IN THE SUPREME COURT OF THE STATE OF NEVADA

Supreme Court Case No. 77320
Consolidated with Case No. 80508

HELIX ELECTRIC OF NEVADA, LLC

Appellant/Cross-Respondent

v.

APCO CONSTRUCTION, INC., A NEVADA CORPORATION,

Respondent/Cross-Appellant.

Appeal from Judgment
Eighth Judicial District Court, Clark County
The Honorable Mark Denton, District Court Judge
District Court Case No. **08A571228**

APPELLANT/CROSS RESPONDENT'S CONSOLIDATED OPENING BRIEF

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NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following is an entity as described in NRAP 26.1(a) and must be disclosed. These representations are made in order that the Judges of this Court may evaluate possible disqualification or recusal.

No publicly held company owns ten percent or more of the stock of Appellant/Cross-Respondent, Helix Electric of Nevada, LLC ("Helix"). Peel Brimley LLP is the only law firm that has appeared on behalf of Helix in this case or is expected to appear on behalf of Helix in this Court.

Dated this 16th day of October, 2020.

PEEL BRIMLEY LLP

/s/ Eric B. Zimbelman

_____

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JURISDICTIONAL STATEMENT

This Court has jurisdiction under NRAP 3A(b)(1). As discussed more fully in Helix's Docketing Statement, the judgments appealed from arise from constituent Case No. A587168 of the Eighth Judicial District Court that was consolidated into a broader case of claims arising from the failed Manhattan West Condominiums Project in Las Vegas, Nevada. The District Court entered an Order granting Helix's Motion for a Rule 54(b) Certification, concluding that no just reason for delay exists with respect to the claims and defenses of Helix and APCO and directing judgment as to the underlying judgment and an order awarding fees and costs to APCO.

ROUTING STATEMENT

Pursuant to NRAP 17(b)(9), this case is presumptively assigned to the Court of Appeals because it involves statutory lien matters under NRS Chapter 108. However, Helix respectfully submits that this case should be assigned to the Supreme Court because it raises a question of statewide importance and an issue of first impression that the Supreme Court may wish to address relating to "pay-if-paid" agreements and this Court's long-standing recognition that "Nevada's public policy favors securing payment for labor and material contractors." *Lehrer McGovern Bovis, Inc. v. Bullock Insulation, Inc*., 124 Nev. 1102, 1117-18, 197 P.3d 1032, 1042 (Nev. 2008). Specifically, but without limitation, the Supreme Court recently clarified in a related case, *APCO Construction, Inc., v. Zitting Brothers*

Construction, Inc., 136 Nev. Adv. Op. 64 (October 8, 2020), that pay-if-paid provisions "are unenforceable if they require subcontractors to waive or limit rights provided under NRS 624.624-.630, relieve general contractors of their obligations or liabilities under NRS 624.624-.630, or require subcontractors to waive their rights to damages, as further outlined under NRS 624.628(3)." However, and because the District Court in *Zitting Brothers* did not abuse its discretion in limiting APCO's condition-precedent defenses to payment of retention in Section 3.8 of the applicable subcontract agreement, the *Zitting Brothers* Court identified but declined to specifically rule on whether such conditions precedent were also void and unenforceable pursuant to NRS 624.628(3) and the Nevada Mechanic's Lien Statute. Those same conditions are at issue here and, as explained more fully below, are either "pay-if-paid" agreements or have otherwise been used to require Helix to waive or limit the rights provided to it under NRS 624.624-.630, to relieve APCO of its obligations or liabilities under NRS 624.624-.630, or to require Helix to waive its rights to damages and recovery under the Mechanic's Lien Statute.

ISSUES PRESENTED

1. Whether the District Court erred in concluding that Helix and APCO had a meeting of the minds sufficient to apply and enforce the terms of a written subcontract "agreement" that was never accepted by both parties despite many months of negotiations and ongoing work on the project? And having so erred,

should the District Court have instead analyzed Helix's entitlement to payment for the earned and unpaid retention as an oral contract, quasi-contract and/or *quantum meruit* rendering moot any application of the disputed conditions precedent to payment of retention in Section 3.8 of the written "agreement?"

2. Assuming the existence of a meeting of minds as to the written agreement, whether the District Court erred in enforcing conditions precedent to Helix's entitlement to payment of earned and withheld retention when such conditions precedent expressly include payment to APCO from the Project owner (i.e., pay-if-paid) and other conditions entirely outside of Helix's control, such as completion of the entire Project and approval and final acceptance of the incomplete and terminated Project, such that the conditions precedent effectively deprive Helix of its statutory right to prompt payment and a mechanic's lien?

3. Whether the District Court erred in ignoring APCO's obligation under Section 9.4 of the written subcontract agreement to pay Helix the "amount due from [the Project owner] to [APCO] for [Helix's] completed work" where APCO terminated its contract with the Project Owner pursuant to NRS 624.610, which "entitled" APCO to "the cost of all work, labor, materials, equipment and services" it had furnished to date?

4. For purposes of Helix's entitlement to payment, whether the District Court erred in concluding that Helix replaced APCO with Camco (a contractor hired by the Project owner after APCO left the Project) when Helix never agreed to release or waive its rights as against APCO and there was no assignment of Helix's subcontract with APCO and, therefore, no novation allowing APCO to escape liability to Helix for the unpaid balance of its contract?

5. Whether the District Court erred, as it did in the related action involving APCO subcontractor *Zitting Brothers*, in concluding that APCO is not the "party legally liable" against whom judgment was proper pursuant to NRS 108.239(12) when the sale proceeds of the property are insufficient to satisfy all liens?

6. Even assuming this Court does not reverse and remand for the foregoing reasons, whether the District Court erred in awarding fees and costs to APCO pursuant to NRCP 68 when trial commenced in this consolidated matter more than 5 years before APCO gave its offer of judgment.

STATEMENT OF THE CASE

In a recently-decided related case, *APCO Construction, Inc., v. Zitting Brothers Construction, Inc.*, 136 Nev. Adv. Op. 64 (2020), this Court clarified that pay-if-paid provisions "are unenforceable if they require subcontractors to waive or limit rights provided under NRS 624.624-.630, relieve general contractors of their

obligations or liabilities under NRS 624.624-.630, or require subcontractors to waive their rights to damages, as further outlined under NRS 624.628(3).”). This appeal arises out of the same facts and circumstances as the *Zitting Brothers* case, with which it was consolidated. Here, after trial, the District Court improperly applied conditions precedent to payment of retention earned by Helix to deny recovery to Helix. Because those conditions precedent, including payment to APCO by the Project owner, serve to deprive Helix of its right to prompt payment, relieve APCO of its payment obligations and effectively deprive Helix of its rights under the Nevada Mechanic’s Lien Statute, those conditions precedent should be deemed void and unenforceable. For this and other reasons, Helix seeks reversal of the District Court’s judgment and award of attorney’s fees and costs and remand to the District Court.

STATEMENT OF FACTS

I. PROCEDURAL HISTORY.

This action, which the District Court described as “one of the oldest cases on the Court’s docket,” 90-JA-6566, arises out of a construction project in Las Vegas known as the Manhattan West Condominiums Project (“the Project”) located at West Russell Road and Rocky Hill Street in Clark County Nevada, (the “Property”), then owned by Gemstone Development West, Inc. (“Gemstone” or “the Owner”).

27-JA-001575.[1] In 2006, Gemstone initially hired Respondent/Cross-Appellant APCO Construction Inc. ("APCO") as its general contractor on the Project pursuant to a General Construction Contract for GMP ("the APCO-Gemstone Contract"). [*Id*.]. Helix was an electrical subcontractor on the Project. [*Id*.]. In August 2008 APCO stopped work and, on September 5, 2008, terminated the APCO-Gemstone Contract pursuant to NRS Chapter 624. 33-JA-002015-16[2]; 34-JA-002081.[3]]. Effective August 25, 2008 Gemstone contracted with Camco Pacific Construction Co., Inc. ("Camco") to act as a construction manager for the Project. 34-JA002147 - 35-JA002176[4]; 81-JA-005850.[5] Within a few short months, by December 15, 2008, the Project lenders withdrew funding and work on the project was terminated and never completed. 41-JA002321-22[6]; 41-JA002323-26.[7] APCO, Camco and numerous subcontractors, including Helix, recorded mechanic's liens against the Property and the District Court consolidated multiple cases for purposes of discovery and trial because they shared sufficient common questions of law and fact. 97-JA-7030.

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[1] Stipulated Statement of Facts, Joint Pretrial Memorandum ¶ 1 (hereinafter "PTM1").
[2] Trial Exhibit 23 (hereinafter "TE23").
[3] TE28.
[4] TE162.
[5] Bench Trial Transcript Vol. 5 p. 31, ll. 10-11 (hereinafter "5TR31:10-11").
[6] TE39.
[7] TE40.

The Project's lender later sought and obtained summary judgment on the issue of lien priority, which this Court affirmed in denying a Writ Petition by the mechanic' lien claimants, including APCO. *See In re Manhattan W. Mech.'s Lien Litig.*, 131 Nev. 702, 712, 359 P.3d 125, 131 (2015); see also 96-JA-6959-58. In the interim, the District Court stayed the consolidated action but ordered the Property sold free and clear of liens such that, after the Writ Petition was denied, the proceeds went to the lender. 27-JA-001577.

Thereafter, the stay was lifted and the subcontractors, such as Helix, continued to pursue claims for non-payment from APCO. 27-JA-001577. Although trial in this consolidated matter had commenced on October 30, 2012 upon the trial of the lien amount, lien validity and related claims of lien claimant, Ready Mix, Inc., 96-JA-06925, trial resumed on January 17, 2018 with Helix and others presenting their claims against APCO and/or Camco. 84-JA-6194.

