed against APCO.

TWENTY-FIRST AFFIRMATIVE DEFENSE

The claims against APCO are barred as a result of WRG's failure to comply with the requirements of NRCP Rule 24 including, but not limited to, WRG having failed to timely apply to the Court to intervene in this action as required.

TWENTY-SECOND AFFIRMATIVE DEFENSE

WRG's claims are barred under the doctrine of accord and satisfaction.

TWENTY-THIRD AFFIRMATIVE DEFENSE

Pursuant to NRCP Rule 8 and 11, as amended, all possible affirmative defenses may not have been alleged herein insofar as sufficient facts were not available after reasonable inquiry upon the filing of this Answer to the Statement, and therefore, APCO reserves the right to amend their Answer to allege additional affirmative defenses if subsequent investigation so warrants.

WHEREFORE, APCO prays for judgment as follows:

1. That WRG take nothing by way of its Complaint on file herein and that the same be dismissed with prejudice against APCO;

2. For an award of attorneys' fees and costs incurred herein by APCO; and

...

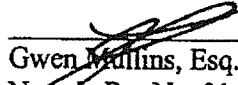
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3. For such other and further relief as this Court may deem just and proper.

DATED this 5 day of August, 2009.

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CERTIFICATE OF MAILING

On the 5th day of August, 2009, the undersigned served a true and correct copy of the foregoing APCO CONSTRUCTION'S ANSWER TO WRG DESIGN INC.S' AMENDED STATEMENT OF FACTS CONSTITUTING NOTICE OF LIEN AND THIRD-PARTY COMPLAINT, by U.S. Mail, postage prepaid, upon the following:

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CAMCO & FDCM's Answer and CAMCO's Third-Party Complaint

Helix000360

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9 Attorneys for
10 Camco Pacific Construction Company, Inc. and
11 Fidelity and Deposit Company of Maryland

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

14 **ACCURACY GLASS & MIRROR**
15 **COMPANY, INC.,** a Nevada corporation,

16 Plaintiff,

17 vs.

18 **ASPHALT PRODUCTS CORP.,** a Nevada
19 corporation; **APCO CONSTRUCTION,** a
20 Nevada corporation; **CAMCO PACIFIC**
21 **CONSTRUCTION COMPANY, INC.,** a
22 California corporation; **GEMSTONE**
23 **DEVELOPMENT WEST, INC.,** Nevada
24 corporation; **FIDELITY AND DEPOSIT**
25 **COMPANY OF MARYLAND;** **SCOTT**
26 **FINANCIAL CORPORATION,** a North
27 Dakota Corporation; **DOES I through X;**
28 **ROE CORPORATIONS I through X;** **BOE**
BONDING COMPANIES I through X; **LOE**
LENDERS I through X, inclusive,

Defendants.

FILED

SEP 11 5 21 PM '09

Ed [Signature]
CLERK OF THE COURT

Case No: A587168
Dept. No: XIII

Consolidated with:
A571228

**ANSWER TO WRG DESIGN, INC.'S
STATEMENT OF FACTS
CONSTITUTING LIEN, THIRD-PARTY
COMPLAINT, AND CAMCO PACIFIC
CONSTRUCTION INC.'S
COUNTERCLAIM**

09A587168
389442



1 WRG DESIGN, INC., a Delaware
2 corporation,

3 Plaintiff in Intervention,

4 vs.

5 ASPHALT PRODUCTS CORP., a Nevada
6 corporation; APCO CONSTRUCTION, a
7 Nevada corporation; CAMCO PACIFIC
8 CONSTRUCTION COMPANY, INC., a
9 California corporation; GEMSTONE
10 DEVELOPMENT WEST, INC., Nevada
11 corporation; FIDELITY AND DEPOSIT
12 COMPANY OF MARYLAND; SCOTT
13 FINANCIAL CORPORATION, a North
14 Dakota Corporation; DOES I through X;
15 ROE CORPORATIONS I through X; BOE
16 BONDING COMPANIES I through X; LOE
17 LENDERS I through X, inclusive,

18 Defendants.

19 CAMCO PACIFIC CONSTRUCTION
20 COMPANY, INC., a California corporation;
21 FIDELITY AND DEPOSIT COMPANY OF
22 MARYLAND,

23 Counterclaimant,

24 vs.