Before trial re-commenced, the District Court granted a motion for summary judgment in favor of Helix and other lien claimants represented by Helix's attorneys, Peel Brimley LLP ("PB Lien Claimants"). 22-JA-01187-1198. Generally, but without limitation, the Court concluded that, pursuant to NRS 624.624 and *Lehrer McGovern Bovis, Inc. v. Bullock Insulation, Inc.*, 124 Nev. 1102, 1117-18, 197 P.3d 1032, 1042 (Nev. 2008), higher-tiered contractors, such as APCO and Camco are required to pay their lower-tiered subcontractors within the time periods set forth in

NRS 624.626(1) and may not fail to make such payment based on so-called "pay-if-paid" agreements that are against public policy, void and unenforceable except under the very limited circumstances that do not exist in this case. *Id*. Accordingly, the Court ruled that APCO and Camco could not assert or rely on any defense to their payment obligations, if any, to the subcontractors, based on a pay-if-paid agreement. 22-JA-001198. Among several pay-if-paid provisions in the Helix-APCO Contract were the following: (i) Section 3.4 (conditioning "any payments to Subcontractor" on "receipt of actual payments by Contractor from Owner); (ii) Section 3.5 (also conditioning progress payment from APCO to its subcontractors on "receipt of the actual payments by Contractor from Owner"); and Section 3.8 (conditioning APCO's obligation to pay withheld retention "upon and only upon … [among other conditions] [r]eceipt of final payment by Contractor from Owner"). 22-JA-001196.

The District Court also granted several motions in limine precluding APCO and Camco from asserting or offering evidence that any of Helix's work on the Project was (i) defective, (ii) not done in a workmanlike manner, or (iii) not done in compliance with the terms of the parties' agreement because APCO and Camco could present no evidence to support such claims. 22-JA-001168, 22-JA-001177.

After trial, the District Court issued several separate Findings of Fact, Conclusions of Law and Judgments resolving the various claims, including the judgment appealed from herein dismissing Helix's claims against APCO, 84JA-

006194 - 85-JA-6264; 90-JA-6541-6550, as well as a separate monetary judgment in favor of Helix against Camco. 89-JA-006522-6540. The District Court later awarded costs and attorney's fees to APCO against Helix. 100-JA-7281-7299.

On or about June 28, 2018, Helix filed a Notice of Appeal seeking review of the District Court's dismissal of Helix's claims against APCO and the subsequent award of attorney's fees and costs, which became Case No. 76276. This Court later dismissed that appeal, ruling that the underlying decision was "not appealable as a final judgment." 101-JA-007314.

On January 3, 2020, the District Court entered an Order granting Helix's Motion for a Rule 54(b) Certification, concluding that no just reason for delay exists with respect to the claims and defenses of Helix and APCO and directing judgment as to the underlying judgment and the Order awarding fees and costs. 119-JA-009124-9131. On January 29, 2020, within 30 days of the Rule 54(b) Certification, Helix filed a Notice of Appeal resulting in this Case No. 80508. 119/120-JA-009132-9136. APCO filed a Cross-Appeal Case No. 77320. 120-JA-009164-10310. This Court consolidated those appeals by Order dated August 21, 2020.

II. RELEVANT FACTS.

By way of its agreement with Gemstone, and for a price of $153,472,300, 29-JA-001837[8], APCO agreed to:

[8] TE2 ¶5.02(a).

- "Complete the work" required by the APCO-Gemstone Contract, "furnish efficient business administration and superintendence," and "use its best efforts to complete the Project;" 29-JA-001819-1820[9];
- "…engage contractors, subcontractors, sub-subcontractors, service providers, [and others, collectively referred to as "Third-Party Service Providers"] to perform the work…"; 29-JA-001820[10];
- Submit monthly to Gemstone, "applications for payment for the previous month on forms similar to AIA G702 and G703 and a corresponding approved Certificate for Payment" with payment application "based on a Schedule of Values [that] shall allocate the entire GMP among the various portions of the Work" with APCO's fee to be shown as a separate line item" and "show the Percentage of Completion of each portion of the Work as of the end of the period covered by the Application for Payment"; 29-JA-001839[11]; and
- Upon receipt of a monthly progress payment, "promptly pay each Third-Party Service Provider the amount represented by the portion of the Percentage of the Work Completed that was completed by such

[9] TE2 ¶ 2.01(a).
[10] TE2 ¶ 2.02(a).
[11] TE2 ¶ 5.05(a)-(c).

Third-Party Service Provider during the period covered by the corresponding Progress Payment." 29-JA-001841.[12]

APCO in turn hired various subcontractors, including Helix, to perform certain scopes of work. After APCO provided its form Subcontract Agreement ("the APCO Subcontract") to Helix (the same form of APCO Subcontract that APCO provided to Zitting Brothers Construction, Inc.), on or about November 28, 2007, Helix modified, signed and returned the same to APCO for its review, consideration and execution. 35-JA-002121-2146[13]; 29-JA-001774.[14] Helix's proposed modifications were contained in an attachment titled the Helix Electric Exhibit to the Standard Subcontract Agreement [between APCO and Helix (hereinafter, "the Helix Exhibit (APCO)"]. 35-JA-002136-2143. Helix also interlineated Section 1.1 of the Helix-APCO Subcontract to reflect that "the attached Helix Electric Exhibit is also part of this Subcontract Agreement." 35-JA-002121.[15] Helix's purpose in providing these modifications and the Helix Exhibit (APCO) was to take "exception to the terms and conditions in APCO form subcontract document" because "we don't agree with those terms/conditions or we're adding our own terms and conditions." 29-JA-001778.[16] Among the many modifications made by Helix, Helix:

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[12] TE2 ¶ 5.05(g).
[13] TE45 (hereinafter "the Helix-APCO Subcontract").
[14] 1TR107:19-108:22.
[15] TE45 ¶ 1.1
[16] 1TR111:16-24.

- Deleted the "Pay-if-Paid" language, including a provision purporting to require Helix to assume the risk that the owner may become insolvent. 29JA001784[17]; and
- Added a provision granting to Helix the right to "terminate this Subcontract … for the same reasons and under the same circumstances and procedures with respect to [APCO] as [APCO] may terminate its agreement with respect to [Gemstone]." 29-JA-001787[18];

On or about April 8, 2008 (i.e., nearly 5 months after Helix submitted its proposed amendments to APCO), APCO signed and returned the Helix-APCO Subcontract with numerous changes to the proposed Helix Exhibit, with APCO rejecting many of Helix's proposed revisions. 36-JA-002189-2198; 29-JA-001778-1779.[19] Helix did not consent to APCO's proposed revisions to the Helix Exhibit (APCO). *Id*.

Thereafter, on July 11, 2008, APCO's Project Manager, Randy Nickerl ("Nickerl") sent Helix's Vice President, Robert Johnson ("Johnson"), another marked-up revision of the Helix Exhibit-APCO stating in an accompanying email "I have gone through and done all I can …" 29-JA-001779; 36-JA-002189.[20] However,

[17] 1TR116:2 – 117:18.
[18] 1TR120:11-19
[19] TE506; 1TR111:25 - 112:5.
[20] TE506; 1TR112:17-19.

by this time, APCO was already threatening to stop work on the Project and soon thereafter (in August 2008) stopped work and (in September 2008) terminated its agreement with Gemstone pursuant to the Nevada Right to Stop Work Statute. 29-JA-001780; 32-JA-001981; 33-JA-002015; 34-JA-002081.[21]

By way of APCO's July 11, 2008 revision of the Helix Exhibit (APCO), APCO removed two provisions to which it had earlier agreed. Specifically:

- Item 17. Whereas APCO was previously willing to grant Helix the same rights of termination that APCO had as against Gemstone, APCO struck that provision, apparently concerned with "their current expose (sic) on the project and them not wanting [Helix] to have the same protection that they were trying to afford themselves." 35-JA-002138; 29-JA-001788-1789;[22] and
- Item 15. Whereas APCO was previously willing to limit Helix's obligation to perform changes to the work without a written change order, APCO now struck that provision, apparently because "at that time [Helix] had nine hundred and some thousand out in change orders on the project." 35-JA-002138; 29-JA-001789.[23]

[21] 1TR113:13-18; TE10; TE23; TE28.
[22] 1TR121:17 - 122:6].
[23] 1TR122:7-16.

Johnson's undisputed testimony is that Helix never accepted APCO's July 11, 2008 revisions. 29-JA-001781.[24] Despite this, Helix performed the agreed-upon work for the Project and submitted many payment applications to APCO, as reflected in summary documents admitted at trial. See 80-JA-5622; As testified by Helix Project Manager Andy Rivera ("Rivera"), Helix billed $5,131,207.11 and was paid the sum of $4,626,186.11. 78-JA-005341.[25] Helix was not paid the sum of $505,021.00 with respect to these pay applications, which amount represents the retention withheld by APCO. *Id*.

In construction projects, retention (also known as "retainage") is monies earned by a contractor but withheld from progress payments (usually 5-10%) until the conclusion of the project in case the contractor abandons the project, fails to complete its work or there is otherwise some kind of dispute relating to the contractor's work. See e.g., 78-JA-005321.[26] Retention is not a bonus or additional payment but rather an "escrow account" of a temporarily-withheld portion of the monies otherwise earned by the contractor for its work in place. 78-JA-005321-5322.[27] By way of its progress payment applications on the forms required by APCO,

[24] 1TR114:7-8.
[25] 2TR58:5-21.
[26] 2TR38:2-22.
[27] 2TR38:8-13; 2TR39:1-3.

Helix showed a gross billing, 10% retention and a "net amount due this period." 55-JA-003344.[28]

There is no evidence of any allegations or claims against Helix that may have allowed APCO to indefinitely withhold Helix's retainage or apply the same as an offset. 78-JA-005321-5322.[29] Indeed, the District Court granted Helix's motions in limine against APCO precluding APCO from asserting or offering any evidence that any of Helix's work was defective, not done in a workmanlike manner or otherwise not in compliance with the terms of the parties' agreement. 22-JA-001177.

APCO included in its payment applications to Gemstone the amounts billed by the subcontractors, including those submitted to APCO by Helix. See *e.g.*, 30-JA-001885; 29-JA-001695-1696.[30] Helix provided undisputed testimony that the amounts billed were reasonable for the work performed. 78-JA-005347-5348.[31] APCO does not dispute these figures, though it incorrectly argued, and the District Court incorrectly found, that "Helix was only seeking retention and not the unpaid invoices." 84-JA-006227-6228.[32]

As discussed more fully below, while Helix complied with Gemstone's directive to submit payment applications through Camco between September 5,

[28] TE501:6
[29] 2TR38:23 – 39:9
[30] TR4:1-19; 1TR28:25 - 29:8.
[31] 2TR64:24 - 65:1].
[32] Finding of Fact 55 (hereinafter, "FF165").

2008 (when the APCO/Gemstone Agreement was terminated – hereinafter, the "Termination Date") and December 2008 (when Gemstone closed the incomplete Project), Helix, in fact, never stopped looking to APCO for payment of the work it performed on the Project and APCO never terminated the Helix-APCO Subcontract. See *e.g.,* 78-JA-005348-5355; 61-JA-003782, 3794, 3801, 3802.[33]

APCO and Gemstone each claimed to have terminated the other. 33-JA-002002-2010.[34] Among other events leading up to APCO's stopping of work and termination of the APCO-Gemstone Contract are the following:

- On July 17, 2008, APCO provided Gemstone with a written notice that unless APCO was paid monies owing by the close of business on July 28, 2008, APCO would stop work on the Project. 32-JA-001979[35];
- On July 28, 2008, APCO provided a written notice to Gemstone that it was stopping work, and that it intended to terminate the APCO-Gemstone Contract as of August 14, 2008. *Id*.;
- On August 11, 2008, APCO issued a new notice of intent to stop work (pursuant to NRS 624.606 through NRS 624.630 inclusive), which

[33] 2TR65:2 - 72:20; TE508:49, 61, 68,69.
[34] TE14.
[35] TE6.

superseded and replaced the July 28, 2008 notice. 32-JA-001981-1987; 29-JA-001740[36];

- On August 15, 2008, Gemstone provided notice to APCO that Gemstone intended to terminate APCO for cause pursuant to Section 10.02(b) of the APCO-Gemstone Contract unless within 48 hours APCO cured certain alleged breaches of that agreement. 32-JA-001988-2001[37];
- In response to Gemstone's Notice of Termination, APCO's counsel wrote to Gemstone's counsel on August 15, 2008 disputing Gemstone's contentions and generally denying that APCO was in default. Noting that "[t]he timing of Gemstone's letter leaves little doubt as to its true purpose," APCO's counsel complained that Gemstone's Notice of Termination was, in essence, an attempt to claim that it had terminated APCO (i.e., on August 24, 2008) before APCO could affect its termination of Gemstone pursuant to its August 11, 2008 notice and by operation of NRS Chapter 624 (i.e., on September 5, 2008). 33-JA-002002-2010[38];

[36] TE10; 1TR73:5-20.
[37] TE13.
[38] TE14.

- As explained by APCO's primary witness, Joe Pelan ("Pelan"), Gemstone's notice was an attempt to "outfox" APCO by trying to terminate APCO before the expiration of the ten-day (stop work) and 15-day (termination) periods required by NRS 624 could elapse. 29-JA-001746-1747[39];
- On August 21, 2008, APCO provided Gemstone with written notice that APCO was stopping work effective immediately and that APCO intended to terminate the APCO-Gemstone Contract on September 5, 2008 pursuant to NRS 624.606 through NRS 624.630 inclusive. 33-JA-002015-2016[40]; and
- On September 5, 2008, APCO wrote to Gemstone confirming that it "has terminated the [APCO-Gemstone Contract] in accordance with NRS 624.610." 34-JA-002081.[41]

By way of correspondence dated August 19, 2008, APCO advised Gemstone that it had "in excess of $20,000,000.00 in civil, architectural and structural changes that we are pricing and will be submitting shortly ***for completed work***." 33-JA-002011 (emphasis added).[42] Later, the District Court issued an Order striking

[39] 1TR79:25 - 80:12.
[40] TE23.
[41] TE28.
[42] TE15:1.

Gemstone's Answer and Counterclaims for failure to give reasonable attention to matters, failure to obtain new counsel and failure to appear at hearings. 27-JA-001576.[43] APCO then filed a Motion for Summary Judgment seeking confirmation that (i) APCO complied with, and Gemstone materially breached, the terms of the APCO-Gemstone Contract, and (ii) Gemstone owes APCO $20,782,659.95. *Id.*[44] Although the Court minutes of the June 13, 2013 hearing reflect that APCO's motion (not opposed by the defaulted Gemstone) was verbally granted with some unspecified "qualifications," the parties were unable to locate any written order. 27-JA-001576; 29-JA-001672, 1674.[45]

APCO's summary judgment amount of $20,782,659.95 is identical to the Notice of Lien that it recorded in 2008 (the "APCO Notice of Lien"). 81-JA-005817-5818.[46] The APCO Notice of Lien describes the manner in which this amount was calculated. Specifically, the APCO's Notice of Lien identifies the original amount of the APCO-Gemstone Contract as $153,472,300 but states in a footnote that "the original contract amount performed and billed through [APCO's] termination of contract (i.e., August 2008) is $60,325,901.89. 81-JA-005817. The APCO Notice of Lien also adds "actual or additional change order work, materials and equipment

[43] PTM16.
[44] PTM17.
[45] PTM17; 1TR5:2-7, 7:14-22.
[46] TE3176.

performed through [APCO's] termination of contract" of $9,168,116.32. *Id*. From that sum, APCO deducts "the total amount of all payments received to date" of $48,711,358.26." *Id*. The math, as confirmed by APCO's bookkeeping witness Mary Jo Allen ("Allen"), is as follows:

Amount of work performed:	$60,325,901.89
Additional or changed work performed:	$ 9,168,116.32
Subtotal work performed:	$69,494,018.22
Less Payments:	($48,711,358.26)
TOTAL:	$20,782,659.96

80-JA-005806; 80-JA-005768-5770. [47]

Despite recording a lien and obtaining a summary judgment for more than $20 million, which lienable amount included amounts owed to Helix of $505,021.00, APCO tried to create the impression that it was only owed monies earmarked for APCO rather than all of the monies for which it has invoiced Gemstone to that point, including subcontractor earnings. Specifically, APCO's Mary Joe Allen misleadingly testified (by focusing only on the amounts sought for APCO for that payment application, exclusive of its subcontractors), and the District Court therefore incorrectly found, that APCO was only owed only approximately $1.4

[47] TE536; 3TR145:25 - 147:18.

million when APCO stopped work on the Project. 80-JA-005745; 84-JA-006218.[48] As the APCO Notice of Lien reliably demonstrates, the amount Ms. Allen testified to is more than $19 million less than APCO actually claimed to be owed.

APCO admits that it did not issue to Helix any notice of termination or notice of intent to terminate the Helix-APCO Subcontract pursuant to Section 9.2 of the Helix-APCO Subcontract (or otherwise). 29-JA-001737; see 35-JA-002129.[49] To the contrary, while APCO was threatening to stop work and terminate its contract with Gemstone, APCO repeatedly directed Helix and the other APCO subcontractors that they remained under contact with APCO. Specifically, but without limitation, APCO gave the following notices to its subcontractors:

- Exhibit 48. An emailed notice advising APCO's subcontractors that it was issuing "a STOP WORK NOTICE to GEMSTONE" but that "ALL SUBCONTRACTORS ARE STILL CONTRACTUALLY BOUND TO THE TERMS OF THEIR RESPECTIVE SUBCONTRACTS WITH APCO CONSTRUCTION …" 41-JA-002357 (CAPS in original)[50];

[48] 3TR122:10-12; FF 111.
[49] 1TR70:15-19; TE45, ¶9.2.
[50] TE48.

- Exhibit 23. A notice that APCO was stopping work but informing the subcontractors that "**APCO CONSTRUCTION is only stopping work on this project**" and that "**all subcontractors, until advised in writing by APCO CONSTRUCTION, remain under contract with APCO CONSTRUCTION**." 33-JA-002015 (CAPS and **bold** in original).[51]

Helix's Robert Johnson testified that, from Helix's perspective, "until APCO does something contractually to inform me our relationship is different, it's not changed." 78-JA-005306.[52] APCO never gave Helix written notice of termination of the Helix-APCO Subcontract. 29-JA-001793.[53] Mr. Johnson also testified that, unlike APCO, Helix did not believe it had a legal right to stop work on the Project after APCO did so. 29-JA-001793.[54] In fact, Helix worried that if it had stopped work it "would have been at full risk of [APCO] pursuing us for abandoning the contract." Id. [55] APCO did not dispute this point. After APCO stopped work, Gemstone hired Camco to be its "construction manager" pursuant to an Amended and Restated ManhattanWest General Construction Agreement effective as of

[51] TE23.
[52] 2TR23:17-19.
[53] 1TR126:1-4.
[54] 1TR128:12-16.
[55] 1TR128:15-16.