25 WRG DESIGN, INC., a Delaware
26 corporation; and DOES I through X,
27 inclusive,

28 Counterdefendants,

29 Third Party Defendants CAMCO PACIFIC CONSTRUCTION COMPANY, INC.
30 (hereinafter "Camco") and FIDELITY AND DEPOSIT COMPANY OF MARYLAND
31 (hereinafter "Fidelity")(Camco and Fidelity are sometimes collectively referred to herein as
32 "Defendants"), by and through their counsel, Steven L. Morris, Esq. of the law firm of
33 Woodbury, Morris & Brown, hereby answer the Third Party Complaint of WRG DESIGN,
34 INC., a Delaware corporation (hereinafter "Plaintiff"), on file herein, and admit, deny and allege
35 as follows:

1 1. Camco and Fidelity deny each and every allegation contained in Paragraphs 29,
2 30, 31, 32, 45, 46, 47, 50, 51, 53, 54, 55, 56, 58, 60, 66, 71, 73, 74, 75, 76, 77, 78, 79, 80, and
3 89 of Plaintiff's Complaint.

4 2. Camco and Fidelity are without information or knowledge sufficient to ascertain
5 the truth of the allegations contained in Paragraphs 4, 8, 10, 11, 12, 13, 14, 15, 16, 18, 19, 20,
6 21, 22, 23, 24, 34, 35, 36, 37, 39, 40, 41, 42, 46, 61, 62, 63, 64, 65, and 69 of Plaintiff's
7 Complaint, and therefore deny each and every allegation contained therein.

8 3. Camco and Fidelity admit the allegations contained in Paragraphs 1, 2, 3, 5, 6, 7,
9 68, 82, 83, 86, and 87 of Plaintiff's Complaint.

10 4. As to Paragraphs 9, 17, 25, 33, 38, 43, 48, 57, 67, 72, and 81 of Plaintiff's
11 Complaint, Camco and Fidelity repeat and reallege the answers to paragraphs 1 through 89 as
12 though fully set forth herein.

13 5. As to Paragraph 26 Camco and Fidelity admit that Camco entered into a
14 Ratification and Amendment of Subcontract Agreement with WRG, but as for the remaining
15 allegations therein, Camco admits that the contract speaks for itself.

16 6. As to Paragraph 27 Camco admits that WRG furnished work for the benefit of
17 and at the specific request of the Owner, but denies the remaining allegations therein.

18 7. As to Paragraph 28 Camco admits that WRG was to be paid by the Owner for its
19 services, but denies the remaining allegations therein.

20 8. As to Paragraph 44 Camco admits that it acted in good faith, but as for the
21 remaining allegations therein, Camco admits that the contract speaks for itself.

22 9. As to Paragraph 49 Camco admits that WRG furnished services for the benefit of
23 and at the specific instance of the Owner, but denies the remaining allegations therein.

24 10. As to Paragraph 52 Camco admits that WRG knew or should have known that
25 payment would have been made by Owner, but denies the remaining allegations therein.

26 11. As to Paragraph 57 Camco denies that WRG's claim against the Property is
27 superior to Camco's, but is without information or knowledge sufficient to ascertain the truth of
28

1 the remaining allegations therein.

2 12. As to Paragraph 84 Camco admits that the Mezzanine Deeds of Trust
3 Subordination Agreement speaks for itself, but denies the remaining allegations therein.

4 13. As to Paragraph 85 Camco admits that the Mezzanine Deeds of Trust
5 Subordination Agreement speaks for itself, but denies the remaining allegations therein.

6 14. As to Paragraph 88 Camco admits that there is an actual controversy as to the
7 overall priority of all the mechanic's liens, but denies the remaining allegations therein.

8 15. To the extent that any allegations set forth in Plaintiff's Complaint have not been
9 answered, these answering Defendants deny each and every allegation or inference thereof not
10 expressly set forth hereinabove.

11 16. It has become necessary for these answering Defendants to retain the services of
12 WOODBURY, MORRIS, & BROWN, attorneys at law, to defend this action, and as a result,
13 these answering Defendants have been damaged by the Plaintiff, and these answering
14 Defendants are accordingly entitled to their attorney fees and costs incurred herein.

15 **AFFIRMATIVE DEFENSES**

16 1. The Complaint on file herein fails to state a claim against Camco and Fidelity
17 upon which relief can be granted.

18 2. That any or all negligence or fault on the part of the Plaintiff would be active and
19 primary, and any negligence or fault of Camco, if any, would be secondary and passive.

20 3. Any and all damages sustained by Plaintiff are the result of its own negligence
21 and breach of contract.

22 4. Camco is not negligent with respect to the transactions which are the subject of
23 the Complaint, and is and was not in breach of contract.

24 5. At the time and place under the circumstances alleged by the Plaintiff, Plaintiff
25 had full and complete knowledge and information in regard to the conditions and circumstances
26 then and there existing, and through Plaintiff's own knowledge, conduct, acts and omissions,
27 assume the risk attendant to any condition there or then present.

28

1 6. The liability, if any, of Camco must be reduced by the percentage of fault of
2 others, including the Plaintiff.

3 7. The claims, and each of them, are barred by the failure of the Plaintiff to plead
4 those claims with particularity.

5 8. The claims of Plaintiff have been waived as a result of the acts and the conduct
6 of the Plaintiff.

7 9. The claim for breach of contract is barred as a result of the failure to satisfy
8 conditions precedent.

9 10. Plaintiff has failed to mitigate its damages.

10 11. Plaintiff's claims are barred from recovery by the doctrine of unclean hands.

11 12. Plaintiff's claims are barred from recovery by the doctrine of laches, waiver, and
12 estoppel.

13 13. To the extent that Plaintiff's work was substandard, not workmanlike, defective,
14 incomplete, or untimely, Plaintiff is not entitled to recover for said work.

15 14. Plaintiff has approved and ratified the alleged acts of Camco for which Plaintiff
16 now complains.

17 15. Plaintiff has failed to name parties that are necessary and/or indispensable to this
18 action.

19 16. Defendant Fidelity is informed and believes that it is entitled to assert all of the
20 defenses available to its principal, and Fidelity hereby incorporates by reference all defenses
21 raised, or that could have been raised, by Fidelity's principal.

22 17. Fidelity alleges that its liability, if any exists, which is expressly denied, is
23 limited to the penal sum of the applicable Contractor's License Bond.

24 18. Any license or surety bond executed by Fidelity was limited to the classification
25 of contracting activities as set forth in its Nevada State Contractor's License Bond.

26 19. The liability of Fidelity if any, is limited to its obligations as set forth in its surety
27 bond agreement.

28 20. The liability of Fidelity if any, is limited to the statutory liability as set forth in

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1 NRS 624.273.

2 21. Fidelity is not liable for the acts or omissions of persons, individuals, firms,
3 partnerships, corporations, associations, or other organizations that are not its named principal.

4 22. The damages sustained by Plaintiff, if any, were caused by the acts of third
5 persons who were not agents, servants, or employees of Fidelity, or its principal, and who were
6 not acting on behalf of Fidelity or its principal in any manner or form, and as such, Fidelity or
7 its principal are not liable in any manner to the Plaintiff.

8 23. Fidelity is not liable for the acts or omissions of persons, individuals, firms,
9 partnerships, corporations, associations, or other organizations that are not its named principal.

10 24. Plaintiff's suit against Fidelity is not timely brought under the terms of the bond
11 because no judgment or court decree has been entered against its principal.

12 25. It has been necessary for Camco and Fidelity to retain the services of the law
13 offices of Woodbury, Morris & Brown, attorneys at law, for the purpose of defending this
14 action, and Camco is entitled to payment of all costs, fees and expenses associated with and/or
15 arising out of the defense of this action.

16 26. Pursuant To NRCP 8, all possible affirmative defenses may not have been
17 alleged herein, inasmuch as sufficient facts were not available after reasonable investigation and
18 inquiry upon the filing of Defendants' Answer and, therefore, Defendants reserves the right to
19 amend their Answer to allege additional affirmative defenses if subsequent investigation
20 warrants.

21 WHEREFORE, Third Party Defendants Camco and Fidelity pray as follows:

- 22 1. That Plaintiff take nothing by way of its Complaint;
23 2. For an award of reasonable attorneys' fees and costs for having to defend this
24 action; and
25 3. For such other and further relief as the Court deems just and proper.

26 COUNTERCLAIM

27 Counterclaimant CAMCO PACIFIC CONSTRUCTION COMPANY, INC. (hereinafter
28 "Camco") by and through its attorney, Steven L. Morris, Esq. of the law firm of Woodbury,

1 Morris & Brown complains as follows:

2 **JURISDICTIONAL ALLEGATIONS**

3 1. Camco was and is at all times relevant to this action, a California corporation,
4 doing business in Clark County, Nevada as a contractor duly licensed by the Nevada State
5 Contractor's Board.