August 25, 2008 ("the Camco-Gemstone Contract"). 35-JA-002147.[56] However, the Camco-Gemstone Contract is significantly different than the APCO-Gemstone Contract. Unlike APCO's agreement with Gemstone, the Camco-Gemstone Contract is a "cost plus agreement" such that, unlike APCO, Camco was not at risk with respect to the costs of construction. 41-JA-002324; 81-JA-005861.[57] Pursuant to the Camco-Gemstone Contract, Camco was entitled to receive a fee of $100,000.00 per month [see Ex. 162, ¶6.01] on top of whatever costs the owner incurs on the Project. 81-JA-005863; 35-JA-002153.[58]

The APCO-Gemstone Contract and the Camco-Gemstone Contract are also vastly different with respect to the duties of the contractor and the owner. Unlike the APCO-Gemstone Contract, the Camco-Gemstone Contract expressly exempts Camco from many traditional general contractor obligations. For example, Article III obligates Gemstone, rather than Camco, to "be responsible for and shall coordinate all construction means, methods, techniques, sequences, procedures necessary for or related to the work." 35-JA-002153. [59] There was no evidence presented at trial to demonstrate that Gemstone possessed the requisite licensing to perform such general contractor tasks. Camco's Dave Parry further admitted that

[56] TE162.
[57] TE40; 5TR42:1-13.
[58] 5TR44:10-20; TE162 ¶6.01.
[59] TE162, ¶3.01(a).

these are tasks that are usually performed by a general contractor." 81-JA-005867.[60] The Camco-Gemstone Contract also contains "Express Exclusions" from Camco's responsibility, including:

- Responsibility for any of the costs, fees or expenses related to the work;
- Any requirement to deliver daily reports; and
- Responsibility for the acts, errors or omissions of its subcontractors. 35-JA-002151.[61]

Mr. Parry described Camco as "more of a construction manager at this point than a general contractor" 81-JA-005850.[62] Camco aggregated payment applications from subcontractors but payments to the subcontractors was never sent to or through Camco, whose "only role in the payment process was to complete and submit each initial payment application." 81-JA-005865; 46-JA-002582.[63] Instead of payments flowing through Camco to subcontractors, payments to subcontractors were made (if at all) through a voucher control company, Nevada Construction Services. *Id*. Although retention was withheld from payments to subcontractors, there was no retention of moneys to be paid to Camco. 81-JA-005864; 36-JA-002156.[64] Mr. Parry also could not point to any portion of the Camco-Gemstone Contract that required

[60] 5TR48:4-11.
[61] TE162 ¶3.02(a)-(c).
[62] 5TR31:10-11.
[63] 5TR46:10-22; TE138.
[64] 5 TR 45:13-24; TE162 ¶7.03(a).

Camco to supervise the work of the subcontractors, and could not deny that Camco was "essentially … there to lend [its] license" to Gemstone. 81-JA-005869-5870.[65]

Camco presented some subcontractors with a standard form Subcontract Agreement ("the Camco Subcontract"). 61-JA-003814-3927; 81-JA-005876-5877.[66] Camco also presented subcontractors who had previously worked for APCO, including Helix, with a document titled Ratification and Amendment of Subcontract Agreement ("the Camco Ratification"). See *e.g.*, 49-JA-002798-2825.[67] The undisputed testimony is that Helix declined to execute either of these documents. 29-JA-001790-1792; 61-JA-003845.[68] Subsequent to the Termination Date, Helix continued to look to APCO for its retention and to both APCO and Camco for payment for its work after the Termination Date.

Helix submitted gross payment applications to Camco totaling $1,010,255.25 (i.e., inclusive of retention). 60-JA-003734-3735, 3770-71; 61-JA-003782, 3801-3802.[69] Helix was paid only $175,778.80 and is owed the balance, $834,476.45. 78-JA-005354.[70] Helix provided undisputed testimony that the amounts it billed were reasonable for the work performed. *Id*.

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[65] 5TR50:17 - 51:9.
[66] TE510; 5TR57:8 – 58:23.
[67] TE 184.
[68] 1TR123:1 - 124:25; TE 510:6.
[69] TE508:1-2, 37-8, 49,68-9.
[70] 5TR71:1-25.

Helix timely recorded a mechanic's lien, as amended ("the Helix Lien"), pursuant to NRS Chapter 108 and perfected the same. 62-JA-003928-4034.[71] The Helix Lien identified both APCO and Camco as the "person by whom the lien claimant was employed or to whom the lien claimant furnished or agreed to furnish work, materials or equipment." 62-JA-003935, 3937.[72] The District Court found that the Helix Lien was timely and perfected. 90-JA-006572. While the District Court awarded Helix the balance of the sums billed through Camco in a judgment against Camco, it denied any such recovery as against APCO. The District Court later awarded costs and attorney's fees to APCO on the basis of a Rule 68 Offer of Judgment, from which Helix also appeals and APCO cross-appeals. 100-JA-007281-7299.

SUMMARY OF THE ARGUMENT

I. Helix and APCO never reached a meeting of the minds with respect to the Helix-APCO Subcontract and were in fact still negotiating the terms of that agreement when APCO left the Project and terminated its agreement with Gemstone. The District Court should therefore have analyzed Helix's entitlement to payment of its unpaid retention as an implied contract, or on the basis of *quantum meruit*. It was undisputed that the monies Helix earned and billed on the Project were reasonable.

[71] TE512.
[72] TE512:7-9.

II. Even if the Helix-APCO Subcontract was the operative agreement, the District Court improperly applied conditions precedent to APCO's obligation to pay Helix's retention. Such preconditions are in violation of NRS 624.624(5) and include an express pay-if-paid provision and otherwise imposed on Helix compliance with conditions within the sole control of APCO and Gemstone, such as completion of the entire Project and Gemstone's approval and final acceptance of a project that it chose to terminate. Because the conditions the District Court required Helix to meet in order to receive payment of monies it otherwise earned were impossible to meet and outside of Helix's control (such as providing "close-out" documents on a terminated project) and/or exercises in futility (such as submitting a formal application for payment of retention that will never be made and that requires, in any event, compliance with the other preconditions), Helix was deprived of its statutory prompt payment and mechanic's lien rights.

III. In interpreting the Helix-APCO Subcontract, the District Court also improperly ignored the provisions of Section 9.4, which were triggered by APCO's termination of the APCO-Gemstone Contract. In that event, APCO became obligated to pay Helix the "amount due from [the Project owner] to [APCO] for [Helix's] completed work." By terminating its contract with Gemstone pursuant to NRS 624.610, APCO became "entitled" to "the cost of all work, labor, materials,

equipment and services" it had furnished to date, which "amount due" included the costs of Helix's completed work.

IV. APCO never terminated the Helix-APCO Subcontract and instead repeatedly informed Helix that it remained "under contract" with APCO. Helix therefore continued performance of that work while, for approximately three months, Gemstone unsuccessfully attempted to complete the Project using Camco as a construction manager in place of its former general contractor, APCO. Helix never entered a written subcontract agreement with Camco and never ratified Camco's replacement of APCO as contractor under the Helix-APCO Subcontract. The District Court nevertheless incorrectly treated Helix's continued performance of its work as proof that "Helix replaced APCO with Camco" but ignored the requirements of Nevada law for establishing a contract novation. Specifically, but without limitation, Helix never released APCO of its payment obligations or otherwise waived its right to be paid by APCO. Gemstone also did not take an assignment of the Helix-APCO Subcontract pursuant to Section 10.4 of the APCO-Gemstone Contract by giving notice to Helix (which it did not do), nor could it have done so because the applicable contract provision allows such assignment only when the APCO-Gemstone Contract is terminated by Gemstone for cause. Here, as APCO persuaded the District Court, APCO terminated that agreement pursuant to the right to stop work provisions of NRS 624.610.

V. Precisely as this Court ruled in *Zitting Brothers*, and for the same reasons, the District Court incorrectly concluded that APCO is not the "party legally liable" against whom judgment was proper pursuant to NRS 108.239(12) when the sale proceeds of the property are insufficient to satisfy all liens. The evidence is undisputed, and the District Court correctly found that Helix properly recorded and perfected its mechanic's lien like *Zitting Brothers*, but due to this Court's earlier decision on priority in *In re Manhattan W. Mech.'s Lien Litig*, there were no foreclosure sales proceeds left for the subcontractors like Helix. Helix had a contract with APCO on which it is owed no less than $505,021.00, which it earned before APCO left the Project. APCO is, therefore, the "party legally liable" to Helix for such amounts, as this Court found in *Zitting Brothers*.

VI. Because the District Court otherwise erred in denying relief to Helix as against APCO, no basis exists to support the District Court's award of attorney's fees and costs to APCO. Even if this Court does not otherwise reverse on the merits of the foregoing arguments, the District Court improperly awarded fees to APCO pursuant to a Rule 68 offer of judgment that APCO had made more than five years ***after*** the District Court (at APCO's request) deemed trial of the consolidated case to have commenced. There was no bifurcation of proceedings and no other basis for deeming APCO's offer of judgment timely under NRCP 68.

ARGUMENT

I. THE DISTRICT COURT ERRED IN ENFORCING THE APCO-HELIX SUBCONTRACT DOCUMENT AS THE OPERATIVE AGREEMENT.

The District Court's rejection of Helix's entitlement to payment of its retention earned and withheld while APCO served as the prime contractor, as well as additional monies earned and unpaid after APCO left the Project, turns on the District Court's application of Section 3.8 of the Helix-APCO Subcontract and the conditions precedent to payment it purports to impose. As discussed more fully below, those provisions violate this Court's prohibition on "pay-if-paid" agreements, are contrary to public policy as expressed in NRS 108.2453(2), NRS 108.2457(1) and NRS 624.628(3), and impermissibly required Helix to engage in futile acts.

Yet the District Court also erred in applying Section 3.8, or any other provision of the Helix-APCO Subcontract, because the parties never adopted that document as their agreement. Specifically, the District Court incorrectly deemed the Helix-APCO Subcontract to be the "valid, final written agreement between APCO and Helix." 84-JA-006243.[73] Even under the clearly erroneous standard,[74] the

[73] Conclusion of Law ¶2 ("CL2").

[74] While contract interpretation is subject to a *de novo* standard of review, the question of whether a contract exists is one of fact that requires this Court to defer to the district court's findings unless they are clearly erroneous or not based on substantial evidence. *Eagle Materials, Inc. v. Stiren*, 127 Nev. 1131, 373 P.3d 911 (2011) citing *May v. Anderson*, 121 Nev. 668, 672–73, 119 P.3d 1254, 1257 (2005). Substantial evidence is evidence that a reasonable mind might accept as adequate to

District Court's conclusion lacks substantial evidence. Indeed, the evidence is decidedly to the contrary.

"Basic contract principles require, for an enforceable contract, an offer and acceptance, meeting of the minds, and consideration." *May v. Anderson*, 121 Nev. at 672. A meeting of the minds exists when the parties have agreed upon the contract's essential terms. *Roth v. Scott*, 112 Nev. 1078, 1083, 921 P.2d 1262, 1265 (1996). Which terms are essential "depends on the agreement and its context and also on the subsequent conduct of the parties, including the dispute which arises and the remedy sought." Restatement (Second) of Contracts § 131 cmt. g (1981).