6 2. Counterdefendant WRG DESIGN, INC., a Delaware corporation (hereinafter
7 referred to as "WRG") is and was at all times relevant to this action, a corporation conducting
8 business in Clark County, Nevada.

9 3. The true names and capacities, whether individual, corporate, associate or
10 otherwise of Defendants named herein as DOES I through X are unknown to Counterclaimant.
11 Said DOE Defendants are responsible for damages suffered by Counterclaimant; therefore,
12 Counterclaimants sue Defendants by such fictitious names. Counterclaimants will ask leave to
13 amend this Counterclaim to show the true names and capacities of each such DOE Defendants
14 at such time as the same have been ascertained.

15 **FIRST CAUSE OF ACTION**

16 **(Breach of Contract)**

17 4. Camco repeats and realleges each and every allegation contained in the
18 preceding paragraphs of Camco's Counterclaim, incorporates the same at this point by reference
19 and further allege:

20 5. Camco is informed and believes and thereupon alleges that WRG entered into a
21 Subcontract Agreement ("Subcontract Agreement") with APCO Construction related to the
22 Manhattan West Condominiums project, located in Clark County, Nevada (the "Project").

23 6. On or about August 26, 2008, Camco and WRG entered into a Ratification
24 and Amendment of Subcontract Agreement ("Ratification Agreement") wherein Camco and
25 WRG acknowledged, ratified, and agreed to the terms of the Subcontract Agreement.

26 7. Section 3.4 of the Subcontract Agreement states: "Any payments to
27 Subcontractor shall be conditioned upon receipt of the actual payments by Contractor from
28 Owner. Subcontractor herein agrees to assume the same risk that the Owner may become

1 insolvent that Contractor has assumed by entering into the Prime Contract with the Owner.”

2 8. All payments made to subcontractors and suppliers on the Project were made
3 directly by Gemstone through Nevada Construction Services. (See Exhibit A, attached hereto
4 and incorporated herein by this reference).

5 9. Camco never received payment on behalf of the subcontractors, including WRG,
6 and was therefore, not responsible nor liable for payment to the subcontractors, including WRG.

7 10. WRG agreed and expressly acknowledged that it assumed the risk of non-
8 payment by the Owner.

9 11. WRG breached its contract with Camco by demanding payment from Camco and
10 by bringing claims against Camco and its License Bond Surety relative to payment for the work
11 allegedly performed by WRG on the Project.

12 12. Camco is entitled to all of its attorneys' fees and costs pursuant to the terms and
13 conditions of the Ratification Agreement.

14 13. Camco has been required to engage the services of the law firm of
15 WOODBURY, MORRIS & BROWN to prosecute this matter and Camco is entitled to a
16 reasonable attorneys' fees and costs therefor.

17 **SECOND CAUSE OF ACTION**

18 **(Breach of Covenant of Good Faith and Fair Dealing)**

19 14. Camco repeats and realleges each and every allegation contained in the
20 preceding paragraphs of Counterclaimant's Counterclaim, incorporate the same at this point by
21 reference and further allege:

22 15. The law imposes upon WRG, by virtue of the contract, a covenant to act in good
23 faith and deal fairly with Counterclaimant;

24 16. Despite this covenant, WRG's intentional failure to abide by the terms of the
25 parties written contract, WRG breached its covenant to act in good faith and deal fairly;

26 17. As a result of its breach of the covenant of good faith and fair dealing, WRG has
27 injured Camco in an amount in excess of \$10,000.00.

28 18. Camco has been required to engage the services of the law firm of

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1 WOODBURY, MORRIS & BROWN to prosecute this matter and Camco is entitled to a
2 reasonable attorneys' fees and costs therefor.

3 WHEREFORE, Counterclaimant Camco prays as follows:

4 1. This Court enter judgment against Counterdefendants, and each of them, in an
5 amount in excess of \$10,000.00, plus interest at the contract rate;

6 2. For an award of reasonable attorneys' fees and costs for having to prosecute this
7 action; and

8 3. For such other and further relief as the Court deems just and proper.

9 DATED this 11th day of September 2009.

10 WOODBURY, MORRIS & BROWN

11 David Blake #1659 for
12 STEVEN L. MORRIS, ESQ.
13 Nevada Bar No. 7454
14 701 N. Green Valley Pkwy., Suite 110
15 Henderson, NV 89074-6178
16 Attorneys for Camco and Fidelity
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CERTIFICATE OF MAILING

I hereby certify that on the 11th day of September 2009, I served a copy of the
ANSWER TO WRG DESIGN, INC.'S STATEMENT OF FACTS CONSTITUTING
LIEN, THIRD PARTY COMPLAINT AND CAMCO PACIFIC CONSTRUCTION'S
COUNTERCLAIM by facsimile and by enclosing a true and correct copy of the same in a
sealed envelope upon which first-class postage was fully prepaid, and addressed to the
following:

RICHARD L. PEEL, ESQ
PEEL BRIMLEY, LLP
3333 E. Serene Avenue, Suite 200
Henderson, Nevada 89074
Fax: 702-990-7273

and that there is regular communication by mail between the place of mailing and the place so
addressed.

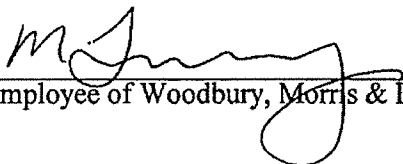

An Employee of Woodbury, Morris & Brown

EXHIBIT A

Helix000371



Date: April 28, 2009
To: Nevada State Contractor's Board
From: Scott Financial Corporation
Subject: ManhattanWest Project

I am the President of Scott Financial Corporation ("SFC"), which is a seasoned commercial finance company located in Bismarck, North Dakota and licensed in Nevada.

SFC is the lender for ManhattanWest Buildings 2, 3, 7, 8, and 9 located at West Russell Road and Rocky Hill Street in Las Vegas, Nevada (the "Project"). No other ManhattanWest buildings were funded or constructed. The Project consisted of condominiums developed by Gemstone Development West, Inc. ("Gemstone").

The purpose of this letter is to explain the payment process for the Project and to demonstrate that Camco Pacific Construction Company, Inc. ("Camco") had no direct responsibility to pay the trade contractors or any other contracting parties on the Project.

As the Project's lender, SFC established a credit facility between SFC (with its network of participating community banks) and Gemstone. As the loan originator and lead lender, SFC established both the Senior and Mezzanine Credit Facilities that were forecasted to fund the entire construction cost to complete the Project; provided however, that an adequate level of condominium sales were closed by Gemstone in a timely manner.

In connection with its funding of the Project, SFC required a very detailed and disciplined payment procedure, which it has used successfully and extensively in the past. This payment procedure was developed collectively between SFC, Gemstone, and Nevada Construction Services ("NCS") to execute the monthly construction funding on the Project in a proper and timely manner.

This payment procedure was communicated to the general contractors and the trade contractors through them and was used to facilitate the payment structure for all trade contractors/vendors.

Prior to the commencement of the Project, SFC entered into a voucher control contract with NCS. First, pursuant to such agreement, NCS managed the voucher control and served as the third party disbursement agent. Second, as part of such agreement, NCS also performed third party site construction inspections for SFC prior to each disbursement. Please note that NCS is a disbursement agent for SFC and does not "approve funding", that is a role of SFC and our participating banks exclusively.

APCO Construction ("APCO") was the original General Contractor for the Project. The protocol for issuing payment involved APCO submitting a monthly payment application to Gemstone based on a schedule of values and materials delivered by the vendors and trade contractors (the "Payment Application").

Next, Gemstone would review the Payment Application and approve or reject its contents based upon the work completed as of the submission of such Payment Application. Upon the final agreement and approval of the Payment Application by Gemstone and APCO, Gemstone would send the Payment Application and any supporting documents to NCS. NCS

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Office: 701.255.2215 • Fax: 701.223.7299

A licensed and bonded corporate finance company.

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would review the Payment Application and the supporting documents and compare them with its payment records. Thereafter, NCS would order a formal NCS inspection of the jobsite to verify that sufficient progress was made to warrant the amount in the Payment Application. After completing such inspection, NCS submitted its request for funding to SFC.

Upon receiving such approval, SFC conducted its final monthly creditor review and completed the funding approval process by taking the following steps: (a) formally signing-off on the Payment Application and (b) obtaining final approval of the Payment Application from the co-lead bank.

Finally, after the Payment Application was properly approved and verified, the corresponding funds were requested by SFC from its participating lenders and advanced into the SFC Project Control Account. Thereafter, the respective (a) soft costs in the Payment Application were advanced directly to Gemstone and (b) the hard costs in the Payment Application were wired directly to NCS for controlled disbursement.