As discussed more fully in the Statement of Facts, *supra*, and despite many months of negotiations, revisions, proposals and counterproposals relating to the terms and conditions of their relationship, Helix and APCO never reached a meeting of the minds with respect to the Helix-APCO Subcontract. Specifically, but without limitation, Helix demonstrated at trial that its acceptance of the Helix-APCO Subcontract was conditioned upon APCO's assent, which it never gave to multiple revisions as contained in the Helix Exhibit (APCO). 36-JA-002189-2198; 29-JA-001778-1779.[75]

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support a conclusion. *Mason-McDuffie Real Estate, Inc. v. Villa Fiore Dev., LLC*, 130 Nev. 834, 838, 335 P.3d 211, 214 (2014).

[75] TE506; 1TR111:25 - 112:5.

It is undisputed that the parties were still exchanging proposed versions of the Helix Exhibit (APCO) as late as July 11, 2008, shortly before APCO stopped work on the Project and that Helix did not agree to or accept APCO's July 11, 2008 proposed revisions, 29-JA-001779-1780; 36-JA-002189-2198[76], which APCO's Randy Nickerl claimed were the result of his having "gone through and done all I can …" 29-JA-001779; 36-JA-002189.[77] By that time APCO was already threatening to stop work on the Project and soon thereafter terminated its agreement with Gemstone. 29-JA-001780; 32-JA-001981; 33-JA-002015; 34-JA-002081.[78] As such, and because Helix and APCO did not reach a meeting of the minds with respect to the Helix-APCO Subcontract, the District Court should have analyzed Helix's entitlement to payment for the earned and unpaid retention as an oral contract, quasi-contract and/or quantum meruit rendering any application of Section 3.8 moot. See *Certified Fire Prot. Inc. v. Precision Constr.*, 128 Nev. 371, 379, 283 P.3d 250, 257 (2012) ("quantum meruit's first application is in actions based upon contracts implied-in-fact.").

[76] 1TR112:3-5, 114:7-8; TE506.
[77] TE506; 1TR112:17-19.
[78] 1TR113:13-18; TE10; TE23; TE28.

II. THE CONDITIONS PRECEDENT OF SECTION 3.8 ARE VOID AND UNENFORCEABLE.

Even assuming the District Court correctly deemed the Helix-APCO Subcontract to be the "valid, final written agreement between APCO and Helix," the District Court incorrectly imposed on Helix conditions to payment that were entirely futile and in contravention to this Court's prohibition on "pay-if-paid" agreements set forth in *Lehrer McGovern Bovis, Inc. v. Bullock Insulation, Inc.*, 124 Nev. 1102, 197 P.3d 1032 (Nev. 2008) and as recently clarified in *Zitting Brothers* (pay-if-paid provisions "are unenforceable if they require subcontractors to waive or limit rights provided under NRS 624.624-.630, relieve general contractors of their obligations or liabilities under NRS 624.624-.630, or require subcontractors to waive their rights to damages, as further outlined under NRS 624.628(3).").

The *Bullock* decision arose from and is consistent with a long line of cases in which this Court has repeatedly and consistently held that Nevada's statutory schemes designed to secure payment to contractors and subcontractors in the construction industry as a whole are remedial. *See Hardy Companies, Inc. v. W.E. O'Neil Const. Co*., 245 P.3d 1149, 1155 (Nev. 2010) (citing *Las Vegas Plywood v. D & D Enterprises*, 98 Nev. 378, 380, 649 P.2d 1367, 1368 (1982)). In *Bullock* this Court explained the rationale for Nevada's public policy:

> Underlying the policy in favor of preserving laws that provide contractors secured payment for their work and materials is the notion that contractors are

> generally in a vulnerable position because they extend large blocks of credit; invest significant time, labor, and materials into a project; and have any number of workers vitally depend upon them for eventual payment. We determine that this reasoning is persuasive as it accords with Nevada's policy favoring contractors' rights to secured payment for labor, materials, and equipment furnished.

Bullock, 124 Nev. at 1116.

Importantly, this Court noted that "because a pay-if-paid provision limits a subcontractor's ability to be paid for work already performed, such a provision impairs the subcontractor's statutory right to place a mechanic's lien on the construction project." *Bullock* at 1117 n. 51 (citing *Wm. R. Clarke Corp. v. Safeco Ins. Co*., 15 Cal. 4th 882, 64 Cal. Rptr. 2d 578, 938 P.2d 372, 376 (Cal. 1997) (hereinafter "*Clarke*") (concluding that a pay-if-paid provision "has the same practical effect as an express waiver of [mechanic's lien] rights")).

Before trial, in reliance on *Bullock*, the District Court (i) reviewed APCO's form of Subcontract, and (ii) granted partial summary judgment to Helix and others (including Zitting Brothers) that the pay-if-paid provisions of the Helix-APCO Subcontract were void and unenforceable. 22-JA-001199-1217. Consistent with its partial summary judgment order, the District also grated Helix's motion *in limine* to preclude APCO from relying on pay-if-paid provisions in defense of Helix's claims

against APCO. 22-JA-001170-1177. In *Zitting Brothers*, this Court affirmed the District Court's conclusion that the pay-if-paid provisions in the same subcontract agreement form at issue here were void and unenforceable because they "limit Zitting's right to prompt payment under NRS 624.624(1) and limit Zitting's recourse to a mechanics' lien. We therefore hold that the pay-if-paid provisions in the parties' subcontract are void and unenforceable under NRS 624.628(3)(a)." *Id*. The same conclusion applies here.

Nonetheless, the District Court concluded that Section 3.8 set forth "valid conditions precedent to payment not combined with a waiver of a mechanic's lien rights." 84-JA-006244.[79] The District Court correctly acknowledged that "one of those preconditions involved Gemstone's payment of retention to APCO." *Id*.[80] The District Court then concluded that Helix's failure to show compliance with all of those preconditions mean that Helix's claim to unpaid retention "fails as a matter of law." 84-JA-006245.[81] Each of these questions presents an issue of law that this Court reviews de novo. *See In re Fontainebleau Las Vegas Holdings*, 128 Nev. 556, 572, 289 P.3d 1199, 1209 (2012) (providing that questions of law are reviewed de novo); *Benchmark Ins. Co. v. Sparks*, 127 Nev. 407, 411, 254 P.3d 617, 620 (2011)

[79] CL7.
[80] CL10.
[81] CL17.

citing *Farmers Ins. Exch. v. Neal*, 119 Nev. 62, 64, 64 P.3d 472, 473 (2003) (Interpretation of a contract is a question of law that this court reviews de novo).

As this Court's decision in *Zitting Brothers* made clear, conditioning payment to Helix on Gemstone's receipt of payment is an impermissible pay-if-paid agreement because it limits Helix's right to prompt payment and limits Helix's recourse to a mechanics' lien. Because ***all*** of the conditions in Section 3.8 must be complied with before APCO is obligated to pay Helix its retention, Section 3.8 must be disregarded *in toto* if any one of those conditions is void and unenforceable. Similarly, Section 3.4 of Helix-APCO Subcontract conditions "***any*** payments to Subcontractor" (i.e., including retention) on "receipt of actual payments by Contractor from Owner" and requires the subcontractors to agree "to assume the same risk that the Owner may become insolvent that [APCO] has assumed by entering into the Prime Contract with the Owner." 35-JA-002123. Section 3.5 contains identical language. 35-JA-002123-2124.

The District Court nonetheless concluded that the remaining conditions "concerned the right to receive payment, not the fact of payment." 84-JA-006244.[82] This Court has never made such a distinction in relation to pay-if-paid agreements, and Helix respectfully submits such a distinction is entirely meaningless. Gemstone's failure to pay APCO – whether for progress payments, final payment or

[82] CL10.

retention – is the factual basis for the assertion of a legal right to deny payment – i.e., pay-if-paid. Regardless, and as more fully discussed below, the remaining preconditions to payment of Helix's retention in Section 3.8 create a pay-if-paid condition because APCO was itself obligated to comply with such conditions before becoming entitled to final payment and retention from Gemstone. Because APCO failed or refused to perform those same obligations and now uses such failure as a defense to Helix's right to payment, it also breached the implied covenant of good faith and fair dealing. Such preconditions were also entirely futile and their performance by Helix may therefore be excused on that basis.

A. Payment Is Due To Helix Pursuant To NRS 624.624(1).

NRS 624.624 is explicit and unambiguous[83] in requiring payment to be made promptly, as follows:

> 1. Except as otherwise provided in this section, if a higher-tiered contractor enters into:
>
> (a) ***A written agreement*** with a lower-tiered subcontractor ***that includes a schedule for payments***, the higher-tiered contractor shall pay the lower-tiered subcontractor:
>
> (1) On or before the date payment is due; or

[83] If a statute's language is clear and unambiguous, courts must enforce the statute as written. *Hobbs v. Nevada*, 127 Nev 234, 237, 251 P.3d 177, 179 (2011).

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

➥***whichever is earlier***.

(b) ***A written agreement*** with a lower-tiered subcontractor ***that does not contain a schedule for payments***, or an agreement that is oral, the higher-tiered contractor shall pay the lower-tiered subcontractor:

(1) Within 30 days after the date the lower-tiered subcontractor submits a request for payment; or

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

➥***whichever is earlier***.

NRS 624.624(1).

Thus, if there is a "schedule of payments" in the Helix-APCO Subcontract, APCO must pay Helix – at the latest – on the date payment is due. To the extent APCO claims the "schedule of payments" is "when Gemstone pays APCO, if ever" such an interpretation renders the payment obligation entirely illusory when no

payment from the higher tier is forthcoming. Stated differently, the "date payment is due" to Helix under NRS 624.624(1)(a) cannot be "if or when payment is received by APCO" because that form of "schedule of payments," which may never occur, is itself a pay-if-paid agreement prohibited by *Bullock*. See also *Zitting Brothers* ("despite the subcontract's schedule for payments, Zitting would not be paid as required under NRS 624.624(1)(a) if APCO did not receive payment from Gemstone—even if Zitting performed its work, Gemstone accepted the work, and payment would otherwise be due."). Despite this, the District Court incorrectly concluded that the Helix-APCO Subcontract "contained a schedule of payments for … retention … with preconditions before APCO had an obligation to pay the subcontractors." 84-JA-006244.[84] As discussed above, at least one of those preconditions is that APCO receive payment from Gemstone – i.e., pay-if-paid.