Upon receiving such hard cost funds, NCS would send the corresponding payment directly to APCO for disbursement to the trade contractors. This was the payment process throughout the period that APCO remained on the Project, except for the June and July 2008 Pay Applications where NCS was notified by Gemstone to issue joint checks to the sub contractors.

APCO was terminated by Gemstone for cause in August 2008. After such termination, Gemstone engaged Camco to serve as the General Contractor for the Project. When this substitution occurred, the payment process used during the APCO engagement was continued with some alterations.

The most important of these alterations was based on the shift from a Guaranteed Maximum Price to a simple monthly fee. APCO had agreed to deliver the Project for a Guaranteed Maximum Price and received a fee for its services based on a percentage of each Payment Application. Consequently, APCO assumed responsibility for the financial aspects of the Project and the proper engagement and payment of the trade contractors.

In contrast, Camco was paid a basic fee of \$100,000 per month plus certain expenses to serve as the General Contractor for the project; provided however, that Gemstone, not Camco, was solely responsible for selecting and negotiating the engagement of the trade contractors by Camco. Because of this shift in responsibility, all decisions and communications for payment authorization and processing were handled by Gemstone, without Camco's ongoing involvement.

In addition, Gemstone provided the financial management component of the Project and was responsible for (a) establishing and maintaining the budget and (b) keeping full and detailed accounts on the Project.

Furthermore, NCS's protocol also changed to effectively limit Camco's involvement. Because Camco was not responsible for establishing or maintaining the budget, Camco's only role in the payment process was to compile and submit each initial Payment Application.

Thereafter, the review, negotiation, and request for the corresponding payments were handled by Gemstone. As a result, NCS never sent payment for trade contractors to Camco. Instead, such payments were sent directly to the trade contractors.

Furthermore, Camco (a) as a rule did not communicate directly with SFC; (b) only occasionally communicated with NCS regarding the payment process; and (c) did not make any decisions related to the Payment Application or the corresponding payments to Camco or the trade contractors. Payments decisions were all made by Gemstone because they were responsible for the budget and as they pertained to credit decisions reviewed by SFC.

In addition, Camco had no physical control over the funds, and all disbursements were completed between NCS and the trade contractors directly. We understand the trade contractors were aware of Camco's limited role in this payment process. First, the negotiation of each trade contractor's engagement was managed by Gemstone employees and only subsequently ratified by Camco. Second, the terms of the engagement contracts between Camco and each trade contractor and Camco and Gemstone described this relationship. Third, on several occasions when a particular trade contractor expressed concern regarding the timing of a forthcoming payment, Gemstone and Camco repeatedly and consistently explained that all lending decisions regarding funding (credit issues specifically) were ultimately made by SFC and that neither Gemstone nor Camco had the ability, authority, or resources to make any payments that did not come from SFC approval.

To this end, on occasion, trade contractors demanded that they be provided with some evidence of payment in order to continue working. In response, Camco could not, and to our understanding did not, promise that any payment was forthcoming.

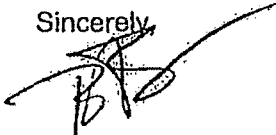
SFC delivered on a limited basis, letters to such disgruntled trade contractors informing them that all credit decisions on payment funding must be approved by SFC and that such funds would be only paid once SFC had completed its required approval process and determined that such payments were appropriate. Attached to this letter as Exhibit A are two such letters executed by SFC and delivered to certain trade contractors.

In December 2008, SFC sent correspondence to NCS that due to uncured loan defaults by Gemstone, a decision was made to cease all funding on the Project. The communications regarding this decision are attached to this letter as Exhibit B. SFC further requested that NCS return funds in the amount of \$993,866.72. NCS returned the funds requested and no additional payment for previous work performed was disbursed to Gemstone, Camco, or any of the trade contractors for the Project. Camco was not a part of these transactions, was not a participant in these decisions, and was unaware of such decisions until the above notice was sent to NCS.

Upon learning of SFC's decision to cease funding, we understand Camco terminated its engagement contract with Gemstone based on Gemstone's failure to pay Camco pursuant to the terms of such contract. As a result of changed circumstances on the Project after APCO's termination, Camco's role was limited with regard to payment.

As a result, SFC does not believe Camco or for that matter NCS can be held responsible for payment of any outstanding applications of the trade contractors.

Sincerely,



Brad Scott
President
Scott Financial Corporation

Exhibit A

Payment Status Letters from SFC to Trade Contractors