Because the "retention payment schedule" - see 84-JA-006244[85] - is an unenforceable pay-if-paid agreement, there is no enforceable written agreement containing a schedule of payments and NRS 624.624(1)(b) applies. Under that provision, APCO's payment is due to Helix – at the latest - within 30 days of its request for payment. The statutory language referencing payment received by the higher-tiered contractor exists only to hasten the time within which payment must

[84] CL9.
[85] CL11.

be made and does not extend the time, much less indefinitely. Here, Helix has waited more than 12 years without payment.

B. The Section 3.8 Conditions To Payment Requires Helix To Waive Its Rights Under NRS 624.624-.630 And the Nevada Mechanic's Lien Statute.

Despite these outside due dates that have long since passed, APCO argued below, and the District Court concluded, that Section 3.8 imposed enforceable conditions precedent on Helix (the "Section 3.8 Conditions to Payment") with which Helix did not comply. 84-JA-006245.[86] Specifically, Section 3.8 provides in part that retention is "payable to [Helix] upon, and only upon the occurrence of ***all*** of the following events, each of which is a condition precedent" to Helix's right to receive final payment and retention." 35-JA-002124, emphasis added. The Section 3.8 Conditions to Payment include:

- APCOs "***[r]eceipt of final payment***" from [Gemstone];
- ***"Completion of the entire project***;"
- Gemstone's "***approval and final acceptance of the project*** Work."
- Helix's delivery to APCO of all "***close-out documents***; and

[86] CL14.

- Helix's delivery to APCO of final ***releases and waivers of claim*** from all of Helix's laborers, material and equipment suppliers, and subcontractors.

35-JA-002124, emphasis added.

At least one of these "conditions precedent" – APCO's receipt of final payment from Gemstone – is explicitly a pay-if-paid agreement, rendering the section void and unenforceable in its entirety for this reason alone. NRS 624.628(3) renders void and unenforceable and against public policy and condition stipulation or provision in an agreement which (among other things):

(a) Requires a lower-tiered subcontractor to waive any rights provided in NRS 624.624 to 624.630, inclusive, or which limits those rights; [or]

(b) Relieves a higher-tiered contractor of any obligation or liability imposed pursuant to NRS 624.624 to 624.630, inclusive."

Moreover, NRS 624.624(5) provides that, other than authorized retention and "as otherwise allowed in subsections 2, 3 and 4, a higher-tiered contractor shall not withhold from a payment to be made to a lower-tiered subcontractor." Yet except for the giving of waivers and releases (in exchange for payment), none of the Section 3.8 Conditions to Payment appears in NRS 624.624(2), (3) or (4). Nothing in those statutory provisions permits APCO to refuse to pay retention unless or until APCO receives final payment from Gemstone, which may never occur. Nothing in those

sections requires Helix to await the "completion of the entire project" to receive its retention when the Project remains incomplete through no fault of Helix. Nothing in those sections allows APCO to condition payment of Helix's retention on Gemstone's approval and final acceptance" of a Project that is never completed and nothing in those sections requires Helix to provide "close-out documents" for a Project that has never closed out (i.e., been completed).

As occurred here, the project owner may never complete the project or it may unreasonably refuse to grant approval and final acceptance of a completed project, or it may unreasonably define or describe the required "close-out documents." Accordingly, under the reasoning promoted by APCO, and accepted by the District Court, Gemstone's failure to complete the Project, give final approval and acceptance (of an incomplete project), and make final payment to APCO deprives Helix of its right to prompt payment and the "rights provided in NRS 624.624 to 624.630, inclusive."

Indeed, because the Section 3.8 Conditions to Payment will never occur, Helix will also never (under the District Court's analysis) be entitled to receive its retention, which is nothing more than monies earned for work already performed. As this Court noted in *Bullock*, "a contractor has a statutory right to a mechanic's lien for the unpaid balance of the price agreed upon for labor, materials, and equipment furnished." 124 Nev. at 1115 citing NRS 108.222(1). Retention is (at least

a portion of) the unpaid balance of the price agreed upon. Any condition imposed on payment of retention must therefore not be interpreted in such a way as to deprive a lien claimant, such as Helix, of its right to receive that unpaid balance.

Here, the Section 3.8 Conditions to Payment require Helix to satisfy conditions entirely outside of its control and entirely within the control of the project owner, Gemstone, who terminated the project, and the Project general contractor, APCO, who terminated its contract with Gemstone. Such conditions therefore violate the Nevada Mechanic's Lien Statute and are void and unenforceable because they impermissibly "require a lien claimant to waive rights provided by law to lien claimants or to limit the rights provided to lien claimants" NRS 108.2453(2). Such "terms of a contract" are also void pursuant to NRS 108.2457(1) because they "attempt[] to waive or impair the lien rights of a contractor, subcontractor or supplier" NRS 108.2457(1). See also *Bullock* and discussion *supra*.

C. The Section 3.8 Conditions To Payment Required Action By APCO, Which It Failed To Perform And Complete.

Because the Section 3.8 Conditions to Payment are also the same or similar conditions with which APCO was required to comply to receive final payment and retention from Gemstone, those conditions in turn create a pay-if-paid relationship when applied to Helix. Specifically, but without limitation, the APCO-Gemstone Contract:

- Required APCO to "complete the work" and "use its best efforts to complete the Project;" 29-JA-001819-1829;
- Conditioned APCO's entitlement to final payment until APCO "has fully performed the contract" 29-JA-001842, and "a final Certificate of Payment has been issued by the architect," *id*.; and
- Conditioned payment of retention to APCO on (i) attainment of final completion, (ii) resolution of "all outstanding disputes," and (iii) removal of all liens. 29-JA-001845.[87]

As discussed above, APCO did none of these things but instead terminated its agreement with Gemstone, recorded a mechanic's lien for all sums earned and unpaid, and obtained a summary judgment for the same. As such, and particularly where APCO defended its obligation to pay Helix on the basis of Helix's alleged non-compliance with Section 3.8, APCO's decision to stop work on the Project directly deprived Helix of the opportunity to comply with the these conditions. APCO therefore performed the Helix-APCO Subcontract in a manner that is unfaithful to the purpose of the contract and Helix's justified expectations, thereby depriving it of the ability to perform the remaining conditions of Section 3.8. For the same reason, it would have been entirely futile for Helix to perform such remaining preconditions even if were possible to do so.

[87] TE2 ¶5.07(f).

1. APCO breached the covenant of good faith and fair dealing.

APCO compounded the harm by failing or refusing to exercise its right to terminate Helix for convenience pursuant to Section 9.1 of the Helix-APCO Subcontract (giving APCO the sole "right to terminate [Helix's performance], at any time, and with or without cause"). 33-JA-002129; 29-JA-001793. If APCO had terminated for convenience, Helix would have been entitled by Section 9.3 to, among other things, "stop all work," terminate its sub-subcontracts," and submit a "written termination claim." 33-JA-002129. Instead, APCO repeatedly notified Helix and its other subcontractors in writing that they "**remain under contract**" with APCO "until advised in writing by APCO CONSTRUCTION," 33-JA-002015 (CAPS and **bold** in original), and were "STILL CONTRACTUALLY BOUND" to the subcontract 41-JA-002357 (CAPS in original). No such additional, contrary notice was ever given to Helix and, despite its requests for information "never got a clear signal," resulting in "confusion." 78-JA-005306.[88] Indeed, Helix worried that if it had stopped work it "would have been at full risk of [APCO] pursuing us for abandoning the contract," a point which APCO did not dispute, 29-JA-001795.[89]

The District Court therefore erred in rejecting Helix's claim for breach of the duty of good faith and fair dealing that is implied in every contract in Nevada. *See*

[88] 2TR23:8-14.
[89] 1TR128:15-16.

Hilton Hotels Corp. v. Butch Lewis Prods., Inc., 107 Nev. 226, 234, 808 P.2d 919, 923–24 (1991) (when one party performs a contract in a manner that is unfaithful to the purpose of the contract and the justified expectations of the other party are thus denied, damages may be awarded against the party who does not act in good faith). Simply stated, the District Court erred in requiring Helix to comply with provisions of the subcontract that APCO actively prevented from occurring.

2. Helix's compliance with Section 3.8 was futile.

Similarly, and even if Helix could have performed any of the conditions required by Section 3.8 of the Helix-APCO Subcontract, it still would not have been entitled to payment because APCO did not "fully perform the contract," "attain final completion," resolve all "all outstanding disputes," remove all liens or, most fundamentally, receive final payment from Gemstone. Accordingly, and to the extent this Court deems all or any of the conditions precedent to payment in Section 3.8 to be enforceable, such conditions should be excused on the basis of their futility.

When one party abandons a contract, the other party need not "engage in futile gestures to preserve contractual rights." *Mayfield v. Koroghli*, 124 Nev. 343, 349, 184 P.3d 362, 366 (2008). Furthermore, it is futile for a party to make a demand "if the other party has repudiated the contract or otherwise indicated [he] refuses to perform." *Id*. Here, it was impossible, and would have been futile, for Helix to comply with the provisions of Section 3.8. For example, the "entire project" was

never completed through no fault of Helix, nor was there any "approval and final acceptance of the project Owner" as Section 3.8 otherwise plainly anticipated.

Similarly, and to the extent that the District Court' decision relied on Helix's "failure" to submit an invoice or billing for its retention – see CL 15 – such a requirement is the epitome of futility. Here, APCO declined any obligation to pay any amounts not received from Gemstone and did not "fully perform the contract" or otherwise do what was required to be entitled to payment of retention from Gemstone. APCO also never billed for its retention – see 80-JA-005745[90] - yet liened for, sued for, and obtained summary judgment for such amounts. 81-JA-005817-5818; 27-JA-001576; 29-JA-001672, 1674.[91] APCO also presented no testimony or evidence to suggest that Helix's "failure" to formally bill for its retention was the reason APCO failed to pay or somehow caused prejudice to APCO's ability to collect its retention. Indeed, under the Helix-APCO Subcontract, Helix was not entitled to seek payment of its retention unless and until it complied with the otherwise impossible conditions of Section 3.8 and was, in any event, barred by Section 3.4 from receiving "any payments to Subcontractor" except upon "receipt of actual payments by Contractor from Owner." 35-JA-002123. Simply stated, APCO's reliance on Section 3.8 and/or Helix's "failure" to apply for payment of

[90] 3TR122:10-12; FF 111.
[91] TE3176; PTM ¶¶ 16, 17; 1TR5:2-7; 1TR7:14-22

retention that APCO otherwise defended on the basis of Helix's "non-compliance" with Section 3.8, is entirely pretextual.

III. SECTION 3.8 DOES NOT APPLY BECAUSE THE APCO/GEMSTONE CONTRACT WAS TERMINATED.

As discussed at length above, the District Court applied Section 3.8 to conclude that Helix-APCO Subcontract "contained a schedule of payments for … retention … with preconditions before APCO had an obligation to pay" Helix. 84-JA-006244.[92] Yet even if these preconditions were otherwise enforceable, they ceased to apply, pursuant to Section 9.4 of that same agreement, once the APCO-Gemstone Contract was terminated. 35-JA-002129.

Here, the District Court found that "APCO properly terminated the [APCO-Gemstone Contract] for cause in accordance with NRS 624.610 and APCO's notice of termination since Gemstone did not pay the June Application as of September 5, 2008." 84-JA-006217.[93] Having made that finding, the District Court erred by then not applying Section 9.4 of the Helix-APCO Subcontract, which provides:

> If there has been a termination of the [APCO-Gemstone Contract], [Helix] shall be paid the amount due from [Gemstone] to [APCO] for [Helix's] completed work, as provided in the Contract Documents, after payment by [Gemstone] to [APCO].

[92] CL9.
[93] FF104.

35-JA-002129. Because the phrase "after payment by [Gemstone] to [APCO] constitutes an unenforceable pay-if-paid agreement, it can and should be ignored. The "amount due from [Gemstone] to [APCO] for [Helix's] completed work, as provided in the Contract Documents" is, in fact, not discernable from the Contract Documents[94] because the only provisions relating to termination procedures and remedies pertain to termination ***by Gemstone***. 29-JA-001848-49.[95]

More fundamentally, because APCO terminated the APCO-Gemstone Contract pursuant to NRS 624.610(5), those statutory provisions control and, in any event, overrule any conflicting contractual provision. Specifically, NRS 624.610(6) provides that if an agreement (such as the APCO-Gemstone Contract) is terminated pursuant to NRS 624.610(5) the prime contractor "is ***entitled*** to recover" from the owner payment for, among other things, "***the cost of all work, labor, materials, equipment and services furnished*** by and through the prime contractor, including any overhead the prime contractor and his or her lower-tiered subcontractors and suppliers incurred …" [Emphasis added]. As noted above, APCO in fact recorded a mechanic's lien for all such amounts, including its (and Helix's) unpaid retention and obtained a summary judgment for the same. 81-JA-005817-5818.[96]

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[94] Pursuant to Section 1.1, the Contract Documents incudes and incorporates by reference the APCO-Gemstone Contract. 35-JA-002121.
[95] TE2 ¶10.01 (with cause), 10.02 (without cause).
[96] TE3176.

Even if APCO had not sought and obtained such relief, it nonetheless became statutorily "entitled" to such amounts, which of necessity include those monies reflected in its pay applications for itself and (among other subcontractors) Helix, including retention, which is money earned but retained. Stated differently, the "cost of all work, labor and materials" includes monies earned but not (yet) billed, including retention. This is, upon termination pursuant to NRS 624.610(5), the "amount due from [Gemstone] to [APCO] for [Helix's] completed work" to which Helix is then entitled ("shall be paid") pursuant to Section 9.4 of the Helix-APCO Subcontract. 35-JA-002129.

For the foregoing reasons, this Court should reverse and remand to the District Court to enter judgment for Helix for all of its unpaid retention earned but never paid to Helix before APCO left the Project.

IV. THE HELIX-APCO SUBCONTRACT WAS NEVER ASSIGNED AND APCO'S OBLIGATIONS TO HELIX WERE NEVER NOVATED TO CAMCO OR GEMSTONE.

The District Court also erred in concluding that there is "no contractual obligation for APCO to pay Helix for the work it performed for Gemstone and/or Camco after APCO left the Project [because] Helix knowingly replaced APCO with Camco under the [Helix-APCO Subcontract] on all executory obligations, including payment for future work and retention." 84-JA-6246.[97]

[97] CL18.

In essence, the District Court concluded that, by words or deeds, there was a novation of the Helix-APCO Subcontract such that Helix intended to and did in fact release APCO of its obligations to Helix pursuant to the Helix-APCO Subcontract. Yet under Nevada law, "the party asserting novation has the burden of providing all essentials of novation ***by clear and convincing evidence***." *United Fire Ins. Co. v. McClelland*, 105 Nev. 504, 509, 780 P.2d 193 (1989) (emphasis added). Specifically, "(1) there must be an existing valid contract; (2) all parties must agree to a new contract; (3) the new contract must extinguish the old contract; and (4) the new contract must be valid." *Id*. at 508. To prove the old contract is extinguished, the party claiming novation must show that the creditor clearly intended to release the original obligor. *See Pink v. Busch*, 100 Nev. 684 (1984) ("the intent to cause a novation must be clear" and the evidence must show a "clear understanding that a complete novation is proposed.").

A. There Was No Novation Of APCO's Obligations To Helix.

Here, while Helix continued to work on the Project until it closed down a few months later and, as instructed by Gemstone, submitted payment applications through Camco, Helix never "replaced APCO with Camco" for purposes of the Helix-APCO Subcontract. More fundamentally, Helix never released APCO of its obligations to Helix pursuant to the Helix-APCO Subcontract, including accrued

retention and payment for Helix's work performed after APCO stopped work and terminated its agreement with Gemstone.

First, Helix rejected and never executed the proposed Camco Subcontract or the Camco Ratification, 29-JA-001790,[98] which purported to acknowledge, ratify and agree that the Helix-APCO Subcontract would "remain in full force and effect" except that "Camco will replace APCO as the "Contractor." 48-JA-002721. The District Court made no finding that Helix entered the Camco Subcontract or the Camco Ratification. Neither is there any evidence that merely by contracting with Gemstone's replacement contractor Helix agreed to release the original obligor, APCO, or waive its right to receive moneys earned and owing, whether temporarily withheld (as retention) or otherwise. Helix's agreement to work for Camco was a reasonable means of seeking an additional means of payment of the work it had agreed to perform for APCO (much like a landlord whose tenant has breached and abandoned the premises may seek to re-let the premises and thereby mitigate its losses) but it does not relieve APCO of its continuing obligation to pay Helix for the work Helix contracted with APCO to perform and merely doing so does not constitute a release or waiver of Helix's contractual rights against APCO.

Waiver is usually defined as "the voluntary and intentional relinquishment of a known right" and may be either express or implied. *Udevco, Inc. v. Wagner*, 100

[98] 1TR123:1-124:25.

Nev. 185, 189, 678 P.2d 679, 682 (1984) citing 5 Williston On Contracts § 678 (3d ed. 1961). Waiver can be implied from conduct such as making payments for or accepting performance which does not meet contract requirements; waiver can also be expressed verbally or in writing. 17 Am.Jur.2d Contracts §§ 393, 396 (1964). Express waiver, when supported by reliance thereon, excuses nonperformance of the waived condition. *Udevco* citing 5 Williston On Contracts § 679 (3d ed. 1961); 17 Am.Jur.2d Contracts § 392 (1964); Restatement (Second) of Contracts § 84(1) (1981).

Here, there is no evidence whatsoever that Helix waived its right to seek payment from APCO. To the contrary, Helix has consistently maintained that, as APCO had repeatedly instructed, Helix remained "under contract" with APCO. 33-JA-002015; 41-JA-002357. APCO did nothing (such as providing a simple notice of termination) to change that belief. 29-JA-001737.[99] Indeed, as part of its review and proposed revision to the Camco Ratification, Helix attempted to incorporate into the Helix Exhibit (Camco) the last version of the Helix Exhibit (APCO) that was acceptable to Helix "because we're still under contract with APCO." 29-JA-001792.[100]

[99] 1TR70:15-19.
[100] 1TR124:22- 125:25.

B. There Was No Assignment Of The Helix-APCO Subcontract.

As a matter of law, Gemstone also did not take, or purport to take, an assignment of the Helix-APCO Subcontract pursuant to Section 10.04 of the APCO-Gemstone Contract, nor could it have done so under Nevada law.[101] Section 10.04 makes such an assignment "effective ***only*** after termination of the [APCO-Gemstone Contract] ***by [Gemstone] for cause*** pursuant to Section 10.02." 29-JA-001850. Here, the District Court expressly found that "***APCO*** properly terminated the Contract for cause ***in accordance with NRS 624.610*** ..." 84-JA-006217, emphasis added.[102] Stated differently, the APCO-Gemstone Contract was terminated ***by APCO***, not Gemstone, and for reasons other than those set forth in Section 10.02 of their agreement (titled "Termination by Developer with Cause"). Furthermore, after APCO's termination of the APCO-Gemstone Contract, there was no remainder (including subcontracts incorporated by reference) to assign to Gemstone.

Section 10.04 also provides that assignment is effective "only for those Third-Party Agreements [such as the Helix-APCO Subcontract] which [Gemstone] accepts by notifying [APCO] and the applicable Third-Party Service Provider [e.g., Helix]

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[101] There was no evidence presented at trial to demonstrate that Gemstone possessed the requisite licensing to lawfully serve as a general building contractor in place of APCO. *See* e.g., NRS 624.700 (requiring a license "to engage in the business or act in the capacity of a contractor within this State), NRS 624.020 (defining "contractor" and "builder"), and NRS 624.031 (describing exemptions to licensing requirements, none of which are applicable here).

[102] FF104.

in writing." 29-JA-001850. Accordingly, and because no such notice was given, Helix cannot be deemed to have consented (i.e. by way of the incorporated contracts or otherwise) to an assignment, much less a novation, to Gemstone and/or its assigns.

Simply stated, the District Court erred by treating Helix's continued work on the Project as a novation releasing APCO from its contractual obligations to Helix. Because there was no such release, the District Court's conclusion absolving APCO of its contractual obligation for APCO to pay Helix for the work it performed for Gemstone and/or Camco after APCO left the Project … including payment for future work and retention. This Court should reverse and require the District Court to enter judgment for Helix for all unpaid retention – before and after APCO – and all unpaid sums, including retention, Helix incurred but was never paid after APCO left the Project.

V. THE DISTRICT COURT ERRED IN CONCLUDING THAT APCO IS NOT LIABLE FOR A DEFICIENCY JUDGMENT.

The District Court found that the Helix Lien was timely and perfected, 90-JA-006572, but nonetheless concluded that "APCO is not legally liable for any deficiency judgment because it is not the party responsible for any deficiency." 85-JA-006249.[103] The deficiency exists because the proceeds of the sale of the Project were awarded to the lender. *Id*.[104]

[103] CL36.
[104] CL35.

However, in *Zitting Brothers*, this Court held that APCO was the "party legally liable" against whom judgment was proper pursuant to NRS 108.239(12) when the sale proceeds of the property are insufficient to satisfy all liens. This Court ruled:

> The plain language of NRS 108.239(12)[105] permits a judgment against the "party legally liable for it"—not necessarily the "owner." NRS 108.239(12) (referring to the party liable); see *City Council of Reno v. Reno Newspapers, Inc.*, 105 Nev. 886, 891, 784 P.2d 974, 977 (1989) ("When the language of a statute is plain and unambiguous, a court should give that language its ordinary meaning and not go beyond it."). Because Zitting is claiming amounts that APCO owes on retention and change orders based on its contract with APCO, APCO is the "party legally liable" for the unsatisfied lien claim. APCO also appeared in the action as the party who brought summary judgment against Scott Financial on its NRS Chapter 108 foreclosure of mechanics' lien claim. Zitting may therefore obtain the residue of its unpaid portions from APCO under NRS 108.239(12).

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[105] NRS 108.239(12) provides:

> Each party whose claim is not satisfied in the manner provided in this section is entitled to personal judgment for the residue against the party legally liable for it if that person has been personally summoned or has appeared in the action.

Zitting Brothers, *Id*. For the same reason, and on the same grounds, the District Court erred in denying Helix recourse to APCO as the "party legally liable" to Helix for the monies it was not able to obtain through the foreclosure of the Property.

VI. THE DISTRICT COURT ERRED IN AWARDING ATTORNEY'S FEES PURSUANT TO NRCP 68.

Assuming this Court overturns the District Court's judgment denying a recovery to Helix, the underlying factual basis for an award of fees and costs (i.e., Helix having failed to obtain a more favorable judgment than APCO's offer of judgment) would, subject to further proceedings at the District Court, no longer be operative and the award of fees and costs should be vacated on such grounds. Out of an abundance of caution, the following argument assumes that this Court does not reverse and remand as requested above and explains why the District Court also erred in awarding attorney's fees to APCO pursuant to NRCP 68.

Specifically, the District Court concluded that "the best basis for attorney fee awards is NRCP 68" and was "persuaded by APCO's contention relative to the applicability of NRCP 68," citing *Allianz Ins, Co. v. Gagnon*, 109 Nev. 990, 994-95, 860 P.2d 720, 724 (1993). 100-JA-007275-7276. However, unlike *Allianz*, this case was never bifurcated and trial in this consolidated action actually commenced on October 30, 2012 – i.e., more than five years before APCO served Rule 68 Offer of Judgment on Helix. Because NRCP 68 is clear, and contains no exception for

"complex cases," which appears to be the District Court's rationale, APCO's Offer of Judgment was untimely and therefore invalid as a basis for an award of fees

NRCP 68 provides that an Offer of Judgment may be made "at any time more than 10 days before trial." NRCP 68; See also *Palace Station Hotel & Casino, Inc. v. Jones*, 115 Nev. 162, 165, 978 P.2d 323, 325 (1999) (express language of NRCP 68 "expressly provides that the offer of judgment must be made 'more than 10 days before the trial begins,' [and] the trial date is the event from which the ten-day period begins to run.").

In this consolidated action, and as expressly set forth in the 2012 Order of the District Court (the "2012 Order"), trial commenced on October 30, 2012. 96-JA-06925. Specifically, the 2012 Order (which was prepared and submitted by and at the behest of APCO, by and through its prior counsel) provides:

> 3. ***Trial of this consolidated matter commenced on October 30, 2012*** upon the trial of the lien amount, lien validity and related claims of Ready Mix, Inc., and therefore, the five year rule set forth in Nevada Rule of Civil Procedure 41 (e) is no longer applicable.

Id., emphasis added.[106]

[106] In addressing the Five-Year Rule, NRCP 41(e), this Court has concluded that it "is clear and unambiguous and requires no construction other than its own language." *D.R. Horton, Inc. v. Eighth Jud. Dist. Ct*., 131 Nev. 865, 872, 358 P.3d 925, 929–30 (2015) citing *Thran v. First Judicial Dist. Court*, 79 Nev. 176, 181, 380 P.2d 297, 300 (1963). Additionally, where a case has not been brought to trial after

As the context of the 2012 Order makes clear, the parties to the already-consolidated action (including APCO, the 2012 Order's author) were concerned that the five-year rule might impact their respective claims. Although some parties ceased to participate after the date of the 2012 Order, this Action has never been bifurcated or de-consolidated and, in fact, multiple parties remained and tried claims at the same time when trial re-commenced in January and February, 2018. See e.g. 29-JA-001671.

Although trial had commenced, APCO nonetheless served an offer of judgment on Helix on November 13, 2017 (i.e., more than five years after trial commenced). 87-JA-006399-6402 As of the date of the offer of judgment (before the 2019 amendments to the rule), NRCP 68 permitted any party to serve an offer of judgment "[a]t any time more than 10 days before the trial begins...." *See Schwartz v. Estate of Greenspun*, 110 Nev. 1042, 1047, 881 P.2d 638, 641 (1994).[107] In *Schwartz*, this Court held that the phrase "before the trial begins" best serves the policy behind the rule if interpreted to mean "the point in trial when the actual presentation of evidence commences." *Id*.

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five years, dismissal is mandatory, affording the district court no discretion. *D.R. Horton* 131 Nev. at 872 citing *Morgan v. Las Vegas 930 Sands, Inc*., 118 Nev. 315, 320, 43 P.3d 1036, 1039 (2002).

[107] Pursuant to the 2019 Amendments, the rule now permits an offer of judgment to be made "[a]t any time more than 21 days before trial…"

While the District Court's 2012 Order does not identify precisely what events occurred to allow the District Court to deem the action to have been brought to trial, such events plainly related to evidence presented in support of the "lien amount, lien validity and related claims" of one of the many consolidated parties, Redi-Mix, Inc. 96-JA-06925. APCO's Offer of Judgment was therefore not made "more than 10 days before the trial [began]." To the contrary, the Offer of Judgment was made more than five years ***after*** trial commenced. Because the Offer of Judgment was served more after trial had commenced, it is ineffective and not available to APCO as a vehicle to recover attorney's fees or costs.

The District Court also erred in its reliance on "APCO's contention relative to the applicability of *Allianz.* In *Allianz*, this Court held that "a party may make an offer of judgment pursuant to NRCP 68 and NRS 17.117 prior to the second phase of a bifurcated trial." There, in determining whether there had been a bifurcated trial, this Court relied on the use of the word "trial" in NRCP 42(b), which "indicates that each phase of a bifurcated trial is a separate 'trial.'" *Allianz,* 109 Nev. at 94.[108]

Here, and while APCO argued that the trial that commenced on October 30, 2012 was "obviously bifurcated," 99-JA-007213, there is in fact no order bifurcating

[108] NRCP 42(b) provides in part:

> The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim ... or of any separate issue or of any number of claims....

those commenced proceedings from any other claims or parties that were part of the consolidated action. Indeed, the District Court Order explicitly ruled that the "***trial of this consolidated matter***" commenced on that date, not some portion thereof. Indeed, were it otherwise, the Five-Year Rule could not have been deemed "inapplicable" to the remaining claims and parties. Because compliance with the Five-Year Rule was the *sine qua non* of the 2012 Order, its underpinnings (commencement of trial of the "consolidated matter") cannot be later unmoored from that order so as to create an entirely different meaning and to imply the existence of a bifurcated trial that never occurred. The 2012 Order unambiguously and intentionally established the date of commencement of trial of the consolidated action as October 30, 2012. As such, APCO's Rule 68 Offer of Judgment was untimely and the District Court therefore erred in awarding any attorney's fees to APCO in reliance thereon.

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CONCLUSION

Based on the foregoing, Helix respectfully requests that the Court reverse the decision below.

Dated this 16th day of October, 2020.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this Brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

[**X**] This Brief has been prepared in a proportionally spaced typeface using Microsoft Word, Version 16 in 14 points, Times New Roman; or

[ ] This Brief has been prepared in a monospaced typeface using [state name and version of word-processing program] with [state number of characters per inch and name of type style].

2. I further certify that this Brief complies with the page-or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either:

[**X**] Proportionately spaced, has a typeface of 14 points or more, and contains 12,783 words; or

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[ ] Does not exceed 30 pages.

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

reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 16th day of October, 2020.

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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 16th day of October, 2020, I caused the above and foregoing document, **APPELLANT/CROSS RESPONDENT'S CONSOLIDATED OPENING BRIEF *t***, 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;

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

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